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HUSBAND AND WIFE

IN GENERAL

WIFE'S SEPARATE LEGAL EXISTENCE

LIABILITIES OF WIFE

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LIABILITIES OF HUSBAND

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See Adverse Possession, 114; Divorce; Homestead; Marriage; Witnesses, 10312.

IN GENERAL

4251. Gifts between—Gifts between husband and wife are permissible.[99] Whether the receipt of money by a husband from his wife is a gift, loan, or trust, is a question of intention. The mere receipt of her money or property is but slight evidence of a gift. Her intention to divest her right to it should be made to appear.[1] Evidence held not to show a gift of a note from a wife to her husband.[2]

4252. Grants to—Upon a grant or devise to husband and wife they take as tenants in common, unless expressly declared to be as joint tenants.[3]

[99] Tullis v. Fridley, 9–79(68); Richardson v. Colburn, 77–412, 80+356, 784.
[1] McNally v. Weld, 30–209, 14+895; Chadbourn v. Williams, 45–294, 47+812; In re Schmidt, 56–256, 57+453.
[2] Conger v. Nesbitt, 30–436, 15+875.
[3] Wilson v. Wilson, 43–398, 45+710; Semper v. Coates, 93–76, 100+662.

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4253. Joint tenancy—Survivorship—Estates by entireties and joint tenancies, with right of survivorship in favor of the husband surviving his wife, do not exist in this state, as applied to real or personal property jointly owned by them.[4]

4254. Contract to convey their property—A contract on the part of husband and wife to convey by deed or will all their property, both real and personal, and a subsequent agreement on their part and that of each of them to make such conveyance, to take effect on their death, includes all the property which they owned jointly or separately.[5]

4255. Notice of each other's contracts and debts—In all cases where the rights of creditors, or purchasers in good faith, come in question, each spouse is held to have notice of the contracts and debts of the other.[6]

4256. Necessity of wife joining in husband's deeds—Except in the case of a homestead,[7] it is not essential that a wife should join in the deeds of her husband in order to convey his interest.[8] But to pass a marketable title it is necessary for her to join in order to cut off her statutory interest.[9] Under Laws 1875 c. 40 a deed by a married man, without his wife joining, cut off her interest.[10] A wife who does not join in her husband's deed is not estopped from claiming her statutory third, after his death, by the mere fact that she knew of the sale, and that the purchaser was in possession of the land, and made no objection thereto during coverture.[11]

4257. Necessity of husband joining in wife's deeds—Prior to Laws 1905 c. 255 and Laws 1907 cc. 123, 417, it was the law that a conveyance or contract for the sale of realty, or of any interest therein, by a married woman, other than mortgages on land to secure the purchase money and leases for terms not exceeding three years, was void unless her husband joined therein.[12] It was held, while that rule was in force, that if a wife took realty in trust her disqualification was subject to the terms of the trust;[13] that a wife might make a valid assignment under the insolvency law of 1881 without her husband joining;[14] that she might be estopped from asserting the invalidity of her sole deed;[15] that she might make a lease of her realty for a term not exceeding three years;[16] that she could not make a declaration of trust in realty without her husband joining;[17] and that a failure of the husband to join

[4] Semper v. Coates, 93–76, 100+662.

[5] Svanburg v. Fosseen, 75–350, 78+4.

[6] R. L. 1905 § 3609; Ladd v. Newell, 34–107, 24+366; Laib v. Brandenburg, 34–367, 25+803; Houston v. Nord, 39–490, 40+568; Chamberlain v. O'Brien, 46–80, 83, 48+447; Mpls. etc. Co. v. Halonen, 56–469, 57+1136; Quinn v. Mpls. T. M. Co. 102–256, 113+689.

[7] See § 4211.

[8] Laws 1907 c. 123.

[9] Sandwich Mfg. Co. v. Zellmer, 48–408, 51+379; Von Hemert v. Taylor, 73–339, 76+42; Stromme v. Rieck, 107–177, 119+948.

[10] Morrison v. Rice, 35–436, 29+168; Roach v. Dion, 39–449, 40+512.

[11] Madson v. Madson, 69–37, 71+824.

[12] G. S. 1894 § 5532; Place v. Johnson, 20–219(198); Yager v. Merkle, 26–429, 4+819; Tatge v. Tatge, 34–272, 25+596, 26+121; Gregg v. Owens, 37–61, 33+216; Hill v. Gill, 40–441, 443, 42+294; Nell v. Dayton, 43–242, 45+229; Dayton v. Nell, 43–246, 45+231; Althen v. Tarbox, 48–18, 50+1018; Kinney v. Sharvey, 48–93, 50+1025; Steele v. Anheuser etc. Assn., 57–18, 58+685; Babbitt v. Bennett, 68–260, 262, 71+22; Blew v. Ritz, 82–530, 85+548; Lowe v. Lowe, 83–206, 86+11; Dickman v. Dryden, 90–244, 95+1120; Laythe v. Minn. L. & I. Co., 101–152, 112+65.

[13] Stranahan v. Richardson, 75–402, 78+110, 671.

[14] Kinney v. Sharvey, 48–93, 50+1025.

[15] Dickman v. Dryden, 90–244, 95+1120. See Nell v. Dayton, 43–242, 45+229; Knight v. Schwandt, 67–71, 69+626; Laythe v. Minn. L. & T. Co., 101–152, 112+65.

[16] Hamilton v. Detroit, 85–83, 89, 88+419.

[17] Tatge v. Tatge, 34–272, 25+596, 26+121.

might be remedied by a curative act.[18] A deed of a wife's homestead in which her husband does not join is void.[19]

WIFE'S SEPARATE LEGAL EXISTENCE

4258. In general—Nearly all the common-law disabilities of married women as regards property, contracts and liability for torts, have been abolished in this state. The property held by them at the time of their marriage continues to be their separate property after marriage. They may, during coveture, receive, hold, use, and enjoy, property of all kinds, and the rents, issues and profits thereof, and all avails of their contracts and industry free from the control of their husbands. They may contract and engage in business as freely as their husbands. They are bound by their contracts and responsible for their torts, and their property is liable for their debts and torts, as if they were unmarried. They are as free as their husbands to dispose of their property, whether real or personal. While they enjoy these enlarged rights they are subject to the corresponding liabilities. Their conduct has the same effect as if they were unmarried.[20]

4259. Her separate property—At common law husband and wife were regarded as one, and that one was the husband.[21] Her personal property became his absolutely upon marriage and she could not have full enjoyment of her separate realty.[22] This theoretical unity of husband and wife as regards property, which prevailed at common law, has been abolished in this state.[23] A wife, whether living with her husband or not, has the same absolute right to the use and enjoyment of her separate property that she would have if unmarried. To the extent necessary for the full exercise and protection of such right she has a separate legal existence, distinct from her husband and wholly unaffected by her marriage relation.[24] Her husband has no control over her personal property whatever—her control is absolute.[25] Since Laws 1905 c. 255, and Laws 1907 c. 417, her control over her realty is as absolute as that of her husband over his. Formerly the rule was otherwise. She could not convey it without her husband joining [26] or, under an early statute, without his "consent." [27] A wife is entitled to the increase and product of her separate property, whether real or personal.[28] Where a husband comes into possession of his wife's property the

[18] Wistar v. Foster, 46–484, 49+247.

[19] Grace v. Grace, 96–294, 104+969. See § 4211.

[20] R. L. 1905 §§ 3605-3611; Laws 1905 c. 255; Laws 1907 c. 417; Baker v. Baker, 22–262; Dobbin v. Cordiner, 41–165, 42+870; Sandwich Mfg. Co. v. Zellmer, 48–408, 51+379; Hossfeldt v. Dill, 28–469, 471, 10+781; Eilers v. Conradt, 39–242, 39+320; Pett-Morgan v. Kennedy, 62–348, 64+912; Wilson v. Wilson, 43–398, 45+710; Lockwood v. Lockwood, 67–476, 482, 70+784; Dickman v. Dryden, 90–244, 249, 95+1120; Semper v. Coates, 93–76, 78, 100+662; Kinney v. Sharvey, 48–93, 97, 50+1025; Christman v. Colbert, 33–509, 24+301.

[21] Allen v. Minn. etc. Co., 68–8, 11, 70+800. See Wilder v. Brooks, 10–50(32).

[22] Williams v. McGrade, 13–46(39, 47); Carpenter v. Leonard, 5–155(119).

[23] Wilson v. Wilson, 43–398, 400, 45+710; In re Holt, 56–33, 36, 57+219.

[24] Spencer v. St. P. etc. Ry., 22–29; Wampach v. St. P. etc. Ry., 22–34; Gillespie v. Gillespie, 64–381, 67+206; Hamilton v. Detroit, 85–83, 88, 88+419; Rich v. Rich, 12–468(369).

[25] Laib v. Brandenburg, 34–367, 369, 25+803; In re Holt, 56–33, 37, 57+219; Dayton v. Nell, 43–246, 249, 45+231.

[26] See § 4257.

[27] Clague v. Washburn, 42–371, 44+130; Merrill v. Nelson, 18–366(335); Rich v. Rich, 12–468(369); Strong v. Colter, 13–82(77); Kingsley v. Gilman, 15–59(40); Pond v. Carpenter, 12–430(315); Selby v. Stanley, 4–65(34).

[28] Williams v. McGrade, 13–46(39); McNally v. Weld, 30–209, 14+895; Hossfeldt v. Dill, 28–469, 10+781; Ladd v. Newell, 34–107, 24+366; Duncan v. Kohler, 37–379, 34+594; Olson v. Amundson, 51–114, 52+1096.

presumption is that he holds it for her.[29] A court will be careful to protect the wife's interest from loss by reason of the confidential relation of husband and wife.[30] A wife's separate property is chargeable with her debts as if she were unmarried. Her creditors have the same remedies against her as if she were single.[31] Her property is not liable for her husband's debts.[32] Under G. S. 1866 the power of a wife to acquire property for her separate use was limited.[33]

4260. Right to contract—A wife may contract as freely as if unmarried, except in relation to her realty.[34] Prior to Laws 1869 c. 56, the common-law disability of married women to contract prevailed in this state, with a few exceptions.[35]

4261. Earnings of labor—While a wife is not entitled to compensation for household services, which it is her duty to perform as a wife, she may be entitled, under a special agreement with her husband, to money derived from keeping boarders.[36]

4262. Husband as agent of wife—A husband may act as the agent of his wife as freely as if they were unmarried, except in relation to her realty. When he so acts the general principles of agency apply as if the parties were unmarried, but the relationship of the parties may be considered in determining whether the husband acted in a particular transaction as his wife's agent, or on his own account.[37]

4263. Wife may purchase husband's property—A wife may purchase her husband's property,[38] but the sale may be set aside if fraudulent as to creditors.[39]

4264. Conveyances by minor wife—A conveyance by a wife is not affected by her minority.[40]

4265. As husband's surety—A wife may become the surety of her husband, and if she does, she is entited to all the rights of a surety as if unmarried.[41]

4266. Husband carrying on farm for wife—A wife may carry on her farm through the agency of her husband, and she is entitled to the crops grown thereon in the absence of a contrary agreement. An intention to invest him with the ownership of the crops is not to be inferred solely from his living with her on the farm, working on it without any agreement as to his compensation, employing some of his farming implements and animals in the work, and acting

[29] Chadbourn v. Williams, 45–294, 47+812. See McNally v. Weld, 30–209, 14+895; Muus v. Muus, 29–115, 12+343.

[30] McNally v. Weld, 30–209, 212, 14+895; Rich v. Rich, 12–468(369).

[31] Kinney v. Sharvey, 48–93, 97, 50+1025; Carpenter v. Leonard, 5–155(119); Pond v. Carpenter, 12–430(315); Tuttle v. Howe, 14–145(113).

[32] Sudbo v. Rusten, 66–108, 68+513; Eilers v. Conradt, 39–242, 39+320.

[33] Leighton v. Sheldon, 16–243(214).

[34] See §§ 4258, 4281–4287.

[35] Carpenter v. Leonard, 5–155(119); Tullis v. Fridley, 9–79(68); Pond v. Carpenter, 12–430(315); Tuttle v. Howe, 14–145(113); Kingsley v. Gilman, 15–59(40); N. W. etc. Co. v. Allis, 23–337; Sandwich Mfg. Co. v. Zellmer, 48–408, 414, 51+379.

[36] Riley v. Mitchell, 36–3, 29+588; Bodkin v. Kerr, 97–301, 107+137.

[37] Comfort v. Sprague, 31–405, 18+108; Ladd v. Newell, 34–107, 24+366; Hossfeldt v. Dill, 28–469, 10+781; McCarthy v. Caldwell, 43–442, 45+723; Knappen v. Freeman, 47–491, 50+533; Tilleny v. Wolverton, 50–419, 52+909; Freeman v. Lawton, 58–546, 60+667; Wheeler v. Benton, 67–293, 69+927; Amans v. Campbell, 70–493, 73+506; Rahm v. Newton, 87–415, 92+408; Hodgins v. Heaney, 17–45(27); Eilers v. Conradt, 39–242, 39+320; Place v. Johnson, 20–219(198); Miller v. Lathrop, 50–91, 52+274; Betcher v. Devenney, 84–262, 87+839; Talboys v. Byrne, 109–412, 124+15.

[38] Sanders v. Chandler, 26–273, 3+351; Houston v. Nord, 39–490, 40+568; Olson v. Amundson, 51–114, 52+1096; Bodkin v. Kerr, 97–301, 107–137. See Kampfer v. East Side Synd., 95–309, 104+290.

[39] See § 4255.

[40] R. L. 1905 § 3335; Daley v. Minn. etc. Co., 43–517, 45+1100. See, under former statute, Dixon v. Merritt, 21–196.

[41] Wolf v. Banning, 3–202(133); Agnew v. Merritt, 10–308(242); Siebert v. Quesnel, 65–107, 67+803.

as her agent. Whether the crops belong to her depends upon the facts of the particular case.[42]

LIABILITIES OF WIFE

4267. Estoppel—The capacity of married women to be estopped by their conduct is incident to their enlarged power to deal with others.[43]

4268. For household necessaries—By statute a wife is jointly and severally liable with her husband for all necessary household articles and supplies furnished to and used by the family.[44] To charge a wife for the wages of domestic servants or household supplies an express agreement on her part must ordinarily be proved.[45]

4269. On husband's covenants—A wife is not required to join in the covenants of her husband, but if she does so, she is estopped thereby and bound thereon.[46]

4270. On husband's contracts—A wife has been held not liable for the cost of a building erected on her land under a contract made by her husband.[47] Whether a contract executed by a married woman, in connection with her husband, is one of suretyship, is to be determined by a consideration of whether or not it was made by her upon a consideration running to her, or for the benefit of her estate.[48]

4271. For her torts—A wife is liable for her torts whether committed in the presence of her husband or not.[49] Formerly the rule was otherwise as to torts committed in the presence of the husband.[50]

RIGHTS OF HUSBAND

4272. In general—A husband is the head of the family [51] and fixes its domicil.[52]

LIABILITIES OF HUSBAND

4273. To support wife—A husband is bound to support his wife according to his station in life,[53] and he is not relieved by the fact that they live apart.[54] The duty is marital and not contractual.[55]

4274. For torts of wife—A husband is not liable for the torts of his wife.[56] Prior to Laws 1897 c. 10 the rule was otherwise.[57]

[42] Sanders v. Chandler, 26-273, 3+351; Hossfeldt v. Dill, 28-469, 10+781; Ladd v. Newell, 34-107, 24+366; Duncan v. Kohler, 37-379, 34+594; Heartz v. Klinkhammer, 39-488, 40+826; Olson v. Amundson, 51-114, 52+1096; Honeywell v. Norby, 61-188, 63+488; Hazlett v. Babcock, 64-254, 66+971; Cain v. Mead, 66-195, 68+840; Bodkin v. Kerr, 97-301, 107+137.

[43] Dobbin v. Cordiner, 41-165, 42+870; Sandwich Mfg. Co. v. Zellmer, 48-408, 51+379; Knight v. Schwandt, 67-71, 69+626; Esty v. Cummings, 80-516, 83+420. See § 4211.

[44] R. L. 1905 § 3608. See, prior to statute, Chester v. Pierce, 33-370, 23+539.

[45] Flynn v. Messenger, 28-208, 9+759; Chester v. Pierce, 33-370, 23+539.

[46] Sandwich Mfg. Co. v. Zellmer, 48-408, 51+379; Security Bank v. Holmes, 68-538, 71+699; Von Hemert v. Taylor, 73-339, 76+42.

[47] Holley v. Huntington, 21-325; Welch v. Huntington, 23-89.

[48] Siebert v. Quesnel, 65-107, 67+803.

[49] R. L. 1905 § 3607; Chamberlain v. O'Brien, 46-80, 48+447.

[50] Brazil v. Moran, 8-236(205).

[51] Friburk v. Standard Oil Co., 66-277, 68+1090; Williams v. Moody, 35-280, 28+510.

[52] Williams v. Moody, 35-280, 28+510; Kramer v. Lamb, 84-468, 87+1024.

[53] Olson v. Youngquist, 72-432, 75+727; Bergh v. Warner, 47-250, 50+77.

[54] Oltman v. Yost, 62-261, 64+564; Kirk v. Chinstrand, 85-108, 88+422; Allen v. Minn. etc. Co., 68-8, 11, 70+800.

[55] Oltman v. Yost, 62-261, 263, 64+564; Bergh v. Warner, 47-250, 50+77.

[56] R. L. 1905 § 3608.

[57] Pett-Morgan v. Kennedy, 62-348, 64+912. See Brazil v. Moran, 8-236(205).

4275. On wife's contracts generally—A husband is not liable, as such, on the contracts of his wife, except for necessaries.[58] A wife has no general authority, as such, to bind her husband by contract.[59]

4276. On contracts of wife for necessaries—If a husband and wife are living together the wife has implied authority to purchase on the credit of her husband ordinary household and family necessaries,[60] and to employ domestic servants,[61] according to his station in life. If they are not living together the wife has no such implied authority, and one selling to her cannot recover from her husband except upon proof of her authority, express or implied, to pledge his credit, or upon proof that the things sold were necessaries which the husband had neglected or refused to provide.[62] In general, one who sells goods to a wife can recover from the husband only upon proof that he authorized the purchase, expressly or impliedly, or upon proof that he refused or neglected to provide a suitable support for the wife and that the goods sold were necessaries.[63] If a husband refuses to allow his wife to live with him, he cannot dictate where she shall live and is liable for such board and lodgings as she may select, if they are respectable and according to his station in life.[64] A husband is liable in all cases where he would be liable under the general rules of agency regardless of the marriage relation.[65] He cannot escape liability for necessaries which he refuses or neglects to provide by a notice that he will not be liable. The term "necessaries," in this regard, is not limited to articles of food and clothing required to preserve life or personal decency, but includes such articles of utility or ornament as are suitable to maintain the wife according to her husband's station in life. The question whether articles are necessaries is ordinarily one for the jury.[66] A recovery for lodgings furnished a wife living apart from her husband has been sustained.[67] Evidence held not to show authority of wife to pledge her husband's credit for diamond ear-rings.[68]

4277. To bury wife—It is the duty of a husband to bury his wife in a suitable manner and if he neglects to do so he is liable to one who does.[69]

4278. For attorney's fees—An attorney is not entitled to recover of the husband for legal services rendered to his wife in a groundless action brought by her, without his consent, to recover possession of premises in the peaceable possession of his tenant, claimed by her to have been the family homestead.[70]

INCHOATE INTEREST IN EACH OTHER'S REALTY

4279. Nature—By virtue of the statute of descent a husband and wife have a certain interest in the realty of each other.[71] It has been held that this statutory interest is merely an enlargement of common-law dower and curtesy and should be construed accordingly.[72] But according to the better view such in-

[58] R. L. 1905 § 3608.
[59] Bergh v. Warner, 47–250, 251, 50+77; Ness v. Singer Mfg. Co., 68–237, 70+1126.
[60] Flynn v. Messenger, 28–208, 9+759; Chester v. Pierce, 33–370, 23+539; Bergh v. Warner, 47–250, 50+77; Olson v. Youngquist, 76–26, 78+870.
[61] Flynn v. Messenger, 28–208, 9+759; Wagner v. Nagel, 33–348, 23+308.
[62] Olson v. Youngquist, 76–26, 78+870; Id., 72–432, 75+727; Oltman v. Yost, 62–261, 64+564.
[63] Bergh v. Warner, 47–250, 50+77.
[64] Kirk v. Chinstrand, 85–108, 88+422.
[65] Bergh v. Warner, 47–250, 50+77.
[66] Bergh v. Warner, 47–250, 50+77; Oltman v. Yost, 62–261, 263, 64+564; Kirk v. Chinstrand, 85–108, 88+422.
[67] Oltman v. Yost, 62–261, 64+564.
[68] Bergh v. Warner, 47–250, 50+77.
[69] Gleason v. Warner, 78–405, 81+206.
[70] Plymat v. Brush, 46–23, 48+443.
[71] R. L. 1905 § 3648; Stromme v. Rieck, 107–177, 119+948.
[72] In re Rausch, 35–291, 28+920; McGowan v. Baldwin, 46–477, 479, 49+251; Dayton v. Corser, 51–406, 413, 53+717; In re Gotzian, 34–159, 24+920; Holmes v. Holmes, 54–352, 56+46; Crowley v. Nelson, 66–400, 407, 69+321; Griswold v. McGee, 102–114, 112+1020, 113+382; Stromme v. Rieck, 107–177, 119+948.

terest is purely statutory and without any of the essential features of dower or curtesy.[73] During the life of the parties this interest is inchoate and contingent. It is not an estate or vested interest. It is a mere expectancy or possibility, incident to the marriage relation.[74] But it is an interest which the law recognizes and which the husband or wife may protect.[75] Upon the death of a spouse this interest becomes vested at once,[76] and a freehold estate if such was the estate of the decedent.[77] Prior to Laws 1905 c. 255, the inchoate interest of a husband in the realty of his wife was greater than her interest in his.[78] This interest is not within the recording act.[79] It is an incumbrance within a covenant against incumbrances.[80] The inchoate interest of the wife of a partner in firm realty is conditional on the winding up of the firm affairs.[81] The interest of a wife in her husband's realty is not such as to make her a necessary party in actions affecting his title.[82]

4280. Loss—This interest may be taken away or modified by subsequent legislation.[83] It is now cut off by an execution sale,[84] but prior to Laws 1901 c. 33 the rule was otherwise.[85] It is cut off by insolvency or bankruptcy proceedings or an assignment for the benefit of creditors.[86] One spouse cannot release his or her interest by contract with the other.[87] A quitclaim deed signed by husband and wife will bar the interest of the wife.[88] It may be lost by estoppel.[89] A power of attorney signed by husband and wife has been held to authorize a conveyance that cut off the inchoate interest of a wife.[90] A wife will lose her interest if she joins in the deed of her husband, though she does not join in the covenants.[91] She may lose it by a judgment against her husband, though she was not a party to the action.[92]

CONTRACTS AND CONVEYANCES BETWEEN

4281. Contracts generally—Except as regards their realty a husband and wife are as free to make any lawful contract with one another as if they were unmarried.[93] They may not be able to stipulate for a pecuniary compensation

[73] Scott v. Wells, 55–274, 56+828; Merrill v. Security T. Co., 71–61, 73+640; Johnson v. Minn. etc. Co., 75–4, 77+421.

[74] In re Rausch, 35–291, 28+920; Hamilton v. Detroit, 85–83, 89, 88+419; Madson v. Madson, 69–37, 40, 71+824; Guerin v. Moore, 25–462; Griswold v. McGee, 102–114, 112+1020, 113+382; Stitt v. Smith, 102–253, 113+632; State Board v. Hart, 104–88, 116+212.

[75] Williams v. Stewart, 25–516; Martin v. Sprague, 29–53, 11+143; Roberts v. Meighen, 74–273, 77+139; Tracy v. Tracy, 79–267, 271, 82+635; Mpls. etc. Ry. v. Lund, 91–45, 97+452; Kopp v. Thele, 104–267, 116+472; Slingerland v. Slingerland, 109–407, 124+19.

[76] Scott v. Wells, 55–274, 56+828; Byrnes v. Sexton, 62–135, 138, 64+155; Mpls. etc. Ry. v. Lund, 91–45, 48, 97+452; Howe v. Parker, 105–310, 117+518.

[77] Hamilton v. Detroit, 85–83, 89, 88+419; Crowley v. Nelson, 66–400, 407, 69+321.

[78] Lowe v. Lowe, 83–206, 209, 86+11.

[79] Snell v. Snell, 54–285, 55+1131.

[80] Crowley v. Nelson, 66–400, 69+321.

[81] Woodward v. Nudd, 58–236, 59+1010.

[82] Stitt v. Smith, 102–253, 113+632.

[83] Griswold v. McGee, 102–114, 112+1020; Wistar v. Foster, 46–484, 49+247; Desnoyer v. Jordan, 27–295, 299, 7+140; Guerin v. Moore, 25–462; Morrison v. Rice, 35–436, 29+168.

[84] R. L. 1905 § 3648; Aretz v. Kloos, 89–432, 440, 95+216, 769; Griswold v. McGee, 102–114, 112+1020, 113+382.

[85] Dayton v. Corser, 51–406, 53+717; Merrill v. Security T. Co., 71–61, 65, 73+640; Roberts v. Meighen, 74–273, 277, 77+139; Johnson v. Minn. etc. Co., 75–4, 7, 77+421; Aretz v. Kloos, 89–432, 440, 95+216, 769.

[86] R. L. 1905 § 3648; Merrill v. Security T. Co., 71–61, 73+640. See Williamson v. Selden, 53–73, 77, 54+1055; Kinney v. Sharvey, 48–93, 50+1025.

[87] In re Rausch, 35–291, 28+920.

[88] Ortman v. Chute, 57–452, 59+533.

[89] Holcomb v. Independent School Dist., 67–321, 69+1067. See Madson v. Madson, 69–37, 71+824.

[90] Snell v. Weyerhauser, 71–57, 73+633.

[91] Sandwich Mfg. Co. v. Zellmer, 48–408, 51+379.

[92] Stitt v. Smith, 102–253, 113+632.

[93] R. L. 1905 § 3609; Laib v. Brandenburg, 34–367, 369, 25+803; Riley v. Mitch-

to be paid by one to the other for performing the duties pertaining to their relation.[94]

4282. As to realty—By statute a husband and wife cannot contract with one another in regard to their realty.[95] The statute is applicable where they are living apart.[96] It renders void a direct conveyance from one spouse to the other,[97] but not an indirect conveyance through a third party.[98] A wife cannot release to her husband her statutory interest in his realty.[99] One spouse cannot make a vaid lease of the other's realty acting as agent or attorney.[1] An agreement by a husband to enter into a contract at a stated time in the future for the sale of realty owned by his wife is void.[2] Where a wife induced her husband to will all his real and personal property to her upon the express condition that she in turn would will it to certain relatives, it was held that upon default upon her part she took the property ex maleficio in trust for such relatives, though the agreement was void as to the realty under the statute.[3] The doctrine of estoppel is applicable to contracts void under the statute.[4] Where a husband procured the title to realty to be taken in his wife's name, a subsequent declaration of trust made and signed by her reciting that the consideration for the conveyances was paid by her husband, that the land was conveyed to her for his use and benefit, and that she held it in trust for him, was held void under the statute.[5] Where earnest money was paid under a contract to convey executed by a husband as the agent of his wife, and therefore void under the statute, it was held that it could not be recovered, the husband and wife being ready and able to perform.[6] Where a husband, acting as the agent of his wife, enters into an executory contract in her name for the sale of her land, and she thereafter confirms his act and offers and tenders performance, the vendee cannot refuse performance on his part on the ground that the contract is void under the statutes because made by the husband as agent.[7]

4283. Separation agreements—An agreement between a husband and wife, after a separation has taken place between them, by which he undertakes to pay her a stipulated sum for her support, in consideration of her release of all other claims upon him therefor, is valid.[8]

4284. To facilitate divorce—An agreement between husband and wife to facilitate divorce is void.[9]

4285. Antenuptial contracts—Parties in contemplation of marriage may by contract, equitably and fairly made, fix the rights which each shall have in the property of the other during life, or which the survivor shall have in the property of the other after his or her death, and to exclude the operation of the

ell, 36–3, 29+588; Kraft v. Kraft, 70–144, 72+804; Bodkin v. Kerr, 97–301, 107+137.

[94] Riley v. Mitchell, 36–3, 29+588.

[95] R. L. 1905 § 3609; Sylvester v. Holasek, 83–362, 365, 86+336.

[96] Phillips v. Blaker, 68–152, 70+1082.

[97] McKinney v. Bode, 32–228, 20+94; Luse v. Reed, 63–5, 65+91; Loveridge v. Coles, 72–57, 62, 74+1109. See, prior to statute, Wilder v. Brooks, 10–50(32).

[98] Wilder v. Brooks, 10–50(32, 36); McMillan v. Cheeney, 30–519, 16+404; Jorgenson v. Mpls. T. M. Co., 64–489, 67+364; Sokolowski v. Ward, 98–177, 107+961.

[99] In re Rausch, 35–291, 28+920.

[1] Sanford v. Johnson, 24–172; Fall v. Moore, 45–515, 48+404; Blomberg v. Montgomery, 69–149, 154, 72+56; Van Brunt v. Wallace, 88–116, 92+521.

[2] Betcher v. Rinehart, 106–380, 118+1026.

[3] Laird v. Vila, 93–45, 100+656.

[4] Dobbin v. Cordiner, 41–165, 42+870; Knappen v. Freeman, 47–491, 50+533; Jones v. Bliss, 48–307, 51+375.

[5] Luse v. Reed, 63–5, 65+91.

[6] Keystone I. Co. v. Logan, 55–537, 57+156.

[7] Stromme v. Rieck, 107–177, 119+948.

[8] Roll v. Roll, 51–353, 53+716. See Phillips v. Baker, 68–152, 154, 70+1082.

[9] Belden v. Munger, 5–211(169); Adams v. Adams, 25–72; McAllen v. Hodge, 94–237, 102+707; McAllen v. McAllen, 97–76, 106+100.

law in respect of fixing such rights. Such a contract cannot be impaired by subsequent legislation.[10]

4286. Wife as agent of husband—Except in relation to realty a wife may act as the agent of her husband,[11] but she has no implied general authority to so act.[12]

4287. Husband working for wife—A husband may work for his wife and manage her property with or without compensation. If a husband chooses to work for his wife without compensation his creditors cannot complain.[13]

ACTIONS

4288. When wife may sue husband—A wife may sue her husband in her own name in any form of action to enforce any right affecting her property.[14] If justifiably living apart she may sue him for separate support.[15] She cannot either before or after divorce sue him for a personal tort committed by him against her during coveture.[16] It is possible that a wife, owning realty as tenant in common with her husband, can maintain an action for partition against him, but she cannot have a partition of his homestead, even though she leaves him for just cause.[17]

4289. By or against wife—Joinder of husband—By statute a wife may sue and be sued in her own name as if unmarried and without joining her husband.[18] The unnecessary joinder of a husband as plaintiff is a mere irregularity which may be disregarded or corrected by striking out his name.[19] The fact that a husband is living with his wife on her land does not make him a necessary party in an action by her for a trespass on the land.[20] In an action by a creditor to set aside a fraudulent conveyance of the property of a husband the latter's wife is not a proper party defendant, but the wife of the fraudulent grantee is.[21] In an action to enforce a resulting trust under R. L. 1905 § 3246, the judgment debtor is a proper, but not a necessary, party defendant; and where a wife in such case is sought to be charged as trustee, her husband need not be made a party.[22] A wife's interest in her husband's homestead is not affected by an action to foreclose a mortgage thereon to which she is not a party.[23]

4290. Barring interest of spouse in realty—A statutory action is provided for barring the interest of a spouse in realty in case of insanity, desertion, or ground for divorce.[24]

4291. By wife when deserted by husband—By statute, when a husband has deserted his family, his wife may prosecute or defend, in his name, any action which he might have prosecuted or defended.[25]

[10] Desnoyer v. Jordan, 27–295, 7+140; Id., 30–80, 14+259; Hosford v. Rowe, 41–245, 42+1018; Appleby v. Appleby, 100–408, 111+305; Slingerland v. Slingerland, 109–407, 124+19. See § 1188.

[11] Steffens v. Nelson, 94–365, 368, 102+871. See Bovee v. Butters, 92–149, 99+641.

[12] See § 4275.

[13] Eilers v. Conradt, 39–242, 39+320. See § 4266.

[14] Gillespie v. Gillespie, 64–381, 67+206; Grace v. Grace, 96–294, 104+969. See Rich v. Rich, 12–468(369); Muus v. Muus, 29–115, 12+343.

[15] Baier v. Baier, 91–165, 97+671. See Stephen v. Stephen, 102–301, 113+913.

[16] Strom v. Strom, 98–427, 107+1047.

[17] Grace v. Grace, 96–294, 104+969.

[18] R. L. 1905 § 4056. See, under former statutes, Wolf v. Banning, 3–202(133); Spencer v. Sheehan, 19–338(292); Nininger v. Carver County, 10–133(106); Kennedy v. Williams, 11–314(219).

[19] Colvill v. Langdon, 22–565.

[20] Spencer v. St. P. etc. Ry., 22–29; Wampach v. St. P. etc. Ry., 22–34.

[21] Tatum v. Roberts, 59–52, 60+848.

[22] Leonard v. Green, 34–137, 24+915; Nat. G. A. Bank v. Lawrence, 77–282, 79+1016, 80+363.

[23] Spalti v. Blumer, 56–523, 58+156.

[24] R. L. 1905 § 3610; Giles v. Giles, 22–348; Weld v. Weld, 27–330, 7+267; Grace v. Grace, 96–294, 104+969; Stephen v. Stephen, 102–301, 113+913.

[25] R. L. 1905 § 4061; Davis v. Woodward, 19–174(137); Allen v. Minn. etc. Co., 68–8, 70+800.

4292. By wife for nuisance—In an action by a wife for a nuisance she cannot recover for injuries to the family.[26]

4293. By wife for personal injury—A wife may maintain an action for personal injury, as if unmarried.[27] The negligence of a husband is not imputable to his wife.[28] She cannot recover expenses incurred for medical treatment, as her husband, and not she, is liable therefor.[29]

4294. For alienation of husband's affections—Enticement—Damages—A wife may maintain an action against one who wrongfully entices her husband from her and alienates his affections, so as to cause a separation between them.[30] Cases are cited below involving the right of a husband to intervene in such an action,[31] and the amount of damages.[32]

4295. For alienation of wife's affections—Enticement—Damages—Cases are cited below involving the question of damages in actions for the alienation of a wife's affections, or enticing her to leave her husband.[33]

4296. By husband for injuries to wife—Where damages to a wife, resulting from defendant's actionable fault, have in no part been caused by the wife's own wrong, two distinct causes of action may accrue—one to her, for the direct injuries to her person and the like; the other to her husband, for the consequential injuries to him, consisting of loss of her services and society, and of the expense to which he may have been put, and the like. That such injuries have resulted in the death of the wife, and that an action has been brought under the statute by the administrator for the statutory beneficiaries and a verdict recovered therein, constitute no bar to the action by the husband to recover damages inflicted on him by defendant's wrong.[34] A husband may maintain an action against a municipality to recover consequential damages sustained by him in the loss of the services of his wife on account of injuries received by her by reason of a defective sidewalk, and also for the recovery of moneys expended by him for medical attendance.[35] Where husband and wife were injured by the same act of negligence, a recovery by the husband for his personal injury was held not a bar to an action by him to recover for loss of the society and services of his wife and expenses in effecting her cure.[36]

4297. For criminal conversation—A wife cannot maintain an action against another woman for criminal conversation.[37]

4298. By wife for abusive language to husband—A wife has been held not entitled to recover for abusive language used toward her husband in her presence, and causing her mental distress and illness.[38]

CRIMES

4299. Non-support of wife—A wilful failure of a husband, without lawful excuse, to furnish proper food, shelter, clothing, or medical attendance and care in case of sickness, to his wife, is a criminal offence.[39]

[26] Friburk v. Standard Oil Co., 66–277, 68+1090.

[27] Mageau v. G. N. Ry., 103–290, 115+651.

[28] Finley v. Chi. etc. Ry., 71–471, 74+174.

[29] Belyea v. Mpls. etc. Ry., 61–224, 63+627.

[30] Lockwood v. Lockwood, 67–476, 70+784.

[31] McAllen v. Hodge, 92–68, 99+424.

[32] Lockwood v. Lockwood, 67–476, 70+784 (verdict for $15,000 held not excessive); White v. White, 101–451, 112+627 (verdict for $2,000 held not excessive).

[33] Huot v. Wise, 27–68, 6+425 (verdict for $1,800 held not excessive); Bathke v. Krassin, 78–272, 80+950 (verdict for $5,000 held excessive); Id., 82–226, 84+796 (verdict for $3,000 held excessive and reduced to $1,500); Korby v. Chesser, 98–509, 108+520 (verdict for $1,500 held not excessive).

[34] Mageau v. G. N. Ry., 103–290, 115+651.

[35] McDevitt v. St. Paul, 66–14, 68+178.

[36] Skoglund v. Mpls. St. Ry., 45–330, 47+1071. See Belyea v. Mpls. etc. Ry., 61–224, 63+627.

[37] Kroessin v. Keller, 60–372, 62+438.

[38] Bucknam v. G. N. Ry., 76–373, 79+98.

[39] R. L. 1905 § 4934; Laws 1905 c. 217;

HYPOTHETICAL QUESTIONS—See Evidence, 3337.
ICE—See Navigable Waters, 6942.
IDEM SONANS—See Names.
IDENTITY—See Evidence, 3249; Names, 6917.
IF—See note 40.
ILLEGAL CONTRACTS—See Bills and Notes, 1020; Contracts, 1867; Wagers.
ILLEGITIMATE CHILDREN—See Bastardy, 825.
ILL FAME—See Disorderly House.
ILLUMINATING OILS—See Inspection.
IMMATERIAL EVIDENCE—See Evidence, 3241.
IMMEDIATE, IMMEDIATELY—See note 41.
IMMUNITY—See Constitutional Law, 1695, and note 42.
IMPAIRMENT OF CONTRACTS—See Constitutional Law, 1622.
IMPANELING JURY—See Jury, 5246.
IMPARTIAL—See note 43.
IMPERFECT OBLIGATION—See note 44.

IMPLIED OR QUASI CONTRACTS

Cross-References

See Contracts, 1905; Money Had and Received; Money Lent; Money Paid; Use and Occupation; Work and Labor.

4300. Definition and nature—An implied or quasi contract is a fictitious contract assumed by the law in order to enforce, by an action ex contractu, certain obligations imposed by law, independent of contract or tort. An implied or quasi contract is not a true contract. It does not require a consideration or mutual assent. It is enforced regardless of the intention of the obligor. A true contract is an obligation created by the act of the parties. A quasi contract is an obligation imposed by law. It resembles a true contract, however, in one important particular. The duty of the obligor is a positive one, that is, to act. In this respect they both differ from obligations, the breach of which constitutes a tort, where the duty is generally negative, that is, to forbear. Since at the common law all obligations were regarded as arising either ex contractu or ex delicto, it was natural that these obligations imposed by law should be regarded as contracts. The real reason, however, for calling them contracts, was to secure their enforcement by the common-law action of assumpsit. To maintain assumpsit it was necessary that there should be a promise, and to meet this requirement the courts resorted to the fiction of a promise where none in fact existed. And even now, long after the abolition of assumpsit, these obligations are generally expressed in terms of contract, though there is no necessity for doing so. The fiction of an implied contract ought to be abandoned, and the present tendency is in that direction.[45] Quasi contracts are founded (1) upon a record; (2) upon

State v. Justus, 85-114, 88+415 (venue); Baier v. Baier, 91-165, 97+671 (statute does not deprive wife of an action for support).

[40] State v. Fleckenstein, 26-177, 2+475.

[41] O'Brien v. Oswald, 45-59, 47+316; Ermentrout v. Girard etc. Co., 63-305, 308, 65+635; State v. St. Paul T. Co., 76-423, 427, 79+543.

[42] Dike v. State, 38-366, 367, 38+95.

[43] Cole v. Curtis, 16-182(161, 172).

[44] State v. Young, 29-474, 531, 9+737.

[45] Dean Ames, 2 Harv. L. Rev. 63; Keener, Quasi Contracts, c. 1; Pomeroy,

a statutory, official, or customary duty; or (3) upon the fundamental principle of justice that no one ought unjustly to enrich himself at the expense of another.[46]

4301. Express contract excludes implied contract—Where there is a subsisting express contract the law will not raise an implied contract.[47]

4302. Illegal contracts—Where an express contract to pay would be illegal and void, the law will not raise an implied promise to pay.[48]

4303. Use of another's property—When one person uses the property of another, without any agreement for compensation, the law will imply an agreement for reasonable compensation, unless it is clear that there was a mutual understanding that the use was to be gratuitous.[49]

4304. Money paid or goods furnished under abandoned contract—Where one party to a contract refuses or fails to perform his part, the other party may rescind the contract and recover upon implied contract the money he has paid, or the reasonable value of what he has done for the other party for which he has received no benefit.[50]

4305. Money paid for another in cases of emergency—It is true that ordinarily there must be a request from a person authorized to make the same to constitute a basis for contract liability, but there are some exceptions to this rule, as where a person lies under a moral and legal obligation to do an act, and another does it for him, under such circumstances of urgent necessity that humanity and decency admit of no time for delay. Here the law will imply a promise to pay without proof that it has been made, when there was an expectation of reimbursement. A very familiar illustration of this rule is where a person furnishes the means of burial of the dead, when no request to do so comes from the person legally liable to perform the obligation. In such cases it has been held that the person furnishing the services may recover to the extent of the expenditures incurred.[51]

4306. Official fees—Official fees may be recovered in an action on implied contract.[52]

4307. Unilateral contracts—A promise by one party is not under all circumstances to be implied from the fact that a promise has been made by another, to which that sought to be implied would be correlative, and so the parties placed under mutual obligations.[53]

4308. Waiving tort and suing on implied contract—A party may sometimes waive an action for a tort and sue on an implied contract. In case of a conversion the owner may generally waive the tort and sue on an implied contract to pay the reasonable value of the goods converted. A mere naked trespass cannot be made the basis of an action on implied contract.[54]

IMPLIED TRUSTS—See Trusts, 9912.

Remedies, §§ 512, 541; Salmond, Jurisprudence, 438. In Deane v. Hodge, 35-146, 150, 27+917, it is said that "implied contracts are such as reason and justice dictate, and which, therefore, the law presumes that every man has contracted to perform."

[46] Dean Ames, 2 Harv. L. Rev. 63. See Todd v. Bettingen, 109-493, 124+443.

[47] Bond v. Corbett, 2-248(209); Beard v. Clarke, 35-324, 327, 29+142.

[48] Macy v. Duluth, 68-452, 71+687.

[49] Bennett v. Gillette, 3-423(309, 312); Deane v. Hodge, 35-146, 27+917.

[50] Bennett v. Phelps, 12-326(216); Robson v. Bohn, 22-410; Reynolds v. Franklin, 41-279, 43+53.

[51] Robbins v. Homer, 95-201, 103+1023.

[52] Conlon v. Holste, 99-493, 110+2.

[53] Ellsworth v. Southern Minn. etc. Co., 31-543, 551, 18+822.

[54] Downs v. Finnegan, 58-112, 59+981; Keener, Quasi Contracts, c. 3; Salmond, Torts, 136; 19 Yale L. Journal, 221. See §§ 1936, 7611, 9680.

IMPOSSIBILITY—See Contracts, 1789.
IMPOUNDING ANIMALS—See Animals, 277.
IMPRISONMENT FOR DEBT—See Constitutional Law, 1665.
IMPROVE—See note 55.

IMPROVEMENTS

Cross-References

See Ejectment, 2904, 2907; Fraudulent Conveyances, 3863; Mortgages, 6242, 6487; New Trial, 7224; Specific Performance, 8815; Tenancy in Common, 9601.

OCCUPYING CLAIMANTS' ACT

4309. Definition of improvements—The statute provides that the word "improvement" shall be construed to include all kinds of buildings and fences, and ditching, draining, grubbing, clearing, breaking, and all other necessary or useful labor of permanent value to the land.[56] It does not include ordinary repairs.[57]

4310. Constitutional questions—The act is constitutional so far as it requires the repayment of taxes with interest and the value of improvements.[58] It is unconstitutional so far as it requires the owner to pay the amount paid by the occupant for his deed.[59] The amendment of 1889 is unconstitutional so far as it is retroactive.[60]

4311. Tenant for life—A tenant for life, making improvements and paying taxes during the continuance of the life estate, is not entitled to the benefits of the act.[61]

4312. Heirs, representatives, or assigns—Heirs, representatives, and assigns stand on the same footing as the original occupant.[62]

4313. Right purely statutory—The right of the occupant to recover for taxes or improvements is purely statutory.[63]

4314. Object and justification of act—The validity of the act is not to be placed on the ground that there is a "natural equity" in favor of one who, under the belief that he has title, takes possession of and improves the land of another, and that such supposed natural equity may be changed by the legislature into a legal right.[64] The justification for the act is that fault is to be imputed to an owner who neglects to assert his title as to one who is in possession apparently occupying as owner.[65] And it is competent for the legislature to make it the duty of the owner to give notice of his title to one in possession and to impose on the neglect of that duty the obligation to pay the value of the improvements or part with his land for its value without such improvements.[66] One object of the act is to encourage purchasers at official sales;[67] another to protect those who make improvements under the honest

[55] Boenig v. Hornberg, 24-307, 310.
[56] R. L. 1905 § 4434.
[57] Northern I. Co. v. Bargquist, 93-106, 100+636.
[58] Wilson v. Red Wing School Dist., 22-488; Madland v. Benland, 24-372.
[59] Madland v. Benland, 24-372.
[60] Flynn v. Lemieux, 46-458, 49+238; Craig v. Dunn, 47-59, 49+396.
[61] Smalley v. Isaacson, 40-450, 42+352.
[62] Pfefferle v. Wieland, 55-202, 56+824. See Wheeler v. Merriman, 30-372, 15+665; Hall v. Torrens, 32-527, 21+717.
[63] Wilson v. Red Wing School Dist., 22-488; Wheeler v. Merriman, 30-372, 15+665; Scharffbillig v. Scharffbillig, 51-349, 53+713.
[64] Wilson v. Red Wing School Dist., 22-488.
[65] Smalley v. Isaacson, 40-450, 42+352.
[66] Wilson v. Red Wing School Dist., 22-488.
[67] Pfefferle v. Wieland, 55-202, 56+824.

belief that they have a good title.[68] The act gives a right in the nature of a lien on the land.[69]

4315. What is color of title—A person is in possession under color of title in fee, within the meaning of the act, when he is in possession under an instrument which on its face appears to give him a title in fee, but does not, in reality, owing to some extrinsic fact.[70] A deed void on its face does not furnish color of title.[71] It is unnecessary that the occupant himself should have color of title in fee, if he is in possession under some person having it.[72] A quitclaim deed expressly conveying a tax title gives color of title.[73] A person who builds a house on the land of another by mistake is not in possession under color of title.[74]

4316. What is an official deed—A tax certificate of purchase [75] or assignment [76] is an official deed, but it does not give color of title until after the expiration of the redemption period.[77] A deed of forfeited land is an official deed, but it does not give color of title unless regular on its face.[78]

4317. Notice—Good faith—Taking possession in good faith under an unofficial deed means taking possession in a belief that such taking is rightful[79]—that is, without actual notice of a superior title and in good faith.[80] Whether notice of facts sufficient to put a man of ordinary prudence on inquiry, which, if followed up with reasonable diligence, would disclose the defective character of the title, deprives the occupant of the benefits of the act is an unsettled question.[81] The occupant has the burden of proving good faith and want of notice,[82] but he may do so by his own direct testimony.[83] The question of good faith is one of fact.[84] In the case of taking possession under an official deed regular on its face only actual notice of defects in the title will defeat the occupant's claim to the benefits of the act and the presumption is that he had no such notice.[85]

4318. Peaceable entry presumed—In the absence of evidence to the contrary it is presumed that the occupants entered peaceably.[86]

4319. When taxes must have been paid—Taxes cannot be recovered unless paid when the occupant was in actual possession under color of title in good faith and without notice. A payment followed by such possession cannot be recovered.[87]

4320. When improvements must have been made—The value of improvements cannot be recovered or offset unless they were made when the occupant

[68] Wheeler v. Merriman, 30–372, 15+665; McLellan v. Omodt, 37–157, 33+326.
[69] Smalley v. Isaacson, 40–450, 42+352.
[70] Seigneuret v. Fahey, 27–60, 6+403; O'Mulcahy v. Florer, 27–449, 8+166; Wheeler v. Merriman, 30–372, 15+665; Northern I. Co. v. Bargquist, 93–106, 100+636; Kampfer v. East Side Synd., 95–309, 104+290.
[71] O'Mulcahy v. Florer, 27–449, 8+166; McLellan v. Omodt, 37–157, 33+326. See Shillock v. Gilbert, 23–386; Everett v. Boyington, 29–264, 13+45.
[72] Hall v. Torrens, 32–527, 21+717; Northern I. Co. v. Bargquist, 93–106, 100+636.
[73] Wheeler v. Merriman, 30–372, 15+665.
[74] Mitchell v. Bridgman, 71–360, 74+142.
[75] McLellan v. Omodt, 37–157, 33+326.
[76] Everett v. Boyington, 29–264, 13+45; Pfefferle v. Wieland, 55–202, 56+824.
[77] McLellan v. Omodt, 37–157, 33+326; Jewell v. Truhn, 38–433, 38+106; Kampfer v. East Side Synd., 95–309, 104+290.
[78] Madland v. Benland, 24–372.
[79] Seigneuret v. Fahey, 27–60, 6+403; Northern I. Co. v. Bargquist, 93–106, 100+636.
[80] Wheeler v. Merriman, 30–372, 15+665.
[81] See Shillock v. Gilbert, 23–386; Wheeler v. Merriman, 30–372, 15+665; Pfefferle v. Wieland, 55–202, 56+824.
[82] Jewell v. Truhn, 38–433, 38+106.
[83] Seigneuret v. Fahey, 27–60, 6+403.
[84] Id.
[85] Pfefferle v. Wieland, 55–202, 56+824. See Wheeler v. Merriman, 30–372, 15+665.
[86] Seigneuret v. Fahey, 27–60, 6+403.
[87] Dawson v. Girard etc. Co., 27–411, 8+142; Pfefferle v. Wieland, 60–328, 62+396.

was in actual possession under color of title in good faith and without notice. It is not enough that such a possession is had subsequent to the improvements.[88] No recovery can be had after service of the pleading asserting the hostile claim.[89]

4321. In what form of action claim may be made—The claim may be asserted and adjudged in any action the result of which may determine and cut off the claim to a lien. And if the lien is established the court must enforce it, though no procedure is expressly provided by the act. It may be asserted and determined in an action of partition;[90] in a statutory action to determine adverse claims generally;[91] in an action of ejectment;[92] and in an action to redeem from a tax sale by a person who has been under a disability.[93] It cannot be asserted in an action under Laws 1887 c. 127 to test a tax title.[94] If the claim cannot be asserted in the particular action it may be asserted subsequently in a proper action.[95]

4322. Validity of taxes to be determined—Recovery can only be had of such taxes as were a valid charge on the land.[96] Hence the owner should be given a full opportunity to contest the validity of the taxes claimed.[97]

4323. Pleading—A party cannot have the benefits of the act without appropriate allegations in his pleading.[98] But a court should be very liberal in allowing a party to amend his pleadings so as to claim such benefits.[99] Allegations in an answer setting for such a claim are not admitted by a failure to reply.[1] It is for the occupant to allege his good faith and to negative notice and for the owner, if he wishes to force the occupant to buy the land, to negative notice on his part.[2]

4324. Burden of proof—The burden of proof ordinarily rests on the occupant to prove all the facts essential to bring him within the statute, but he is aided by presumptions.[3] An occupant seeking to recover for improvements made or taxes paid by his grantor must prove that the latter, at the time of the improvements or payment, was in actual occupation under color of title in fee and without notice.[4] The burden rests on the owner in the first instance to prove that he had no notice, actual or constructive, of the possession of the occupant before the improvements were made, if he is seeking to force the occupant to buy the land.[5] The holder of a tax certificate is not required to establish the validity of the tax judgment and prior proceedings.[6]

4325. Interest—No interest is allowed on the amount of the judgment but only on the taxes and improvements up to the verdict or findings.[7]

4326. Evidence—The receipt of the treasurer is evidence of the payment of taxes. Good faith may be proved by the direct testimony of the occupant. The value of improvements may be proved by evidence of their cost.[8]

[88] Wheeler v. Merriman, 30-372, 15+665; McLellan v. Omodt, 37-157, 33+326.
[89] Seigneuret v. Fahey, 27-60, 6+403. See Gahre v. Berry, 82-200, 84+733.
[90] Smalley v. Isaacson, 40-450, 42+352. See Cook v. Webb, 19-167(129).
[91] Dawson v. Girard etc. Co., 27-411, 8+142; Mueller v. Jackson, 39-431, 40+565; Smalley v. Isaacson, 40-450, 42+352; Kampfer v. East Side Synd., 95-309, 104+290. See Windom v. Schuppel, 39-35, 38+757.
[92] Reed v. Newton, 22-541.
[93] Goodrich v. Florer, 27-97, 6+452.
[94] Sanborn v. Mueller, 38-27, 35+666.
[95] Id.; Windom v. Schuppel, 39-35, 38+757.
[96] Madland v. Benland, 24-372.
[97] See Lewis v. Knowlton, 84-53, 86+875.
[98] Yorks v. Mooberg, 84-502, 87+1115.
[99] Cool v. Kelly, 85-359, 88+988.
[1] Reed v. Newton, 22-541.
[2] Jewell v. Truhn, 38-433, 38+106.
[3] Seigneuret v. Fahey, 27-60, 6+403; Wheeler v. Merriman, 30-372, 15+665; Pfefferle v. Wieland, 55-202, 56+824.
[4] Wheeler v. Merriman, 30-372, 15+665. See Hall v. Torrens, 32-527, 21+717.
[5] Jewell v. Truhn, 38-433, 38+106.
[6] Everett v. Boyington, 29-264, 13+45.
[7] Taylor v. Slingerland, 39-470, 40+575.
[8] Seigneuret v. Fahey, 27-60, 6+403; Northern I. Co. v. Bargquist, 93-106, 111, 100+636.

4327. Judgment—The judgment should be for the amount due after deducting the damages or rental value from the total amount of improvements and taxes with interest.[9] It should not bear interest.[10]

4328. Execution conditional on payment—If the amount of the judgment is not paid into court within one year from the entry of judgment no execution can issue and the title vests absolutely in the occupant. The amendment of 1889 is unconstitutional so far as it is retroactive.[11]

4329. When owner may force occupant to buy—The owner may force the occupant to buy the land or lose the value of his improvements if he is in possession under an unofficial deed and the owner had no notice, actual or constructive, of the possession prior to the improvements. The burden rests on the owner in the first instance to show want of such notice.[12]

4330. Removal of crops—The occupant may remove crops after the entry of judgment, though he was not entitled to the possession when they were sown.[13]

IMPUTED NEGLIGENCE—See Negligence, 7037.
INADEQUATE DAMAGES—See Damages, 2598; New Trial, 7141.

INCEST

4331. Statutes—The crime of incest was punishable under Penal Code § 259 prior to the passage of Laws 1893 c. 90.[14]

INCLOSURE—See note 15.
INCLUDING—See note 16.
INCOMPATIBLE OFFICES—See Public Officers, 7995.

INCOMPETENTS

4332. Guardians—Provision is made by statute for the appointment of guardians for persons who, by reason of old age, or loss or imperfection of mental faculties, are incompetent to have the management of their property.[17]

INCONSISTENT POSITIONS—See Estoppel, 3218.
INCORPORATED—See note 18.
INCORPOREAL HEREDITAMENTS—See Easements, 2851.
INCRIMINATING QUESTIONS—See Witnesses, 10337.
INCUMBENT—See note 19.

[9] See Western L. Assn. v. Thompson, 79-423, 82+677.
[10] Taylor v. Slingerland, 39-470, 40+575.
[11] R. L. 1905 § 4436. Flynn v. Lemieux, 46-458, 49+238; Craig v. Dunn, 47-59, 49+396.
[12] R. L. 1905 § 4437; Jewell v. Truhn, 38-433, 38+106. See Ogden v. Ball, 40-94, 41+453; Smalley v. Isaacson, 40-450, 42+352; Western L. Assn. v. Thompson, 79-423, 82+677.
[13] R. L. 1905 § 4438; Bloemendal v. Albrecht, 79-304, 82+585.
[14] State v. Herges, 55-464, 57+205.
[15] State v. McGregor, 88-74, 92+509.
[16] Cooper v. Stinson, 5-522(416).
[17] R. L. 1905 § 3826; In re Hause, 32-155, 19+973 (creditor of ward may contest account of guardian); Doyle v. Doyle, 74-162, 77+26 (finding of competency sustained); Schmidt v. Zeugner, 90-366, 96+1134 (finding of incompetency sustained); Swick v. Sheridan, 107-130, 119+791 (id.).
[18] State v. Cornwall, 35-176, 28+144.
[19] State v. Benedict, 15-198(153, 156); Scott County v. Ring, 29-398, 13+181.

INCUMBRANCE—A charge or servitude affecting property, which diminshes the value of ownership, or may impair its enjoyment so as to constitute a qualification or diminution of the rights of ownership;[20] any right to or interest in land which may subsist in third persons to the diminution of the value of the estate of the tenant, but consistently with the passing of the fee;[21] an obstruction.[22]

INDEBITATUS ASSUMPSIT—See Contracts, 1903; Money Had and Received, 6126; Money Lent, 6138; Money Paid, 6142.

INDEBTEDNESS—See note 23.

INDECENT ASSAULT—See Assault and Battery, 525, 549.

INDECENT LIBERTIES—See Assault and Battery, 549.

INDEFINITE PLEADINGS—See Pleading, 7646.

INDEMNITY

Cross-References

See Agency, 208; Guaranty; Judgments, 5176; Mechanics' Liens, 6092; Suretyship.

4333. Definition—The word "indemnify" is used in two senses—in the sense of giving security, and in the sense of compensating for actual damages.[24]

4334. Consideration—A contract of indemnity, like other contracts, requires a consideration.[25]

4335. Breach—When right of action accrues—To recover on a contract to indemnify against liability the plaintiff must show not only liability, but also actual loss.[26] The mere existence of claims for which no lien has been perfected by proper proceedings is not a breach of a contract of indemnity against liens.[27] Where a mortgagee, holding a bond of indemnity against paramount liens, forecloses and bids in the premises for the full amount of his debt, he has no cause of action on the bond, as he has suffered no damage.[28] A mortgagee holding a bond against paramount liens has been held entitled to recover substantial damages on a breach of the bond, though the debt secured by his mortgage was not yet due.[29]

4336. Extent of liability on indemnity bonds—General rule—The liability of an obligor on an indemnity bond is limited to such acts as ought reasonably to have been contemplated by him.[30]

[20] Century Dict.

[21] McNaughton v. Carleton College, 28-285, 290, 9+805; Fritz v. Pusey, 31-368, 18+94; Mackey v. Harmon, 34-168, 172, 24+702; Delisha v. Mpls. etc. Co., 126+276 (perpetual easement for a railway right of way). See Covenants, 2379.

[22] Fox v. Winona, 23-10.

[23] Blew v. Collins, 61-418, 63+1091; Bell v. Mendenhall, 78-57, 80+843.

[24] See Weller v. Eames, 15-461(376); Bausman v. Credit G. Co., 47-377, 50+496; Walsh v. Featherstone, 67-103, 69+811.

[25] Esch v. White, 76-220, 78+1114; Id., 82-462, 85+238, 718.

[26] Weller v. Eames, 15-461(376); Campbell v. Rotering, 42-115, 43+795; Walsh v. Featherstone, 67-103, 69+811. See Howe v. Friedheim, 27-294, 7+143; Anoka L. Co. v. Fidelity & C. Co., 63-286, 65+353; Wilcox v. School Dist., 103-43, 114+262.

[27] Price v. Doyle, 34-400, 26+14; Simonson v. Grant, 36-439, 31+861. See Houston v. Nord, 39-490, 40+568.

[28] Am. B. & L. Assn. v. Waleen, 52-23, 53+867; Am. B. & L. Assn. v. Stoneman, 53-212, 54+1115; Pioneer S. & L. Co. v. Freeburg, 59-230, 61+25. See Pioneer S. & L. Co. v. Bartsch, 51-474, 53+764; Sergeant v. Ruble, 33-354, 23+535; Mechanics' S. Bank v. Thompson, 58-346, 59+1054.

[29] Mechanics' S. Bank v. Thompson, 58-346, 59+1054.

[30] Sharvy v. Cash, 66-200, 68+1070.

4337. Particular contracts construed—A contract to indemnify against liability for delivering goods without collecting transportation charges;[31] against debts of a firm;[32] against paramount liens;[33] against any liability by reason of any transaction, etc.;[34] against liability for the indorsement of a note;[35] against liability from guaranteeing the fidelity of an agent;[36] against liability on an appeal bond;[37] against any loss arising out of any indebtedness of an agent;[38] against any loss from the manufacture of an article.[39]

4338. Payment by indemnitee.—The indemnitee is not protected against loss through a voluntary payment.[40] Payment by note of the indemnitee after his liability becomes absolute will give him an immediate right of action against the indemnitor.[41]

4339. Indemnitee in default—An indemnitee cannot recover from an indemnitor if he has not strictly performed the contract on his own part.[42]

4340. Notice to indemnitor of action—A judgment against the indemnitee may authorizee a recovery against the indemnitor, though the former did not notify the latter of the pendency of the action in which the judgment was recovered.[43]

4341. Res judicata—A judgment against the indemnitee is conclusive on the indemnitor as to the existence and extent of the liability of the indemnitee, if the indemnitor had notice of the action in which the judgment was rendered and an opportunity to defend.[44]

4342. Between wrongdoers—Servant or agent—As a general rule there is no right to indemnity between joint wrongdoers,[45] but when one is employed or directed by another to do an act in his behalf which is not manifestly wrong, and which the former does not know, or is not presumed to have known, to be wrong, the law implies a promise of indemnity by the principal for such damages as flow directly from the execution of the agency. The employer impliedly assumes the responsibility.[46]

4343. Fidelity bonds—Cases involving bonds to secure the fidelity of private agents, servants, etc., will be found elsewhere under various appropriate heads. They are collected below for convenience of reference.[47]

[31] Weller v. Eames, 15–461(376).
[32] Cowel v. Anderson, 33–374, 23+542; Dunham v. Johnson, 85–268, 88+737.
[33] Pioneer S. & L. Co. v. Bartsch, 51–474, 53+764; Am. B. & L. Assn. v. Waleen, 52–23, 53+867; Am. B. & L. Assn. v. Stoneman, 53–212, 54+1115; Pioneer S. & L. Co. v. Freeburg, 59–230, 61+25.
[34] Walsh v. Featherstone, 67–103, 69+811.
[35] Bausman v. Credit G. Co., 47–377, 50+496.
[36] Fidelity & C. Co. v. Lawler, 64–144, 66+143.
[37] Esch v. White, 76–220, 78+1114; Id., 82–462, 85+238, 718.
[38] Union etc. Co. v. Prigge, 90–370, 96+917.
[39] Mankato M. Co. v. Willard, 94–160, 102+202.
[40] Price v. Doyle, 34–400, 26+14.
[41] Bausman v. Credit G. Co., 47–377, 50+496.
[42] Pioneer S. & L. Co. v. Freeburg, 59–230, 61+25.
[43] G. N. Ry. v. Akeley, 88–237, 92+959. See Lamson v. Coffin, 102–493, 499, 114+248.
[44] G. N. Ry. v. Akeley, 88–237, 92+959. See Hersey v. Long, 30–114, 14+508.
[45] Lesher v. Getman, 30–321, 330, 15+309; Warren v. Westrup, 44–237, 46+347.
[46] Lesher v. Getman, 30–321, 330, 15+309. See § 5854.
[47] Fidelity etc. Co. v. Eickhoff, 63–170, 65+351; Fidelity etc. Co. v. Lawler, 64–144, 66+143; Morrison v. Arons, 65–321, 68+33; Traders' Ins. Co. v. Herber, 67–106, 69+701; Eagle R. M. Co. v. Dillman, 67–232, 69+910; Deering v. Shumpik, 67–348, 69+1088; Lancashire Ins. Co. v. Callahan, 68–277, 71+261; Manchester F. A. Co. v. Redfield, 69–10, 71+709; Capital F. Ins. Co. v. Watson, 76–387, 79+601; Bates v. Watson, 76–332, 79+309; Fidelity etc. Co. v. Crays, 76–450, 79+531; Farragut v. Shepley, 78–284, 80+976; Goodhue etc. Co. v. Davis, 81–210, 83+531; Fidelity M. L. Assn. v. Dewey, 83–389, 86+423; Union etc. Co. v. Prigge, 90–370, 96+917; Danvers F. E. Co. v. Johnson, 93–323, 101+492; Nelson v. Armstrong, 93–449, 101+968, 102+207, 731.

4344. Parties—A third party has been held not entitled to sue on a bond of indemnity, though the bond was given to save harmless from a liability incurred for the benefit of such person.[48]

4345. Pleading—A complaint on a bond not signed by the principal has been held insufficient in not alleging that the sureties waived its execution by the principal, and authorized its delivery to the obligee as a valid obligation.[49]

INDEPENDENT CONTRACTORS—See Master and Servant, 5835, 5879.

INDIANS

Cross-References

See Intoxicating Liquors; Marriage, 5792; Public Lands.

4346. Status of Indian tribes—The Indian tribes are distinct political communities—separate nations, subject to the control of the federal government.[50] For treaty purposes they are quasi independent.[51] They are in a sense foreign to the state government.[52] They are domestic, dependent communities, under the guardianship and protection of the general government. They are neither foreign or independent nations.[53]

4347. Status of tribal Indians—Tribal Indians are the wards of the federal government and under its exclusive guardianship and control. The state cannot interfere with or impair such control in any way.[54] A tribal Indian living on a reservation may sue in the state courts to redress any wrong committed outside his reservation against his person or property. When off his reservation he is liable to the criminal laws of the state and may be sued in the state courts either ex contractu or ex delicto.[55] A tribal Indian is not generally a citizen of the United States or of the state,[56] but he may become so by accepting an allotment under the act of Congress of Feb. 8, 1887.[57] Whether Indians are legal voters is undetermined.[58] A state probate court has been held not to have jurisdiction of the estate of an Indian who lived on a reservation.[59]

4348. White Earth reservation—Operation of state laws—The state cannot tax the property of Indians within the reservation,[60] or interfere with the control of Indians therein by the federal government,[61] or punish them for acts committed therein contrary to its laws.[62] Otherwise the laws of the state, both civil and criminal, are operative therein.[63] The state may establish

[48] Walsh v. Featherstone, 67–103, 69+811.
[49] Bjoin v. Anglim, 97–526, 107+558.
[50] U. S. v. Shanks, 15–369(302); Earl v. Godley, 42–361, 44+254.
[51] Becker v. Sweetzer, 15–427(346, 353).
[52] State v. Cooney, 77–518, 80+696.
[53] State v. Campbell, 53–354, 356, 55+553.
[54] Selkirk v. Stephens, 72–335, 338, 75+386; State v. Cooney, 77–518, 520, 80+696; Becker v. Sweetzer, 15–427(346, 353); Bem-Way-Bin-Ness v. Eshelby, 87–108, 113, 91+291; State v. Campbell, 53–354, 55+553.
[55] Bem-Way-Bin-Ness v. Eshelby, 87–108, 91+291; Ain-Dus-O-Kee-Shig v. Beaulieu, 98–98, 107+820. See R. L. 1905 § 5174.
[56] State v. Campbell, 53–354, 356, 55+553; U. S. v. Shanks, 15–369(302).
[57] Hankey v. Bowman, 82–328, 332, 84+1002; Bem-Way-Bin-Ness v. Eshelby, 87–108, 112, 91+291; State v. Wise, 70–99, 72+843.
[58] Hankey v. Bowman, 82–328, 332, 84+1002.
[59] U. S. v. Shanks, 15–369(302).
[60] Selkirk v. Stephens, 72–335, 338, 75+386; Foster v. Blue Earth County, 7–140 (84).
[61] Selkirk v. Stephens, 72–335, 338, 75+386.
[62] State v. Campbell, 53–354, 55+553.
[63] Selkirk v. Stephens, 72–335, 338, 75+386.

election districts therein;[64] it may punish a white man for a crime committed therein;[65] and it may enforce its game laws therein,[66] except against Indians.[67]

4349. Boundaries of reservations—Cases are cited below involving the boundaries of reservations.[68]

4350. Treaties—The treaty of Sept. 30, 1854, with the Chippewa Indians of Lake Superior and the Mississippi, has been construed.[69]

4351. Deeds—A deed of half-breed lands has been held not void as against public policy or the acts of Congress.[70]

4352. Claims against—Assignment—An assignment of a claim against certain Indians has been held illegal under the act of Congress of Feb. 26, 1853.[71]

4353. Tribal fund—Conversion—The individual Indians who were directed by the tribe, according to the usage thereof, to act as custodians of a tribal fund, are the proper parties to maintain an action for conversion thereof which took place outside the reservation. The district court has jurisdiction of the subject-matter and of the parties. The fact that one of the parties charged with the conversion was originally one of the tribal representatives intrusted as a custodian of the fund does not prevent the other custodians from recovering the money as against him; it appearing that he had severed his tribal relations with the band and removed from the reservation.[72]

INDICIA OF OWNERSHIP—See Estoppel, 3204.

[64] Hankey v. Bowman, 82–328, 84+1002.
[65] State v. Campbell, 53–354, 55+553.
[66] Selkirk v. Stephens, 72–335, 339, 75+386.
[67] State v. Cooney, 77–518, 80+696.
[68] U. S. v. Shanks, 15–369(302); Sharon v. Wooldrick, 18–354(325).
[69] Dole v. Wilson, 20–356(308).
[70] Hope v. Stone, 10–141(114).
[71] Becker v. Sweetzer, 15–427(346).
[72] Ain-Dus-O-Kee-Shig v. Beaulieu, 98–98, 107+820.

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Cross-References

See Criminal Law; Grand Jury.

NECESSITY

4354. Constitutional right—Prior to the amendment of 1904 our constitution provided that "no person shall be held to answer for a criminal offence unless on the presentment or indictment of a grand jury, except in cases of of impeachment or in cases cognizable by justices of the peace, or arising in the army or navy, or in the militia when in actual service in time of war or public danger." [73] Violations of municipal ordinances, punishable by fine or imprisonment, are criminal offences within the meaning of this provision, and consequently, where the prescribed punishment may exceed three months' imprisonment or one hundred dollars, a person can be held to answer for them only on the indictment or information of a grand jury.[74] A violation of the state military code in time of peace is not a criminal offence within the meaning of this provision.[75]

FINDING AND PRESENTMENT

4355. Evidence of finding—The fact that an indictment is indorsed "a true bill," the indorsement signed by the foreman, and the indictment properly filed, is evidence that the indictment has been "found" by the grand jury.[76]

4356. Signing by foreman—The objection that an indictment is not signed by the foreman is waived if not made by motion to quash or by demurrer.[77]

4357. Presentment—Presumption—An indictment found and properly filed is presumed to have been presented to the court. The clerk receives the indictment from the grand jury and files it in silence, allowing no one to inspect it but the judge and county attorney. It is not customary to make any note of it in the minutes at the time, if the accused has not been arrested. The record when finally made up should show a due presentment.[78]

4358. Indorsing names of witnesses—The witnesses whose names are required to be indorsed on an indictment, or inserted at the foot thereof, are only those who were examined and gave material evidence upon the particular charge alleged in the indictment, at the time when such charge was being investigated by the grand jury. It is not required to indorse or enter the names of witnesses who, while other charges were being investigated, may have given evidence material upon the charge alleged in the indictment, unless the grand jury found the indictment, in whole or in part, on such evidence; and the fact that the names of such witnesses are not indorsed or entered on the indictment is conclusive that the grand jury did not take such evidence into account in finding "a true bill." [79] Where, in the investigation of a grand jury of a charge against one person, evidence is elicited which proves that another person is guilty of the same or another crime, the jury may, on such evidence, indict the latter person without recalling and re-examining the witnesses, and the names of such witnesses should be inserted on the indictment.[80] Where the accused is required to give evidence against himself before the grand jury the indictment will be quashed though his name was not indorsed thereon.[81] The state is not bound to call and examine all the witnesses whose names are indorsed on the indictment.[82]

[73] Const. art. 1 § 7; State v. Ames, 91-365, 373, 98+190; State v. Bates, 105-440, 117+844.

[74] State v. West, 42-147, 43+845; State v. Anderson, 47-270, 50+226; State v. Bates, 105-440, 117+844.

[75] State v. Wagener, 74-518, 77+424.

[76] State v. McCartey, 17-76(54); State v. Beebe, 17-241(218).

[77] State v. Shippey, 10-223(178).

[78] State v. Beebe, 17-241(218).

[79] State v. Hawks, 56-129, 57+455. See State v. Beebe, 17-241(218).

[80] State v. Beebe, 17-241(218).

[81] State v. Gardner, 88-130, 92+529.

[82] State v. Smith, 78-362, 81+17; State v. Sheltrey, 100-107, 110+353.

CONSTRUCTION AND SUFFICIENCY IN GENERAL

4359. General tests of sufficiency—The statute provides a general test by which to determine the sufficiency of indictments.[83] Others are sometimes applied. One test of an indictment is, will it protect the accused from a second prosecution for the same offence?[84] Another is, are the essential, ultimate facts alleged consistent with the innocence of the accused? If such facts are reconcilable with the innocence of the accused the indictment is bad.[85]

4360. Certainty—The constitution provides that "in all criminal prosecutions the accused shall enjoy the right * * * to be informed of the nature and cause of the accusation."[86] This principle is not original with the constitution, but is as old as the common law itself. The constitutional provision is but declaratory of what the law has always been and hence is to be construed in its historical sense. The information required by the constitution must be contained in the indictment.[87] The statute provides that the indictment shall be direct and certain as regards the party charged, the offence charged, and the particular circumstances of the offence charged, when they are necessary to constitute a complete offence.[88] This statute effected no essential change in the law. The common law required the same certainty. It is a general rule of criminal pleading that the offence charged should be described with reasonable certainty, that the accused may know for what offence he is required to answer, that the court may render a proper judgment, and that the conviction or acquittal may be pleaded in bar of another prosecution for the same offence.[89] An indictment is sufficiently certain if "the act or omission charged as the offence is stated with such a degree of certainty as to enable the court to pronounce judgment, upon a conviction, according to the right of the case."[90] The offence charged must be described with sufficient certainty to identify it,[91] and to enable the court to determine that the acts alleged constitute a criminal offence.[92] This degree of certainty must extend to every essential element of the offence,[93] and to "the particular circumstances of the offence charged when they are necessary to constitute a complete offence."[94] The general rule is limited by the possibilities of the case and should not be so applied as to make the execution of the criminal law depend upon criminals leaving open to discovery by the grand jury the precise methods by which crime has been perpetrated, and all the circumstances of its accomplishment. Hence the grand jurors are allowed to state that a particular fact, not vital to the

[83] R. L. 1905 § 5305; State v. Ryan, 13–370(343); State v. Robinson, 14–447 (333); State v. McCartey, 17–76(54); State v. Coon, 18–518(464); State v. Munch, 22–67; State v. Anderson, 25–66; State v. Lavake, 26–526, 6+339; State v. Harris, 50–128, 52+387; State v. Cody, 65–121, 67+798; State v. Howard 66–309, 68+1096; State v. Scott, 78–311, 81+3; State v. Erickson, 81–134, 83+512; State v. Clements, 82–448, 85+234; State v. Ames, 91–365, 98+190.

[84] State v. O'Connor, 38–243, 36+462; State v. Tracy, 82–317, 84+1015.

[85] State v. Erickson, 81–134, 83+512.

[86] Const. art. 1 § 7.

[87] State v. Nelson, 74–409, 77+223; State v. Ames, 91–365, 98+190.

[88] R. L. 1905 § 5299.

[89] State v. Shenton, 22–311; State v. Schmail, 25–368; State v. Gray, 29–142, 12+455; State v. Clarke, 31–207, 17+344; State v. O'Connor, 38–243, 36+462; State v. Nelson, 74–409, 77+223; State v. Clements, 82–448, 85+234; State v. Ames, 91–365, 98+190.

[90] R. L. 1905 § 5305(7); State v. Munch, 22–67; State v. Anderson, 25–66; State v. Matakovich, 59–514, 61+677; State v. Howard, 66–309, 68+1096; State v. Erickson, 81–134, 139, 83+512.

[91] State v. Butler, 26–90, 1+821; State v. Schmail, 25–368.

[92] State v. Ullman, 5–13(1).

[93] State v. Ullman, 5–13(1); State v. Brown, 12–490(393); State v. Cody, 65–121, 67+798. See § 4382.

[94] R. L. 1905 § 5299; State v. McIntyre, 19–93(65); State v. Gray, 29–142, 12+455; State v. Howard, 66–309, 68+1096; State v. Nelson, 79–388, 82+650.

accusation, is to them unknown.[95] Ordinarily the rule is not applicable to time,[96] means,[97] matters not essentially descriptive of the offence,[98] matters of mere inducement,[99] and obscene matters.[1] The rule of certainty does not require the pleading of evidence[2] and does not forbid the use of technical terms.[3] It requires that the name of the person injured should be stated.[4] To be certain allegations must be direct.[5] Ordinarily an indictment is sufficiently certain if it follows the language of the statute.[6]

4361. Words construed according to common usage—The meaning which, in ordinary use, attaches to words not technical will be given to them in an indictment.[7]

4362. Specific allegations control general allegations—Specific allegations control general allegations and where it is attempted to allege the particular facts constituting a general or ultimate fact all the particular facts must be alleged.[8]

4363. Construction of "then and there"—The word "there" in indictments refers to a place before particularly designated. The expression "then and there" has been held not to show the county in which the crime was committed.[9] The expression "then and there" in an indictment for seduction has been held to refer to the time of and immediately before the seduction.[10]

4364. Surplusage—An indictment is not vitiated by the presence of unnecessary and immaterial words. Such words may be disregarded as surplusage,[11] unless they are essential by being inseparably connected with essential words so as to become descriptive of the identity of that with which they are connected.[12] Where an indictment charges two offences, but one inadequately, the latter may be disregarded as surplusage.[13] A name cannot be disregarded as surplusage if it is descriptive of the identity of an essential element of the offence.[14]

4365. Formal defects disregarded—It is provided by statute that "no indictment shall be insufficient, nor shall the trial, judgment, or other proceedings thereon be affected, by reason of a defect or imperfection in matter of form which does not tend to the prejudice of the substantial rights of the defendant upon the merits."[15] This and other statutory provisions[16] are to be liberally construed. They were enacted to free criminal pleading of the excessive technicality, formality, and tautology of the common law[17]—to simplify criminal procedure and secure the trial of indictments on the merits.[18]

[95] State v. Gray, 29–142, 12+455. See § 4394.
[96] See § 4374.
[97] State v. Gray, 29–142, 12+455; State v. Lautenschlager, 22–514.
[98] State v. Lautenschlager, 22–514.
[99] See § 4375.
[1] State v. Kunz, 90-526, 97+131.
[2] See § 4384.
[3] See § 4378.
[4] See § 4399.
[5] See § 4385.
[6] See § 4379.
[7] State v. Munch, 22–67; State v. Lavake, 26–526, 6+339; State v. Gill, 89–502, 95+449.
[8] State v. Ring, 29–78, 11+233; State v. Farrington, 59–147, 60+1088.
[9] State v. Brown, 12–490(393).
[10] State v. Sortviet, 100–12, 110+100.
[11] State v. Dineen, 10–407(325); State v. Garvey, 11–154(95); State v. Crummey, 17–72(50); State v. Munch, 22–67; State v. Heck, 23–549; State v. Kobe, 26–148, 1+1054; State v. Comings, 54–359, 56+50; State v. O'Neil, 71–399, 73+1091; State v. Feldman, 80–314, 83+182; State v. Fellows, 98–179, 107+542.
[12] Chute v. State, 19–271(230, 237); State v. Heck, 23–549; State v. Ruhnke, 27–309, 7+264.
[13] State v. Henn, 39–464, 40+564.
[14] State v. Ruhnke, 27–309, 7+264.
[15] R. L. 1905 § 5306; State v. Ryan, 13–370(343); State v. McCartey, 17–76(54); State v. Munch, 22–67; State v. Holong, 38–368, 37+587; State v. Harris, 50–128, 52+387; State v. Golden, 86–206, 90+398; State v. Quackenbush, 98–515, 108+953.
[16] R. L. 1905 §§ 5297, 5304, 5305.
[17] State v. Holong, 38–368, 37+587; State v. Howard, 66–309, 68+1096; State v. Hinckley, 4–345(261).
[18] State v. Whitman, 103–92, 114+363.

Indictments are therefore to be construed, not with reference to the canons of common-law pleading, but in accordance with the more liberal and reasonable rules prescribed by statute.[19] These statutory provisions were not intended to encourage laxity in criminal pleading and do not affect the rule that indictments must be direct and certain as to every essential element of the offence.[20]

4366. The charging part—The charging part of the indictment is alone to be considered in determining whether the indictment states a public offence.[21]

4367. Misnaming offence—The sufficiency of an indictment is not affected by the fact that the grand jury misnames or neglects to name the offence charged.[22]

4368. Statutory forms—The legislature has a large discretion in prescribing forms of indictment, but it is limited by the paramount law of the constitution.[23] The sufficiency of an indictment is to be determined not by the statutory forms, but by the tests prescribed in R. L. 1905 § 5305.[24] The forms prescribed in G. S. 1894 c. 108 were enacted before the Penal Code and are not sufficient when inconsistent therewith.[25] The forms for larceny,[26] perjury [27] and rape [28] are insufficient, at least for some species of those offences.

4369. Attacking indictment on appeal—The objection that an indictment does not state facts sufficient to constitute a public offence may be made for the first time on appeal.[29]

4370. Construction on appeal—When objection to the sufficiency of an indictment is made for the first time on appeal it will be given the benefit of every reasonable intendment.[30]

MODE OF CHARGING OFFENCE

4371. Caption—An indictment for a crime committed in an organized county, to which others are attached for judicial purposes, may be entitled as in all of the counties.[31] Where several counties are attached for judicial purposes, entitling an indictment in the name only of the county to which the others are attached, is a defect of form merely.[32] The number of the judicial district is no part of the title of the district court and if stated erroneously may be rejected.[33] All criminal prosecutions whether under statutes or ordinances are properly prosecuted in the name of the state.[34]

4372. Commencement or accusing clause—A commencement in the following words is sufficient: "The grand jurors of the county of Rice, in the State of Minnesota, upon their oaths, present that," etc.[35] An error in designating the name of the offence in the commencement is an irregularity merely.[36] The commencement is strictly no part of the indictment. The fact that

[19] State v. Shenton, 22–311; State v. Keith, 47–559, 50+691; State v. Harris, 50–128, 52+387; State v. Cowdery, 79–94, 99, 81+750.

[20] State v. Brown, 12–490(393); State v. Howard, 66–309, 68+1096; State v. Clements, 82–448, 85+234; State v. Quackenbush, 98–515, 108+953.

[21] State v. Howard, 66–309, 68+1096. See State v. Nelson, 79–388, 82+650.

[22] State v. Hinckley, 4–345(261); State v. Garvey, 11–154(95); State v. Coon, 18–518(464); State v. Munch, 22–67; State v. Howard, 66–309, 68+1096.

[23] State v. Nelson, 74–409, 77+223.

[24] State v. Hinckley, 4–345(261); State v. Coon, 18–518(464). But see, State v. Nelson, 79–388, 82+650.

[25] State v. Johnson, 37–493, 35+373.

[26] State v. Farrington, 59–147, 60+1088; State v. Henn, 39–464, 40+564.

[27] State v. Nelson, 74–409, 77+223.

[28] State v. Vorey, 41–134, 43+324.

[29] State v. Tracy, 82–317, 84+1015.

[30] State v. Bell, 26–388, 5+970; State v. Howard, 66–309, 68+1096.

[31] State v. Stokely, 16–282(249).

[32] State v. McCartey, 17–76(54).

[33] State v. Munch, 22–67.

[34] State v. Gill, 89–502, 95+449.

[35] State v. Hinckley, 4–345(261).

[36] State v. Howard, 66–309, 68+1096; State v. Munch, 22–67.

the name of the accused is not repeated in the commencement is not material.[37] Where a crime has a name and is divided into several classes or degrees it is sufficient if the accused is charged with the offence by name in the accusing clause and the particular degree or class is made out in the charging part.[38] An indictment which alleges that the defendant is accused of having committed an offence, but which does not directly charge that he committed the offence, is insufficient.[39]

4373. Laying venue—Every indictment must allege the place where the crime was committed in order to show that it was committed within the jurisdiction of the court and to apprise the accused of the offence charged with certainty. It is the general rule that it must be alleged that the offence was committed within the county in which the indictment is found, but where an offence is committed within one hundred rods of the dividing line between two counties an indictment may be found in either county and it may be alleged that the offence was committed in the county where the indictment was found or that it was committed in the other county within one hundred rods of the dividing line.[40] It is unnecessary to allege the particular place in the county.[41] The proper county being named in the caption it is sufficient to lay the venue "in said county," [42] or "in the county aforesaid." [43] But the phrase, "then and there" is insufficient, standing alone.[44] Under an indictment charging the offence to have been committed in a certain county, the accused may be convicted if the offence was committed on a vessel which passed through the county on the voyage in the course of which the act took place.[45] Where a blow is inflicted in one county and death ensues in another county and state the venue may be laid in the former county.[46] The court cannot amend an indictment by inserting an allegation as to venue.[47]

4374. Alleging date of offence—It is provided by statute that "the precise time at which the offence was committed need not be stated in the indictment, but may be alleged to have been committed at any time before the finding thereof, except where the time shall be a material ingredient in the offence." [48] An indictment is sufficient in this regard if it can be understood therefrom "that the offence was committed at some time prior to the time of finding the indictment." [49] It is ordinarily sufficient to allege the time as "on or about" a specified day.[50] Where the offence is not of a continuous nature it is improper, but not fatal, to allege the time as of a specified day "and divers other days and times since said day." [51] Where the time was alleged as "the fifth day of July, one thousand eight hundred and seventy-one," the omission of the word "year" was held not fatal.[52] Ordinarily the offence need not be proved as of the date alleged.[53] A special statutory limitation applies to embezzlement.[54]

[37] State v. Monson, 41-140, 42+790.
[38] State v. Eno, 8-220(190).
[39] State v. Nelson, 79-388, 82+650. See State v. Briggs, 84-357, 87+935.
[40] State v. Robinson, 14-447(333). See State v. Anderson, 25-66; State v. Masteller, 45-128, 47+541.
[41] O'Connell v. State, 6-279(190).
[42] State v. Bell, 26-388, 5+970.
[43] State v. Brown, 12-490(393).
[44] Id.
[45] State v. Timmens, 4-325(241).
[46] State v. Gessert, 21-369.
[47] State v. Armstrong, 4-335(251).
[48] R. L. 1905 § 5302; State v. Lavake, 26-526, 6+339; State v. Holmes, 65-230, 68+11; State v. Johnson, 23-569. See State v. Smith, 78-362, 81+17.
[49] R. L. 1905 § 5305(5); State v. Ryan, 13-370(343); State v. Lavake, 26-526, 6+339.
[50] State v. Lavake, 26-526, 6+339.
[51] State v. Kobe, 26-148, 1+1054.
[52] State v. Munch, 22-67.
[53] State v. New, 22-76; State v. Johnson, 23-569; State v. Lavake, 26-526, 6+339; State v. Brecht, 41-50, 42+602; State v. Masteller, 45-128, 47+541; State v. Holmes, 65-230, 68+11; State v. Gerber, 126+482.
[54] R. L. 1905 § 5320; State v. Holmes, 65-230, 68+11.

4375. Matters of inducement—Matters of inducement need not be alleged with the same degree of certainty as the facts constituting the gist of the offence.[55] Matter of inducement has been held not to render an indictment double.[56] All matters of inducement which are necessary in order to show that the act charged is a criminal offence must be stated.[57]

4376. Alleging a corporation—In naming a corporation in an indictment it is sufficient to give its corporate name and add "a corporation." It is unnecessary to allege its incorporation or the place of its incorporation where those facts are not directly involved.[58] And it is ordinarily sufficient to prove it a corporation in fact.[59] A mistake in using "railroad" instead of "railway" in describing a railway corporation has been held immaterial.[60] A failure to allege that a company was a corporation has been held immaterial.[61]

4377. No particular form of words necessary—The statute provides that "ordinary and concise language" shall be used.[62] The object of this provision was to free criminal pleading of the formality, technicality, and tautology of common-law pleading.[63] "Words used in the statutes to define a public offence need not be strictly pursued in the indictment, but other words conveying the same meaning may be used." [64] If an indictment states fully, directly and clearly acts constituting a public offence it is immaterial in what form of words the acts are alleged.[65]

4378. Use of technical and composite words—The statute providing for the use of "ordinary and concise language" and the rule against pleading legal conclusions do not prohibit the use of technical words or words of a composite meaning compounded of law and fact. Thus, instead of pleading all the minute facts constituting an ultimate fact it is sufficient to use such words as "assault," [66] "forge," [67] "take," [68] "executed," [69] "sell" and "sold," [70] "indecent liberties," [71] "ravish," [72] "being aided by an accomplice actually present." [73]

4379. Following language of statute or ordinance—An indictment charging an offence in the language of the statute is ordinarily sufficient.[74] But the rule is otherwise where the statute does not set forth all of the elements of the offence intended to be punished. If the statute simply names the offence or defines it by its legal result, the indictment must allege with certainty all the particular facts necessary to bring the case within the statute.[75] The modern tendency is to restrict the exceptions to the general rule.[76] The judicious

[55] State v. Barry, 77–128, 79+656.
[56] State v. Scott, 78–311, 81+3.
[57] State v. Barry, 77–128, 79+656.
[58] State v. Loomis, 27–521, 8+758; State v. Rue, 72–296, 75+235.
[59] State v. Rue, 72–296, 75+235.
[60] State v. Brin, 30–522, 16+406.
[61] State v. Golden, 86–206, 90+398.
[62] R. L. 1905 § 5297.
[63] State v. Hinckley, 4–345(261); State v. Holong, 38–368, 37+587; State v. Howard, 66–309, 68+1096.
[64] R. L. 1905 § 5304; State v. Holong, 38–368, 37+587; State v. Stein, 48–466, 51+474; State v. Southall, 77–296, 79+1007.
[65] State v. Holong, 38–368, 37+587.
[66] State v. Bell, 26–388, 5+970; State v. Ward, 35–182, 28+192.
[67] State v. Greenwood, 76–211, 78+1042.
[68] State v. Friend, 47–449, 50+692.
[69] State v. Butler, 47–483, 50+532.
[70] State v. Lavake, 26–526, 6+339.
[71] State v. Kunz, 90–526, 97+131.
[72] O'Connell v. State, 6–279(190).
[73] State v. O'Neil, 71–399, 73+1091.
[74] State v. Garvey, 11–154(95); State v. Comfort, 22–271; State v. Shenton, 22–311; State v. Heck, 23–549; State v. Lavake, 26–526, 6+339; State v. Gray, 29–142, 12+455; Mankato v. Arnold, 36–62, 30+305; State v. Holong, 38–368, 37+587; State v. Abrisch, 41–41, 42+543; State v. Stein, 48–466, 51+474; State v. O'Neil, 71–399, 73+1091; State v. Greenwood, 76–211, 78+1042; State v. Barry, 77–128, 79+656; State v. Evans, 88–262, 92+976; State v. Gill, 89–502, 95+449; State v. Sager, 99–54, 108+812; State v. Bly, 99–74, 108+833.
[75] State v. Howard, 66–309, 68+1096; State v. Bradford, 78–387, 81+202; State v. Sager, 99–54, 108+812; State v. Swanson, 106–288, 119+45.
[76] State v. Shenton, 22–311.

pleader will always follow the exact language of the statute and there is no real safety in any other course.[77] But the precise words need not be strictly pursued. Words may be used which are the equivalents in meaning of those found in the statute.[78] It is to be presumed that all the words used to define an offence are essential and it is accordingly necessary to employ them all or their equivalents in an indictment.[79] In a complaint under an ordinance it is sufficient to follow the language of the ordinance if it sets forth all the essential elements of the offence.[80]

4380. Negativing exceptions—An indictment must negative exceptions or provisos found in the enacting clause of the statute on which it is based.[81] The enacting clause, within the meaning of the rule, is that part of the statute which defines the offence.[82] An exception or proviso, which is no part of the enacting clause and is not descriptive of the offence, need not be negatived, whether it is found in the same section as the enacting clause, or in a separate one. The test whether an exception or proviso must be negatived is whether it is descriptive of the offence.[83] An exception in a subsequent independent statute need not be negatived.[84] An exception may be introduced by the word "unless" as well as by the word "except."[85] If an act is made unlawful unless done with the consent of some person the consent must be negatived.[86]

4381. Direct charge necessary—There must be a direct charge against the accused that he committed the offence. A recital that he is accused of having committed it is not a charge that he has committed it.[87]

4382. Every essential element of the offence must be alleged—Every essential element of the offence must be alleged directly and certainly. No allegation may be omitted if without it a criminal offence would not be described.[88] Nothing can be inferred, intended, or presumed that is necessary to be alleged as an essential element of an offence.[89]

4383. Anticipating defence—It is sufficient to allege facts constituting a public offence prima facie. It is unnecessary to anticipate and negative possible defences.[90]

4384. Ultimate and not evidentiary facts to be alleged—Only the ultimate facts constituting the offence are required to be alleged. It is unnecessary to allege evidentiary facts.[91]

4385. Facts must be alleged directly and not inferentially—The material facts constituting the offence must be alleged directly and positively and not inferentially, argumentatively, or by way of recital.[92] There must be a direct

[77] State v. Stein, 48–466, 51+474.
[78] State v. Stein, 48–466, 51+474; State v. Southall, 77–296, 79+1007.
[79] State v. Ullman, 5–13(1).
[80] Mankato v. Arnold, 36–62, 30+305; State v. Gill, 89–502, 95+449. See State v. Swanson, 106–288, 119+45.
[81] State v. Johnson, 12–476(378); State v. McIntyre, 19–93(65); State v. Jarvis, 67–10, 69+474; State v. Corcoran, 70–12, 72+732; State v. Tracy, 82–317, 84+1015; State v. Kunz, 90–526, 97+131. See State v. Russell, 69–499, 72+832.
[82] State v. Corcoran, 70–12, 72+732.
[83] Id.
[84] State v. Holt, 69–423, 72+700.
[85] State v. McIntyre, 19–93(65).
[86] State v. Mims, 26–191, 2+492.
[87] State v. Nelson, 79–388, 82+650.
[88] State v. Ullman, 5–13(1); State v. McIntyre, 19–93(65); State v. Ruhnke, 27–309; 7+264; State v. Heitsch, 29–134, 12+353; State v. Howard, 66–309, 68+1096; State v. Clements, 82–448, 85+234; State v. Tracy, 82–317, 84+1015; State v. Holton, 88–171, 92+541; State v. MacDonald, 105–251, 117+482.
[89] State v. Ames, 91–365, 378, 98+190.
[90] State v. Ward, 35–182, 28+192.
[91] State v. Ring, 29–78, 11+233; State v. O'Neil, 71–399, 73+1091; State v. Moore, 86–418, 90+786; State v. Holton, 88–171, 92+541; State v. Braun, 96–521, 105+975; State v. Whitman, 103–92, 114+363.
[92] State v. Cody, 65–121, 67+798; State v. Howard, 66–309, 68+1096; State v. Nelson, 79–388, 82+650; State v. Clements, 82–448, 85+234; State v. King, 88–175, 92+965; State v. Ames, 91–365, 98+190.

charge against the accused that he committed the offence. A recital that he is accused of having committed it is not a charge that he has committed it.[93]

4386. Facts and not conclusions of law to be stated—An indictment must allege facts and not conclusions of law, but this rule does not forbid the use of technical and composite words compounded of fact and law.[94]

4387. Conjunctive and disjunctive allegations—Where a statute declares that the doing of a thing by any of several means shall constiute a criminal offence an indictment charging the act as having been done by all of such means set forth conjunctively is ordinarily sufficient if the means are not repugnant in themselves.[95] And by statute such means may be alleged in the alternative.[96] An indictment charging conjunctively matters which might be charged in the alternative is sufficient.[97]

4388. Facts judicially noticed—Facts of which judicial notice will be taken need not be alleged.[98]

4389. Facts presumed—Facts that will be presumed in the absence of evidence need not be alleged.[99]

4390. Intent—Necessity of alleging—As a general rule it is not necessary to allege an intent to do the acts charged as it is presumed that an act was intentionally done, but when a specific intent is an essential element of an offence such intent must be directly alleged.[1] It is sufficient to allege intent directly.[2]

4391. Use of words "feloniously," "criminally," and "unlawfully"—It is unnecessary to use the word "feloniously" in an indictment for a felony and its use in an indictment for a misdemeanor is not fatal.[3] Where the statute in defining a crime does not use the words "feloniously" or "criminally" it is unnecessary to use them in an indictment.[4] The words "feloniously" and "unlawfully" have been held properly disregarded as surplusage.[5] Their use does not obviate the necessity of alleging the facts constituting the offence.[6]

4392. Pleading private statute—The statutory rule in respect to pleading a private statute by a reference to its title and the day of its passage, has no application to a case where, at common law, such statute need not have been pleaded.[7]

4393. Obscene facts—Obscene facts may be described in general terms.[8]

4394. Alleging that fact is unknown—Where a mere descriptive fact not vital to the accusation is unknown it may be stated as unknown.[9] Such an allegation is not traversable.[10]

4395. Repugnancy—Where one material part of an indictment is repugnant to another the indictment is insufficient.[11]

4396. Use of videlicet—To-wit—If an allegation is essential the fact that it follows a videlicet (to-wit) is immaterial. Where the matter alleged under

[93] State v. Nelson, 79–388, 82+650.
[94] State v. Greenwood, 76–211, 78+1042; State v. O'Neil, 71–399, 73+1091. See § 4378.
[95] State v. Gray, 29–142, 12+455; State v. McGinnis, 30–52, 14+258.
[96] See § 4410.
[97] State v. Gray, 29–142, 12+455.
[98] State v. Gill, 89–502, 95+449.
[99] State v. Ward, 35–182, 28+192.
[1] State v. Ullman, 5–13(1); State v. Rubnke, 27–309, 7+264; State v. Howard, 66–309, 68+1096.
[2] Wilcox v. Davis, 4–197(139, 143).
[3] State v. Hogard, 12–293(191); State v. Crummey, 17–72(50).
[4] State v. Garvey, 11–154(95).
[5] State v. Crummey, 17–72(50).
[6] See State v. MacDonald, 105–251, 117+482.
[7] State v. Loomis, 27–521, 8+758.
[8] See State v. Kunz, 90–526, 97+131.
[9] State v. Taunt, 16–109(99); State v. Gray, 29–142, 12+455; State v. Brin, 30–522, 16+406; State v. Clarke, 31–207, 17+344; State v. Briggs, 84–357, 87+935; State v. Ames, 91–365, 98+190; State v. Bly, 99–74, 108+833.
[10] State v. Taunt, 16–109(99); State v. Quackenbush, 98–515, 108+953.
[11] See State v. Gray, 29–142, 12+455; State v. Brin, 30–522, 16+406.

a videlicet is essenial, entering into the substantial description of the offence, the averment is regarded as positive and direct, and is traversable. It will then be treated as particularizing that which was before general, or as explaining that which was before obscure.[12] It seems that a videlicet will prevent a non-essential allegation from becoming essential by association with an essential descriptive allegation.[13]

4397. Collective allegation against several—An indictment against two or more persons may charge the act to have been done by them collectively.[14]

4398. Alleging name of person injured—As a general rule it is necessary, as a requirement of certainty of description, to state the name of the person injured, if known, and if not known, to so state.[15] But by statute it is unnecessary to allege the name of the person intended to be defrauded.[16] An indictment for the embezzlement of notes has been held sufficient though it did not state the name of the payee of the notes.[17] An erroneous allegation as to the person injured is not generally fatal.[18]

4399. Names—Misnomer—Idem sonans—Where a person is called in an indictment, in describing the offence, by a name other than his true name, but he is known as well by such other name as by his true name, it is not a variance.[19] In describing an offence it is sufficient to give only the initial of the Christian names of third parties.[20] It is provided by statute that, "when the offence shall involve the commission of, or an attempt to commit, a private injury, and is described with sufficient certainty in other respects to identify the act, an erroneous allegation as to the person injured, or intended to be injured, shall not be material."[21] This statute is inapplicable where the name of the injured person is an essential part of the description of the offence.[22] The term "private injury," in the statute, is limited to injuries to property.[23] A variance as to the initial of the middle name of a third party has been held immaterial.[24] Where an indictment charged the seduction of "Anne Forrest" and it appeared on the trial that her surname was spelled "Fourai," that she was a French Canadian, and that the accused spoke French, it was held that he was not misled by the misspelling and that there was no misnomer.[25] The variance between "Tommy Barron," "Tony Baron," and "Antonio Barone," held not fatal.[26] The variance between "Kurkowiske" and "Kurkowski," held not fatal.[27] The variance between "Fred Vongard" and "William Bungard," held fatal.[28] The use of the word "railroad" for "railway" in naming a company has been held immaterial.[29] A failure to repeat the name of the accused in the commencement of an indictment has been held not fatal.[30]

4400. Setting forth written instruments—Exhibits—In pleading a written instrument it should properly be incorporated in the indictment and not

[12] State v. Grimes, 50–123, 52+275.
[13] State v. Heck, 23–549; State v. Williams, 32–537, 21+746.
[14] State v. Johnson, 37–493, 35+373.
[15] State v. Boylson, 3–438(325); State v. Ruhnke, 27–309, 7+264; State v. Clarke, 31–207, 17+344; State v. Blakeley, 83–432, 86+419.
[16] R. L. 1905 §§ 4748(5), 4781; State v. Adamson, 43–196, 45+152; State v. Goodrich, 67–176, 69+815; State v. Ruhnke, 27–309, 7+264.
[17] State v. Rue, 72–296, 75+235.
[18] See § 4399.
[19] State v. Brecht, 41–50, 42+602. See State v. Quinlan, 40–55, 41+299.
[20] State v. Butler, 26–90, 1+821.
[21] State v. Tall, 43–273, 45+449.
[22] State v. Timmens, 4–325(241).
[23] State v. Blakeley, 83–432, 86+419.
[24] R. L. 1905 § 5303; State v. Grimes, 50–123, 52+275; State v. Bourne, 86–432, 90+1108.
[25] State v. Boylson, 3–438(325); State v. Ruhnke, 27–309, 7+264; State v. Blakeley, 83–432, 86+419.
[26] State v. Boylson, 3–438(325).
[27] State v. Quinlan, 40–55, 41+299.
[28] State v. Monson, 41–140, 42+790.
[29] State v. Johnson, 26–316, 3+982.
[30] State v. Brin, 30–522, 16+406.

attached as an exhibit. But when an instrument is attached as an exhibit and made a part of the indictment by apt reference it will be deemed a part of the indictment on demurrer.[31]

4401. Bill of particulars—Where the offence is of a general nature and the charge is in general terms the prosecution may be required to file a specification of the particular acts relied on to sustain the charge.[32]

4402. Mode of charging accessory before the fact—An indictment against an accessory before the fact may charge him directly with the commission of the offence as if he personally committed it, or it may directly charge him as a principal by stating the facts which at common law would make him an accessory before the fact.[33]

4403. Mode of charging accessory after the fact—An indictment charging the accused with being an accessory to a felony after the fact should allege facts constituting the felony with the same degree of certainty as though the person who committed it were alone indicted.[34]

4404. Conclusion against the peace and the statute—The constitution provides that all indictments shall conclude "against the peace and dignity of the State of Minnesota." [35] Possibly a failure to comply with this provision is a mere formal defect.[36] If a statute does not create a crime but simply prescribes its punishment the indictment need not conclude against the form of the statute.[37] Putting the date when and the place where found, at the end of an indictment, after the words "against the peace and dignity of the State of Minnesota," does not vitiate it.[38] The only purpose of the clause "against the form of the statute" is to show that the prosecution is based on a statute, and not on a common law offence, and since the repeal of all common law offences it is functionless except in cases where the same acts are declared to be an offence and punishable both by statute and by a municipal ordinance. In such cases the indictment or complaint ought to conclude contrary to the statute or ordinance as the case may be.[39] A complaint for the violation of an ordinance concluding against both the statute and the ordinance has been held not double on that account.[40]

DUPLICITY

4405. In general—If an indictment charges two offences, but one of them insufficiently so that no conviction could be had thereon, it is not double.[41] Where, in defining an offence, a statute enumerates a series of acts, either of which separately, or all together, may constitute the offence, all such acts may be charged in a single count, for the reason that, notwithstanding each act may by itself constitute the offence, all of them do no more, and likewise constitute but one and the same offence.[42]

4406. A defect of substance—At common law a court has discretionary power to sustain a double indictment, but in our practice the defect is one of substance and there is no such discretion.[43]

[31] State v. Williams, 32-537, 21+746.
[32] State v. Holmes, 65-230, 68+11. See State v. Kortgaard, 62-7, 64+51.
[33] R. L. 1905 § 4758; State v. Beebe, 17-241(218); State v. Briggs, 84-357, 87+935; State v. Whitman, 103-92, 114+363.
[34] State v. King, 88-175, 92+965.
[35] Const. art. 6 § 14.
[36] See Hanna v. Russell, 12-80(43); Thompson v. Bickford, 19-17(1).
[37] O'Connell v. State, 6-279(190); State v. Crummey, 17-72(50); State v. Coon, 18-518(464).
[38] State v. Johnson, 37-493, 35+373.
[39] State v. Gill, 89-502, 95+449. See State v. Reckards, 21-47.
[40] Jordan v. Nicolin, 84-367, 87+916.
[41] State v. Henn, 39-464, 40+564.
[42] State v. Greenwood, 76-207, 78+1044, 1117.
[43] State v. Wood, 13-121(112).

4407. Objection how taken—Duplicity is a ground for demurrer [44] and if not so taken it is waived.[45]

4408. Amendment by striking out—If the court sustains a demurrer on the ground of duplicity it may allow an amendment striking out one of the charges.[46]

4409. Different degrees of same offence—By statute, when by law an offence comprises different degrees, an indictment may contain counts for the different degrees, of the same offence, or for any of such degrees. The same indictment may contain counts for murder, and also for manslaughter, or different degrees of manslaughter.[47]

4410. Alternative statement of means—By statute, where the offence may have been committed by the use of different means, the indictment may allege the means of committing the offence in the alternative.[48]

4411. In case of doubt as to class of offence—By statute, where it is doubtful to what class an offence belongs, the indictment may contain several counts, describing it as of different classes or kinds.[49]

4412. Indictments held double—An indictment against a justice of the peace for neglect of duty charging several acts of omission and commission; [50] an indictment for a nuisance, alleging unsafe building and accumulation of filth therein; [51] an indictment for forging and uttering a note.[52]

4413. Indictments held not double—An indictment for an assault with a dangerous weapon with intent to do great bodily harm, charging a beating and wounding with the weapon; [53] an indictment for swindling by three card monte, charging different means conjunctively; [54] a complaint for selling liquor without a license, alleging one sale of beer, "a fermented or malt liquor;" [55] an indictment for larceny, with allegations insufficient to charge forgery; [56] an indictment for larceny alleging an unlawful conversion with the superfluous words, "steal and carry away;" [57] an indictment for rape charging the commission of the offence in different ways; [58] an indictment for forgery charging several acts but committed at the same time and with reference to the same instrument; [59] an indictment for perjury under Laws 1895 c. 175 § 104; [60] an indictment for inducing and procuring another to keep a gambling device; [61] an indictment for indecent liberties; [62] an indictment for selling liquor; [63] an indictment for accepting bribes from prostitutes; [64] an indictment for forging and uttering the same instrument; [65] an indictment for uttering of several forged instruments at the same time and to the same person; [66] an indictment for libeling two or more persons in a single writing; [67] an indictment for selling mortgaged property to several persons; [68] an indictment alleging a sale and dis-

[44] State v. Wood, 13-121(112); Chute v. State, 19-271(230).
[45] State v. Henn, 39-464, 40+564; State v. Briggs, 84-357, 87+935; State v. Kunz, 90-526, 97+131.
[46] R. L. 1905 § 5345; State v. Wood, 13-121(112); Chute v. State, 19-271(230).
[47] R. L. 1905 § 5301; State v. Wood, 13-121(112).
[48] R. L. 1905 § 5301; State v. Owens, 22-238; State v. Gray, 29-142, 12+455; State v. Hann, 73-140, 76+33.
[49] R. L. 1905 § 5301; State v. Wood, 13-121(112).
[50] State v. Coon, 14-456(340).
[51] Chute v. State, 19-271(230).
[52] State v. Wood, 13-121(112).
[53] State v. Dineen, 10-407(325).
[54] State v. Gray, 29-142, 12+455.
[55] State v. Nerbovig, 33-480, 24+321.
[56] State v. Henn, 39-464, 40+564.
[57] State v. Comings, 54-359, 56+50.
[58] State v. Hann, 73-140, 76+33.
[59] State v. Greenwood, 76-207, 78+1044, 1117.
[60] State v. Scott, 78-311, 81+3.
[61] State v. Briggs, 84-357, 87+935.
[62] State v. Kunz, 90-526, 97+131.
[63] State v. Kobe, 26-148, 1+1054.
[64] State v. Ames, 91-365, 98+190.
[65] State v. Klugherz, 91-406, 98+99.
[66] State v. Moore, 86-422, 90+787.
[67] State v. Hoskins, 60-168, 62+270.
[68] State v. Williams, 32-537, 21+746.

posal of intoxicating liquors;[69] complaint for keeping a saloon open during prohibited hours contrary to the statute and a city ordinance.[70]

ELECTION BY STATE

4414. In general—Where, on the trial of an indictment, in which the time alleged for the commission of the offence is not material, the evidence tends to prove an offence committed on a day other than that alleged in the indictment, and a precisely similar offence committed on the day alleged in the indictment, the state may elect for which it will proceed.[71] Where several offences of the same kind form parts of one entire transaction, evidence may be given of all, and it is in the discretion of the court whether the state shall be required to elect.[72] A motion to compel the state to elect whether to ask for a conviction for a sale of "spirituous" or for a sale of "malt" liquors has been held properly denied.[73]

DEMURRER

4415. In general—A demurrer goes to the whole indictment, and if, omitting objectionable parts, there still remains an offence properly charged, the indictment must be sustained.[74]

4416. Grounds—Duplicity is a ground for demurrer.[75] The fact that a written instrument, in the form of an exhibit, is attached to an indictment instead of being incorporated therein, is not a ground for demurrer.[76]

4417. Allowance—Effect as a bar—Re-submission—If a demurrer is allowed the judgment thereon is final upon the indictment demurred to, and a bar to another prosecution for the same offence, unless the court shall allow an amendment, where the defendant will not be unjustly prejudiced thereby, or, being of the opinion that the objection on which the demurrer is allowed may be avoided in a new indictment, shall direct the case to be re-submitted to the same or another grand jury.[77] An allowance of an amendment or re-submission must be by matter of record, and is properly made in the order or judgment allowing the demurrer.[78] Where upon objection to the introduction of any evidence under an indictment on the ground of its insufficiency the objection is sustained, and the court dismisses the indictment without directing that the case be submitted to another grand jury, a second indictment may be found for the same offence.[79] The dismissal of an indictment on the motion of the county attorney after the same has been attacked by demurrer is not equivalent to a decision of the court sustaining the demurrer, so as to prevent the case from being re-submitted to the same or another grand jury, without an order of court.[80]

4418. Disallowance—Pleading over—It is provided by statute that "if the demurrer shall be disallowed, or the indictment amended, the court shall permit the defendant, at his election, to plead forthwith, or at such time as the court may allow. If he does not plead, judgment shall be pronounced against him."[81] The court, upon overruling a demurrer to an indictment, may permit the defendant to plead forthwith, or at such other time as it may fix. Where

[69] State v. McGinnis, 30-52, 14+258.
[70] Jordan v. Nicolin, 84-367, 87+916.
[71] State v. Johnson, 23-569. See State v. Masteller, 45-128, 47+541.
[72] State v. Mueller, 38-497, 38+691.
[73] State v. Feldman, 80-314, 83+182.
[74] State v. Hinckley, 4-345(261, 270).
[75] See § 4407.
[76] State v. Williams, 32-537, 21+746.
[77] R. L. 1905 § 5345; State v. McGrorty, 2-224(187); State v. Comfort, 22-271; State v. Holton, 88-171, 92+541.
[78] State v. Comfort, 22-271.
[79] State v. Holton, 88-171, 92+541.
[80] State v. Peterson, 61-73, 63+171.
[81] R. L. 1905 § 5346.

the case is certified to the supreme court for its decision, and for any other good and satisfactory reason, the court may extend the time, or allow the defendant to plead after the time originally fixed therefor.[82]

4419. Waiver by failing to demur—The objections specified in R. L. 1905 § 5343, appearing on the face of the indictment, are waived unless taken by demurrer, except objection to the jurisdiction of the court over the subject of the indictment and the sufficiency of the facts stated to constitute an offence.[83] The objection that an indictment does not state facts sufficient to constitute a public offence may be raised for the first time on appeal.[84]

SETTING ASIDE ON MOTION

4420. Statutory grounds—It is provided by statute that an indictment may be set aside on motion, "when it shall not be found, indorsed, and presented as prescribed in the subdivision relating to grand juries," [85] or "when the names of the witnesses examined before the grand jury are not inserted at the foot of the indictment or indorsed thereon." [86] The statutory grounds are limited to such as arise subsequent to the impaneling of the grand jury.[87]

4421. Statutory grounds not exclusive—The statutory grounds for setting aside an indictment are not exclusive.[88] Thus an indictment may be set aside because the defendant was compelled to testify against himself before the grand jury; [89] or because, in a prosecution for adultery, complaint was not made by the husband or wife.[90]

4422. Held not ground for setting aside indictment—An indictment will not be set aside because there is another indictment pending in the same court against the same defendant for the same offence; [91] because one of the grand jurors was not present when the grand jury was charged, but was present during the examination of the charge against defendant and voted upon the finding; [92] because when the grand jury was impaneled and sworn the defendant was in jail; [93] because the names of witnesses before the grand jury whose testimony was not considered in finding the indictment are not indorsed on the indictment; [94] because the grand jury was filled out by a special venire; [95] because less than a full panel of grand jurors found the indictment; [96] because the grand jury was reconvened at an adjourned term of court; [97] because of an immaterial irregularity in drawing the grand jury list; [98] or because of bias or prejudice in the grand jury.[99] Objection to the petit jury cannot be made by

[82] State v. Abrisch, 42-202, 43+1115.

[83] R. L. 1905 § 5347; State v. Shippey, 10-223(178) (objection that indictment is not signed by the foreman of the grand jury waived); State v. Reckards, 21-47, 49 (indefiniteness and informality waived); State v. Loomis, 27-521, 525, 8+758 (objections which may be raised on a motion in arrest of judgment—statute cited); State v. Kunz, 90-526, 97+131 (duplicity waived).

[84] State v. Tracy, 82-317, 84+1015. See § 4369.

[85] R. L. 1905 § 5338; State v. Shippey, 10-223(178) (failure of foreman to sign indictment); State v. Schumm, 47-373, 50+362 (defect in organization of grand jury); State v. Dick, 47-375, 50+362 (id.); State v. Goodrich, 67-176, 69+815 (selection of grand jury list—reconvening grand jury at adjourned term); State v. Arbes, 70-462, 73+403 (aliens on grand jury); State v. Slocum, 126+1096 (presence of stranger in jury room—exclusion of county attorney from jury room—publication of facts relating to indictment before it is framed).

[86] R. L. 1905 § 5338; State v. Hawks, 56-129, 57+455.

[87] State v. Greenman, 23-209.

[88] State v. Brecht, 41-50, 42+602.

[89] State v. Froiseth, 16-296(260); State v. Hawks, 56-129, 57+455; State v. Gardner, 88-130, 92+529.

[90] State v. Brecht, 41-50, 42+602.

[91] State v. Gut, 13-341(315). State v. Riley, 109-529, 124+13.

[92] State v. Froiseth, 16-313(277).

[93] State v. Hoyt, 13-132(125).

[94] State v. Hawks, 56-129, 57+455.

[95] State v. Russell, 69-502, 72+832.

[96] State v. Cooley, 72-476, 75+729.

[97] State v. Goodrich, 67-176, 69+815.

[98] Id.

[99] State v. Ames, 90-183, 96+330.

a motion to set aside the indictment.[1] It is not an abuse of discretion for the court to deny defendant leave to withdraw his plea of not guilty for the purpose of enabling him to move to set aside the indictment on the ground that members of the grand jury were aliens.[2] One who is held to answer at a term of the district court for a criminal offence must make any objection that he has to the manner of procuring the grand jury by challenge and not by motion to set aside the indictment.[3] An indictment should not be set aside for any defect or imperfection in matter of form which does not tend to the prejudice of the substantial rights of the defendant upon the merits.[4]

4423. Time—A motion to set aside an indictment for defects in the organization of the grand jury must be made at the time of the arraignment, unless for good cause the court allows it to be made subsequently.[5]

4424. Affidavits on motion—The affidavit of a grand juror is not admissible to show misconduct on the part of the grand jury.[6] An affidavit upon motion to quash the indictment for the reason that the accused was compelled to be a witness against himself before the grand jury has been held sufficient to require the state to traverse it and the court to determine the motion on the merits.[7]

4425. Waiver of objections by failure to move—The objections to an indictment specified in R. L. 1905 § 5338 are waived if not made by a motion to set aside the indictment.[8]

OBJECTIONS ON THE TRIAL

4426. In general—The only objections to the indictment, appearing on its face, that can be raised of right on the trial are (1) that the court has not jurisdiction over the subject of the indictment and (2) that the facts stated do not constitute a public offence.[9] The following objections to the indictment cannot be raised by the accused as of right on the trial: that more than one offence is charged in the indictment contrary to the statute;[10] that the indictment is not signed by the foreman of the grand jury;[11] that the grand jury list in the clerk's office is not signed and certified by the chairman of the board of county commissioners;[12] that a portion of the grand jury were improperly called by special venire;[13] that an indictment for adultery does not state that the prosecution was commenced on the complaint of the wife or husband;[14] that a defective copy of the indictment was served upon the accused at the time of his arraignment;[15] that the court has not jurisdiction of his person.[16]

VARIANCE

4427. In general—It is a fundamental rule of criminal procedure that the proof must conform to the allegations of the indictment. It is a general rule that in the trial of all cases, whether civil or criminal, no testimony should

[1] State v. Thomas, 19–484(418).
[2] State v. Arbes, 70–462, 73+403.
[3] State v. Greenman, 23–209.
[4] See § 4365.
[5] State v. Schumm, 47–373, 50+362; State v. Dick, 47–375, 50+362.
[6] State v. Beebe, 17–241(218).
[7] State v. Gardner, 88–130, 92+529.
[8] R. L. 1905 § 5338; State v. Shippey, 10–223(178); State v. Thomas, 19–484 (418); State v. Schumm, 47–373, 50+362; State v. Dick, 47–375, 50+362.
[9] R. L. 1905 §§ 5338, 5347; State v. McIntyre, 19–93(65); State v. Reckards, 21–47.
[10] State v. Henn, 39–464, 40+564; State v. Briggs, 84–357, 87+935; State v. Kunz, 90–526, 97+131.
[11] State v. Shippey, 10–223(178).
[12] State v. Schumm, 47–373, 50+362; State v. Dick, 47–375, 50+362.
[13] Id.
[14] State v. Brecht, 41–50, 42+602.
[15] State v. Comings, 54–359, 56+50.
[16] State v. Fitzgerald, 51–534, 53+799.

be received which does not directly tend to prove or disprove the matter in issue; and in criminal proceedings the necessity is stronger, if possible, than in civil of strictly enforcing the rule, and confining the testimony exclusively to the transaction which forms the subject of the indictment. Where the prosecution has introduced testimony relative to the commission of a certain crime, and rested its case, it cannot be permitted, the defendant objecting, to waive a conviction, abandon the prosecution as to that charge, and go into proof of a separate and distinct offence, committed at another time, though of precisely the same character.[17] But a conviction may be had for a lesser degree of the offence charged or of any offence necessarily included in the offence charged.[18] One who at common law would be an accessory before the fact may, by virtue of R. L. 1905 § 4758, be charged directly with the commission of the felony as principal, and on his trial evidence may be received to show that he procured the crime to be committed. The admission of such evidence does not constitute a variance.[19] A variance as to the person injured or intended to be injured is generally immaterial.[20] So is a variance as to the time of the offence.[21] It is sufficient if the proof agrees with the allegation in its substance and generic character, without precise conformity in every particular.[22] A variance is to be distinguished from mere redundancy of proof.[23] Objection to a variance cannot be made for the first time on appeal.[24] By statute a variance as to the person defrauded or intended to be defrauded is immaterial.[25] A variance as to the possession or ownership of property is generally immaterial by virtue of statute.[26]

4428. Variance held immaterial—A variance as to the possession of a building, on a charge of arson;[27] as to the person defrauded, on a charge of obtaining money or property by false pretences;[28] as to wounds inflicted, on a charge of murder;[29] as to the weapon used to inflict the fatal wound, on a charge of murder;[30] as to the amount offered, on a charge of bribery;[31] as to the things kept by a storekeeper, on a charge of keeping a second hand store without a license;[32] as to the capacity in which the defendant received money embezzeled by him;[33] as to the initial of the middle name of the accused;[34] as to the name of the woman married, on a charge of bigamy;[35] on a charge of keeeping a gambling device;[36] as to the name of the prosecuting witness, on a charge of larceny;[37] as to the ownership of property stolen and the building from which it was taken;[38] as to the person paying for liquors sold on Sunday.[39]

4429. Variance held fatal—As to the person assaulted, on a charge of assault with intent to kill;[40] as to the kind of liquor sold, on a charge of selling

[17] State v. Masteller, 45–128, 47+541.
[18] See § 2486.
[19] State v. Whitman, 103–92, 114+363.
[20] State v. Bourne, 86–432, 90+1108.
[21] State v. Masteller, 45–128, 47+541; State v. Johnson, 23–569; State v. Langdon, 31–316, 17+859. See § 4374.
[22] State v. Hoyt, 13–132(125); State v. Lautenschlager, 22–514.
[23] Chute v. State, 19–271(230).
[24] State v. Brame, 61–101, 63+250.
[25] R. L. 1905 §§ 4748(5), 4781; State v. Adamson, 43–196, 45+152; State v. Goodrich, 67–176, 69+815. But see, State v. Ruhnke, 27–309, 7+264.
[26] R. L. 1905 § 5321; State v. Grimes, 50–123, 52+275; State v. Whitman, 103–92, 114+363.
[27] State v. Grimes, 50–123, 52+275.
[28] State v. Bourne, 86–432, 90+1108.
[29] State v. Hoyt, 13–132(125).
[30] State v. Lautenschlager, 22–514.
[31] State v. Howard, 66–309, 68+1096.
[32] State v. Segel, 60–507, 62+1134.
[33] State v. Brame, 61–101, 63+250.
[34] State v. Tall, 43–273, 45+449.
[35] State v. Armington, 25–29.
[36] State v. Briggs, 84–357, 87+935.
[37] State v. Blakeley, 83–432, 86+419.
[38] State v. Whitman, 103–92, 114+363.
[39] State v. Collins, 107–500, 120+1081.
[40] State v. Boylson, 3–438(325).

spirituous liquors without a license;[41] as to the manner of committing a rape;[42] as to the person assaulted on a charge of assault with intent to kill.[43]

AMENDMENT

4430. In general—An indictment cannot be amended by the court except as to matters of mere form, as, for example, the date or place of finding or the court in which found. It cannot be amended by inserting the county in which the offence was committed.[44] It is the right and duty of the court to refuse to receive an informal indictment and to send the jury out to correct it.[45] An indictment may probably be amended by indorsing the names of the witnesses examined by the grand jury.[46]

INDORSEMENT, INDORSED—See Bills and Notes, 932, and note 47.
INDORSING PAPERS—See Service of Notices and Papers, 8278.
INDUCEMENT—See Indictment, 4375; Pleading, 7527.
INEBRIATES—See Hospitals, 4250, and note 48.
INFAMOUS CRIME—See Criminal Law, 2406.

INFANTS

Cross-References

See Attorney and Client, 695; Domicil, 2813; Guardian and Ward; Limitation of Actions, 5616; Parent and Child; Process, 7819; Witnesses, 10311.

IN GENERAL

4431. When of age—At common law both males and females become of age at twenty-one.[49] By statute females become of age at eighteen.[50]

4432. Age of legal discretion—An infant fourteen years old has arrived at an age of legal discretion.[51]

4433. Entitled to protection of law—An infant is a citizen within the meaning of the law of the land, and entitled to such rights and privileges as are appropriate to his class, and to the equal protection of the law.[52] Where the property rights of infants are concerned, courts will exercise the most vigilant care in protecting their interests, and will require of guardians and all who are engaged in managing or disposing of their property the utmost good faith and a strict performance of every duty. It is unnecessary that the aid of the court should be especially invoked to exercise its protective jurisdiction in behalf of infant parties; but, when it sees that the rights of infants are in jeopardy, it may interpose and exercise its equitable powers to protect those rights and see that their interests are preserved inviolate. Formerly the courts of chancery were regarded as the universal guardians for all infants, and now, in proper cases, courts of equity, or those exercising equitable powers, can apply such powers for the benefit of those of tender years.[53]

[41] State v. Quinlan, 40-55, 41+299.
[42] State v. Vorey, 41-134, 43+324.
[43] State v. Boylson, 3-438(325).
[44] State v. Armstrong, 4-335(251).
[45] See State v. Williams, 32-537, 21+746; State v. Beebe, 17-241(218).
[46] State v. Hawks, 56-129, 57+455.
[47] Beatty v. Ambs, 11-331(234); Paine v. Smith, 33-495, 24+305; Haas v. Sackett, 40-53, 54, 41+237; Reynolds v. Atlas etc. Co., 69-93, 71+831.
[48] Leavitt v. Morris, 105-170, 117+393.
[49] Anderson v. Peterson, 36-547, 32+861.
[50] R. L. 1905 § 3636; Cogel v. Raph, 24-194.
[51] Temple v. Norris, 53-286, 55+133.
[52] Mattson v. Minn. etc. Ry., 95-477, 488, 104+443.
[53] Johnson v. Avery, 60-262, 62+283.

4434. Right to damages for injury—The right of an infant to damages for injuries to his person caused by the wrongful act of another is a property right and entitled to the same protection in the courts as his other property.[54]

CONTRACTS

4435. Theory and policy of law—The rule which disables an infant from binding himself by contract rests on the idea that by reason of immaturity and inexperience he is incompetent and unfit to judge of the nature of a contract and of the expediency of entering into it.[55] The object of the rule is to protect the infant from imprudent contracts,[56] and not to disbar him altogether from the privilege of contracting.[57] The hardships which may arise in particular cases must yield to the operation of a general rule founded on public policy.[58] The plea of infancy should not be allowed to operate as a weapon of offence.[59]

4436. Voidable, not void—The contracts of an infant are not void, but merely voidable in certain cases.[60]

4437. Contracts for necessaries—A contract for necessaries is not voidable on the sole ground of infancy.[61] A pony is not ordinarily a necessity.[62] Neither is life insurance.[63]

4438. Goods sold to partnership—In an action upon contract for goods sold and delivered to a partnership, one member of which is a minor, the plea of infancy may be interposed by him in bar of any claim of personal liability on the contract.[64]

4439. Infancy of wife joining in deed—The validity of a deed or mortgage is not affected by the infancy of a wife joining in its execution with her husband.[65]

4440. Chattel mortgages—The mortgage of an infant upon his personal property for borrowed money, there being no delivery of the mortgaged property, is voidable at his election, at any time during his infancy; and if the property is taken from his possession, under the mortgage, without his consent, he may reclaim the same, upon disaffirmance of the contract, without returning or offering to return the money borrowed, it not appearing that he has the ability to do so.[66] Where upon a sale of personalty to an infant he executes a mortgage on it to the seller for part of the purchase price, if he wishes to disaffirm the mortgage he must return the property.[67]

4441. Deeds—A conveyance by an infant of his realty is not void but merely voidable. It is binding until disaffirmed by some positive act upon arriving at majority.[68] It cannot be disaffirmed until majority,[69] and it must be disaffirmed within a reasonable time thereafter if at all.[70] Placing the grantee in

[54] Mattson v. Minn. etc. Ry., 95-477, 488, 104+443.

[55] Conrad v. Lane, 26-389, 4+695. See, upon the general subject, Note, 18 Am. St. Rep. 569.

[56] Conrad v. Lane, 26-389, 4+695; Miller v. Smith, 26-248, 251, 2+942; Folds v. Allardt, 35-488, 29+201.

[57] Johnson v. N. W. etc. Co., 56-365, 373, 57+934, 59+992.

[58] Folds v. Allardt, 35-488, 489, 29+201.

[59] Goodnow v. Empire L. Co., 31-468, 471, 18+283.

[60] Cogley v. Cushman, 16-397(354, 358); Nichols v. Snyder, 78-502, 81+516; Coursolle v. Weyerhauser, 69-328, 72+697.

[61] Johnson v. N. W. etc. Co., 56-365, 370, 374, 57+934, 59+992.

[62] Miller v. Smith, 26-248, 250, 2+942.

[63] Johnson v. N. W. etc. Co., 56-365, 370, 57+934, 59+992.

[64] Folds v. Allardt, 35-488, 29+201.

[65] Daley v. Minn. etc. Co., 43-517, 45+1100. See R. L. 1905 § 3335.

[66] Miller v. Smith, 26-248, 2+942.

[67] Cogley v. Cushman, 16-397(354).

[68] Dixon v. Merritt, 21-196; Coursolle v. Weyerhauser, 69-328, 72+697.

[69] Irvine v. Irvine, 5-61(44).

[70] Goodnow v. Empire L. Co., 31-468, 18+283; Houlton v. Manteuffel, 51-185, 53+541. See Eisenmenger v. Murphy, 42-84, 43+784; Dixon v. Merritt, 21-196.

statu quo by returning the consideration is not a condition precedent to disaffirmance, but it may be for relief in equity.[71] The execution of a deed within a reasonable time after arriving at majority is a disaffirmance of a prior deed of the same land to another person during infancy.[72] A complaint for the cancelation of a deed on the ground of infancy must show that the plaintiff has arrived at majority.[73] Whether the infant has affirmed or lost his right to disaffirm is ordinarily a question of fact.[74] An infant has been held not estopped from denying a deed as his where he signed his name under the attestation clause.[75]

4442. Power of attorney—The appointment by a minor of an attorney to sell and convey realty, and a conveyance by the attorney thereunder, are not void, but merely voidable, and capable of ratification by the infant on attaining his majority.[76]

4443. Executed personal contracts—If the contract has been wholly or partly performed on both sides, the infant may always rescind and recover back what he has paid upon restoring what he has received. On the other hand, if he cannot restore what he has received he cannot recover what he has paid if the other party proves that the contract is fair and reasonable, and free from any fraud, overreaching, or undue influence on his part.[77] If the contract was fraudulent the infant may recover all that he paid; otherwise he can only recover the excess of what he paid over what he received.[78]

4444. Executory personal contracts—If a contract is executory on the part of an infant, he may always interpose his infancy as a defence to an action for its enforcement. He can always use his infancy as a shield. Such contracts are not binding unless confirmed or ratified after majority.[79] If the contract has been wholly or partly performed by the infant, but is wholly executory on the part of the other party, the infant having received no benefits from it, he may recover back what he has paid or parted with.[80]

4445. Ratification and confirmation—An executory contract is not binding unless confirmed, or ratified after majority.[81] A failure to disaffirm an executed contract within a reasonable time after majority constitutes a confirmation.[82] A power of attorney by an infant is capable of ratification after majority;[83] and so is a declaration of intention to become a citizen.[84] An arrangement for the payment of a note has been held a ratification though not carried out.[85] An action improperly begun may be ratified at majority.[86] Acts showing a ratification held admissible.[87]

[71] Dawson v. Helmes, 30-107, 113, 14+462; Johnson v. N. W. etc. Co., 56-365, 374, 57+934, 59+992. See U. S. Invest. Corp. v. Ulrickson, 84-14, 20, 86+613; Shillock v. Gilbert, 23-386.

[72] Dixon v. Merritt, 21-196; Dawson v. Helmes, 30-107, 14+462.

[73] Irvine v. Irvine, 5-61(44).

[74] Dixon v. Merritt, 21-196, 200.

[75] Shillock v. Gilbert, 23-386.

[76] Coursolle v. Weyerhauser, 69-328, 72+697. See 23 Harv. L. Rev. 145.

[77] Johnson v. N. W. etc. Co., 56-365, 57+934, 59+992; Alt v. Graff, 65-191, 68+9; Braucht v. Graves, 92-116, 99+417; Link v. N. Y. etc. Co., 107-33, 119+488. See Svanburg v. Fosseen, 75-350, 365, 78+4; U. S. Invest. Corp. v. Ulrickson, 84-14, 20, 86+613; 13 Harv. L. Rev. 528.

[78] Johnson v. N. W. etc. Co., 56-365, 57+934, 59+992.

[79] Johnson v. N. W. etc. Co., 56-365, 374, 57+934, 59+992; Nichols v. Snyder, 78-502, 81+516; Tupp v. Pederson, 78-524, 81+1103; Folds v. Allardt, 35-488, 29+201; U. S. Invest. Corp. v. Ulrickson, 84-14, 18, 86+613.

[80] Johnson v. N. W. etc. Co., 56-365, 374, 57+934, 59+992.

[81] Nichols v. Snyder, 78-502, 81+516; Tupp v. Pederson, 78-524, 81+1103.

[82] Goodnow v. Empire L. Co., 31-468, 18+283; Houlton v. Manteuffel, 51-185, 53+541.

[83] Coursolle v. Weyerhauser, 69-328, 72+697.

[84] State v. Streukens, 60-325, 62+259.

[85] Houlton v. Manteuffel, 51-185, 53+541.

[86] Germain v. Sheehan, 25-338.

[87] Montgomery v. Witbeck, 23-172.

4446. Time of disaffirmance—A personal contract or transfer of personalty may be disaffirmed at any time during minority, or within a reasonable time thereafter.[88] A conveyance of realty cannot be disaffirmed during minority and must be disaffirmed within a reasonable time thereafter, if at all.[89] A judgment must be avoided within a reasonable time after majority, if at all.[90] What is a reasonable time depends on the facts of the particular case and is a question for the jury, unless the evidence is conclusive.[91]

4447. Requisites of disaffirmance—The avoidance of a contract relating to personalty may be by any act clearly demonstrating a renunciation of the contract.[92]

4448. Fraud—If the other party has been guilty of fraud or undue influence the contract may be avoided.[93]

4449. Estoppel—Cases are cited below involving the doctrine of estoppel as applied to infants.[94]

4450. Burden of proof—The burden of proving the defence of infancy is on him who asserts it.[95]

WAGES

4451. To whom payable—It is provided by statute that "any parent or guardian claiming the wages of a minor in service shall so notify his employer, and, if he fail so to do, payment to the minor of wages so earned shall be valid."[96] An infant has been held entitled to recover for services, it not appearing that his father contracted for or claimed his wages.[97] In such an action the infant need not prove his infancy, though alleged and denied.[98] An action by an infant, through his father as guardian ad litem, has been sustained though the contract was with the father.[99] An action by the assignee of an infant's claim for wages has been sustained.[1]

GUARDIAN AD LITEM

4452. Definitions—A guardian ad litem is an officer of the court appointed to look after the interests of an infant or insane party and to manage the suit for him.[2] A next friend (prochein ami) is an officer of the court appointed to prosecute an action for such a party. The distinction between a guardian ad litem and a next friend has not been carefully observed in our prac-

[88] Miller v. Smith, 26–248, 251, 2+942; Cogley v. Cushman, 16–397(354).

[89] See § 4441.

[90] Eisenmenger v. Murphy, 42–84, 43+784.

[91] Goodnow v. Empire L. Co., 31–468, 18+283; Dixon v. Merritt, 21–196, 200.

[92] Cogley v. Cushman, 16–397(354, 359).

[93] Johnson v. N. W. etc. Co., 56–365, 374, 57+934, 59+992.

[94] Conrad v. Lane, 26–389, 4+695 (not estopped by representations as to age); Folds v. Allardt, 35–488, 29+201 (not estopped by engaging in business as member of a firm); Teipel v. Vanderweier, 36–443, 31+934 (long acquiescence in family settlement); Clague v. Washburn, 42–371, 376, 44+130 (representations as to age); Bausman v. Eads, 46–148, 155, 48+769 (an infant may be estopped by the acts of the ancestor through whom he claims title); Alt v. Graff, 65–191, 195, 68+9 (representations as to age); Coursolle v. Weyerhauser, 69–328, 72+697 (failure to object to acts under power of attorney); U. S. Invest. Corp. v. Ulrickson, 84–14, 20, 86+613 (representations as to age); Barbieri v. Messner, 106–102, 118+258 (evidence held not to show any fraud on the part of an infant upon which to base an estoppel—representations as to partnership).

[95] Klason v. Rieger, 22–59.

[96] R. L. 1905 § 1812.

[97] Schoonover v. Sparrow, 38–393, 37+949.

[98] Meyenberg v. Eldred, 37–508, 35+371.

[99] Grosovsky v. Goldenberg, 86–378, 90+782.

[1] O'Neil v. Chi. etc. Ry., 33–489, 24+192.

[2] Bryant v. Livermore, 20–313(271).

tice.[3] Practically the distinction is only one of form.[4] In most states an infant plaintiff appears by a next friend, but here he must appear by a guardian ad litem, or a general, or testamentary guardian.[5]

4453. Necessity of appointing a guardian ad litem—Infants must sue and be sued in their own names, appearing by a general guardian, a testamentary guardian, or a guardian ad litem.[6] It is unnecessary to have a guardian ad litem appointed if there is a general or testamentary guardian. Our statutes provide that a general or testamentary guardian "shall appear for and represent his ward in all legal proceedings, unless another person is appointed for that purpose."[7] This does not in any way impair the power of the district court to appoint a guardian ad litem.[8] A minor may appear by a guardian ad litem though there is a general guardian competent to act.[9] As respects proceedings to probate a will no appointment of a guardian ad litem for any minor interested in the estate is necessary.[10] Nor it is necessary, before the administration account of an executor or administrator is allowed, to appoint a guardian ad litem for minor heirs or legatees.[11]

4454. Effect of infant appearing without guardian—A judgment rendered upon default against an infant over fourteen years of age, after service of summons upon him, but without the appointment of a guardian ad litem is erroneous and voidable, but not void.[12] A guardian ad litem may be appointed after the commencement of an action, nunc pro tunc.[13] It is improper for an infant to appear by attorney. But if, during the pendency of the action, the infant reaches majority, it is competent for him to adopt an action thus erroneously commenced, and to ratify what has been done therein.[14]

4455. Guardian not a party—A guardian ad litem is not a party to the action,[15] or the real party in interest.[16] He cannot sue in his own name.[17] But a guardian is a proper party to the record. He is really the active party who institutes the suit and has the entire control of its prosecution.[18]

4456. Objection to competency of guardian—In an action brought by a guardian ad litem, the allegation in a complaint that the guardian has been duly appointed by the judge of the district court in which the action is brought, is not put in issue by an answer denying the allegations of the complaint. If such alleged appointment has not been duly made, or a person assumes to act as such guardian without any appointment, the better and more convenient practice is to take preliminary objection, by motion, before interposing an answer to the merits.[19]

4457. Authority of guardian continues on appeal—A guardian ad litem has authority to appeal to the supreme court without a special order of court.[20] It is provided by rule of the supreme court that "the attorneys and guardians

[3] See Meyenberg v. Eldred, 37–508, 35+371; Plympton v. Hall, 55–22, 56+351.
[4] Bryant v. Livermore, 20–313(271, 297).
[5] See § 4453.
[6] Price v. Phoenix, 17–497(473); Germain v. Sheehan, 25–338; Eisenmenger v. Murphy, 42–84, 43+784; Perine v. Grand Lodge, 48–82, 50+1022; Peterson v. Baillif, 52–386, 54+185; Beckett v. N. W. etc. Assn., 67–298, 69+923.
[7] R. L. 1905 § 3838. Patterson v. Melchior, 102–363, 113+902.
[8] R. L. 1905 § 3825; Plympton v. Hall, 55–22, 56+351.
[9] Peterson v. Baillif, 52–386, 54+185.
[10] In re Mousseau, 30–202, 14+887; Ladd v. Weiskopf, 62–29, 64+99.
[11] Balch v. Hooper, 32–158, 20+124; Ladd v. Weiskopf, 62–29, 64+99.
[12] Eisenmenger v. Murphy, 42–84, 43+784; Phelps v. Heaton, 79–476, 82+990.
[13] Patterson v. Melchior, 106–437, 119+402.
[14] Germain v. Sheehan, 25–338.
[15] Bryant v. Livermore, 20–313(271, 295).
[16] Price v. Phoenix, 17–497(473); Perine v. Grand Lodge, 48–82, 50+1022; Peterson v. Baillif, 52–386, 54+185.
[17] Id.
[18] Schuek v. Hagar, 24–339; Perine v. Grand Lodge, 48–82, 50+1022.
[19] Schuek v. Hagar, 24–339.
[20] Tyson v. Tyson, 54 Wis. 225; Jones v. Foberts, 96 Wis. 424; Tyson v. Richard-

4471. Threatened injury must be irreparable—It is sometimes said that an injunction should not issue except for the prevention of irreparable injury.[40] The word "irreparable" is infelicitous, and taken strictly, does not accurately express the rule at the present time.[41] It simply means that the threatened injury must be real and serious.[42]

4472. Adequate remedy at law—Injunction will not issue where there is an adequate remedy at law.[43] It is not enough that there is a remedy at law; it must be as practical and efficient to the ends of justice and its prompt administration as the remedy in equity.[44] Injunction will not issue where the plaintiff has an adequate remedy in replevin,[45] ejectment,[46] certiorari,[47] an action for damages,[48] or a statutory proceeding.[49] The incompleteness and inadequacy of the legal remedy is the criterion which determines the right to the equitable remedy of injunction.[50] Where the defendant goes to trial on the merits, it is too late afterwards to raise for the first time the objection that the plaintiff had an adequate remedy at law.[51]

4473. Prevention of multiplicity of actions—The prevention of a multiplicity of actions is a ground for an injunction.[52] On this ground a continuing trespass to realty may be restrained.[53] One who has no interest in a controversy cannot maintain an action on the ground that otherwise there may be a multiplicity of actions by those who are interested.[54]

4474. Change in conditions after commencement of action—When conditions change after the commencement of an action, so as to render an injunction unnecessary, it will not be granted.[55]

4475. Strangers to action cannot be enjoined—It is a general rule that an injunction will not be granted against a person not a party to the action.[56]

SUBJECTS OF PROTECTION AND RELIEF

4476. Trespass to realty—If a threatened trespass to realty consists of a single act, which will be temporary in its effect, a court of equity, if the wrong-

[40] Goodrich v. Moore, 2-61(49); Hart v. Marshall, 4-294(211); Montgomery v. McEwen, 9-103(93); Sinclair v. Winona County, 23-404, 407; Butman v. James, 34-547, 552, 27+66.

[41] Whittaker v. Stangvick, 100-386, 392, 111+295; Bilsborrow v. Pierce, 101-271, 276, 112+274.

[42] See Goodrich v. Moore, 2-61(49) (injury pressing or delay dangerous); Montgomery v. McEwen, 9-103(93, 96) ("great" injury).

[43] Goodrich v. Moore, 2-61(49); Scribner v. Allen, 12-148(85); Vanderburgh v. Minneapolis, 93-81, 100+668.

[44] Rich v. Braxton, 158 U. S. 406; Sinclair v. Winona County, 23-404; Mann v. Flower, 26-479, 5+365; Stees v. Kranz, 32-313, 20+241; Central T. Co. v. Moran, 56-188, 57+471; Colliton v. Oxborough, 86-361, 90+793; Gile v. Stegner, 92-429, 100+101.

[45] Minn. L. O. Co. v. Maginnis, 32-193, 20+85; Normandin v. Mackey, 38-417, 37+954; Marks v. Jones, 71-136, 73+719.

[46] Vanderburgh v. Minneapolis, 93-81, 100+668.

[47] Scribner v. Allen, 12-148(85); Sinclair v. Winona County, 23-404; Schumacher v. Wright County, 97-74, 105+1125. See Bilsborrow v. Pierce, 101-271, 112+274.

[48] Schurmeier v. St. P. etc. Ry., 8-113 (88); Normandin v. Mackey, 38-417, 37+954; Vanderburgh v. Minneapolis, 93-81, 100+668.

[49] Weber v. Timlin, 37-274, 34+29; Fajder v. Aitkin, 87-445, 92+332; Kerr v. Waseca, 88-191, 92+932; Schumacher v. Wright County, 97-74, 105+1125.

[50] Colliton v. Oxborough, 86-361, 90+793.

[51] St. Paul etc. Ry. v. Robinson, 41-394, 43+75.

[52] McRoberts v. Washburne, 10-23(8, 15); Harrington v. St. P. etc. Ry., 17-215(188, 204); Cotton v. Miss. etc. Co., 19-497 (429, 433); Galbraith v. Yates, 79-436, 82+683; Cleveland v. Cleveland C. Ry., 194 U. S. 517. See, as to when a multiplicity of actions would not be avoided, Scribner v. Allen, 12-148(85, 88); Albrecht v. St. Paul, 47-531, 533, 50+608.

[53] See § 4476.

[54] Waseca Co. Bank v. McKenna, 32-468, 21+556.

[55] See Patterson v. Barber, 94-39, 101+1064, 102+176.

[56] Chamblin v. Schlichter, 12-276(181).

doer is solvent, will not interfere, but leave the injured party to his action at law for damages. But if the trespass is continuous in its nature, and its repetition is threatened, equity, though each act of trespass, if taken by itself, would not be destructive of the freehold, and the legal remedy would be adequate if each act stood alone, will prevent the threatened wrong by injunction, because the injured party has not a complete and adequate remedy by one action at law for the entire wrong, while a court of equity, by preventing the wrong, affords in a single action a complete remedy.[57] These principles are applicable to trespasses in connection with highway proceedings.[58] It is not error for the court to refuse to grant a temporary injunction against alleged threatened acts of trespass on land, when the defendant, both by answer and affidavit, disclaims any right to commit the acts, and positively denies that he ever intended or threatened to commit them.[59] One in the peaceable possession of land may maintain an action to restrain repeated and continuing trespasses by one asserting title in himself. The fact that there is a bona fide dispute as to the title will not prevent the court from passing upon it and awarding equitable relief.[60]

4477. Other actions—Injunction will not lie to restrain actions at law, where there is involved no general principle or question conclusive as to them all. The mere saving of expense is not enough. A bill of peace enjoining litigation at law is allowable only when the complainant has already established his right at law, or where he claims a general or exclusive right, and several actions would lead to vexatious litigation.[61] Where a common right or a community of interest in the subject-matter of a controversy, or a common title, from which all of the defendants' separate claims, and all questions at issue between the parties plaintiff and defendants, have arisen, can be shown at the trial, an equitable action will lie to restrain and enjoin the several defendants from prosecuting separate actions at law against the plaintiff.[62] An injunction may issue in one equitable action to restrain proceedings in another equitable action in the same court.[63] Injunction will not ordinarily lie to restrain a party from bringing an action in which the party to be sued may make his defence as completely as in the action for the injunction.[64]

4478. Foreign actions and proceedings—A court of equity of this state has the power and will restrain its own citizens, of whom it has jurisdiction, from prosecuting actions in the courts of other states and foreign jurisdictions, whenever the facts of the case make such restraint necessary to enable the court to do justice, and prevent one citizen from obtaining an inequitable advantage over other citizens. The court acts in personam, and will not suffer

[57] Colliton v. Oxborough, 86–361, 90+793; Schurmeier v. St. P. etc. Ry., 8–113(88); Whitman v. St. P. etc. Ry., 8–116(90); Althen v. Kelly, 32–280, 20+188; Butman v. James, 34–547, 27+66; Eisenmenger v. Board. Water Comrs., 44–457, 47+156; Kern v. Field, 68–317, 71+393; Carlson v. St. Louis etc. Co., 73–128, 75+1044; Galbraith v. Yates, 79–436, 82+683; Reeves v. Backus, 83–339, 86+337; Lamprey v. Danz, 86–317, 90+578; Albert Lea v. Knatvold, 89–480, 95+309; Realty Co. v. Johnson, 92–363, 100+94; State v. Dist. Ct., 98–136, 107+963; Whittaker v. Stangvick, 100–386, 111+295; Baldwin v. Fisher, 124+1094. See Note, 99 Am. St. Rep. 731.

[58] Woodruff v. Glendale, 23–537; Chadbourne v. Zilsdorf, 34–43, 24+308; Gorton v. Forest City, 67–36, 69+478; Hansen v. Verdi, 83–44, 85+906; Hurley v. West St. Paul, 83–401, 86+427; Arndt v. Thomas, 90–355, 96+1125; Meyer v. Petersburg, 96–314, 104+899; Johnson v. Clontarf, 98–281, 108+521.

[59] Hagemeyer v. St. Michael, 70–482, 73+412.

[60] Baldwin v. Fisher, 124+1094.

[61] Albert Lea v. Nielsen, 80–101, 82+1104.

[62] Albert Lea v. Nielsen, 83–246, 86+83; Fegelson v. Niagara etc. Co., 94–486, 103+495.

[63] Mann v. Flower, 26–479, 5+365.

[64] Albrecht v. St. Paul, 47–531, 50+608; Schumacher v. Wright County, 97–74, 105+1125.

any one within its reach to do what is contrary to its notions of equity, merely because the act to be done may be, in point of locality, beyond its jurisdiction. No general rule can be laid down as to when the court ought to exercise this power, and enjoin a party from prosecuting an action in a foreign jurisdiction. Each case must be ruled by its own facts. If they show that it is necessary and equitable to exercise the power in the orderly administration of justice, the court should enjoin the party, otherwise not.[65] It has been held proper to deny a temporary injunction to restrain void proceedings in another state.[66] An injunction, to restrain a citizen of this state from enforcing an attachment lien acquired by him in another state, has been denied.[67]

4479. Contracts—Upon a proper showing of equities an injunction may issue to restrain the breach of a contract[68] restricting the uses of demised premises;[69] of a contract not to engage in business within certain limits;[70] and of a contract to divide crops to be raised.[71] An agreement in a lease not to let other premises of the lessor for the same purpose does not entitle the lessee to an injunction against subsequent lessees of such other premises, restraining them from the enjoyment of their lease; they being neither parties or privies in respect to the former contract.[72] Equity will not interfere or refuse to interfere merely because the subject-matter in respect to which relief is asked may have grown out of a fraudulent or illegal transaction. It will interfere, even in the case of illegal contracts, to restrain their active enforcement, upon the same principle that under other circumstances they may be defended against at law, though it would not give to either party any relief or benefit growing out of the contract.[73]

4480. Municipal affairs—A taxpayer who has no other adequate remedy may restrain any unauthorized action of a municipality which will lead, directly or indirectly, to an increase of his taxes.[74] Thus he may maintain an action to restrain the illegal issuance of municipal bonds;[75] or to restrain a municipality from entering into an illegal contract;[76] or to restrain municipal officers from paying out municipal funds illegally;[77] or to restrain an illegal use of municipal property;[78] or to restrain a municipality from performing an illegal contract.[79]

4481. Affairs of private corporations—Members of a private corporation may sometimes enjoin unauthorized corporate acts.[80] The publisher of a newspaper has been held not entitled to an injunction restraining a street railway company from using its cars for advertising purposes to the possible decrease of newspaper advertising.[81]

[65] Hawkins v. Ireland, 64–339, 67+73. See Security T. Co. v. Dodd, 173 U. S. 624.
[66] First Nat. Bank v. La Due, 39–415, 40+367.
[67] Jenks v. Ludden, 34–482, 27+188.
[68] See Note, 90 Am. St. Rep. 634.
[69] Stees v. Kranz, 32–313, 20+241; Spalding v. Emerson, 69–292, 72+119.
[70] Kronschnabel v. Kronschnabel, 87–230, 91+892.
[71] Schmitt v. Cassilius, 31–7, 16+453.
[72] Napa Valley W. Co. v. Boston B. Co., 44–130, 46+239.
[73] Hamilton v. Wood, 55–482, 57+208.
[74] Hodgman v. Chi. etc. Ry., 20–48(36); Sinclair v. Winona County, 23–404; Flynn v. Little Falls etc. Co., 74–180, 77+38; Grannis v. Blue Earth County, 81–55, 83+495; Hamilton v. Detroit, 85–83, 88+419; Schiffmann v. St. Paul, 88–43, 92+503.
[75] Hodgman v. Chi. etc. Ry., 20–48(36); Hamilton v. Detroit, 85–83, 88+419.
[76] Schiffmann v. St. Paul, 88–43, 92+503; Farmer v. St. Paul, 65–176, 67+990; Le Tourneau v. Hugo, 90–420, 97+115.
[77] Flynn v. Little Falls etc. Co., 74–180, 77+38; Grannis v. Blue Earth County, 81–55, 83+495.
[78] Flaten v. Moorhead, 51–518, 53+807; Nerlien v. Brooten, 94–361, 102+867.
[79] Grannis v. Blue Earth County, 81–55, 83+495; Sinclair v. Winona County, 23–404.
[80] See § 2074.
[81] Burns v. St. P. C. Ry., 101–363, 112+412.

4482. Other courts—Where the probate courts have exclusive jurisdiction they cannot be controlled by injunctions issued out of the district courts.[82]

4483. Enforcement of ordinances—The enforcement of a void municipal ordinance may be restrained even before its publication, if nothing remains to give it effect but the mere ministerial act of publication.[83] The enforcement of an ordinance impairing the vested rights of a telephone company in the use of streets for poles and wires, has been restrained.[84]

4484. Prosecution of public works—Courts will not interfere by injunction with the prosecution of public works or enterprises of a quasi public nature except in very clear cases.[85] But where the plaintiff will otherwise be without adequate remedy, an injunction will issue, however important to the public the improvement may be.[86]

4485. Public officers—As a general rule the misconduct of public officers is not a ground for injunction, but if their acts necessarily lead to multiplicity of actions, or irreparable injury to property, or cast a cloud on the title to realty, they may be restrained.[87] The courts cannot restrain the state executive officers in the exercise of their discretionary powers.[88]

4486. Right to public office—The writ of injunction cannot be used to test the right to a public office.[89] While proceedings by injunction cannot be used to determine disputed title to offices, they may be used to protect the possession of officers de facto against the interference of claimants whose title is disputed until they shall establish their title by appropriate judicial proceedings, at least when the title is doubtful, or the facts upon which it depends are disputed and uncertain.[90]

4487. Improper use of instruments—Equity will sometimes restrain a party from making an improper use of written instruments.[91]

4488. Enforcement of unconstitutional statutes—Powers of federal courts—The federal courts may restrain the attorney general of the state from enforcing an unconstitutional statute, but an injunction cannot issue by a federal court against a state court.[92]

TEMPORARY INJUNCTIONS

4489. Nature and object—The object of a temporary injunction is to maintain the matter in controversy in its existing condition until judgment, so that the effect of the judgment shall not be impaired by the acts of the parties during the litigation.[93]

4490. When authorized—Discretion—The statute prescribes the conditions authorizing the issuance of a temporary injunction.[94] Within the limits prescribed by the statute, the allowance of a temporary injunction rests largely in judicial discretion, to be exercised with reference to the facts of the particular case, and with regard to the relative injury and inconvenience which may be likely to result to the parties, respectively, from the allowance or dis-

[82] O'Brien v. Larson, 71–371, 74+148.
[83] Minneapolis St. Ry. v. Minneapolis, 155 Fed. 987.
[84] N. W. etc. Co. v. Minneapolis, 81–140, 83+527, 86+69.
[85] Bass v. Shakopee, 27–250, 4+619; Myers v. Duluth T. Ry., 53–335, 55+140.
[86] Wilkin v. St. Paul, 33–181, 22+249.
[87] Scribner v. Allen, 12–148(85); Minn. L. O. Co. v. Palmer, 20–468(424).
[88] See § 1593.
[89] Burke v. Leland, 51–355, 53+716. See Trautmann v. McLeod, 74–110, 76+964.
[90] School Dist. v. Weise, 77–167, 79+668.
[91] Scofield v. Quinn, 54–9, 55+745 (mistake of law—restraining the assertion of rights contrary to the real intention of the parties); Streissguth v. Kroll, 86–325, 90+577 (negotiation of note).
[92] Ex parte Young, 209 U. S. 123; Perkins v. N. P. Ry., 155 Fed. 445.
[93] Mann v. Flower, 26–479, 5+365.
[94] R. L. 1905 § 4259.

allowance of such relief. The action of a court in this regard will not be reversed on appeal except for a clear abuse of discretion.[95] An order refusing a temporary injunction, which rests solely on the complaint, may be the subject of judicial discretion though the complaint clearly authorizes the relief sought, and warrants the issuance of the injunction.[96]

4491. Time of allowance—Under the present statute a temporary injunction cannot be granted before the commencement of the action, that is, the service of summons.[97] Under a former statute it might be allowed upon a complaint before the service of summons.[98]

4492. Allowable on complaint alone—If a complaint is verified, and its allegations are positive, a temporary injunction may be allowed thereon without any further showing.[99]

4493. Continuance—It is not important whether a temporary writ of injunction in form restrains defendant from doing the threatened act until the further order of the court, or during the pendency of the action, or whether both expressions be omitted therefrom. By operation of law such a writ continues in force from the time of its issuance until the court makes some further order with respect thereto, and this whether the writ expressly so provides or not. It is usual, however, for a temporary writ to contain express words of limitation.[1]

4494. Mandatory—A temporary mandatory injunction may be allowed under the statute; but it ought not to be allowed except in cases of extreme urgency and where it is reasonably certain that the plaintiff will have judgment, and conditions can be imposed safeguarding the defendant.[2]

4495. When equities denied—While it is not usual to grant a temporary injunction if the equities alleged in the complaint or petition are denied the court has discretionary power to do so.[3] It is proper to deny a temporary injunction against alleged threatened acts of trespass on land, when the defendant, both by answer and affidavit, disclaims any right to commit the acts, and positively denies that he ever intended or threatened to commit them.[4]

4496. Allowable though permanent injunction not asked—A temporary injunction may be allowed though the plaintiff does not ask for a permanent injunction in his complaint, for other appropriate relief may be asked, substantially equivalent. It is enough if it is made to appear that the defendant is threatening to do some act in violation of plaintiff's rights in respect to the subject of the action, and tending to render the judgment ineffectual.[5]

4497. Modification—On a motion to modify a writ, objection cannot be made to its allowance.[6]

4498. Dissolution on motion—As a general rule a temporary injunction will be dissolved on motion of the defendant, if his answer is verified and de-

[95] Conkey v. Dike, 17–457(434); Pineo v. Heffelfinger, 29–183, 184, 12+522; Rockwood v. Davenport, 37–533, 35+377; Myers v. Duluth T. Ry., 53–335, 55+140; Gorton v. Forest City, 67–36, 69+478; McGregor v. Case, 80–214, 83+140; Fuller v. Schutz, 88–372, 93+118; Felt v. Elmquist, 104–33, 115+746; Haugen v. Sundseth, 106–129, 118+666; Watters v. Mankato, 106–161, 118+358; Meagher v. Schussler, 106–539, 118+664; Holmes v. Park Rapids L. Co., 108–196, 121+877.

[96] McGregor v. Case, 80–214, 83+140.

[97] R. L. 1905 § 4260.

[98] Lash v. McCormick, 14–482(359).

[99] McRoberts v. Washburne, 10–23(8); Stees v. Kranz, 32–313, 20+241. See McGregor v. Case, 80–214, 83+140.

[1] State v. Dist. Ct., 78–464, 81+323.

[2] Central T. Co. v. Moran, 56–188, 57+471. See 12 Harv. L. Rev. 95; Toledo etc. Ry. v. Penn. Co., 54 Fed. 730.

[3] Montgomery v. McEwen, 9–103(93); Fuller v. Schutz, 88–372, 93+118; Watters v. Mankato, 106–161, 118+358; Holmes v. Park Rapids L. Co., 108–196, 121+877.

[4] Hagemeyer v. St. Michael, 70–482, 73+412.

[5] Hamilton v. Wood, 55–482, 57+208.

[6] Albrecht v. St. Paul, 47–531, 50+608.

nies fully and positively all the equities of the complaint. This rule, however, is not inflexible. The matter rests largely in the discretion of the court and its action will not be reversed on appeal except for a clear abuse of discretion. The discretion should be exercised with reference to the facts of the particular case, and should take into consideration the relative injury and inconvenience which will be likely to result to the parties, respectively, from the continuance or dissolution of the injunction.[7] Where the circumstances are such as to lead the court to believe it quite probable that, upon a final hearing, the material allegations of the complaint will turn out to be true, the injunction should not be dissolved.[8] Where the answer does not deny the allegations of the complaint, but sets up new matter as a defence, the injunction will ordinarily be allowed to continue until the hearing, unless the new matter is admitted.[9] Where the the answer sets up new matter the court should not entertain a motion to dissolve the injunction until after the time to reply has expired, or at least should only entertain it to deny it.[10] On a motion to dissolve the complaint cannot be dismissed over objection.[11] An injunction which, for any reason, was improperly granted, should be dissolved.[12] The hearing on a motion to dissolve an ex parte injunction is the first hearing ever had in the matter, and, while the order may be in form one dissolving, it is essentially one refusing to grant, an injunction, and the legal status of the matter is, in effect, the same.[13] In all cases the matter of dissolving temporary injunctions, whether upon the pleadings or otherwise, rests largely in the discretion of the court and its action will not be reversed on appeal except for a clear abuse of discretion.[14]

4499. Bond—Before a temporary injunction can issue a bond must be executed as provided by statute.[15] An action on the bond is the sole remedy of a defendant for the recovery of his damages by reason of the issuance of the writ, if the court finally decides the plaintiff is not entitled thereto, unless it was sued out maliciously and without probable cause. If the sum named in the bond is insufficient as security, it is the duty of the court, upon defendant's motion, to set aside the writ unless additional security is given. The defendant's damages may be ascertained in the same action by reference or otherwise, as the court may order, or in an action on the bond.[16] In actions where a writ of injunction has been allowed and issued, and subsequent to the issuance of the writ third persons are, by order of the court, brought in, and made parties defendant, the failure of the court to require a new bond to be given, running to the new defendants, is, at most, but an irregularity, which can only be taken advantage of by motion to dissolve the writ. Upon being served with such writ of injunction, the new defendants become bound thereby, and must obey its

[7] Moss v. Pettingill, 3-217(145); Armstrong v. Sanford, 7-49(34); Montgomery v. McEwen, 9-103(93); Pineo v. Heffelfinger, 29-183, 12+522; Stees v. Kranz, 32-313, 20+241; Hamilton v. Wood, 55-482, 57+208; Knoblauch v. Minneapolis, 56-321, 57+928; Fuller v. Schutz, 88-372, 93+118; Miller v. Jensen, 102-391, 113+914; Watters v. Mankato, 106-161, 118+358.

[8] Pineo v. Heffelfinger, 29-183, 12+522; Stees v. Kranz, 32-313, 20+241.

[9] Moss v. Pettingill, 3-217(145); Miller v. Jensen, 102-391, 113+914; Watters v. Mankato, 106-161, 118+358.

[10] Moss v. Pettingill, 3-217(145).

[11] Goodrich v. Moore, 2-61(49).

[12] Hart v. Marshall, 4-294(211); Chamblin v. Schlichter, 12-276(181); Lash v. McCormick, 14-482(359).

[13] State v. Duluth St. Ry., 47-369, 372, 50+332.

[14] Bass v. Shakopee, 27-250, 4+619; Todd v. Rustad, 43-500, 46+73; Myers v. Duluth T. Ry., 53-335, 55+140; Tozer v. O'Gorman, 65-1, 67+666; Gorton v. Forest City, 67-36, 69+478; Stillwater W. Co. v. Farmer, 92-230, 99+882; Meyer v. Petersburg, 96-314, 104+899.

[15] R. L. 1905 § 4261.

[16] Hayden v. Keith, 32-277, 20+195. See Curtis v. Hart, 34-329, 25+636 (counterclaim to plaintiff's damages).

commands.[17] In an action upon a statutory injunction bond, only such expenses for counsel fees can be considered or included in the damages for a breach of the condition as are shown to have been necessarily incurred in procuring a dissolution of the injunction. Expenses for services of counsel, incurred in abortive attempts to set aside the same, or in the regular conduct of the trial, and necessarily incident thereto, independent of the allowance of the temporary injunction, are not to be allowed in such action.[18] But where the bond is predicated upon a preliminary injunction issued in a cause the purpose of which was to enjoin defendants from prosecuting certain actions, counsel fees and the necessary expenses incurred in an unsuccessful effort to dissolve the injunction and in conducting the main action may be recovered upon final dissolution of the injunction. Where the injunction was dissolved by a dismissal of the main action on the part of the plaintiffs, followed by judgment of dismissal, there was, in effect, a final adjudication that the injunction writ had been wrongfully issued.[19] The sureties on a bond have been held bound without the signature of their principal, though he was named as such in the body of the bond.[20] A complaint on a bond, alleging that the court finally decided the injunction suit and dismissed the same, has been sustained.[21] Where the parties to an action settled their controversy without consulting their attorneys, it was held that the latter had no recourse on a bond.[22]

PROCEDURE

4500. Pleading—In general—Whenever an injunction is sought the facts entitling the party to such relief must be clearly and positively alleged and shown. It is not enough that their existence may be inferred from the averments.[23] An injunction will not ordinarily be granted where the essential facts are alleged only on "information and belief." [24] A bare allegation of irreparable injury is insufficient. Facts must be alleged showing that such injury would necessarily result.[25] A bare allegation that the party has no adequate remedy at law is insufficient. Facts must be alleged from which the inadequateness of the legal remedy is apparent.[26] It has been said that an injunction cannot be granted in any case without a proper complaint framed for that purpose.[27]

4501. Complaint for damages and injunction—In an action for damages and for an injunction the latter does not follow as a matter of course the recovery of the former.[28]

4502. Cross-complaint—In a proper case a defendant may seek an injunction against the defendant by means of a cross-complaint.[29]

4503. Modification and vacation of permanent injunctions—A permanent injunction may be modified or vacated on motion after judgment.[30]

[17] State v. Dist. Ct., 78–464, 81+323.
[18] Lamb v. Shaw, 43–507, 45+1134; Frost v. Jordan, 37–544, 36+713.
[19] Nielson v. Albert Lea, 87–285, 91+1113.
[20] Safranski v. St. P. etc. Ry., 72–185, 75+17.
[21] Guptill v. Red Wing, 76–129, 78+970.
[22] Nielsen v. Albert Lea, 91–392, 98+197.
[23] Warsop v. Hastings, 22–437; Maloney v. Finnegan, 38–70, 35+723.
[24] Armstrong v. Sanford, 7–49(34). See McRoberts v. Washburne, 10–23(8); Conkey v. Dike, 17–457(434); Gorton v. Forest City, 67–36, 69+478.
[25] Schumeier v. St. P. etc. Ry., 8–113 (88); Montgomery v. McEwen, 9–103 (93); Clarke v. Ganz, 21–387; Laird v. Pine County, 72–409, 75+723.
[26] Goodrich v. Moore, 2–61(49); Clarke v. Ganz, 21–387; Laird v. Pine County, 72–409, 75+723.
[27] Pine Tree L. Co. v. McKinley, 83–419, 86+414.
[28] Finch v. Green, 16–355(315). See Little v. Willford, 31–173, 17+282.
[29] Pine Tree L. Co. v. McKinley, 83–419, 86+414.
[30] Weaver v. Miss. etc. Co., 30–477, 16+269; Colstrum v. Mpls. etc. Ry., 33–516, 24+255.

VIOLATION

4504. Punishment as for contempt—A violation of an injunction is punishable as a contempt of court.[31] A municipality cannot be guilty of contempt in disobeying an injunction, though its officers may be.[32]

4505. Justification—The mere fact that an injunction is erroneously issued, as, for example, that it is too broad in its terms and covers property over which it should not extend, is no justification for its violation.[33]

INJURY—Damage resulting from an unlawful act.[34]

INNKEEPERS

4506. Definition—A hotel or inn is a house the proprietor of which holds out that he will receive all travelers and sojourners who are willing to pay a price adequate to the sort of accommodation provided, and who come in a situation in which they are fit to be received.[35]

4507. Furnishing meals not essential—A person may be an innkeeper, and liable as such, though he does not furnish his guests with meals.[36]

4508. Who is a guest—If a person stops at an inn as a traveler, and he is received as such, the relation of innkeeper and guest is immediately established, with all its privileges and liabilities; and once established, such relation continues as long as he sojourns as a traveler, which is presumed until the contrary appears. The relation is not necessarily terminated by a special agreement as to price.[37]

4509. Refusal to entertain—Exemplary damages—In an action where an innkeeper, after a guest had engaged and paid for a night's lodging, refused to let him have it and turned him out of the house, with abusive and insulting language, it was held that exemplary damages might be recovered.[38]

4510. Posting statutory notice—It is incumbent on an innkeeper claiming the benefit of the statute [39] to show affirmatively a substantial compliance with all its requirements.[40] A notice to deposit valuables, not conforming to the statute, is ineffectual unless assented to by the guest so as to constitute a contract.[41]

4511. Liability for loss of goods—By common law an innkeeper is responsible for the loss in his inn of the goods of a traveler who is his guest, except when the loss arises from the negligence of the guest, or the act of God, or of the public enemy.[42] But this strict liability exists only in favor of travelers, as distinguished from boarders.[43] It covers all forms of personalty.[44] As re-

[31] State v. Dist. Ct., 52–283, 53+1157; State v. Dist. Ct., 78–464, 81+323; State v. Dist. Ct., 98–136, 107+963.

[32] Bass v. Shakopee, 27–250, 4+619.

[33] State v. Dist. Ct., 98–136, 107+963.

[34] Bohn v. Hollis, 54–223, 233, 55+1119. See Nichols v. Minneapolis, 30–545, 16+410.

[35] Nelson v. Johnson, 104–440, 116+828; Wickstrom v. Swanson, 107–482, 120+1090.

[36] Johnson v. Chadbourn, 89–310, 94+874; Nelson v. Johnson, 104–440, 116+828.

[37] Lusk v. Belote, 22–468; Ross v. Mellin, 36–421, 32+172. See Singer Mfg. Co. v. Miller, 52–516, 55+56. See Note, 105 Am. St. Rep. 932.

[38] McCarthy v. Niskern, 22–90.

[39] R. L. 1905 § 2810.

[40] Chamberlain v. West, 37–54, 33+114.

[41] Olson v. Crossman, 31–222, 17+375.

[42] Lusk v. Belote, 22–468; Olson v. Crossman, 31–222, 17+375; Johnson v. Chadbourn, 89–310, 316, 94+874; Nelson v. Johnson, 104–440, 116+828. See Note, 99 Am. St. Rep. 577.

[43] Lusk v. Belote, 22–468; Ross v. Mellin, 36–421, 32+172.

[44] See Singer Mfg. Co. v. Miller, 52–516, 55+56.

gards the money of a guest it is not limited to such an amount as might be necessary for traveling expenses.[45] Where property of a guest is lost at an inn, to relieve the innkeeper from liability it must appear that it was lost from one of the causes for which he is not liable; as, for instance, the negligence of the guest.[46] Losses by fire are prima facie due to the negligence of the proprietor, but he may relieve himself of liability by showing that the loss was due to irresistible force, or unavoidable accident, such as a fire originating on premises over which he had no control, without fault or negligence on his part.[47] A guest may recover for the loss of goods though he had a mere possessory interest therein.[48]

4512. Negligence of guest—A theft from a guest by a companion whom he brings to the inn is imputable to the guest as his own negligence. Consenting to sleep in the same room with a person whom he does not bring to the inn is not negligence in a guest.[49] For a guest to sleep alone with a large sum of money on his person in a room, the door of which might be opened from the outside by a wire, has been held not negligence.[50] Contributory negligence on the part of a guest is a question for the jury, unless the evidence is conclusive.[51]

4513. Liability for personal injuries—An innkeeper is liable to his guests for personal injuries inflicted upon them by strangers who are permitted to enter the inn.[52]

4514. Lien—An innkeeper's lien attaches to goods in the possession of his guest, though they belong to a stranger, if he has no notice of that fact. At common law an innkeeper has no lien on the goods of a mere boarder.[53]

4515. Crime of defrauding—G. S. 1878 c. 124 § 23,[54] prohibiting frauds on innkeepers, is not unconstitutional as an attempt to imprison for debt. A complaint thereon has been held sufficient.[55]

IN PARI MATERIA—See Contracts, 1885; Statutes, 8984.

IN REM, IN PERSONAM—These terms have no fixed, inflexible meaning in the law. In a strict sense an action or proceeding in rem is one taken directly against property and has for its object the disposition of the property, without reference to the title of individual claimants—one in which the court acquires jurisdiction by seizing the property instead of by service of process on a person. In a larger sense it is one between parties where the direct object is to reach and dispose of property owned by them, or of some interest therein. An action or proceeding involving the status of a person is often called in rem.[56]

[45] Smith v. Wilson, 36-334, 31+176.
[46] Olson v. Crossman, 31-222, 17+375.
[47] Johnson v. Chadbourn, 89-310, 94+874. See 17 Harv. L. Rev. 47.
[48] Chamberlain v. West, 37-54, 33+114.
[49] Olson v. Crossman, 31-222, 17+375.
[50] Smith v. Wilson, 36-334, 31+176.
[51] Chamberlain v. West, 37-54, 33+114.
[52] Mastad v. Swedish Brethren, 83-40, 42, 85+913. See Curran v. Olson, 88-307, 92+1124.
[53] Singer Mfg. Co. v. Miller, 52-516, 55+56. See R. L. 1905 § 2811; Note, 107 Am. St. Rep. 868.
[54] See R. L. 1905 § 5164.
[55] State v. Benson, 28-424, 10+471.
[56] Stone v. Myers, 9-303(287); Reynolds v. St. Favorite, 10-242(190, 194); Griswold v. St. Otter, 12-465(364, 368); Whalley v. Eldridge, 24-358, 361; Morin v. St. P. etc. Ry., 33-176, 180, 22+251; Lane v. Innes, 43-137, 45+4; Stapp v. St. Clyde, 43-192, 193, 45+430; Bardwell v. Collins, 44-97, 101, 46+315; Shepherd v. Ware, 46-174, 48+773; Plummer v. Hatton, 51-181, 182, 53+460; Farrell v. St. Paul, 62-271, 274, 64+809; Bengtsson v. Johnson, 75-321, 324, 78+3; State v. Westfall, 85-437, 444, 89+175; McMillan v. Freeborn County, 93-16, 23, 100+384; Minn. D. Co. v. Johnson, 94-150, 102+381; Pennoyer v. Neff, 95 U. S. 714; Arndt v. Griggs, 134 U. S. 316. See Divorce, 2787; Drains, 2824; Eminent Domain, 3079; Equity, 3136; Executors and Administrators, 3558, 3617, 3660; Insolvency, 4534; Judgments, 4967; Mortgages, 6305, 6426; Municipal Corporations, 6880; Partition, 7333; Quieting Title, 8030, 8040; Registration of Title, 8354; Taxation, 9263, 9281, 9353.

INSANE PERSONS

Cross-References

See Contracts, 1731; Criminal Law, 2446; Evidence, 3316, 3328; Hospitals; Limitation of Actions, 5614; Wills, 10208; Witnesses, 10316, 10354.

IN GENERAL

4516. Presumption—All persons are presumed to be sane until the contrary appears.[57] When insanity of a permanent type is once shown it is presumed to continue until the contrary is shown; otherwise, if the insanity is temporary.[58]

4517. Evidence of insanity—Evidence of the insanity of a person's ancestors and relatives is not alone competent or sufficient to prove that he is insane. It is only admissible in corroboration. Evidence of temporary insanity at a given time is not alone sufficient to prove insanity at a later period.[59] Opinion evidence is admissible.[60]

4518. Management of estate by expectant heirs—Where the expectant heirs of a person who is non compos assume, without letters of guardianship, the management of his estate, which subsequently descends to them upon his death, their acts with reference to the property will bind themselves, though it would not bind their ancestor, if he had recovered his mental capacity, or his personal representatives, if the property were required for purposes of admintration, such as the payment of debts.[61]

CONTRACTS

4519. Mental capacity to contract—Evidence—A person may be insane on some one subject, and still be as able as the sanest to manage his own property and affairs.[62] A person may have capacity to make an ordinary contract though he lacks testamentary capacity.[63] Proceedings for commitment to a state insane asylum are not evidence of incapacity.[64] Evidence of the party's business acts, at or about the time of the execution of the instrument in issue, and of his declarations, oral or written, tending to show his comprehension or non-comprehension of daily occurrences in his business, is proper.[65]

4520. Ratification in lucid intervals—A person making a contract, in form and substance, while under mental incapacity, may subsequently, when rational, so act as to constitute a ratification equivalent to an express agreement, which will be binding upon him, especially if he retains and enjoys the fruit thereof.[66]

4521. Disaffirmance on restoration to capacity—On restoration of mental capacity a person must elect within a reasonable time to affirm or disaffirm a contract made with him in good faith while he was insane. If he elects to disaffirm he must return the consideration which he has received. This rule is not changed by the fact that the contract was made and the consideration paid by a third person for the benefit of the other party.[67]

4522. Executed contracts—When voidable—The fact that one party to an executed contract was insane at the time of its execution does not render it void,

[57] State v. Hayward, 62–474, 496, 65+63; Bonfanti v. State, 2–123(99); In re Layman, 40–371, 373, 42+286.
[58] State v. Hayward, 62–474, 65+63.
[59] State v. Hayward, 62–474, 65+63.
[60] See §§ 3316, 3328.
[61] Wheeler v. Benton, 71–456, 74+154.
[62] Knox v. Haug, 48–58, 61, 50+934.
[63] Young v. Otto, 57–307, 311, 59+199.
[64] Knox v. Haug, 48–58, 50+934; Schaps v. Lehner, 54–208, 211, 55+911.
[65] Woodcock v. Johnson, 36–217, 30+894.
[66] Whitcomb v. Hardy, 73–285, 76+29; Ham v. Potter, 101–439, 112+1015.
[67] Morris v. G. N. Ry., 67–74, 69+628.

but merely voidable. It will not be set aside if there had been no prior adjudication of insanity and the other party was without notice, and paid a fair consideration, and the parties cannot be placed in statu quo.[68] If there had been a prior adjudication of insanity the contract is void. While a person is under guardianship he is incapable of contracting, though he is at the time of the contract in fact sane. If a guardianship has been practically abandoned, without any formal discharge, there may be a restoration of capacity.[69] The burden of proving notice has been held on a party assailing a deed. If a deed is canceled for the insanity of the grantor, the grantee should be compensated for any expenditures enhancing the value of the property, made in good faith.[70] A court of equity guards with jealous care all contracts or transactions made with persons of unsound mind, but its strong arm is not used as a sword against the innocent, but as a shield for the unfortunate ones. Persons contracting with insane persons, knowing them to be insane, are guilty of a fraud and the contract may be set aside.[71] Courts are very liberal in permitting insane persons to repudiate or rescind contracts entered into by them while under disability, even where the other party is not at fault, provided the latter can be placed in statu quo.[72] The burden of proof is on the party assailing the instrument.[73]

COMMITMENT

4523. Proceedings for commitment—The probate courts have jurisdiction of the matter.[74] A person cannot be adjudged insane and committed without notice and an opportunity to be heard.[75] Where a warrant of commitment showed on its face that the party alleged to be insane, and ordered committed, was so found by the probate judge on the certificate and recommendation of "two examiners in lunacy," instead of a finding of insanity by the jury after due examination, as directed by the statute, it was held void on its face.[76] The appointment of three persons instead of two to act with the judge of probate as a board of examiners, has been held not to render the proceedings void and subject to collateral attack. The fact that the record fails to show the issuance of a warrant for the arrest of the alleged insane person, or that he was present during the proceedings, is not sufficient to impeach the judgment, or show want of jurisdiction. The court may dispense with the issuance of a warrant, if the presence of the alleged insane person may be secured without it.[77]

GUARDIANS

4524. Appointment—The probate courts have exclusive jurisdiction of the subject.[78] A person may be capable of managing his property though he is subject to "delusions," or is insane on some subjects.[79] An order appointing a guardian for an incompetent person has been held justified by the evidence.[80] An order of appointment has been held sufficient in form, and not subject to collateral attack on habeas corpus.[81] An executrix of the estate of the husband

[68] Scott v. Hay, 90–304, 97+106; Thorpe v. Hanscom, 64–201, 66+1; Schaps v. Lehner, 54–208, 55+911; Youn v. Lamont, 56–216, 57+478; Morris v. G. N. Ry., 67–74, 69+628. See Sabledowsky v. Arbuckle, 50–475, 483, 52+920.

[69] Thorpe v. Hanscom, 64–201, 66+1. See Schaps v. Lehner, 54–208, 212, 55+911.

[70] Schaps v. Lehner, 54–208, 55+911.

[71] Youn v. Lamont, 56–216, 221, 57+478.

[72] Lundberg v. Davidson, 72–49, 54 74+ 1018.

[73] Schaps v. Lehner, 54–208, 211, 55+911; Youn v. Lamont, 56–216, 57+478.

[74] State v. Wilcox, 24–143.

[75] State v. Billings, 55–467, 57+206, 794; State v. Kilbourne, 68–320, 71+396.

[76] State v. Billings, 55–467, 57+206, 794.

[77] State v. Kilbourne, 68–320, 71+396.

[78] See § 7770.

[79] State v. Probate Ct., 83–58, 85+917.

[80] Schmidt v. Zeugner, 90–366, 96+1134.

[81] State v. Lawrence, 86–310, 90+769.

of a non-resident incompetent has been held not entitled to notice of proceedings.[82] Laws 1883 c. 107, authorizing the appointment of a trust company as guardian, has been sustained.[83] Letters of guardianship are not subject to collateral attack for defects not appearing on their face.[84]

4525. Bond—In an action on a bond it is unnecessary to prove the insanity of the ward or the regularity of the appointment of the guardian.[85]

4526. Powers and duties—A guardian of the person of an incompetent may remove his ward from one place or state to another, temporarily or permanently, but an improper removal may be restrained by the courts. The removal must be for the benefit of the ward, and not for the mere convenience of the guardian. Such a guardian may care for and control his ward in any reasonable manner.[86] At common law a guardian of an incompetent took no legal estate in the property of his ward.[87] The guardian of an insane person cannot secure an inequitable advantage against his ward, or have the aid of a court to enforce a contract to the latter's injury; and whenever it appears that such a contract has been made between the guardian and a third party concerning the ward's interest a court should not interfere in such guardian's behalf, but decline to enforce it, and this irrespective of the question whether there was or not actual fraud. The fiduciary relation in such case is a bar to any relief which might produce detriment to the ward.[88]

4527. Removal—On habeas corpus a court commissioner cannot make an order which practically removes a guardian.[89] An order has been held not one removing a guardian, though resulting in such removal.[90]

RESTORATION TO CAPACITY

4528. Proceedings for restoration to capacity—The court may order the fees of witnesses and counsel to be paid out of the estate of the insane person.[91] A final order denying an application for restoration is in the nature of a judgment. Prior to Laws 1901 c. 147, it was not appealable, but only reviewable by certiorari. An order denying an application for restoration has been held not justified by the evidence.[92]

GUARDIAN AD LITEM

4529. In general—An insane person may sue and be sued, appearing by next friend, general guardian, or guardian ad litem.[93] Our statute provides that the guardian of an insane person "shall appear for and represent his ward in all legal proceedings unless another person is appointed for that purpose."[94] This provision does not deprive the district court of power to appoint a next friend or guardian ad litem for an insane party even though a general guardian has been appointed by the probate court.[95] It is the general policy of our law that an insane person shall appear by his general guardian. But it is not necessary in order to institute or defend an action in the district court to first institute proceedings in the probate court for the appointment of a general guardian. Where persons are incapable of acting for themselves, as in the case of in-

[82] Edgerly v. Alexander, 82-96, 84+653.
[83] Minn. L. & T. Co. v. Beebe, 40-7, 41+232.
[84] Id.
[85] Id.
[86] State v. Lawrence, 86-310, 90+769. See Townsend v. Kendall, 4-412(315).
[87] Pflaum v. Babb, 86-395, 398, 90+1051.
[88] Wester v. Flygare, 95-214, 103+1020.
[89] State v. Lawrence, 86-310, 90+769.
[90] State v. Probate Ct., 83-58, 85+917.
[91] Kelly v. Kelly, 72-19, 74+899.
[92] State v. Probate Ct., 83-58, 85+917.
[93] Plympton v. Hall, 55-22, 56+351.
[94] R. L. 1905 § 3838. See Patterson v. Melchior, 102-363, 113+902.
[95] See Perine v. Grand Lodge, 48-82, 50+1022; Plympton v. Hall, 55-22, 56+351.

sane persons or lunatics, they are entitled to the protection of the court, and proceedings may be instituted under its direction. Suit may be brought in their name and the court will authorize some suitable person to carry it on as next friend or guardian ad litem. The power of the district courts to exercise such authority is not taken away by the statutes authorizing the probate courts to appoint general guardians for insane persons. But it is in the discretion of the court to allow an action so instituted to proceed or not, and it may order a stay of proceedings to await the due appointment of a general guardian, or order the same to be discontinued as it may be advised.[96] The courts of this state may appoint a next friend for a non-resident insane plaintiff.[97]

4530. Effect of failure to appoint guardian—Where personal service is obtained against an insane person the failure to appoint a guardian ad litem does not render the judgment void.[98]

ACTIONS

4531. Service of process on insane persons—Guardian ad litem—Conceding that, under our statutes, jurisdiction may be obtained in a divorce action by the service of summons and complaint personally upon an insane defendant, it is suggested as a safe rule of practice that the trial court should require the appointment of a guardian ad litem to appear for and protect the interests of the unfortunate at the trial and during all subsequent proceedings.[99]

4532. Claims against—Prosecution—Claims against an insane or incompetent person under guardianship need not be presented to the probate court, but may be prosecuted in the district court.[1]

[96] Plympton v. Hall, 55–22, 56+351.
[97] Id.
[98] Lundberg v. Davidson, 72–49, 74+1018
[99] Wilson v. Wilson, 95–464, 104+300.
[1] Pflaum v. Babb, 86–395, 90+1051.

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Cross-References

See Assignments for the Benefit of Creditors; Bankruptcy; Banks and Banking, 823; Conflict of Laws, 1558; Corporations, 2140; Limitation of Actions, 5620; Sales, 8584.

IN GENERAL

4533. Insolvency defined—As applied to a merchant, banker, or trader, insolvency, within the meaning of the insolvency statute, means inability to pay one's debts in the ordinary course of business.[2] The term has a more restricted meaning as applied to those not engaged in a commercial pursuit.[3] It is to be construed more or less with reference to the habits and usages of the place where the debtor resides, and of the particular branch of business in which he is engaged. One who operates a flouring-mill and grain warehouse is a trader.[4] So are brewers, brick-makers, and lumber manufacturers.[5] A physician is not.[6] The term insolvency is sometimes used to denote the insufficiency of one's entire property and assets to pay all his debts.[7] Thus, in relation to probate law, a person is solvent when he is in such a condition that all lawful demands against him may be collected out of his own means by legal process.[8]

4534. Nature and object of proceedings—The primary object of the proceedings, whether under the first or second section of the statute, is to secure an equal distribution of the debtor's property among his creditors.[9] An assignment is merely a voluntary surrender of the debtor's property to the custody of the court for the benefit of creditors. The only difference between an assignment under the first section and a receivership under the second is that one is voluntary and the other involuntary on the part of the debtor.[10] The proceedings are in rem, the res being the estate of the insolvent.[11] They are a sequestration of the estate for the benefit of such creditors as come in and accept the terms of the act. It is optional with a creditor to come in and share in the assets on the terms prescribed by the act, or to stay out and rely on the ordinary legal remedies.[12] The proceedings are in the nature of an execution against the estate of the insolvent, to sequester it for the benefit of his creditors.[13] They are special [14] and judicial.[15] They are not according to the course of the common law, but are rather of an equitable nature.[16]

4535. A judicial proceeding—Upon the filing of an assignment the entire subject-matter and everything involved in it, including the assigned property, comes under the jurisdiction of the court ipso facto, and the assigned property

[2] Daniels v. Palmer, 35-347, 29+162; Daniels v. Bank of Zumbrota, 35-351, 29+165; Corliss v. Jewett, 36-364, 31+362; In re Howes, 38-403, 38+104; Hastings M. Co. v. Heller, 47-71, 49+400; Bean v. Scheffer, 68-33, 70+854; Pattridge v. Jessup, 69-33, 71+916; Fishel v. Burt, 69-250, 72+109; Taylor v. Mitchell, 80-492, 83+418; State v. Clements, 82-434, 447, 85+229.

[3] Daniels v. Palmer, 35-347, 29+162; Williamson v. Hatch, 55-344, 57+56; In re Bissell, 57-78, 58+828.

[4] Daniels v. Palmer, 35-347, 29+162.

[5] Hastings M. Co. v. Heller, 47-71, 49+400.

[6] Williamson v. Hatch, 55-344, 57+56.

[7] Daniels v. Palmer, 35-347, 29+162; Crummey v. Raudenbush, 55-426, 56+1113; Camp v. Thompson, 25-175, 181; Wilcox v. School Dist., 103-43, 114+262. See In re Youths' Temple of Honor, 73-319, 76+59.

[8] Johanson v. Hoff, 70-140, 72+965.

[9] Wendell v. Lebon, 30-234, 15+109; In re Mann, 32-60, 19+347; Simon v. Mann, 33-412, 23+856.

[10] Kinney v. Sharvey, 48-93, 50+1025.

[11] Beardslee v. Beaupre, 44-1, 46+137; Smith v. St. Paul etc. Co., 56-202, 57+475.

[12] Kimball v. Coon, 45-45, 47+315.

[13] Beardslee v. Beaupre, 44-1, 46+137; In re Howes, 38-403, 38+104.

[14] State v. Severance, 29-269, 13+48.

[15] State v. Severance, 29-269, 13+48; Second Nat. Bank v. Schranck, 43-38, 44+524. See § 4535.

[16] Smith v. St. Paul etc. Co., 56-202, 57+475.

is in custodia legis.[17] The attachment of the property of a debtor assignor gives the district court jurisdiction of the assignment.[18]

4536. Jurisdiction—The court initiating insolvency proceedings by the appointment of a receiver or assignee has and retains exclusive jurisdiction thereof and of the receiver or assignee for all purposes of adjusting in the same proceeding all conflicting interests, all matters arising out of or connected with the estate, including the settlement of the accounts of the receiver, and surcharging the same on account of losses occurring by reason of his negligence or mismanagement.[19]

4537. Powers of court—In general—The court is invested with general supervision of the proceedings and may make any order necessary to carry out the provisions of the law.[20] It has the power and duty to mould the proceedings so as to protect the legal and constitutional rights of the parties.[21] The function of the court in insolvency proceedings is to appropriate the property of the debtor to the payment of his debts in the manner pointed out by the statute, and for that purpose to cause his property to be sold and turned into money in the way most for the interests of all concerned. It may be that, in order to effect the best sale, the court would have authority to direct other things to be done, as, in case of a merchant's stock, it might appear necessary, in order to make a good sale, that additions to the stock be made. The court may have the power to direct the assignee to make the necessary replenishment with the funds in his hands. But certainly the court would have no power to carry on, or direct its assignee or receiver to carry on, indefinitely, a business, for the purpose of making profits with which to pay the debts. No question can be made of the authority of the court, with the consent of all the parties interested, to restore the property to the debtor, or to direct it to be conveyed to the creditors in satisfaction of their debts, or to be conveyed to them, or to any one agreed upon by all the parties, to be disposed of, and the proceeds applied upon the debts. In other words, the court may permit the parties to compromise on such terms as they may agree upon.[22] The court may make or direct calls upon unpaid subscriptions to stock subject to call. Such a call does not determine the liability of stockholders, but only makes due and payable whatever they may be liable for under a call, so that suit may be brought for it. The authority of the court to call in unpaid subscriptions depends on the necessity of applying them to payment of debts.[23] Where an assignee has failed to comply with the order of the court to turn over all money and property in his hands to his successor, the court may refuse to pass upon and allow his account for services and disbursements until he complies with the order.[24]

4538. Non-residents may share—The law gives the same right to non-residents as to our own citizens to come in and avail themselves of its benefits.[25]

4539. Statute constitutional—The statute has been held constitutional against various objections.[26]

[17] In re Mann, 32–60, 19+347; Lord v. Meachem, 32–66, 19+346; Simon v. Mann, 33–412, 23+856; North Star B. & S. Co. v. Lovejoy, 33–229, 22+388; Second Nat. Bank v. Schranck, 43–38, 44+524; Holtoquist v. Clark, 59–59, 60+1077; Gunn v. Smith, 71–281, 73+842.

[18] Bennett v. Denny, 33–530, 24+193.

[19] State v. Germania Bank, 103–129, 114+651.

[20] R. L. 1905 § 4623; Weston v. Loyhed, 30–221, 14+892; In re Mann, 32–60, 19+347.

[21] Weston v. Loyhed, 30–221, 14+892.

[22] State v. Young, 44–76, 46+204.

[23] In re Minnehaha D. P. Assn., 53–423, 55+598.

[24] In re State Bank, 57–361, 59+315.

[25] Wendell v. Lebon, 30–234, 15+109.

[26] Wendell v. Lebon, 30–234, 15+109; Weston v. Loyhed, 30–221, 14+892; Lambert v. S. A. Bank, 66–185, 68+834; Union

4540. Not compulsory on creditors—If a creditor, citizen or non-resident, prefers not to come in and accept the provisions of the law, he is at liberty to stay out; and if he does so, he retains his claim and right of action thereon against the debtor, unaffected by the insolvency proceedings.[27]

4541. Action by creditor not barred—An action may be maintained by a creditor against an insolvent debtor, though the debtor may have made an assignment of his property under the statute, and this is so whether the action is commenced before or after the assignment; nor is the creditor barred of his right to proceed to judgment on such action by reason of his having filed his claim with the assignee in the insolvency proceedings.[28]

4542. A bankrupt act—The insolvency law of 1881 is a bankrupt act;[29] the first section providing for voluntary bankruptcy, the second section for involuntary bankruptcy.[30]

4543. Property in custodia legis—The property of an insolvent who has made an assignment or for whom a receiver has been appointed is in custodia legis.[31]

4544. Effect on attachments, etc.—When an assignment is made or receiver appointed under the statute no order of court is necessary to vacate prior attachments against the insolvent's property. The insolvency proceedings themselves work the dissolution.[32] An assignment will vacate a prior attachment if made within ten days of the levy.[33] In appointing a receiver the court cannot vacate prior attachments, etc. The statute gives that effect only to the appointment and qualification of the receiver.[34] Supplemental proceedings are dissolved by an assignment even though the complaint of the judgment creditor is on file for more than twenty days before the entry of judgment.[35] The lien of an execution levied upon personalty is not dissolved by the subsequent appointment of a receiver of the property of the judgment debtor, where the judgment upon which the execution was issued was recovered in an action upon a complaint which was filed in the clerk's office twenty days prior to the entry of the judgment.[36] An assignment will not affect a judgment or lien perfected more than ten days prior to the assignment.[37] The courts of this state will not enjoin one of our citizens from enforcing an attachment secured in another state which, if it had been secured in this state, would have been dissolved by an assignment.[38]

4545. Equity rules applicable—Except as otherwise provided by the statute the court administers the trust, through an assignee or receiver, in accordance with the rules of equity.[39]

Bank v. Rugg, 78–256, 80+1121; Mather v. Nesbit, 13 Fed. 872; Sloane v. Chimquy, 22 Fed. 213.

[27] Wendell v. Lebon, 30–234, 15+109; Jenks v. Ludden, 34–482, 27+188; Sloane v. Chimquy, 22 Fed. 213.

[28] Smith v. St. Paul etc. Co., 56–202, 57+475; Chicago etc. Ry. v. St. Paul etc. Co., 56–209, 57+477.

[29] Wendell v. Lebon, 30–234, 15+109; In re Mann, 32–60, 19+347; Simon v. Mann, 33–412, 23+856; Jenks v. Ludden, 34–482, 27+188; Daniels v. Palmer, 35–347, 29+162; Ames v. Wilkinson, 47–148, 49+696; Foley v. Sawyer, 76–118, 78+1038.

[30] Simon v. Mann, 33–412, 23+856.

[31] Thomas v. Foote, 46–240, 48+1019. See § 4535.

[32] Johnson v. Bray, 35–248, 28+504; In re Van Norman, 41–494, 43+334; Mather v. Nesbit, 13 Fed. 872.

[33] First Nat. Bank v. Briggs, 34–266, 26+6; Fairbanks v. Whitney, 36–305, 30+812. See In re Church, 40–39, 41+241.

[34] In re Shakopee Mfg. Co., 37–91, 33+219.

[35] Wolf v. McKinley, 65–156, 68+2.

[36] In re Jones, 33–405, 23+835; Bean v. Schmidt, 43–505, 46+72.

[37] In re Church, 40–39, 41+241.

[38] Jenks v. Ludden, 34–482, 27+188.

[39] Davis v. Swedish etc. Bank, 78–408, 418, 80+953, 81+210; Forepaugh v. Westfall, 57–121, 58+689.

4546. Schedule—The schedule filed by an insolvent does not limit the operation of the proceedings over his property.[40] It is not evidence of the indebtedness of the insolvent as against a third party.[41]

ASSIGNMENTS

4547. Form and sufficiency—An assignment, reciting the facts justifying an assignment under the statute and providing for distribution to "creditors who shall file releases of their debts as by law provided," has been held sufficient.[42] An assignment has been sustained though it did not contain the words "bona fide" of the statute.[43] Unless it affirmatively appears on the face of an assignment that it was made under the insolvency act it will be held to have been made as a common-law assignment.[44]

4548. Deed of assignment controls—Inasmuch as the statute takes the assignment of the debtor himself as the basis of the procedure in administering his estate such administration must be in accordance with the terms of the trust therein declared. Creditors have a right to be informed by the assignment itself what its conditions are, and on what terms they are entitled to share in its benefits.[45]

4549. Personal act of assignor—An assignment must be the personal act of the assignor. He cannot delegate to an agent authority to determine whether he is insolvent or to select an assignee.[46]

4550. When voluntary—An assignment under the statute by a debtor after garnishment proceedings have been commenced against him is voluntary.[47]

4551. Fraud does not vitiate—An assignment is not vitiated by the fraud of the assignor,[48] or of the assignee, or of both.[49]

4552. Reservation of surplus—An assignment is not vitiated by a reservation of any surplus to the assignor.[50]

4553. Execution—Filing—Bond of assignee—The execution and filing of the assignment,[51] and the bond of the assignee,[52] are governed by the statute regulating common-law assignments for the benefit of creditors.

4554. Conditional execution—An assignment is not invalid because it is left with the assignee to be filed if certain creditors sue the assignor.[53]

4555. Time—The limit of time for making an assignment to ten days after an attachment, etc., is absolute.[54]

4556. By partner—What passes—An assignment by a partner has been held to convey all the interest of such partner in realty belonging to the firm, title to which was held in their individual names.[55]

4557. By firm—An assignment by a firm must include on its face all the unexempt property of the partners.[56] A surviving partner may make an assignment of the firm property.[57]

[40] Security Bank v. Beede, 37–527, 35+435.

[41] Hahn v. Penney, 60–487, 62+1129.

[42] Smith v. Bean, 46–138, 48+687.

[43] Yanish v. Pioneer F. Co., 64–175, 66+198.

[44] Lanpher v. Burns, 77–407, 80+361.

[45] In re Bird, 39–520, 40+827.

[46] Mpls. T. Co. v. School Dist., 68–414, 71+679.

[47] Hawkins v. Ireland, 64–339, 67+73.

[48] In re Mann, 32–60, 19+347; Simon v. Mann, 32–65, 19+347; Id., 33–412, 23+856.

[49] Bennett v. Denny, 33–530, 24+193 (affirmed 128 U. S. 489).

[50] In re Mann, 32–60, 19+347; Simon v. Mann, 32–65, 19+347.

[51] R. L. 1905 § 4621. See § 590.

[52] See § 605.

[53] Holtoquist v. Clark, 59–59, 60+1077.

[54] Thompson v. Winona H. Works, 41–434, 43+383.

[55] Ryan v. Ruff, 90–169, 95+1114.

[56] May v. Walker, 35–194, 28+252; In re Walker, 37–243, 33+852, 34+591; Security Bank v. Beede, 37–527, 35+435; In re Allen, 41–430, 43+382; Thompson v. Winona H. Works, 41–434, 43+383; Hanson v. Metcalf, 46–25, 48+441; Farwell v. Brooks, 65–184, 68+5; Holmes v. Brooks, 65–187, 67+1150.

[57] Hanson v. Metcalf, 46–25, 48+441.

4558. By corporation—A corporation organized for private gain may make an assignment.[58]

4559. Married women—A married woman may make an assignment without her husband joining.[59]

4560. By non-resident—An assignment may be executed out of the state and by a non-resident, if it is filed in the county in this state where the business of the assignor is carried on.[60] A non-resident has been held to have carried on business in this state sufficiently to bring him within the statute.[61]

4561. Grounds—Attachment, etc.—The issuance of an attachment out of the circuit court of the United States for the district of Minnesota is a ground for assignment.[62] An assignment based on the garnishment of a debt within the limit of an exemption is not subject to collateral attack.[63]

4562. All unexempt property—An assignment which does not on its face include all of the unexempt property of the assignor is void as against his creditors.[64] The act requires an assignment of all unexempt property without exception, wherever it may be situated, and for the benefit, without exception, of all creditors, wherever they may reside.[65]

4563. Who may attack—If a creditor comes in under an invalid or fraudulent assignment and accepts benefits under it, he cannot thereafter attack it.[66] If a creditor assents to or confirms an assignment he cannot subsequently attack it.[67]

4564. Collateral attack—An assignment valid on its face is not subject to collateral attack.[68]

APPOINTMENT OF RECEIVER

4565. Grounds—An act, the natural tendency of which will be to give a preference, is a ground for a receiver.[69] An omission to move to set aside a garnishment or to make an assignment is a ground.[70] Evidence held to show no ground.[71]

4566. Who may petition—A creditor whose claim is not yet due may petition.[72]

4567. Time of application—The petition must be filed or the order to show cause served within the sixty-day limitation of the statute.[73]

4568. Petition—A petition based on the ground that a debtor has confessed judgment in favor of one of his creditors need not allege that the creditor thereby obtained a preference.[74] An allegation of a preference by means of a conveyance has been held sufficient.[75]

[58] Tripp v. N. W. Nat. Bank, 41-400, 43+60; Id., 45-383, 48+4; N. W. Nat. Bank v. Seeley, 41-404, 43+1152; Yanish v. Pioneer F. Co., 64-175, 66+198.

[59] Kinney v. Sharvey, 48-93, 50+1025.

[60] Smith v. Bean, 46-138, 48+687.

[61] Rollins v. Rice, 60-358, 62+325.

[62] Simon v. Mann, 33-412, 23+856.

[63] North Star B. & S. Co. v. Lovejoy, 33-229, 22+388.

[64] Tarbox v. Stevenson, 56-510, 58+157; May v. Walker, 35-194, 28+252. See § 3876.

[65] In re Harrison, 46-331, 48+1132.

[66] In re Walker, 37-243, 246, 33+852, 34+591; Olson v. O'Brien, 46-87, 48+453.

[67] Aberle v. Schlichenmeir, 51-1, 52+974.

[68] Bennett v. Denny, 33-530, 24+193; Second Nat. Bank v. Schranck, 43-38, 44+524; Holtoquist v. Clark, 59-59, 60+1077; Staples v. Schulenburg, 62-158, 64+148.

[69] In re Kollmann, 34-282, 25+602; Met. T. Co. v. Northern T. Co., 61-462, 63+1030.

[70] Maxfield v. Edwards, 38-539, 38+701.

[71] Meister v. Adamson, 61-166, 63+618.

[72] Citizens' Nat. Bank v. Minge, 49-454, 52+44.

[73] Foot v. Ofstie, 70-212, 73+4.

[74] In re Graeff, 30-476, 16+363.

[75] In re Stevens, 38-432, 38+111.

4569. Notice to creditors—A petition may be dismissed without notice to creditors who have not been joined and who are not known in the proceedings.[76]

4570. Venue—A petition may be heard in any county designated by the court.[77]

4571. After assignment—Where an assignment for the benefit of creditors is made pending an application for a receiver the court may deny the application and allow the assignment to stand.[78]

4572. Practice on hearing—The court is not restricted to proof by affidavits. It is required to receive all pertinent evidence and determine the petition summarily.[79] The debtor is not entitled to a jury trial.[80]

4573. Order of appointment—The court cannot, in the order appointing a receiver, vacate prior attachments or garnishments.[81]

4574. Foreign assignment—An assignment for the benefit of creditors in another state will not defeat a receivership in this state.[82]

4575. Estoppel—A creditor is not estopped from petitioning for a receiver by having accepted a dividend under an invalid assignment.[83]

ASSIGNEE OR RECEIVER

4576. Qualifications of assignee—He need not be a freeholder of the state.[84] The appointment of an unfit assignee, as distinguished from one legally incapable, does not vitiate an assignment.[85]

4577. Refusal of assignee to serve—The refusal of an assignee to serve does not defeat the assignment. The court may appoint another assignee.[86]

4578. Officer of court—An assignee or receiver is an officer of the court.[87] He is not an agent of the creditors. Though he may at times and for some purposes represent the creditors only, and again, under other circumstances, stand in the shoes of the insolvent, having no other or greater rights, he is in no sense an agent of either; he is the officer of the law.[88] His duties are defined by law, and not by the deed of assignment.[89]

4579. Bond—Liability—Sureties are not liable if the principal exercises good faith and reasonable diligence.[90]

4580. Title—The legal title and all the equitable interest of the insolvent in his unexempt property passes to the assignee or receiver.[91] The title of the assignee or receiver is official.[92] An assignee, in the case of the separate bankruptcy of one partner, can affect the joint property no further than the bankrupt himself. He has no right to change the possession, or to make any specific division of the joint effects. He takes only such an undivided share

[76] In re Studdart, 30-553, 16+452.
[77] R. L. 1905 § 4623. See, under former statute, In re Barnard, 30-512, 16+403.
[78] Hyde v. Weitzner, 45-35, 47+311.
[79] R. L. 1905 § 4623; Prouty v. Hallowell, 53-488, 55+623.
[80] In re Howes, 38-403, 38+104.
[81] In re Shakopee Mfg. Co., 37-91, 33+219.
[82] Rollins v. Rice, 60-358, 62+325.
[83] In re Walker, 37-243, 33+852, 34+591.
[84] Simon v. Mann, 33-412, 23+856.
[85] McKibbin v. Ellingson, 58-205, 59+1003.
[86] Holtoquist v. Clark, 59-59, 60+1077.
[87] Jenks v. Ludden, 34-482, 27+188; Thomas v. Foote, 46-240, 48+1019; Kinney v. Sharvey, 48-93, 50+1025; Johnson v. Laybourn, 56-332, 57+935; Forepaugh v. Westfall, 57-121, 58+689; Gunn v. Smith, 71-281, 73+842.
[88] Thomas v. Foote, 46-240, 48+1019.
[89] Forepaugh v. Westfall, 57-121, 58+689.
[90] In re Robbins, 36-66, 30+304. See McCollister v. Bishop, 78-228, 80+1118 and § 605.
[91] Donohue v. Ladd, 31-244, 17+381; Lord v. Meachem, 32-66, 19+346; Williamson v. Selden, 53-73, 54+1055; State v. Nelson, 79-373, 82+674. See Haven v. Place, 28-551, 11+117.
[92] Kinney v. Sharvey, 48-93, 50+1025; Johnson v. Laybourn, 56-332, 57+935; King v. Remington, 36-15, 29+352.

or interest therein as the bankrupt himself had, and in the same manner as he held it; that is to say, subject to all of the rights and liens of the other partners. And he is entitled only to the balance which is ascertained to be due the bankrupt after all the partnership debts are paid, and a division is made of the surplus.[93] The assignee or receiver takes the property and deals with it as a common-law assignee would, subject to all valid liens against it at the date of the assignment.[94] He succeeds to a mechanic's lien to which the insolvent was entitled.[95] He stands in the shoes of the insolvent.[96]

4581. Sales—Rights of purchasers—A purchaser from an assignee has been held not entitled to avoid a mortgage placed on the property before the assignment by the insolvent, on the ground of fraud or want of consideration.[97] A sale carries no implied warranty.[98]

4582. Notice to assignee or receiver not notice to creditors—Notice to an assignee or receiver is not notice to the creditors.[99]

4583. Liability—Good faith—Diligence—An assignee is liable only for the failure to exercise good faith and reasonable diligence in the administration of his trust.[1]

4584. Liability for interest—An assignee or receiver is not liable for interest on the trust funds unless he wrongfully commingles them with his own funds or makes other improper use of them.[2]

4585. Liability for rent—An assignee does not accept a leasehold interest, and the burdens thereof, by merely accepting the trust. If he accepts a lease he is liable for the rent while he holds the leasehold interest. He may go upon the leased premises and there perform his trust by selling the assigned goods, or even continuing the business a short time under the direction of the court, without thereby electing to take the lease, especially if no step is taken by the landlord or assignor to compel him to elect.[3]

4586. Fraud—If a receiver makes a fraudulent sale he is accountable for the full value of the property and an ex parte order confirming the sale is not conclusive on the creditors.[4]

4587. Compensation—The compensation of assignees and receivers is regulated by statute.[5] If they are guilty of fraud, wilful neglect, or gross negligence, they are not entitled to any compensation.[6] A judgment has been held properly subordinated to an assignee's claim for services.[7] An assignee has been held not entitled to a lien on certain funds obtained from the sale of property belonging to the insolvent.[8] Where an assignee has failed to comply with the order of the court to turn over all money and property in his hands to his successor, the court may refuse to pass upon and allow his account for services and disbursements until he complies with the order.[9] The attorney of an assignee cannot appeal from an order disallowing the claim for compensation for the assignee and his attorney.[10] The insolvent may appeal from the allowance.[11]

93 In re Allen, 41–430, 43+382.
94 In re Church, 40–39, 41+241.
95 Miller v. Condit, 52–455, 55+47.
96 Head v. Miller, 45–446, 48+192.
97 New Prague M. Co. v. Schreiner, 70–125, 72+963; Olson v. Hanson, 74–337, 77+231.
98 Johnson v. Laybourn, 56–332, 57+935.
99 Thomas v. Foote, 46–240, 48+1019.
1 In re Robbins, 36–66, 30+304 (failure to pay dividend—loss of releases).
2 In re Shotwell, 49–170, 51+909, 52+1078; Davis v. Swedish etc. Bank, 78–408, 80+953, 81+210.
3 Forepaugh v. Westfall, 57–121, 58+689; Nelson v. Kalkhoff, 60–305, 62+335.
4 In re Shea, 57–415, 59+494.
5 R. L. 1905 § 4635; Gallagher v. Walsh, 60–527, 63+108; In re Shotwell, 49–170, 51+909; Reeves v. Hastings, 61–254, 63+633.
6 Davis v. Swedish etc. Bank, 78–408, 80+953, 81+210.
7 Hay v. Bacon, 80–188, 83+134.
8 Clark v. Richards, 74–305, 77+213.
9 In re State Bank, 57–361, 59+315.
10 Davis v. Swedish etc. Bank, 78–408, 80+953, 81+210.
11 Reeves v. Hastings, 61–254, 63+633.

4588. Removal—Provision is made by statute for the removal of an assignee or receiver by the court and the appointment of another.[12]

4589. Actions by—Fraudulent conveyances—An assignee or receiver may maintain an action in his own name, without joining the insolvent or creditor, to set aside fraudulent conveyances or preferences of the insolvent. It is unnecessary for him to first obtain leave of court or to reduce the claims of creditors to judgment.[13] He is presumed to represent creditors who are entitled to attack the transfer.[14] He may sue a United States marshal for a conversion of the assigned property.[15] Where an insolvent has transferred his personalty to defraud his creditors, his assignee or receiver in insolvency may avoid such sale by demanding of the fraudulent vendee a return of the property; and, if the demand is refused, he may replevy the property, or sue the vendee for the value thereof. He is not required to first bring an equitable action to set aside the sale.[16] He may assert the invalidity of mortgages on the assigned property on the ground of usury.[17] A receiver of the insolvent estate of one member of a partnership cannot maintain an action to set aside as preferential a conveyance of real and personal property belonging to a partnership and of its assets, given to secure a firm debt.[18]

4590. Actions against—An action will not ordinarily lie against an assignee personally upon a contract which he made "as assignee."[19] An action may be brought in any court having jurisdiction of the amount involved.[20] In replevin against an assignee, evidence of long possession, payment of taxes, etc., by the assignor, has been held admissible.[21] An assignee, sued as an individual for the wrongful detention of funds, has been held not entitled to a dismissal because he was not sued in his representative capacity.[22]

PREFERENCES

4591. Definition—A preference is the paying or securing of one or more creditors, in whole or in part, to the exclusion of the rest—a payment to one creditor, which will give or may possibly give him an advantage over others.[23]

4592. Essential elements—To avoid a preference three things must concur: (1) the insolvency of the debtor; (2) notice to the creditor of such insolvency; (3) an intent on the part of the debtor to give a preference, or that a preference should be obtained.[24]

[12] R. L. 1905 § 4630; Bennett v. Denny, 33–530, 24+193 (statute commented upon); In re Nicolin, 55–130, 56+587 (who may petition for removal—procedure on hearing of petition—right of a majority of creditors to cause removal); In re Nicolin, 59–323, 61+330 (assignee not entitled to be reimbursed for expenses of appeal from order removing him); Lyman v. Spencer, 70–183, 72+1066 (adverse interests of assignee ground for removal—appeal—review of evidence—record on appeal); Gunn v. Smith, 71–281, 73+842 (order of removal not appealable).

[13] R. L. 1905 § 4617; Moore v. Hayes, 35–205, 28+238; Merrill v. Ressler, 37–82, 33+117; Tripp v. N. W. Nat. Bank, 45–383, 48+14; Chamberlain v. O'Brien, 46–80, 48+447; Reilly v. Bader, 46–212, 48+909; Thomas v. Foote, 46–240, 48+1019; Gallagher v. Rosenfield, 47–507, 50+696; St. Paul etc. Co. v. Berkey, 52–497, 55+60; Shay v. Security Bank, 67–287, 69+920; Clark v. Richards, 68–282, 71+389; Thomas v. Drew, 69–69, 71+921; Kellogg v. Kelley, 69–124, 71+924; New Prague M. Co. v. Schreiner, 70–125, 72+963; Davies v. Dow, 80–223, 83+50.

[14] Shay v. Security Bank, 67–287, 69+920; Davies v. Dow, 80–223, 228, 83+50; Oliver v. Hilgers, 88–35, 92+511.

[15] Bennett v. Denny, 33–530, 24+193 (affirmed 128 U. S. 489).

[16] Rossman v. Mitchell, 73–198, 75+1053.

[17] Stein v. Swensen, 44–218, 46+360.

[18] Masterman v. Lumbermen's Nat. Bank, 61–299, 63+723.

[19] Hayes v. Crane, 48–39, 50+925.

[20] Church v. St. Paul etc. Co., 58–472, 59+1103.

[21] Dailey v. Linnehan, 42–277, 44+59.

[22] Stein v. Swensen, 44–218, 46+360.

[23] In re Stevens, 38–432, 38+111.

[24] Baumann v. Cunningham, 48–292, 51+611; Schlitz B. Co. v. Childs, 65–409, 68+65; Fisher v. Utendorfer, 68–226, 71+29.

4593. What constitutes—In general—A payment or transfer may constitute a preference though it was given merely to secure further credit, with the hope of being enabled to continue in business.[25] A payment on a secured debt may be a preference if the security is inadequate. It cannot be a preference if the payment is made out of the proceeds of the security.[26] A payment or transfer may be a preference though it is made in pursuance of a prior lawful agreement.[27] An indorsement of a firm note by a partner has been held not to fall within the statute, so as to render it unlawful, though it operated as a preference.[28] A preference may be in the form of a sale;[29] a deposit in a bank, applied by the bank to the payment of its claim against the depositor;[30] a delivery of property to a creditor or acquiesence in his taking;[31] a return of merchandise;[32] a chattel mortgage;[33] or a note of a third party.[34]

4594. Fraudulent intent—It is essential that the debtor should intend to give a preference or that a preference should be obtained.[35] When the necessary consequence of an act is to give a preference the intent to give it is conclusively presumed.[36] When a debtor knows that he is insolvent and pays or gives security to one creditor to the full amount of his claim, and is unable to pay or secure others, the intent to prefer is conclusively presumed.[37]

4595. Who is a creditor—The holder of a wheat ticket or receipt issued by a warehouseman is a creditor within the statute relating to preferences.[38] Sureties are placed on the same footing as creditors by the statute.[39] A mortgagee has been held not a creditor.[40]

4596. Security given—An agreement to give security is not a "security given" within the meaning of the statute, at least, when the agreement cannot be specifically enforced in equity.[41]

4597. Judgments—If an insolvent debtor allows a judgment to be taken against him without opposition, and with an intent to allow a preference to be secured thereby, the judgment is avoidable as a preference, if the creditor had reasonable cause to believe the debtor was insolvent. It is a "security given" within the statute.[42] The fraudulent intent is not inferable from the mere fact that the judgment debtor does not make an assignment for the benefit of creditors.[43]

4598. Cause to believe debtor insolvent—A preference is avoidable if the creditor to whom it is given has reasonable cause to believe that the debtor is

[25] Corliss v. Jewett, 36-364, 31+362; Penney v. Haugen, 61-279, 63+728.
[26] Duluth T. Co. v. Clark, 69-324, 72+127; Clarke v. Nat. Citizens' Bank, 74-58, 76+965, 1125.
[27] Grant v. Mpls. B. Co., 68-86, 70+868.
[28] Davis v. Cobb, 81-167, 83+505.
[29] In re Howes, 38-403, 38+104; Parsons v. George, 44-151, 46+325; Thompson v. Johnson, 55-515, 57+223; Clarke v. Nat. Citizens' Bank, 74-58, 76+965, 1125.
[30] Tripp v. N. W. Nat. Bank, 45-383, 48+4.
[31] Hawkes v. Fraser, 52-201, 53+1144.
[32] Fishel v. Burt, 69-250, 72+109.
[33] Parsons v. George, 44-151, 46+325; Schlitz v. Childs, 65-409, 68+65; Grant v. Mpls. B. Co., 68-86, 70+868; Henderson v. Kendrick, 72-253, 75+127.
[34] Cumbey v. Ueland, 72-453, 75+727. See Reilly v. Bader, 46-212, 48+909.
[35] Wright v. Fergus Falls Nat. Bank, 48-120, 128, 50+1030; Baumann v. Cunningham, 48-292, 51+611; Penney v. Haugan, 61-279, 63+728; Schlitz v. Childs, 65-409, 68+65; Bean v. Scheffer, 68-33, 70+854; Fisher v. Utendorfer, 68-226, 71+29; Moore v. Am. L. & T. Co., 80 Fed. 49.
[36] Penney v. Haugan, 61-279, 63+728.
[37] Hastings M. Co. v. Heller, 47-71, 49+400; Thompson v. Johnson, 55-515, 57+223; Tripp v. N. W. Nat. Bank, 45-383, 48+4; Penney v. Haugan, 61-279, 63+728; Fisher v. Utendorfer, 68-226, 71+29. See In re Howes, 38-403, 38+104.
[38] Daniels v. Palmer, 41-116, 42+855.
[39] Weston v. Sumner, 31-456, 18+149.
[40] Hanson v. White, 75-523, 78+111.
[41] Grant v. Mpls. B. Co., 68-86, 70+868; Chickering v. White, 42-457, 44+988.
[42] Wright v. Fergus Falls Nat. Bank, 48-120, 50+1030; Yanish v. Pioneer F. Co., 60-321, 62+387; Id., 64-175, 66+198; Bean v. Scheffer, 68-33, 70+854; Fisher v. Utendorfer, 68-226, 71+29; In re Church, 40-39, 41+241.
[43] Fisher v. Utendorfer, 68-226, 71+29.

insolvent.[44] It is not essential that he should actually believe in such insolvency; it is sufficient, if he has knowledge of facts that would cause such belief in a man of ordinary intelligence and prudence. If he knows facts which would put a person of ordinary intelligence and prudence upon inquiry he is charged with notice of the facts that such inquiry would disclose.[45] A mere suspicion of insolvency is not enough to charge the creditor. While he cannot shut his eyes to suspicious circumstances which should put him upon inquiry, yet he must have reasonable cause to believe in the insolvency.[46] It requires more to charge a creditor with knowledge of the insolvency of a debtor who is not engaged in a commercial pursuit than in the case of one who is so engaged.[47] A reputation for solvency is admissible to prove that the creditor did not have reasonable cause to believe the debtor insolvent.[48] An order appointing a receiver upon a petition alleging a preference is not an adjudication that the creditor alleged to be preferred had reasonable cause to believe the debtor insolvent.[49]

4599. To non-resident creditor—A preferential transfer of property in this state to a non-resident creditor is voidable under the statute of this state.[50]

4600. Transfer to creditor and others—When a preference is given by a transfer to a creditor and others who pay part of the price, the transfer will not be valid as to them if they knew the purpose was to give a preference to the creditor.[51]

4601. Part payment for transfer—A preference in the form of a transfer of property is not partly valid because the creditor, to secure the preference, paid in money part of the agreed price of the property.[52]

4602. Change of possession—The "delivery or change of possession" required by R. L. 1905 § 4626 must be actual and not merely constructive or symbolical. The words "such conveyances" in the second clause of the section refer to those described in the first clause. The provisions of the second clause are not limited to cases where the contract of sale or conveyance is in writing.[53]

4603. Time—The time within which a preference is unlawful is to be computed from the date of the filing the petition by creditors for the appointment of a receiver in insolvency or from the date of the filing of an assignment for the benefit of creditors.[54] A preference made within the prohibited period is unlawful though it is made pursuant to an agreement made prior to such period.[55]

4604. Voidable—Not void—How avoided—A preference is not void, but merely voidable, and in the absence of actual fraud only voidable in favor of proceedings under and in aid of the insolvency law.[56] It is not avoided by the

[44] R. L. 1905 § 4626; Weston v. Sumner, 31–456, 18+149; Williamson v. Hatch, 55–344, 57+56.

[45] Noyes v. Gill, 35–289, 28+711; Daniels v. Palmer, 35–347, 29+162; Daniels v. Bank of Zumbrota, 35–351, 29+165; Corliss v. Jewett, 36–364, 31+362; Parsons v. George, 44–151, 46+325; Holcombe v. Ehrmanntraut, 46–397, 49+191; Hastings M. Co. v. Heller, 47–71, 49+400; Baker v. Wyman, 47–177, 49+649; Dow v. Sutphin, 47–479, 50+604; Williamson v. Hatch, 55–344, 57+56; Thompson v. Johnson, 55–515, 57+223; Mahoney v. Hale, 66–463, 69+334; Bean v. Scheffer, 68–33, 70+854; Pattridge v. Jessup, 69–33, 71+916; Kells v. Webster, 71–276, 73+962; Moore v. Am. L. & T. Co., 80 Fed. 49.

[46] Daniels v. Bank of Zumbrota, 35–351, 29+165; Kells v. Webster, 71–276, 73+962.

[47] Williamson v. Hatch, 55–344, 57+56.

[48] Hahn v. Penney, 60–487, 62+1129; Id., 62–116, 63+843.

[49] Baker v. Wyman, 47–177, 49+649.

[50] Macdonald v. First Nat. Bank, 47–67, 49+395; In re Kahn, 55–509, 57+154.

[51] Thompson v. Johnson, 55–515, 57+223.

[52] Id.

[53] Chickering v. White, 42–457, 44+988. See Weston v. Sumner, 31–456, 18+149.

[54] Beardslee v. Beaupre, 44–1, 46+137.

[55] Grant v. Mpls. B. Co., 68–86, 70+868. See Williams v. Clark, 47–53, 49+398.

[56] Smith v. Deidrick, 30–60, 14+262; Berry v. O'Connor, 33–29, 21+840; Bannon v. Bowler, 34–416, 26+237; Moore v. Hayes, 35–205, 28+238; Smith v. Brainerd,

mere filing of a petition for a receiver.[57] The receiver of an insolvent debtor, under the statute, may maintain an action, without first obtaining leave from the court, to avoid a disposition of property whereby a creditor is preferred.[58] An assignee or receiver may, on the ground that it is a fraudulent preference, test the validity of a mortgage given to a creditor by an insolvent debtor, in any action brought against him in which the creditor's rights as a mortgagee are involved.[59]

4605. Who may avoid—A preference is avoidable in an action by a receiver [60] or assignee [61] in insolvency, and without first obtaining leave of court to sue.[62] It is not avoidable by any other person.[63] The debtor is not a necessary party to an action.[64]

4606. Pleading—A complaint in intervention has been held insufficient for the purpose of avoiding a note as a preference.[65]

4607. Remedies—Upon a preferential conveyance of land the remedy is a recovery of the land. An assignee cannot refuse to take it back and elect to recover its value.[66]

4608. Refundment by creditor—A creditor cannot be required to refund, as an unlawful preference, money which he has not received but which a purchaser from the insolvent had promised to pay him.[67]

4609. Damages—Judgment—A judgment declaring a transfer void relates back to its date, so that the transferee may be charged with the value of the use of the property, and for the damages to it while in his possession; and if, when, pursuant to the judgment, the property is delivered to the assignee, it appears to have been damaged, the court may then ascertain the amount thereof, and modify the judgment accordingly.[68]

PROOF AND ALLOWANCE OF CLAIMS

4610. What provable—A claim for rent accruing after an assignment by the lessee is not provable.[69] A debt is allowable though not yet due and though secured by the liability of a third party as surety.[70] A judgment in an action begun after an assignment is not provable.[71] In the case of an assignment by a firm of both individual and firm property either an individual or firm debt is provable.[72] Contingent claims are not provable.[73]

4611. Statute of limitations—Insolvency proceedings stop the running of the statute of limitations.[74]

4612. Bona fides of debt—The validity and bona fides of a debt has been held not affected by conduct of the debtor toward other creditors.[75]

37–479, 35+271; In re Church, 40–39, 41+241; Mackellar v. Pillsbury, 48–396, 51+222; Haugan v. Sunwall, 60–367, 62+398; Fisher v. Utendorfer, 68–226, 71+29; Dyson v. St. Paul Nat. Bank, 74–439, 77+236; Davis v. Cobb, 81–167, 83+505; Aretz v. Kloos, 89–432, 95+216, 769.

57 Williamson v. Hatch, 55–344, 57+56.

58 Moore v. Hayes, 35–205, 28+238.

59 Dow v. Sutphin, 47–479, 50+604.

60 Weston v. Loyhed, 30–221, 14+892; Moore v. Hayes, 35–205, 28+238; Parsons v. George, 44–151, 46+325; Bliss v. Doty, 36–168, 30+465; Beardslee v. Beaupre, 44–1, 46+137; Dow v. Sutphin, 47–479, 50+604.

61 In re Church, 40–39, 41+241; Dow v. Sutphin, 47–479, 50+604; Thompson v. Johnson, 55–515, 57+223.

62 Moore v. Hayes, 35–205, 28+238.

63 Smith v. Brainerd, 37–479, 35+271; Haugan v. Sunwall, 60–367, 62+398; Fisher v. Utendorfer, 68–226, 71+29.

64 Williamson v. Selden, 53–73, 54+1055.

65 Reilly v. Bader, 46–212, 48+909.

66 Clerihew v. West Side Bank, 50–538, 52+967.

67 Grant v. Mpls. B. Co., 68–86, 70+868.

68 Thompson v. Johnson, 55–515, 57+223; Cumbey v. Ueland, 72–453, 75+727.

69 Wilder v. Peabody, 37–248, 33+852; In re Shotwell, 49–170, 51+909, 52+1078.

70 Citizens' Nat. Bank v. Minge, 49–454, 52+44.

71 Clark v. Richards, 72–397, 75+605.

72 Clark v. Lindeke, 43–463, 45+863.

73 Markell v. Ray, 75–138, 77+788.

74 In re St. Paul etc. Co., 58–163, 59+996.

75 Townsend v. Johnson, 34–414, 26+395

4613. Waiver—A contract between a claimant and the assignor has been held to preclude the allowance of a claim.[76] A creditor may prove his claim though he has previously contested an assignment.[77]

4614. Creditors with a security or lien—Creditors with a security or a lien may prove their claims the same as other creditors, without surrendering or exhausting their securities.[78]

4615. Benefits from act of creditor—If a creditor takes proceedings that result in a saving to the estate he is sometimes entitled to reimbursement out of the estate for his expenses.[79]

4616. Claim against assignee—A person having a claim against an assignee, incurred by the latter while administering the trust, may present the same, by petition, complaint, or motion to the court in which the insolvency proceedings are pending, for allowance, and for payment by such assignee under order of court.[80]

4617. Attorney's fees—An attorney, requested by an assignee to complete foreclosure proceedings, but later directed by the assignee to discontinue them, has been held not entitled to be paid in full out of the trust estate, but entitled to prove his claim as a general creditor.[81]

4618. Powers of court—Conditions—Preferences—The court may refuse to allow the claim of a creditor who has received a preference except on the condition that he restore to the assignee what he has received. And this is so whether the preference is on the claim he presents for allowance or upon some other. Such a creditor cannot, by transferring his claim, put his transferee in any better position in this respect than himself.[82]

4619. Allowance—Powers of assignee or receiver—Claims are presented in the first instance to the assignee or receiver for allowance and his decision thereon is final if acquiesced in.[83] He cannot reconsider a claim. After he has allowed or disallowed a claim his power is functus officio.[84]

4620. Leave to file out of time—The matter of allowing a creditor to file his claim after the time limited is largely discretionary with the trial court.[85]

4621. Appeal to district court—An appeal under Laws 1881 c. 148 § 8 from the disallowance of a claim is to be tried in the district court without reference to the proof offered to the assignee.[86] The debtor or other party interested in the assets is entitled to a review by the district court.[87] An objection that no issues were framed has been held too late.[88]

RELEASES—DISCHARGE OF DEBTOR

4622. Sufficiency—A reservation in a release of all rights of the creditor as against other debtors than the insolvent is harmless.[89]

[76] Clark v. Lindeke, 44–112, 46+326; Id., 44–179, 46+339.
[77] In re Van Norman, 41–494, 43+334.
[78] Swedish etc. Bank v. Davis, 64–250, 66+986; Mead v. Randall, 68–233, 71+31. See Smith v. Brainerd, 37–479, 35+271; In re Church, 40–39, 41+241; Mercantile Nat. Bank v. Macfarlane, 71–497, 74+287.
[79] Swedish etc. Bank v. Davis, 71–508, 74+286; Lane v. Hale, 78–421, 81+218; Merrick v. Bonness, 66–135, 68+850.
[80] Fitterling v. Welch, 76–441, 79+500.
[81] Merrick v. Putnam, 73–240, 75+1047.
[82] In re Kahn, 55–509, 57+154.
[83] In re Minnehaha etc. Assn., 53–423, 55+598.
[84] Robitshek v. Swedish etc. Bank, 68–206, 71+7; Id., 72–319, 75+231.
[85] Richter v. Merchants Nat. Bank, 65–237, 67+995; Clark v. Squier, 62–364, 64+908; Neff v. Clark, 95–1, 103+562.
[86] Crane v. Wheeler, 48–207, 50+1033.
[87] In re Minnehaha etc. Assn., 53–423, 55+598; Robitshek v. Swedish etc. Bank, 68–206, 71+7.
[88] Swedish etc. Bank v. Davis, 69–181, 72+62.
[89] Nat. G. A. Bank v. Wilder, 35–94, 27+201.

4623. Assignment not requiring releases—When an assignment is by its terms made for the benefit of all creditors, and not merely those who execute releases, no release can be exacted as a condition of sharing in the estate.[90]

4624. Acceptance of dividend—The acceptance of a dividend does not discharge the debtor.[91]

4625. By whom—The release may be executed by the original holder of the demand or any subsequent owner thereof.[92]

4626. Effect of release—A release does not discharge the insolvent.[93] It is provided that the release of a debtor shall not operate to discharge any other party liable as surety, guarantor, or otherwise, for the same debt.[94] This includes stockholders.[95] A release does not limit the judgment of discharge.[96]

4627. Distribution without releases—Fraud—Provision is made for a distribution of the assets without releases where the debtor has been guilty of certain forms of fraud or failure to keep sufficient books of account.[97]

4628. Judgment of discharge—It is the judgment, not the release, which discharges the debtor. The judgment derives its force from the law and not from the act of the creditor.[98] It discharges the debtor from all claims on debts, whether filed or not, held by a creditor who files a claim and receives a dividend,[99] but it does not release a security given for a claim not filed.[1] The judgment is not limited by the release.[2] It was held that a judgment under a former statute was void unless it appeared that the required notice to creditors had been given.[3]

4629. Discharge under Laws 1895 c. 67—Provision was made by Laws 1895 c. 67 for special proceedings to recover an absolute discharge whether creditors filed releases or not.[4] The act of 1895 was repealed by Laws 1897 c. 264.

DISTRIBUTION

4630. Deed of assignment controls—Distribution must be made in accordance with the terms of the trust as declared in the deed of assignment.[5]

[90] In re Bird, 39–520, 40+827.

[91] Megins v. Pary, 72–113, 75+120.

[92] R. L. 1905 § 4631. See, prior to Laws 1895 c. 66, Adamson v. Cheney, 35–474, 29+71; Kimball v. Coon, 45–45, 47+315.

[93] Nat. G. A. Bank v. Wilder, 35–94, 27+201; In re Walker, 37–243, 33+852, 34+591; Megins v. Pary, 72–113, 75+120.

[94] R. L. 1905 § 4621. See Ames v. Wilkinson, 47–148, 49+696.

[95] Tripp v. N. W. Nat. Bank, 41–400, 43+60; Willis v. Mabon, 48–140, 50+1110. See, prior to statute, Mohr v. Minn. El. Co., 40–343, 41+1074.

[96] Kimball v. Coon, 45–45, 47+315.

[97] R. L. 1905 § 4631; In re Gazett, 35–532, 29+347 (a mere preference insufficient—complaint held sufficient); In re Rees, 39–401, 40+370 (dishonest disclosure of debtor); In re Lyons, 42–19, 43+568 (evidence held not to show fraud); In re Miller, 42–96, 43+840 (dealing in options after insolvency held not to show fraud); In re Welch, 43–7, 44+667 (inability to account for expenditures—purchase of homestead in wife's name—estoppel—statements to creditors—application of statute); In re Shotwell, 43–389, 45+842 (actual intent to cheat and defraud necessary—dishonest disclosure); In re Harrison, 46–331, 48+1132 (appealability of order dismissing petition—requisites of petition—fraud committed out of state or in relation to property out of state within statute); Ekberg v. Schloss, 62–427, 64+922 (sufficiency of books of account); Work v. Holmboe, 64–383, 67+205 (id.); Dunham v. Messing, 68–257, 70+1128 (id.); Farwell v. Dickinson, 60–528, 63+109 (fraud in contracting debt—sufficiency of books of account); Merrick v. Bonness, 66–135, 68+850 (attorney held not entitled to compensation for securing order dispensing with releases).

[98] Nat. G. A. Bank v. Wilder, 35–94, 27+201; In re Walker, 37–243, 33+852, 34+591; Kimball v. Coon, 45–45, 47+315; Megins v. Pary, 72–113, 75+120.

[99] Kimball v. Coon, 45–45, 47+315.

[1] Nicolay v. Mallery, 62–119, 64+108. See First Nat. Bank v. Pope, 85–433, 89+318.

[2] Kimball v. Coon, 45–45, 47+315.

[3] Ullman v. Lion, 8–381(338).

[4] Lambert v. Scand. etc. Bank, 66–185, 68+834; Union Bank v. Rugg, 78–256, 80+1121; Davis v. Swedish etc. Bank, 78–408, 80+953, 81+210.

[5] In re Bird, 39–520, 40+827; In re Fuller, 42–22, 43+486.

4631. Equity rules applicable—The distribution is governed by the rules of equity, except as otherwise provided by statute.[6]

4632. Equality—Where a receiver was held accountable for the full value of property fraudulently sold by him, it was held that all the creditors were entitled to share in the increased assets, though all did not object to the sale.[7]

4633. Preferred claims—The state is a preferred creditor.[8] Cases are cited below holding various claims not preferred.[9]

4634. Liens—Priorities—The insolvency law does not authorize the receiver or assignee to sell the property free from incumbrances, and distribute the proceeds to those entitled, first to lienholders according to their priorities, and then to the general creditors. Nor does it authorize the lienholder to foreclose his lien in the insolvency proceedings.[10]

4635. Compromise—Termination of proceedings—Where, in pursuance of a compromise between the parties interested in an insolvent estate, the court ordered the assignee to turn over the estate to a trustee, it was held that the insolvency proceedings were thereby terminated and the trust not a proceeding in court.[11]

4636. As between firm and individual creditors—Where there are both firm and individual assets for distribution, the firm assets will be first applied to the payment of the firm debts; and the individual assets to the payment of the individual debts of the partners. If there is a surplus in either fund, after paying in full the creditors to whom it primarily belongs, it will be carried to the other fund, and distributed as a part thereof.[12]

4637. Surrender or exhaustion of securities—A creditor cannot share in the distribution unless he exhausts or surrenders his securities.[13] If a creditor files a release and accepts a dividend without disclosing a security he will ordinarily be held to have waived it.[14]

4638. Surplus—Any surplus remaining after the distribution and the payment of the expenses of the administration reverts to the insolvent.[15]

INSPECTION

Cross-References

See Animals, 278; Discovery; Evidence, 3262 (physical examination of plaintiff).

4639. Inspection of illuminating oils—Statute—Provision is made by statute for the inspection of illuminating oils.[16] The validity of the statute

[6] Hawkins v. Mahoney, 71–155, 73+720; Plymouth C. Co. v. Seymour, 67–311, 69+1079. See Mackellar v. Anchor Mfg. Co., 48–549, 51+616.

[7] In re Shea, 57–415, 59+494.

[8] R. L. 1905 § 4633. See State v. Northern T. Co., 70–393, 73+151; In re Western Implement Co., 166 Fed. 576.

[9] In re Seven Corners Bank, 58–5, 59+633; Bishop v. Mahoney, 70–238, 73+6; St. Paul v. Seymour, 71–303, 74+136; Brusegaard v. Ueland, 72–283, 75+228.

[10] In re Church, 40–39, 41+241.

[11] State v. Young, 44–76, 46+204.

[12] Hawkins v. Mahoney, 71–155, 73+720. See Davis v. Cobb, 81–167, 83+505.

[13] Swedish etc. Bank v. Davis, 64–250, 66+986; Id., 69–181, 72+62; First Nat. Bank v. Pope, 85–433, 89+318.

[14] First Nat. Bank v. Pope, 85–433, 89+318.

[15] Donohue v. Ladd, 31–244, 17+381; In re Mann, 32–60, 19+347; Simon v. Mann, 32–65, 19+347; King v. Remington, 36–15, 32, 29+352; First Nat. Bank v. Randall, 38–382, 37+799; Atwater v. Manchester S. Bank, 45–341, 48+187; Smith v. Bean, 46–138, 48+687; Kinney v. Sharvey, 48–93, 50+1025; State v. Nelson, 79–373, 82+674; Joswich v. Faber, 93–387, 101+614; N. W. etc. Co. v. Murphy, 103–104, 114+360.

[16] R. L. 1905 §§ 1724–1733. See State v. Barrows, 71–178, 73+704 (term of office of inspectors—discharge of deputy—reinstatement—preference for Union soldiers).

has been sustained against various objections.[17] The original statute did not include in its prohibitions the sale of oil after it had been properly inspected and branded, though it had been subsequently removed to an unbranded receptacle, from which it was sold.[18] The statute contemplates an inspection of oils in tank railroad cars without reference to the will of the owner. If the owner removes the oil from such tank cars without inspection, the inspector may follow and inspect it in the place to which it is taken, and charge the same fees as for inspecting in the tank car. Such oils, when subject to the inspection laws of this state, and held and designed for sale in this state, may be inspected, though not yet put upon the market for sale.[19]

INSPECTION OF DOCUMENTS—See Discovery.
INSPECTORS OF BOILERS—See Steam, 9003.
INSTITUTION—See note 20.
INSTRUCTIONS—See Appeal and Error; Criminal Law, 2479; New Trial, 7165; Trial, 9781–9800.

[17] Willis v. Standard Oil Co., 50–290, 52+ 652.
[18] State v. Finch, 37–433, 34+904.
[19] Willis v. Standard Oil Co., 50–290, 52+ 652.
[20] Nobles County v. Hamline University, 46–316, 317, 48+1119.

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Cross-References

See Exemptions, 3689; Mortgages, 6275; Taxation, 9568.

IN GENERAL

4640. Nature—Insurance is defined by statute.[21] The words "contract" and "policy" are generally used synonymously.[22] The contract is always personal.[23] Indemnity is the basis of fire insurance,[24] but not of life insurance.[25] The ordinary forms of insurance are not contrary to public policy as gambling contracts.[26]

4641. Insurable interest—It is a general rule, based on considerations of public policy, that the beneficiary of a policy of insurance should have an insurable interest. This rule, however, does not prevent one holding insurance

[21] R. L. 1905 § 1596; State v. Beardsley, 88–20, 92+472; Physicians' D. Co. v. O'Brien, 100–490, 111+396. See, for other definitions, State v. Federal I. Co., 48–110, 50+1028; Physicians' D. Co. v. O'Brien, 100–490, 496, 111+396.

[22] Wilkins v. State Ins. Co., 43–177, 45+1.

[23] Culbertson v. Cox, 29–309, 13+177.

[24] N. W. etc. Co. v. Rochester etc. Co., 85–48, 52, 88+265.

[25] Note, 128 Am. St. Rep. 303. See, contra, State v. Federal I. Co., 48–110, 50+1028; Taylor v. Grand Lodge, 96–441, 447, 105+408.

[26] State v. U. S. Ex. Co., 95–442, 448, 104+556.

from disposing of the benefit by will.[27] It is probably unnecessary that an assignee of a life policy should have an insurable interest.[28] The following have been held to have an insurable interest: a carrier in goods shipped;[29] a creditor in the life of his debtor;[30] and a vendee in possession under a conditional sale.[31]

4642. Contract to insure—Breach—Damages—A person may maintain an action to recover damages for the breach of a contract to insure his property against loss by fire, and the measure of damages, in case of the destruction of the same, is the value thereof, up to the amount for which it was agreed that insurance and indemnity should be procured. The relationship established by such an agreement seems to be that of principal and agent.[32]

4643. Insurance against loss from negligence—A contract of insurance against loss by fire occasioned by the negligence of the insured is not contrary to public policy.[33]

4644. Credit insurance—Laws 1881 c. 123 authorizes the business of insurance against losses resulting from the insolvency of those to whom goods are sold on credit.[34]

4645. Recovery of premiums paid—When a policy of insurance never attaches, and no risk is assumed, the insured may recover back the premiums, unless he has been guilty of fraud, or the contract is illegal and he is in pari delicto. But the insurer is not obliged to return, or offer to return, the premiums which have been paid voluntarily before notice of the fact that the policy is not in force, as a condition precedent to availing itself of its defence to an action on the policy.[35]

THE CONTRACT

4646. The policy the contract—Attaching papers—By statute all the terms of the contract must be incorporated in the policy or attached thereto. The application is no part of the policy unless it is so incorporated or attached.[36] Formerly the application,[37] or any other document,[38] might be made a part of the contract or policy by apt words of reference. Attaching a copy of an application to a policy with mucilege has been held an "indorsement" of the application, within the meaning of a policy.[39]

4647. Oral contract—A contract to insure, the insurance to commence within a year, is not within the statute of frauds.[40] Where there is an oral contract, a policy to be subsequently issued, and there is nothing said about conditions, it is presumed that the parties intended to have inserted in it the conditions usual in such cases, or such as have been before used by the parties.

[27] Middelstadt v. Grand Lodge, 107-228, 120+37. See Cash v. Concordia etc. Co., 126+524; 23 Harv. L. Rev. 57.

[28] Hogue v. Minn. etc. Co., 59-39, 43, 60+812; Brown v. Equitable etc. Soc., 75-412, 419, 78+103, 671, 79+968.

[29] Mpls. etc. Ry. v. Home Ins. Co., 64-61, 66+132.

[30] Hale v. Life Indemnity etc. Co., 65-548, 68+182.

[31] Holbrook v. St. Paul etc. Co., 25-229. See Kells v. N. W. etc. Co., 64-390, 67+215, 71+5.

[32] Everett v. O'Leary, 90-154, 95+901. See MacDonell v. Keller, 90-321, 96+785.

[33] Quirk v. Mpls. etc. Ry., 98-22, 107+742.

[34] Hayne v. Met. Trust Co., 67-245, 69+916.

[35] Parsons v. Lane, 97 98, 106+485.

[36] R. L. 1905 § 1616; Coleman v. Retail etc. Assn., 77-31, 79+588; Kollitz v. Equitable etc. Co., 92-234, 99+892; Dwinnell v. Kramer, 87-392, 92+227; Wild Rice L. Co. v. Royal Ins. Co., 99-190, 108+871; Flakne v. Minn. etc. Co., 105-479, 117+785. See Louden v. Modern B. of A., 107-12, 119+425 (benevolent fraternal associations not within statute).

[37] See Price v. Phoenix etc. Co., 17-497 (473).

[38] Aetna Ins. Co. v. Grube, 6-82(32, 37).

[39] Reynolds v. Atlas etc. Co., 69-93, 71+831.

[40] Wiebeler v. Milwaukee etc. Co., 30-464, 16+363.

That a particular condition is usual must be shown by the party who insists on it. If a written policy is delivered after a loss, pursuant to the oral agreement, it is not conclusive as to the terms of the insurance, but may be contradicted by proof of the oral agreement.[41] Cases are cited below involving the sufficiency of evidence to prove the making of oral contracts.[42]

4648. Executory contract to insure—An executory contract to insure held not void for uncertainty or want of mutuality.[43]

4649. Parties—A fire policy insuring the "estate" of a deceased person is valid.[44]

4650. Underwriters—An underwriter is one who insures another, on life or property, in a policy of insurance.[45]

4651. When entire and indivisible—Where the consideration is single and entire and the amount of insurance is for a gross sum distributed upon several distinct items of property the contract is entire and indivisible, the sole effect of the distribution being to limit the risk as to each item to the amount specified.[46]

4652. Meeting of minds—Acceptance of application—To constitute a contract of insurance there must be a meeting of minds as in other contracts.[47] An application for insurance is a mere proposal. There is no contract until the proposal has been accepted.[48] A mere proposal cannot be converted into a contract by delay on the part of the company or its agent in rejecting or accepting it.[49]

4653. Acceptance of policy—If the insured receives and retains a policy without objection he accepts it, and is liable for the premiums thereon.[50]

4654. Delivery of policy—It will be presumed that a policy purporting to be signed by the insurer and found among the papers of the insured after his death was duly executed and delivered.[51] Evidence held not to show a delivery.[52]

4655. When takes effect—A policy does not ordinarily take effect until the premium is paid, though it is delivered.[53] Where an applicant pays the first premium to the agent, the contract is consummated when the company accepts the application, executes a policy, and deposits it in the mail directed to its agent for delivery to the applicant.[54] A provision in a life policy that it shall not take effect until the payment of the initial premium and the delivery of the policy to the insured is valid.[55] A policy has been held not to have taken effect until after a loss.[56]

[41] Salisbury v. Hekla etc. Co., 32–458, 21+552; Ganser v. Fireman's etc. Co., 34–372, 25+943.

[42] Ganser v. Fireman's etc. Co., 38–74, 35+584; Scanlon v. Continental Ins. Co., 101–537, 111+1134.

[43] Ames v. Aetna Ins. Co., 83–346, 86+344.

[44] Magoun v. Fireman's etc. Co., 86–486, 91+5. See Walter v. Hensel, 42–204, 207, 44+57.

[45] Childs v. Firemen's Ins. Co., 66–393, 397, 69+141.

[46] Plath v. Minn. etc. Assn., 23–479; Parsons v. Lane, 97–98, 106+485.

[47] Guernsey v. Am. Ins. Co., 17–104 (83, 86); Wales v. New York etc. Co., 37–106, 33+322.

[48] Heiman v. Phoenix etc. Co., 17–153 (127); Schwartz v. Germania etc. Co., 18–448(404); Kilborn v. Prudential Ins. Co., 99–176, 108+861.

[49] Heiman v. Phoenix etc. Co., 17–153 (127).

[50] Adams v. Eidam, 42–53, 43+690.

[51] Gardner v. United Surety Co., 125+264.

[52] Heiman v. Phoenix etc. Co., 17–153 (127); Schwartz v. Germania etc. Co., 18–448(404).

[53] Union etc. Co. v. Taggart, 55–95, 56+579. See Kollitz v. Equitable etc. Co., 92–234, 99+892; Stramback v. Fidelity etc. Co., 94–281, 102+731.

[54] Kilborn v. Prudential Ins. Co., 99–176. 108+861.

[55] Stramback v. Fidelity etc. Co., 94–281, 102+731.

[56] Wales v. New York etc. Co., 37–106, 33+322.

4656. Ordinance as part of contract—An ordinance relating to the repair of buildings within the fire limits of a city has been held a part of a contract of insurance.[57]

4657. Antedating policy—Fraud—A policy antedated as of a date prior to a loss is void if the insured knew of the loss at the time and failed to notify the insurer.[58]

4658. Notice of contents of policy—The insured is charged with notice of the contents of a policy which he accepts, and he is bound by its conditions, if he retains it without objection, unless he is misled by the insurer.[59]

4659. Construction—The language of a policy, being that selected by the insurer and for its benefit, must be clear and unambiguous, and any reasonable doubt as to its meaning must be resolved in favor of the insured. Especially is this true as to conditions involving a forfeiture.[60] The language used is to be construed with reference to the nature of the property to which it is applied, the purposes for which it is ordinarily used, and the manner in which it is usually kept.[61] If the written and printed portions of a policy cannot be reconciled by any reasonable construction the former control.[62] A policy is to be construed as a whole, and so as to harmonize and give effect to all its provisions.[63] It is to be taken by its four corners to ascertain its meaning.[64] The standard policy is to be construed as similar contracts voluntarily entered into.[65] Clear and unambiguous language cannot be disregarded in the interest of the insured.[66] A policy issued in lieu of the policy of another company, pursuant to a contract between the two companies, is to be construed with reference to such contract.[67] The rule of "noscitur a sociis" is applicable to insurance policies.[68]

[57] Larkin v. Glens Falls Ins. Co., 80-527, 83+409.

[58] Wales v. New York etc. Co., 37-106, 33+322; Nippolt v. Firemen's Ins. Co., 57-275, 59+191.

[59] McFarland v. St. Paul etc. Co., 46-519, 49+253; Wilkins v. State Ins. Co., 43-177, 45+1; Goldin v. Northern A. Co., 46-471, 49+246; Parsons v. Lane, 97-98, 106+485.

[60] Price v. Phoenix etc. Co., 17-497 (473, 494); Chandler v. St. Paul etc. Co., 21-85; Symonds v. N. W. etc. Co., 23-491, 501; Loy v. Home Ins. Co., 24-315; Cargill v. Millers' etc. Co., 33-90, 22+6; Boright v. Springfield etc. Co., 34-352, 25+796; Olson v. St. Paul etc. Co., 35-432, 29+125; De Graff v. Queen Ins. Co., 38-501, 38+696; Kerr v. Minn. etc. Assn., 39-174, 39+312; Pettit v. State Ins. Co., 41-299, 303, 43+378; Schreiber v. German etc. Co., 43-367, 372, 45+708; St. Paul etc. Co. v. Parsons, 47-352, 356, 50+240; Soli v. Farmers' etc. Co., 51-24, 28, 52+979; Mpls. T. M. Co. v. Firemen's Ins. Co., 57-35, 58+819; First Nat. Bank v. Am. etc. Co., 58-492, 499, 60+345; Mareck v. Mutual etc. Assn., 62-39, 64+68; Anoka L. Co. v. Fidelity etc. Co., 63-286, 291, 65+353; Ermentrout v. Girard etc. Co., 63-305, 307, 65+635; McCarvel v. Phenix Ins. Co., 64-193, 198, 66+367; Geare v. U. S. etc. Co., 66-91, 94, 68+731; Reilly v. Chicago etc. Soc., 75-377, 382, 77+982; Cook v. Benefit League, 76-382, 79+320; Central etc. Co. v. Fireman's etc. Co., 92-223, 99+1120, 100+3; Robson v. United Order, 93-24, 100+381; Stramback v. Fidelity etc. Co., 94-281, 102+731; White v. Standard etc. Co., 95-77, 103+735, 884; Bader v. New Amsterdam C. Co., 102-186, 112+1065.

[61] Holbrook v. St. Paul etc. Co., 25-229; Boright v. Springfield etc. Co., 34-352, 25+796; De Graff v. Queen Ins. Co., 38-501, 38+696; Mpls. T. M. Co. v. Firemen's Ins. Co., 57-35, 37, 58+819.

[62] Phoenix Ins. Co. v. Taylor, 5-492 (393); Broadwater v. Lion etc. Co., 34-465, 26+455; Frost's Detroit etc. Works v. Millers' etc. Co., 37-300, 34+35; McFarland v. St. Paul etc. Co., 46-519, 521, 49+253; Russell v. Manufacturers' etc. Co., 50-409, 52+906; Lamberton v. Bogart, 46-409, 49+230. See Mareck v. Mutual etc. Assn., 62-39, 64+68.

[63] Andrus v. Maryland etc. Co., 91-358, 362, 98+200; Lamberton v. Bogart, 46-409, 49+230.

[64] Boright v. Springfield etc. Co., 34-352, 25+796.

[65] Kollitz v. Equitable etc. Co., 92-234, 99+892.

[66] White v. Standard etc. Co., 95-77, 103+735; Bader v. New Amsterdam C. Co., 102-186, 112+1065.

[67] Seymour v. Chicago etc. Soc., 54-147, 55+907.

[68] Bader v. New Amsterdam C. Co., 102-186, 112+1065.

APPLICATION

4660. What constitutes—A letter has been held to be the application on which a life policy was issued.[69]

4661. Nature—An application for insurance is a mere proposal on the part of the applicant.[70] It is collateral to the contract of insurance.[71] It is not a part of the contract unless actually attached to the policy or incorporated therein.[72]

4662. Act of applicant—The application is ordinarily the act of the applicant, though made out by the agent of the insurer,[73] but the insurer is responsible for the acts of the agent in such connection.[74] A finding that certain answers in an application were not the answers of the applicant has been sustained.[75]

WARRANTIES AND REPRESENTATIONS

4663. Definitions and distinctions—A warranty is a stipulation in a policy upon the truth or performance of which the validity of the contract depends. A representation is a statement in regard to a material fact, made by the applicant for insurance to the insurer, with reference to a proposed contract of insurance. Warranties are a part of the contract; representations are not, being merely collateral thereto. It is sufficient if a representation is substantially true, while a warranty must be strictly true or strictly performed. A statement is not a warranty merely because it is incorporated in the policy.[76] Warranties are not conditions precedent.[77]

4664. Representations basis of contract—Representations to insurers, before or at the time of making a contract, are a presentation of the elements upon which to estimate the risk proposed to be assumed. They are the basis of the contract, its foundation, on the faith of which it is entered into. If wrongly presented in any respect material to the risk, the policy that may be issued thereupon will not take effect. To enforce it would be to apply the insurance to a risk that was never presented.[78]

4665. Statutory regulation—The law as to warranties and representations has been radically changed in this state by statute. A stipulation cannot be a warranty unless it is actually incorporated in the policy or attached thereto.[79] A representation or warranty is not material so as to avoid a policy, if untrue, unless it was made with intent to deceive and defraud, or unless the matter misrepresented increases the risk of loss.[80] Prior to the statute the parties might make any representation material, and if a stipulation was declared in the policy to be a "warranty" or "material," the courts were bound to treat it as such.[81]

[69] Scheffer v. Nat. etc. Co., 25–534.

[70] Heiman v. Phoenix etc. Co., 17–153 (127); Schwartz v. Germania etc. Co., 18–448(404).

[71] Price v. Phoenix etc. Co., 17–497(473, 483).

[72] See § 4646.

[73] Aetna Ins. Co. v. Grube, 6–82(32).

[74] See § 4717.

[75] Price v. Washington etc. Co., 92–251, 99+810.

[76] Aetna Ins. Co. v. Grube, 6–82(32); Price v. Phoenix etc. Co., 17–497(473); Perine v. Grand Lodge, 51–224, 53+367.

[77] Chambers v. N. W. etc. Co., 64–495, 67+367.

[78] Taylor v. Grand Lodge, 96–441, 105+408; O'Connor v. Modern Woodmen, 124+454.

[79] R. L. 1905 § 1616; Coleman v. Retail etc. Assn., 77–31, 79+588; Kollitz v. Equitable etc. Co., 92–234, 99+892. See § 4646.

[80] R. L. 1905 § 1623; Price v. Standard etc. Co., 90–264, 95+1118. See, for rule prior to statute, Newman v. Springfield etc. Co., 17–123(98).

[81] Stensgaard v. St. Paul etc. Co., 50–429, 52+910; Price v. Phoenix etc. Co., 17–497(473); Aetna Ins. Co. v. Grube, 6–82(32). Some recent cases, apparently overlooking the statute, lay down this old rule.

4666. Test of materiality—The statute fixes the test of materiality.[82] Disregarding the statute it has been held that the test for determining whether questions contained in an application for insurance are material is, would the knowledge or ignorance of the facts sought to be elicited thereby materially influence the action of the insurer.[83]

4667. Warranty of truth of answers—If an applicant warrants the truth of his answers in an application, the warranty does not extend beyond the answers actually given. If a question is not answered there is no warranty.[84] A warranty as to matters "so far as the same are known to the applicant and material to the risk," has been held to have only the effect of a representation.[85]

4668. Warranties disfavored—If there is any reasonable doubt as to whether a statement is a representation or a warranty, it will be construed to be a representation.[86]

4669. Representations as to health—Where questions propounded to an applicant as to his physical condition are in such terms as to include trivial ailments or injuries, they should be construed as referring only to such ailments or injuries as affect the risk assumed. Answers which are mere expressions of opinion are not warranties of the correctness of the opinion, but only of its good faith. A representation that the applicant is in "good health," or "sound physical condition," does not require that he be absolutely free from disease. It is sufficient if such a representation is made in good faith and the applicant is free from serious disorders, so far as he knows.[87]

4670. Concealment—Incomplete answers—A failure of the insured to disclose the fact that his lease of the ground on which the insured building stood had been assigned to him without the consent of the landlord, has been held not a breach of a condition against concealment of material facts.[88] An incomplete answer to a question in an application will not vitiate a policy, in the absence of fraud or intentional concealment.[89]

4671. Irresponsive and immaterial answers—The answer to a material question may be so irresponsive and immaterial as not to avoid the policy, though untrue, in the absence of fraud.[90]

4672. Effect of breach of warranty—Formerly a breach of warranty as to any fact, however immaterial the fact, avoided the policy, in the absence of special provision to the contrary. By statute the rule is now otherwise.[91]

4673. Effect of misrepresentation—A misrepresentation of a material fact avoids the policy whether it was made innocently or not,[92] and though the policy contains no provision that it should have that effect.[93] If the applicant knew that his statements in his application were false it is immaterial whether he knew their materiality or not.[94]

Cerys v. State Ins. Co., 71-338, 73+849; Rupert v. Supreme Court, 94-293, 102+715; Ranta v. Supreme Tent, 97-454, 107+156.

[82] R. L. 1905 § 1623. See § 4665.

[83] Mattson v. Modern Samaritans, 91-434, 98+330. See Taylor v. Grand Lodge, 96-441, 105+408.

[84] Hale v. Life Indemnity etc. Co., 65-548, 68+182.

[85] Aetna Ins. Co. v. Grube, 6-82(32).

[86] Price v. Phoenix etc. Co., 17-497(473).

[87] Rupert v. Supreme Court, 94-293, 102+715; Ranta v. Supreme Tent, 97-454, 107+156; Murphy v. Met. etc. Co., 106-112, 118+355. See Price v. Standard etc. Co., 90-264, 95+1118; Price v. Phoenix etc. Co., 17-497(473).

[88] Caplis v. Am. etc. Co., 60-376, 62+440.

[89] O'Connor v. Modern Woodmen, 124+454.

[90] Perine v. Grand Lodge, 51-224, 53+367.

[91] See § 4665.

[92] Perine v. Grand Lodge, 51-224, 53+367; Price v. Standard etc. Co., 90-264, 95+1118; Rupert v. Supreme Court U. O. F., 94-293, 102+715; Taylor v. Grand Lodge, 96-441, 105+408.

[93] Price v. Phoenix etc. Co., 17-497(473, 484).

[94] Mattson v. Modern Samaritans, 91-434, 98+330.

4674. Effect of various representations considered—A representation as to the amount of incumbrance on property;[95] as to the use of intoxicating liquors;[96] as to the disease of which a parent died;[97] as to past freedom from disease and present physical condition or freedom from disease;[98] as to the refusal of other companies to insure the applicant;[99] as to the situation, condition, and value of property;[1] as to the name of the family physician;[2] as to where a threshing machine was located;[3] as to freedom of the property from incumbrances;[4] as to the "last price paid" for property;[5] as to consulting physicians;[6] as to occupation;[7] and as to age.[8]

WAIVER, ESTOPPEL, AND ELECTION

4675. Definitions and distinctions—A waiver is the intentional relinquishment of a known right. It need not be based on a new agreement, or on estoppel. It may be inferred from acts or declarations which would not give rise to a technical estoppel.[9] The distinction between a waiver and an election in this connection is not well defined.[10]

4676. Waiver—What constitutes—In general—A waiver of the terms of a contract of insurance may consist in the doing of some act which is inconsistent with an intention to insist on a strict performance, or a course of conduct inconsistent with and in disregard of the terms of the contract.[11]

4677. Stipulations against waiver—A stipulation in a policy, that "no officer, agent, or representative" shall be deemed to have waived any of the conditions therein unless such waiver is indorsed thereon, is not binding.[12] A stipulation that no condition can be waived or altered "except in writing signed by the secretary of the company" is binding.[13] A stipulation "nor shall notice to any agent, nor shall knowledge possessed by any agent, or by any other person, be held to effect a waiver or change of this contract, or any part of it," is not binding.[14]

4678. Knowledge of facts—There can be no waiver unless the insurer at the time knows, either actually or constructively, all the facts constituting the breach.[15]

[95] Cerys v. State Ins. Co., 71–338, 73+849.

[96] Chambers v. N. W. etc. Co., 64–495, 67+367; O'Connor v. Modern Woodmen, 124+454.

[97] Perine v. Grand Lodge, 51–224, 53+367.

[98] Price v. Standard etc. Co., 90–264, 95+1118; Price v. Phoenix etc. Co., 17–497 (473); Rupert v. Supreme Court, 94–293, 102+715; Ranta v. Supreme Tent, 97–454, 107+156.

[99] Bruce v. Conn. etc. Co., 74–310, 77+210.

[1] Aetna Ins. Co. v. Grube, 6–82(32); Newman v. Springfield etc. Co., 17–123 (98).

[2] Price v. Phoenix etc. Co., 17–497(473).

[3] Everett v. Continental Ins. Co., 21–76.

[4] Wilson v. Minn. etc. Assn., 36–112, 30+401.

[5] Stensgaard v. St. Paul etc. Co., 50–429, 52+910.

[6] Hale v. Life etc. Co., 65–548, 68+182; Rupert v. Supreme Court, 94–293, 102+715.

[7] Mattson v. Modern Samaritans, 91–434, 98+330.

[8] Taylor v. Grand Lodge, 96–441, 105+408; Wiberg v. Minn. etc. Assn., 73–297, 76+37.

[9] Parsons v. Lane, 97–98, 106+485; Mee v. Bankers' etc. Assn., 69–210, 72+74.

[10] See Schreiber v. German etc. Co., 43–367, 45+708; 18 Harv. L. Rev. 364.

[11] Elder v. Grand Lodge, 79–468, 472, 82+987.

[12] Lamberton v. Conn. etc. Co., 39–129, 39+76; Wilkins v. State Ins. Co., 43–177, 45+1; St. Paul etc. Co. v. Parsons, 47–352, 50+240; Anderson v. Manchester etc. Co., 59–182, 60+1095, 63+241. See Note, 107 Am. St. Rep. 99.

[13] Wilkins v. State Ins. Co., 43–177, 45+1; Andrus v. Maryland etc. Co., 91–358, 363, 98+200.

[14] Andrus v. Maryland etc. Co., 91–358, 98+200.

[15] Schreiber v. German etc. Ins. Co., 43–367, 45+708; St. Paul etc. Co. v. Parsons, 47–352, 50+240; First Nat. Bank v. Manchester etc. Co., 64–96, 66+136; Parsons v. Lane, 97–98, 106+485; Kelly v. Liverpool etc. Co., 102–178, 111+395.

4679. Intent—Waiver is a voluntary act. Intent to waive is essential. The intent may be expressed directly, or it may be inferred from conduct or declarations.[16]

4680. Silence or non-action—A waiver is not to be inferred from mere silence or non-action.[17]

4681. Facts known when issuing policy—A company waives any breach of conditions resulting from facts known to it, directly or through its agents, at the time it issued the policy and accepted the premium.[18] A stipulation in a policy contrary to this rule has been held ineffectual.[19]

4682. Failure to investigate—Failure of an insurer to make investigations before issuing a policy, without written application or representations by the applicant, does not constitute a waiver. It is not, generally, obligatory on the insurer to make inquiry or investigations.[20] By statute it is made the duty of an insurer to investigate the value of buildings to be insured, but this does not require an investigation as to their occupancy.[21]

4683. Failure to return premiums, etc.—If a policy is obtained by actual fraud on the part of the insured, the failure of the company to return premiums or assessments will not constitute a waiver. Whether, in the absence of such fraud, the retention, after knowledge of a breach of condition, of premiums voluntarily paid prior to such knowledge, constitutes a waiver of the breach, is an open question.[22] Where a company recovered a premium by action, it was held that its failure to return it, after learning of a breach of condition, was a waiver of the breach.[23] A failure to return salvage or its proceeds, after learning of a breach, has been held a waiver.[24]

4684. Acceptance of premiums, etc.—The acceptance of a premium or assessment, after knowledge of a breach of a condition, is a waiver thereof.[25]

4685. Secret intent of insurer—A secret intention of the insurer not to waive a forfeiture cannot defeat the legal effect of unequivocal and deliberate acts of its officers.[26]

4686. Conduct after forfeiture—If, in negotiations or transactions with the insured, after knowledge of a forfeiture, the insurer recognizes the continued validity of the policy, or does acts based thereon, the forfeiture is, as a matter of law, waived, and such a waiver need not be based on any new agreement or estoppel.[27]

4687. Extent—A permit to store fireworks for a limited period has been held to waive a forfeiture from a prior storage, but not to waive a forfeiture from storage after the time limited. An objection to proof of loss, coupled with

[16] Parsons v. Lane, 97–98, 106+485.

[17] Johnson v. Am. Ins. Co., 41–396, 43+59; Goldin v. Northern A. Co., 46–471, 49+246.

[18] Brandup v. St. Paul etc. Co., 27–393, 7+735; Wilson v. Minn. etc. Assn., 36–112, 30+401; First Nat. Bank v. Am. etc. Co., 58–492, 60+345; Anderson v. Manchester etc. Co., 59–182, 195, 60+1095, 63+241; Quigley v. St. Paul etc. Co., 60–275, 62+287; Kells v. N. W. etc. Co., 64–390, 67+215, 71+5; Otte v. Hartford etc. Co., 88–423, 93+608; Andrus v. Maryland etc. Co., 91–358, 98+200; Hartley v. Penn. etc. Co., 91–382, 98+198; Kelly v. Citizens' etc. Assn., 96–477, 105+675; Parsons v. Lane, 97–98, 106+485.

[19] Andrus v. Maryland etc. Co., 91–358, 98+200.

[20] Collins v. St. Paul etc. Co., 44–440, 46+906; McFarland v. St. Paul etc. Co., 46–519, 49+253; Parsons v. Lane, 97–98, 106+485.

[21] Aiple v. Boston Ins. Co., 92–337, 100+8.

[22] Taylor v. Grand Lodge, 96–441, 105+408.

[23] Schreiber v. German etc. Co., 43–367, 45+708.

[24] First Nat. Bank v. Manchester etc. Co., 64–96, 66+136; First Nat. Bank v. Lancashire Ins. Co., 65–462, 68+1.

[25] Wiberg v. Minn. etc. Assn., 73–297, 76+37. See Richwine v. La Crosse etc. Assn., 76–417, 79+504; Mee v. Bankers' etc. Assn., 69–210, 72+74; Perine v. Grand Lodge, 48–82, 50+1022; Abell v. Modern Woodmen, 96–494, 105+65.

[26] Mee v. Bankers' etc. Assn., 69–210, 72+74.

[27] Id.

a denial of liability on account of a breach of condition, has been held not a waiver of a breach.[28]

4688. By agent—A local agent has no authority to waive notice and proof of loss.[29] An agent without knowledge of a breach of a condition is not to be deemed to have waived it by statements not intended to have that effect, in the absence of facts constituting an estoppel.[30] The authority of an agent to waive conditions may be limited by the policy.[31] An ordinary soliciting agent has no authority to waive a condition against other insurance.[32] An adjuster has been held to have authority to waive a condition against incumbrances.[33] Evidence held to show authority of an agent to adjust a loss and waive breaches of conditions.[34]

SURRENDER OF POLICY

4689. Fraud—Where the insured was induced to surrender a policy and accept a duplicate with more onerous conditions through the fraudulent representations of the officer of the company, it was held that the duplicate was not enforceable.[35]

RENEWALS

4690. Presumption—In the absence of evidence to the contrary it is presumed that a renewal is for the same length of time and at the same rate of premium, as in the original policy.[36]

4691. Custom—A custom of insurance agents to renew expiring policies has been held not proved.[37]

ASSIGNMENT OF POLICY

4692. Fire policy—In the absence of special agreement a fire policy is not assignable. The effect of a sale, by the insured, of the property insured, is to put an end to the contract of insurance.[38] Where an agent of the company, at the request of the insured, indorsed a policy making it payable to a creditor "to the extent of his claim," it was held that the creditor might maintain an action on the policy in his own name without alleging any other assignment.[39] An indorsement on the back of a policy, assigning "the interest of" the insured "as owner of property covered by this policy," has been held a sufficient assignment. The owner of a lot and building conveyed the premises to plaintiff, and at the same time, by mistake, assigned to plaintiff's husband the insurance policy on the building, to which the insurer consented. Subsequently, and before the fire, the husband assigned the policy to plaintiff, to which the insurer consented. It was held that, conceding that the policy was void while so held by the husband, the latter assignment and the insurer's consent to the same validated the policy, and plaintiff was entitled to recover.[40]

4693. Life policy—If a fire policy contains no provision to the contrary it is assignable like any other thing in action.[41] No one but the insurer can ob-

[28] Betcher v. Capital etc. Co., 78–240, 80+971.

[29] See § 4789.

[30] St. Paul etc. Co. v. Parsons, 47–352, 50+240.

[31] See § 4677.

[32] Goldin v. Northern A. Co., 46–471, 49+246.

[33] First Nat. Bank v. Manchester etc. Co., 64–96, 66+136; First Nat. Bank v. Lancashire Ins. Co., 65–462, 68+1.

[34] Swain v. Agr. Ins. Co., 37–390, 34+738.

[35] Wyman v. Gillett, 54–536, 56+167.

[36] Wiebeler v. Milwaukee etc. Co., 30–464, 16+363.

[37] Nippolt v. Firemen's Ins. Co., 57–275, 59+191.

[38] White v. Robbins, 21–370.

[39] Newman v. Springfield etc. Co., 17–123(98).

[40] Rines v. German Ins. Co., 78–46, 80+839.

[41] Hogue v. Minn. etc. Co., 59–39, 60+812; Brown v. Equitable etc. Soc., 75–412, 78+

ject to non-compliance with a provision in a policy requiring an assignment to be indorsed in writing on the policy, and a copy delivered to the company. An assignment without compliance with such provisions is valid as between the parties to the assignment.[42] If a policy is payable to named beneficiaries, it cannot be assigned except by them or their consent:[43] Where a wife joined with her husband in the assignment of a policy to secure his debt, she being the beneficiary named in the policy, it was held that she was a surety and was released by an extension of the debt without her consent.[44] A assigned a policy on his life to B by a written assignment absolute in form but in fact as security for a loan. B assigned it to C who took it as security for a loan in good faith believing that the prior assignment was absolute. B did not repay the loan to C but paid the premiums until the policy matured. At maturity the company paid the policy to C. It was held that C took subject to the equities of A but that A was estopped by his laches from asserting any claims against B or C.[45] If a company pays a policy to the named beneficiary without knowledge of an assignment it is not liable to the assignee.[46] An assignee of a policy has been held not to have forfeited his rights thereunder by attempting to have a new policy issued.[47]

CANCELATION AND RESCISSION

4694. When cancelation authorized—A policy can be canceled by one of the parties only by a strict compliance with its terms as to cancelation, unless such compliance is waived. A finding that a policy was duly canceled by the insurer pursuant to its terms has been held not justified by the evidence.[48] The words "subject to result of investigation" written across the face of a policy has been held to authorize a cancelation by the company on further investigation.[49] The insured may waive the formalities of cancelation.[50] Whether a contract for the procurement by plaintiff of a policy of insurance for defendant was canceled by the mutual consent of the parties has been held a question of fact.[51] A finding in an action for a premium, wherein the defendant claimed that the policy had been canceled, held justified by the evidence.[52]

4695. Return of premiums on cancelation—Cases are cited below in which findings as to the return of premiums on cancelation have been sustained.[53]

4696. Rescission for fraud—In an action to rescind a policy it has been held that oral fraudulent representations by an agent were a ground for rescission though the policy provided that no statements of such an agent should bind the company unless reduced to writing and presented to the officers of the company at its home office; that the negligence of the insured in relying on the representations without examining the application and policy was no defence; that the fact that the parties could not be placed in statu quo was no defence: and that the questions whether the agent made the alleged representations, and

103, 671, 79+968; Maceman v. Equitable etc. Soc., 69–285, 72+111.

[42] Hogue v. Minn. etc. Co., 59–39, 60+812.

[43] Ricker v. Charter Oak etc. Co., 27–193, 6+771; Allis v. Ware, 28–166, 9+666.

[44] Allis v. Ware, 28–166, 9+666.

[45] Brown v. Equitable etc. Soc., 75–412, 78+103, 671, 79+968.

[46] Linder v. Fidelity etc. Co., 52–304, 54+95.

[47] Maceman v. Equitable etc. Soc., 69–285, 72+111.

[48] Bradshaw v. Fire Ins. Co., 89–334, 94+866. See MacDonell v. Keller, 90–321, 96+785.

[49] Hall v. U. S. etc. Co., 77–24, 79+590.

[50] Bradshaw v. Fire Ins. Co., 100–545, 110+1132.

[51] MacDonell v. Keller, 90–321, 96+785.

[52] Empire S. S. Co. v. Cameron, 124+442.

[53] Peterson v. Herber, 75–133, 77+418; Ackerson v. Svea A. Co., 75–135, 77+419.

if so, whether the insured had lost his right of rescission by negligence and unreasonable delay in not sooner discovering the fraud were for the jury.[54]

REINSURANCE

4697. Nature—A simple contract of reinsurance between insurance companies is a contract of indemnity, in which the insurer reinsures risks in another company, and is solely for the benefit of the latter, and not of the policyholders.[55]

INSURANCE AGENTS AND BROKERS

4698. Definition—Insurance agents and brokers have been defined by statute.[56]

4699. Local and general—The distinction between "special," "local," "soliciting," and "general" agents is not decisive of the extent of their authority.[57]

4700. General insurance agency—A general insurance agency has been held authorized to act as the agent of the insured in waiving notice of cancelation and in accepting a delivery of a new policy. The act of a clerk of the agency has been held the act of the agency.[58]

4701. Brokers—An insurance broker, under the statute, is the representative of the insured, and not the agent of the insurance company, except for the purpose of collecting or securing the premiums, and an agency in fact cannot be inferred from acts and conduct entirely consistent with his position as a broker. Section 1642 of Revised Laws 1905 must be construed in connection with section 1716, which declares the extent of the agency of an insurance broker. It does not enlarge the authority of a broker to represent the insurance company as defined in section 1716. Evidence held to show that a broker was not the agent of the insurance company for the purpose of making a contract of insurance or an agreement to insure, and that there was therefore no mutual mistake which would authorize the reformation of a contract of insurance.[59] Evidence held to show a person a broker rather than an agent.[60] In an action against a broker for failure to replace policies, it has been held that the burden of proving negligence was on the plaintiff; that evidence tending to show the hazardous nature of the risk and the difficulty of securing insurance was admissible; and that a verdict for the defendant was justified by the evidence. It is the duty of a broker to notify his principal, within a reasonable time, of his inability to place insurance.[61]

4702. License—All agents of foreign companies, except fraternal beneficiary associations, are required to be licensed by the insurance commissioner.[62] In a prosecution for acting without a license, it has been held immaterial whether the company had complied with the statute;[63] that the state was not required to elect under which section of the statute it would proceed, and that

[54] McCarty v. New York etc. Co., 74–530, 77+426.

[55] Barnes v. Hekla etc. Co., 56–38, 57+314. See N. W. etc. Co. v. Conn. etc. Co., 105–483, 117+825 (contract of one company to "cede" to another its first surplus for reinsurance—modification of contract—issuance of "binder"—custom).

[56] See Webster v. Ferguson, 94–86, 102+213.

[57] Ermentrout v. Girard etc. Co., 63–305, 310, 65+635; Kilborn v. Prudential Ins. Co., 99–176, 108+861.

[58] Hamm v. N. H. etc. Co., 80–139, 83+41; Id., 84–336, 87+933.

[59] Fredman v. Consolidated etc. Co., 104–76, 116+221.

[60] Gude v. Exchange etc. Co., 53–220, 54+1117.

[61] Backus v. Ames, 79–145, 81+766.

[62] R. L. 1905 § 1710; State v. Beardsley, 88–20, 25, 92+472; Webster v. Ferguson, 94–86, 91, 102+213.

[63] State v. Johnson, 43–350, 45+711.

newspapers tending to show the accused was acting as agent of the company were properly admitted.[64] A city charter has been held not to authorize the licensing of agents.[65]

4703. Bonds—Cases are cited below involving liability on bonds of agents.[66]

4704. Authority in general—An agent is presumed to be acting within the scope of his authority.[67] A mere soliciting agent has no authority to make a contract of insurance,[68] or to cancel a policy, or to receive notice of cancelation.[69] A local agent has authority to consent to the removal of property.[70] He has no authority to cancel a policy after the termination of his agency.[71] The express authority conferred upon an agent at a certain place "and vicinity," has been held to embrace risks in the vicinity of the place specified which had previously been taken by another agent, who had power to act at a neighboring place "and vicinity." [72] Cases are cited below involving the authority of agents to collect the first premium; [73] to accept notes for the first premium; [74] to adjust losses and waive conditions; [75] to employ an assistant; [76] and to insure property in which they are interested.[77]

4705. Authority depends on policy—The insured is charged with notice of the authority of an agent as defined in the policy as regards matters arising after the issuance of the policy.[78]

4706. Limitations on authority of agent in policy—Provisions in a policy restricting the authority of agents are not binding on the insured as to matters occurring before the policy was issued, if he had no actual knowledge of them.[79]

4707. General principles of agency—The general principles of agency are applicable to insurance agents.[80]

4708. Fact of agency—Sufficiency of evidence—Cases are cited below holding evidence sufficient [81] or insufficient [82] to justify a finding of agency.

4709. Notice to agent notice to company—Notice to an agent of facts within the scope of the agency is notice to the company; [83] otherwise as to facts

[64] State v. Beardsley, 88–20, 92+472.

[65] Prince v. St. Paul, 19–267(226); Moss v. St. Paul, 21–421.

[66] Royal Ins. Co. v. Clark, 61–476, 63+1029; Traders' Ins. Co. v. Herber, 67–106, 69+701; Lancashire Ins. Co. v. Callahan, 68–277, 71+261; Manchester etc. Co. v. Redfield, 69–10, 71+709; Capital etc. Co. v. Watson, 76–387, 79+601; Farragut etc. Co. v. Shepley, 78–284, 80+976.

[67] Kilborn v. Prud. Ins. Co., 99–176, 108+861.

[68] Morse v. St. Paul etc. Co., 21–407.

[69] Broadwater v. Lion etc. Co., 34–465, 26+455. See Gardner v. Fidelity etc. Assn., 67–207, 69+895.

[70] Cooper v. German etc. Co., 96–81, 104+687.

[71] Merchants' Ins. Co. v. Prince, 50–53, 52+131.

[72] St. Paul etc. Co. v. Parsons, 47–352, 50+240. See Royal Ins. Co. v. Clark, 61–476, 63+1029.

[73] Kilborn v. Prud. Ins. Co., 99–176, 108+861.

[74] Godfrey v. New York etc. Co., 70–224, 73+1; Jackson v. Mutual etc. Co., 79–43, 81+545, 82+366; Kilborn v. Prud. Ins. Co., 99–176, 108+861.

[75] Swain v. Agr. Ins. Co., 37–390, 34+738. See § 4688.

[76] Trebby v. Western Ins. Co., 83–452, 86+407.

[77] Magoun v. Fireman's etc. Co., 86–486, 91+5.

[78] Goldin v. Northern A. Co., 46–471, 49+246; Wilkins v. State Ins. Co., 43–177, 45+1. See § 4658.

[79] Kausal v. Minn. etc. Assn., 31–17, 16+430; Kilborn v. Prudential Ins. Co., 99–176, 108+861.

[80] See Wilkins v. State Ins. Co., 43–177, 178, 45+1; Jackson v. Mutual etc. Co., 79–43, 81+545, 82+366; Ermentrout v. Girard etc. Co., 63–305, 65+635; Kilborn v. Prudential Ins. Co., 99–176, 108+861.

[81] Newman v. Springfield etc. Co., 17–123 (98); Guernsey v. Am. Ins. Co., 17–104 (83); Frost's Detroit etc. Works v. Millers' etc. Co., 37–300, 34+35; Ganser v. Fireman's etc. Co., 38–74, 35+584; Whitney v. Nat. etc. Assn., 57–472, 59+943; Ames v. Aetna Ins. Co., 83–346, 86+344; Otte v. Hartford etc. Co., 88–423, 93+608.

[82] Gude v. Exchange etc. Co., 53–220, 54+1117; Mitchell v. Minn. Fire Assn., 48–278, 51+608.

[83] Jackson v. Mutual etc. Co., 79–43, 81+545, 82+366; Soli v. Farmers' etc. Co., 51–24, 52+979; Kelly v. Citizens' etc. Assn., 96–477, 105+675.

without the scope of the agency.[84] Notice acquired by an agent when not acting as such, if actually in mind when subsequently acting for the company, will charge the company.[85]

4710. Declarations—Declarations of an agent not within the scope of his agency or concerning past transactions are inadmissible against his principal.[86]

4711. Liability to company—An agent has been held liable to his company for loss resulting from his failure to obey instructions to cancel a policy;[87] and not to take risks on a certain building.[88]

4712. Commissions—A contract relating to renewal commissions has been held not to entitle an agent to commissions on renewal premiums paid after the termination of his agency by his discharge for cause.[89]

4713. Misrepresentations—The company is liable for the misrepresentations of its agent in relation to an application which he prepares.[90] A misrepresentation to the effect that a provision in a policy was not found in the policies of a rival company has been held not a defence to an action for a premium.[91] Evidence of misrepresentations as to the value of policies has been held inadmissible without evidence that they were within the scope of the agent's authority.[92]

4714. Duty to deliver policy—It has been held to be the duty of an agent to deliver a life policy though the insured had become dangerously ill.[93]

4715. Agency contract—Sale of company—Action for damages—Cases are cited below involving the liability of an insurance company to agents of another company whose business it had purchased.[94]

4716. Liability for unauthorized contract—Under certain circumstances an insurance agent, who acts in this state, for a foreign company not authorized to do business here, renders himself personally liable. But he is not liable on a contract in respect to which he assumes to act, by request, unless the insured was deceived by his conduct, having reasonable grounds for believing that the company involved in the transaction was duly authorized by the state.[95]

4717. Preparing applications—In preparing applications an agent represents the company, and not the insured. Any representations that he makes to the insured respecting the character or effect of statements in an application bind the company. If the insured states the facts correctly any error in making out the application is chargeable to the company and not to the insured.[96] This rule is not affected by a stipulation in the policy subsequently issued that the acts of the agent in making out the application shall be deemed the acts of the insured.[97] Parol evidence is admissible to show that an application was

[84] Jackson v. Mutual etc. Co., 79–43, 81+545, 82+366; St. Paul etc. Co. v. Parsons, 47–352, 50+240; Linder v. Fidelity etc. Co., 52–304, 54+95.

[85] Wilson v. Minn. etc. Assn., 36–112, 30+401.

[86] Colby v. Life etc. Co., 57–510, 59+539; Jackson v. Mut. etc. Co., 79–43, 81+545, 82+366.

[87] Phoenix Ins. Co. v. Pratt, 36–409, 31+454.

[88] Hanover etc. Co. v. Ames, 39–150, 39+300.

[89] Jacobson v. Conn. etc. Co., 61–330, 63+740.

[90] See § 4717.

[91] Am. etc. Co. v. Wilder, 39–350, 40+252.

[92] Gardner v. Fidelity etc. Assn., 67–207, 69+895.

[93] Schwartz v. Germania etc. Co., 18–448 (404); Id., 21–215.

[94] Crowell v. N. W. etc. Co., 99–214, 108+962; Wilson v. N. W. etc. Co., 103–35, 114+251; Israel v. N. W. etc. Co., 127+187.

[95] Webster v. Ferguson, 94–86, 102+213.

[96] Brandup v. St. Paul etc. Co., 27–393, 7+735; Kausal v. Minn. etc. Assn., 31–17, 16+430; Lamberton v. Conn. etc. Co., 39–129, 39+76; Pettit v. State Ins. Co., 41–299, 43+378; Whitney v. Nat. etc. Assn., 57–472, 59+943; Otte v. Hartford etc. Co., 88–423, 93+608; White v. Standard etc. Co., 95–77, 103+735; Kelly v. Citizens' etc. Assn., 96–477, 105+675. See Aetna Ins. Co. v. Grube, 6–82(32).

[97] Kausal v. Minn. etc. Assn., 31–17, 16+430.

made out by the agent and that the facts were correctly stated to him.[98] If the applicant knew that his application as prepared by the agent contained false statements, the policy is void though the agent knew all the facts.[99] A finding that certain answers in an application filled out by the medical examiner of the insured were not the answers of the insured has been sustained.[1]

INSURANCE COMPANIES

4718. What constitutes—A corporation has been held not a life endowment or casualty company, and hence not subject to the provisions of Laws 1885 c. 184.[2]

4719. Application of insurance code—The insurance code is applicable to all insurers, whether corporations, associations, partnerships, or individuals.[3]

4720. Deposit of securities—A surrender and exchange of securities by the insurance commissioner has been held unauthorized.[4] The interest of policyholders and creditors in a fund has been determined.[5] Intervention of stockholders in an action by the insurance commissioner to administer and distribute a fund deposited by an insolvent company has been denied.[6]

4721. Ultra vires contracts—A company organized for the purpose of insuring against fire cannot insure live stock against death.[7] A company which issues an ultra vires policy is ordinarily estopped from asserting that it was unauthorized, in an action thereon by the beneficiary.[8] A mutual hail etc. insurance company, organized under G. S. 1878 c. 34 §§ 338, 347, has been held not authorized to insure the standing or growing grain of its members against loss by hail.[9]

4722. Boards of fire underwriters—The Minneapolis Board of Fire Underwriters and the Merchants' Board of Fire Underwriters have been held not "boards of underwriters" within the meaning of Laws 1895 cc. 175, 178, relating to salvage corps and fire patrols.[10]

FOREIGN INSURANCE COMPANIES

4723. Statutory prerequisites—A foreign insurer, whether a corporation, association, partnership, or individual, cannot do business in this state without complying with the statutory prerequisites.[11] If a foreign company does not comply with such prerequisites it cannot collect premiums or assessments,[12] though it is liable on any policies it may issue.[13] A foreign company comply-

[98] Kausal v. Minn. etc. Assn., 31–17, 16+430; Otte v. Hartford etc. Co., 88–423, 93+608.

[99] Mattson v. Modern Samaritans, 91–434, 98+330.

[1] Price v. Washington etc. Co., 92–251, 99+810.

[2] State v. Federal I. Co., 48–110, 50+1028.

[3] State v. Beardsley, 88–20, 92+472; Seamans v. Christian etc. Co., 66–205, 68+1065.

[4] Hayne v. Met. etc. Co., 67–245, 69+916.

[5] Smith v. Nat. etc. Co., 65–283, 68+28; Hayne v. Met. etc. Co., 67–245, 69+916; Smith v. Nat. etc. Co., 72–364, 75+596; Id., 78–214, 80+966; Id., 79–486, 82+976.

[6] Smith v. Nat. etc. Co., 72–364, 75+596.

[7] Rochester Ins. Co. v. Martin, 13–59(54).

[8] Seymour v. Chicago etc. Soc., 54–147, 55+907; Langworthy v. Washburn, 77–256, 79+974; Gruber v. Grand Lodge, 79–59, 81+743.

[9] Delaware etc. Co. v. Wagner, 56–240, 57+656; Delaware etc. Co. v. Knuppel, 56–243, 57+656.

[10] Childs v. Firemen's Ins. Co., 66–393, 69+141.

[11] State v. Beardsley, 88–20, 92+472; Seamans v. Christian etc. Co., 66–205, 68+1065; Webster v. Ferguson, 94–86, 91, 102+213.

[12] Seamans v. Christian etc. Co., 66–205, 68+1065; Langworthy v. Garding, 74–325, 329, 77+207; Swing v. Red River L. Co., 105–336, 117+442.

[13] Ganser v. Fireman's etc. Co., 34–372, 25+943; Strampe v. Minn. etc. Co., 109–364, 123+1083.

ing with the statutes is entitled to all the rights, privileges, and immunities of domestic companies, unless otherwise provided by law.[14] In an action by a foreign company it is unnecessary to allege a compliance with the statutes.[15]

4724. Certificate—In issuing a certificate to a foreign company the insurance commissioner acts ministerially and does not conclude the state.[16]

4725. Stipulation for service of process—The statute requires foreign insurance companies to stipulate for the service of process against them on the insurance commissioner.[17] The stipulation is irrevocable for any cause as to all outstanding liabilities growing out of any policies made in this state while it is in force.[18] It does not give the company a domicil in this state for all purposes, or bring into this state the situs of a debt which it owes elsewhere by reason of business transacted elsewhere.[19] The mode of service is not exclusive.[20]

4726. Retaliatory statute—A foreign company is not to be excluded from doing business in this state under the retaliatory statute upon a doubtful construction of a foreign law.[21]

INSOLVENT COMPANIES

4727. Effect of insolvency—Rights of policyholders—An adjudication of insolvency, or an assignment for the benefit of creditors, has the effect of canceling all outstanding policies.[22] Policies on which losses have not occurred are not debts or fixed liabilities of a mutual company, and losses occurring after insolvency cannot be allowed as claims by a receiver. All outstanding policies at the date of insolvency stand on the same footing and policyholders are entitled only to the surrender-value of their policies.[23] Where a mutual company was authorized to issue "all-cash" policies to a limited extent, it was held that the right of a holder of such a policy to a repayment of the unearned premium was not inferior to the claims of other policyholders who had suffered loss by fire.[24] The respective rights of several policyholders to share in the assets of an insolvent credit insurance company have been determined.[25] The holder of a policy of insurance issued by a real estate title insurance company is, upon a cancelation or annulment of the policy by a judicial decree declaring the company insolvent and appointing a receiver to wind up its affairs, entitled to a return of a proportionate part of the premium paid therefor, measured by the time elapsing between the date of the policy and the date on which the company was so adjudged insolvent. The policyholder is not entitled to the return of that part of the premium which the application for insurance stipulated might be retained by the company for its services in investigating the title insured.[26] Where a mutual endowment association, whose policies are to be paid from a fund

[14] Eickhoff v. Fidelity & C. Co., 74–139, 142, 76+1030.

[15] Fidelity & C. Co. v. Eickhoff, 63–170, 65+351; Langworthy v. Garding, 74–325, 77+207; Langworthy v. Washburn, 77–256, 79+974.

[16] State v. Fidelity etc. Co., 39–538, 41+108.

[17] R. L. 1905 § 1705. See State v. Brotherhood, American Yeomen, 126+404.

[18] Magoffin v. Mutual etc. Assn., 87–260, 91+1115.

[19] Swedish etc. Bank v. Bleecker, 72–383, 75+740.

[20] Baldinger v. Rockford Ins. Co., 80–147, 82+1083; Horn v. Grand Rapids etc. Co., 80–146, 83+1118.

[21] State v. Fidelity etc. Co., 39–538, 41+108.

[22] Taylor v. North Star etc. Co., 46–198, 48+772; In re Mpls. etc. Co., 49–291, 296, 51+921; Smith v. Nat. etc. Co., 65–283, 289, 68+28; State v. Minn. etc. Co., 104–447, 116+944.

[23] Taylor v. North Star etc. Co., 46–198, 48+772.

[24] In re Mpls. etc. Co., 49–291, 51+921.

[25] Smith v. Nat. etc. Co., 65–283, 68+28.

[26] State v. Minn. etc. Co., 104–447, 116+944.

raised by assessments on the holders of policies, is dissolved under G. S. 1878 c. 34 § 415, the maturing of its immatured policies is arrested, and the right of holders thereof is to share, as members of the association, in its assets, after its liabilities are discharged. Where the policies are payable in the event that the beneficiaries arrive at a specified age, they do not mature, so as to be debts of the association, until the beneficiaries reach that age, even though, before then, all dues and assessments that can be required of the holders have been paid.[27]

4728. Liability on subscription to guaranty fund—Cases are cited below involving the liability of subscribers to a guaranty fund.[28]

4729. Remedies against—The remedy against an insolvent insurance company afforded by Laws 1885 c. 184 was not exclusive of the remedy afforded by G. S. 1878 c. 76 § 12.[29]

4730. Mutual companies—Assessment of members—Where a mutual company was authorized to issue all-cash policies to a limited extent, it was held that the premium notes of members were assessable to pay the holder of an all-cash policy for unearned premiums.[30] An assessment upon members made in insolvency proceedings in another state, has been held conclusive on members in this state, though without personal notice of the proceedings.[31] An assessment on premium notes may include the expenses of winding up the affairs of the company.[32] An assessment has been held not barred by the statute of limitations.[33] An assessment, on premium notes to a mutual insurance company, made after the company has become insolvent, and a receiver has been appointed, may properly include the expenses of winding up its affairs.[34] In an action by a receiver of an insolvent mutual insurance company to recover an assessment from a policyholder, it has been held that the policy stated upon its face that it was a mutual company, and that the insured was subject to pay the additional premium, and the contract was not changed by the fact that it was represented to be a stock policy; that having kept the policy and received the benefit of the insurance, the insured was estopped from setting up as a defence fraudulent representations as to its character; that the insured was not entitled to notice of intention to make an assessment for such additional premium; that the policy was not void because it did not contain a notice of the annual meetings, nor because the insured did not receive such notice; that the answer did not state a defence; and that the complaint stated a good cause of action.[35] Where a fire policy was substantially in the standard form, except that at the end thereof the words following were added: "This policy is issued in accordance with the provisions of sections 47, 48, 49, and 40, chapter 175, General Insurance Laws of the State of Minnesota. Reference is hereby made to said acts, and the same, together with the by-laws and the application of the assured on file with this company, are hereby declared to be a part of this contract," it was held, construing certain provisions of Laws 1895, c. 175, relating to mutual fire insurance companies, that policyholders were not thereby made liable for as-

[27] In re Educational Endow. Assn., 56–171, 57+463.

[28] Dwinnell v. Mpls. etc. Co., 87–59, 91+266, 1098; Id., 90–383, 97+110; Id., 97–340, 106+312.

[29] State v. Educational etc. Assn., 49–158, 51+908.

[30] In re Mpls. etc. Co., 49–291, 51+921.

[31] Langworthy v. Garding, 74–325, 77+207; Swing v. Red River L. Co., 105–336, 117+442.

[32] Langworthy v. Washburn, 77–256, 79+974.

[33] Langworthy v. Washburn, 77–256, 79+974; Langworthy v. Garding, 74–325, 77+207.

[34] Langworthy v. Washburn, 77–256, 79+974.

[35] Dwinnell v. Felt, 90–9, 95+579.

sessments for the losses of the company.[36] In an action by the receivers of an insolvent mutual insurance company to recover of the directors thereof the amounts of their respective subscriptions to a fund which the company with their knowledge, actual or imputed, represented to be its paid-up capital, it was held that the directors were estopped from denying their liability to the extent of their respective subscriptions for the claims of creditors, whose policies were issued to and accepted by them in reliance upon such representations. Creditors whose claims are based upon policies which were cash or stock policies containing no express reference to any mutual liability are presumed to have relied upon such representations, but such presumption does not extend to creditors who accepted policies which by their terms expressly provided for a mutual liability.[37] When a receiver exercises the powers of the board of directors in assessing the members of a mutual insurance company under an order of court, he must comply with the conditions precedent prescribed by the statute, before the members can be held liable to pay the assessment.[38] In an action by a receiver of an insolvent company to recover an assessment, it has been held that the evidence was sufficient to justify the court in finding that the defendants were induced to surrender certain policies of insurance, and accept others in lieu thereof, through fraudulent representations, and under circumstances calculated to mislead and prevent them from examining the new policies in detail, and discovering the difference between them and the surrendered policies.[39] In an action to recover an assessment made by a court, the assessment is not conclusive upon any policyholder as to the question whether his relation to the company was such as to subject him to liability for an assessment. The judgment making the assessment is, however, conclusive as to matters relating to the necessity for, and the amount of, the assessment.[40]

4731. Action for assessment—Complaint—A complaint, in an action to recover an assessment of a policyholder in a mutual insurance company of Ohio, has been sustained.[41]

ACTIONS

4732. Limitation of actions—The limitation in the standard policy begins to run from the time of the fire, or actual destruction of the property.[42] Cases are cited below involving various questions as to the limitation of actions.[43]

[36] Dwinnell v. Kramer, 87–392, 92+227.
[37] Dwinnell v. Mpls. etc. Co., 97–340, 106+312.
[38] Swing v. Wurst, 76–198, 79+94.
[39] Wyman v. Gillett, 54–536, 56+167.
[40] Swing v. Humbird, 94–1, 101+938; Swing v. Red River L. Co., 105–336, 117+442.
[41] Swing v. Red River L. Co., 101–428, 112+393. See Swing v. Red River L. Co., 105–336, 117+442.
[42] Rottier v. German Ins. Co., 84–116, 86+888.
[43] Chandler v. St. Paul etc. Co., 21–85 (limitation held to run from the time of furnishing proofs, if not from the time the loss became payable); In re St. Paul etc. Co., 58–163, 59+996 (limitation held not to bar a claim in insolvency not filed until after the running of the limitation); Willoughby v. St. Paul etc. Co., 68–373, 71+272 (an adjustment of the amount of damage held not to interrupt the running of a limitation); Rottier v. German Ins. Co., 84–116, 86+888 (insurer held not to have misled the insured as to the time of a fire so as to be estopped from claiming the benefit of a limitation); McCallum v. Nat. etc. Co., 84–134, 86+892 (limitation held inapplicable to an action on a settlement and adjustment of claims for loss—limitation held inapplicable to an action to recover premiums paid on a policy subsequently canceled); Strampe v. Minn. etc. Co., 109–364, 123+1083 (where a loss under an insurance policy is adjusted, and the insuring company agrees to pay a fixed sum on or before a day certain, a complaint alleging those facts bases the action upon the adjustment, and the limitation of time for bringing actions contained in the policy does not apply).

4733. Time before an action may be brought after a loss—Policies often contain a provision against bringing an action within a specified time after a loss.[44]

4734. Parties plaintiff—The following persons have been held entitled to sue: one to whom a policy was made payable "to the extent of his claim;"[45] a husband and wife, the policy running to them jointly, though the property belonged to the husband;[46] an assignee of a mortgagee, to whom the policy was payable "as his interest may appear;"[47] the owner and the assignee of a mortgagee;[48] children, by their guardian ad litem.[49] A mortgagor has been held not to show a right to recover on a policy payable to his mortgagee.[50]

4735. Complaint—It has been held unnecessary to allege that an arbitration was or was not had or was waived;[51] to allege that representations or warranties were true;[52] to negative excepted risks;[53] to negative an increase of risk;[54] to allege the amount of other insurance;[55] to negative the existence or breach of a condition against incumbrances;[56] to negative a change of beneficiary;[57] to allege a demand;[58] to allege a compliance with state laws by a foreign company;[59] or to allege due exertion to save property.[60] The performance of conditions precedent may be alleged generally under the statute.[61] In an action on an oral contract it is unnecessary to set forth the terms of a policy issued after the loss.[62] If the insured relies on a waiver or excuse for non-performance he must allege the facts in his complaint.[63] After a loss under a standard form of fire insurance policy, the insured may sue as for a total loss, and allege in addition thereto the actual amount of the damage. If the evidence fails to establish a total loss, there may in the same action be a recovery for the actual damages as proved.[64] Cases are cited below involving the sufficiency of particular complaints.[65]

[44] Hand v. Nat. etc. Co., 57–519, 59+538 (denial of liability by the insurer held a waiver of provision); La Plant v. Firemen's Ins. Co., 68–82, 70+856 (denial of liability by the insurer held not a waiver of provision); Gallenbeck v. N. W. etc. Assn., 84–184, 87+614 (complaint held defective in not showing that the prescribed period had expired).

[45] Newman v. Springfield etc. Co., 17–123 (98).

[46] Kausal v. Minn. etc. Assn., 31–17, 16+430.

[47] Maxey v. N. H. etc. Co., 54–272, 55+1130.

[48] Ermentrout v. Am. etc. Co., 60–418, 62+543.

[49] Price v. Phoenix etc. Co., 17–497(473).

[50] Graves v. Am. etc. Co., 46–130, 48+684.

[51] Kelly v. Liverpool etc. Co., 94–141, 102+380; Fegelson v. Niagara etc. Co., 94–486, 103+495. See Fletcher v. German etc. Co., 79–337, 82+647; Mossness v. German etc. Co., 50–341, 52+932.

[52] Chambers v. N. W. etc. Co., 64–495, 67+367; Price v. Phoenix etc. Co., 17–497 (473).

[53] Schrepfer v. Rockford Ins. Co., 77–291, 79+1005.

[54] Newman v. Springfield etc. Co., 17–123 (98).

[55] Ermentrout v. Am. etc. Co., 60–418, 62+543. See Guerin v. St. Paul etc. Co., 44–20, 46+138.

[56] Mistilski v. German Ins. Co., 64–366, 67+80.

[57] Laudenschlager v. N. W. etc. Assn., 36–131, 30+447.

[58] Ganser v. Fireman's etc. Co., 34–372, 25+943.

[59] Fidelity etc. Co. v. Eickhoff, 63–170, 65+351; Langworthy v. Garding, 74–325, 77+207; Ganser v. Fireman's etc. Co., 34–372, 25+943.

[60] Fletcher v. German etc. Co., 79–337, 82+647.

[61] R. L. 1905 § 4150; Mosness v. German etc. Co., 50–341, 52+932. See Hand v. Nat. etc. Co., 57–519, 59+538.

[62] Ganser v. Fireman's etc. Co., 34–372, 25+943.

[63] Hand v. Nat. etc. Co., 57–519, 59+538. See Boon v. State Ins. Co., 37–426, 34+902.

[64] Moore v. Sun Ins. Office, 100–374, 111+260; Moore v. Phoenix Ins. Co., 100–393, 111+263.

[65] Ganser v. Fireman's etc. Co., 34–372, 25+943 (complaint held not to show that an action was prematurely brought); Boon v. State Ins. Co., 37–426, 34+902 (necessity of excusing delay in bringing action); Guerin v. St. Paul etc. Co., 44–20, 46+138 (complaint held defective in not alleging that the insurer had notice of

4736. Answer—New matter—Matters in the nature of confession and avoidance must be specially pleaded by the defendant.[66] In pleading misrepresentations the particular statements claimed to be false must be specified.[67] By denying in an answer any liability for loss the insurer does not waive the right to plead that the action is prematurely brought.[68] A vacancy has been held sufficiently pleaded without alleging that it increased the risk.[69]

4737. Issues—Variance—After a loss under a standard form of fire insurance policy, the insured may sue as for a total loss, and allege in addition thereto the actual amount of the damage. If the evidence fails to establish a total loss, there may in the same action be a recovery for the actual damages as proved.[70] Under an allegation of performance of conditions precedent evidence of a waiver or excuse for non-performance is inadmissible.[71] Cases are cited below involving questions as to the issues in particular actions.[72]

4738. Burden of proof—The burden of proof has been held on the insurer, as to the falsity of warranties and representations;[73] as to concealment;[74] as to suicide;[75] as to breach of condition against incumbrances;[76] as to breach of condition against increased risk;[77] as to excepted risks;[78] as to compliance with state laws by foreign company;[79] as to arbitration;[80] as to exertions to

or consented to other insurance); Maxcy v. N. H. etc. Co., 54–272, 55+1130 (an allegation of loss by a mortgagee held sufficient): Ermentrout v. Am. etc. Co., 60–418, 62+543 (complaint in an action by an assignee of an assignee of a mortgagee sustained); Mpls. etc. Ry. v. Home Ins. Co., 64–61, 66+132 (complaint in action by a common carrier sustained); Morley v. Liverpool etc. Co., 76–285, 79+103 (an allegation of an assignment of a claim for loss sustained); Gallenbeck v. N. W. etc. Assn., 84–184, 87+614 (complaint held to show action prematurely brought—complaint held not to state a cause of action against the defendant, the policy issued by the defendant to the plaintiff having been surrendered and a new policy issued by another company); Knutzen v. Nat. etc. Co., 108–163, 121+632 (policy conditioned to indemnify insured for loss by death from disease or accident of animals insured—complaint held bad on demurrer in not alleging that the death of the animal sued for was caused either by disease or accident); Cash v. Concordia etc. Co., 126+524 (complaint on fire policy sustained).

[66] Newman v. Springfield etc. Co., 17–123 (98) (increase of risk); Ganser v. Fireman's etc. Co., 38–74, 35+584 (misrepresentations); Brigham v. Wood, 48–344, 51+228 (change of ownership); Caplis v. Am. etc. Co., 60–376, 62+440 (misrepresentations—concealment); Cruikshank v. St. Paul etc. Co., 75–266, 77+958 (breach of warranty of title); Fletcher v. German etc. Co., 79–337, 82+647 (failure to make requisite exertions to prevent loss).

[67] Chambers v. N. W. etc. Co., 64–495, 67+367. See Cerys v. State Ins. Co., 71–338, 340, 73+849.

[68] La Plant v. Firemen's Ins. Co., 68–82, 70+856.

[69] Doten v. Aetna Ins. Co., 77–474, 80+630.

[70] Moore v. Sun Ins. Office, 100–374, 111+260; Moore v. Phoenix Ins. Co., 100–393, 111+263.

[71] Hand v. Nat. etc. Co., 57–519, 59+538.

[72] Newman v. Springfield etc. Co., 17–123 (98) (under an allegation of defects in the roof of a building evidence of the condition of the building as a whole held inadmissible); Ganser v. Fireman's etc. Co., 38–74, 35+584 (question of fraudulent representations held not within the issues); Guerin v. St. Paul etc. Co., 44–20, 46+138 (evidence to show that the insurer consented to other insurance held inadmissible under the pleadings); Bromberg v. Minn. Fire Assn., 45–318, 47+975 (evidence of a mistake in the description of the property insured held inadmissible under the pleadings).

[73] Chambers v. N. W. etc. Co., 64–495, 67+367; Perine v. Grand Lodge, 51–224, 53+367; Caplis v. Am. etc. Co., 60–376, 62+440; Price v. Standard etc. Co., 90–264, 95+1118; Murphy v. Met. etc. Co., 106–112, 118+355.

[74] Caplis v. Am. etc. Co., 60–376, 62+440.

[75] Hale v. Life etc. Co., 61–516, 63+1108; Id., 65–548, 68+182; Beckett v. N. W. etc. Assn., 67–298, 69+923; Sartell v. Royal Neighbors, 85–369, 88+985.

[76] Mistilski v. German Ins. Co., 64–366, 67+80.

[77] Newman v. Springfield etc. Co., 17–123 (98); Taylor v. Security etc. Co., 88–231, 92+952.

[78] Schrepfer v. Rockford Ins. Co., 77–291, 79+1005.

[79] Fidelity etc. Co. v. Eickhoff, 63–170, 65+351.

[80] Kelly v. Liverpool etc. Co., 94–141, 102+380.

prevent loss;[81] as to non-payment of dues and assessments;[82] and as to the invalidity of a policy.[83] It has been held on the insured, as to whether a person was the agent of the insurer with authority to waive a condition;[84] and as to whether a dead body was that of the insured.[85] It has been held on a mortgagee to show his interest.[86]

4739. Evidence of value—Necessity—Where it was assumed on the trial that the policy was a valued one, it was held that the insured could not object on appeal to the want of evidence of value.[87]

4740. Law and fact—Except where the evidence is conclusive the following questions are for the jury: whether representations were material or increased the risk;[88] whether the insured committed suicide;[89] whether proofs of loss were furnished within a reasonable time;[90] whether the risk had been increased;[91] whether there had been a total loss;[92] whether the insurer was informed of prior insurance;[93] whether representations had been made, and if so, with actual intent to deceive;[94] and whether a delay in sending blanks was unreasonable.[95]

4741. Evidence—Admissibility—Parol evidence is inadmissible to vary the terms of the written contract[96] and this extends to bills of lading fixing the liability of the insured as a carrier.[97] Cases are cited below holding evidence admissible,[98] or inadmissible.[99]

[81] Fletcher v. German etc. Co., 79-337, 82+647; Morris v. Farmers etc. Co., 63-420, 65+655.

[82] Scheufler v. Grand Lodge, 45-256, 47+799.

[83] Hale v. Life etc. Co., 65-548, 68+182.

[84] Gude v. Exchange etc. Co., 53-220, 54+1117.

[85] Baxter v. Covenant etc. Assn., 77-80, 79+596.

[86] Wilcox v. Mutual etc. Co., 81-478, 84+334.

[87] Hand v. Nat. etc. Co., 57-519, 59+538.

[88] Price v. Standard etc. Co., 90-264, 95+1118; Rupert v. Supreme Court, 94-293, 102+715.

[89] Hale v. Life etc. Co., 61-516, 63+1108; Sartell v. Royal Neighbors, 85-369, 88+985.

[90] Fletcher v. German etc. Co., 79-337, 82+647.

[91] Taylor v. Security etc. Co., 88-231, 92+952.

[92] Poppitz v. German Ins. Co., 85-118, 88+438.

[93] Magoun v. Fireman's etc. Co., 86-486, 91+5.

[94] Price v. Standard etc. Co., 90-264, 95+1118.

[95] Robinson v. N. W. etc. Co., 92-379, 100+226.

[96] Frost's etc. Works v. Millers' etc. Co., 37-300, 34+35; Calmenson v. Equitable etc. Co., 92-390, 100+88. See § 3368.

[97] Mpls. etc. Ry. v. Home Ins. Co., 55-236, 56+815.

[98] Ganser v. Fireman's etc. Co., 38-74, 35+584 (an expired contract of insurance, in connection with a subsequent parol agreement for reinsurance); Powers v. Imperial etc. Co., 48-380, 51+123 (declarations of other adjusters, made in the presence of the defendant's adjuster in connection with an adjustment); Pfeifer v. Nat. etc. Co., 62-536, 64+1018 (parol evidence as to which of two horses a policy was canceled); Chambers v. N. W. etc. Co., 64-495, 67+367 (business habits, pursuits, and associations of insured); Levine v. Lancashire Ins. Co., 66-138, 68+855 (books of account of the insured to show the amount and the value of property destroyed); Coleman v. Retail etc. Assn., 77-31, 79+588 (inventory prepared immediately after a loss); Boak v. Manchester etc. Co., 84-419, 87+932 (facts relevant to the question whether plaintiff made due exertions to save property); Taylor v. Security etc. Co., 88-231, 92+952 (custom of insurance companies to charge a higher rate of premium under certain conditions, the issue being as to an increase of risk); Tozer v. Ocean A. & G. Corp., 99-290, 109+410 (understanding of a party as to whether a claim for damages came within the terms of an indemnity contract); Taylor v. Grand Lodge, 101-72, 111+919 (declarations of a person, since deceased, respecting the date of his birth—prior application for life insurance in another company); Kornig v. Western L. I. Co., 102-31, 112+1039 (circumstantial evidence relevant to an issue of suicide).

[99] Price v. Phoenix etc. Co., 17-497(473) (evidence tending to show a representation immaterial which the parties had agreed should be deemed material); Perine v. Grand Lodge, 48-82, 50+1022 (reputation of the cause of a parent's death, to charge a young child with notice); Dade v. Aetna Ins. Co., 54-336, 56+48 (testimony of the insured that he had complied with all the

MUTUAL INSURANCE

4742. Nature—The feature distinguishing a mutual insurance company from all others is that in a mutual company the policyholders are at once the insurers and the insured; in all others the policyholder is the insured and the company the insurer.[1] There is no stock or stockholders and ordinarily no other fund from which to pay claims than that arising from premium notes or cash premiums.[2]

4743. The contract—Construction—The contract of a member with a foreign company has been held to include, and to be construed with reference to, the policy, application, constitution, by-laws, and enabling act.[3] Where the policy stated on its face that the company was a mutual one, and the insured subject to pay an additional premium, it was held that the contract was not changed by the fact that it was represented to be a stock policy; that after keeping the policy and receiving the benefit of an insurance the insured was estopped from setting up as a defence to an action for an additional premium fraudulent representations as to its character.[4]

4744. Premium note—Consideration—An unpaid portion of a premium note held to be without consideration.[5]

4745. Duration of policy—Parol evidence—Where it did not appear from the application, policy, or constitution of the company, for what period a policy was issued, it was held that parol evidence was admissible to prove its duration.[6]

4746. All-cash policies—A company has been held authorized by special statutory provisions to issue "all-cash" policies, to a limited extent.[7]

4747. Capital or guaranty fund—A mutual fire insurance company is not authorized to create a capital or guaranty fund. A mutual fire and marine insurance company may do so.[8]

4748. Membership—A policyholder becomes a member of the company by the mere issuance of a policy to him.[9] The holder of an "all-cash" policy issued by a mutual company has been held not a member thereof.[10]

4749. Notice of constitution, etc.—Every member is charged with notice of, and is bound by, the constitution and by-laws of the company, including amendments duly made.[11]

4750. Amendment of by-laws—Notice—Where the by-laws of a mutual fire insurance company provide for the manner in which members shall be notified of amendments or additions to such by-laws, and that when such notice is so given it shall become a part of the member's policy, a member who has not been notified in the manner prescribed, and who has no knowledge

conditions of a policy not in evidence, no sufficient foundation having been laid for secondary evidence of the policy); Hale v. Life etc. Co., 65–548, 68+182 (declarations of an intention to commit suicide made two years before the death of the declarant); Price v. Standard etc. Co., 90–264, 95+1118 (register of patients kept at a hospital); Schornak v. St. Paul etc. Co., 96–299, 104+1087 (fact that the insured had scattered oil on the walls of his living room fifty feet distant from the building burned).

[1] Dwinnell v. Mpls. etc. Co., 87–59, 91+266, 1098.

[2] Dwinnell v. Mpls. etc. Co., 87–59, 91+266, 1098; Taylor v. North Star etc. Co., 46–198, 48+772.

[3] Ebert v. Mutual etc. Assn., 81–116, 83+506, 84+457. See R. L. 1905 § 1616.

[4] Dwinnell v. Felt, 90–9, 95+579.

[5] Bankers' etc. Co. v. Rogers, 73–12, 75+747.

[6] Bankers' etc. Co. v. Rogers, 73–12, 75+747.

[7] In re Mpls. etc. Co., 49–291, 51+921.

[8] Dwinnell v. Mpls. etc. Co., 87–59, 91+266, 1098. See § 4859.

[9] Morris v. Farmers etc. Co., 63–420, 65+655.

[10] In re Mpls. etc. Co., 49–291, 51+921.

[11] Morris v. Farmers etc. Co., 63–420, 65+655.

of the amendment or addition, is not bound by it.[12] An amendment of by-laws, removing an uncertainty as to the time when policies expired, has been held reasonable and valid.[13]

4751. Notice of annual meetings—A policy has been held not void because it did not contain a notice of the annual meetings or because the insured did not receive such notice.[14]

4752. Lapsing of policy—Dividend—A provisional dividend has been held not applicable to the indebtedness of the insured to the company, so as to prevent his policy from lapsing prior to his death.[15]

4753. Assessments—Losses are payable by assessments on the policyholders.[16] The essential principle upon which mutual insurance companies are based is that each member will pay his proportionate share of the losses incurred during the time of his membership and that he shall not be required to pay any greater amount thereof than his pro rata share; and any assessment which violates this principle cannot be enforced against him. If a member is assessed for losses incurred when he was not a member, or if other members liable to be assessed with him are knowingly omitted from the assessment it is, as to him, voidable.[17] In fixing the amount of an assessment reasonable allowances may be made for probable failures in collections and the expense of making collections. An assessment has been held fraudulent on its face, and a complaint in an action to have it declared void, sustained.[18] Where a policyholder contracts to pay a certain sum, by such instalments as the directors of the company shall assess and order for losses and expenses of the company, the statute of limitations does not begin to run in his favor until an assessment is made.[19]

4754. Change of rate of assessments—The board of directors of a company has been held to have authority to change the rates of assessment from time to time to meet death losses and expenses, provided the apportionment is equitable.[20]

4755. Classification of members for assessment—In the absence of express authority directors cannot arbitrarily place all members who joined prior to a certain year into a class by themselves, and advance their ages each year as assessments are made, while all members joining after that date are assessed as of the age of entry. Such discrimination against the old and in favor of the new members is not an equitable distribution of the increasing cost of carrying the older members, and was not contemplated by the terms of their contracts.[21]

4756. Wrongful cancelation of policy—Damages—The measure of damages for the wrongful cancelation of a member's policy for refusal to pay illegal assessments is not the amount of the premiums paid by the member, but the damage resulting at the date of cancelation, allowance being made for insurance already had.[22]

[12] Morris v. Farmers etc. Co., 63-420, 65+655.

[13] Flakne v. Minn. etc. Co., 105-479, 117+785.

[14] Dwinnell v. Felt, 90-9, 95+579. See R. L. 1905 § 1626.

[15] Petrie v. Mutual etc. Co., 92-489, 100+236.

[16] Dwinnell v. Mpls. etc. Co., 87-59, 62, 91+266, 1098.

[17] Swing v. Akeley, 62-169, 64+97.

[18] Pencille v. State etc. Co., 74-67, 76+1026.

[19] Langworthy v. Garding, 74-325, 77+207; Langworthy v. Washburn, 77-256, 79+974.

[20] Ebert v. Mutual etc. Assn., 81-116, 83+506, 84+457.

[21] Id.

[22] Id.

ENDOWMENT INSURANCE

4757. Definition—An endowment policy is one that is to be paid at the expiration of a fixed term of years or at prior death.[23]

4758. Endowment policy—Construction—The provisions of an endowment policy, as to the payment of premiums and the application of dividends to the payment of premium notes, have been construed.[24]

FIRE INSURANCE

IN GENERAL

4759. The standard policy—The standard form is exclusive and cannot be modified by the parties except as expressly authorized.[25] It is to be construed as similar contracts voluntarily entered into.[26] Its provisions are considered elsewhere under appropriate headings.[27]

4760. Rider—Lightning clause—The words "and in no case to include loss or damage by cyclone, tornado, or windstorm," in a "lightning clause," attached as a rider to a policy, are limited to the rider, and do not apply to or vary the contract as contained in the policy.[28]

THE INSURED PROPERTY

4761. Description—The description in a standard policy cannot be affected by a description in the application not incorporated in the policy or attached thereto.[29] A description must be construed with reference to the nature of the property, its ordinary use, and the manner in which it is ordinarily kept.[30] Any reasonable doubt as to whether property was covered by a policy must be resolved in favor of the insured.[31] Parol evidence is inadmissible to prove what property was intended by the parties to be covered—to vary the written description,[32] but it is admissible to show of what a building consisted.[33] A description of live stock, or other insurable property, as in a particular place, is not a condition or warranty that it will remain there.[34] The phrase "stock in trade" covers not only all the goods usually carried in the particular trade, but also everything necessary for carrying on the business.[35] If a policy is issued for a period of years on a building in course of construction, it covers the completed building.[36] Where a mistake was made in the number of the

[23] Nat. P. Legion v. O'Brien, 102–15, 112+1050.

[24] Van Norman v. N. W. etc. Co., 51–57, 52+988.

[25] Dwinnell v. Kramer, 87–392, 92+227; Kollitz v. Equitable etc. Co., 92–234, 99+892; Wild Rice L. Co. v. Royal Ins. Co., 99–190, 108+871. See Moore v. Sun Ins. Office, 100–374, 111+260; Russell v. German etc. Co., 100–528, 111+400.

[26] Kollitz v. Equitable etc. Co., 92–234, 99+892.

[27] See §§ 4762–4778.

[28] Russell v. German etc. Co., 100–528, 111+400.

[29] Coleman v. Retail etc. Assn., 77–31, 79+588.

[30] De Graff v. Queen Ins. Co., 38–501, 38+696; Boright v. Springfield etc. Co., 34–352, 25+796.

[31] De Graff v. Queen Ins. Co., 38–501, 38+696; Pettit v. State Ins. Co., 41–299, 43+378. This is especially true when the agent of the company writes the description. Pettit v. State Ins. Co., 41–299, 43+378; Soli v. Farmers' etc. Co., 51–24, 52+979.

[32] Collins v. St. Paul etc. Co., 44–440, 46+906; Bromberg v. Minn. Fire Assn., 45–318, 47+975; Boak v. Manchester etc. Co., 84–419, 87+932.

[33] Cargill v. Millers' etc. Co., 33–90, 22+6; Pettit v. State Ins. Co., 41–299, 43+378; Boak v. Manchester etc. Co., 84–419, 87+932.

[34] See § 4767.

[35] Phoenix Ins. Co. v. Taylor, 5–492(393).

[36] Frost's etc. Works v. Millers' etc. Co., 37–300, 34+35.

section on which the buildings insured were situated it was held that there could be no recovery without a reformation of the policy.[37] Where more than one description is given and there is a discrepancy, that description will be adhered to as to which there is the least likelihood that a mistake could be committed, and that be rejected in regard to which mistakes are more apt to be made.[38] A rider to the standard policies which is unauthorized as a condition may operate to restrict the general descriptive language of the policy.[39] Cases are cited below involving the construction of particular policies as to the property covered.[40]

CONDITIONS

4762. Exertions to save property—A finding that the plaintiff made all reasonable exertions to save the property after the fire has been sustained.[41]

4763. Clear space—A rider to the standard policy stipulating for a clear space about the insured premises has been held unauthorized.[42]

4764. Storing goods—A condition against storing goods is not violated by keeping them for sale in a store.[43]

4765. Incumbrances—If a policy contains a condition against mortgaging the property, a mortgage of a portion of the property avoids the whole policy.[44] A condition against mortgaging the property has been held not qualified by a subsequent clause in the policy.[45] A lien of a lessor has been held not a chattel mortgage within the meaning of a condition against chattel mortgages.[46] Cases are cited below holding conditions against incumbrances waived,[47] or the reverse.[48]

4766. Other insurance—The object of the usual condition against other insurance is to keep the amount of insurance below the value of the property so that the insured will have an interest in its preservation.[49] The mere fact that at the time of its contract an insurance company has knowledge of other insurance upon the property does not justify the inference that it assented to

[37] Collins v. St. Paul etc. Co., 44–440, 46+906.

[38] Everett v. Cont. Ins. Co., 21–76.

[39] Wild Rice L. Co. v. Royal Ins. Co., 99–190, 108+871.

[40] See Phoenix Ins. Co. v. Taylor, 5–492 (393) (stock of goods); Everett v. Cont. Ins. Co., 21–76 (threshing machine); Holbrook v. St. Paul etc. Co., 25–229 (mules); Cargill v. Millers' etc. Co., 33–90, 22+6 (elevator and additions); Boright v. Springfield etc. Co., 34–352, 25+796 (horses on farm); Broadwater v. Lion etc. Co., 34–465, 26+455 (buildings detached); Frost's etc. Works v. Millers' etc. Co., 37–300, 34+35 (sawmill); De Graff v. Queen Ins. Co., 38–501, 38+696 (farm buildings and live stock); Pettit v. State Ins. Co., 41–299, 43+378 (elevator and annex); Schreiber v. German etc. Co., 43–367, 45+708 (growing crops); Collins v. St. Paul etc. Co., 44–440, 46+906 (farm buildings—mistake in section number); Soli v. Farmers' etc. Co., 51–24, 52+979 (hay in stack); Bergstrom v. Farmers' etc. Co., 51–29, 52+980 (hay); Mpls. etc. Ry. v. Home Ins. Co., 55–236, 56+815 (interest of carrier in goods shipped); Mpls. T. M. Co. v. Firemen's Ins. Co., 57–35, 58+819 (threshing machine and separator "while not in use"); Boak v. Manchester etc. Co., 84–419, 87+932 (goods stored in annex to warehouse); Carpenter v. Germania etc. Co., 86–371, 90+766 (lumber yard, coal sheds, etc.); Central etc. Co. v. Fireman's etc. Co., 92–223, 99+1120, 100+3 (mining plant); Wild Rice L. Co. v. Royal Ins. Co., 99–190, 108+871 (lumber yards connected with sawmill).

[41] Boak v. Manchester etc. Co., 84–419, 87+932; Schornak v. St. Paul etc. Ins. Co., 96–299, 104+1087.

[42] Wild Rice etc. Co. v. Royal Ins. Co., 99–190, 108+871.

[43] Phoenix Ins. Co. v. Taylor, 5–492(393).

[44] Plath v. Minn. etc. Assn., 23–479.

[45] First Nat. Bank v. Am. etc. Co., 58–492, 60+345.

[46] Caplis v. Am. etc. Co., 60–376, 62+440.

[47] Wilson v. Minn. etc. Assn., 36–112, 30+401; First Nat. Bank v. Lancashire Ins. Co., 65–462, 68+1; First Nat. Bank v. Manchester etc. Co., 64–96, 66+136. See Schreiber v. German etc. Co., 43–367, 45+708.

[48] Gude v. Exchange etc. Co., 53–220, 54+1117.

[49] Funke v. Minn. etc. Assn., 29–347, 13+164; Church of St. George v. Sun etc. Co., 54–162, 55+909.

additional insurance subsequently taken out by the insured.[50] The usual condition against other insurance is violated by other insurance which is void because of misrepresentations by the insured.[51] Other insurance renders the policy void and not merely voidable. No affirmative action is required by the insurer.[52] A written condition against other insurance cannot be varied by parol.[53] Other insurance procured by a mortgagee of the insured has been held not procured by the insured.[54] The failure of an agent of the insurer to inform the latter of other insurance on premises in which the agent had an interest has been held not to avoid a policy.[55] Cases are cited below holding a condition against other insurance waived,[56] or the reverse.[57]

4767. Removal of property—A removal may be authorized by the insurer through a local agent.[58] A description in a policy of the property insured, as being in a certain place, is not a condition or warranty that it will remain there.[59] A removal has been held to invalidate a policy.[60] The duly authorized agent of a fire insurance company, having power to consent to the removal of the location of insured property and to transfer the policy, may by oral agreement consent to such removal and make such transfer, and if such agreement is made the policy does not become void but continues in force. The fact that the rate of insurance is greater at the new location does not relieve the obligations of the company under the policy, provided the insured agrees and holds himself in readiness to pay the additional premium. The duty is upon the agent to ascertain what the increased rate is and make demand upon the insured therefor.[61]

4768. Vacancy—The object of the usual condition against vacancy is that the building insured shall be under the care and supervision of some one actually occupying and using it.[62] The condition in the standard policy against vacancy is unaffected by statutory provisions relating to increase of risk.[63] A condition against vacancy has been held not qualified by a subsequent clause in a policy.[64] A partial vacancy is not fatal.[65] The phrase "occupied as a dwelling" in a policy is to be construed as a warranty, if the insurer did not know that the building was vacant when issuing the policy.[66] A condition against vacancy may be waived.[67] Whether premises were vacant at the time of the loss is a question for the jury, unless the evidence is conclusive.[68]

[50] Kelly v. Liverpool etc. Co., 102–178, 111+395.

[51] Funke v. Minn. etc. Assn., 29–347, 13+164.

[52] Johnson v. Am. Ins. Co., 41–396, 43+59; Goldin v. Northern A. Co., 46–471, 49+246. See Lake Superior etc. Co. v. Concordia etc. Co., 95–492, 104+560.

[53] Calmenson v. Equitable etc. Co., 92–390, 100+88.

[54] Church of St. George v. Sun etc. Co., 54–162, 55+909.

[55] Magoun v. Fireman's Fund Ins. Co., 86–486, 91+5.

[56] Brandup v. St. Paul etc. Co., 27–393, 7+735; First Nat. Bank v. Am. etc. Co., 58–492, 60+345; Anderson v. Manchester etc. Co., 59–182, 195, 60+1095, 63+241; Kelly v. Citizens' etc. Assn., 96–477, 105+675; Barrie v. Northern A. Co., 103–529, 115+1132.

[57] Johnson v. Am. Ins. Co., 41–396, 43+59; Goldin v. Northern A. Co., 46–471, 49+246; Kelly v. Liverpool etc. Co., 102–178, 111+395.

[58] Cooper v. German etc. Co., 96–81, 104+687.

[59] Everett v. Cont. Ins. Co., 21–76; Holbrook v. St. Paul etc. Co., 25–229; De Graff v. Queen Ins. Co., 38–501, 38+696.

[60] Brigham v. Wood, 48–344, 51+228.

[61] Cooper v. German etc. Co., 96–81, 104+687.

[62] Stensgaard v. Nat. etc. Co., 36–181, 30+468.

[63] Doten v. Aetna Ins. Co., 77–474, 80+630.

[64] Moriarty v. Home Ins. Co., 53–549, 55+740.

[65] Haider v. St. Paul etc. Co., 67–514, 518, 70+805; Central Montana Mines Co. v. Fireman's Fund Ins. Co., 92–223, 99+1120, 100+3.

[66] Aiple v. Boston Ins. Co., 92–337, 100+8.

[67] Swain v. Agr. Ins. Co., 37–390, 34+738; Lamberton v. Conn. etc. Co., 39–129, 39+76.

[68] Roach v. Aetna Ins. Co., 108–127, 121+613.

4769. Increased risk—What constitutes an increase of risk is a question of fact for the jury [69] unless the increase is obvious.[70] A building has been held not "contiguous" within the meaning of a condition against an increase of risk from the erection of contiguous buildings.[71] A general condition against increase of risk must be held to refer to the risk incident to the ordinary use of the property insured. Unless the terms of a policy forbid, insurance must be presumed to be made with reference to the character of the property insured and to the owner's use of it in the ordinary way.[72] If a risk is increased it is immaterial that the loss was not caused by it.[73] A policy provided that if the insured building should be "altered, added to, or enlarged," notice must be given and consent indorsed on the policy. The contract (a by-law) elsewhere provided that if a building should be "altered, enlarged, or appropriated to any other purposes than those mentioned, or the risk be otherwise increased," without the consent of the insurer, the policy should be void. These provisions were held to require notice and consent with respect to a material enlargement of the building, even though the risk was not thereby increased.[74] A removal involving an increase of risk has been held authorized by the insurer through its local agent.[75]

4770. Payment of premiums—A fire insurance policy at a gross premium for the term of five years, the insured giving two notes for the premium, contained a clause that, in case of default to pay any note, the insurance should be suspended, and the premium considered as earned, but that, on subsequent full payment, the policy should be revived and in force as to losses happening thereafter. It was held that, upon a default to pay a premium note, the insurer could recover the amount of it.[76] An ultra vires policy held no consideration for a premium note.[77] A breach of a condition for the payment of premiums held not waived.[78] A local agent has been held not to have authority to waive a condition for the payment of a premium before the policy should become operative.[79] By delivering a policy without requiring a prepayment of the premium a company may be held to have extended credit to the insured.[80]

4771. Alterations—A policy has been construed as requiring notice and consent as respects a material enlargement of the building insured, even though the risk was not increased. A provision in a policy authorizing "necessary alterations and repairs," has been held not to authorize a material enlargement of the building.[81]

4772. Gunpowder, gasoline, etc.—A policy has been construed to permit the keeping of gunpowder in a general store for sale; [82] and to permit the keeping of benzine and gasoline in a paint factory.[83] A condition against the use

[69] Taylor v. Security etc. Co., 88-231, 92+952.
[70] Betcher v. Capital Fire Ins. Co., 78-240, 80+971.
[71] Olson v. St. Paul etc. Co., 35-432, 29+125.
[72] Holbrook v. St. Paul etc. Co., 25-229; Minneapolis etc. Co. v. Firemen's Ins. Co., 57-35, 58+819.
[73] Taylor v. Security etc. Co., 88-231, 235, 92+952.
[74] Frost's etc. Works v. Millers' etc. Co., 37-300, 34+35.
[75] Cooper v. German etc. Co., 96-81, 104+687.
[76] Minn. etc. Assn. v. Olson, 43-21, 44+672.
[77] Rochester Ins. Co. v. Martin, 13-59 (54).
[78] McMartin v. Cont. Ins. Co., 41-198, 42+934.
[79] Wilkins v. State Ins. Co., 43-177, 45+1.
[80] Kollitz v. Equitable etc. Co., 92-234, 99+892. See Union etc. Co. v. Taggart, 55-95, 56+579.
[81] Frost's etc. Works v. Millers' etc. Co., 37-300, 34+35.
[82] Phoenix Ins. Co. v. Taylor, 5-492(393).
[83] Russell v. Manufacturers' etc. Co., 50-409, 52+906.

of gasoline held waived;[84] held not waived.[85] The keeping of a small amount of gasoline has been held not to invalidate a policy as a matter of law.[86]

4773. Limitations on use—A description of property as a "sawmill building" has been held not to restrict the use to the purpose of a sawmill.[87] A policy has been construed to prohibit the carrying on of a hazardous trade in a dwelling-house.[88]

4774. Transfer of interest—A condition against a sale or transfer of title has been held violated by a transfer by the insured to his wife.[89] It has been held not violated by a mortgage and foreclosure thereunder;[90] or by an agreement to transfer to a mortgagee in full satisfaction of the mortgage debt.[91] A condition against a transfer of "interest" is violated by an executory contract to convey. Where the condition is against a transfer of "title" there is no breach unless there is a transfer of the "legal" title.[92] A condition requiring a mortgagee to give the insurer notice of any change of ownership applies to a transfer to a third person and not to one from the mortgagor to the mortgagee through foreclosure.[93] An unauthorized transfer may render a policy void as to the insured, but not as to a mortgagee to whom it is payable.[94] The effect of a change of ownership due to the withdrawal of a partner from a firm is undetermined.[95] Whether a sale had been completed before a fire by an acceptance has been held a question for the jury.[96] A condition against a transfer held not waived.[97]

4775. Title of insured—A policy provided that "this policy * * * shall be void * * * if the interest of the insured be other than unconditional and sole ownership, or if the subject of insurance be a building on ground not owned by the insured in fee simple." It was held that this referred to existing conditions, and not to future changes of title; that it was incumbent on the insured to disclose the nature of his title; that the insurer did not waive the condition by issuing the policy without inquiry as to the title; and that a breach of the condition invalidated the entire policy.[98] Under a similar condition it was held that no recovery could be had where the insured had only a life tenancy.[99] A similar condition has been held not broken where some part of the insured building stood on land owned in fee by the insured and part on a public street.[1] A condition requiring a fee in the insured has been held qualified by a subsequent clause describing the property as at a United States post or fort.[2] A condition requiring unconditional and sole ownership is not violated by an incumbrance.[3] Where the company shows that at the time of the application the property had been conveyed to a third party at a tax sale, the insured may show that the sale was void.[4]

[84] Hartley v. Penn. etc. Co., 91-382, 98+198.
[85] McFarland v. St. Paul etc. Co., 46-519, 49+253.
[86] Fegelson v. Niagara etc. Co., 97-535, 106+1132.
[87] Frost's etc. Works v. Millers' etc. Co., 37-300, 34+35.
[88] Gasner v. Met. Ins. Co., 13-483(447).
[89] Langdon v. Minn. etc. Assn., 22-193.
[90] Loy v. Home Ins. Co., 24-315.
[91] Magoun v. Fireman's Fund Ins. Co., 86-486, 91+5.
[92] Gibb v. Philadelphia etc. Co., 59-267, 61+137. See 22 Harv. L. Rev. 602.
[93] Washburn v. Fire Assn., 60-68, 61+828; Pioneer etc. Co. v. St. Paul etc. Co., 68-170, 70+979.
[94] Sterling etc. Co. v. Beffrey, 48-9, 50+922.
[95] See Brigham v. Wood, 48-344, 51+228.
[96] Chandler v. St. Paul etc. Co., 21-85.
[97] St. Paul etc. Co. v. Parsons, 47-352, 50+240.
[98] Parsons v. Lane, 97-98, 106+485.
[99] Collins v. St. Paul etc. Co., 44-440, 46+906.
[1] Haider v. St. Paul etc. Co., 67-514, 70+805.
[2] Broadwater v. Lion etc. Co., 34-465, 26+455.
[3] Caplis v. Am. etc. Co., 60-376, 378, 62+440.
[4] Newman v. Springfield etc. Co., 17-123 (98).

4776. Effect of conditions—As a general rule, where there is no application for insurance, the insured is bound by the conditions found in the policy which he has accepted, and retained without objection.[5]

4777. Effect of breach of conditions—The cases are not harmonious as to the effect of a breach of a condition in a policy—some holding that the effect is to render the policy void,[6] and others merely voidable.[7] A condition that in case any of the representations in the application are untrue the policy shall be null and void does not mean that it shall be absolutely void, but voidable only at the election of the insurer. If the insurer elects to avoid the policy it is void in toto and from the beginning, so that the insurer cannot avoid it and enforce the promise of the insured to pay the premium.[8] If a policy is made payable to a mortgagee of the property, no act or default of any person other than such mortgagee or his agents, or those claiming under him affects such mortgagee's right to recover in case of loss.[9]

4778. Fraud and false swearing—Wilful false swearing, in regard to any material matter avoids the whole policy. A misrepresentation, to avoid the policy, must be material. A slight exaggeration of the value of the property is not fatal.[10] A provision that "any fraud or attempt at fraud or false swearing on the part of the insured shall cause a forfeiture of all claim under this policy," has been held to embrace the whole period from the making of the contract until the proofs of loss are furnished.[11]

LOSS

4779. Cause of fire—A finding that a fire was not caused by the insured has been sustained.[12]

4780. Total loss—Fire limits—A building is a total loss though the walls above the foundation remain standing, in whole or in part, if they could not be safely and economically utilized in rebuilding. The question is one of fact. The test is, would a person of ordinary prudence utilize the remnants in rebuilding as they stand rather than tear them down to the foundation.[13] In applying the test it is proper to receive evidence of the value of the remnants, the cost of repairing the same, and the total cost of reconstruction.[14] In an action upon a policy covering a building located within the fire limits of a city, and of a class the repair of which is, under certain conditions, prohibited by the city ordinances, recovery may be had as for a total loss when the repair of the building insured and damaged is prevented under and by reason of such ordinances, the value of what remains of the building after the fire over and above the cost of removing it from the premises being deducted therefrom. Whether the determination of the building inspector of the city of St. Paul, or of the board of arbitration on appeal from his decision, that a building within the fire limits of such city has been damaged to the extent of fifty per

[5] McFarland v. St. Paul etc. Co., 46-519, 49+253; Parsons v. Lane, 97-98, 106+485.

[6] Taylor v. Grand Lodge, 96-441, 105+408; Johnson v. Am. Ins. Co., 41-396, 43+59; Goldin v. Northern A. Co., 46-471, 49+246; Betcher v. Capital etc. Co., 78-240, 80+971.

[7] Schreiber v. German etc. Co., 43-367, 45+708; Brigham v. Wood, 48-344, 51+228.

[8] Schreiber v. German etc. Co., 43-367, 45+708.

[9] Moore v. Sun Ins. Office, 100-374, 111+260; Magoun v. Fireman's etc. Co., 86-486, 91+5; Sterling etc. Co. v. Beffrey, 48-9, 50+922.

[10] Hamberg v. St. Paul etc. Co., 68-335, 71+388. See Hodge v. Franklin Ins. Co., 126+1098.

[11] Gies v. Bechtner, 12-279(183).

[12] Schornak v. St. Paul etc. Co., 96-299, 104+1087.

[13] N. W. etc. Co. v. Rochester etc. Co., 85-48, 88+265; N. W. etc. Co. v. Sun Ins. Office, 85-65, 88+272; Poppitz v. German Ins. Co., 85-118, 88+438.

[14] N. W. etc. Co. v. Sun Ins. Office, 85-65, 88+272.

cent. of its value, and therefore not subject to repair under the ordinance, is final and conclusive, and not subject to judicial review by the courts, is an open question. Even though not final and conclusive, such determination can only be impeached by clear and convincing proof of fraud, collusion, or mistake; and the burden of proof is upon the party who calls it in question.[15]

4781. When loss "direct result" of fire—To render a loss the direct result of fire it is unnecessary that the property be ignited or consumed by fire. Where a building, separated from the insured building by a partition wall, caught fire, and as a direct result of the fire, fell, carrying down with it the partition wall and a part of the insured building, it was held that the fall of the insured building was the "direct result of fire" within the terms of the policy though no part of it was ignited or consumed by fire.[16] Where a building was injured by the fall of a wall of an adjacent building which had been partially destroyed by fire several days before, the fall of the wall being due to a heavy wind, it was held that if, under all the circumstances, the parties to the contract of insurance could have reasonably foreseen that a fire might leave the adjacent wall unsupported, subject to the action of such wind, and that it might be blown over and fall upon the insured building, such contingency was an element in the risk.[17]

NOTICE AND PROOF OF LOSS

4782. Condition precedent—Substantial compliance—Provisions as to notice and proof of loss must be substantially complied with before the claim is payable. They are conditions precedent to the right of the insured to maintain an action unless they are waived.[18]

4783. By whom—Objection that proof of loss was furnished by an assignee of a policy, rather than by the insured, has been held waived.[19]

4784. Sufficiency of statement—A substantial compliance with the terms of the standard policy, as respects proof of loss, is sufficient. It is not essential that the statement contain a specific demand or claim as to the amount of the loss.[20]

4785. Inventory—A failure to furnish an inventory as required by a policy is excused if it is not practicable to do so on account of damage to the goods from fire.[21]

4786. Certificate of magistrate—A provision requiring the insured to furnish a certificate of the nearest magistrate or notary, as to the facts of a loss, is a condition precedent, and the refusal of the officer for any reason to furnish it, does not excuse the insured.[22]

4787. Time of furnishing—The term "forthwith" in the standard policy means within a reasonable time.[23] Under the standard policy a failure to furnish the statement within a reasonable time does not work a forfeiture, but merely postpones the time of payment.[24] Prior to the standard policy a failure

[15] Larkin v. Glens Falls Ins. Co., 80-527, 83+409.

[16] Ermentrout v. Girard etc. Co., 63-305, 65+635.

[17] Russell v. German etc. Co., 100-528 111+400.

[18] Gies v. Bechtner, 12-279(183).

[19] Newman v. Springfield etc. Co., 17-123 (98).

[20] De Raiche v. Liverpool etc. Co., 83-398, 86+425.

[21] Powers v. Imperial etc. Co., 48-380, 51+123.

[22] Lane v. St. Paul etc. Co., 50-227, 52+649. See Potter v. Holmes, 72-153, 158, 75+591; Young v. Grand Council, 63-506, 510, 65+933.

[23] Fletcher v. German etc. Co., 79-337, 82+647; Rines v. German Ins. Co., 78-46, 80+839.

[24] Mason v. St. Paul etc. Co., 82-336, 85+13. See Rottier v. German Ins. Co., 84-116, 119, 86+888.

to furnish notice and proof of loss as prescribed in the policy worked a forfeiture,[25] unless there was a waiver.[26] The company may waive the prompt furnishing of proof under the standard policy.[27]

4788. Service by mail—Proof of loss duly mailed to the insurer at its home office is presumed to be received in due course of mails.[28]

4789. Waiver—If the company objects to the sufficiency of proof of loss on one ground alone it waives all other objections.[29] If the company retains proof of loss without objection it waives all objections,[30] but the acceptance, without objection, of proofs of loss in compliance with one condition cannot be construed as a waiver of compliance with another.[31] A local agent who is simply authorized to fix rates and countersign and deliver policies, subject to the approval of the company, has no authority to waive notice and proof of loss.[32] If the company retains proofs, but objects to their sufficiency, and denies liability on the policy, it is not a waiver.[33] A failure to furnish proof within the prescribed time held waived.[34] Where a company investigated the cause of a fire, admitted its liability, and prepared proofs and presented them to the insured for signature, which he refused to sign because of a stipulation of settlement therein, it was held to waive formal proof of loss.[35] An adjusting agent has been held to have authority to waive proof of loss or defects therein.[36] A condition as to proof of loss held not waived.[37]

ADJUSTMENT OF LOSS

4790. Adjusters—An adjuster has been held to have authority to agree with the insured as to the disposal of salvage;[38] to waive defects in proof of loss;[39] to waive a breach of a condition against incumbrances;[40] to waive a breach of condition against vacancy;[41] and to employ an assistant.[42]

4791. Effect—A mere adjustment of the amount of a loss is not an admission of liability thereon, and does not raise an implied promise to pay it.[43] If,

[25] Bowlin v. Hekla etc. Co., 36–433, 31+859; Shapiro v. Western etc. Co., 51–239, 53+463; Shapiro v. St. Paul etc. Co., 61–135, 63+614, Ermentrout v. Girard etc. Co., 63–305, 65+635.

[26] Phoenix Ins. Co. v. Taylor, 5–492 (393); McCarvel v. Phenix Ins. Co., 64–193, 66+367.

[27] Lake Superior etc. Co. v. Concordia etc. Co., 95–492, 104+560.

[28] Dade v. Aetna Ins. Co., 54–336, 56+48.

[29] Levine v. Lancashire Ins. Co., 66–138, 68+855; Phoenix Ins. Co. v. Taylor, 5–492 (393).

[30] Newman v. Springfield etc. Co., 17–123 (98); Bromberg v. Minn. Fire Assn., 45–318, 47+975; Powers v. Imperial etc. Co., 48–380, 51+123; First Nat. Bank v. Am. etc. Co., 58–492, 60+345; Mpls. etc. Ry. v. Home Ins. Co., 64–61, 66+132.

[31] Lane v. St. Paul etc. Co., 50–227, 52+649; Dade v. Aetna Ins. Co., 54–336, 56+48.

[32] Bowlin v. Hekla etc. Co., 36–433, 31+859; Shapiro v. St. Paul etc. Co., 61–135, 63+614; Ermentrout v. Girard etc. Co., 63–305, 65+635. See Mpls. etc. Ry., v. Home Ins. Co., 64–61, 66+132; Guernsey v. Am. Ins. Co., 17–104(83).

[33] Ermentrout v. Girard etc. Co., 63–305, 65+635.

[34] McCarvel v. Phenix Ins. Co., 64–193, 66+367; Lake Superior etc. Co. v. Concordia etc. Co., 95–492, 104+560. See Mistilski v. German Ins. Co., 64–366, 67+80 (waiver held a question for the jury).

[35] Larkin v. Glens Falls Ins. Co., 80–527, 83+409.

[36] Swain v. Agr. Ins. Co., 37–390, 34+738; Mpls. etc. Ry. v. Home Ins. Co., 64–61, 66+132.

[37] Mitchell v. Minn. Fire Assn., 48–278, 51+608.

[38] First Nat. Bank v. Manchester etc. Co., 64–96, 66+136; First Nat. Bank v. Lancashire Ins. Co., 65–462, 68+1.

[39] Mpls. etc. Ry. v. Home Ins. Co., 64–61, 66+132; Swain v. Agr. Ins. Co., 37–390, 34+738.

[40] First Nat. Bank v. Manchester etc. Co., 64–96, 66+136.

[41] Swain v. Agr. Ins. Co., 37–390, 34+738.

[42] Trebby v. Western Ins. Co., 83–452, 86+407.

[43] Willoughby v. St. Paul etc. Co., 68–373, 71+272. See Lake Superior etc. Co. v. Concordia etc. Co., 95–492, 104+560.

upon an adjustment, the company promises to pay the loss the obligation rests on the adjustment and not on the policy.[44]

4792. Accord and satisfaction—An adjustment may amount to an accord and satisfaction.[45]

ARBITRATION

4793. Condition precedent—Waiver—A provision in a policy making an arbitration of the amount of loss a condition precedent to an action is valid.[46] Under the standard policy arbitration is not a condition precedent when there is not an actual disagreement as to the amount of the loss,[47] or when a building is destroyed by fire and the total insurance thereon, exclusive of foundation, is less than its insurable value as fixed in the policy.[48] The right to insist on an arbitration as a condition precedent may be waived.[49]

4794. Board of referees—Practice—The referees provided for under the standard policy are a quasi court, subject to the rules governing common-law arbitration. They should sit in a body and receive evidence offered by the respective parties subject to cross-examination. But they are not limited to such evidence and are not bound by the same strict rules as courts in their investigation. They may examine the locus in quo and pursue their investigations without the aid of witnesses, but they should do so as a body and not individually.[50] The parties must be given reasonable opportunity to be present in person or by counsel and submit evidence.[51] The referees must be disinterested and impartial,[52] but it is no objection that they are acquainted with the facts of the case.[53] A referee may render himself liable in damages for fraud or other misconduct.[54] The pendency of negotiations for a compromise does not excuse a party from compliance with a demand that arbitration proceedings go forward. Neither party should interfere with the two referees in the selection of a third.[55] The provision of the statute requiring referees to be residents of the state is mandatory.[56]

4795. Refusal to accept award—Practice—If one of the parties refuses to abide by an award on the ground of misconduct of the referees and notifies the other party of that fact, stating the grounds of objection, and demanding a reappraisement, the party so notified may stand by the award or submit to a reappraisement. If he abides by the award and the same is adjudged illegal, for

[44] McCallum v. Nat. etc. Co., 84–134, 86+892; Strampe v. Minn. etc. Co., 109–364, 123+1083.

[45] See Lake Superior etc. Co. v. Concordia etc. Co., 95–492, 104+560.

[46] Gasser v. Sun Fire Office, 42–315, 44+252; Powers v. Imperial etc. Co., 48–380, 388, 51+123; Mosness v. German etc. Co., 50–341, 52+932; Levine v. Lancashire Ins. Co., 66–138, 148, 68+855; Hamberg v. St. Paul etc. Co., 68–335, 71+388.

[47] Fletcher v. German etc. Co., 79–337, 82+647; Kelly v. Liverpool etc. Co., 94–141, 145, 102+380.

[48] Ohage v. Union Ins. Co., 82–426, 85+212; Moore v. Sun Ins. Office, 100–374, 111+260. See N. W. etc. Co. v. Rochester etc. Co., 85–48, 63, 88+265.

[49] Powers v. Imperial etc. Co., 48–380, 51+123; Hamberg v. St. Paul etc. Co., 68–335, 71+388; Schrepfer v. Rockford Ins. Co., 77–291, 79+1005; O'Rourke v. German Ins. Co., 96–154, 104+900; Id., 99–293, 109+401; Moore v. Sun Ins. Office, 100–374, 111+260; Cash v. Concordia etc. Co., 126+524.

[50] Levine v. Lancashire Ins. Co., 66–138, 68+855; Christianson v. Norwich etc. Soc., 84–526, 88+16; Produce etc. Co. v. Norwich etc. Soc., 91–210, 97+875, 98+100.

[51] Schreiber v. German etc. Co., 43–367, 45+708; Mosness v. German etc. Co., 50–341, 52+932; Redner v. New York etc. Co., 92–306, 99+886; Schoenich v. Am. Ins. Co., 109–388, 124+5. See Janney v. Goehringer, 52–428, 54+481, and cases above.

[52] Levine v. Lancashire Ins. Co., 66–138, 68+855; Christianson v. Norwich etc. Soc., 84–526, 88+16; Produce etc. Co. v. Norwich etc. Soc., 91–210, 97+875, 98+100.

[53] Produce etc. Co., v. Norwich etc. Soc., 91–210, 216, 97+875, 98+100.

[54] Alden v. Christianson, 83–21, 85+824.

[55] Powers v. Imperial etc. Co., 48–380, 51+123.

[56] Schoenich v. Am. Ins. Co., 109–388, 124+5.

the cause assigned, there can be no resubmission to other referees, but the damages may be determined in the action to set aside the award.[57]

4796. Effect of award—An award has been held not to preclude the insurer from subsequently contesting his liability on the policy.[58]

4797. Setting aside award—An action will lie to set aside an award for fraud or partiality in the referees or for their refusal to receive material evidence,[59] but an award is not to be lightly set aside.[60] It is presumed that the referees discharged their duty.[61] If an award is set aside a new appraisement is a condition precedent to an action on the policy unless waived.[62] A complaint in an action to set aside an award held sufficient.[63] In such an action a referee who refused to join in the award may testify as to acts of partiality and misconduct on the part of the other referees.[64]

4798. Compensation of referees—In the absence of express agreement each party is liable for one-half the reasonable value of the services of the referees.[65]

4799. Refusal of referee to act—If a referee nominated by the insurer to adjust a fire loss arbitrarily and unfairly refuses to co-operate with his associate in selecting a third referee, and refuses to further act as a referee, such conduct will constitute a waiver by the insurer of its rights to have the loss adjusted by referees, if it authorizes or approves, directly or indirecly, the action of its referee. If the insurer does not so authorize or approve the action of its referee, but, upon being advised thereof, it refuses to agree to the selection of other referees, it thereby waives its right to an appraisal of the loss.[66] The fact that the insured in the meantime repaired the building is immaterial.[67]

PAYMENT OF LOSS

4800. Time—Under the standard policy a loss is not payable absolutely within sixty days after the submission of proof of loss, but, in case of a reference, it is not payable until the referees make their award.[68] A policy has been construed as fixing the time of payment with reference to the written notice of loss, and not with reference to the formal proof of loss.[69] An absolute denial of any liability, on a policy, and a refusal to pay, are a waiver of the right to a stipulated time after proof of loss in which to pay.[70]

4801. To whom—A receiver is a "legal representative" within the meaning of the standard policy.[71] A personal representative, receiving payment of a policy on a homestead, holds the money in trust for those interested in the land and not as general assets.[72] The right of a mortgagee to insurance money is considered elsewhere.[73] A carrier has been held entitled to recover on policies covering grain of others in carriage.[74]

[57] Levine v. Lancashire Ins. Co., 66–138, 149, 68+855; Christianson v. Norwich etc. Soc., 84–526, 88+16; Produce etc. Co. v. Norwich etc. Soc., 91–210, 97+875, 98+100.

[58] Johnson v. Am. Ins. Co., 41–396, 43+59.

[59] See cases under § 4794.

[60] Levine v. Lancashire Ins. Co., 66–138, 147, 68+855; Mosness v. German etc. Co., 50–341, 52+932.

[61] Mosness v. German etc. Co., 50–341, 52+932; Produce etc. Co. v. Norwich etc. Soc., 91–210, 214, 97+875, 98+100.

[62] Levine v. Lancashire Ins. Co., 66–138, 149, 68+855.

[63] Redner v. New York etc. Co., 92–306, 99+886.

[64] Levine v. Lancashire Ins. Co., 66–138, 68+855.

[65] Alden v. Christianson, 83–21, 85+824.

[66] O'Rourke v. German etc. Co., 96–154, 104+900. See Powers v. Imperial etc. Co., 48–380, 51+123.

[67] O'Rourke v. German etc. Co., 99–293, 109+401.

[68] Schrepfer v. Rockford Ins. Co., 77–291, 79+1005.

[69] Cargill v. Millers' etc. Co., 33–90, 22+6.

[70] Hand v. Nat. etc. Co., 57–519, 59+538.

[71] Alford v. Consolidated etc. Co., 88–478, 93+517.

[72] Culbertson v. Cox, 29–309, 13+177.

[73] See § 6275.

[74] Home Ins. Co. v. Mpls. etc. Ry., 71–296, 74+140.

4802. Apportionment between insurer and insured—Under a provision in a policy for apportionment of damage between insurer and insured from the removal of property from a building exposed to fire, it has been held that each party must bear the loss in proportion to the risk which he carried.[75]

4803. Amount—Where, on the trial, the insurer made no claim that it was entitled to any reduction by reason of the fact that the insured did not take reasonable steps to preserve the property after the fire started, it was held not error for the court to instruct the jury that if they found for the insured it should be for the entire amount of the policy.[76]

4804. Interest—The insured has been held not entitled to interest on the amount of a loss until he offered to submit to a reference.[77]

4805. Pro rata liability—Subrogation—Where a carrier took out several policies, on goods of different owners in carriage, it was held that there was such identity of interest, person, and risk that it was a case of double insurance; that all the policies must contribute ratably to the payment of the loss; and that the carrier had no right of subrogation.[78] A provision in a policy for proportionate liability construed.[79]

LIFE INSURANCE

4806. What constitutes—A contract of life insurance, or of insurance upon a life, in the ordinary form, is a contract to pay a certain sum of money on the death of the insured.[80]

4807. Nature of contract—A contract, with provisions for the payment of annual premiums, is not a contract of insurance for a single year, with the privilege of renewal from year to year by paying the annual premium; but an entire contract of insurance for life, subject to forfeiture for non-payment of premiums.[81]

4808. Participating policy—A participating policy is one that is entitled to dividends, whether such dividends are paid yearly or at stated distribution periods.[82]

4809. Condition as to health—Sound health—The expression "sound health" in a condition of a policy, has been held to mean not perfect health but an absence of any disease that has a direct tendency to shorten life.[83]

4810. Death in violating law—A condition against liability for death in or in consequence of the violation of any criminal law has been held not violated by a suicide to escape arrest and trial for a crime.[84]

4811. Suicide of insured—In the event of suicide by the insured the insurer is liable if the policy is silent on the subject.[85] If the policy simply provides against liability in the event of suicide, the insurer is not liable, if the insured commits suicide when sane, but is liable if the insured commits suicide when insane.[86] A provision in a policy against liability in case of suicide by the

[75] Peoria etc. Co. v. Wilson, 5-53(37).
[76] Schornak v. St. Paul etc. Co., 96-299, 104+1087.
[77] Schrepfer v. Rockford Ins. Co., 77-291, 79+1005.
[78] Home Ins. Co. v. Mpls. etc. Ry., 71-296, 74+140.
[79] Hoffman v. Mpls. etc. Co., 42-291, 44+67.
[80] State v. Federal Invest. Co., 48-110, 50+1028. See Tennes v. N. W. etc. Co., 26-271, 3+346 (contract held not one purely of life insurance).
[81] Stramback v. Fidelity etc. Co., 94-281, 102+731.
[82] Nat. P. Legion v. O'Brien, 102-15, 112+1050.
[83] Murphy v. Met. L. Ins. Co., 106-112, 118+355.
[84] Kerr v. Minn. etc. Assn., 39-174, 39+312.
[85] Mills v. Rebstock, 29-380, 13+162; Kerr v. Minn. etc. Assn., 39-174, 39+312.
[86] Scheffer v. Nat. Life Ins. Co., 25-534; Robson v. United Order of Foresters, 93-24, 100+381. See Bunker v. United Order of Foresters, 97-361, 107+392.

insured, whether sane or insane, has been sustained.[87] The burden of proving suicide is generally upon the insurer. The question of suicide is for the jury, unless the evidence is conclusive.[88] The presumption is against suicide. If the known facts are consistent with the theory of natural or accidental death, the presumption which the law raises from the ordinary motives and principles of human conduct requires a finding against suicide. When circumstantial evidence is relied on, the defendant must establish facts which exclude any reasonable hypothesis of natural or accidental death.[89] An "incontestable clause" in a policy has been held to render the insurer liable in case of suicide after a certain period.[90] One who intentionally takes his own life by administering to himself poisonous drug, being of sufficient mental capacity to comprehend the nature and consequences of the act, commits deliberate suicide.[91]

4812. To whom payable—A policy has been held payable to a wife of the insured only in the event of his dying within a certain period, leaving her surviving.[92] An endowment policy has been held payable, in case of the death of the insured, before its maturity, to his wife, only in case she survived him; otherwise to his personal representatives or assigns.[93] A provision for payment to the brothers and sisters of the insured, "or to their living issue, according to the right of representation," has been held to refer to living lineal descendents of deceased brothers and sisters.[94] The phrase "his children" has been held to include the children of two marriages.[95] An old-line life insurance policy contained a provision that the amount of the insurance should be payable to the heirs at law of the insured (the husband) in case he should outlive the beneficiary (the wife). It was held that upon the death of the beneficiary the interest in the policy as such passed to her son, and upon his death to the heirs at law of the insured.[96]

4813. Right of beneficiaries—Unless a policy reserves the right of divestiture it confers immediately upon the beneficiary a vested right. Without the consent of the beneficiary the insured cannot assign, pledge, or surrender the policy, or in any way impair such vested right.[97] If the insured reserves the right to change the beneficiary the beneficiary originally named has no vested right, but a mere expectancy.[98] The vested interest of a wife under an endowment policy has been held not affected by an agreement between the husband and wife as to the disposition of property on a divorce.[99]

4814. Reinstatement—Health certificate—The insured has been held entitled to have his policy reinstated after a default upon paying the premiums then due, without paying premiums not yet due.[1] Cases are cited below involving the effect of a reinstatement upon a waiver in the original application,[2]

[87] Cotter v. Royal Neighbors, 76–518, 79+542. See 23 Harv. L. Rev. 557.

[88] Hale v. Life Indemnity etc. Co., 61–516, 63+1108; Beckett v. N. W. etc. Assn., 67–298, 69+923; Sartell v. Royal Neighbors, 85–369, 88+985; O'Connor v. Modern Woodmen, 124+454.

[89] Lindahl v. Supreme Court, 100–87, 110+358; Kornig v. Western L. I. Co., 102–31, 112+1039; Zearfoss v. Switchmen's Union, 102–56, 112+1044.

[90] Mareck v. Mut. Reserve etc. Assn., 62–39, 64+68.

[91] Zearfoss v. Switchmen's Union, 102–56, 112+1044.

[92] Tennes v. N. W. etc. Co. 26–271. 3+346.

[93] Lamberton v. Bogart, 46–409, 49+230.

[94] Hemenway v. Draper, 91–235, 97+874.

[95] Ricker v. Charter Oak etc. Co., 27–193, 6+771.

[96] Birge v. Franklin, 103–482, 115+278.

[97] Ricker v. Charter Oak etc. Co., 27–193, 6+771; Allis v. Ware, 28–166, 9+666; Wallace v. Mutual etc. Co., 97–27, 106+84; Birge v. Franklin, 103–482, 115+278.

[98] Richmond v. Johnson, 28–447, 10+596; Laudenschlager v. N. W. etc. Assn., 36–131, 30+447.

[99] Wallace v. Mutual etc. Co., 97–27, 106+84.

[1] Coburn v. Life etc. Co., 52–424, 54+373.

[2] Geare v. U. S. etc. Co., 66–91, 68+731.

and the construction of a health certificate made to secure the reinstatement of a policy.[3]

4815. Proof of death—Statements in the proof of death as to the manner of death may be contradicted.[4] Evidence held sufficient to justify a finding that a failure to furnish proof of death within the prescribed time was due to the delay of the insurer in furnishing the beneficiary with the requisite blanks. If it is the duty of the company to furnish such blanks, and it sends them by mail, it assumes the risk of delivery.[5] Evidence held insufficient to justify a finding that the insured died within a certain time after his disappearance,[6] or that a certain dead body was that of the insured.[7] Evidence held sufficient to justify a verdict as to the death of the insured, and the identity of the body.[8]

4816. Payment of premiums—Notes—Under a New York policy it has been held that a failure to pay a premium note forfeited the policy; that no statutory notice of forfeiture was necessary; that no declaration of forfeiture was necessary; and that the evidence did not show a waiver of the forfeiture.[9] A forfeiture clause in premium notes has been construed with reference to the terms of a policy providing that it should become a paid-up policy, for a ratable part of the amount insured, on payment of the annual premiums.[10] The acceptance of a premium note has been held equivalent to a cash payment.[11] A policy does not ordinarily take effect until the premium is paid, though it is delivered.[12] A provision in a policy, that the insurance would continue for a certain period after the due date of the annual premium, notwithstanding a default in payment, construed.[13] The provisions of an endowment policy, as to the payment of premiums, construed. A default in the payment of interest amounting to four cents has been held too trifling to be noticed.[14] A forfeiture for the non-payment of a premium has been held not to affect the period of insurance already paid for, but to affect a future period of insurance covered by the premium defaulted.[15]

4817. Amount recoverable—A creditor to whom a policy had been assigned as security has been held entitled to recover the full face value thereof, though a portion of his claim was not due.[16]

MUTUAL BENEFIT INSURANCE

4818. Constitution and by-laws of insurer—If a society issues no policy, its constitution and by-laws stand in the place of a policy and constitute the contract which determines the mutual rights and obligations of the parties.[17]

[3] Reilly v. Chicago etc. Soc., 75–377, 77+982.

[4] Beckett v. N. W. etc. Assn., 67–298, 69+923.

[5] Robinson v. N. W. etc. Co., 92–379, 100+226.

[6] Spahr v. Mutual etc. Co., 98–471, 108+4.

[7] Baxter v. Covenant etc. Assn., 77–80, 79+596; Id., 81–1, 83+459.

[8] Lindahl v. Supreme Court, 100–87, 110+358.

[9] Banholzer v. New York etc. Co., 74–387, 77+295, 78+244.

[10] Symonds v. N. W. etc. Co., 23–491.

[11] Symonds v. N. W. etc. Co., 23–491; Union etc. Co. v. Taggart, 55–95, 56+579.

[12] Union etc. Co. v. Taggart, 55–95, 56+579. See § 4655.

[13] Grattan v. Prud. Ins. Co., 98–491, 108+821.

[14] Van Norman v. N. W. etc. Co., 51–57, 52+988.

[15] Stramback v. Fidelity etc. Co., 94–281, 102+731.

[16] Hale v. Life etc. Co., 65–548, 68+182.

[17] Mills v. Rebstock, 29–380, 13+162; Davidson v. Old People's etc. Soc., 39–303, 39+803; Hesinger v. Home Ben. Assn., 41–516, 43+481; Scheufler v. Grand Lodge, 45–256, 47+799; Hall v. Merrill, 47–260, 49+980; Finch v. Grand Grove, 60–308, 62+384; Lake v. Minn. etc. Assn., 61–96, 63+261; Schoenau v. Grand Lodge, 85–349,

If it issues a policy the constitution and by-laws are a part of the contract.[18] If a society issues a policy which is inconsistent with one of its by-laws, but is authorized by its charter, it waives the by-law in favor of the insured.[19] If there is a conflict between the articles of association and the by-laws the former control.[20] A by-law adopted after the insured took out his insurance is not binding on him, if it is unreasonable.[21]

4819. Organization of insurer—If the insurer has assumed to make the contract on which the action is brought under the name by which it is sued, it is immaterial, so far as the plaintiff's right to recover is concerned, whether it is a corporation duly organized, or a corporation de facto, or a mere voluntary association.[22] By accepting and retaining the dues or fees of an applicant for a beneficiary certificate, with knowledge of the facts, the insurer waives all irregularities in the organization of the subordinate lodge and in the admission of the applicant to its membership.[23] An association whose purpose is to endow the wife of each member with a sum of money equal to as many dollars as there are members of the association, to be raised by assessment on them, has been held not a "benevolent society" for the purpose of incorporation under G. S. 1878 c. 34 § 166.[24]

4820. Reorganization—An association, upon reorganization, has been held not liable on a certificate issued by a former association of the same name.[25]

4821. Members charged with notice—Members are presumed to know the significance of their membership—their rights and liabilities.[26]

4822. Membership—Conditions—By-laws—The by-laws of mutual benefit soieties often prescribe conditions of membership.[27] A member may recover damages for a wrongful expulsion.[01]

4823. Designation of beneficiaries—The statute defines the persons who may be made beneficiaries.[28] Where the insured directed that his certificate be payable according to his will and bequest and died intestate, it was held that there was no designation and that payment should be made as provided by the constitution.[29] The term "representatives" has been held to mean any person whom the member might designate, or, if he failed to designate any one, the person whom the by-laws designate, as the person to whom payment shall be made. A designaton as beneficiary of a person not a member of the family of the insured has been sustained.[30] A "lodge," whether duly organized or not,

88+999; Bost v. Supreme Council, 87–417, 92+337; Monahan v. Supreme Lodge, 88–224, 92+972; Louden v. Modern Brotherhood, 107–12, 119+425.

[18] Davidson v. Old People's etc. Soc., 39–303, 39+803; O'Connor v. Modern Woodmen, 124+454. See Louden v. Modern Brotherhood, 107–12, 119+425.

[19] Davidson v. Old People's etc. Soc., 39–303, 39+803.

[20] Walter v. Hensel, 42–204, 208, 44+57.

[21] Thibert v. Supreme Lodge, 78–448, 81+220; Tebo v. Supreme Council, 89–3, 93+513; Olson v. Court of Honor, 100–117, 110+374. See 17 Harv. L. Rev. 127.

[22] Foster v. Moulton, 35–458, 29+155; Jewell v. Grand Lodge, 41–405, 43+88; Scheufler v. Grand Lodge, 45–256, 47+799; Perine v. Grand Lodge, 48–82, 50+1022; Cornfield v. Order Brith Abraham, 64–261, 66+970.

[23] Perine v. Grand Lodge, 48–82, 50+1022; Id., 51–224, 53+367.

[24] State v. Critchett, 37–13, 32+787; State v. Trubey, 37–97, 33+554.

[25] Adams v. N. W. etc. Assn., 63–184, 65+360.

[26] Foster v. Moulton, 35–458, 29+155.

[27] Louden v. Modern Brotherhood, 107–12, 119+425 (application—examination by physician—acceptance by head office—initiation in a local lodge—authority of officers of local lodges—departure from by-laws—waiver); O'Connor v. Modern Woodmen, 124+454 (provision of by-laws against intemperate habits—meaning of "intemperate use of intoxicating liquors").

[01] Malmsted v. Mpls. Aerie, 126+486.

[28] R. L. 1905 § 1703; Laws 1907 c. 382. See Louden v. Modern Brotherhood, 107–12, 119+425; Middelstadt v. Grand Lodge, 107–228, 120+37; Meyer v. Grand Lodge, 108–25, 121+235.

[29] Jewell v. Grand Lodge, 41–405, 43+88.

[30] Walter v. Hensel, 42–204, 44+57.

may be named as a beneficiary.[31] The words "legal representatives" have been held to mean heirs or next of kin, and not executors or administrators.[32] A widow has been held to be an "heir." An act has been held to be an "original designation" and not a "change" of beneficiaries. Informality in the designation of a beneficiary may be waived by the society.[33] A designation of brothers and sisters "or to their living issue," has been held to include living lineal descendents of deceased brothers and sisters.[34] The word "orphans" has been held to mean children.[35] The insurer has been held estopped from questioning the competency of a person to be named as a beneficiary, after collecting assessments from the insured for a term of years.[36] The designation of a beneficiary partakes of the nature of a testamentary disposition of property, and the same rules of construction should be applied so far as possible. Unless a contrary intention is manifest they should be construed as speaking as of the date of the death of the donor.[37] Where a member of a beneficial association disposes of the proceeds of a beneficial certificate by will, it is unnecessary that the party thus receiving the fund shall have had an insurable interest in the life of the insured. When a member of a beneficial association, with the consent of the association, has inserted in the certificate the name of a person whom he was not authorized by the constitution to name as beneficiary, and thereafter by will bequeaths the proceeds of the certificate to the person thus illegally designated, the fact that such person was illegally named as beneficiary is of no consequence, as the fund passes by testamentary disposition, and not by virtue of the designation.[38] A society is entitled to assume that a person named in a certificate is within the limitations imposed by the constitution of the society, and does not waive the provisions of the constitution, and is not estopped from asserting the contrary, by the fact that the person claiming to be entitled to the fund was named as the beneficiary upon a blank furnished by the society, attested by the secretary, and that the dues and assessments were paid for the period of six years.[39]

4824. Change of beneficiaries—A right to change beneficiaries has been held absolute.[40] Regulations governing a change of beneficiaries may be waived or varied by the society.[41] Certain acts of the insured have been held not to constitute a change.[42] In an action involving a contest growing out of a change of beneficiaries it was held that the findings did not justify the conclusions of law.[43] A certain act has been held to be an "original designation," and not a "change" of beneficiaries.[44] A change cannot be made after the death of the insured.[45] In the absence of regulations a change may be made in any way clearly evincing the intention of the insured.[46] A change caused by undue influence is voidable.[47]

[31] Bacon v. Brotherhood, 46–303, 48+1127; Finch v. Grand Grove, 60–308, 62+384.

[32] Schultz v. Citizens' etc. Co., 59–308, 61+331.

[33] Hanson v. Minn. etc. Assn., 59–123, 60+1091.

[34] Hemenway v. Draper, 91–235, 97+874.

[35] Fischer v. Malchow, 93–396, 101+602.

[36] Gruber v. Grand Lodge, 79–59, 81+743.

[37] Kottmann v. Gazett, 66–88, 68+732. See Note, 128 Am. St. Rep. 302.

[38] Middelstadt v. Grand Lodge, 107–228, 120+37; Meyer v. Grand Lodge, 108–25, 121+235.

[39] Meyer v. Grand Lodge, 108–25, 121+235.

[40] Finch v. Grand Grove, 60–308, 62+384.

[41] Schoenau v. Grand Lodge, 85–349, 88+999; Fischer v. Malchow, 93–396, 101+602. See Hall v. Merrill, 47–260, 49+980.

[42] Hall v. N. W. etc. Assn., 47–85, 49+524; Hall v. Merrill, 47–260, 49+980.

[43] Becker v. Kuhl, 62–366, 64+895.

[44] Hanson v. Minn. etc. Assn., 59–123, 60+1091.

[45] Hall v. Merrill, 47–260, 49+980; Kottmann v. Gazett, 66–88, 68+732.

[46] Schoenau v. Grand Lodge, 85–349, 88+999.

[47] Knauer v. Grand Lodge, 95–518, 103+1132.

4825. Substitution of certificates—Where one certificate was substituted for another, it was held that the beneficiary was charged with notice and not entitled to recover on both.[48]

4826. Rights of beneficiaries—When vested—The right of a beneficiary during the life of the insured is not a vested right, but a mere expectancy.[49] It becomes a vested right after the death of the insured.[50] If a member forfeits his rights, his beneficiary has no right to relief after his death.[51]

4827. Disposal of proceeds of certificate by will—Where the member of a beneficial association disposes of the proceeds of a beneficial certificate by will, it is not necessary that the party thus receiving the fund shall have had an insurable interest in the life of the insured.[52]

4828. Assignment of benefit—A by-law against the assignment to any one person of more than one-half of a benefit held waived. A party taking an assignment for the purpose of avoiding the by-law held not entitled to any portion of a benefit.[53]

4829. Representations of applicant—The rules as to the effect of representations of an applicant [54] are stated elsewhere.[55]

4830. Construction—Forfeitures are not favored. Conditions of the contract of insurance are to be construed liberally in favor of the insured so as to avoid a forfeiture.[56] The rules and regulations of a society should be construed liberally to carry out the benevolent purposes of the society.[57] Ambiguous language in the contract is to be construed against the society and in favor of the member.[58] Provisions calculated to delay the payment of benefits are to be strictly construed against the society.[59]

4831. Prohibited employments—Forfeiture—A provision in the constitution of a society that "no person who engages in the sale of intoxicating drinks can be admitted or retained as a member" has been held not self-executing, so that its violation would ipso facto work a forfeiture.[60] Engagement in a prohibited employment has been held not to avoid a certificate except as to the hazards of such employment.[61] Where the by-laws of a society provided that if the certificate holder entered into a prohibited employment after becoming a member he might by filing a written waiver of liability because of the increased hazard continue his certificate except as to injury or death directly traceable to the prohibited employment, it was held that if after notice and without the filing of the written waiver, the society continued to receive and retain assessments, the certificate would be continued in force without amendment.[62]

[48] Wheeler v. Odd Fellows' etc. Assn., 44–513, 47+149.

[49] Richmond v. Johnson, 28–447, 10+596; Laudenschlager v. N. W. etc. Assn., 36–131, 30+447; Gutterson v. Gutterson, 50–278, 52+530; Hanson v. Minn. etc. Assn., 59–123, 129, 60+1091; Finch v. Grand Grove, 60–308, 311, 62+384; Schoenau v. Grand Lodge, 85–349. 88+999; Fischer v. Malchow, 93–396, 399, 101+602.

[50] Kottmann v. Gazett, 66–88, 68+732; Hall v. Merrill, 47–260, 49+980.

[51] Bost v. Supreme Council, 87–417, 92+337; Mueller v. Grand Grove, 69–236, 72+48.

[52] Middelstadt v. Grand Lodge, 107–228, 120+37.

[53] Swedish etc. Soc. v. Lawrence, 79–124, 81+756.

[54] Mattson v. Modern Samaritans, 91–434, 98+330; Wiberg v. Minn. etc. Assn., 73–297, 76+37; Perine v. Grand Lodge, 51–224, 53+367; Rupert v. Supreme Court, 94–293, 102+715; Taylor v. Grand Lodge, 96–441, 105+408; Ranta v. Supreme Tent, 97–454, 107+156; O'Connor v. Modern Woodmen, 124+454.

[55] See §§ 4663–4674.

[56] Scheufler v. Grand Lodge, 45–256, 260, 47+799; Bridges v. Nat. Union, 73–486, 497, 76+270, 409, 77+411; Steinert v. United Brotherhood, 91–189, 97+668.

[57] Jewell v. Grand Lodge, 41–405, 43+88.

[58] Ball v. N. W. etc. Assn., 56–414, 420, 57+1063; Finch v. Grand Grove, 60–308, 312, 62+384.

[59] Carey v. Switchmen's Union, 98–28, 107+129.

[60] Steinert v. United Brotherhood, 91–189, 97+668.

[61] Abell v. Modern Woodmen, 96–494, 105+65.

[62] Johnson v. Modern Brotherhood, 109–288, 123+819.

4832. Disability—A provision in a by-law for a benefit in case a member became "totally and permanently disabled, by reason of accident or disease, from following any occupation whatever," construed.[63]

4833. Notice of illness—A notice of illness held to have been given in time.[64] A failure to give notice of illness held to deprive a member of the right to have his dues and assessments paid by the society.[65]

4834. Provisions against resort to courts—Provisions against a resort to the courts for the enforcement of claims until after all remedies within the order have been exhausted are void, if they are unreasonable.[66]

4835. Surrender of policy on disability—A provision in a life policy, that if the insured became permanently disabled he might surrender the policy and receive a certain sum in full discharge, construed.[67]

4836. Payment of assessments and dues—Cases are cited below involving the construction of the constitution of a society as to the time allowed for payment;[68] as to a "guaranty deposit," to secure the payment of assessments;[69] as to the payment of "monthly dues;"[70] and as to the payment by a society of the assessment of a sick member.[71]

4837. Levying assessments—The conditions upon which assessments may be levied and the mode of their levy vary so much under the constitutions and by-laws of different societies that no general rules can be laid down.[72] An action will lie for the refusal to levy an assessment.[73] Parol evidence held admissible to prove the fact of an assessment.[74] A notice to local councils held presumptive evidence that the assessments therein required to be collected were necessary to meet death claims.[75]

4838. Notice of assessment—Provisions of the constitution of a society as to the time of sending notice have been held directory. Notice sent by mail is sufficient, if it is actually received; and it is presumed that a notice properly sent by mail is received.[76] Testimony of an officer that he sent notices of an assessment to all the members of a lodge, as was his custom and duty to do, has been held sufficient evidence of the sending of a particular notice.[77] A notice specifying the wrong date upon which the right to pay an assessment would terminate has been held invalid. The "date of the notice" is not the date stated on the notice itself, but, when sent by mail, the date on which the notice is mailed, or is or should be received by the member in due course of mail.[78] A statute of Ohio providing for the publication of an assessment list has been held to contemplate a publication of the whole assessment list and not to authorize the company to provide by its by-laws that publication be made by notifying a mem-

[63] Monahan v. Supreme Lodge, 88-224, 92+972.

[64] Grant v. North American etc. Co., 88-397, 93+312.

[65] Bost v. Supreme Council, 87-417, 92+337.

[66] Lindahl v. Supreme Court, 100-87, 110+358. See Malmsted v. Mpls. Aerie, 126+486.

[67] Thorensen v. Mass. Ben. Assn., 68-477, 71+668.

[68] Benedict v. Grand Lodge, 48-471, 51+371.

[69] Mee v. Bankers' Life Assn., 69-210, 72+74.

[70] Mueller v. Grand Grove, 69-236, 72+48.

[71] Bost v. Supreme Council, 87-417, 92+337.

[72] See Backdahl v. Grand Lodge, 46-61, 48+454; Schultz v. Citizens' etc. Co., 59-308, 61+331; Mee v. Bankers' Life Assn., 69-210, 72+74; Bridges v. Nat. Union, 73-486, 76+270, 409, 77+411; Swing v. Wurst, 76-198, 79+94.

[73] Lake v. Minn. etc. Assn., 61-96, 63+261; Bentz v. N. W. Aid Assn., 40-202, 41+1037.

[74] Backdahl v. Grand Lodge, 46-61, 48+454.

[75] Bridges v. Nat. Union, 73-486, 76+270, 409, 77+411.

[76] Benedict v. Grand Lodge, 48-471, 51+371.

[77] Backdahl v. Grand Lodge, 46-61, 48+454.

[78] Bridges v. Nat. Union, 73-486, 76+270, 409, 77+411.

ber by mail of the amount of his own assessment.[79] The statute providing that notice of assessment shall state the cause and purpose thereof does not affect notices where the assessment could be for one cause only and for one purpose only. Whether it applies to foreign companies is an open question.[80] A change in the by-laws of a society, as to notice of assessments has been held unreasonable and void as to one becoming a member prior thereto.[81]

4839. Forfeiture for non-payment of dues or assessments—There can be no forfeiture without a valid notice of the assessment,[82] giving an opportunity to pay it.[83] A non-payment has been held, ipso facto, to work a forfeiture.[84] A forfeiture for non-payment of dues has been held not to result from non-payment alone, but only after a formal suspension upon notice.[85] Evidence held to show,[86] or not to show,[87] a forfeiture.

4840. Return of assessments when certificate void—If a certificate is obtained by actual fraud it may be repudiated without returning the assessments received from the holder.[88]

4841. Waiver and estoppel—By a long course of conduct in allowing dues and assessments to become delinquent without enforcing forfeitures a society may be estopped from enforcing a forfeiture in a particular case.[89] Such a course of conduct is not irrevocable and it may be so changed as to prevent a member from taking advantage of it.[90] The habitual conduct of an officer of a society in receiving assessments and dues after default will not bind the society, and constitute a waiver, if the society had no knowledge of the conduct and the officer had no authority to waive a strict compliance.[91] A custom of a society to reinstate members after suspension for non-payment of dues and assessments is not a waiver of prompt payment of future dues and assessments. A compliance with the terms of a contract of insurance on the part of the insurer cannot be construed as a waiver of the terms of the contract thus complied with.[92] Certain acts and representations of the insurer held to excuse the insured in not paying premiums.[93] If after knowledge of a ground of forfeiture the society recognizes the continued validity of the certificate, or does acts based thereon, it waives the forfeiture.[94] A misrepresentation in an application for membership may be waived.[95] If the society receives and retains dues and assessments after a default, without objection, and unconditionally, it waives the default.[96] The fact that the clerk of a society sends to a member notice of a current assessment is not a waiver of past delinquencies of the member.[97] A society has been held not estopped from denying its liability for death resulting

[79] Swing v. Wurst, 76–198, 79+94.

[80] R. L. 1905 § 1700; Bridges v. Nat. Union, 73–486, 76+270, 409, 77+411.

[81] Thibert v. Supreme Lodge, 78–448, 81+220.

[82] Scheufler v. Grand Lodge, 45–256, 47+799; Bridges v. Nat. Union, 73–486, 76+270, 409, 77+411.

[83] Ball v. N. W. etc. Assn., 56–414, 419, 57+1063.

[84] Scheufler v. Grand Lodge, 45–256, 47+799; Benedict v. Grand Lodge, 48–471, 477, 51+371.

[85] Scheufler v. Grand Lodge, 45–256, 47+799; Backdahl v. Grand Lodge, 46–61, 48+454.

[86] Benedict v. Grand Lodge, 48–471, 51+371; Bost v. Supreme Council, 87–417, 92+337.

[87] Mills v. Rebstock, 29–380, 13+162; Ball v. N. W. etc. Assn., 56–414, 57+1063

[88] Taylor v. Grand Lodge, 96–441, 105+408.

[89] Mueller v. Grand Grove, 69–236, 72+48; Richwine v. La Crosse etc. Assn., 76–417, 79+504; Elder v. Grand Lodge, 79–468, 473, 82+987; Leland v. Modern Samaritans, 126+728; Villmont v. Grand Grove, 126+730.

[90] Bost v. Supreme Council, 87–417, 92+337.

[91] Elder v. Grand Lodge, 79–468, 82+987; Graves v. Modern Woodmen, 85–396, 89+6.

[92] Elder v. Grand Lodge, 79–468, 82+987.

[93] Colby v. Life etc. Co., 57–510, 59+539.

[94] Mee v. Bankers' Life Assn., 69–210, 72+74.

[95] Wiberg v. Minn. etc. Assn., 73–297, 76+37.

[96] Mee v. Bankers' Life Assn., 69–210, 72+74.

[97] Bowlin v. Sovereign Camp, 82–411, 85+160.

from a prohibited occupation by accepting the dues and assessments of a member with knowledge that he had entered upon such occupation.[98] A society has been held not estopped to claim that a certificate was void by its request that the beneficiary name some one with whom it could negotiate with reference to the claim.[99]

4842. Waiver of forfeiture—Cases are cited below holding various acts to constitute a waiver of a forfeiture,[1] or the reverse.[2]

4843. Reinstatement—The right to reinstatement is generally regulated by by-laws.[3] If a policy gives the right to reinstatement upon compliance with certain conditions the society cannot impose others.[4] An unauthorized demand of an assessment which misled the insured has been held a ground for reinstatement.[5] A custom of reinstating members after a forfeiture does not give a legal right to reinstatement.[6]

4844. Proof of claim—The society cannot arbitrarily determine what shall be sufficient proof; that is for the courts in case of disagreement. If a policy requires satisfactory proof of death the circumstances of the death need not be set forth in the proof. The statements of physicians as to the cause of death in affidavits forming a part of the proof of death have been held not conclusive on the beneficiary.[7] Letters to a society announcing the death of a member and asking for blanks for proof of death and demanding payment have been held a sufficient proof of death.[8] A failure to prove death in conformity to the by-laws of a society has been held excused by the refusal of the society to furnish the requisite blanks for proof.[9] The failure of a society's medical examiner to certify as to the condition of a member has been held not fatal.[10] Proof of claim must be made within a reasonable time after the death of the insured according to the circumstances, and not necessarily within the statutory limitation from the time of death. Where the insured disappeared, it was held that the beneficiary did not surrender his right to produce proof of death within a reasonable time after such proof was possible, by stopping payment of assessments within a year after the disappearance of the insured on the assumption that he was dead.[11]

4845. Interest—Interest has been held to run from the time of a denial of liability, though no formal demand of payment was made.[12]

4846. Amount recoverable—Cases are cited below involving the amount recoverable by beneficiaries upon the death of members.[13]

4847. Payment out of particular funds—Certificates are sometimes payable only out of a particular fund.[14]

[98] Abell v. Modern Woodmen, 96-494, 105+65.

[99] Taylor v. Grand Lodge, 96-441, 105+408.

[1] Colby v. Life etc. Co., 57-510, 59+539; Mee v. Bankers' Life Assn., 69-210, 72+74; Mueller v. Grand Grove, 69-236, 72+48; Wiberg v. Minn. etc. Assn., 73-297, 76+37; Richwine v. La Crosse etc. Assn., 76-417, 79+504; Fischer v. Malchow, 93-396, 101+602.

[2] Elder v. Grand Lodge, 79-468, 82+987; Bowlin v. Sovereign Camp, 82-411, 85+160; Graves v. Modern Woodmen, 85-396, 89+6. See Louden v. Modern Brotherhood, 107-12, 119+425.

[3] See Manson v. Grand Lodge, 30-509, 16+395.

[4] Davidson v. Old People's etc. Soc., 39-303, 39+803. See Coburn v. Life etc. Co., 52-424, 54+373.

[5] Colby v. Life etc. Co., 57-510, 59+539.

[6] Elder v. Grand Lodge, 79-468, 82+987.

[7] Bentz v. N. W. Aid Assn., 40-202, 41+1037.

[8] Mueller v. Grand Grove, 69-236, 72+48.

[9] Gellatly v. Minn. etc. Soc., 27-215, 6+627.

[10] Young v. Grand Council, 63-506, 65+933.

[11] Behlmer v. Grand Lodge, 109-305, 123+1071.

[12] Perine v. Grand Lodge, 51-224, 53+367.

[13] Kerr v. Minn. etc. Assn., 39-174, 39+312; Lake v. Minn. etc. Assn., 61-96, 63+261.

[14] Kerr v. Minn. etc. Assn., 39-174, 39+312; Hesinger v. Home Ben. Assn., 41-516, 43+481.

4848. Sale of endowments—Beneficiary associations are forbidden to sell endowments.[15]

4849. Appeal to convention—A provision for an appeal to the next convention of a society, from the disallowance of a claim, construed.[16]

4850. Arbitration—A stipulation in a policy for arbitration has been held invalid.[17]

4851. Damages—In an action for refusal to make an assessment the measure of damages is prima facie the amount assessable upon all insured.[18]

4852. Burden of proof—Cases are cited below involving questions as to the burden of proof in actions for the recovery of benefits.[19]

4853. Pleading—Cases are cited below involving questions of pleading in actions for the recovery of benefits.[20]

TITLE INSURANCE

4854. Representations—Waiver—Title insurance is governed by the same rules as regards representations [21] and waiver [22] as life and fire insurance.[23]

4855. Provisions of policies construed—A provision as to "tenancy of the present occupants;" a provision against recovery unless the insured had contracted to sell the estate or interest covered by the policy and the title had been declared defective by judgment of court; [24] a provision as to the limit of liability; [25] a provision as to notice of refusal by the insurer to defend proceedings.[26]

4856. Subrogation—An insurer paying certain liens for labor and material has been held entitled to be subrogated to the rights of the insured on a bond running to the insured for the payment of such liens.[27]

MARINE INSURANCE

4857. What constitutes—The business of issuing ordinary fire insurance policies upon boats navigating the Great Lakes and the high seas is marine insurance within the meaning of Laws 1895 c. 175.[28]

[15] Laws 1907 c. 321; Nat. P. Legion v. O'Brien, 102-15, 112+1050.

[16] Carey v. Switchmen's Union, 98-28, 107+129.

[17] Whitney v. Nat. etc. Assn., 52-378, 54+184.

[18] Bentz v. N. W. Aid Assn., 40-202, 41+1037.

[19] Neskern v. N. W. etc. Assn., 30-406, 15+683 (as to the number of members of a society); Scheufler v. Grand Lodge, 45-256, 47+799 (as to default in payment of dues and assessments); Lake v. Minn. etc. Assn., 61-96, 63+261 (as to the measure of damages); Cornfield v. Order Brith Abraham, 64-261, 66+970 (as to membership and good standing); Monahan v. Supreme Lodge, 88-224, 92+972 (id.).

[20] Neskern v. N. W. etc. Assn., 30-406, 15+683 (complaint in an action on a certificate held sufficient though it did not allege a failure to make an assessment or the receipt of money on an assessment); Laudenschlager v. N. W. etc. Assn., 36-131, 30+447 (in a complaint by the beneficiary named in a policy it is unnecessary to negative a change of beneficiary); Backdahl v. Grand Lodge, 46-61, 48+454 (defence of suspension for non-payment of assessments and defence of suspension for non-payment of dues held not inconsistent); Lake v. Minn. etc. Assn., 61-96, 63+261 (objection to the form of a complaint held waived by the issues tendered in the answer and the course of the trial); Carey v. Switchmen's Union, 98-28, 107+129 (complaint sustained against objection first made on appeal that it failed to allege an appeal to the next convention of the society from a disallowance of the claim).

[21] Stensgaard v. St. Paul etc. Co., 50-429, 52+910.

[22] Quigley v. St. Paul etc. Co., 60-275, 62+287.

[23] See §§ 4663-4688.

[24] Place v. St. Paul etc. Co., 67-126, 69+706.

[25] Quigley v. St. Paul etc. Co., 60-275, 62+287; Id., 64-149, 66+364.

[26] Quigley v. St. Paul etc. Co., 64-149, 66+364.

[27] St. Paul etc. Co. v. Johnson, 64-492, 67+543.

[28] Dwinnell v. Mpls. etc. Co., 90-383, 97+110.

4858. Who may write—A mutual fire insurance company may be authorized to do a marine insurance business only upon compliance with Laws 1895 c. 175 §§ 27, 47.[29]

4859. Guaranty fund—A mutual fire and marine insurance company may provide a guaranty fund as authorized by statute. A subscription to such a fund is in the nature of a loan or an agreement on the part of the subscriber to advance to the company from time to time money sufficient to enable it to pay current losses and expenses, the same to be refunded to them subsequently, with interest.[30]

LIVE STOCK INSURANCE

4860. Authority to insure—A company authorized to insure property against fire has been held not authorized to insure live stock against death.[31]

4861. Title—Notice of sickness—A contract for the purchase of a horse on credit, notes being given for the purchase price, provided that if the horse should die within a certain time thereafter, the vendor was to take the insurance and give up the note. It was held that this did not constitute a breach of a clause in the policy warranting that the vendee was the sole, absolute, and unconditional owner, of the horse. The policy provided that in case of sickness the owner should notify the insurer thereof, at its home office, by telegram. It was held that this did not require the owner to notify the insurer immediately of a sickness which lasted only a few minutes and did not recur again for several weeks.[32]

4862. Action—Pleading—A complaint in an action to recover on a live stock insurance policy conditioned to indemnify plaintiff for loss by death from disease or accident of the animals insured, has been held defective on demurrer, in not alleging that the death of the animal sued for was caused either by disease or accident. In such a case the naked allegation that the animal died does not show a liability under the contract.[33]

MUTUAL HAIL INSURANCE

4863. Assessments—A policy in a mutual hail association, organized under G. S. 1894 §§ 3333–3360, and acts amendatory thereto, which was issued in 1901, is subject to an annual assessment of five per cent. of its face at a date subsequent to the amendment made by Laws 1903 c. 271 § 9.[34]

4864. Setoff—A policyholder has been held not entitled to setoff against an assessment of a particular year, in an action brought to enforce it, a balance of a loss in a prior year remaining unpaid after the insured had received on that loss a proper proportion of funds available for that purpose under his agreement with the association.[35]

4865. Attorney's fees—An association has been held entitled to recover a reasonable attorney's fee for collecting an assessment.[36]

EMPLOYERS' LIABILITY INSURANCE

4866. Not contrary to public policy—This form of insurance is not contrary to public policy, even though it insures an employer against loss due to his own negligence.[37]

[29] Dwinnell v. Mpls. etc. Co., 90–383, 97+ 110. See R. L. 1905 §§ 1597, 1679.

[30] R. L. 1905 § 1679; Dwinnell v. Mpls. etc. Co., 87–59, 91+266, 1098.

[31] Rochester Ins. Co. v. Martin, 13–59 (54).

[32] Kells v. N. W. etc. Co., 64–390, 67+ 215, 71+5.

[33] Knutzen v. Nat. etc. Co., 108–163, 121+ 632.

[34] Farmers etc. Assn. v. Dally, 98–13, 107+555.

[35] Id.

[36] Id.

[37] Quirk v. Mpls. etc. Ry., 98–22, 107+ 742.

4867. Construction of particular policies—Cases are cited below involving the construction of particular policies.[38]

4868. Estoppel—A policy provided against liability for injuries to a child employed by the insured contrary to law. In an action against the insured for such an injury the insurer, after notice of all the facts, took charge of the defence in the trial and appellate courts. It was held that the insurer was estopped from subsequently denying his liability.[39]

ACCIDENT INSURANCE

4869. Definition—Casualty insurance is insurance against loss through accidents or casualties resulting in bodily injury, or death. As applied to injuries resulting in death it is life insurance limited to specified risks.[40]

4870. Classification of occupations—If a trade or occupation is not mentioned in a classification it is not classed as non-insurable.[41]

4871. Representations—Waiver—Construction—Accident policies are governed by the same rules as regards representations,[42] waiver,[43] and construction,[44] as life and fire policies.

4871a. What constitutes an accident—Medical treatment—When an injury is caused by means insured against, and the medical treatment administered is rendered necessary and proper by the nature of the injury, the death of the insured, if caused solely by the injury and the subsequent medical treatment, is "accidental," within the meaning of a policy insuring against death caused by "external, violent, and accidental means." [45]

4872. Various provisions of policies construed—A provision against entering a moving steam vehicle;[46] a provision against riding on the platform of a moving railway coach;[47] a provision as to total disability to prosecute any and every kind of business pertaining to the occupation of the insured;[48] a provision against intentional injuries inflicted by the insured or another;[49] a provision authorizing the insured to secure immediate surgical relief when imperative;[50] a provision limiting the amount of recovery in case of death "due to unnecessary exposure to obvious risk of injury or obvious danger;" [51] a provision as to "conditions indorsed hereon;" [52] a provision exempting from liability in case of death resulting in part from disease;[53] a provision that

[38] Anoka L. Co. v. Fidelity etc. Co., 63-286, 65+353 (notice of injury—contract not one merely of indemnity—necessity of judgment—assignment for benefit of creditors—garnishment); N. W. etc. Co. v. Maryland C. Co., 86-467, 90+1110 (notice of accident); Andrus v. Maryland C. Co., 91-358, 98+200 (exception of injuries in connection with additions to or alterations in a building); Despatch L. Co. v. Employers' etc. Corp., 105-384, 117+506, 118+152 (stipulation requiring insured to guard machinery).

[39] Tozer v. Ocean etc. Corp., 94-478, 103+509; Id., 99-290, 109+410.

[40] State v. Federal I. Co., 48-110, 50+1028.

[41] Wilson v. N. W. etc. Assn., 53-470, 55+626.

[42] Price v. Standard etc. Co., 90-264, 95+1118; White v. Standard etc. Co., 95-77, 103+735, 884. See §§ 4663-4674.

[43] Reynolds v. Atlas etc. Co., 69-93, 71+831. See § 4675.

[44] Cook v. Benefit League, 76-382, 79+320; White v. Standard etc. Co., 95-77, 103+735, 884.

[45] Gardner v. United Surety Co., 125+264.

[46] Miller v. Travelers' Ins. Co., 39-548, 40+839.

[47] Hull v. Equitable etc. Assn., 41-231, 42+936.

[48] Cook v. Benefit League, 76-382, 79+320; Lobdill v. Laboring Men's etc. Assn., 69-14, 71+696.

[49] Ging v. Travelers Ins. Co., 74-505, 77+291. See Trudeau v. Aetna etc. Co., 88-217, 92+1131.

[50] Kelly v. Maryland etc. Co., 89-337, 94+889.

[51] Price v. Standard etc. Co., 92-238, 99+887.

[52] Reynolds v. Atlas etc. Co., 69-93, 71+831.

[53] White v. Standard etc. Co., 95-77, 103+735, 884; Id., 100-541, 110+1134.

"no action shall lie against the company as respects any loss under this policy unless it shall be brought by the assured himself to reimburse him for loss actually sustained and paid by him in satisfaction of a judgment within sixty days from date of such judgment and after trial of the issue;" [54] and a provision relating to accidents caused by shooting.[55]

4873. Disease concurrent cause—Evidence held to show that diabetes co-operated with an injury in causing the death of the insured.[56]

4874. Negligence—Mere negligence on the part of the insured does not defeat recovery unless the policy so provides. Recovery is not defeated by a voluntary exposure to the dangers incident to the occupation of the insured. "Pointing" has been held to be within the occupation of a brick mason.[57]

4875. Proof of death—Proof of death filed by a third party, and adopted by an administrator, has been held sufficient.[58]

INSURANCE AGENTS—See Insurance, 4698.
INSURANCE BROKERS—See Insurance, 4698.
INSURANCE COMPANIES—See Insurance, 4718; Taxation, 9568.
INTENT—See Criminal Law, 2409, and note 59.
INTENTION—See Evidence, 3231, 3293; Pleading, 7523.

INTEREST

Cross-References

See Conflict of Laws, 1540; Damages, 2524; Trusts, 9941; Usury.

4876. Application of statute—The statute fixing the rate of interest applies only to a "legal indebtedness." [60]

4877. Necessity of agreement—Interest in the strict sense of the term, as distinguished from interest as damages, is the creature of contract.[61] As a general rule a party is not chargeable with interest unless there is a promise on his part, express or implied, to pay it. An implied contract to pay interest arises where the circumstances of a transaction justify the inference that the parties contracted with reference to interest.[62]

4878. Necessity of writing—An oral contract for interest in excess of six per cent. is void as to the excess.[63] Under an early statute the parties might agree upon any rate of interest, if their agreement was in writing.[64]

4879. Incident of debt—It is sometimes said that interest is a mere incident of the principal debt.[65]

[54] Kennedy v. Fidelity & C. Co., 100–1. 110+97.

[55] Bader v. New Amsterdam C. Co., 102–186, 112+1065.

[56] White v. Standard etc. Co., 95–77, 103+735, 884. See Smith v. Standard etc. Co., 80–291, 83+342.

[57] Wilson v. N. W. etc. Assn., 53–470, 55+626. See Price v. Standard etc. Co., 92–238, 99+887.

[58] Wilson v. N. W. etc. Assn., 53–470, 55+626.

[59] State v. Hair, 37–351, 34+893; In re Shotwell, 43–389, 393, 45+842.

[60] R. L. 1905 § 2733; McCutchen v. Freedom, 15–217(169) (applicable to scrip issued by town to pay bounties to soldiers); Evans v. Rhode Island H. T. Co., 67–160, 164, 69+715 (applicable to money paid on redemption from foreclosure sale); Lakeside Ry. v. Duluth St. Ry., 78–129, 80+831 (inapplicable to contract to pay "a fair proportion of the interest of investment" in a power house, etc.).

[61] Mason v. Callender, 2–350(302); Cooper v. Reaney, 4–528(413). See Brown v. Gurney, 20–527(473).

[62] Fallon v. Fallon, 124+994.

[63] R. L. 1905 § 2733; Swank v. G. N. Ry., 63–258, 65+452; Staughton v. Simpson, 72–536, 75+744.

[64] Mason v. Callender, 2–350(302, 324); Allen v. Jones, 8–202(172).

[65] Cushman v. Carver County, 19–295

4880. Interest upon interest—Interest coupons—As a general rule a contract to pay interest upon interest is unenforceable,[66] though it is not deemed usurious.[67] A contract to pay interest upon interest is enforceable, if it is in the form of coupon notes for overdue interest.[68]

4881. After maturity of debt—A contract for an increase of interest after maturity is illegal, except as to contracts bearing no interest before maturity.[69] A stipulation for such an increase does not invalidate the entire contract, but simply works a forfeiture of the entire interest.[70] A stipulation for a certain rate of interest until paid, and for a less rate if paid when due, is equivalent to a stipulation for an increase of rate after maturity.[71] Interest as damages after the maturity of a debt is recoverable at the legal rate, regardless of the rate fixed by the parties.[72]

4882. On accounts—An account for goods sold and delivered draws interest, as damages, from the time when it is payable.[73] Where there are reciprocal claims and demands, not constituting an open account, interest on the balance is allowable as damages from the plaintiff's last item.[74] An account consisting of items of debit and credit is an unliquidated, running account, and does not carry interest, in the absence of an agreement therefor, express or implied. But from the time of the last item on the debit side of such an account interest runs on the balance due.[75] When an open account becomes liquidated interest runs thereon.[76]

4883. On verdicts—It is provided by statute that "when the judgment is for the recovery of money, interest from the time of the verdict or report, until judgment is finally entered, shall be computed by the clerk and added thereto."[77] The statute applies to unliquidated, as well as liquidated claims.[78]

4884. When begins to run—Demand—A contract to pay money, no time of payment being specified, is payable immediately, and interest runs from its date. A promise to pay upon demand requires at least a judicial demand to set interest running.[79] Where one receives the money of another a demand is sometimes necessary to set interest running.[80] No demand is necessary where a party denies liability so that a demand would be futile.[81]

4885. Computation—Partial payments—The rule for casting interest, when partial payments have been made, is to apply the payment, in the first place, to the discharge of the interest then due. If the payment exceeds the interest, the surplus goes toward discharging the principal, and the subsequent interest is to be computed on the balance of principal remaining due. If the

(252); Moran v. St. Paul, 65–300, 304, 67+1000. See McCutchen v. Freedom, 15–217(169).

[66] Mason v. Callender, 2–350(302); Talcott v. Marston, 3–339(238); Culbertson v. Lennon, 4–51(26); Martin v. Lennon, 19–67(45); Dyar v. Slingerland, 24–267; Lee v. Melby, 93–4, 100+379.

[67] R. L. 1905 § 2733; Lee v. Melby, 93–4, 100+379.

[68] Welsh v. First Div. etc. Ry., 25–314; Winona v. Minn. etc. Co., 29–68, 77, 11+228; Holbrook v. Sims, 39–122, 39+74; Lee v. Melby, 93–4, 100+379.

[69] R. L. 1905 § 2733; Chase v. Whitten, 51–485, 53+767; Id., 62–498, 65+84. See, under former statutes, Mason v. Callender, 2–350(302); Talcott v. Marston, 3–339 (238); Kent v. Bown, 3–347(246); Culbertson v. Lennon, 4–51(26); Bidwell v. Whitney, 4–76(45); Martin v. Lennon, 19–67(45); Newell v. Houlton, 22–19; White v. Iltis, 24–43; Smith v. Crane, 33–144, 22+633; Holbrook v. Sims, 39–122, 39+74, 140.

[70] Chase v. Whitten, 51–485, 53+767; Id., 62–498, 65+84.

[71] Smith v. Crane, 33–144, 22+633.

[72] See § 2524.

[73] Cooper v. Reaney, 4–528(413).

[74] Leyde v. Martin, 16–38(24). See Taylor v. Parker, 17–469(447).

[75] Bell v. Mendenhall, 78–57, 80+843.

[76] Mason v. Callender, 2–350(302, 317).

[77] R. L. 1905 § 4344; Martin Co. Bank v. Bird, 90–336, 96+915.

[78] Palmer v. Bank of Zumbrota, 72–266, 281, 75+380.

[79] Horn v. Hansen, 56–43, 57+315.

[80] See § 6137.

[81] Perine v. Grand Lodge, 51–224, 53+367.

payment is less than the interest, the surplus of interest must not be taken to augment the principal; but interest continues on the former principal until the period when the payments, taken together, exceed the interest due, and then the surplus is to be applied toward discharging the principal; and interest is to be computed on the balance, as aforesaid.[82]

4886. Effect of tender—A sufficient tender of payment, if kept good, stops the running of interest.[83]

4887. Payment of debt prevented by law—Interest due by agreement is recoverable though payment of the debt is prevented by law.[84]

INTEREST (IN PROPERTY)—See note 85.
INTERFERENCE WITH BUSINESS—See Conspiracy, 1566.
INTERFERENCE WITH CONTRACTS—See Torts, 9637.
INTERLINEATIONS—See Alteration of Instruments, 263.
INTERLOCUTORY—See note 86.
INTERNAL IMPROVEMENT LANDS—See Public Lands, 7969.
INTERNAL IMPROVEMENTS—See State, 8830.

INTERNAL REVENUE

4888. Revenue stamps—The revenue act of 1862 did not require a stamp on a writ of certiorari,[87] or on appeal papers,[88] or on arbitration papers,[89] or on a deed correcting a description in a former deed.[90] It required a stamp on the probate of a will or the letters of administration, but not on both.[91] A pledge of unstamped cigars does not fall within the provisions of sections 3387, 3406, U. S. Revised Statutes, which require cigars manufactured and sold or removed for consumption and use to be stamped. It seems that a sale of unstamped cigars will not be invalid if, as a part of the transaction, it was contemplated that they should be stamped before removal.[92] The want of a required stamp on an instrument does not always invalidate it.[93] It does not render an instrument inadmissible in the state courts, unless the omission was fraudulent.[94] In pleading it is unnecessary to allege that an instrument was stamped.[95] In the absence of evidence to the contrary it will be presumed that an instrument required to be stamped was in fact stamped.[96] A stamp is no part of the instrument stamped.[97]

[82] Betcher v. Hodgman, 63–30, 65+96.
[83] Balme v. Wambaugh, 16–116(106); Pinney v. Jorgenson, 27–26, 6+376; Lamprey v. St. P. & C. Ry., 89–187, 94+555.
[84] Lash v. Lambert, 15–416(336) (effect of war).
[85] Sanford v. Johnson, 24–172, 173; Baldwin v. Canfield, 26–43, 56, 1+261; Donohue v. Ladd, 31–244, 17+381; Gibb v. Philadelphia etc. Co., 59–267, 61+137; Delisha v. Mpls. etc. Co., 126+276.
[86] Chouteau v. Rice, 1–24(8).
[87] Pierce v. Huddleston, 10–131(105).
[88] Dorman v. Bayley, 10–383(306).
[89] Lovell v. Wheaton, 11–92(57).
[90] Greve v. Coffin, 14–345(263).
[91] Dayton v. Mintzer, 22–393.
[92] Combs v. Tuchelt, 24–423.
[93] Cabbott v. Radford, 17–320(296); Sanborn v. Nockin, 20–178(163).
[94] Spoon v. Frambach, 83–301, 86+106.
[95] Smith v. Jordan, 13–264(246); Cabbott v. Radford, 17–320(296).
[96] Thayer v. Barney, 12–502(406); Smith v. Jordan, 13–264(246); Cabbott v. Radford, 17–320(296); Owsley v. Greenwood, 18–429(386); Kiefer v. Rogers, 19–32(14).
[97] Owsley v. Greenwood, 18–429(386); Kiefer v. Rogers, 19–32(14).

INTERNATIONAL LAW

4889. Definition—International law consists of those rules which civilized independent states observe, or are generally thought bound to observe, in their dealings with one another and with one another's subjects.[98]

4890. Territorial sovereignty—Modern international law rests upon the conception of territorial sovereignty. The territory of a nation consists of the land and waters within its geographical boundaries and the waters which wash its shores to the extent of a marine league, or other distance determined by custom or treaty, from the shore. Over this territory the jurisdiction of the nation is exclusive and absolute.[99]

4891. International waters—The use of international waters is often regulated by treaty. Independent of treaty, the use and control of waters lying within the geographical boundaries of the United States is not restrained by international comity.[1]

INTERPLEADER

Cross-References

See Deposits in Court; Intervention.

4892. Under statute—The statute provides for interpleader in an action for the recovery of money upon contract or of specific real or personal property.[2] It is the proper practice for the court, in its order of interpleader, to direct that the summons and complaint amended, with a copy of the order, be served by the plaintiff upon the substituted defendant within a specified time thereafter, or, in default thereof, that the action be dismissed. Such party may voluntarily appear and move for such dismissal, upon plaintiff's default in making such service, and the court may order the property or fund in controversy, and in its custody, to be delivered over to him. Its right to make such disposition of the property is not affected by a voluntary dismissal of the action by plaintiff.[3]

4893. In equity—The statute providing for interpleader on motion is not exclusive.[4] An action in the nature of a bill of interpleader in equity will lie in this state. To maintain such an action a party must stand in a position of indifference between rival claimants and must have no interest in or claim to the subject-matter.[5] He must be without adequate remedy at law.[6] It has been said that there must be privity between the claimants,[7] but this is doubtful.[8] Upon the trial of such an action it is the better practice to determine

[98] Pollock, Jurisprudence, 13; Gray, Nature and Sources of Law, c. 6.

[99] Minn. C. & P. Co. v. Pratt, 101–197, 228, 112+395.

[1] Id.

[2] R. L. 1905 § 4138; Rohrer v. Turrill, 4–407(309, 314); Cassidy v. First Nat. Bank, 30–86, 14+363; Schuler v. McCord, 79–39, 81+547; Schuler v. Wood, 81–372, 84+121.

[3] Hooper v. Balch, 31–276, 17+617.

[4] Smith v. St. Paul, 65–295, 68+32. See Note, 91 Am. St. Rep. 593.

[5] St. Louis etc. Co. v. Alliance etc. Co., 23–7; Cullen v. Dawson, 24–66; Newman v. Home Ins. Co., 20–422(378); Austin v. March, 86–232, 90+384. See Maxcy v. N. H. F. Ins. Co., 54–272, 55+1130.

[6] Blair v. Hilgedick, 45–23, 47+310.

[7] Newman v. Home Ins. Co., 20–422(378).

[8] See Crane v. McDonald, 118 N. Y. 648.

first whether the interpleader will lie.[9] After it has been determined that interpleader will lie and the money or property has been deposited in court, the plaintiff is out of the action altogether, the defendants being left to contest their conflicting claims without any aid or interference on his part. Costs may be awarded against a party who brings an action of interpleader in bad faith.[10]

INTERPRETATION—See Contracts; Statutes; Wills; and other specific heads.

INTERPRETER—See Evidence, 3289.

INTERROGATORIES TO JURY—See Trial, 9801-9810.

INTERSTATE COMMERCE

Cross-References

See Carriers, 1301; Taxation, 9121, 9159.

4894. What constitutes—It is conceded that sales of goods by a foreign corporation, even through a traveling salesman sent into the state, to a resident of the state, to be shipped to him in the state, belong to the operations of interstate commerce. But the interstate commerce clause does not apply when the foreign corporation maintains a resident agent in the state whose business it is to solicit orders for and deliver the goods of the corporation to the purchaser. A distinction must also be made between the acts of a foreign corporation in shipping its goods to a commission merchant or other agent within a state, to be sold by him and the proceeds accounted for to the corporation, the title of the goods to remain in the corporation until paid for, and the case where a local commission merchant solicits orders for the goods of a foreign corporation and forwards them directly to the corporation. In the latter case the orders are filled by the corporation with the same effect as though they were received direct from the customer. But, if the commission merchant or other agent to whom the goods are consigned acts as the agent of a foreign corporation under an agreement that all the goods, so long as unsold, remain the property of the corporation, and the proceeds of the sales belong also to the corporation, the corporation has established an agency in the state for the sale of its goods and is doing business within the state.[11] After goods imported into the state have been disposed of here to citizens of the state, they are to be taken as intermingled with and as part of the general property of the state, free from the exclusive jurisdiction of Congress.[12] The transportation of property by a common carrier, including the rates to be charged therefor, is commerce. Transportation between two points in this state over a route extending across a neighboring state is interstate commerce.[13]

4895. Exclusive jurisdiction of Congress—The state cannot exclude foreign corporations engaged in interstate commerce or place restrictions on their doing business here.[14] A law is not deemed a regulation of interstate com-

[9] Cullen v. Dawson, 24-66.

[10] St. Louis etc. Co. v. Alliance etc. Co., 23-7.

[11] Thomas v. Knapp, 101-432, 112+989; Rock Island P. Co. v. Peterson, 93-356, 101+616. See State v. Deering, 56-24, 57+313; State v. Franklin, 79-127, 81+752.

[12] Willis v. Standard Oil Co., 50-290, 299, 52+652.

[13] State v. Chi. etc. Ry., 40-267, 41+1047. See Connery v. Quincy etc. Ry., 92-20, 99+365; Jacobson v. Wis. etc. Ry., 71-519, 528, 74+893.

[14] State v. Canda C. C. Co., 85-457, 460, 89+66; Rock Island P. Co. v. Peterson, 93-356, 101+616.

merce merely because it incidentally or indirectly affects it.[15] The state cannot tax interstate commerce, but the property of persons engaged in interstate commerce may be taxed, if it has a fixed situs here.[16] The exclusive jurisdiction of Congress over interstate commerce does not restrict the police power of the several states.[17]

4896. What constitutes a regulation—A law is not to be deemed a regulation of interstate commerce merely because it affects it incidentally, or indirectly.[18]

4897. Held not to interfere with interstate commerce—A law regulating commission merchants dealing in farm products;[19] a law forbidding the sale of intoxicating liquors;[20] a law prohibiting the shipment out of the state of fish caught here;[21] a law regulating the sale and redemption of transportation tickets;[22] a law requiring railway companies to stop all regular passenger trains at county seats;[23] a law for the inspection of illuminating oils;[24] a law regulating the sale of oleomargarine;[25] a law forbidding any one to sell ruffed grouse;[26] a law providing for the inspection of animals imported into the state;[27] a law providing for reciprocal demurrage.[28]

INTERVENTION

Cross-References

See Trial, 9763.

4897a. Definition—Intervention is an act by which one voluntarily becomes a party to an action pending between others.[29]

4898. As of right—If a party brings himself within the terms of the statute[30] he has an absolute right to intervene. It is unnecessary to apply to the court for leave to intervene.[31]

4899. Nature of interest entitling party to intervene—To entitle a party to intervene under the statute he must have an interest in the matter in litigation in the action of such a direct and immediate character that he would either gain or lose by the direct legal operation and effect of the judgment therein.[32] It is not essential to his right to intervene that he would either

[15] State v. Wagener, 77–483, 500, 80+633, 778; Hardwick v. Chi. etc. Ry., 124+819.
[16] State v. Canda C. C. Co., 85–457, 89+66; State v. Union T. L. Co., 94–320, 102+721.
[17] Hardwick v. Chi. etc. Ry., 124+819. See cases under § 4897.
[18] State v. Wagener, 77–483, 500, 80+633.
[19] State v. Edwards, 94–225, 102+697; State v. Wagener, 77–483, 80+633, 778.
[20] State v. Johnson, 86–121, 126, 90+161.
[21] State v. N. P. Ex. Co., 58–403, 59+1100.
[22] State v. Corbett, 57–345, 59+317; State v. Manford, 97–173, 106+907.
[23] State v. Gladson, 57–385, 59+487.
[24] Willis v. Standard Oil Co., 50–290, 52+652.
[25] Butler v. Chambers, 36–69, 30+308.
[26] State v. Shattuck, 96–45, 104+719.
[27] Evans v. Chi. etc. Ry., 109–64, 122+876.
[28] Hardwick v. Chi. etc. Ry., 124+819.
[29] Fariey v. St. Paul I. & S. Soc., 125+676.
[30] R. L. 1905 § 4140.
[31] Bennett v. Whitcomb, 25–148. See, upon the subject generally, 123 Am. St. Rep. 280.
[32] Bennett v. Whitcomb, 25–148; Mann v. Flower, 26–479, 5+365; Lewis v. Harwood, 28–428, 10+586; Wohlwend v. Case, 42–500, 44+517; Becker v. Northway, 44–61, 46+210; Dennis v. Spencer, 51–259, 53+631; Steenerson v. G. N. Ry., 60–461, 62+826; Larsen v. Nichols, 62–256, 64+553; Masterman v. Lumbermen's Nat. Bank, 61–299, 63+723; Smith v. St. Paul, 65–295, 68+32; Id., 69–276, 72+104; Id., 111 Fed. 308; Am. Exch. Bank v. Davidson, 69–319, 72+129; Holcomb v. Stretch, 74–234, 76+1132; Johnson v. White, 78–48, 80+838; Schuler v. McCord, 79–39, 81+547; Cone v. Wold, 85–302, 88+977; Walker v. Sanders, 103–124, 114+649. See Hunter v. Cleveland etc. Co., 31–505, 18+645; Maxey v. N. H. F. Ins. Co., 54–272, 55+1130.

gain or lose by the judgment if he did not become a party to the action.[33] Under the statute as it read prior to the revision of 1905 it was held that he need not have a property or pecuniary interest.[34] The statute is to be liberally construed. A person may intervene though he has another remedy. The statute applies alike to legal and equitable actions and to controversies involving either real or personal property.[35]

4900. Origin of statute—Our statute derives from the code of Louisiana, through the statutes of California and Iowa.[36]

4901. In equity—In an equitable action the court may allow a party interested in the subject-matter of an action to intervene without reference to the statute.[37]

4902. Intervener cannot delay or terminate action—A party cannot intervene in an action to object to a trial thereof or to move for a dismissal.[38]

4903. Pleading—The ordinary rules of pleading apply.[39] There may be a demurrer to the complaint in intervention for its failure to state a cause of action or ground of intervention.[40]

4904. Remedy for wrong intervention—The objection that the intervener has no right to intervene may be raised by demurrer;[41] by motion for dismissal on the trial;[42] and by motion to strike out the complaint in intervention.[43] Objection to an intervention cannot be made for the first time after trial.[44]

INTIMIDATION—See note 45.

[33] Fariey v. St. Paul I. & S. Soc., 125+676.

[34] McAllen v. Hodge, 92–68, 99+424.

[35] Walker v. Sanders, 103–124, 114+649; Fariey v. St. Paul I. & S. Soc., 125+676.

[36] Bennett v. Whitcomb, 25–148; Lewis v. Harwood, 28–428, 10+586; McAllen v. Hodge, 92–68, 99+424.

[37] Winslow v. Minn. etc. Ry., 4–313(230); State v. Merchants' Bank, 67–506, 70+803; Smith v. Nat. C. Ins. Co., 72–364, 75+596. See Smith v. St. Paul, 65–295, 68+32.

[38] Hunt v. O'Leary, 84–200, 87+611; Mann v. Flower, 26–479, 5+365.

[39] R. L. 1905 § 4140. See, as to necessity of reply to answer, Pierce v. Wagner, 64–265, 66+977, 67+537.

[40] Shepard v. Murray County, 33–519, 24+291.

[41] Shepard v. Murray County, 33–519, 24+291; Seibert v. Mpls. etc. Ry., 52–148, 53+1134.

[42] Lewis v. Harwood, 28–428, 10+586.

[43] Dennis v. Spencer, 51–259, 53+631.

[44] Boxell v. Robinson, 82–26, 84+635; Holcomb v. Stretch, 74–234, 76+1132; Lougee v. Bray, 42–323, 44+194.

[45] Gray v. Building Trades Council, 91–171, 181, 97+663.

INTOXICATING LIQUORS

Cross-References

See Municipal Corporations, 6566.

CONSTITUTIONALITY OF STATUTES

4905. In general—To require a license for the sale of liquors is not to take private property for a public use without compensation, or to impose an unequal tax.[46] To require saloons to close on Sunday is not an infraction of the constitutional right to liberty of conscience.[47] An act authorizing the voters of a municipality to determine whether licenses shall be issued or not is valid; and if the voters determine against granting licenses, it operates as a revocation of all outstanding licenses.[48] An act requiring saloonkeepers to pay a license fee for the maintenance of a state inebriate asylum has been held constitutional.[49] G. S. 1894 § 2002 (R. L. 1905 § 1560), prohibiting the sale of liquor to Indians, is constitutional.[50] Laws 1895, c. 259, authorizing manufacturers of liquor in towns and villages which have voted no license, to sell liquor outside such towns and villages, is constitutional.[51] Laws 1895 c. 346 is consistent in

[46] Rochester v. Upman, 19–108(78).
[47] State v. Ludwig, 21–202.
[48] State v. Cooke, 24–247.
[49] State v. Cassidy, 22–312.
[50] State v. Wise, 70–99, 72+843.
[51] State v. Johnson, 86–121, 90+161.

all its parts, and does not violate section 1 of article 3 of the constitution.[52] Laws 1901 c. 101, limiting the number of licenses to be issued for the sale of malt or spirituous liquors in places bordering on the patrol limits in all cities of the state of Minnesota, now or hereafter having over fifty thousand inhabitants, is unconstitutional, being in violation of section 36 of article 4 of the constitution, in that it does not apply equally to all the cities of the class.[53] R. L. 1905 § 1519, declaring the sale of intoxicating liquors without a license a misdemeanor, is not unconstitutional because no maximum penalty is prescribed for its violation.[54]

LOCAL OPTION

4906. Application of statutes—R. L. 1905 § 1528, granting the right of local option to "towns and incorporated villages," does not apply to the "cities" of the state.[55]

LICENSES

4907. Nature—A license is a mere privilege to pursue a business, subject to police regulation and control.[56]

4908. Who required to be licensed—All persons, regardless of the nature of their business, are required to take out a license for sales of a less quantity than five gallons.[57] It is immaterial that such sales are in the original package, or in corked bottles, or the liquor is not to be drank on the premises.[58] Manufacturers, wholesalers, or others, are not required to obtain a license for the sale of liquor in quantities of five gallons or more.[59] But they cannot sell in quantities in municipalities where no license has been voted.[60] A city ordinance requiring a license has been held inapplicable to manufacturers.[61] Such an ordinance has been held applicable to druggists.[62] The payment of a federal tax on the business of retail liquor dealers does not relieve a party from the necessity of obtaining a license.[63] G. S. 1866 c. 16 § 4 made no exceptions as to the necessity of obtaining a license.[64]

4909. Sales by social clubs—A social organization, or club, incorporated under the laws of this state, is a "person," within the meaning of R. L. 1905 § 1519. The distribution of intoxicating liquors in less quantities than five gallons by such a club to its members, for a consideration, though without profit, constitutes a "sale" within the meaning of that section, and is prohibited, unless protected by license as provided by law.[65]

4910. When becomes operative—A license does not become operative until delivered to the licensee.[66] It cannot be given retroactive effect by antedating.[67]

4911. Granting a matter of discretion—Mandamus—Whether a license shall be granted or refused is a matter of discretion which cannot be controlled by mandamus.[68]

[52] State v. Bates, 96–110, 104+709.
[53] State v. Schraps, 97–62, 106+106.
[54] State v. Kight, 106–371, 119+56.
[55] Kleppe v. Gard, 109–251, 123+665.
[56] State v. Harris, 50–128, 52+387.
[57] State v. Schroeder, 43–231, 45+149; Id., 45–44, 47+308; State v. Benz, 41–30, 42+547; State v. Brackett, 41–33, 42+548.
[58] Id.
[59] State v. Orth, 38–150, 36+103.
[60] State v. Johnson, 86–121, 90+161.
[61] St. Paul v. Troyer, 3–291(200).
[62] Rochester v. Upman, 19–108(78).
[63] State v. Funk, 27–318, 7+359.
[64] State v. Cron, 23–140.
[65] State v. Minn. Club, 106–515, 119+494.
[66] State v. Bach, 36–234, 30+764; Jordan v. Bespalec, 86–441, 90+1052; State v. Carver County, 60–510, 62+1135.
[67] State v. Carver County, 60–510, 62+1135; Zeglin v. Carver County, 72–17, 74+901.
[68] State v. Carver County, 60–510, 62+1135; State v. Northfield, 94–81, 101+1063. See Jordan v. Bespalec, 86–441, 90+1052.

4912. Nature and scope of licensing power—To license and regulate the sale of intoxicating liquors is an exercise of the ordinary police power of the state.[69] It is not an exercise of the taxing power,[70] or of the power of eminent domain.[71] The power of regulation extends not only to the acts of the person licensed, but to the times and places when and where sales are made.[72] The power to license involves the power to refuse to license,[73] and to limit the number of licenses to be granted.[74] It is a reasonable regulation of the liquor traffic to limit it not only by the amount of the license fee, but also with regard to the character of the persons permitted to engage in it, the character of the buildings in which it shall be conducted, and the location with reference to other lines of business, all for the purpose of restraining any evil influences likely to flow therefrom.[75] It is the legislative policy of the state to localize the traffic and give it the greatest publicity possible.[76] It is permissible to exclude the traffic from the resident and suburban portions of a city.[77] The control of the traffic calls for legislative discretion.[78] The expediency or necessity of the regulation is a legislative and not a judicial question.[79] Regulations must be reasonable and courts must judge of their reasonableness, but in doing so they will not look closely into mere matters of judgment and set up their own judgment against that of municipal authorities when there is reasonable ground for a difference of opinion.[80] The power of a city council to regulate and license includes the power to fix the amount of the license fee, within the limits prescribed by law.[81] Fixtures in a saloon are subject to the police power.[82] The legislature may prohibit the sale of liquor to Indians altogether.[83] The power to license involves the power to prohibit sales by persons not licensed.[84]

4913. Delegation of power to municipalities—The legislative power to regulate the sale of intoxicating liquors may be delegated to municipalities,[85] including the supervisors of a township.[86] When the legislature delegates the power to a municipality it may prescribe by whom the power shall be exercised, by a particular officer or set of officers, or by the electors at large; and it may transfer the power from a city council to the electors at large.[87] The power of a city to license and collect license charges is a delegated police power and therefore completely within the control of the legislature.[88] The legislature may authorize a municipality to impose new and additional penalities for acts already penal by the laws of the state.[89] The power to license delegated to county commissioners cannot be delegated by them.[90]

4914. Conflict between general laws and municipal charters and ordinances—The general statutes of the state regulating the sale of intoxicating liquors operate and have force uniformly throughout the state, anything con-

[69] State v. Ludwig, 21-202; Rochester v. Upman, 19-108(78); State v. Cassidy, 22-312; State v. Wise, 70-99, 72+843; State v. Robinson, 101-277, 287, 112+269; Claussen v. Luverne, 103-491, 115+643.

[70] Rochester v. Upman, 19-108(78); State v. Cassidy, 22-312.

[71] Rochester v. Upman, 19-108(78).

[72] State v. Ludwig, 21-202; State v. Barge, 82-256, 84+911.

[73] St. Paul v. Troyer, 3-291(200); State v. Northfield, 94-81, 101+1063.

[74] State v. Northfield, 94-81, 101+1063.

[75] State v. Scatena, 84-281, 87+764.

[76] State v. Barge, 82-256, 84+911.

[77] In re Wilson, 32-145, 19+723; State v. Kantler, 33-69, 21+856.

[78] In re Wilson, 32-145, 19+723.

[79] St. Paul v. Troyer, 3-291(200); State v. Cassidy, 22-312.

[80] In re Wilson, 32-145, 19+723.

[81] Kelly v. Faribault, 83-9, 85+720.

[82] State v. Barge, 82-256, 84+911.

[83] State v. Wise, 70-99, 72+843.

[84] State v. Gill, 89-502, 95+449.

[85] State v. Ludwig, 21-202.

[86] State v. Dwyer, 21-512.

[87] State v. Cooke, 24-247.

[88] Winona v. Whipple, 24-61.

[89] State v. Ludwig, 21-202.

[90] Hennepin County v. Robinson, 16-381 (340).

tained in municipal charters or ordinances to the contrary notwithstanding.[91] R. L. 1905 §§ 1519–1566 provide a general system for the regulation of the business of selling intoxicating liquors, which is operative throughout the state, and imposes a standard of regulation below which no municipality may fall. It does not deprive municipalities of their existing charter powers to provide for such supplementary and additional regulations, not inconsistent with the general statutes as are required by local conditions.[92] The provisions of Laws 1887 cc. 5, 6, 81, superseded all inconsistent charter provisions as to the terms and conditions on which licenses might be issued. They were complete in themselves and did not require any additional local legislation by city councils to render them operative and effectual.[93] But they were not exclusive, and they did not have the effect of repealing by implication existing municipal ordinances upon the subject, or the charter power to enact ordinances not inconsistent with them.[94] Prior to the legislation of 1887 the charters of some cities and villages gave to the municipality exclusive control over the regulation of the sale of liquor, so that the general laws were not operative within the municipality.[95] An indictment will lie under the general law, for selling liquor without a license within a municipality which has voted against any license.[96] Acts which are punishable under the general law may also be made punishable by ordinance and the punishment need not be the same.[97]

4915. Ordinances held valid—An ordinance for the closing of saloons on Sunday and election days;[98] an ordinance prohibiting the sale of liquor without a license, and not limiting the quantity;[99] an ordinance requiring every saloon and the bar of every tavern, inn, etc., to close on Sunday;[1] an ordinance prohibiting stalls, booths, or inclosures of any kind, in saloons;[2] an ordinance providing that one who applies for a liquor license must make an affidavit designating the place where the business is to be conducted, that the applicant will carry it on personally, and that the rooms in which it shall be conducted are not adjacent to any building wherein theatrical or variety entertainments are conducted;[3] an ordinance limiting the sale of liquor to certain parts of a city;[4] an ordinance prohibiting the sale of "malt" liquor without a license;[5] an ordinance prohibiting the keeping of a saloon open on Sunday.[6]

[91] State v. Robinson, 101-277, 112+269.

[92] Evans v. Redwood Falls, 103-314, 115+200.

[93] State v. Peterson, 38-143, 36+443; State v. Olson, 38-150, 36+446; State v. Sannerud, 38-229, 36+447; State v. Harris, 50-128, 52+387; Minneapolis v. Olson, 76-1, 78+877; Kelly v. Faribault, 83-9, 85+720; State v. Scatena, 84-281, 87+764; State v. Swanson, 85-112, 88+416; State v. Robinson, 101-277, 112+269; Evans v. Redwood Falls, 103-314, 115+200.

[94] State v. Harris, 50-128, 52+387; State v. Lindquist, 77-540, 80+701; State v. Scatena, 84-281, 87+764. See State v. Priester, 43-373, 45+712.

[95] See State v. Hanley, 25-429; State v. Wheeler, 27-76, 6+423; State v. Nolan, 37-16, 33+36; State v. Langdon, 29-393, 13+187; Id., 31-316, 17+859; State v. Schmail, 25-370; State v. Pfeifer, 26-175, 2+474; State v. Fleckenstein, 26-177, 2+475; State v. Arbes, 70-462, 73+403; State v. Robinson, 101-277, 112+269; Evans v. Redwood Falls, 103-314, 115+200.

[96] State v. Holt, 69-423, 72+700; State v. Arbes, 70-462, 73+403; State v. Swanson, 85-112, 88+416. To same effect under G. S. 1878 c. 16 §§ 1, 4, State v. Funk, 27-318, 7+359.

[97] State v. Ludwig, 21-202; State v. Harris, 50-128, 52+387; Jordan v. Nicolin, 84-367, 87+916; State v. Marciniak, 97-355, 105+965; State v. Collins, 107-500, 120+1081.

[98] State v. Ludwig, 21-202.

[99] State v. Priester, 43-373, 45+712.

[1] State v. Harris, 50-128, 52+387.

[2] State v. Barge, 82-256, 84+911. See State v. McGregor, 88-74, 92+509.

[3] State v. Scatena, 84-281, 87+764.

[4] In re Wilson, 32-145, 19+723; State v. Kantler, 33-69, 21+856.

[5] State v. Gill, 89-502, 95+449.

[6] Duluth v. Abrahamson, 96-39, 104+682 (ordinance of Duluth—title held sufficient).

4916. Ordinances construed—The so-called wineroom ordinance of Minneapolis is designed to do away entirely with separate rooms, booths, stalls, or compartments, of whatever size, which may be used for the purpose of concealing or protecting persons while drinking intoxicating liquor.[7] A licensed saloonkeeper cannot evade the ordinance by letting a part of the room covered by his license to a third party, so arranged that it may be used as a wineroom in connection with his bar.[8]

4917. License fees—G. S. 1894 § 2023 (R. L. 1905 § 1527) forbids the granting of licenses for the sale of intoxicating liquors for a less sum than five hundred dollars, and authorizes the council of any city of the class designated to exact a license fee in excess of such sum.[9] If the county board refuses to issue any but an unlawful license to a person who has paid the regular fee for a license, the latter may recover the amount so paid.[10] Cases are cited below involving the construction of special laws relating to the disposition of license fees.[11]

4918. Bonds—The filing of a sufficient bond is a necessary part of the application for a liquor license, and where such bond, after its approval and the granting of the application by the city council, has been withdrawn, the municipal officers have no authority to issue the license.[12] The bond must run to the state and not to a municipality.[13] It is one of indemnity; given to protect the state as well as such private parties as are authorized to maintain actions under G. S. 1894 § 1992 (R. L. 1905 § 1540). The amount of the bond is a penalty, and not in the nature of liquidated damages, to be recovered as an entire sum in case any of the conditions of the bond are violated. A private party can recover only the amount of his damages.[14] The bond may be prosecuted in the name of the state by the county attorney in his official capacity. Where a bond was erroneously executed to a village in its corporate name, it was held that the county attorney was not authorized on his own motion, and without the consent of the village, to prosecute.[15]

4919. Revocation—A license may be revoked without judicial proceedings.[16] Under an act authorizing local option a vote against granting licenses may operate to revoke all outstanding licenses.[17] A provision that no license shall be granted for a less term than one year has been held not to withhold power to revoke a license before the expiration of the year for which it was granted.[18] In proceedings for the revocation of a license, under G. S. 1878, c. 16 § 28, a refusal of the council to postpone the hearing has been held not improper.[19] The revocation of a license upon conviction for the violation of an ordinance is not a punishment within the meaning of the constitution limiting the jurisdiction of justices of the peace.[20] A city is not liable in tort for mistaken action of its council in attempting to revoke a license.[21]

[7] State v. Barge, 82–256, 84+911; State v. McGregor, 88–74, 92+509; State v. Klein, 107–184, 119+656; State v. Brown, 107–175, 119+657; State v. Lally, 108–264, 122+13.

[8] State v. Brown, 107–175, 119+657.

[9] Kelly v. Faribault, 83–9, 85+720. See Gillen v. South St. Paul, 126+624.

[10] Zeglin v. Carver County, 72–17, 74+901.

[11] Winona v. Whipple, 24–61 (charter of Winona); State v. Bailer, 91–186, 97+670 (Sp. Laws 1889 c. 443 relating to license fees in the village of Alma City held not repealed by Laws 1903 c. 201).

[12] State v. Schreiner, 86–253, 90+401.

[13] St. James v. Hingtgen, 47–521, 50+700; Minneapolis v. Olson, 76–1, 78+877.

[14] State v. Larson, 83–124, 86+3.

[15] St. James v. Hingtgen, 47–521, 50+700.

[16] State v. Harris, 50–128, 52+387; State v. Larson, 83–124, 128, 86+3; Claussen v. Luverne, 103–491, 115+643.

[17] State v. Cooke, 24–247.

[18] State v. Dwyer, 21–512.

[19] State v. Northfield, 41–211, 42+1058.

[20] State v. Harris, 50–128, 52+387; State v. O'Connor, 58–193, 59+999.

[21] Claussen v. Luverne, 103–491, 115+643.

CRIMINAL OFFENCES

4920. Sales without a license—The sale and want of a license constitute the crime.[22] It is no defence that the accused was entitled to a license, if one had not been issued and delivered to him;[23] that a license could not be obtained for sales at the place where the sale charged was made;[24] that the county board refused to issue any licenses;[25] that the town had voted against license; that the accused had paid a federal tax on retail liquor dealers;[26] or that the accused honestly believed that the liquor sold was not intoxicating.[27] An indictment will lie under the general law for selling liquor without a license within a municipality which has voted against any license.[28] G. S. 1894 § 2029, prohibiting the sale of liquor without a license, was not repealed by Laws 1901 c. 252 prohibiting "blind pigs."[29]

4921. Soliciting sales without a license—An indictment under Laws 1905 c. 346, charging the solicitation of a contract for the sale of spirituous liquors for future delivery in a less quantity than five gallons without a license, committed by the defendant at a time and place mentioned by soliciting a person named without a license, but not stating whether the crime was committed by defendant in his own behalf or as an agent of another, sufficiently specifies a public offence.[30]

4922. Gifts—A gift of liquor to a prospective purchaser by a traveling salesman of a licensed liquor dealer has been held unlawful under G. S. 1894 § 2029.[31] A gift of liquor has been held unlawful under an ordinance making it unlawful to "dispose" of liquor without a license.[32]

4923. Sales to Indians—G. S. 1894 § 2002 (R. L. 1905 §§ 1534, 1560), prohibiting the sale of liquor to Indians, is a valid exercise of the police power and constitutional. It is applicable to Indians who have severed their tribal relations and become citizens of the United States.[33]

4924. Sales to minors—Under G. S. 1878 c. 16 § 10 it was held immaterial whether the accused had a license or not, or was engaged in any of the occupations mentioned in the third sentence of that section.[34] To constitute the offence prescribed in the first and second sentences of that section no written notice was necessary.[35] It is immaterial that the accused was ignorant of the minority of the person to whom the sale was made or honestly believed in his maturity.[36] No change in the law was made by the revision of 1905.[37]

4925. Sales to habitual drunkards—It is immaterial whether the accused had a license,[38] or whether he knew that the person to whom the sale was made was an habitual drunkard.[39] The offence prescribed by the first and second sentences of G. S. 1878 c. 16 § 10, is distinct from that prescribed in the third sentence of that section, and to make out the former offence no written notice is necessary.[40] A single sale by a servant has been held insufficient to raise

[22] State v. Funk, 27–318, 7+359.
[23] State v. Bach, 36–234, 30+764; Jordan v. Bespalec, 86–441, 90+1052.
[24] State v. Kantler, 33–69, 21+856.
[25] State v. Cron, 23–140.
[26] State v. Funk, 27–318, 7+359.
[27] State v. Gill, 89–502, 95+449.
[28] State v. Holt, 69–423, 72+700; State v. Arbes, 70–462, 73+403; State v. Swanson, 85–112, 88+416.
[29] State v. McCoy, 86–149, 90+305.
[30] State v. Braun, 96–521, 105+975.
[31] State v. Jones, 88–27, 92+468.
[32] State v. Deusting, 33–102, 22+442.
[33] State v. Wise, 70–99, 72+843.
[34] State v. McGinnis, 30–48, 14+256.
[35] State v. Hyde, 27–153, 6+555. See, under G. S. 1866 c. 16 § 10, State v. Richter, 23–81.
[36] State v. Austin, 74–463, 77+301; State v. Larson, 83–124, 86+3. See State v. Heck, 23–549; State v. Mueller, 38–497, 38+691.
[37] State v. Stroschein, 99–248, 109+235.
[38] State v. McGinnis, 30–52, 14+258.
[39] State v. Heck, 23–549.
[40] State v. Hyde, 27–153, 6+555.

a presumption that the servant was authorized by the defendant to make the sale.[41] Upon a charge of furnishing "one glass of spirituous liquor, to wit, whisky," it was held unnecessary to prove that the liquor furnished was whisky.[42]

4926. Sales on Sunday—Keeping open on Sunday—Penal Code § 229 does not authorize the sale of beer on Sunday.[43] The accused must own the saloon or have charge or control of it.[44] Possibly an owner is not responsible for an opening by his servant contrary to his instructions and without his knowledge or wishes. The fact that a license does not particularly describe the room in which the bar is to be kept is no defence.[45] The provisions of Laws 1887 c. 81 § 1 supersede all inconsistent charter provisions, are complete in themselves, and do not require any additional legislation by city councils to render them operative and effectual.[46] The revocation of a license for keeping a saloon open on Sunday in violation of a city ordinance does not bar a criminal prosecution for such violation.[47] Under an ordinance of Minneapolis, requiring saloons and places where intoxicating liquors are sold to be closed and kept closed on Sundays, the owner is prima facie responsible for such place being open on Sunday, whether he is present or not.[48]

4927. Keeping open after eleven o'clock—The hours of compulsory closing are to be determined by standard time.[49] Under G. S. 1894 § 2012, hotels were excepted from the provision requiring closing, but not from the provision prohibiting sales.[50] The purpose of the statute is to require all dealers in intoxicating liquors not only to shut their doors at the hour of eleven at night, but to cease the transaction of business. The mere fact that the door of a saloon may be open for a short time after that hour for some legitimate purpose, unaccompanied by evidence of a continuance of the saloon business, or an intention or purpose to do so if customers present themselves, would not constitute an offence, or violation of the statute.[51]

4928. Blind pigs—Laws 1901 c. 252, prohibiting and punishing the maintaining of blind pigs, or places or devices for the unlawful sale of intoxicating liquors, does not repeal any part of G. S. 1894 § 2029, providing for the punishment of the sale of such liquors without a license.[52] Laws 1901 c. 252 is not unconstitutional as authorizing unreasonable searches and seizures.[53]

CRIMINAL PROSECUTIONS

4929. Jurisdiction of district, municipal, and justice courts—Both the constitution and the statute authorize the district court to try indictments for selling liquor without a license.[54] Under Laws 1887 c. 6, a justice of the peace has no jurisdiction to hear and determine a criminal charge for selling intoxicating liquors without a license, or for an attempt to evade the statute prohibiting such sales.[55] The municipal court of Minneapolis has jurisdiction of such a charge under an ordinance of that city.[56] Laws 1901 c. 252, which authorizes

[41] State v. Mahoney, 23–181.
[42] State v. Heck, 23–549. See State v. Quinlan, 40–55, 41+299.
[43] State v. Baden, 37–212, 34+24.
[44] State v. Gluck, 41–553, 43+483.
[45] State v. Sodini, 84–444, 87+1130.
[46] State v. Peterson, 38–143, 36+443.
[47] State v. Harris, 50–128, 52+387; State v. O'Connor, 58–193, 59+999.
[48] State v. O'Connor, 58–193, 59+999. See State v. Sodini, 84–444, 87+1130.
[49] State v. Johnson, 74–381, 77+293.
[50] State v. Eckert, 74–385, 77+294.
[51] State v. Clemmensen, 92–191, 99+640. See Duluth v. Abrahamson, 96–39, 104+682.
[52] State v. McCoy, 86–149, 90+305.
[53] State v. Stoffels, 89–205, 94+675.
[54] State v. Bach, 36–234, 30+764; State v. Kobe, 26–148, 1+1054; State v. Russell, 69–499, 72+832.
[55] State v. Anderson, 47–270, 50+226. See State v. Larson, 40–63, 41+363.
[56] State v. Harris, 50–128, 52+387; State

the trial of a person charged with keeping a "blind pig" before any magistrate in the county where the offence is committed, is valid.[57]

4930. Complaints by public officers—Laws 1895 c. 50 provides that it shall be the privilege of certain public officials, and any person, to make complaint for the violation of the liquor laws of this state under any law or by-law of any city therein. Such statute is of general application, and relates to cities organized under special charters, as well as the general laws of the state.[58]

4931. Indictment or complaint under general statutes for selling liquor without a license—An indictment or complaint must negative a license;[59] must allege the name of the person to whom the sale is made, or if that is unknown, give a description of him;[60] must allege the quantity, so as to show that it was less than five gallons,[61] but it is sufficient to allege a sale in quantities less than five gallons;[62] and it must describe the liquor, but it is sufficient to describe it as an intoxicating liquor.[63] It is unnecessary to negative the proviso with reference to druggists,[64] or the exceptions and conditions of Laws 1895 c. 259.[65] It is not indispensable that the indictment should be certain as to the date of the sale. As to the mode of disposing of the liquor it is sufficient to allege that the accused "sold" it. An allegation as to the place of sale as "in said county of Lincoln" held sufficient.[66]

4932. Complaint under ordinance for selling liquor without a license—A complaint which substantially follows the language of the ordinance is sufficient.[67] A complaint held to negative a license sufficiently.[68] In a complaint for selling malt liquor without a license contrary to a city ordinance, held unnecessary to allege that the liquor was intoxicating or to plead the ordinance.[69]

4933. Indictment or complaint for keeping saloon open on Sunday—It must show that the accused either owned the saloon or had charge or control of it.[70] An indictment held sufficient as to the place where the offence was committed.[71] A complaint under an ordinance held sufficient.[72] It is unnecessary to allege whether the defendant was or was not a licensed liquor dealer, for a sale by any person on Sunday is a violation of law.[73]

4934. Indictment or complaint for keeping saloon open after eleven o'clock—The exception as to hotels must be negatived.[74] It is necessary to allege a license.[75] A complaint in a prosecution before a justice held sufficient.[76]

4935. Indictment under Laws 1895 c. 259 for selling liquor without a license—An indictment held sufficient against the objection that it failed to allege that the liquor was sold for consumption in the village.[77]

4936. Complaint for selling liquor to habitual drunkard—A complaint substantially following the language of G. S. 1866 c. 16 § 11, as amended by

v. Lindquist, 77–540, 80+701. See State v. Marciniak, 97–355, 105+965; State v. Nugent, 108–267, 121+898.

57 State v. Dreger, 97–221, 106+904.

58 State v. Enger, 81–399, 84+218.

59 State v. Nerbovig, 33–480, 24+321. See Elbow Lake v. Holt, 69–349, 72+564.

60 State v. Schmail, 25–368.

61 State v. Lavake, 26–526, 6+339; State v. Bach, 36–234, 30+764; State v. Langdon, 29–393, 13+187; State v. Wyman, 42–182, 43+1116.

62 State v. Budworth, 104–257, 116+486.

63 State v. McGinnis, 30–52, 14+258; State v. Feldman, 80–314, 83+182; State v. Quinlan, 40–55, 41+299.

64 State v. Corcoran, 70–12, 72+732.

65 State v. Holt, 69–423, 72+700.

66 State v. Lavake, 26–526, 6+339.

67 Mankato v. Arnold, 36–62, 30+305; State v. Gill, 89–502, 95+449.

68 Elbow Lake v. Holt, 69–349, 72+564.

69 State v. Gill, 89–502, 95+449; State v. Evans, 89–506, 95+1133.

70 State v. Gluck, 41–553, 43+483.

71 State v. Peterson, 38–143, 36+443.

72 State v. Marciniak, 97–355, 105+965.

73 State v. Collins, 107–500, 120+1081.

74 State v. Jarvis, 67–10, 69+474; State v. Russell, 69–499, 72+832.

75 See Jordan v. Nicolin, 84–370, 87+915.

76 State v. Clemmensen, 92–191, 99+640.

77 State v. Johnson, 86–121, 90+161.

Laws 1872 c. 61 and Laws 1875 c. 112, held sufficient.[78] It is enough to charge a sale of "intoxicating liquors" without describing them.[79]

4937. Indictment for selling liquor to minor—In an indictment for selling liquor to a minor it is unnecessary to allege that the accused did not make the sale as a licensed pharmacist.[91] It need not allege a notice forbidding a sale.[90] Under G. S. 1878 c. 16 § 10, it was held unnecessary to allege that the accused was a person licensed to sell intoxicating liquors or engaged in any particular occupation.[81] It is unnecessary to allege that the liquor was sold to be drank on the premises.[82]

4938. Indictment for selling to husband after notice—Under G. S. 1878 c. 16 § 10, before its amendment by Laws 1887 c. 81 § 1, it was held necessary to allege that the accused was one of the persons enumerated in that section as a tavern or hotel keeper, merchant, etc., at the time written notice was served on him.[83]

4939. Duplicity in indictments or complaints—Cases are cited below involving questions as to duplicity in indictments and complaints.[84]

4940. Election—A motion to compel the state to elect whether to ask for a conviction for a sale of "spirituous," or for a sale of "malt" liquors, held properly denied.[85]

4941. Variance—A variance as to the quantity of liquor sold, within the statutory limit, is immaterial.[86] A variance as to the time of the sale is immaterial.[87] A variance as to the kind of liquor sold held fatal.[88] A variance as to the person paying for liquor held immaterial.[89]

4942. Burden of proving license on accused—In prosecutions under the general law it is unnecessary for the state to prove the want of license. The burden of proving license is on the accused.[90] In a prosecution for keeping a licensed saloon open after eleven o'clock at night, contrary to an ordinance, it has been held necessary to show that the person charged with such offence had a license for the sale of intoxicating liquors at such place.[91]

4943. Proof of kind of liquor unnecessary—In prosecutions under the general law it is unnecessary to prove the particular kind of intoxicating liquor sold.[92]

4944. What are intoxicating liquors—Presumption—Judicial notice—Courts and juries may take judicial notice of the fact that brandy, whisky, and lager beer, are intoxicating liquors.[93] By statute intoxicating liquor is defined as including distilled, fermented, spirituous, vinous, and malt liquor.[94] It is provided by statute that in prosecutions under the general law it shall be unnecessary to allege or prove the name or kind of intoxicating liquor sold, and

[78] State v. Heck, 23–549.
[79] State v. McGinnis, 30–52, 14+258. See State v. Quinlan, 40–55, 41+299.
[91] State v. Schmidt, 126+487.
[80] State v. Hyde, 27–153, 6+555.
[81] State v. McGinnis, 30–48, 14+256.
[82] State v. Stroschein, 99–248, 109+235.
[83] State v. Heitsch, 29–134, 12+353.
[84] State v. Kobe, 26–148, 1+1054; State v. McGinnis, 30–52, 14+258; Jordan v. Nicolin, 84–367, 87+916.
[85] State v. Feldman, 80–314, 83+182.
[86] State v. Tisdale, 54–105, 55+903; State v. Ahern, 54–195, 55+959.
[87] State v. Lavake, 26–526, 6+339. See State v. Kobe, 26–148, 1+1054.
[88] State v. Quinlan, 40–55, 41+299. But see, State v. Heck, 23–549; State v. McGinnis, 30–52, 14+258; State v. Feldman, 80–314, 83+182.
[89] State v. Collins, 107–500, 120+1081.
[90] R. L. 1905 § 1566; State v. Schmail, 25–370; State v. Bach, 36–234, 30+764; State v. Ahern, 54–195, 55+959; State v. Tisdale, 54–105, 55+903.
[91] Jordan v. Nicolin, 84–370, 87+915.
[92] R. L. 1905 § 1566; State v. McGinnis, 30–52, 14+258; State v. Feldman, 80–314, 83+182. See State v. Quinlan, 40–55, 41+299; State v. Heck, 23–549.
[93] State v. Tisdale, 54–105, 55+903; State v. Lewis, 86–174, 90+318; State v. Hawkins, 96–140, 104+898.
[94] R. L. 1905 § 1564; State v. Quinlan, 40–55, 41+299.

proof of the sale of what appeared to be intoxicating liquor shall be prima facie proof of the sale of such liquor.[95] Ordinary fermented malt beer, such as is sold in saloons, has been held not to be a spirituous liquor,[96] but it is an intoxicating liquor.[97] The intoxicating quality of "maltum" has been held a question for the jury.[98] Ale, porter, stout, and lager, are all varieties of beer.[99] Malt liquor is an alcoholic liquor, such as beer, ale or porter, prepared by fermenting an infusion of malt. It is a fermented liquor.[1] The word "beer," as used by witnesses in a case has been held to mean ordinary fermented malt liquor.[2] Where there is reasonable doubt as to the intoxicating quality of liquor the question is for the jury.[3]

4945. Evidence—Admissibility—Cases are cited below involving the admissibility of evidence.[4]

4946. Evidence—Sufficiency—Cases are cited below involving the sufficiency of evidence to justify a conviction for selling liquor to a minor;[5] for selling liquor without a license;[6] for selling liquor on Sunday;[7] for keeping a

[95] R. L. 1905 § 1566; State v. Dick, 47–375, 50+362; State v. Tisdale, 54–105, 55+903.

[96] State v. Quinlan, 40–55, 41+299.

[97] R. L. 1905 § 1564; State v. Quinlan, 40–55, 41+299; State v. Dick, 47–375, 50+362; State v. Tisdale, 54–105, 55+903.

[98] State v. Story, 87–5, 91+26. See State v. Gill, 89–502, 95+449.

[99] State v. Quinlan, 40–55, 41+299; State v. Gill, 89–502, 95+449.

[1] State v. Gill, 89–502, 95+449.

[2] State v. Gibbs, 109–247, 123+810.

[3] State v. Story, 87–5, 91+26; State v. Gill, 89–502, 95+449; State v. Schagel, 102–401, 113+1014.

[4] State v. Peterson, 38–143, 36+443 (official records as to issuance of license); State v. Sannerud, 38–229, 36+447 (id.); State v. Mueller, 38–497, 38+691 (sale of liquor to minor—evidence of other sales to same minor held admissible—evidence of previous general instructions by accused to his servants not to furnish liquor to minors held immaterial); State v. Priester, 43–373, 45+712 (sale of liquor without a license—proof of sale by evidence of order sent by purchaser through telephone); State v. Austin, 74–463, 77+301 (sale of liquor to minor—sales to other minors held inadmissible); State v. Sodini, 84–444, 87+1130 (keeping saloon open on Sunday—evidence of sales held admissible—evidence that saloon had been open on previous Sundays held admissible); State v. Lewis, 86–174, 90+318 (sale of liquor by druggist without a license—evidence of quantity of liquor kept in stock and sold and the instructions under which clerk making sales acted held admissible); State v. Stoffels, 89–205, 94+675 (keeping blind pig—liquors and appliances usually used in the sale thereof found on premises and seized under a search warrant held admissible); State v. Gill, 89–502, 95+449 (sale of liquor without a license—evidence that accused believed the liquors sold by him not intoxicating held inadmissible); State v. Evans, 89–506, 95+1133 (id.); State v. Olson, 95–104, 103+727 (bottle of "tanto" purchased by a police officer at a restaurant held admissible and officer allowed to testify as to its stimulating qualities); State v. Hawkins, 96–140, 104+898 (issue as to intoxicating qualities of liquor—held proper to show that liquor made people drunk or the reverse); State v. Peterson, 98–210, 108+6 (sale of liquor without license—evidence of other sales by accused held admissible); State v. Bollenbach, 98–410, 108+3 (sale of liquor without a license—record of town meeting relating to vote as to granting licenses held admissible); State v. Sederstrom, 99–234, 109+113 (sale of liquor without a license—evidence of other sales by accused held admissible); State v. Schagel, 102–401, 113+1014 (held proper to show that liquor made people drunk or the reverse); State v. Gibbs, 109–247, 123+810 (evidence of officers engaged in ascertaining whether an unlawful business was being carried on held admissible); State v. Lindquist, 124+215 (sale of liquor without a license—evidence of discovery of jugs of liquor concealed in bathroom on second floor of building held admissible—held proper to allow jury to take jugs to jury room).

[5] State v. Waterstradt, 74–292, 77+48; State v. Hawkins, 96–140, 104+898; State v. Nugent, 108–267, 121+898.

[6] State v. Johnson, 86–121, 90+161; State v. Story, 87–5, 91+26; State v. Tisdale, 54–105, 55+903; State v. Gill, 89–502, 95+449; State v. Bryant, 97–8, 105+974; State v. Worthingham, 101–544, 112+1142; State v. Budworth, 104–257, 116+486; State v. Gibbs, 109–247, 123+810; State v. Lindquist, 124+215.

[7] State v. Dick, 47–375, 50+362.

saloon open on Sunday;[8] for selling liquor to an habitual drunkard;[9] and for keeping a licensed saloon open after eleven o'clock.[10]

4947. Punishment—Acts which are punishable under the general law may also be made punishable by ordinance and the punishment need not be the same.[11] The amount of punishment which may be inflicted under the charter of Minneapolis (Sp. Laws 1881 c. 76 subd. 4 § 5) cannot exceed one hundred dollars for each breach of an ordinance.[12] A commitment to the county jail to await the payment of a fine has been held proper.[13] The municipal court of the city of Minneapolis has, under the ordinances of that city regulating the sale of intoxicating liquor, authority to impose imprisonment as a punishment for an unlawful sale of such liquor, without giving defendant an option to discharge his violation of the law by the payment of a fine.[14] The municipal court of Duluth has been held to have the power to impose a fine of one hundred dollars and costs, and upon default of payment thereof to commit a convict to the county jail for a period not to exceed ninety days.[15]

SEARCHES AND SEIZURES

4948. Search warrant—Laws 1901 c. 252 is not invalid as authorizing unreasonable searches and seizures. The warrant of arrest and search warrant authorized by it may be in the same instrument.[16]

INTOXICATION—See Criminal Law, 2447.
IN USE—See note 17.
INVOLUNTARY NONSUIT—See Trial, 9750–9763.
INVOLUNTARY SERVITUDE—See note 18.
IRREGULARITY—See note 19.
IRRELEVANT PLEADINGS—See Pleading, 7252.
ISLANDS—See Navigable Waters, 6953.
ISSUE—See note 20.
ISSUES TO JURY—See Trial, 9837.
JAILS—See Prisons.
JEOPARDY—See Criminal Law, 2425.
JOINDER OF ACTIONS—See Pleading, 7500.
JOINDER OF PARTIES—See Parties.

JOINT ADVENTURE

4949. Quasi partnership—Obligations of members—Though a joint adventure is not in a strict legal sense a partnership, the rules and principles of law applicable to partnerships govern the rights, duties, and obligations of persons engaged in a joint adventure. The relation between them is of a fiduciary nature. They owe to each other the utmost good faith, and one cannot secure

[8] State v. O'Connor, 58-193, 59+999; Duluth v. Abrahamson, 96-39, 104+682.
[9] State v. Mahoney, 23-181.
[10] Jordan v. Nicolin, 84-370, 87+915.
[11] See § 4914.
[12] Minneapolis v. Olson, 76-1, 78+877.
[13] State v. Peterson, 38-143, 36+443.
[14] State v. Collins, 107-500, 120+1081.
[15] State v. Bates, 108-55, 121+225.
[16] State v. Stoffels, 89-205, 94+675.
[17] Mpls. T. M. Co. v. Firemen's Ins. Co., 57-35, 36, 58+819.
[18] State v. West, 42-147, 43+845.
[19] Sache v. Wallace, 101-169, 112+386.
[20] Davidson v. Farrell, 8-258(225) (subject of difference between the parties as settled by the pleadings); Whiting v. Whiting, 42-548, 44+1030 (a word of purchase and not of limitation).

a secret advantage over the others.[21] Where, in a joint enterprise for the purchase of property, the active party overstates the price paid, his associates may recover from him an amount sufficient to equalize between them the cost of the property.[01]

JOINT AND SEVERAL LIABILITIES—See Contracts, 1899.
JOINT LIABILITY—See Contracts, 1899.
JOINT STOCK COMPANIES—See Corporations, 1969(93); Partnership, 7346.

JOINT TENANCY

Cross-References

See Husband and Wife, 4253; Tenancy in Common.

4950. Definition—At common law joint tenants are such as hold property jointly between them in equal shares by purchase.[22] In this state, by virtue of statute, such tenants are deemed tenants in common unless they are expressly declared in the deed or will creating the estate to be joint tenants.[23] As a practical result joint tenancy rarely exists in this state.

4951. Survivorship—The doctrine of survivorship, whereby, upon the death of one joint tenant the survivors succeed to the entire estate, is a distinctive incident of joint tenancy.[24]

4952. Sale by cotenant—One joint tenant may sell his individual interest in the common property.[25]

JOINT TORTFEASORS—See Contribution, 1924; Damages, 2592; Torts, 9643.
JOURNALS—See State, 8841; Statutes, 8897.

JUDGES

Cross-References

See District Court; Justices of the Peace; Municipal Courts; Probate Court; Supreme Court.

4953. Election—Extending term—The legislature may make reasonable changes, by amendments to existing laws, in respect to the time for holding the election of judges; and in such case incumbents previously elected for an existing term, and until their successors are elected and qualified, may hold over during the interval. Such change will not be deemed unreasonable, or the act making it unconstitutional, unless so great as to raise the presumption of a design substantially to deprive the office of its elective character.[26]

4954. Vacancies—Appointment and election to fill—The constitution provides that "in case the office of any judge shall become vacant before the expiration of the regular term for which he was elected, the vacancy shall be filled

[21] Church v. Odell, 100–98, 110+346.
[01] Gasser v. Wall, 126+284.
[22] Bouvier, Law Dict.
[23] See § 9597.
[24] See Wilson v. Wilson, 43–398, 45+710; Semper v. Coates, 93–76, 100+662.
[25] Wilson v. Wilson, 43–398, 45+710; Schlag v. Gooding, 98–261, 264, 108+11. See, as to sale of cotenant's interest, St. John v. Sinclair, 108–274, 122+164.
[26] Jordan v. Bailey, 37–174, 33+778.

by appointment by the governor, until a successor is elected and qualified. And such successor shall be elected at the first annual election that occurs more than thirty days after the vacancy shall have happened." [27] A person elected judge to fill a vacancy holds for the full term of the office, and not merely for the unexpired portion of his predecessor's term.[28] In computing the thirty days in the constitutional provision, neither the day on which the vacancy happens, or the day on which the election occurs, can be counted.[29] There is no provision in the constitution for filling by appointment a vacancy caused by the expiration of the regular term of a judge.[30] The constitutional provision has no application to an election which would have been held had no vacancy occurred.[31]

4955. De facto—There may be a de facto judge.[32] The rules applicable to de facto officers are stated elsewhere.[33]

4956. Cannot hold other offices—Judges of the supreme and district courts can hold no other offices either under the state or federal government.[34]

4957. Salaries cannot be decreased—The salaries of judges of the supreme and district courts cannot be decreased during their continuance in office.[35]

4958. Acts after expiration of term—It has been held proper to set aside a judgment entered on an order made by a judge after the expiration of his term in a cause tried by him during his term.[36]

4959. Not civilly liable for judicial acts—A judge is not liable in a civil action to any one for his judicial acts, however erroneous, or by whatever motives prompted.[37]

4960. Powers at chambers—The power and jurisdiction of a judge at chambers are precisely those of a judge in vacation. The term "chambers" means the private room or office of a judge, where, for the convenience of parties, he hears such matters and transacts such business as a judge in vacation is authorized to hear, and which do not require a hearing by the judge sitting as a court. The chambers of a judge are not an element of jurisdiction, but of convenience. For the purposes of jurisdiction, the chambers of a judge are wherever he is found within his district, and any business he is authorized to do as a judge in vacation is chamber business. The powers of a judge in vacation are often confounded with those of a court in vacation, under our statute which declares the district courts of the state to be always open for all business except the trial of issues of fact. A judge in vacation has no power to hear and determine any matter which the court only can hear. When, under the statute, he hears such matters in vacation, he sits as a court, and not as a judge in vacation or at chambers.[38] The power of the judge at chambers is confined to such matters as granting orders to show cause, extending time to plead, letting to bail, granting injunctions, and otherwise putting the process of the court in motion, and generally such preliminary or intermediate matters as are allowed, of course, by a judge on a prima facie showing, and which might be allowed by a single judge of a court composed of several judges.[39]

[27] Const. art. 6 § 10.
[28] Crowell v. Lambert, 9-283(267).
[29] State v. Brown, 22-482.
[30] State v. Frizzell, 31-460, 465, 18+316.
[31] State v. Black, 22-336.
[32] State v. Brown, 12-538(448); Carli v. Rhener, 27-292, 7+139.
[33] See § 8012.
[34] Const. art. 6 § 11; Barnum v. Gilman, 27-466, 468, 8+375; Taylor v. Sullivan, 45-309, 312, 47+802; State v. Sutton, 63-147, 151, 65+262.
[35] Const. art. 6 § 6; Steiner v. Sullivan, 74-498, 503, 77+286.
[36] Cain v. Libby, 32-491, 21+739. See State v. Brown, 12-538(448); Carli v. Rhener, 27-292, 7+139.
[37] Stewart v. Cooley, 23-347; Stewart v. Case, 53-62, 54+938; Murray v. Mills, 56-75, 57+324.
[38] Hoskins v. Baxter, 64-226, 66+969.
[39] Gere v. Weed, 3-352(249); Pulver v. Grooves, 3-359(252); Marty v. Ahl, 5-27 (14); State v. Hill, 10-63(45); Yale v. Edgerton, 11-271(184); Hoffman v. Mann,

4961. Sickness or absence—In the case of sickness or absence of a judge for any cause our statutes provide that another judge of the same district may act,[40] or the governor may appoint a judge of another district to act,[41] or the sheriff or clerk may adjourn the term.[42] But if a judge becomes sick during the course of a trial another judge cannot take up the trial; the jury must be discharged.[43]

4962. Disqualification—It is provided by statute that "no judge shall sit in any cause, except to hear a motion to change the venue, if he be interested in its determination, or if he might be excluded for bias from acting therein as a juror." [44] In districts having three or more judges a party may disqualify a judge to sit in a cause by filing an affidavit of prejudice or bias.[45] But under this provision of the statute a party is entitled to but one change of judges.[46] A guardian ad litem is not a party to the action, so that relationship to him will disqualify a judge.[47]

JUDGMENT BOOK—See Judgments, 5052.

JUDGMENT NON OBSTANTE—See Judgments, 5075–5087.

JUDGMENT NOTWITHSTANDING THE VERDICT—See Judgments, 5075–5087.

JUDGMENT ON PLEADINGS—See Pleading, 7689.

JUDGMENT ROLL—See Judgments, 5053–5058.

11–364(262); McNamara v. Minn. C. Ry., 12–388(269); Rogers v. Greenwood, 14–333(256); Johnston v. Higgins, 15–486 (400); Ives v. Phelps, 16–451(407); State v. Macdonald, 26–445, 4+1107; State v. Duluth St. Ry., 47–369, 50+332; State v. Dist. Ct., 52–283, 53+1157; Hoskins v. Baxter, 64–226, 66+969.

[40] R. L. 1905 § 98.

[41] R. L. 1905 § 94.

[42] R. L. 1905 § 100.

[43] Rossman v. Moffett, 75–289, 77+960.

[44] R. L. 1905 § 4098; Sjoberg v. Nordin, 26–501, 5+677 (only a pecuniary interest disqualifies); State v. Ledbeter, 126+477 (fact that judge is related to attorney of one of the parties within ninth degree does not disqualify him). See Mower County v. Smith, 22–97 (judge disqualified by having been an attorney in a cause); Jordan v. Henry, 22–245 (justice of peace cannot issue search warrant for his own property); State v. Macdonald, 26–445, 4+1107. (fact that judge was a taxpayer held not to disqualify him to act in road proceedings).

[45] R. L. 1905 § 4101; State v. Webber, 96–348, 105+68; State v. Hoist, 126+1090.

[46] State v. Gardner, 88–130, 92+529.

[47] Bryant v. Livermore, 20–313(271).

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Cross-References

See Criminal Law, 2487; Evidence, 3360, 3388; Justices of the Peace; Limitation of Actions, 5625, 5638; Pleading, 7689; Recording Act, 8307; Taxation; and specific actions and proceedings.

IN GENERAL

4963. Definition—A judgment is the final determination of the rights of the parties to an action. It is the sentence of the law pronounced by the court upon the matter contained in the record.[48] It is the final determination and

[48] Deuel v. Hawke, 2-50(37); Sanborn v. Rice County, 9-273(258, 264); Aetna Ins. Co. v. Swift, 12-437(326); Williams v. McGrade, 13-46(39). See State v. Weber, 96-422, 105+490.

adjudication of a controversy or proceeding.[49] A "decree" is the same as a judgment in our practice.[50]

4964. Nature—Contract—Thing in action—A judgment is deemed a contract within the statute relating to counterclaims.[51] It is not a contract within the meaning of the constitutional provision prohibiting legislation impairing the obligation of contracts, or within the rule by which statutes of limitation are tolled by a new promise or part payment.[52] It is a thing in action.[53]

4965. Formal sufficiency—Certainty—A judgment must be reasonably certain as to the facts adjudicated and the relief awarded.[54] Mere formal defects will be disregarded.[55] A judgment is neither a writ nor a process, and need not have the seal of the court attached.[56]

4966. Only one judgment in action—Regularly only one judgment should be entered in an action, unless a different practice is expressly authorized, and it should determine the rights of all the parties.[57]

4967. In rem and in personam—Strictly a judgment in rem is one against a thing, as distinguished from one against a person or in personam. The term is often applied to judgments determining the status of persons and the right to property, or a lien thereon.[58]

4968. As notice to parties—A judgment is notice to the parties from the time of its entry.[59]

4969. Court cannot order judgment on the evidence—While a court may order judgment on the pleadings, it cannot order judgment on the evidence or on the pleadings and the evidence.[60]

4970. Cannot rest on evidence alone—A judgment cannot rest on the evidence alone, without any verdict or finding.[61]

4971. Validating on motion—A void judgment cannot be validated by citing the party against whom it is entered to show cause why it should not be declared valid.[62]

4972. Enforcement—The regular mode of enforcing a judgment is by execution.[63] A judgment is enforced when its terms are made effectual by legal process. Several proceedings or steps are necessary to accomplish this result. A party proceeds to enforce it when he takes either of the steps prescribed for that purpose. He enforces it when he takes all the steps necessary to satisfy his judgment. To proceed to enforce it, and to enforce it, therefore, are materially different things. The issuing of the execution on a judgment for money only is the first step to enforce the judgment, and when this is done the party has proceeded to enforce his judgment.[64]

CONFESSION OF JUDGMENT

4973. Sufficiency of the statement—The purpose of the statute in requiring the statement of facts out of which the indebtedness arose is to protect creditors, and to prevent fraud by facilitating its detection by enabling creditors to

[49] State v. Probate Ct., 83–58, 60, 85+917; State v. Weber, 96–422, 427, 105+490.
[50] See Thompson v. Bickford, 19–17(1, 10).
[51] Midland Co. v. Broat, 50–562, 52+972; Way v. Colyer, 54–14, 55+744.
[52] Olson v. Dahl, 99–433, 109+1001; State v. Dist. Ct., 102–482, 490, 113+697, 114+654.
[53] Thompson v. Sutton, 23–50.
[54] Tidd v. Rines, 26–201, 209, 2+497; Norton v. Beckman, 53–456, 55+603.
[55] Aetna Ins. Co. v. Swift, 12–437(326).
[56] Miller v. Natwick, 125+1022.
[57] Adamson v. Sundby, 51–460, 53+761.
[58] See In Rem.
[59] Holmes v. Campbell, 13–66(58).
[60] Chickering v. White, 42–457, 44+988.
[61] Miller v. Chatterton, 46–338, 342, 48+1109.
[62] Jewett v. Iowa L. Co., 64–531, 67+639.
[63] Holmes v. Campbell, 10–401(320).
[64] Davidson v. Gaston, 16–230(202, 212).

investigate the transaction out of which the debt might be alleged to have arisen. It is apparent that, in view of this purpose, a distinction must be taken between the transaction—the facts out of which the debt arose—and the mere evidence of it which the parties to the confession have made. If only that evidence is stated, creditors will be no better directed in their inquiries than by the judgment confessed. It is therefore uniformly agreed that stating such evidence as the note, bond, or other writing will not answer the purpose of the statute, and that the facts which furnish the consideration for the note, bond, or other writing must be stated far enough to put creditors on inquiry as to the existence of such facts, and to direct them so that they can make such inquiry.[65] Formerly some courts were inclined to hold with exceeding strictness against statements for confessions of judgments, when attacked by creditors; but the general doctrine of the later cases is to the effect that the requirement that the facts be stated out of which the indebtedness arose is intended to enable other creditors to test the bona fides of the transaction by which a particular debt is preferred; that it is not the object of the statute to compel the debtor to state sufficient of the transaction to enable other creditors to form an opinion, from the facts stated, as to the integrity of the debtor in confessing judgment, but that all that is required is to state facts sufficient to enable them to investigate the transaction, and form their opinion of the honesty of the judgment from the facts thus ascertained.[66]

4974. Signing statement—The statute requires the statement to be signed and verified by the defendant, but it has been held sufficient if he signs the verification.[67]

4975. Duty of clerk to enter—When a statement which appears on its face to authorize a judgment by confession is presented to the clerk, with a request to enter and docket a judgment thereon, he is bound to do so promptly, and is liable for damages resulting from his neglect. He has no authority to pass on the sufficiency of the statement, as against creditors.[68]

4976. Effect of insufficient statement—A judgment by confession, entered upon a statement of facts insufficient to satisfy the requirements of the statute, is valid as between the parties. The judgment debtor cannot avoid it on that ground alone; nor can one do so who claims rights of property under him, but whose interests are not prejudiced thereby.[69]

4977. Who may attack judgment—Such a judgment may be attacked either for insufficiency in the statement or for fraud, by judgment or attaching creditors who are prejudiced.[70] It may also be attacked by a purchaser for value who received his deed before, but did not record it until after, the judgment was confessed.[71] Whether a subsequent purchaser for value without actual notice may do so is an open question in this state.[72] The judgment debtor cannot avoid such a judgment for insufficiency of the statement.[73] An assignee for the benefit of creditors may attack a judgment confessed by his assignor.[74]

[65] Kern v. Chalfant, 7–487(393); Cleveland C. S. Co. v. Douglas, 27–177, 6+628; Wells v. Gieseke, 27–478, 8+380; Hackney v. Wollaston, 73–114, 75+1037.

[66] Atwater v. Manchester S. Bank, 45–341, 48+187.

[67] Kern v. Chalfant, 7–487(393).

[68] Whelan v. Reynolds, 101–290, 112+223.

[69] Coolbaugh v. Roemer, 30–424, 15+869; Whelan v. Reynolds, 101–290, 112+223. See also, Wells v. Gieseke, 27–478, 8+380; Hackney v. Wollaston, 73–114, 75+1037.

[70] Wells v. Gieseke, 27–478, 8+380; Auerbach v. Gieseke, 40–258, 41+946; Atwater v. Manchester S. Bank, 45–341, 48+187; Hackney v. Wollaston, 73–114, 75+1037.

[71] Hackney v. Wollaston, 73–114, 75+1037.

[72] Id. See Marshall v. Hart, 4–450(352); Kern v. Chalfant, 7–487(393); Coolbaugh v. Roemer, 30–424, 15+869.

[73] Coolbaugh v. Roemer, 30–424, 15+869; Whelan v. Reynolds, 101–290, 112+223.

[74] Cleveland C. S. Co. v. Douglas, 27–177, 6+628.

4978. Mode of attack—In New York it is held that a judgment by confession may be set aside either by motion [75] or action.[76] A similar practice prevails in this state.[77]

4979. Amendment nunc pro tunc—As between the parties the court has power to amend the proceedings as justice may require. An amendment nunc pro tunc of an insufficient statement for judgment by confession will not be allowed to the prejudice of subsequent judgment creditors whose executions have been levied, and who have begun proceedings to avoid the prior judgment. An order allowing such amendment, without notice to such subsequent judgment creditors, is of no effect as to them.[78]

4980. Vacating judgment in part—Where the statement is for two or more liabilities the judgment may be vacated as to those insufficiently stated and allowed to stand as to the others, if not vitiated by fraud.[79]

OFFER OF JUDGMENT

4981. Statute—Application—The statute authorizes an offer of judgment.[80] The right to offer judgment is purely statutory and can only be exercised as expressly authorized. The statute is inapplicable to municipal courts organized under Laws 1895 c. 229.[81] Whether an offer can be made under the statute on appeal from a justice court is an open question.[82]

4982. Object of statute—Construction—The object of the statute is to enable a defendant to avoid further expenses of litigation. Being of a remedial nature it should be liberally construed to further this object.[83]

4983. Requisites of offer—The offer must be full and responsive to the complaint. Where, in an action to recover personal property, the defendant returned the property to the plaintiff before trial and offered to allow judgment to be taken against him for eight dollars damages and costs, the offer was held insufficient because it did not offer to allow judgment to be entered determining the title.[84]

4984. Must include costs—An offer of judgment for a specified sum and "accrued costs" is sufficient as regards costs.[85] The term "costs" as used in this connection includes disbursements.[86]

4985. Time of offer—The offer must be made at least ten days before the erm at which the action stands for trial.[87]

4986. Time within which to accept offer—The plaintiff is entitled to the ull period of ten days in which to accept or reject the offer, and, in case of cceptance, to give notice thereof. In ascertaining this period, the day of ervice of the offer must be excluded and the trial must be regarded as a single oint of time identical with its commencement.[88]

4987. Effect of refusal—A defendant may offer to permit judgment to be ıken against him for a specified sum and costs—that is, all the allowances to hich the plaintiff is entitled up to the time his offer is accepted or deemed

[75] Chappel v. Chappel, 12 N. Y. 215; Dunm v. Waterman, 17 N. Y. 9; Norris v. nton, 30 Barb (N. Y.) 357.
[76] Dunham v. Waterman, 6 Abb. Pr. (N.) 357; Miller v. Earle, 24 N. Y. 110.
[77] See Cleveland C. S. Co. v. Douglas, 27-, 6+628 (motion); Hackney v. Wollas-, 73-114, 75+1037 (action).
[78] Wells v. Gieseke, 27-478, 8+380; Auerh v. Gieseke, 40-258, 41+946.
[79] Kern v. Chalfant, 7-487(393); Wells Gieseke, 27-478, 8+380.
[80] R. L. 1905 § 4196.
[81] Thompson v. Ferch, 78-520, 81+520.
[82] Flaherty v. Rafferty, 51-341, 53+644.
[83] Woolsey v. O'Brien, 23-71.
[84] Oleson v. Newell, 12-186(114).
[85] Petrosky v. Flanagan, 38-26, 35+665.
[86] Woolsey v. O'Brien, 23-71; Hennepin County v. Wright County, 84-267, 87+846.
[87] Mansfield v. Fleck, 23-61.
[88] Id.

withdrawn; and, to enable plaintiff, in case of such an offer, to secure those allowances, he must either accept the offer, or secure, upon the trial, a larger sum than that offered. If he chooses to take the risk of recovering less, he must take the risk of losing his right to such allowances, and of paying them to defendant.[89]

ARREST OF JUDGMENT

4988. In general—After verdict and any time before judgment is entered an unsuccessful defendant may move in arrest of judgment on the ground that there is some error appearing on the face of the record and not waived on the trial which vitiates the proceedings. The evidence is no part of the record for this purpose. Probably the only objections that can be raised on such a motion in this state are want of jurisdiction over the subject-matter of the action and failure of the complaint to state a cause of action.[90] Upon such a motion the complaint is liberally construed and every reasonable doubt resolved in favor of its sufficiency. Defects that would be fatal on demurrer are not necessarily so on a motion in arrest of judgment.[91] A good cause of action may have been made out by the evidence and in such a case, if the evidence was admitted without objection that it was inadmissible under the pleadings, the court will allow an amendment to conform to the proof.[92] Again, the complaint may have been aided by the answer [93] or verdict.[94]

ON DEFAULT

4989. Act of clerk act of court—The rendition of a judgment in any case is a judicial act which, according to the letter of the law, can only be performed by the court; and in the early days of the common law it was true in fact and in theory that all judgments were rendered by the courts. This feature of the common law has long since been greatly modified, and while the theory still is that all judgments are rendered by the court, yet the fact is that they are entered by the prothonotary or clerk out of court, and in some cases without the actual direction of the court or any judge.[95] The judgment entered by the clerk is the judgment of the court in all cases whether entered upon an order, verdict, or default. The clerk acts for the court. When a plaintiff, in order to take judgment for want of an answer, offers to the clerk proof of the service of summons and that no answer has been received, the clerk must necessarily decide upon the sufficiency of such proof and to that extent he acts on behalf of the court in a judicial capacity. His decision is a judicial determination of the facts essential to the entry of a judgment by default and as conclusive upon the parties as if it had been made by the judge himself.[96] If the clerk, in entering up a default judgment, commits error or irregularity, the judgment is not void and cannot be collaterally attacked.[97]

4990. Affidavit of no answer—Filing—The affidavit of no answer should be filed with the clerk before entry of judgment. But a judgment without such preliminary filing would probably not be absolutely void.[98]

4991. Notice—In an action arising on contract for the payment of money only, when the plaintiff is entitled to judgment as a matter of course on de-

[89] Woolsey v. O'Brien, 23-71.
[90] Wentworth v. Wentworth, 2-277(238); Lee v. Emery, 10-187(151); Smith v. Dennett, 15-81(59).
[91] Lee v. Emery, 10-187(151); Smith v. Dennett, 15-81(59).
[92] See § 7713.
[93] See § 7727.
[94] See § 7729.
[95] Skillman v. Greenwood, 15-102(77).
[96] Kipp v. Fullerton, 4-473(366).
[97] Kipp v. Fullerton, 4-473(366); Dillon v. Porter, 36-341, 31+56. See §§ 4997. 4998.
[98] Cunningham v. Water-Power S. Co., 74-282, 77+137.

fault of an answer, the appearance of defendant does not entitle him to notice of the entry of judgment, any more than in case of entry of judgment upon a verdict, finding, or report. But where, upon default,[99] judgment cannot be entered except on application to the court a defendant who has appeared is entitled to notice of such application.[1]

4992. Security—When the summons is served by publication in actions arising on contract for the recovery of money only, the plaintiff is entitled to judgment as of course upon filing with the clerk proof of such service and that no answer has been received within the time allowed by law, together with the statutory security in certain cases, in the same manner as if the summons had been personally served upon the defendant. So far as the formal entry of judgment is concerned, the proceeding against a non-resident who has been served by publication solely, is, with the exception as to security, the same as it is against a defendant who has been personally served.[2] Where judgment is entered without personal service of the summons it is not essential that the judgment roll should show that security was filed.[3]

4993. Diligence in entering—A default judgment not entered within a reasonable time after the default may be vacated on motion.[4]

4994. Premature entry—A defendant against whom a judgment as by default is entered before the time for answering has expired, has an absolute right to have it set aside on motion.[5]

4995. Necessity of proving cause of action—In an action on contract for the payment of money only, the clerk is authorized to enter judgment for the amount stated in the summons without proof of the cause of action and without any order of court.[6] In other actions for the recovery of money, while it is unnecessary to prove the cause of action, it is necessary to prove the amount to which the plaintiff is entitled, and the clerk cannot enter judgment without an order of court.[7] Where a cause of action in tort is joined with one on contract it is error for the clerk to enter judgment, including the amount claimed for the tort, without an order of court.[8] If other relief than for money is demanded, the court may require such proof as may be necessary to enable it to give judgment.[9] In an action of ejectment it is unnecessary for the plaintiff to prove title.[10] In an action to avoid a mortgage and a statutory foreclosure thereof for usury, the relief may be awarded on default without proof. The practice is similar to the chancery practice of taking a bill pro confesso.[11] A divorce cannot be granted on default without proof.[12] It will be presumed that whatever proof was necessary was made.[13]

4996. Relief which may be awarded—On default the relief which may be awarded the plaintiff is strictly limited in nature and degree to the relief specifically demanded in the complaint and it matters not that the allegations and proof would justify different or greater relief.[14] A judgment awarding

[99] Heinrich v. England, 34-395, 26+122.

[1] Banning v. Sabin, 41-477, 43+329; Davis v. Red River L. Co., 61-534, 63+1111.

[2] Cousins v. Alworth, 44-505, 47+169.

[3] Shaubhut v. Hilton, 7-506(412); Brown v. Brown, 28-501, 11+64.

[4] Coleman v. Akers, 87-492, 92+408.

[5] Gillette v. Ashton, 55-75, 56+576. See Swift v. Fletcher, 6-550(386).

[6] R. L. 1905 § 4133(1); Heinrich v. Englund, 34-395, 26+122.

[7] R. L. 1905 § 4133(2); Doud v. Duluth M. Co., 55-53, 56+463; Hersey v. Walsh, 38-521, 38+613.

[8] Reynolds v. La Crosse etc. Co., 10-178 (144).

[9] R. L. 1905 § 4133(3). See Deuel v. Hawke, 2-50(37); Fowler v. Jenks, 90-74, 95+887, 96+914, 97+127.

[10] Doyle v. Hallam, 21-515.

[11] Exley v. Berryhill, 37-182, 33+567.

[12] True v. True, 6-458(315); Young v. Young, 17-181(153).

[13] Hotchkiss v. Cutting, 14-537(408).

[14] Minn. L. O. Co. v. Maginnis, 32-193, 20+85; Prince v. Farrell, 32-293, 20+234; Heinrich v. Englund, 34-395, 26+122; Exley v. Berryhill, 37-182, 33+567; Spooner

relief in violation of this restriction is not merely irregular, but is extra-judicial and void, and subject to collateral attack, the excessive relief appearing on the face of the record.[15]

4997. Irregularity in entering judgment—If the proper judgment is entered it is immaterial that it was entered by the clerk without an order where regularly an application should have been made to the court.[16] In an action against four defendants jointly indebted upon a contract, a judgment upon default entered by the clerk against the three only who were served with summons is not void but only irregular or erroneous.[17] Where a cause of action in tort is joined with others on contract it is error for the clerk upon default to enter judgment including the amount claimed for the tort.[18]

4998. Remedy for irregular or erroneous judgment by default—If the clerk commits an error or irregularity in entering a default judgment the remedy is a motion to set aside,[19] a motion to correct,[20] or possibly an appeal from the judgment. In the earliest cases it was held that such objections could not be raised for the first time on appeal.[21] Later these earlier cases were overruled.[22] But in all cases it is practically advisable to apply to the trial court in the first instance. If the court commits an error or irregularity in ordering judgment on default and the clerk enters judgment in strict accordance with the order the objection may be raised for the first time on appeal.[23] Of course a motion to amend or modify the judgment is proper in such cases and should ordinarily be resorted to in the first instance.

4999. Presumptions in favor of default judgment—Where judgment is entered by default it will be presumed that whatever proofs were necessary were taken.[24] In the absence of anything in the record to the contrary it will be presumed that the court had jurisdiction over the person of the defendant.[25] But if the record shows that jurisdiction over the defendant was acquired, if acquired at all, by publication of summons, the record must affirmatively show compliance with the statutory requirements as to service of summons by publication.[26]

5000. Variance between summons and complaint—Effect of failure to apply to court—In an action wherein the complaint stated a cause of action arising on contract for the payment of money only and demanded judgment for a specified sum, the summons notified the defendant that in case of default the plaintiff would "have the amount he is entitled to recover ascertained by the court, or under its direction, and take judgment for the amount so ascertained." The summons and complaint were served together on defendant. Upon default of answer judgment was entered by the clerk without application to the court. The supreme court held the variance no ground for a reversal, saying: "Inasmuch as both summons and complaint were served together, we

v. Bay St. Louis Syndicate, 47–464, 50+601; Doud v. Duluth M. Co., 55–53, 56+463; Northern T. Co. v. Albert Lea College, 68–112, 71+9; Halvorsen v. Orinoco M. Co., 89–470, 95+320; Sache v. Wallace, 101–169, 112+386.

15 Sache v. Wallace, 101–169, 112+386.

16 Libby v. Mikelborg, 28–38, 8+903; Heinrich v. Englund, 34–395, 26+122; Hersey v. Walsh, 38–521, 38+613; Hencke v. Twomey, 58–550, 60+667; Slater v. Olson, 83–35, 85+825.

17 Dillon v. Porter, 36–341, 31+56.

18 Reynolds v. La Crosse etc. Co., 10–178 (144).

19 Heinrich v. Englund, 34–395, 26+122; Dillon v. Porter, 36–341, 31+56; Hersey v. Walsh, 38–521, 38+613.

20 Babcock v. Sanborn, 3–141(86); Hawke v. Banning, 3–67(30); Milwain v. Sanford, 3–147(92).

21 Id.

22 Reynolds v. La Crosse etc. Co., 10–178 (144).

23 White v. Iltis, 24–43; Northern T. Co. v. Albert Lea College, 68–112, 71+9.

24 Hotchkiss v. Cutting, 14–537(408); Skillman v. Greenwood, 15–102(77).

25 Skillman v. Greenwood, 15–102(77).

26 See § 7834.

think the variance between the two was immaterial. The defendant could not have been misled by the form of the notice, as the complaint informed him of the nature of the cause of action and the amount for which judgment was asked. He could not have taken advantage of the variance, under the circumstances, even on motion. The form of notice in the summons will confer no right upon a plaintiff to enter judgment without application to the court, when application is necessary by the form of the complaint; and, by analogy of reasoning, we think that when both summons and complaint are served, a plaintiff is entitled to judgment, without application to the court, notwithstanding the form of notice in the summons, when such application is unnecessary under the form of the complaint. But even if the plaintiffs in this case should regularly have applied to the court for judgment, their failure to do so was an irregularity which did not prejudice defendant, for the reason that, under the complaint, plaintiffs would have been entitled to the order for judgment as a matter of course."[27]

5001. Misnomer of plaintiff—A judgment by default against the defendants in an action is valid notwithstanding a mistake in the summons in the Christian name of one of the plaintiffs.[28]

5002. Effect of attachment—If an attachment has been issued it is unnecessary to refer to the fact in the order for judgment or in the judgment. In this state the practice is to enter a general money judgment and issue a general execution without referring to the attachment.[29]

OPENING DEFAULT ON PUBLICATION OF SUMMONS

5003. A matter of right—In actions where default judgment is rendered on a service of the summons by publication, the defendant is entitled, as a matter of right, under R. L. 1905 § 4113, to an order vacating the judgment and allowing him to come in and defend the action, upon an application seasonably made to the court, accompanied by an answer setting up a good defence. Such an application is not addressed to the discretion of the court and in this particular is to be distinguished from an application under R. L. 1905 § 4160. If the proposed answer contains a good defence to the action and the defendant is not guilty of laches in making his application sufficient cause is shown for opening the judgment and the relief must be granted as a matter of right.[30]

5004. Relief allowed liberally—Where a judgment has been taken by default against a non-resident, upon whom there was no personal service of the summons, courts ought to be liberal in granting leave to answer.[31] The legislature intended to give one not personally served more opportunity to obtain relief and make a defence than one personally served.[32]

5005. A good defence sufficient cause—The statute provides that sufficient cause must be shown. It is held that a good defence is a sufficient cause within the meaning of the statute.[33] It is indispensable that the applicant should show a good defence in his moving papers,[34] but he need do no more than propose an answer setting up a good defence.[35]

[27] Heinrich v. Englund, 34–395, 26+122. See Libby v. Mikelborg, 28–38, 8+903; Hersey v. Walsh, 38–521, 38+613.

[28] Bradley v. Sandilands, 66–40, 68+321.

[29] Hencke v. Twomey, 58–550, 60+667.

[30] Lord v. Hawkins, 39–73, 38+689; Nye v. Swan, 42–243, 44+9; Boeing v. McKinley, 44–392, 46+766; Bausman v. Tilley, 46–66, 48+459; Fifield v. Norton, 79–264, 82+581; Bogart v. Kiene, 85–261, 88+748; Kipp v. Clinger, 97–135, 106+108; Fink v. Woods, 102–374, 113+909.

[31] Frankoviz v. Smith, 35–278, 28+508; Lord v. Hawkins, 39–73, 38+689.

[32] Lord v. Hawkins, 39–73, 38+689.

[33] Lord v. Hawkins, 39–73, 38+689; Nye v. Swan, 42–243, 44+9; Bausman v. Tilley, 46–66, 48+459.

[34] Holcomb v. Stretch, 74–234, 76+1132.

[35] Fifield v. Norton, 79–264, 82+581.

5006. Diligence in making application—The applicant need not show in his moving papers that he has been diligent. He need not show that he did not have actual notice of the action in time to interpose his defence before judgment.[36] But he is bound to meet any charge of laches made by the plaintiff on proper affidavits.[37] There is, of course, no hard and fast rule by which to determine the diligence required of the defendant in making his application after actual notice of the action. Each case must be determined upon its own facts.[38] But inasmuch as the legislature has given the defendant the right to apply any time within one year from the rendition of judgment a court ought not to deny relief within that time except where the want of diligence indicates bad faith. But if a party receives the summons through the mail he is bound to act with great promptness.[39]

5007. When year begins to run—The year within which the defendant must move begins to run with the entry of judgment. If the proceedings are begun before the expiration of the year it is immaterial that the court does not pass upon it until after the expiration of the year.[40]

5008. The question on appeal—The action of the trial court will not be reversed on appeal except for a clear abuse of discretion.[41]

OPENING DEFAULT JUDGMENTS—IN GENERAL

5009. Statute—How far exclusive—Action—The statute authorizes a court to open a default judgment and allow a party to answer.[42] When relief can be had by motion under the statute an action will not lie to open a default and allow a party to answer.[43]

5010. Statute not a grant of power—This statute is not a grant of power. All courts of superior jurisdiction have inherent power to open their judgments and grant relief from default.[44] The statute is a limitation rather than a grant of power.[45] It simply regulates the inherent power of the court over its own judgments and proceedings in execution thereof.[46]

5011. Application of statute—The statute is applicable to all forms of actions or proceedings. Thus it has been held applicable to foreclosure proceedings;[47] to tax proceedings;[48] to condemnation proceedings;[49] to habeas corpus proceedings;[50] to garnishment proceedings;[51] to actions in which the summons is served by publication;[52] to actions to determine adverse claims in which the summons is served on parties as unknown persons or heirs;[53] to partition pro-

[36] Frankoviz v. Smith, 35-278, 28+508.
[37] Mueller v. McCulloch, 59-409, 61+455; Bogart v. Kiene, 85-261, 88+748.
[38] Nye v. Swan, 42-243, 44+9; Bausman v. Tilley, 46-66, 48+459; Cutler v. Button, 51-550, 53+872; Carlson v. Phinney, 56-476, 58+38; Mueller v. McCulloch, 59-409, 61+455; Fink v. Woods, 102-374, 113+909.
[39] Bogart v. Kiene, 85-261, 88+748.
[40] Washburn v. Sharpe, 15-63(43).
[41] Whitcomb v. Shafer, 11-232(153); Washburn v. Sharpe, 15-63(43); Frankoviz v. Smith, 35-278, 28+508; Lord v. Hawkins, 39-73, 38+689; Bausman v. Tilley, 46-66, 48+459; Cutler v. Button, 51-550, 53+872.
[42] R. L. 1905 § 4160.
[43] Wieland v. Shillock, 23-227; Sargeant v. Bigelow, 24-370; Phelps v. Western R. Co., 89-319, 94+1085, 1135.
[44] Gerish v. Johnson, 5-23(10); Waller v. Waller, 102-405, 113+1013.
[45] Gerish v. Johnson, 5-23(10).
[46] Russell v. Blakeman, 40-463, 42+391. See Holmes v. Campbell, 13-66(58).
[47] Russell v. Blakeman, 40-463, 42+391.
[48] See Duluth v. Dibblee, 62-18, 63+1117; Martin v. Curley, 70-489, 73+405.
[49] In re Mpls. R. T. Co., 38-157, 36+105.
[50] State v. Bechdel, 38-278, 37+338.
[51] Goodrich v. Hopkins, 10-162(130).
[52] Lord v. Hawkins, 39-73, 38+689; Welch v. Marks, 39-481, 40+611; Russell v. Blakeman, 40-463, 42+391; Boeing v. McKinley, 44-392, 46+766; Waite v. Coaracy, 45-159, 47+537; Nauer v. Benham, 45-252, 47+796; Bogart v. Kiene, 85-261, 88+748; Hoyt v. Lightbody, 93-249, 101+304; Kipp v. Clinger, 97-135, 106+108.
[53] Boeing v. McKinley, 44-392, 46+766.

ceedings;[54] to an action of ejectment;[55] and to actions for the annulment of the marriage relation.[56] Actions for divorce are expressly excepted.[57]

5012. A matter of discretion—Except when the summons is served by publication[58] the matter of opening a default lies in the discretion of the trial court.[59] It is in the very nature of discretionary power that no rules can be laid down for its government.[60] It must be exercised judicially, with close regard to the facts of the particular case and in furtherance of justice.[61] It is ordinarily in furtherance of justice that an action should be tried on the merits.[62] The discretion contemplated by the statute is not the arbitrary and uncontrolled pleasure or caprice of the judge, but a sound legal discretion; a discretion in the exercise of which it is the duty of the judge to grant the desired relief in a meritorious case.[63] The discretion should not be exercised in a way to encourage loose practice or a lax administration of the law.[64] Still, it should be remembered that the object to be attained by the exercise of the discretion of the court is the administration of justice. Orderly procedure is a means to that end, but not the end itself.[65] If a defendant pleads in time, the court has no discretion in opening a judgment taken against him as by default.[66]

5013. Relief to be granted liberally—Courts are naturally and very properly inclined to relieve a party from a default if he furnishes any reasonable excuse for his neglect and makes any fair showing of merits.[67] Indeed, in such a case a default should ordinarily be opened as a matter of course, if it is apparent that the plaintiff has not been substantially prejudiced by a brief delay.[68] The statute is in the interest of justice, and should be liberally construed, in order that causes may be tried on the merits.[69] Different considerations apply when the application is made by a "prowling assignee," or speculative purchaser.[70]

5014. Who may move—In an early case it was held that the statute applies only to parties;[71] but an heir, grantee, or personal representative may move under the statute, at least if he is first substituted as defendant.[72] The right of a successor in interest to relief depends upon whether the defendant, to whose rights he succeeds, would, on the facts disclosed, be entitled to it.[73] Whatever rights a trustee in bankruptcy has to have a judgment vacated depend upon his position as trustee.[74] A minor heir, upon good cause shown, may be allowed to defend his interest in realty involved in an action to determine ad-

[54] Welch v. Marks, 39–481, 40+611.
[55] Hallam v. Doyle, 35–337, 29+130.
[56] Waller v. Waller, 102–405, 113+1013.
[57] Scribner v. Scribner, 93–195, 101+163; La Fond v. La Fond, 102–344, 113+896.
[58] See § 5003.
[59] See § 5035.
[60] Russell v. Blakeman, 40–463, 42+391.
[61] Merritt v. Putnam, 7–493(399); McClure v. Clarke, 94–37, 101+951.
[62] Whitcomb v. Shafer, 11–232(153); Potter v. Holmes, 74–508, 77+416; Walsh v. Boyle, 94–437, 103+506; Barrie v. Northern A. Co., 99–272, 109+248; Waller v. Waller, 102–405, 113+1013.
[63] Merritt v. Putnam, 7–493(399); Wieland v. Shillock, 24–345; Forin v. Duluth, 66–54, 68+515; Potter v. Holmes, 74–508, 77+416.
[64] Merritt v. Putnam, 7–493(399); Noye v. Wheaton R. M. Co., 60–117, 61+910.
[65] Barrie v. Northern A. Co., 99–272, 109+248.
[66] Swift v. Fletcher, 6–550(386).
[67] People's Ice Co. v. Schlenker, 50–1, 52+219; Martin v. Curley, 70–489, 73+405; Milwaukee H. Co. v. Schroeder, 72–393, 75+606; Hull v. Chapel, 77–159, 79+669; McMurran v. Bourne, 81–515, 84+338.
[68] Walsh v. Boyle, 94–437, 103+506; Barrie v. Northern A. Co., 99–272, 109+248. See Potter v. Holmes, 74–508, 77+416.
[69] Waller v. Waller, 102–405, 113+1013.
[70] McClymond v. Noble, 84–329, 87+838.
[71] Kern v. Chalfant, 7–487(393).
[72] Boeing v. McKinley, 44–392, 46+766; Waite v. Coaracy, 45–159, 47+537; Kipp v. Clinger, 97–135, 106+108. See McClymond v. Noble, 84–329, 87+838.
[73] Kipp v. Clinger, 97–135, 106+108.
[74] Peru P. & I. Co. v. King, 90–517, 97+373.

verse claims, within two years of becoming of age, where jurisdiction was obtained by publication, and he was without actual notice of the pendency thereof before entry of judgment.[75]

5105. Time of application—Diligence—Laches—A party must make his application within a reasonable time after notice of the judgment and at all events within one year of such notice.[76] He must proceed with due diligence regardless of the one year limitation. Because the court is authorized to entertain such an application within one year of notice it does not follow that the party may always take one year in which to make his application.[77] What is due diligence depends upon the facts of the particular case and slight attention should be paid to precedents.

5016. Notice of judgment—The year within which a party may have relief from a default judgment begins to run from the time when he has actual notice of the judgment. Personal service of the summons in the action is not notice of the judgment within the meaning of the statute.[78]

5017. Notice of motion—The motion should be brought on by a written notice of eight days. If a restraining order is necessary, or if some exigency exists which would cause injury to the moving party, or render the relief sought ineffectual if he were required to give the regular notice of eight days, an order to show cause, including a restraining clause, may be secured from the judge.[79] The attorney of a judgment creditor is, while his authority to enforce and collect the judgment continues, that is, for two years after the entry of judgment or until it is satisfied, authorized to act for his client in protecting and retaining the judgment against any proceeding in the same action to avoid it, and notice of such proceeding should be served on him.[80] Notice of a motion to vacate a judgment in favor of a non-resident plaintiff may be served on his attorney of record, though more than two years have elapsed since the entry thereof.[81] Purchasers of property affected by the judgment must be served with notice.[82]

5018. Moving affidavits—Sufficiency—The rule excluding hearsay evidence applies to affidavits used on motions to open default judgments. An affidavit by a grantee stating in general terms that the defendant, his grantor, had no actual notice or knowledge of the judgment, is hearsay, and insufficient to establish the fact of want of notice.[83]

5019. Applicant must have a meritorious defence—The applicant must have a good defence on the merits and exhibit it to the court on the motion.[84]

[75] Hoyt v. Lightbody, 93–249, 101+304.

[76] Gerish v. Johnson, 5–23(10); Groh v. Bassett, 7–325(254); Jorgensen v. Boehmer, 9–181(166); Holmes v. Campbell, 13–66(58); Altmann v. Gabriel, 28–132, 9+633; Sheffield v. Mullin, 28–251, 9+756; Frear v. Heichert, 34–96, 24+319; Dillon v. Porter, 36–341, 31+56; Van Aernam v. Winslow, 37–514, 35+381; St. Paul L. Co. v. Dayton, 39–315, 40+66; Weymouth v. Gregg, 40–45, 41+243; Kipp v. Cook, 46–535; 49+257; McMurran v. Meek, 47–245, 49+983; Stickney v. Jordain, 50–258, 52+861; Carlson v. Phinney, 56–476, 58+38; Seibert v. Mpls. etc. Ry., 58–72, 59+828; Northern T. Co. v. Crystal Lake C. Assn., 67–131, 69+708; First Nat. Bank v. Northern T. Co., 69–176, 71+928; Hinckley v. Kettle River Ry., 70–105, 72+835; McMurran v. Bourne, 81–515, 84+338; McClymond v. Noble, 84–329, 87+838; Queal v. Bulen, 89–477, 95+310; McClure v. Clarke, 94–37, 101+951; Hoffman v. Freimuth, 101–48, 111+732.

[77] Gerish v. Johnson, 5–23(10); Groh v. Bassett, 7–325(254); Altmann v. Gabriel, 28–132, 9+633; Kipp v. Clinger, 97–135, 106+108.

[78] Wieland v. Shillock, 23–227; Dillon v. Porter, 36–341, 31+56; Lord v. Hawkins, 39–73, 38+689.

[79] Marty v. Ahl, 5–27(14); Goodrich v. Hopkins, 10–162(130); Gillette v. Ashton, 55–75, 56+576.

[80] Sheldon v. Risedorph, 23–518.

[81] Phelps v. Heaton, 79–476, 82+990.

[82] Aldrich v. Chase, 70–243, 73+161; White v. Gurney, 92–271, 99+889.

[83] Kipp v. Clinger, 97–135, 106+108.

[84] Frasier v. Williams, 15–288(219); St.

The proper practice is to exhibit a proposed answer setting forth a good defence.[85] Of course he need not set forth the evidence of his defence and its truth or falsity cannot be tried on affidavits.[86] A verified general denial shows a good defence and is ordinarily sufficient.[87] But the court need not be content with a formal compliance in the answer with the rules of pleading which a party may follow when answering as a matter of right, but may require that in its denials the answers show the actual extent of the controversy upon the matters denied, as where the denials are of amounts stated in the complaint, and the exact amounts stated are not material.[88] The court may perhaps take into consideration the justice of the proposed defence in exercising its discretion.[89]

5020. Affidavit of merits—As a general rule an affidavit of merits is required on a motion to open a default.[90] But where the proposed answer is verified on personal knowledge and discloses fully the nature of the defence, and it is meritorious, no affidavit of merits should be required.[91] In all cases it is purely discretionary with the trial court to require an affidavit of merits.[92] An affidavit should be made by the party personally, or by some one having personal knowledge of the facts.[93] Any informality in an affidavit may be waived by the court.[94] Neither the formal affidavit of merits provided for in the rules of the district court, nor the tender of a proposed answer, is indispensable, when the court does not require the same as a prerequisite to such relief, and when facts authorizing the exercise of the court's discretion are made to appear by the affidavit of the moving party.[95]

5021. Proposed answer—Sufficiency—Correct practice requires an applicant to serve on the adverse party a proposed answer, showing the nature of his defence.[96] An application should not be denied on account of the insufficiency of a proposed answer, unless such insufficiency is so glaring that the answer would have been stricken out as sham or frivolous, if it had been served in time.[97]

5022. Counter affidavits—Counter affidavits are not permissible to show want of merits, or to controvert the allegations of the proposed answer or affidavit of merits. The court cannot try the merits of the cause on affidavits.[98]

Paul L. Co. v. Dayton, 39–315, 40+66; Flanigan v. Sable, 44–417, 46+854; People's Ice Co. v. Schlenker, 50–1, 52+219; Jones v. Swain, 57–251, 59+297; Hinckley v. Kettle River Ry., 70–105, 72+835; Osman v. Wisted, 78–295, 80+1127.

[85] McMurran v. Bourne, 81–515, 84+338.

[86] Lathrop v. O'Brien, 47–428, 50+530; McMurran v. Bourne, 81–515, 84+338.

[87] Jones v. Swain, 57–251, 59+297; Fitzpatrick v. Campbell, 58–20, 59+629. See Rhodes v. Walsh, 58–196, 59+1000.

[88] St. Paul etc. Ry. v. Blackmar, 44–514, 47+172. See Jones v. Swain, 57–251, 59+297.

[89] See Washburn v. Sharpe, 15–63(43); Mpls. etc. Ry. v. Firemen's Ins. Co., 62–315, 316, 64+902; Neff v. Clark, 95–1, 4, 103+562. See, as to opening a default to set in the defence of the statute of limitations, 61 L. R. A. 746; and the defence of usury, 12 L. R. A. (N. S.) 659.

[90] Rule 17, District Court; People's Ice Co. v. Schlenker, 50–1, 52+219; Crane v. Sauntry, 90–301, 96+794.

[91] People's Ice Co. v. Schlenker, 50–1, 52+219.

[92] Crane v. Sauntry, 90–301, 96+794; Stevens v. Parker, 98–529, 106+1134; Fishstrom v. Bankers M. C. I. Co., 102–228, 113+267; Fink v. Woods, 102–374, 113+909.

[93] People's Ice Co. v. Schlenker, 50–1, 52+219; Forin v. Duluth, 66–54, 68+515.

[94] Sheldon v. Risedorph, 23–518; Russell v. Blakeman, 40–463, 42+391; Rhodes v. Walsh, 58–196, 59+1000; Crane v. Sauntry, 90–301, 96+794.

[95] McMurran v. Bourne, 81–515, 84+338; Wood v. Schoenauer, 85–138, 88+411.

[96] Rule 17, District Court; McMurran v. Bourne, 81–515, 84+338; Wood v. Schoenauer, 85–138, 88+411.

[97] Woods v. Woods, 16–81(69); Sheldon v. Risedorph, 23–518; Lathrop v. O'Brien, 47–428, 50+530; Rhodes v. Walsh, 58–196, 59+1000; Forin v. Duluth, 66–54, 68+515. See Lynn v. Schunk, 101–22, 111+729.

[98] Lathrop v. O'Brien, 47–428, 50+530; McMurran v. Bourne, 81–515, 84+338; Queal v. Bulen, 89–477, 480, 95+310.

5023. Terms—It is within the discretion of the court to impose reasonable terms as a condition of granting relief under the statute.[99] Thus it has been held proper to open a default and grant leave to answer upon condition that the defendants consent to the appointment of a receiver of the property in controversy, pending the trial and determination of the issues raised by the answer.[1] Under the peculiar facts of the particular case the payment of seventy-five dollars has been held not an improper condition.[2] Where a meritorious case for relief was presented by non-resident defendants, it was held not a reasonable exercise of the discretion of the court to require, as a condition, that they file a bond, with resident sureties, to be approved by the court, in a sum sufficient to secure the payment of the amount of such money judgment as the plaintiffs might recover in the action.[3] It is common practice to allow the judgment to stand as security.[4]

5024. Costs—The imposition of costs on a motion to open a judgment is wholly discretionary with the court.[5] They are commonly covered by the terms, the distinction between terms and costs not being observed with nicety. Ordinarily the defendant ought to be required to pay the disbursements of the plaintiff in making proof on the default and entering up judgment.[6]

5025. Excusable neglect—The discretion of a court in relieving from defaults is not confined to cases involving no fault or negligence in the moving party. To the end that justice may be done, relief may, within proper limits, be granted from the consequences of positive negligence.[7] A party may be relieved from a default occasioned by the negligence of his attorney,[8] and in a recent case it has been said that trial courts are often too strict in refusing relief in such cases where the party is personally free from fault.[9] Where the defendant was apprised of the suit, appeared in it, answered the complaint and offered no excuse for not appearing at the trial except that his attorneys did not inform him that the action had been noticed for trial, it was held proper not to open the default.[10] Where the defendant knew that the case was to be tried at a particular time but left home and traveled from place to place so that he could not be notified of the trial it was held that the default ought not to be opened.[11] In an action against a city the summons and complaint were served on the mayor who neglected to turn them over to the corporation counsel. It was held proper to open the default.[12] Where a sheriff signed what he supposed was an answer to the complaint but which was, in fact, an answer to an order to show cause, it was held proper to open the default.[13] Two sureties were told by their principal that they need not pay any attention to an action against them and that he would have his attorney put in an answer for them.

[99] Washburn v. Sharpe, 15–63(43); Henderson v. Lange, 71–468, 74+173. See St. Mary's Hospital v. Nat. B. Co., 60–61, 61+824.

[1] Exley v. Berryhill, 36–117, 30+436.

[2] Ueland v. Johnson, 77–543, 80+700.

[3] Brown v. Brown, 37–128, 33+546.

[4] Barman v. Miller, 23–458; Brown v. Brown, 37–128 33+546.

[5] Brown v. Brown, 37–128, 33+546.

[6] See Henderson v. Lange, 71–468, 74+173.

[7] Winona v. Minn. Ry. C. Co., 29–68, 11+228.

[8] Jorgensen v. Boehmer, 9–181(166); Hildebrandt v. Robbecke, 20–100(83); Dupries v. Mil. etc. Ry., 20–156(139); Sandberg v. Berg, 35–212, 28+255; Bridgman v. Dambly, 41–526, 43+482; Lathrop v. O'Brien, 47–428, 50+530; Stewart v. Cannon, 66–64, 68+604; White v. Gurney, 92–271, 99+889; Dion v. Bassett, 102–512, 113+1133.

[9] White v. Gurney, 92–271, 99+889. In Merritt v. Putnam, 7–493(399) it is said that "where a plaintiff, who is regular in every respect, obtains a judgment by the default of the attorney for the defendant, it will not be disturbed, unless upon the most cogent reasons." A more liberal rule now prevails.

[10] Merritt v. Putnam, 7–493(399).

[11] Bates v. Bates, 66–131, 68+845.

[12] Glaeser v. St. Paul, 67–368, 69–1101.

[13] Whitney v. Sherin, 74–4, 76–787.

but none was put in. An order opening the default was sustained on appeal.[14] A corporation may be relieved from a default occasioned by the neglect of an officer.[15] Where the attorney for defendant was suddenly called away from home by telegram announcing the death of his father it was held proper to extend the time to answer.[16] When a party is personally served with summons he must show a good excuse for his neglect to answer.[17] Mere preoccupation with business is not a sufficient excuse.[18] Neglect to answer cannot be excused upon equivocal and evasive affidavits.[19] An order overruling a demurrer to an answer was sustained on appeal. The plaintiff moved for leave to file a reply. The motion was denied on the ground that the proper practice under the circumstances was to file a supplemental complaint. No stay of proceedings was ordered. On the same day on which the order was made the defendant entered up judgment. It was held proper to open the judgment.[20] It is proper to consider the ignorance of the defendant in determining whether his negligence was excusable.[21] Negligence in failing to answer may properly be excused if it was the natural consequence of the conduct and assurances of the adverse party or his attorney.[22] That a party did not expect that the cause would be reached for trial is not ordinarily a good ground for opening a default.[23] A party upon whom summons is served at his house of usual abode in which his family resides ought not to be relieved from default after a long lapse of time when "ordinary diligence on his part and attention to his business and family would have led to a knowledge of the pendency of the action."[24] A party who suffers a default in reliance on a decision of the supreme court which is subsequently overruled, is not chargeable with negligence on an application to open the default for the purpose of taking advantage of the subsequent decision.[25] Where an attorney failed to be present when a case was called for trial, because of assurances made to him by the attorney of the adverse party to the effect that the case was not likely to be reached until later and that it would be "all right" for him if he was there by a certain time, it was held proper to open a default.[26] A party cannot be permitted to close his eyes, and refuse to read papers served upon him, and then say that he had no knowledge of their contents.[27]

5026. Surprise—Where all arrangements had been made for putting in an answer by one of three attorneys who failed to do so because suddenly and unexpectedly called away from home, but who sent the necessary facts for drafting an answer to the other attorneys who also happened to be away from home, it was held proper to open the default on the ground of surprise.[28] Before the time for answering had expired the defendants had served notice on the plaintiff of a motion to have the sheriff substituted in their place and it was stipulated by the attorneys of both parties that the motion should be submitted to the judge of another district. Before the determination on the mo-

[14] Hull v. Chapel, 77–159, 79+669.
[15] Bray v. Church of St. Brandon, 39–390, 40+518; Queal v. Bulen, 89–477, 95+310.
[16] Bridgman v. Dambly, 41–526, 43+482.
[17] Pine Mountain I. & C. Co. v. Tabour, 55–287, 56+895; Noye v. Wheaton R. M. Co., 60–117, 61+910.
[18] Noye v. Wheaton R. M. Co., 60–117, 61+910; Bates v. Bates, 66–131, 68+845.
[19] Osman v. Wisted, 78–295, 80+1127; Missouri etc. Co. v. Norris, 61–256, 63+634.
[20] Schuler v. Wood, 81–372, 84+121.
[21] Martin v. Curley, 70–489, 73+405; Milwaukee H. Co. v. Schroeder, 72–393, 75+606; Wood v. Schoenauer, 85–138, 88+411.
[22] Hull v. Chapel, 77–159, 79+669; McMurran v. Bourne, 81–515, 84+338.
[23] Foote v. Branch, 42–62, 43+782; Barrie v. Northern A. Co., 99–272, 109+248.
[24] Missouri etc. Co. v. Norris, 61–256, 63+634.
[25] Hollinshead v. Von Glahn, 4–190(131).
[26] Barrie v. Northern A. Co., 99–272, 109+248.
[27] Hoffman v. Freimuth, 101–48, 111–732.
[28] Dupries v. Mil. etc. Ry., 20–156(139).

tion judgment was entered without notice, to the surprise of the defendants. Held proper to open the judgment.[29] A default may be opened on the ground of surprise where a party is misled and deceived by his attorney.[30] That a party did not expect that a cause would come on for trial so early in the term is not ordinarily a ground for opening a default.[31]

5027. Mistake—Relief may be had from default occasioned by the mistaken advice of an attorney on a question of law.[32] A default may be opened on the ground that the attorney for defendant made a mistake as to the expiration of the time for answering.[33] The attorneys for the defendants were non-residents, but were notified by plaintiffs' attorney of the service of an amended complaint, the reason assigned for not serving it upon the attorneys being that the court had ordered personal service on the defendants. Within twenty days thereafter the same attorneys appeared for defendants and served their answers, which plaintiffs' attorney immediately returned, because the defendants' attorneys were non-residents. It was held proper to open the default.[34] Where a judgment was entered in accordance with a stipulation shown to have been entered into under a mistake of fact it was held that the judgment was properly opened.[35] Where, in an action against a city, the mayor turned the summons over to the city attorney, giving him the date of service, and the attorney by mistake noted on the summons the wrong date on which the period for answering would expire and in consequence inadvertently allowed a default to be taken, it was held proper to open the judgment.[36] It has been held proper to open a default where a party was mistaken as to the date on which the summons was served.[37]

5028. Fraud—A judgment may be opened on the ground of fraudulent practices in obtaining it,[38] but the usual practice is to set it aside summarily on motion or by action as authorized by statute.[39]

5029. Judgment in action to quiet title—In an application by a defendant to set aside a judgment quieting title in the plaintiff, rendered after service of summons by publication, the discretion of the court may be influenced by the long continued neglect of the defendant, both subsequent and prior to the judgment, to interfere with the adverse occupancy of the land by plaintiff, to pay taxes thereon, or to assert any rights respecting it.[40] In an action to determine adverse claims in which the plaintiff relied on a tax title it was held proper on an application of the owner to open a default to consider the great disparity between the value of the property and the amount of taxes and interest paid by the plaintiff.[41]

5030. Application by municipal corporation—While municipal corporations are subject to the same rules as other litigants, yet, in the application of these rules, regard must be had to the fact that such corporations are not natural persons, but have to act through the agency of public officers.[42]

[29] Woods v. Woods, 16–81(69).
[30] Hildebrandt v. Robbecke, 20–100(83).
[31] Foote v. Branch, 42–62, 43+782. See Barrie v. Northern A. Co., 99–272, 109+248; Knoblauch v. Baer, 102–506, 112+1141.
[32] Jorgensen v. Boehmer, 9–181(166); Brown v. Brown, 37–128, 33+546; Baxter v. Chute, 50–164, 52+379. See Northern T. Co. v. Crystal Lake C. Assn., 67–131, 69+708; Martin v. Curley, 70–489, 73+405.
[33] Lathrop v. O'Brien, 47–428, 50+530.
[34] Brown v. Brown, 37–128, 33+546.
[35] Gerdtzen v. Cockrell, 52–501, 55+58.
[36] Forin v. Duluth 66–54, 68+515.
[37] Walsh v. Boyle, 94–437, 103+506; Fishstrom v. Bankers M. C. I. Co., 102–228, 113+267.
[38] True v. True, 6–458(315); Young v. Young, 17–181(153); Bray v. Church of St. Brandon, 39–390, 40+518; Sturm v. School Dist., 45–88, 47+462.
[39] See §§ 5122, 5125, 5126.
[40] Nauer v. Benham, 45–252, 47+796.
[41] Martin v. Curley, 70–489, 73+405.
[42] Glaeser v. St. Paul, 67–368, 69+1101; Queal v. Bulen, 89–477, 95+310. See Forin v. Duluth, 66–54, 68+515.

5031. Renewal of motion—Where a motion has been fully heard and determined it cannot be renewed, and the same questions again raised, except on leave of court first had. A second application founded on facts which were known or ought to have been known to the party when making the first should not be entertained.[43] An order to show cause why an application shall not be granted, is sufficient leave to renew the application, if it has been previously heard and denied.[44]

5032. Waiver—A stipulation extending the time to answer, and providing that plaintiff may take judgment if the answer is not served within the extended time, will not ordinarily estop the defendant from moving to open the default.[45]

5033. Bona fide purchasers—It is the general rule that the setting aside of a judgment, regular upon its face, had in a court of competent jurisdiction, and not affecting the title of real property, does not avoid a judicial sale of real property, under an execution issued thereon, made to a stranger who has purchased in good faith for a valuable consideration.[46] In the absence of statute the same rule applies to a judicial sale under a judgment affecting the title to real property. But a purchaser from the successful party to a judgment affecting the title of real property takes it subject to the judgment being set aside, except as otherwise provided by statute.[47] This rule, however, is subject to the qualification, that the purchaser, to be thus affected, must have been served with notice of the application to set aside or in some way made a party to the proceeding.[48] Our statute protects a bona fide purchaser from the successful party to a judgment which has been of record in the proper county for a period of three years next preceding the date of the application for relief.[49]

5034. Appeal—An order granting or denying a motion to open a default is appealable.[50] An appeal from an order vacating a judgment does not have the effect of reinstating the judgment so as to give it operation as an estoppel.[51]

5035. The question on appeal—The matter of opening a default lies almost wholly in the discretion of the trial court and its action will not be reversed on appeal except for a clear abuse of discretion.[52] Particularly is this true

[43] Swanstrom v. Marvin, 38–359, 37+455; Weller v. Hammer, 43–195, 45+427; Carlson v. Carlson, 49–555, 52+214.

[44] Goodrich v. Hopkins, 10–162(130).

[45] Barker v. Keith, 11–65(37); Dupries v. Mil. etc. Ry., 20–156(139).

[46] Gowen v. Conlow, 51–213, 53+365; Branley v. Dambly, 69–282, 71+1026.

[47] Lord v. Hawkins, 39–73, 38+689; Berryhill v. Gasquoine, 88–281, 92+1121; White v. Gurney, 92–271, 99+889.

[48] Aldrich v. Chase, 70–243, 73+161; White v. Gurney, 92–271, 99+889. See Welch v. Marks, 39–481, 40+611.

[49] Drew v. St. Paul, 44–501, 47+158; Whitacre v. Martin, 51–421, 53+806.

[50] Holmes v. Campbell, 13–66(58); Chisago County v. St. P. & D. Ry., 27–109, 6+454; People's Ice Co. v. Schlenker, 50–1, 52+219; Barrie v. Northern A. Co., 99–272, 109+248.

[51] Hershey v. Meeker Co. Bank, 71–255, 73+967.

[52] Perrin v. Oliver, 1–202(176); Myrick v. Pierce, 5–65(47); True v. True, 6–458 (315); Swift v. Fletcher, 6–550(386); Groh v. Bassett, 7–325(254); Merritt v. Putnam, 7–493(399); Jorgensen v. Boehmer, 9–181(166); Goodrich v. Hopkins, 10–162(130); Barker v. Keith, 11–65(37); Whitcomb v. Shafer, 11–232(153); Woods v. Woods, 16–81(69); Reagan v. Madden, 17–402(378); Sheldon v. Risedorph, 23–518; Libby v. Mikelborg, 28–38, 8+903; Moran v. Mackey, 32–266, 20+159; Smith v. Harmon, 32–312, 20+238; Frear v. Heichert, 34–96, 24+319; Sandberg v. Berg, 35–212, 28+255; Hallam v. Doyle, 35–337, 29+130; Exley v. Berryhill, 36–117, 30+436; St. Paul L. Co. v. Dayton, 39–315, 40+66; Bray v. Church of St. Brandon, 39–390, 40+518; Russell v. Blakeman, 40–463, 42+391; Bridgman v. Dambly, 41–526, 43+482; Foote v. Branch, 42–62, 43+782; Weller v. Hammer, 43–195, 45+427; Boeing v. McKinley, 44–392, 46+766; Flanigan v. Sable, 44–417, 46+854; Sturm v. School Dist., 45–88, 47+462; Nauer v. Benham, 45–252, 47+796; Granse v. Frings, 46–352, 49+60; Kipp v. Cook, 46–535, 49+257; McMurran v. Meek, 47–245, 49+983; Lathrop v. O'Brien, 47–428,

when the determination of the trial court is made on conflicting affidavits.[53] If it is obvious that the trial court has acted wilfully, arbitrarily, capriciously, or under a misapprehension of the law, and in denial of justice, its action will be reversed on appeal, for its power in this regard is not absolute but judicial and must be judicially exercised.[54] The supreme court will affirm the action of the trial court as a matter of course if the record on appeal does not contain all the papers upon which the order was based.[55]

ENTRY

5036. By the clerk—In all actions, whether of a legal or equitable nature, and whether the trial was by jury, court, or referee, the judgment is entered by the clerk.[56] In thus entering judgment the clerk acts in a ministerial rather than judicial capacity.[57] He is the arm of the court. His act is the act of the court and the judgment entered is the judgment of the court.[58] While it is the duty of the clerk to enter judgment he does not ordinarily act except upon the application of one of the parties.

5037. Notice—The prevailing party may cause judgment to be entered on a verdict, report, or decision without notice to the opposite party.[59] In entering default judgments notice is sometimes necessary,[60] and the same rules

50+530; People's Ice Co. v. Schlenker, 50-1, 52+219; Stickney v. Jordain, 50-258, 52+861; Gerdtzen v. Cockrell, 52-501, 55+58; Pine Mountain I. & C. Co. v. Tabour, 55-287, 56+895; Wolford v. Bowen, 57-267, 59+195; Fitzpatrick v. Campbell, 58-20, 59+629; Seibert v. Mpls. etc. Ry., 58-72, 59+828; Rhodes v. Walsh, 58-196, 59+1000; St. Mary's Hospital v. Nat. B. Co., 60-61, 61+824; Missouri etc. Co. v. Norris, 61-256, 63+634; Northern T. Co. v. Markell, 61-271, 63+735; Duluth v. Dibblee, 62-18, 63+1117; Forin v. Duluth, 66-54, 68+515; Bates v. Bates, 66-131, 68+845; Stewart v. Cannon, 66-64, 68+604; Northern T. Co. v. Crystal Lake C. Assn., 67-131, 69+708; Glaeser v. St. Paul, 67-368, 69+1101; First Nat. Bank v. Northern T. Co., 69-176, 71+928; Hinckley v. Kettle River Ry., 70-105, 72+835; Martin v. Curley, 70-489, 73+405; Milwaukee H. Co. v. Schroeder, 72-393, 75+606; Whitney v. Sherin, 74-4, 76+787; Ueland v. Johnson, 77-543, 80+700; Hull v. Chapel, 77-159, 79+669; Schuler v. Wood, 81-372, 84+121; McMurran v. Bourne, 81-515, 84+338; Deering v. Donovan, 82-162, 84+745; McClymond v. Noble, 84-329, 87+838; Wood v. Schoenauer, 85-138, 88+411; Kasson v. Lloyd, 86-286, 90+1133; Queal v. Bulen, 89-477, 95+310; Crane v. Sauntry, 90-301, 96+794; Peru P. & I. Co. v. King, 90-517, 97+373; White v. Gurney, 92-271, 99+889; Hoyt v. Lightbody, 93-249, 101+304; Stevens v. Parker, 98-529, 106+1134; Lynn v. Schunk, 101-22, 111+729; Fishstrom v. Bankers etc. Co., 102-228, 113+267; Waller v. Waller, 102-405, 113+1013; Knoblauch v. Baer, 102-506, 112+1141; Dion v. Bassett, 102-512, 113+1133; Hendricks v. Conner, 104-399, 116+751; Dunn v. Lawrence, 106-541, 118+1118; Perkins v. Gibbs, 108-151, 121+605.

[53] Libby v. Mikelborg, 28-38, 8+903; Moran v. Mackey, 32-266, 20+159; Swanstrom v. Marvin, 38-359, 37+455; Flanigan v. Duncan, 47-250, 49+981; Perkins v. Gibbs, 108-151, 121+605.

[54] Hildebrandt v. Robbecke, 20-100(83); Altmann v. Gabriel, 28-132, 9+633; Welch v. Marks, 39-481, 40+611; Weymouth v. Gregg, 40-45, 41+243; People's Ice Co. v. Schlenker, 50-1, 52+219; Baxter v. Chute, 50-164, 52+379; Jones v. Swain, 57-251, 59+297; Noye v. Wheaton R. M. Co., 60-117, 61+910; Potter v. Holmes, 74-508, 77+416; Osman v. Wisted, 78-295, 80+1127; McClure v. Clarke, 94-37, 101+951; Walsh v. Boyle, 94-437, 103+506; Barrie v. Northern A. Co., 99-272, 109+248; Hoffman v. Freimuth, 101-48, 111+732.

[55] Downs v. Nourse, 30-552, 16+412.

[56] R. L. 1905 § 4266; Piper v. Johnston, 12-60(27); Skillman v. Greenwood, 15-102(77).

[57] Williams v. McGrade, 13-46(39); Ramaley v. Ramaley, 69-491, 72+694. See § 4989.

[58] Hawke v. Banning, 3-67(30); Kipp v. Fullerton, 4-473(366); Reynolds v. La Crosse etc. Co., 10-178(144); Skillman v. Greenwood, 15-102(77); Dillon v. Porter, 36-341, 31+56.

[59] Piper v. Johnston, 12-60(27); Whitaker v. McClung, 14-170(131); Leyde v. Martin, 16-38(24); Berthold v. Fox, 21-51; Heinrich v. Englund, 34-395, 26+122.

[60] See § 4991.

apply to the entry of judgment for the plaintiff on an issue of law.[61] Notice is unnecessary in entering a judgment of dismissal.[62]

5038. Signing by clerk—All judgments, and copies thereof for the judgment roll, must be signed by the clerk and no other signature is necessary.[63] The failure of the clerk to sign a judgment renders it irregular, but not void.[64] Formerly judgments were sometimes signed by the judge.[65]

5039. Either party may cause entry—Time of entry—Either party may cause judgment to be entered.[66] In this state there is no statutory requirement as to the time within which judgment must be entered. In order to prevent the prevailing party from taking advantage of this fact to the injury of the adverse party, it is provided by rule of court that "where a party is entitled to have judgment entered in his favor by the clerk, upon the verdict of a jury, report of referee, or decision or finding of the court, and neglects to enter the same for the space of ten days after the rendition of the verdict, or notice of the filing of the report, decision, or finding, (or in case the same has been stayed, for the space of ten days after the expiration of such stay), the opposite party may cause the same to be entered by the clerk upon five days' notice to the adverse party of the application therefor." [67] A judgment entered during a stay of proceedings is irregular,[68] but not void.[69] Generally a judgment is not entered until after the taxation of costs.[70] The entry may be made in vacation.[71]

5040. Necessity of an order of court—In all actions, whether of a legal or equitable nature, judgment may be entered by the clerk on the verdict, report, or decision, without any special order of the court therefor.[72] In entering a default judgment the necessity of an order of court depends on the character of the action.[73] In entering a judgment upon an issue of law for the plaintiff the necessity of an order of court is the same as in the case of default judgments.[74] In entering judgments by confession no order of court is necessary.[75] Judgments of dismissal are entered by the clerk without special order of court.[76] Where a motion for judgment on the pleadings is granted, the order granting the motion generally directs judgment.

5041. Relief allowable—Except as against a defendant in default, the plaintiff "may have any relief consistent with the complaint and within the issue actually tried." [77] Where issues not made by the pleadings are litigated by

[61] R. L. 1905 § 4186. See Schuler v. Wood, 81–372, 84+121.
[62] See Herrick v. Butler, 30–156, 14+794.
[63] R. L. 1905 § 4266; Rule 39, District Court. See Hawke v. Banning, 3–67(30); Leatheart v. Peck, 11–45(24).
[64] Jorgensen v. Griffin, 14–464(346); Hotchkiss v. Cutting, 14–537(408).
[65] See Hawke v. Banning, 3–67(30).
[66] Warner v. Lockerby, 28–28, 8+879.
[67] Rule 40, District Court. See Deuel v. Hawke, 2–50(37); Furlong v. Griffin, 3–7(138); Sherrerd v. Frazer, 6–572(406).
[68] Uhe v. Chi. etc. Ry., 4 S. D. 505. See Conner v. Capehart, 41–294, 42+1062.
[69] See Harvey v. McAdams, 32 Mich. 473.
[70] See § 2220.
[71] R. L. 1905 § 4187; Grant v. Schmidt, 1.
[72] R. L. 1905 §§ 4185, 4193, 4266; Piper v. Johnston, 12–60(27).
[73] See § 4995.

[74] R. L. 1905 § 4186.
[75] See § 4975.
[76] R. L. 1905 § 4195.
[77] R. L. 1905 § 4264; Thompson v. Bickford, 19–17(1); Washburn v. Mendenhall, 21–332; Griffin v. Jorgenson, 22–92; Morish v. Mountain, 22–564; Howard v. Barton, 28–116, 9+584; Hardin v. Palmerlee, 28–450, 10+773; Mpls. H. Works v. Smith, 30–399, 16+462; Hatch v. Coddington, 32–92, 19+393; Abbott v. Nash, 35–451, 29+65; Smith v. Gill, 37–455, 35+178; Mykleby v. Chi. etc. Ry., 39–54, 38+763; Alworth v. Seymour, 42–526, 44+1030; Farmer v. Crosby, 43–459, 45+866; Wilson v. Fairchild, 45–203, 47+642; Triggs v. Jones, 46–277, 48+1113; Henry v. Meighen, 46–548, 49+323, 646; Spooner v. Bay St. Louis Syndicate, 47–464, 50+601; Seibert v. Mpls. etc. Ry., 58–39, 59+822; Wilson v. Fuller, 58–149, 59+988; Brown v. Doyle, 69–543, 72+814; Aultman v. O'Dowd, 73–

consent or without objection full relief is to be granted as if the issues had been formerly made.[78] The prevailing party must be given such relief, either legal or equitable, as he proves himself entitled to, without regard to the prayer for relief. A plaintiff cannot be thrown out of court because he has mistaken the character of his cause of action and remedial right, but only when he has failed to show himself entitled to any relief on the facts proved within the allegations of his complaint. The court, disregarding plaintiff's theory of the case and prayer for relief, should consider the facts proved within the allegations of the complaint, in connection with the whole body of the substantive and remedial law of the state, and grant relief accordingly—either legal or equitable,[79] or both.[80] Equitable relief may be granted in a legal action and legal relief in an equitable action, whenever the facts proved within the allegations of the complaint warrant it.[81] When the plaintiff is clothed with primary rights, both legal and equitable, growing out of the same cause of action or the same transaction, and is entitled to an equitable remedy, and also to a further legal remedy, based upon the supposition that the equitable relief is granted, and he sets forth in his complaint the facts which support each class of rights, and which show that he is entitled to each kind of remedy, and demands a judgment awarding both species of relief, the action will be sustained to its full extent in the form thus adopted. He may, on the trial, prove all the facts averred, and the court will in its judgment formally grant both the equitable and the legal relief.[82] Where a right to have an instrument reformed is shown, the instrument may be treated as if reformed, and further relief be granted as if the instrument had been formally reformed.[83] When a court of equity once takes jurisdiction of a case it is its duty to determine all rights and obligations pertaining to the subject-matter and to grant full measure of relief.[84] Though a party fails to prove some fact alleged, necessary to the full measure of the relief demanded, if he proves facts within the allegations of his complaint entitling him to some relief it must be awarded to him.[85] In actions for damages, greater damages than prayed cannot be recovered, though there is an answer, but this limitation may always be avoided by amendment.[86] The relief which may be awarded on default is considered elsewhere.[87]

5042. Judgment between several parties—It is provided by statute that "judgment may be given for or against one or more of several plaintiffs, or of several defendants, and, when justice so requires, it shall determine the ul-

58, 75+756; Norton v. Met. Life Ins. Co., 74-484, 77+539; Piper v. Sawyer, 78-221, 80+970; Germania Bank v. Osborne, 81-272, 83+1084.

[78] See § 7675.

[79] Greenleaf v. Egan, 30-316, 15+254; Canty v. Latterner, 31-239, 17+385; Merrill v. Dearing, 47-137, 140, 49+693; Stitt v. Rat Portage L. Co., 96-27, 37, 104+561.

[80] Little v. Willford, 31-173, 17+282; Slingerland v. Sherer, 46-422, 49+237; Erickson v. Fisher, 51-300, 53+638; Bell v. Mendenhall, 71-331, 73+1086; Whiting v. Clugston, 73-6, 75+759; Gilbert v. Boak, 86-365, 90+767; Disbrow v. Creamery P. M. Co., 104-17, 115+751.

[81] Sanborn v. Nockin, 20-178(163); Little v. Willford, 31-173, 17+282; Crump v. Ingersoll, 47-179, 49+739; Marshall v. Gilman, 47-131, 49+688; Erickson v. Fisher, 51-300, 53+638.

[82] Disbrow v. Creamery P. M. Co., 104-17, 115+751.

[83] Seofield v. Quinn, 54-9, 13, 55+745.

[84] Nichols v. Randall, 5-304(240); Belote v. Morrison, 8-87(62, 70); Sewall v. St. Paul, 20-511(459); Winona etc. Ry. v. St. P. etc. Ry., 26-179, 182, 2+489; Coolbaugh v. Roemer, 32-445, 21+472; Thwing v. Hall, 40-184, 41+815; Crump v. Ingersoll, 47-179, 49+739; Erickson v. Fisher, 51-300, 53+638; Sprague v. Sprague, 73-474, 76+268; Redner v. New York etc. Co., 92-306, 99+886.

[85] Wilson v. Fairchild, 45-203, 47+642.

[86] Elfelt v. Smith, 1-125(101); Eaton v. Caldwell, 3-134(80); Amort v. Christofferson, 57-234, 59+304; Nichols v. Wiedemann, 72-344, 75+208.

[87] See § 4996.

timate rights of the parties on each side as between themselves." [88] The object of this statutory provision was to abolish the common-law rules relating to judgments between several parties, and to make the rules of equity upon the subject applicable to all actions,[89] but it did not abolish the rule that the judgment must follow the complaint and that in an action against several defendants upon a joint contract the plaintiff must recover against all or none.[90] This rule, however, has been abolished by another statute.[91] Though the court is authorized "to determine the ultimate rights of the parties on each side," [92] this determination must be confined to the issues presented by the complaint. The relief which the defendants may have, as against each other, must be framed upon the facts involved in the litigation of the plaintiff's claim, and as a part of the adjustment of that claim, and not upon claims with which the plaintiff has nothing to do, and which are properly the subject of an independent litigation.[93] If new issues are to be formed it must be by means of a cross-complaint and even then the new issues must have relation to the subject of the original action.[94] It is every day practice to render judgment against part of several defendants.[95] Whether a judgment may be entered in favor of a joint plaintiff, after amendment of the complaint so as to allege a cause of action in his favor, but without striking out the name of the other party, is an open question.[96]

5043. Judgment against one or more of several defendants—Joint obligations—The statutes [97] of this state have abolished the common-law rules relating to judgments against one or more parties on a joint obligation.[98] A plaintiff may allege a joint contract and recover upon proof of a joint and several contract, or a joint contract, as to a part of the defendants.[99] Since Laws 1897 c. 303, a judgment may be recovered against one or more of several defendants on a joint obligation, as if upon a several obligation.[1] It is provided by statute that "when a several judgment is proper, the court in its discretion may give judgment for or against one or more of the defendants, leaving the action to proceed against the others." [2] Prior to Laws 1897 c. 303 this provision was held inapplicable to an action on a joint obligation.[3] In an action against the maker, and the guarantors of payment, of a note, the plaintiff may enter a several judgment on a verdict against the maker without waiting until

[88] R. L. 1905 § 4265.

[89] Fetz v. Clark, 7-217(159); Howe v. Spalding, 50-157, 52+527.

[90] Carlton v. Chouteau, 1-102(81); Fetz v. Clark, 7-217(159); Whitney v. Reese, 11-138(87); Davison v. Harmon, 65-402, 67+1015.

[91] See § 5043.

[92] Goldschmidt v. Nobles County, 37-49, 33+544; Ermentrout v. American F. I. Co., 60-418, 62+543. See Grant v. Schmidt, 22-1.

[93] Howe v. Spalding, 50-157, 52+527; Richardson v. McLaughlin, 55-489, 57+210; Jewett v. Iowa L. Co., 64-531, 67+639.

[94] American Exch. Bank v. Davidson, 69-319, 72+129.

[95] Harper v. Carroll, 66-487, 69+610, 1069; Hanson v. Davison, 73-454, 76+254.

[96] Forman v. Saunders, 92-369, 100+93.

[97] R. L. 1905 §§ 4265, 4282.

[98] See, as to the common-law rules, Carlton v. Chouteau, 1-102(81); Fetz v. Clark, 7-217(159); Whitney v. Reese, 11-138(87); Beatty v. Ambs, 11-331(234); Johnson v. Lough, 22-203; Whittaker v. Collins, 34-299, 25+632; Little v. Lee, 53-511, 55+737; Davison v. Harmon, 65-402, 67+1015; Pfefferkorn v. Haywood, 65-429, 68+68; Harper v. Carroll, 66-487, 69+610, 1069; Ingwaldson v. Olson, 79-252, 82+579; Sundberg v. Goar, 92-143, 99+638.

[99] Reed v. Pixley, 22-540; Miles v. Wann, 27-56, 6+417; Keigher v. Dowlan, 47-574, 50+823; Bunce v. Pratt, 56-8, 57+160; Bardwell v. Brown, 57-140, 58+872; Sexton v. Steele, 60-336, 62+392; Ermentrout v. American F. I. Co., 60-418, 62+543.

[1] R. L. 1905 § 4282; Hollister v. U. S. etc. Co., 84-251, 87+776; Hoatson v. McDonald, 97-201, 106+311; Fryklund v. G. N. Ry., 101-37, 111+727; Morgan v. Brach, 104-247, 116+490; Kettle River v. Bruno, 106-58, 118+63.

[2] R. L. 1905 § 4265.

[3] Davison v. Harmon, 65-402, 67+1015.

the trial of the issues with the other defendants.[4] The matter rests in the discretion of the court and judgment therefore cannot regularly be entered without an order.[5]

5044. Judgment in favor of defendant for affirmative relief—It is provided by G. S. 1894 § 5419 that "if a counterclaim, established at the trial, exceeds the plaintiff's demand so established, judgment for the defendant shall be given for the excess, or, if it appears that the defendant is entitled to any other affirmative relief, judgment shall be given accordingly."[6] The object of this statute was to abrogate the common-law rule that judgment for affirmative relief cannot be rendered in favor of the defendant.[7] When in an answer matter is pleaded as a counterclaim, the defendant must have such relief, though not specifically demanded in the answer, as the facts proved within its allegations show him entitled to.[8] It is immaterial whether the defendant labels his new matter as a defence or a counterclaim. If he demands affirmative relief he will be awarded such relief as the facts proved within the allegations of his answer entitle him to though not specifically prayed.[9] A party may authorize a judgment for affirmative relief against him by voluntarily litigating a counterclaim.[10] The defendant cannot recover greater damages than prayed in his answer.[11]

5045. Judgment in actions for tort against several—In an action against several for a tort alleged to have been committed by them jointly a recovery may be had against one or more of them proved to be guilty, though the action fails as to the others.[12] All persons whose property is affected by a nuisance, though they own the property in severalty and not jointly, may join in an action to abate the nuisance. But in such case the relief granted must be such as is common to all of the plaintiffs. Several judgments in favor of each for his separate damages cannot be rendered.[13] At common law a judgment in an action ex delicto against several defendants, jointly and severally liable at the election of plaintiff, though void as to one of the defendants for want of jurisdiction, is not necessarily, because so void as to one, void as to the other defendants.[14]

5046. Judgment after death of party—A judgment ought not to be rendered for or against a party after his death. But a court which has acquired jurisdiction of the subject-matter and the parties possesses the power to proceed to the final determination of the action; and while the court ought to cease to exercise its jurisdiction over a party at his death, the neglect to do so is an error to be corrected by some proceeding in the action in which the error occurs, and the judgment, though erroneous, is not on that account to be attacked in a collateral action. In other words, the judgment is voidable when properly assailed, but not void.[15] It is provided by statute that an action does not abate by the death of a party and provision is made for the substitution of his personal representative.[16] It is held that the term "representative" as used in the

[4] Bank of Com. v. Smith, 57–374, 59+311; First Nat. Bank v. Burkhardt, 71–185, 73+858.

[5] Wolford v. Bowen, 57–267, 59+195.

[6] G. S. 1894 § 5419.

[7] See Smith v. Dukes, 5–373(301); Townsend v. Mpls. etc. Co., 46–121, 48+682.

[8] Wilson v. Fairchild, 45–203, 47+642.

[9] Germania Bank v. Osborne, 81–272, 83+1084.

[10] Phelps v. Compton, 72–109, 75+19.

[11] Nichols v. Wiedemann, 72–344, 75+208.

[12] Huot v. Wise, 27–68, 6+425. See Fryklund v. G. N. Ry., 101–37, 111+727.

[13] Grant v. Schmidt, 22–1.

[14] Engstrand v. Kleffman, 86–403, 90+1054.

[15] Hayes v. Shaw, 20–405(355); Stocking v. Hanson, 22–542; Berkey v. Judd, 27–475, 8+383.

[16] R. L. 1905 § 4064; Landis v. Olds, 9–90(79); Stocking v. Hanson, 22–542; Lanier v. Irvine, 24–116; Jordan v. Secombe, 33–220, 22+383; Brown v. Brown, 35–191, 28+238.

statute is not confined to executors and administrators, but includes all persons who occupy the position held by the deceased party, succeeding to his rights and obligations.[17] It is provided by statute that "judgment may be entered after the death of a party upon a verdict, or decision upon an issue of fact, rendered in his lifetime. Such judgment shall not be a lien on real property of the decedent, but shall be payable, in the course of administration of his estate, as if allowed by the probate court against his estate." [18]

5047. Judgment upon stipulations—Judgments are frequently entered upon stipulations therefor.[19] Whether the clerk may enter such judgments without an order of court is an open question in this state. The practice is not uncommon and where it is followed the parties ought to be estopped from raising objection.[20] Under R. L. 1905 § 2283, an attorney has, in an action pending, authority to stipulate for judgment against his client; but, even though the opposite party is not guilty of fraud, collusion, or bad faith in entering into the stipulation with such attorney, the court, by reason of the large equitable powers which it has over its own proceedings, may, in a proper case, set aside the stipulation on the ground that the same was improvidently made, or ought not in equity or good conscience to stand.[21] Where all the parties to an action but one entered into a stipulation for judgment which ignored the rights of such party and the court ordered judgment accordingly, it was held on appeal that the judgment was erroneous as to the party not joining in the stipulation.[22]

5048. Must be authorized by verdict, findings, or order—The judgment entered must be such as is authorized by the verdict,[23] findings,[24] or conclusions of law or order.[25]

5049. Construction—In the event of any doubt as to the scope or meaning of the judgment, as entered in the judgment book, it is to be construed in connection with the judgment roll.[26] Resort may also be had to extrinsic evidence not inconsistent with the record.[27] Judgments cannot be explained by experts, or by evidence of the local meaning of their language. A domestic judgment must speak for itself, and the court must be able, by reading it, to determine what it means, without other aid than a knowledge of the ordinary and usual meaning of the words and characters employed, as the same are used in judicial proceedings.[28] If, after considering the judgment roll and permissible ex-

[17] Willoughby v. St. Paul etc. Co., 80–432, 83+377.

[18] R. L. 1905 § 4270; Berkey v. Judd, 27–475, 8+383; Id., 31–271, 17+618; Fowler v. Mickley, 39–28, 38+634; Fern v. Leuthold, 39–212, 39+399; Berkey v. St. Paul Nat. Bank, 54–448, 56+53; Oswald v. Pillsbury, 61–520, 63+1072.

[19] Chisholm v. Clitherall, 12–375(251); Herrick v. Butler, 30–156, 14+794; Rolfe v. Burlington etc. Ry., 39–398, 40+267; Oldenberg v. Devine, 40–409, 42+88; Cameron v. Chi. etc. Ry., 51–153, 53+199; Nash v. Adams, 55–46, 56+241; Bates v. Bates, 66–131, 68+845; Wells v. Penfield, 70–66, 72+816; Walsh v. Curtis, 73–254, 76+52; State v. Merchants Bank, 74–175, 77+31; Western R. Co. v. Phelps, 86–52, 90+11, 793.

[20] See Oldenberg v. Devine, 40–409, 42+88.

[21] Wells v. Penfield, 70–66, 72+816. See Bates v. Bates, 66–131, 68+845.

[22] State v. Merchants Bank, 74–175, 77+31.

[23] Eaton v. Caldwell, 3–134(80); Meighen v. Strong, 6–177(111); Wilson v. McCormick, 10–216(174).

[24] See § 9857.

[25] Ramaley v. Ramaley, 69–491, 72+694. See § 9848.

[26] Flint v. Webb, 25–93, 97; Boom v. St. Paul F. & M. Co., 33–253, 22+538; Andrews v. School Dist., 35–70, 27+303; Banning v. Sabin, 41–477, 43+329; Daly v. Bradbury, 46–396, 49+190; City Nat. Bank v. Hager, 52–18, 53+867; Engstrand v. Kelffman, 86–403, 406, 90+1054; Hanlon v. Hennessy, 87–353, 92+1.

[27] Drea v. Cariveau, 28–280, 9+802; Irish-Am. Bank v. Ludlum, 56–317, 57+927; Augir v. Ryan, 63–373, 65+640; Neilson v. Penn. C. & O. Co., 78–113, 80+859.

[28] Keith v. Hayden, 26–212, 2+495.

trinsic evidence, there is any reasonable doubt as to the facts actually litigated, the judgment does not operate as an estoppel by verdict.[29]

5050. Remedy for erroneous entry—If the clerk enters a judgment not authorized by the verdict, or the conclusions of law or order for judgment, the remedy is a motion in the trial court for an amendment. The objection cannot be raised for the first time on appeal.[30] If a judgment entered in strict accordance with the order of the court for judgment departs from or exceeds the relief demanded in the complaint, the proper remedy is by appeal from the judgment, not by a motion to wholly vacate and set it aside.[31]

5051. Rendition of judgment—At common law and in the practice of most of the states the rendition of judgment is distinct from its entry. The entry in the judgment book is regarded as a mere memorial or record of a pre-existing judgment.[32] The judgment may be in the form of an entry in a judgment book kept by the clerk, or it may be orally announced by the court and reported in the minutes of the clerk, or it may be in the form of an order signed by the presiding judge finally disposing of the case.[33] In our practice there is no judgment prior to the entry in the judgment book and the rendition and entry are one and the same thing.[34] In an action tried by the court without a jury the findings, conclusions, and order for judgment, do not constitute the judgment.[35] When filed they constitute the "decision" of the court, but not its judgment. They are basis of the judgment, like a verdict, rather than the judgment itself.[36]

5052. Judgment book—The statutes provide that the clerk shall keep "a judgment book, in which every judgment shall be entered," [37] and that "the judgment in all cases shall be entered and signed by the clerk in the judgment book. A copy thereof, also signed by the clerk, shall be attached to the judgment roll. It shall conform to the verdict or decision, and clearly specify the relief granted, or other determination of the case." [38] The writing out of the judgment in full by the clerk in the judgment book constitutes the entry of judgment.[39] Regularly the judgment in the judgment roll is a copy of the judgment in the judgment book,[40] but if the clerk irregularly enters the original judgment in the judgment roll instead of in the judgment book the judgment is not void. If the court has jurisdiction, a departure from the statute in the manner of entering the judgment is a mere irregularity, and does not render void the judgment or the proceedings under it. The validity of the judgment cannot depend on whether it is written in one part of the clerk's record or another; whether it is written in the judgment book or in the judgment roll. If, before entering a judgment in the judgment book, the judgment roll is made up with a judgment entered therein such that it would be a proper judgment if

[29] See § 5162.

[30] See §§ 5100, 5102, 5103.

[31] Palmer v. **Bank of Zumbrota**, 65–90, 67+893.

[32] Black, Judgments, § 106; Freeman, Judgments (3 ed.) § 38.

[33] State v. Weber, 96–422, 105+490.

[34] See Brown v. Hathaway, 10–303(238); Williams v. McGrade, 13–46(39); Jorgensen v. Griffin, 14–464(346); Hodgins v. Heaney, 15–185(142); Thompson v. Bickford, 19–17(1); Rockwood v. Davenport, 37–533, 35+377; Maurin v. Carnes, 71–308, 74+139. But see Clark v. Butts, 73–361, 76+199.

[35] Child v. Morgan, 51–116, 52+1127.

[36] See § 9848.

[37] R. L. 1905 § 110; Brown v. Hathaway, 10–303(238); Jorgensen v. Griffin, 14–464 (346); Thompson v. Bickford, 19–17(1).

[38] R. L. 1905 § 4266; Williams v. McGrade, 13–46(39); Rockwood v. Davenport, 37–533, 35+377; Ramaley v. Ramaley, 69–491, 72+694.

[39] Brown v. Hathaway, 10–303(238); Williams v. McGrade, 13–46(39); Washburn v. Sharpe, 15–63(43); Smith v. Valentine, 19–452(393); Rockwood v. Davenport, 37–533, 35+377. See Jorgensen v. Griffin, 14–464(346).

[40] Rockwood v. Davenport, 37–533, 35+377.

entered in the judgment book, and the judgment is docketed, or an execution issued, or a transcript of the judgment is taken out, before entering judgment in the judgment book, this amounts to treating the judgment entered in the judgment roll as the judgment in fact. And though it is irregular to enter the judgment in the judgment roll, instead of entering it in the judgment book, yet the judgment entered in the roll will support the docketing, execution, etc., and will not be vitiated or destroyed by subsequently entering a copy or duplicate of it in the judgment book.[41]

JUDGMENT ROLL

5053. Necessity—The filing of a judgment roll is not essential to the validity of the judgment. Execution may issue as soon as the judgment is entered in the judgment book and before the filing of the roll. Neither is a judgment roll essential to a valid docketing of the judgment.[42]

5054. Contents—The roll properly includes proof of the service of summons.[43] A bond for costs need not be included.[44] A settled case is properly a part of the roll.[45]

5055. Making and filing—Clerical duty of clerk—In our practice the making and filing the judgment roll is a mere clerical duty imposed on the clerk of the court to be performed immediately after entering the judgment, for which neither the party nor his attorney is responsible.[46]

5056. Time of making and filing—Regularly the making and filing of the judgment roll immediately follows the entry of judgment in the judgment book and the judgment in the roll is a copy of the judgment in the judgment book.[47] But this order of entry is not jurisdictional. The entry of the original judgment in the roll prior to its entry in the judgment book does not render the subsequent proceedings void.[48]

5057. Presumptions—Want of jurisdiction not affirmatively appearing, a judgment of a court of general jurisdiction is presumed valid. It is not enough to overcome this presumption merely to show that the judgment roll is irregularly and defectively made up, or that papers, which should properly constitute a part of it, are missing from it.[49] But it will not be presumed that there was other proof of service of summons than that shown in the judgment roll; nor, in an action against a non-resident who is shown to have been personally beyond the jurisdiction of the court, will it be presumed, the question being directly presented, that the court acquired jurisdiction by substituted service, unless that is affirmatively shown.[50] The docket of a judgment being shown it will be presumed that a judgment roll has been regularly filed.[51] It will be presumed that an affidavit for publication of summons attached to the judgment roll was filed at the proper time.[52]

5058. As evidence—The judgment roll or an authenticated copy of it is evidence of all that is properly contained in it, including the judgment, and is prima facie evidence that the judgment was properly rendered and entered, so as to have effect.[53] The judgment roll is not exclusive evidence of the judgment itself.[54]

[41] Clark v. Butts, 73-361, 76+199. See Scheibel v. Anderson, 77-54, 79+594.
[42] See Williams v. McGrade, 13-46(39).
[43] Godfrey v. Valentine, 39-336, 40+163.
[44] Shaubhut v. Hilton, 7-506(412).
[45] State v. Fellows, 98-179, 107+542, 108+825.
[46] Williams v. McGrade, 13-46(39).
[47] Williams v. McGrade, 13-46(39); Rockwood v. Davenport, 37-533, 35+377.
[48] Clark v. Butts, 73-361, 76+199; Scheibel v. Anderson, 77-54, 79+594.
[49] Herrick v. Butler, 30-156, 14+794. See § 2347.
[50] See §§ 2347, 7834.
[51] Williams v. McGrade, 13-46(39).
[52] Bogart v. Kiene, 85-261, 88+748.
[53] In re Ellis, 55-401, 56+1056.
[54] Williams v. McGrade, 13-46(39).

DOCKETING

5059. Necessity and object—The primary object of the statute is to create a lien on the realty of the judgment debtor.[55] The docketing of a judgment and the lien thereby acquired performs the office and takes the place of an actual levy on the land.[56] An execution issued to a county other than the one in which the judgment was rendered is valid though taken from the clerk's office before the judgment is docketed in the county to which it runs, but not delivered to the sheriff for service until after the judgment is so docketed.[57]

5060. A duty of the clerk—The statute provides that the clerk shall keep "a docket, in which he shall enter alphabetically the name of each judgment debtor, the amount of the judgment, and the precise time of its entry." [58] The duty is a ministerial rather than judicial one.[59]

5061. Time—Necessity of prior judgment—Regularly the docketing of a judgment follows immediately upon the filing of the judgment roll. These three acts follow in regular sequence: (1) the entry of judgment in the judgment book; (2) making up and filing the judgment roll; (3) docketing the judgment.[60] Until there is a judgment there can be no valid docketing.[61] The docketing must follow the entry of judgment. Formerly it was held that there could be no valid docketing until after the entry of judgment in the judgment book.[62] It is now held that a prior entry of the judgment in the judgment roll alone will sustain a docketing.[63] On the other hand there may be a valid docketing without a judgment roll if there is a prior entry of the judgment in the judgment book.[64] A judgment may be docketed before the taxation of costs.[65]

5062. Mistakes in name of debtor—The docketing of a judgment in favor of Sumner W. Farnham is proved by a transcript of the docket, in which the name is given Samuel W. Farnham, the description corresponding in every other respect with the judgment rendered.[66] A judgment duly rendered against one whose name is misspelled in the proceedings, is, when docketed, a lien on his real estate, unless as against those who can claim that by reason of the misspelling the docket is no notice to them. A fraudulent grantee cannot object to it.[67] A record of a judgment against one whose Christian name is indicated only by initials is effectual to put upon inquiry a subsequent purchaser of lands the title of which appears of record in a person of the same family name as such judgment debtor, and whose Christian name has the same initial letters.[68] The omission of "Jr." from the debtor's name does not affect the validity of a judgment lien.[69]

5063. As evidence—A transcript of the docket of a judgment is prima facie evidence of the docketing,[70] but not of the judgment.[71] Docket entries which are merely minutes of proceedings are not admissible as evidence of a judgment.[72]

[55] Todd v. Johnson, 50–310, 52+864; Brady v. Gilman, 96–234, 104+897.
[56] Thompson v. Dale, 58–365, 59+1086.
[57] Gowan v. Fountain, 50–264, 52+862. See Dodge v. Chandler, 9–97(87).
[58] R. L. 1905 § 110; Brady v. Gilman, 96–234, 104+897.
[59] Williams v. McGrade, 13–46(39).
[60] Rockwood v. Davenport, 37–533, 35+377; Todd v. Johnson, 50–310, 52+864.
[61] Hunter v. Cleveland C. S. Co., 31–505, 18+645; Rockwood v. Davenport, 37–533, 35+377; Clark v. Butts, 73–361, 76+199.
[62] Rockwood v. Davenport, 37–533, 35+377.
[63] Clark v. Butts, 73–361, 76+199; Scheibel v. Anderson, 77–54, 79+594.
[64] Williams v. McGrade, 13–46(39).
[65] Richardson v. Rogers, 37–461, 35+270.
[66] Thompson v. Bickford, 19–17(1).
[67] Fuller v. Nelson, 35–213, 28+511.
[68] Pinney v. Russell, 52–443, 54+484; Nystrom v. Quinby, 68–4, 70+777.
[69] Bidwell v. Coleman, 11–78(45).
[70] Williams v. McGrade, 13–46(39); Thompson v. Bickford, 19–17(1).
[71] Brown v. Hathaway, 10–303(238).
[72] Todd v. Johnson, 50–310, 52+864.

5064. Docket entries unimpeachable collaterally—The entries in the judgment docket import absolute verity. If they are erroneous the error must be corrected on an application for that purpose to the court of which they are records. They cannot be impeached collaterally by the parties or their privies.[73]

5065. Effect of appeal—When a judgment which is docketed in the district court is affirmed by the supreme court, it remains, without re-docketing, a lien upon real estate, by virtue of the original docketing, for the amount of the original judgment with cumulative interest. But to make it a lien for the damages and costs in the supreme court, it must be re-docketed.[74]

LIEN

5066. Nature—A judgment lien is not an estate or interest in the land. It only confers a right to levy on the same to the exclusion of other adverse interests, subsequent to the judgment. In short, a judgment creditor has no jus in re, but a mere power to make his general lien effectual by following up the steps of the law and consummating his judgment by an execution and levy on the land.[75] The docketing of a judgment, and the lien thereby acquired, performs the office and takes the place of an actual levy on land. A lien by judgment does not exist except in consequence of the right to an execution for its enforcement.[76] It is purely a creature of statute.[77] The nature of the lien is not changed by the levy of an execution.[78]

5067. Duration—The ten-year limitation is absolute and cannot be extended by means of a levy or action.[79] In calculating the ten years the first day should be excluded and the last day included.[80] The death of a judgment debtor does not operate to extend the life of a lien.[81] Cases are cited below involving the construction and application of obsolete statutes.[82]

5068. To what estates and interests attaches—Under the existing law the lien does not attach to the homestead of the judgment debtor.[83] Formerly the rule was otherwise.[84] When the owner of land executes a bond for the conveyance of the same he continues to be the legal owner as long as any part of the purchase money remains unpaid, and his interest, which is the fee subject to the equitable right of the obligee, is bound by the lien of a judgment duly docketed against him in the county where the land is situated.[85] After the docketing, the obligee cannot acquire new rights in the land free from the lien.[86]

[73] Ferguson v. Kumler, 25–183. See Hunter v. Cleveland C. S. Co., 31–505, 18+645.

[74] Daniels v. Winslow, 4–318(235); Messerschmidt v. Baker, 22–81.

[75] Steele v. Taylor, 1–274(210); Burwell v. Tullis, 12–572(486); Brackett v. Gilmore, 15–245(190); Ashton v. Slater, 19–347(300); Lebanon S. Bank v. Hollenbeck, 29–322, 13+145; State v. Dist. Ct., 85–283, 88+755.

[76] Thompson v. Dale, 58–365, 59+1086.

[77] Ashton v. Slater, 19–347(300).

[78] State v. Dist. Ct., 85–283, 88+755.

[79] Ashton v. Slater, 19–347(300); Newell v. Dart, 28–248, 9+732; Dole v. Wilson, 39–330, 40+161; Spencer v. Haug, 45–231, 47+794; Reed v. Siddall, 94–216, 102+453; Brown v. Dooley, 95–146, 103+894; O'son v. Dahl, 99–433, 109+1001; Gaines v. Grunewald, 102–245, 113+450. See § 5150.

[80] Davidson v. Gaston, 16–230(202); Spencer v. Haug, 45–231, 47+794.

[81] Erickson v. Johnson, 22–380.

[82] Marshall v. Hart, 4–450(352); Entrop v. Williams, 11–381(276); Burwell v. Tullis, 12–572(486); Grace v. Donovan, 12–580(503); Dana v. Porter, 14–478(355); Lamprey v. Davidson, 16–480(435); Davidson v. Gaston, 16–230(202); Davidson v. Barnes, 17–69(47); Erickson v. Johnson, 22–380; State v. Probate Ct., 25–22; Sherburne v. Rippe, 35–540, 29+322.

[83] R. L. 1905 § 3452; Kaser v. Haas, 27–406, 7+824; Kipp v. Bullard, 30–84, 14+364; Neumaier v. Vincent, 41–481, 43+376.

[84] Folsom v. Carli, 5–333(264); Tillotson v. Millard, 7–513(419); Liebetrau v. Goodsell, 26–417, 4+813.

[85] Mpls. etc. Ry. v. Wilson, 25–382; Welles v. Baldwin, 28–408, 10+427; Coolbaugh v. Roemer, 30–424, 15+869; Baker v. Thompson, 36–314, 31+51; Berryhill v. Potter, 42–279, 44+251; Fleming v. Wilson, 92–303, 100+4.

[86] Coolbaugh v. Roemer, 30–424, 15+869.

The interest of a vendee under a subsisting contract for the sale of land, under which he has entered and paid part of the purchase price, is subject to a judgment lien against him.[87] Where a deed of land, absolute in terms, and a simultaneous bond for reconveyance, duly recorded, constitute a mortgage, the mortgagee, that is, the grantee in the deed, has no interest subject to levy or to the lien of a judgment against him.[88] A trustee who, without the knowledge of his cestui que trust, purchases real estate, taking title in his own name, and pays part of the consideration with trust funds in his hands and gives his own note and mortgage for the remainder, has an interest subject to a judgment lien against him.[89] It is provided by statute that "judgment may be entered after the death of a party upon a verdict, or decision upon an issue of fact, rendered in his lifetime. Such judgment shall not be a lien on real property of the decedent, but shall be payable in the course of administration of his estate, as if allowed by the probate court against his estate."[90] A lien attaches to the realty of the judgment debtor in the hands of a fraudulent grantee.[91] It does not attach to realty held by a judgment debtor when it clearly appears that he holds a bare legal title unaccompanied by any beneficial interest therein.[92] A creditor of the party selected as the medium through whom a conveyance of land is made by a husband to his wife acquires no right, title, or interest in the land by virtue of a judgment existing against such medium, and it is immaterial that such conveyance was made pursuant to a purpose by the husband to defraud his creditors.[93] Judgments properly docketed against a mortgagor, the mortgage being in the form of an absolute deed, are liens upon his equity of redemption in the premises, and an action to have them so declared may be maintained against a subsequent purchaser having knowledge of the facts, and holding the land under a deed direct from the mortgagee.[94] A judgment has been held not a lien on the interest of a wife under the statute, resulting from a divorce from her husband on account of his adultery.[95] The lien attaches to any surplus remaining after a sale in administration proceedings.[96]

5069. Limited to interest of judgment debtor—In all cases the lien of the judgment is limited to the actual interest of the judgment debtor in the land.[97]

5070. Priority of liens—Successive judgment liens take effect in the order of the docketing and a junior judgment creditor cannot secure a preference merely by virtue of superior diligence in taking steps to enforce his lien.[98] Where one conveys land, and at the same time takes back a mortgage for a part of the purchase money, the lien of the mortgage takes precedence of the lien of a prior judgment against the mortgagor.[99]

5071. Debtor cannot defeat—When a judgment lien has attached it cannot be defeated by the act of the judgment debtor without the consent of the judgment creditor.[1]

[87] Reynolds v. Fleming, 43-513, 45+1099; Hook v. N. W. T. Co., 91-482, 98+463.
[88] Butman v. James, 34-547, 27+66.
[89] Martin v. Baldwin, 30-537, 16+449.
[90] R. L. 1905 § 4270. See § 5046.
[91] Wadsworth v. Schisselbauer, 32-84, 19+390; Jackson v. Holbrook, 36-494, 32+852; Lane v. Innes, 43-137, 45+4. See Fryberger v. Berven, 88-311, 92+1125.
[92] Fleming v. Wilson, 92-303, 100+4.
[93] Sokolowski v. Ward, 98-177, 107+961.
[94] Marston v. Williams, 45-116, 47+644.
[95] Keith v. Mellenthin, 92-527, 100+366.
[96] Kolars v. Brown, 108-60, 121+229.
[97] Banning v. Edes, 6-402(270). See Steele v. Taylor, 1-274(210); Martin v. Baldwin, 30-537, 16+449.
[98] Jackson v. Holbrook, 36-494, 32+852. See Bagley v. McCarthy, 95-286, 104+7 (transcripts from municipal court filed at same time).
[99] Banning v. Edes, 6-402(270); Stewart v. Smith, 36-82, 30+430. See Barker v. Kelderhouse, 8-207(178); Peaslee v. Hart, 71-319, 73+976, and cases under § 6209.
[1] Campion v. Whitney, 30-177, 14+806.

5072. Death of debtor—A judgment lien cannot be acquired on the land of the judgment debtor after his death.[2] The death of a judgment debtor does not operate to extend the life of a lien.[3]

SATISFACTION

5073. In general—Statute—The satisfaction of judgments is regulated by statute.[4] Whenever a judgment is satisfied in fact otherwise than upon execution it is the duty of the party or attorney to give an acknowledgment of satisfaction, and, upon motion, the court may compel it, or may order the entry of satisfaction to be made without it. If the facts are in dispute the court may deny the motion and relegate the parties to an action.[5] A party may be compelled to accept a lawful tender and satisfy the judgment.[6] Judgments may be satisfied by being set off either on motion or by action.[7] An unfiled order of the court declaring a judgment to be satisfied is of no more effect than an order for judgment and is inadmissible as evidence of a satisfaction.[8] On an application to have a judgment satisfied of record it is immaterial that the consideration for the satisfaction did not move from the judgment debtor.[9] A satisfaction may be set aside for cause.[10] A judgment cannot be collaterally attacked by proof of its satisfaction subsequent to the acquirement of the grantee's rights under it.[11]

PROCEEDINGS SUPPLEMENTARY TO JUDGMENT

5074. Enforcing judgment against joint obligors—Statute—It was formerly provided by statute that "when a judgment is recovered against one or more of several persons jointly indebted upon an obligation, by proceeding as provided by statute, those who were not originally summoned to answer the complaint may be summoned to show cause why they should not be bound by the judgment, in the same manner as if they had been originally summoned." [12]

JUDGMENT NOTWITHSTANDING THE VERDICT—AT COMMON LAW

5075. In general—When the answer distinctly admits the facts set up in the complaint, but pleads matters in avoidance which are found true by the jury, and a verdict accordingly rendered for the defendant, the court on motion will order a judgment for the plaintiff non obstante veredicto if such matters in avoidance are insufficient in law to defeat plaintiff's cause of action. The answer, being bad in law, cannot be rendered effectual by a verdict which merely finds it to be true in point of fact. In this state the strict common-law rule prevails and the motion can only be made by the plaintiff.[13] Judgment

[2] Byrnes v. Sexton, 62–135, 64+155; New Hampshire Sav. Bank v. Barrows, 77–138, 79+660.

[3] Erickson v. Johnson, 22–380.

[4] R. L. 1905 § 4278.

[5] Ives v. Phelps, 16–451(407); Lough v. Pitman, 26–345, 4+229; Woodford v. Reynolds, 36–155, 30+757; Warren v. Ward, 91–254, 97+886. See, as to evidence of satisfaction, Shelley v. Lash, 14–498(373); Brisbin v. Farmer, 16–215(187); Presley v. Lowry, 26–158, 2+61; Walker v. Crosby, 38–34, 35+475.

[6] Rother v. Monahan, 60–186, 62+263; Roberts v. Meighen, 74–273, 77+139.

[7] See § 5088.

[8] Hall v. Sauntry, 80–348, 83+156.

[9] Ives v. Phelps, 16–451(407).

[10] First Nat. Bank v. Rogers, 22–224; Northrup v. Hayward, 102–307, 113+701.

[11] Hall v. Sauntry, 80–348, 83+156.

[12] G. S. 1894 § 5436; Johnson v. Lough, 22–203; First Nat. Bank v. Ames, 39–179, 39+308; Ingwaldson v. Olson, 79–252, 82+579; Brown v. Dooley, 95–146, 103+894.

[13] Wentworth v. Wentworth, 2–277(238); Williams v. Anderson, 9–50(39); Lough v. Thornton, 17–253(230); Lough v. Bragg, 18–121(106); Gaffney v. St. P. etc. Ry., 38–111, 35+728; Cruikshank v. St. Paul etc. Co., 75–266, 77+958; Plano Mfg. Co. v. Richards, 86–94, 90+120. See Dunnell, Minn. Pr. § 945.

is granted only on the merits, and for defects of substance appearing on the face of the record, without reference to the evidence.[14] In this state, in addition to the common-law judgment non obstante, we have such a judgment by statute when special findings are inconsistent with the general verdict,[15] and when a motion on the trial for a directed verdict is erroneously denied.[16]

JUDGMENT NOTWITHSTANDING THE VERDICT—UNDER STATUTE

5076. Enlargement of common-law remedy—The statute does not create a new remedy, but merely enlarges the common-law remedy of judgment non obstante veredicto.[17]

5077. Inapplicable to trial by court—The statute is inapplicable to an action tried by the court without a jury.[18]

5078. Must not infringe right to jury trial—The statute is not an unconstitutional infringement of the right of trial by jury.[19] But it must be construed and applied so as not to invade that right.[20]

5079. Motion for directed verdict necessary—A party is not entitled to a judgment under the statute unless, at the close of the testimony, he made a motion to direct a verdict in his favor.[21] On appeal it must be made to appear affirmatively in the settled case that such a motion was made on the trial; it cannot be made to appear by affidavit or a recital in the order for judgment.[22]

5080. Motion for judgment—A party is not entitled to a judgment under the statute unless, after verdict, he specifically moves for it. The court cannot grant such relief on a mere motion for a new trial.[23] A party may make his motion in the alternative; that is, for judgment notwithstanding the verdict, or, in case that is denied, for a new trial.[24] A party must state in his notice of motion that he will ask for a judgment in his favor and this notice must appear in the record on appeal. A mere recital in the order for judgment is insufficient.[25]

5081. When there are several parties—A motion for judgment for defendants notwithstanding the verdict, when made with reference to all the defendants, is properly denied when it appears that it may have been granted as to some of the defendants only.[26]

5082. When judgment may be ordered—Judgment should not be ordered under the statute [27] unless it clearly appears from the whole evidence that the cause of action or defence sought to be established does not, in point of substance, constitute a legal cause of action or a legal defence.[28] It is not alone

[14] Cruikshank v. St. Paul etc. Co., 75-266, 77+958.

[15] See § 9808.

[16] See §§ 5076-5087.

[17] Cruikshank v. St. Paul etc. Co., 75-266, 77+958; Fischer v. Sperl, 94-421, 103+502.

[18] Hughes v. Meehan, 84-226, 87+768; Noble v. G. N. Ry., 89-147, 94+434; Cable v. Hoolihan, 98-143, 107+967; Meshbesher v. Channellene O. & M. Co., 107-104, 119+428.

[19] Kernan v. St. P. C. Ry., 64-312, 67+71.

[20] Marengo v. G. N. Ry., 84-397, 87+1117 and cases cited; Fischer v. Sperl, 94-421, 103+502.

[21] Hemstad v. Hall, 64-136, 66+366; Netzer v. Crookston, 66-355, 68+1099; Sayer v. Harris, 84-216, 87+617.

[22] Hemstad v. Hall, 64-136, 66+366.

[23] Kernan v. St. P. C. Ry., 64-312, 67+71; Crane v. Knauf, 65-447, 68+79; Netzer v. Crookston, 66-355, 68+1099.

[24] Netzer v. Crookston, 66-355, 68+1099; St. Anthony Falls Bank v. Graham, 67-318, 69+1077.

[25] Netzer v. Crookston, 66-355, 68+1099.

[26] Bank of Glencoe v. Cain, 89-473, 95+308.

[27] R. L. 1905 § 4362.

[28] Cruikshank v. St. Paul etc. Co., 75-266, 77+958; Greengard v. St. P. C. Ry., 72-181, 75+221; Marquardt v. Hubner, 77-442, 80+617; McKibbin v. G. N. Ry., 78-232, 80+1052; Kreatz v. St. Cloud School Dist., 79-14, 81+533; Fohl v. Sleepy Eye Lake, 80-67, 82+1097; Brennan v. G. N. Ry., 80-205, 83+137; Jones v. Chi. etc. Ry., 80-488, 83+446; Baxter v. Covenant M. L.

sufficient to authorize such a judgment that the evidence was such that the trial court, in its discretion, ought to have granted a new trial.[29] If there is some evidence reasonably tending to prove a good cause of action or defence judgment should not be ordered.[30] Where it appears probable that a party has a good cause of action or defence, and that deficiencies of proof might be remedied on another trial, judgment should not be ordered.[31] Where it is clear that deficiencies of proof could not be remedied on another trial judgment should be ordered.[32] Judgment should not be ordered where there is a clear conflict in the evidence upon material issues.[33] It should not be ordered unless the evidence is practically conclusive against the vardict.[34] It has been said that if a party is entitled to a directed verdict on the trial, he is entitled to a judgment notwithstanding the verdict.[35] If a party is not entitled to a directed verdict on the trial he is not entitled to a judgment notwithstanding the verdict.[36] The objection that an answer does not state a defence may be raised on a motion under the statute after a verdict for the defendant.[37]

5083. Dismissal of action—Whether, on a motion for judgment notwithstanding the verdict, the court may dismiss the action, is an open question.[38]

5084. Appealability of order on motion—An order granting or denying a motion under the statute for judgment is not, standing alone, appealable.[39] If the party moving for judgment notwithstanding the verdict does not desire a new trial, but to stand upon the record, he should move for judgment without asking for the alternative relief of a new trial. Then, if either party wishes to review the order made on such motion, he can have judgment entered in accordance with the order,—that is, on the verdict or notwithstanding it,—and appeal from the judgment, and have the order reviewed as an intermediate one affecting the merits. But if the defeated party is unwilling to stand or fall on his claim to a judgment in his favor upon the record as a matter of strict legal right, he may blend his motion for judgment with one for a new trial. If his motion is wholly denied, he may appeal from the order, and review the action of the trial court upon either or both of the alternative motions so united.[40] If any part of his motion is granted, the adverse party may appeal

Assn., 81–1, 83+459; Bragg v. Chi. etc. Ry., 81–130, 83+511; Sours v. G. N. Ry., 81–337, 84+114; Martin v. Courteney, 81–112, 83+503; Levine v. Barrett, 83–145, 85+942, 87+847; Kreuzer v. G. N. Ry., 83–385, 86+413; Fohl v. Chi. etc. Ry., 84–314, 87+919; Marengo v. G. N. Ry., 84–397, 87+1117; Kurstelska v. Jackson, 84–415, 87+1015; Linden v. N. P. Ry., 85–391, 89+64; Olson v. Minn. etc. Ry., 89–280, 94+871; Johnson v. Peterson, 90–503, 97+384; Fischer v. Sperl, 94–421, 103+502; White v. Standard etc. Co., 95–77, 84, 103+735, 884; Hess v. G. N. Ry., 98–198, 108+7; Mohr v. Williams, 98–494, 108+818; Segal v. Fred, 105–126, 117+225; Omodt v. Chi. etc. Ry., 106–205, 118+798; Wessel v. Gigrich, 106–467, 119+242.

[29] Marquardt v. Hubner, 77–442, 80+617.

[30] Bragg v. Chi. etc. Ry., 81–130, 83+511; Hess v. G. N. Ry., 98–198, 108+7.

[31] Cruikshank v. St. Paul etc. Co., 75–266, 77+958; Kreatz v. St. Cloud School Dist., 79–14, 81+533; Fohl v. Sleepy Eye Lake, 80–67, 82+1097; Brennan v. G. N. Ry., 80–205, 83+137; Baxter v. Covenant M. L. Assn., 81–1, 83+459; Marengo v. G. N. Ry., 84–397, 87+1117; Kurstelska v. Jackson, 84–415, 87+1015; Roe v. Winston, 86–77, 90+122; Glover v. Sage, 87–526, 92+471; Wessel v. Gigrich, 106–467, 119+242.

[32] Brennan v. G. N. Ry., 80–205, 83+137; Baxter v. Covenant M. L. Assn., 81–1, 83+459; Swenson v. Erlandson, 86–263, 90+534; Wessel v. Gigrich, 106–467, 119+242.

[33] Hess v. G. N. Ry., 98–198, 108+7.

[34] Jones v. Mpls. etc. Ry., 91–229, 234, 97+893; Peek v. Ostrom, 107–488, 120+1084.

[35] Begin v. Begin, 98–122, 107+149. See, however, Bick v. Mpls. etc. Ry., 107–78, 119+505.

[36] Ritko v. Grove, 102–312, 316, 113+629.

[37] Plano Mfg. Co. v. Richards, 86–94, 90+120.

[38] Welch v. N. P. Ry., 96–211, 104+894.

[39] St. Anthony Falls Bank v. Graham, 67–318, 69+1077; Oelschlegel v. Chi. etc. Ry., 71–50, 73+631; Savings Bank v. St. Paul P. Co., 76–7, 78+873; Sanderson v. N. P. Ry., 88–162, 92+542; Gay v. Kelley, 109–101, 123+295; Hostager v. Northwest P. Co., 109–509, 124+213.

[40] Kernan v. St. P. C. Ry., 64–312, 67+71

from the order disposing of the motion.[41] Where, however, the trial court grants the alternative request of the moving party for a new trial and denies the balance of the motion, he cannot, after securing a new trial, appeal only from so much of the order as denied his alternative motion for judgment, leaving the order for a new trial in full force.[42] But in such a case he may appeal from the order as a whole and have reviewed that part of the order denying his motion for judgment.[43] Where the defendant made a blended motion for judgment notwithstanding the findings or for a new trial in a case tried by the court without a jury, and appealed from the whole of the order denying both motions, it was held that the order was appealable as one in effect denying a motion for a new trial, the motion for judgment being unauthorized.[44]

5085. Scope of review on appeal from judgment—The scope of review on an appeal from a judgment entered under the statute is considered elsewhere.[45]

5086. Disposition of case on appeal—Where the motion is made in the alternative, that is, for a judgment notwithstanding the verdict or for a new trial and the trial court orders judgment improperly, the supreme court on appeal may remand the case with leave to the defeated party to renew his motion for a new trial if his first motion was not passed upon.[46] Where a party makes a motion for a judgment notwithstanding the verdict but does not also move for a new trial he waives his right to the latter remedy. Consequently the supreme court on appeal in such cases either orders judgment for the opposite party[47] or sustains the judgment.[48] It does not grant a new trial.

5087. Waiver of right to new trial—Where a party moves for judgment under the statute without asking the alternative relief of a new trial he waives his right to a new trial at least for the purposes of the motion.[49]

SETTING OFF JUDGMENTS

5088. In general—The district court has full power to adjust adverse claims existing between its suitors by setting off judgments recovered between the same parties. The power is not statutory, but is an incident of the general jurisdiction of the court over its suitors and is of an equitable nature.[50] It is a discretionary power, to be exercised only in the furtherance of justice.[51] It may be exercised on motion[52] or in an action.[53] That there is an appeal pending from one of the judgments is cause for retaining the motion to set off, until a decision on the appeal, but not for denying the motion.[54] It has been held

[41] St. Anthony Falls Bank v. Graham, 67-318, 69+1077; Peterson v. Mpls. St. Ry., 90-52, 95+751; Steidl v. McClymonds, 90-205, 95+906.

[42] St. Anthony Falls Bank v. Graham, 67-318, 69+1077. See Hodge v. Franklin Ins. Co., 126+1098.

[43] Kalz v. Winona etc. Ry., 76-351, 79+310; Westacott v. Handley, 109-452, 124+226.

[44] Noble v. G. N. Ry., 89-147, 94+434.

[45] See § 393.

[46] Kreatz v. St. Cloud School Dist., 79-14, 81+533; Fohl v. Sleepy Eye Lake, 80-67, 82+1097; Fohl v. Chi. etc. Ry., 84-314, 87+919.

[47] Marquardt v. Hubner, 77-442, 80+617; Bragg v. Chi. etc. Ry., 81-130, 83+511.

[48] Cruikshank v. St. Paul etc. Co., 75-266, 77+958.

[49] Bragg v. Chi. etc. Ry., 81-130, 83+511; Krumdick v. Chi. etc. Ry., 90-260, 95+1122.

[50] Temple v. Scott, 3-419(306); Lindholm v. Itasca L. Co., 64-46, 65+931; Martin Co. Nat. Bank v. Bird, 92-110, 99+780; Lundberg v. Davidson, 68-328, 71+395, 72+71. See Wyvell v. Barwise, 43-171, 45+11; Note, 109 Am. St. Rep. 137.

[51] Lindholm v. Itasca L. Co., 64-46, 65+931; Lundberg v. Davidson, 68-328, 71+395, 72+71; Martin Co. Nat. Bank v. Bird, 92-110, 99+780. See, contra, Brisbin v. Newhall, 5-273(217).

[52] Temple v. Scott, 3-419(306); Irvine v. Myers, 6-562(398); Lindholm v. Itasca L. Co., 64-46, 65+931.

[53] Martin Co. Nat. Bank v. Bird, 92-110, 99+780.

[54] Irvine v. Myers, 6-562(398); Lindholm v. Itasca L. Co., 64-46, 65+931.

that a judgment may be set off though it was recovered for the conversion of exempt property.[55] A judgment may be set off pro tanto against a judgment in favor of an administrator, without being proved and allowed in the probate court.[56] Judgments may be set off though the claims on which they were recovered could not be set off or counterclaimed.[57] One of several defendants against whom a judgment for a personal tort is recovered may have set off against such judgment another judgment which he has recovered against the plaintiff, the latter being insolvent.[58] A judgment is a contract and as such may be counterclaimed as of right in an action on contract.[59] A setoff may be denied where it would defeat an attorney's lien,[60] but the right of setoff is not subordinate to an attorney's lien.[61]

ASSIGNMENT

5089. In general—A joint owner of a judgment may assign his undivided interest therein, and his assignee has the right to redeem from a prior lien to the same extent and for the same purposes as the assignor.[62] If the debtor, before notice of an assignment, pays the judgment in good faith, an execution issued will be set aside and the judgment satisfied of record.[63] Where in the same action, there are judgments against and in favor of each party, the assignee of one of the judgments is charged with notice of the judgment against his assignor.[64] An action may be maintained against the assignee of a judgment to set it aside for want of jurisdiction.[65] An assignment is valid though it contains an error as to the date of the rendition and docketing of the judgment, if the identity of the judgment plainly appears.[66] An assignee of a judgment takes subject to all equities existing at the time between the judgment debtor and the assignor.[67] If an assignment is made to two persons and one of them bids off the property at a sale on execution under it he will hold it in trust.[68] A charge relating to the amount which the assignee paid for the assignment and the solvency or insolvency of the assignor and judgment debtor, has been held not erroneous.[69] An assignee of a judgment on which the attorneys who recovered it for the judgment creditor issued execution, having recognized and acquiesced in their acts in the matter, is bound by the sheriff's payment to such attorneys the money collected on the execution. When attorneys recovering a judgment have a lien on it, and the judgment has been collected by the sheriff, the latter may, if the attorneys give him notice of the lien, and require him so to do, retain the amount of the lien out of the money so collected, when the money is demanded by an assignee of the judgment.[70]

5090. Filing and entering—Statute—It is provided by statute that no assignment of a judgment "shall be valid, as against a subsequent purchaser of the judgment in good faith for value, or against a creditor levying upon or attaching the same, unless it is filed with the clerk and an entry thereof made in the docket."[71] This provision is applicable to an assignment of a part of

[55] Temple v. Scott, 3-419(306).
[56] Martin Co. Nat. Bank v. Bird, 92-110, 99+780.
[57] Temple v. Scott, 3-419(306).
[58] Hunt v. Conrad, 47-557, 50+614.
[59] Midland Co. v. Broat, 50-562, 52+972.
[60] Lindholm v. Itasca L. Co., 64-46, 65+931; Lundberg v. Davidson, 68-328, 71+395, 72+71. See 19 Harv. L. Rev. 211.
[61] Morton v. Urquhart, 79-390, 82+653.
[62] Hunter v. Mauseau, 91-124, 97+651. See Wheaton v. Spooner, 52-417, 54+372.
[63] Dodd v. Brott, 1-270(205).
[64] Irvine v. Myers, 6-562(398) (decided prior to statute).
[65] Magin v. Lamb, 43-80, 44+675.
[66] Willis v. Jelineck, 27-18, 6+373.
[67] Brisbin v. Newhall, 5-273(217); Wyvell v. Barwise, 43-171, 45+11.
[68] Holmes v. Campbell, 10-401(320).
[69] Dalby v. Lauritzen, 98-75, 107+826.
[70] Gill v. Truelsen, 39-373, 40+254.
[71] R. L. 1905 § 4276.

a judgment.[72] As between the parties an assignment is valid though not filed and entered.[73]

AMENDMENT OF JUDGMENTS AND JUDICIAL RECORDS

5091. To be made with caution—Obvious considerations of public policy require that the records of a court should be as permanent and inviolable as an enlightened administration of justice will permit. Anciently, judicial records were regarded as sacrosanct. The modern tendency is to relax more and more the common-law rules upon this subject. Yet even now it is held that the power of amending records should be sparingly and cautiously exercised. No general rule can be laid down. The discretion of the court should be exercised with reference to the facts of the particular case, the time of the application, the nature of the amendment sought, and the probability of third parties being affected. Mere clerical mistakes ought to be freely corrected. But in no case should the court allow an amendment unless it is persuaded beyond a reasonable doubt of the truth of the facts on which the amendment is sought.[74]

5092. A matter of discretion—The matter of amending the record in an action lies almost wholly in the discretion of the trial court and its action will not be reversed on appeal except for a clear abuse of discretion.[75] Each case should be determined with reference to its own facts and in furtherance of justice.[76]

5093. Notice of motion—Except where the amendment is merely formal, notice should be given to the adverse party[77] and purchasers affected by the judgment.[78] The notice should be served on the adverse party personally rather than on his attorney, if the authority of the latter has terminated.[79]

5094. Order—The clerk has no authority to make a nunc pro tunc entry without a written order of the court.[80]

5095. May be made after term—In this state a record may be amended as well after as in term. The rule limiting the amendment of records to the term in which they were made up, which was fixed by the old practice, was adopted on the ground alone that the court and parties interested would be more capable of safely arriving at the truth while the transaction was fresh in their minds, than at a more remote period, and the wisdom of such limitation is manifest wherever the facts of the particular case fall within the reason upon which it stands; but when the facts stand undisputed, and the objection is based upon the technical point alone that the term has passed at which the record was made up, it would be doing violence to the spirit which pervades the administration of justice in the present age to sustain it.[81] An amendment cannot be made after an appeal and return to the supreme court so as to affect the rights of the parties on appeal.[82]

[72] Wheaton v. Spooner, 52-417, 54+372.

[73] Swanson v. Realization etc. Corp., 70-380, 73+165.

[74] Bilansky v. State, 3-427(313); In re Wright, 134 U. S. 136.

[75] Berthold v. Fox, 21-51; Burr v. Seymour, 43-401, 45+715.

[76] Bilansky v. State, 3-427(313); Berthold v. Fox, 21-51; Burr v. Seymour, 43-401, 45+715; Mitchell v. Overman, 103 U. S. 62.

[77] See Berthold v. Fox, 21-51.

[78] Aldrich v. Chase, 70-243, 73+161; Louisville B. Co. v. Blake, 70-252, 73+155. See White v. Gurney, 92-271, 99+889.

[79] Berthold v. Fox, 21-51. See Phelps v. Heaton, 79-476, 82+990.

[80] Rockwood v. Davenport, 37-533, 35+377.

[81] Bilansky v. State, 3-427(313); In re Wright, 134 U. S. 136. See Gerish v. Johnson, 5-23(10); Berthold v. Fox, 21-51; McClure v. Bruck, 43-305, 45+438; Nell v. Dayton, 47-257, 49+981; Chase v. Whitten, 62-498, 65+84 and § 5101.

[82] Floberg v. Joslin, 75-75, 77+557.

5096. Who may oppose motion—A person not a party to the action has no right to be heard in opposition to such a motion or to appeal from the order allowing the amendment.[83]

5097. Extrinsic evidence admissible—It is held in many jurisdictions that the record cannot be amended, at least after term, by reference to evidence dehors the record—that there must be something in the record to amend by.[84] In this state the rule is otherwise. The court may consider any competent evidence or act on its own memory.[85] The minutes of the judge are competent but not conclusive evidence.[86]

5098. Clerical mistakes of judge—The district court may at any time after final judgment—at least where no rights of third parties are affected—correct its own clerical mistakes or misprisions so as to make its judgments conform to what it intended they should be.[87] It may make such corrections upon its own motion.[88]

5099. Clerical mistakes of clerk—The district court, as a superior court with general jurisdiction, has full power, by the common-law and by statute, to amend its records by correcting the clerical errors and misprisions of its clerk.[89]

5100. Judgment not authorized by order—When the clerk enters a judgment not authorized by the order therefor the court will correct it on motion. The objection cannot be raised for the first time on appeal.[90]

5101. Modification of judgment—It was formerly held in this state that after entry of judgment pursuant to order a court had no authority to correct its judicial errors on motion, the only remedy being a new trial or an appeal.[91] It is now held that the court may modify its judgments on motion at any time within the period for taking an appeal.[92] It has been held error for a court to amend a judgment of dismissal, against objection, so as to make it a judgment on the merits.[93] There is a sharp distinction between amending a judgment so that it may conform to the original intention of the court and amending it to correct judicial error. If a judgment entered without application to the court is erroneous, it is an irregularity which may be corrected on motion, and the court may either modify or vacate it. But if such a judgment is entered upon application to the court, and pursuant to its order, the case is different. The court is presumed to have decided the plaintiff's right to recover to the full extent justified by its order. There may be error in the decision

[83] Berthold v. Fox, 21–51.

[84] 1 Black, Judgments, § 165; 17 Ency. Pl. & Prac. 928.

[85] Lundberg v. Single Men's E. Assn., 41–508, 43+394.

[86] See Crich v. Williamsburg City etc. Co., 45–441, 48+198.

[87] Hodgins v. Heaney, 15–185(142); McClure v. Bruck, 43–305, 45+438; Knappen v. Freeman, 47–491, 50+533; Chase v. Whitten, 62–498, 65+84; U. S. Invest. Co. v. Ulrickson, 84–14, 86+613, 1004; Wright v. Krabbenhoft, 104–460, 116+940. See Stitt v. Rat Portage L. Co., 102–337, 113+901.

[88] Chase v. Whitten, 62–498, 65+84.

[89] Coit v. Waples, 1–134(110); Thompson v. Bickford, 19–17(1); Berthold v. Fox, 21–51; State v. Macdonald, 24–48; Lundberg v. Single Men's E. Assn., 41–508, 43+394; State v. Crosley Park L. Co., 63–205, 65+268.

[90] Lundberg v. Single Men's E. Assn., 41–508, 43+394; Hall v. Merrill, 47–260, 49+980; Nell v. Dayton, 47–257, 49+981; Harper v. Carroll, 66–487, 69+610, 1069; Levine v. Lancashire Ins. Co., 66–138, 68+855; Parker v. Bradford, 68–437, 71+619; McLaughlin v. Nicholson, 70–71, 72+827, 73+1; Bishop v. Hyde, 72–16, 74+1016; Keenan v. Johnson, 126+523. See Oldenberg v. Devine, 40–409, 42+88 (judgment entered irregularly on stipulation).

[91] Grant v. Schmidt, 22–1; Semrow v. Semrow, 23–214; White v. Iltis, 24–43; Weld v. Weld, 28–33, 8+900.

[92] Gallagher v. Irish-Am. Bank, 79–226, 81+1057. See Weaver v. Miss. etc. Co., 30–477, 16+269; U. S. Invest. Corp. v. Ulrickson, 84–14, 86+613; Tomlinson v. Phelps, 93–350, 101+496.

[93] Day v. Mountin, 89–297, 94+887.

of the court; but if the judgment follows the order, there is no irregularity in its entry. At common law the court might, at any time during the same term, correct any error in its judgment, even after it was in fact entered, but had no right to do so after the close of the term. Under common-law practice all causes came on to be disposed of at some term, and all judgments were entered as of the term at which the cause was heard, and the court was supposed to retain control over causes during the entire term at which they came on to be heard, and not to have finally disposed of them until the term closed. This theory is not retained in our practice. The summons is not returnable at any term. The cause need not be brought on at a term unless there is an issue to be tried. The judgment, whether in fact entered during a term or in vacation, is not entered as of any term. In chancery, after the decree was enrolled, errors apparent on the face of the decree could be reheard on bill of review; those not apparent only by appeal. Before enrolment a rehearing might be obtained by petition. The bill of review and rehearing are not retained in our practice and both legal and equitable actions are governed by the same rules as to amendment on motion.[94]

5102. Judgment not authorized by verdict—When the clerk enters a judgment not authorized by the verdict the court will correct it on motion. The objection cannot be raised for the first time on appeal.[95]

5103. Judgment not authorized by report of referee—When the clerk enters a judgment not authorized by the report of a referee the court will correct it on motion. The objection cannot be urged for the first time on appeal.[96]

5104. Amendment of names of parties—Where an action was brought in the name of a guardian it was held that the court had authority, either before or after judgment, to amend the record by inserting the name of the ward as plaintiff.[97] It is in the discretion of the trial court to amend the record in respect to the name of the plaintiff and if there is no suggestion that the defendant was misled the supreme court will affirm its action as a matter of course.[98] The court may also amend the name of a defendant. If a party who was in fact intended to be sued is personally served with process in which he is incorrectly designated he must appear and object to the misnomer and if he fails to do so any judgment rendered in the action will bind him until set aside or amended.[99]

5105. Supplying omissions in the record—The court has full authority to supply omissions in the record on motion and its discretion in this regard is freely exercised to prevent the reversal of judgments on merely technical grounds. If a jury is sworn according to law, or any other of the ordinary proceedings takes place in the progress of the trial of a cause, and the clerk omits to record the fact, the record may be made to conform to the truth, even after the term, when there exists no doubt about what the truth is.[1] Thus it was held allowable for the court in a capital case to amend the record so that it would show that when the jury retired they were put in charge of an officer who was duly sworn to keep them as prescribed by law; that after each adjournment of the trial, and before the charge of the court, the jury were per-

[94] Grant v. Schmidt, 22-1.

[95] Eaton v. Caldwell, 3-134(80); Hennepin County v. Jones, 18-199(182); Scott v. Mpls. etc. Ry., 42-179, 43+966; Hall v. Merrill, 47-260, 49+980.

[96] Piper v. Johnston, 12-60(27); Hall v. Merrill, 47-260, 49+980.

[97] Perine v. Grand Lodge, 48-82, 50+1022; Beckett v. N. W. etc. Assn., 67-298, 69+923.

[98] McEvoy v. Bock, 37-402, 34+740; Western L. Assn. v. Thompson, 79-423, 82+677. See Bradley v. Sandilands, 66-40, 68+321.

[99] Casper v. Klippen, 61-353, 63+737; Ueland v. Johnson, 77-543, 80+700.

[1] Bilansky v. State, 3-427(313).

mitted to separate with the consent of the defendant; that the jury were polled at the request of the defendant on the coming in of the verdict, and each assented to it and that it was then entered and read over to the jury and by them again assented to.[2] Findings of fact and conclusions of law may be filed by the court after judgment nunc pro tunc.[3] Proof of service of summons either personally or by publication may be supplied by amendment.[4] After a judgment by default the court may allow a defect in the affidavit of no answer to be corrected.[5]

5106. Replacing lost records—A court has the power to replace its own records when lost or destroyed. This power extends to supplying any pleadings or other papers in civil cases before as well as after judgment.[6]

5107. Rights of third parties—An amendment of a record should in all cases be made with a saving of the rights of third persons, not parties or privies to the judgment. In any event the law protects their rights; but it is proper that such saving clause should be inserted in the order for amendment.[7] The amendment of a judgment by confession stands on distinct grounds. An amendment nunc pro tunc of an insufficient statement for judgment by confession will not be allowed to the prejudice of subsequent judgment creditors whose executions have been levied and who have begun proceedings to avoid the prior judgment. An order allowing such amendment, without notice to such subsequent judgment creditors, is of no effect as to them.[8]

VACATION

5108. Distinction between opening default and vacating judgment—There is an obvious distinction between opening and vacating a judgment. A motion to vacate a judgment and nothing more is usually made on the ground of some irregularity or jurisdictional defect appearing on the face of the record.[9] It is a direct attack on the validity of the judgment.[10] The opening of a judgment is merely a mode of allowing a defendant who is in default to interpose a defence, and it does not necessarily involve the vacation of the judgment. It is not an attack on the judgment, but proceeds on the assumption that there is a valid judgment.[11] A motion to vacate a judgment is a matter of right; but a motion to open a judgment is directed to the discretion of the court. On a motion to vacate it is immaterial whether the moving party has a meritorious defence or has moved with diligence. On a motion to open the moving party must show merits and due diligence. When a judgment is opened it is commonly vacated by the same order, but the court may allow it to stand as security.

5109. Inherent power—All superior courts of common-law jurisdiction have inherent power to vacate their judgments when improvidently entered.[12] Our statute regulates and greatly extends this power. At common-law the power could be fully exercised only at the term in which the judgment was rendered,[13] and was limited to a few well defined grounds.[14]

[2] Bilansky v. State, 3-427(313).
[3] See § 9867.
[4] See § 7820.
[5] Dunwell v. Warden, 6-287(194).
[6] Red River etc. Ry. v. Sture, 32-95, 20+229.
[7] Berthold v. Fox, 21-51. See also Burr v. Seymour, 43-401, 45+715.
[8] Wells v. Gieseke, 28-478, 8+380; Auerbach v. Gieseke, 40-258, 41+946.
[9] O'Hara v. Baum, 82 Pa. St. 416. Not always so in this state. See §§ 5119-5123.
[10] Stocking v. Hanson, 22-542; Jensen v. Crevier, 33-372, 23+541; Magin v. Lamb, 43-80, 44+675; Duluth v. Dibblee, 62-18, 63+1117; Reinhart v. Lugo, 86 Cal. 395.
[11] Durham v. Moore, 48 Kans. 135. See Ueland v. Johnson, 77-543, 80+700.
[12] Crosby v. Farmer, 39-305, 40+71.
[13] Albers v. Whitney, 1 Story (U. S.) 310; Grant v. Schmidt, 22-1.
[14] See 15 Ency. Pl. & Pr. 234.

5110. Notice—Notice of a motion to vacate a judgment in favor of a non-resident plaintiff may be served on his attorney of record, though more than two years have elapsed since the entry thereof.[15]

5111. Application by non-resident—Attachment—Where jurisdiction over a non-resident was acquired by publication of summons and the attachment of property alleged to be his, it was held that he could not have the judgment entered on default set aside and the attachment defeated on affidavit denying any interest in the property attached.[16]

5112. Application by stranger—A judgment, void for want of jurisdiction appearing on its face, may be set aside on motion of one not a party to the action who has an interest in the property upon which the judgment is a cloud, but he is not entitled to such relief as a matter of right.[17]

5113. Application by assignee—In an action where the original parties, the defendant having no notice of the assignment of the cause of action, compromised the suit and stipulated for a judgment to be entered, and judgment was accordingly entered, it was held that the assignee could not have the judgment set aside.[18]

5114. Laches—When the judgment is absolutely void and not merely voidable the moving party need not show diligence.[19] A void judgment never becomes good by lapse of time.[20] When the judgment to be set aside is merely voidable the applicant must show due diligence.[21]

5115. Merits need not be shown—Upon an application to vacate a judgment for irregularity of the court or plaintiff or for want of jurisdiction the applicant need not show merits, for he is demanding a right and not craving a favor. Every defendant may insist that legal proceedings against him shall be conducted regularly and according to law and the practice of the courts, whether he has a good defence on the merits or not.[22]

5116. Motion to vacate defeated by amendment—When a motion to vacate a judgment is made for a defect which is remediable by amendment the court may deny the motion and order an amendment.[23]

5117. Void judgments—A person against whom a void judgment has been entered has an absolute right, at any time, and without showing diligence[24] or a meritorious defence,[25] to have it vacated on motion.[26] An appearance to set aside a void judgment does not validate it.[27] A stranger to the action may sometimes have a void judgment vacated, but his application, unlike that of

[15] Phelps v. Heaton, 79–476, 82+990.

[16] Whitney v. Sherin, 74–4, 76+787.

[17] Mueller v. Reimer, 46–314, 48+1120. See Hunter v. Cleveland C. S. Co., 31–505, 18+645; Stewart v. Duncan, 40–410, 42+89.

[18] Chisholm v. Clitherall, 12–375(251).

[19] Lee v. O'Shaughnessy, 20–173(157); Heffner v. Gunz, 29–108, 12+342; Feikert v. Wilson, 38–341, 37+585; Phelps v. Heaton, 79–476, 82+990. But see, Stocking v. Hanson, 35–207, 28+507.

[20] McNamara v. Casserly, 61–335, 63+880.

[21] Jorgensen v. Griffin, 14–464(346); Stocking v. Hanson, 22–542; Covert v. Clark, 23–539; Dillon v. Porter, 36–341, 31+56; Feikert v. Wilson, 38–341, 37+585; Eisenmenger v. Murphy, 42–84, 43+784; Seibert v. Mpls. etc. Ry., 58–72, 59+828.

[22] Mackubin v. Smith, 5–367(296); Lee v. O'Shaughnessy, 20–173(157); Heffner v. Gunz, 29–108, 12+342; Savings Bank v. Authier, 52–98, 53+812.

[23] Burr v. Seymour, 43–401, 45+715.

[24] See § 5114.

[25] See § 5115.

[26] Mackubin v. Smith, 5–367(296); Lee v. O'Shaughnessy, 20–173(157); Covert v. Clark, 23–539; Heffner v. Gunz, 29–108, 12+342; Cain v. Libby, 32–491, 21+739; Chauncey v. Wass, 35–1, 35, 25+457; Feikert v. Wilson, 38–341, 37+585; Godfrey v. Valentine, 39–336, 40+163; Magin v. Lamb, 43–80, 44+675; Wistar v. Foster, 46–484, 49+247; Strong v. Comer, 48–66, 50+936; Roberts v. Chi. etc. Ry., 48–521, 51+478; Savings Bank v. Authier, 52–98, 53+812; Gillette v. Ashton, 55–75, 56+576; Duluth v. Dibblee, 62–18, 63+1117; Holcomb v. Stretch, 74–234, 76+1132; Phelps v. Heaton, 79–476, 82+990.

[27] See § 478.

a party, is addressed to the discretion of the court.[28] The remedy by motion is so simple and expeditious that it is almost always resorted to, but an action may be maintained in this state to set aside a void judgment.[29]

5118. Want of jurisdiction—The following jurisdictional defects have been held grounds for vacating judgments: defective or untrue affidavits for publication of summons;[30] defective publication of summons;[31] improper personal service of summons;[32] service of summons on wrong person;[33] service by publication on resident of state;[34] failure to substitute proper parties after death of defendant;[35] rendition of judgment in state court after removal to federal court;[36] improper service at house of usual abode;[37] unauthorized appearance;[38] no service of summons;[39] departure from the requirements of the statute in regard to the service of a summons in any substantial matter affecting the rights of the defendant;[40] improper service of summons on officer of a foreign corporation;[41] service of summons on agent of natural person under unconstitutional law.[42]

5119. Unauthorized action—A judgment in an action begun by an attorney without authority is void and may be set aside.[43] But in such cases the plaintiff cannot have the judgment set aside unless he returns or offers to return the fruits of the action.[44]

5120. Erroneous judgment—If a judgment entered in strict accordance with the order of the court for judgment departs from or exceeds the relief demanded in the complaint, the proper remedy is not a motion to wholly vacate and set it aside, but an appeal from the judgment[45] or a motion to correct.[46]

5121. Vacation because of facts arising after judgment—Where facts have arisen after final judgment of such a nature that it ought not to be executed relief by the vacation or modification of the judgment may be granted on motion if the facts are undisputed.[47]

5122. Fraud—A judgment may be set aside summarily on motion for fraudulent practices in obtaining it.[48] In this state, however, it is the usual practice to seek relief in such cases by means of an action as authorized by statute.[49]

5123. Surprise—A judgment may be vacated on the ground of surprise.[50] Thus, in an action against a resident, in which the summons was improperly

[28] Mueller v. Reimer, 46-314, 48+1120. See Lee v. O'Shaughnessy, 20-173(157); Magin v. Lamb, 43-80, 44+675; Holcomb v. Stretch, 74-234, 76+1132.

[29] Magin v. Lamb, 43-80, 44+675; Vaule v. Miller, 69-440, 445, 72+452. See Allen v. McIntyre, 56-351, 57+1060; State v. Dist. Ct., 85-283, 88+755.

[30] Mackubin v. Smith, 5-367(296); Chauncey v. Wass, 35-1, 35, 25+457, 30+826; Feikert v. Wilson, 38-341, 37+585.

[31] Godfrey v. Valentine, 39-336, 40+163; Stai v. Selden, 87-271, 92+6.

[32] Savings Bank v. Authier, 52-98, 53+812.

[33] Magin v. Lamb, 43-80, 44+675; Savings Bank v. Authier, 52-98, 53+812.

[34] Covert v. Clark, 23-539; Bardwell v. Collins, 44-97, 46+315. See Shepherd v. Ware, 46-174, 48+773; McClymond v. Noble, 84-329, 87+838.

[35] Lee v. O'Shaughnessy, 20-173(157).

[36] Roberts v. Chi. etc. Ry., 48-521, 51+478.

[37] Crosby v. Farmer, 39-305, 40+71.

[38] Stocking v. Hanson, 35-207, 28+507. See Deering v. Donovan, 82-162, 84+745.

[39] Flanigan v. Duncan, 47-250, 49+981; Knutson v. Davies, 51-363, 53+646; Allen v. McIntyre, 56-351, 57+1060; Phelps v. Heaton, 79-476, 82+990; Glauber v. Wallace, 104-128, 116+107.

[40] Lee v. Clark, 53-315, 55+127.

[41] State v. Dist. Ct., 26-233, 2+698.

[42] Cabanne v. Graf, 87-510, 92+461.

[43] Stocking v. Hanson, 35-207, 28+507.

[44] Deering v. Donovan, 82-162, 84+745.

[45] Palmer v. Bank of Zumbrota, 65-90, 67+893.

[46] See § 5100.

[47] Weaver v. Miss. etc. Co., 30-477, 16+269; Colstrum v. Mpls. etc. Ry., 33-516, 24+255. See Semrow v. Semrow, 23-214.

[48] Johnston v. Paul, 23-46; Wieland v. Shillock, 23-227; Id., 24-345; Olmstead v. Olmstead, 41-297, 43+67; Cornish v. Coates, 91-108, 97+579; Scribner v. Scribner, 93-195, 101+163.

[49] See § 5126.

[50] Wieland v. Shillock, 23-227. See Seibert v. Mpls. etc. Ry., 58-72, 59+828.

served upon him by publication, it was held that the judgment might be vacated on the ground of surprise.[51]

5124. Appeal—An appeal lies from an order vacating or refusing to vacate a judgment.[52] A determination of the trial court, based on conflicting affidavits will rarely be disturbed on appeal.[53] The record on appeal must be certified to contain all the moving papers.[54]

EQUITABLE ACTION TO VACATE FOR FRAUD

5125. When lies—Independent of R. L. 1905 § 4277, an equitable action to vacate a judgment for fraud or false testimony will not lie where there is an adequate remedy by motion in the same action.[55] Where there is no adequate remedy at law an equitable action will lie.[56] A complaint in such an action must show not only the commission of a fraud, but also damage resulting therefrom to the plaintiff. An action will not lie against one innocent of the fraud, not a party to the judgment, and claiming nothing under it.[57] Where a defeated party has been prevented from fully exhibiting his case by his adversary, as by keeping him away from court through a false promise of a compromise, or where a defendant never had knowledge of an action, being kept in ignorance by the acts of the plaintiff, these and similar cases, which show that there has never been a real contest in the trial or hearing, are reasons for which a new action may be sustained to set aside and annul the former judgment and open the case for a new and fair trial.[58]

STATUTORY ACTION TO VACATE FOR FRAUD

5126. Nature of action—The action afforded by the statute [59] is governed by the rules applicable to similar actions in equity.[60] It is concurrent with the remedy by motion.[61]

5127. Validity and construction of statute—The statute has been held constitutional against various objections.[62] It is to be construed strictly.[63] It is not designed to afford a remedy in place of a motion for a new trial.[64] It is unwise to attempt to lay down a general rule by which to determine what cases fall within the statute. Each case must necessarily be determined largely with reference to its own facts.[65] The right to have a judgment set aside under the

[51] Covert v. Clark, 23–539.

[52] Barker v. Keith, 11–65(37); Piper v. Johnston, 12–60(27); Young v. Young, 17–181(153); Stocking v. Hanson, 22–542.

[53] Olmstead v. Olmstead, 41–297, 43+67; Flanigan v. Duncan, 47–250, 49+981; Knutson v. Davies, 51–363, 53+646; Scribner v. Scribner, 93–195, 101+163.

[54] Gerish v. Johnson, 5–23(10).

[55] State v. Bachelder, 5–223(178); Johnston v. Paul, 23–46; Wieland v. Shillock, 23–227; Id., 24–345; Stewart v. Duncan, 40–410, 411, 42+89; Geisberg v. O'Laughlin, 88–431, 435, 93+310. See Johnson v. Vaule, 61–401, 63+1039.

[56] Bomsta v. Johnson, 38–230, 233, 36+341; Street v. Alden, 62–160, 64+157; Geisberg v. O'Laughlin, 88–431, 435, 93+310. See State v. Bachelder, 5–223(178).

[57] McNair v. Toler, 21–175.

[58] Street v. Alden, 62–160, 64+157; Hinckley v. Kettle River Ry., 80–32, 82+1088.

[59] R. L. 1905 § 4277.

[60] Spooner v. Spooner, 26–137, 1+838; Schweinfurter v. Schmahl, 69–418, 72+702; Geisberg v. O'Laughlin, 88–431, 93+310.

[61] Geisberg v. O'Laughlin, 88–431, 93+310; Cornish v. Coates, 91–108, 97+579; Scribner v. Scribner, 93–195, 101+163.

[62] Spooner v. Spooner, 26–137, 1+838. It was unconstitutional as respects judgments obtained prior to its enactment. Wieland v. Shillock, 24–345.

[63] Stewart v. Duncan, 40–410, 42+89; Hass v. Billings, 42–63, 43+797; Watkins v. Landon, 67–136, 69+711; O'Brien v. Larson, 71–371, 74+148; Moudry v. Witzka, 89–300, 94+885; Hayward v. Larrabee, 106–210, 118+795.

[64] Hulett v. Hamilton, 60–21, 61+672; Bisseberg v. Ree, 99–481, 109+1115.

[65] Hass v. Billings, 42–63, 43+797; Geisberg v. O'Laughlin, 88–431, 93+310; Hayward v. Larrabee, 106–210, 118+795.

statute is not of an absolute nature.[66] The statute was not designed to excuse a party from exercising due diligence in preparing for trial, or in moving for a new trial on the ground of surprise or newly discovered evidence.[67]

5128. For perjury—Where issues are squarely made by the pleadings in an action, so that each party knows what the other will attempt to prove, and is not dependent on the other to prove the facts as he claims them to be, an action will not lie under the statute to set aside a judgment procured by perjury in proving such facts.[68]

5129. For fraudulent practices—An action will lie under the statute where the prevailing party has been guilty of fraudulent practices toward the adverse party,[69] or the court.[70]

5130. To enable a party to plead a defence—A judgment will not be vacated under the statute, and a new trial granted, to enable a party to make a defence which, in the exercise of due diligence, ought to have been asserted in the original action.[71]

5131. Judgment of divorce—A judgment of divorce may be set aside under the statute, but where there has been a remarriage it should not be done except on very clear proof.[72]

5132. Who may maintain action—One not a party to the action, though directly interested in the result, cannot maintain an action under the statute.[73]

5133. After death of party—An action to set aside a judgment of divorce may be maintained after the death of the party who obtained it by fraud. In such an action all the persons interested in the estate of the decedent should be made parties.[74]

5134. Laches—A delay of one year and seven months has been held not such laches as to defeat an action.[75]

5135. Pleading—A complaint under the statute must specifically point out the act of perjury, or subornation thereof, or the fraudulent acts or practices relied on, and show on its face that the action is brought within the statutory period.[76] Where the plaintiff claims that he was prevented from defending by the fraud of the prevailing party, he must show in his complaint that he was entirely free from contributory negligence in suffering the judgment to be taken against him.[77] A complaint has been held to state but a single cause of action.[78]

[66] Geisberg v. O'Laughlin, 88–431, 93+310.

[67] Hass v. Billings, 42–63, 43+797.

[68] Hass v. Billings, 42–63, 43+797; Wilkins v. Sherwood, 55–154, 56+591; Colby v. Colby, 59–432, 61+460; Watkins v. Landon, 67–136, 69+711; Moudry v. Witzka, 89–300, 94+885; Bisseberg v. Ree, 99–481, 109+1115; Hayward v. Larrabee, 106–210, 118+795. See Dart v. Richardson, 96–249, 104–1094; Boring v. Ott, 119+865 (Wis.); 22 Harv. L. Rev. 600.

[69] Geisberg v. O'Laughlin, 88–431, 93+310; Moudry v. Witzka, 89–300, 94+885. See Colby v. Colby, 59–432, 61+460; Street v. Alden, 62–160, 64+157; Hinckley v. Kettle River Ry., 80–32, 82+1088; Dart v. Richardson, 96–249, 104+1094.

[70] Scribner v. Scribner, 93–195, 101+163.

[71] Clark v. Lee, 58–410, 59+970; Watkins v. Landon, 67–136, 69+711; Schweinfurter v. Schmahl, 69–418, 72+702; O'Brien v. Larson, 71–371, 74+148.

[72] Bomsta v. Johnson, 38–230, 36+341; Colby v. Colby, 59–432, 61+460; Id., 64–549, 67+663; Scribner v. Scribner, 93–195, 101+163. See True v. True, 6–458(315); Young v. Young, 17–181(153); Olmstead v. Olmstead, 41–297, 43+67; Barteau v. Barteau, 45–132, 43+645.

[73] Stewart v. Duncan, 40–410, 42+89. See Street v. Alden, 62–160, 64+157.

[74] Bomsta v. Johnson, 38–230, 36+341.

[75] Colby v. Colby, 59–432, 61+460.

[76] Bomsta v. Johnson, 38–230, 36+341; Hass v. Billings, 42–63, 43+797; Wilkins v. Sherwood, 55–154, 56+591; Colby v. Colby, 59–432, 61+460 (complaint held to state a cause of action for fraudulent practices by husband to prevent wife from defending an action for divorce).

[77] Schweinfurter v. Schmahl, 69–418, 72+702; O'Brien v. Larson, 71–371, 74+148.

[78] Baker v. Sheehan, 29–235, 12+704.

5136. Relief allowable—The court is authorized to award such relief as the facts of the particular case require, according to the practice of courts of equity in similar cases.[79] In setting aside a judgment for divorce it should not ordinarily grant a new trial, at least if the parties do not ask it.[80]

COLLATERAL ATTACK

5137. In general—It is the general rule that a judgment of a court of superior jurisdiction, rendered in an action in which the court has jurisdiction both of the person and subject-matter, is not subject to collateral attack by parties or their privies,[81] but it has been held in this state that in addition to jurisdiction of the parties and subject-matter of the action, it is necessary to the validity of a judgment that the court should have had jurisdiction of the precise question the judgment assumes to determine, or the particular relief which it assumes to grant.[82] Collateral attacks on judgments are not favored.[83]

5138. What constitutes—An action to set aside a judgment on the ground of jurisdictional defects is a direct, rather than a collateral, attack upon it.[84] Where, in an action to determine adverse claims, the plaintiff showed a title resting on a judgment, an attack on the judgment by the defendant was held a collateral attack.[85]

5139. For want of jurisdiction over the subject-matter—The judgment of a domestic court of superior jurisdiction may be attacked collaterally by parties or strangers for want of jurisdiction over the subject-matter of the action.[86] Though want of jurisdiction over the subject-matter may always be shown collaterally, the presumption is in favor of the jurisdiction of the court. The want of jurisdiction must be shown affirmatively. Nothing is presumed to be without the jurisdiction of a court of superior jurisdiction.[87] Where a court has jurisdiction over a general class of cases and it is required to determine whether the facts of a particular case bring it within the class, its decision, if wrong, is mere error, and cannot be attacked collaterally even by strangers.[88] Jurisdiction of the subject-matter means not only authority to hear and determine a particular class of actions, but also authority to hear and determine the particular questions the court assumes to decide.[89]

5140. For want of jurisdiction of particular issues—A judgment of a domestic court of superior jurisdiction may be attacked collaterally by parties or strangers on the ground that the court had no jurisdiction of the precise question which the judgment assumes to determine.[90]

[79] R. L. 1905 § 4277; Spooner v. Spooner, 26–137, 1+838 (powers of a court of equity in similar cases); Baker v. Sheehan, 29–235, 12+704 (restitution of property received under judgment—damages for attempted or successful enforcement of judgment); Henry v. Meighen, 46–548, 49+323 (prayer for relief in alternative—not entitled to vacation of judgment—recovery of amount collected in excess of judgment); Colby v. Colby, 64–549, 67+663 (action for divorce—held error to allow plaintiff to answer in another action); Geisberg v. O'Laughlin, 88–431, 93+310 (court may direct satisfaction of judgment, compel restitution, or make such other or further order as may be just under the circumstances—conditional vacation on terms protecting interests of both parties).

[80] Colby v. Colby, 64–549, 67+663.

[81] State v. Macdonald, 24–48; Sandwich Mfg. Co. v. Earl, 56–390, 57+938; Hall v. Sauntry, 72–420, 75+720; Schmitt v. Dahl, 88–506, 514, 93+665.

[82] Sache v. Wallace, 101–169, 112+386.

[83] Jewett v. Iowa L. Co., 64–531, 67+639

[84] Vaule v. Miller, 69–440, 72+452.

[85] Hall v. Sauntry, 80–348, 83+156.

[86] State v. West, 42–147, 43+845; Jewett v. Iowa L. Co., 64–531, 538, 67+639; Sache v. Wallace, 101–169, 112+386.

[87] Holmes v. Campbell, 12–221(141); Gemmell v. Rice, 13–400(371); Davis v. Hudson, 29–27, 34, 11+136; Pierro v. St. P. etc. Ry., 37–314, 34+38; Stahl v. Mitchell, 41–325, 43+385.

[88] Chauncey v. Wass, 35–1, 31, 25+457, 30+826; Logenfiel v. Richter, 60–49, 61+826.

[89] Sache v. Wallace, 101–169, 112+386.

[90] Sache v. Wallace, 101–169, 112+386. See In re Mousseau, 30–202, 14+887.

5141. For want of jurisdiction over the person—A judgment may be collaterally attacked by any person against whom it is asserted, on the ground that the court rendering it did not have jurisdiction of the person against whom it was rendered, if such fact affirmatively appears on the face of the record.[91] But the judgment of a domestic court of superior jurisdiction cannot be attacked collaterally by parties or privies for want of jurisdiction over the person not affirmatively appearing on the face of the record.[92] Jurisdiction is presumed. To rebut the presumption of jurisdiction want of jurisdiction must affirmatively appear on the face of the record. Extrinsic evidence is inadmissible.[93] Absence from the record of the necessary jurisdictional facts will not overcome the presumption.[94] But where the record discloses the manner in which summons was served, and this was ineffectual to confer jurisdiction, it will not be presumed that a valid service was made in some other way.[95] A domestic judgment in personam, rendered in an action to enforce a pecuniary liability against a non-resident, upon service of summons by publication, is a nullity and may be attacked collaterally by the defendant, if no property was attached and he did not voluntarily appear and was not personally served within the state.[96] But a domestic judgment in rem, rendered against a non-resident, upon service of summons by publication cannot be attacked collaterally by parties or privies for want of due service of summons not affirmatively appearing on the face of the record.[97] A judgment of the circuit court of the United States for the district of Minnesota stands on the same footing as a domestic judgment, as respects presumption of jurisdiction and susceptibility to collateral attack.[98]

5142. For want of jurisdiction to award the relief granted—A judgment of a domestic court of superior jurisdiction may be attacked collaterally by parties or strangers on the ground that the court had no jurisdiction to award the particular relief granted.[99]

5143. For fraud—A judgment of a domestic court of superior jurisdiction cannot be attacked collaterally by parties or privies for fraud.[1] But a stranger may attack such a judgment collaterally, if it was created and kept in force by collusion of the parties for the purpose of defrauding him. It is not enough that fraud was practiced in procuring the judgment. It must have been directed against the stranger and collusively designed to affect injuriously his pecuniary interests.[2]

[91] Kanne v. Mpls. etc. Ry., 33–419, 23+854; Barber v. Morris, 37–194, 33+559; Mueller v. Reimer, 46–314, 48+1120; Jewett v. Iowa L. Co., 64–531, 67+639.

[92] Kipp v. Fullerton, 4–473(366); Hotchkiss v. Cutting, 14–537(408); Turrell v. Warren, 25–9; Weld v. Weld, 27–330, 7+267; Davis v. Hudson, 29–27, 37, 11+136; Herrick v. Morrill, 37–250, 33+849; Sandwich Mfg. Co. v. Earl, 56–390, 57+938; Sodini v. Sodini, 94–301, 102+861.

[93] Turrell v. Warren, 25–9; McNamara v. Casserly, 61–335, 340, 63+880.

[94] Herrick v. Butler, 30–156, 14+794; Nye v. Swan, 42–243, 44+9; Sandwich Mfg. Co. v. Earl, 56–390, 57+938; McNamara v. Casserly, 61–335, 340, 63+880; State v. Kilbourne, 68–320, 71+396; Gulickson v. Bodkin, 78–33, 80+783; Bogart v. Kiene, 85–261, 88+748; Hadley v. Bourdeaux, 90–177, 95+1109.

[95] Barber v. Morris, 37–194, 33+559; Morey v. Morey, 27–265, 6+783; Godfrey v. Valentine, 39–336, 40+163; Hempsted v. Cargill, 46–141, 48+686; Jewett v. Iowa L. Co., 64–531, 67+639; Brattland v. Calkins, 67–119, 69+699.

[96] Heffner v. Gunz, 29–108, 12+342; Kenney v. Goergen, 36–190, 31+210 (overruling Stone v. Myers, 9–303, 287; Cleland v. Tavernier, 11–194, 126); Lydiard v. Chute, 45–277, 47+967; Plummer v. Hatton, 51–181, 53+460.

[97] Turrell v. Warren, 25–9.

[98] Turrell v. Warren, 25–9; Pierro v. St. P. etc. Ry., 37–314, 34+38; Sandwich Mfg. Co. v. Earl, 56–390, 57+938. See Miller v. Natwick, 125+1022.

[99] Sache v. Wallace, 101–169, 112+386. See, however, Weld v. Weld, 28–33, 8+900.

[1] Oswald v. Mpls. T. Co., 65–249, 68+15; Hall v. Sauntry, 72–420, 75+720; Id., 80–348, 83+156. See Sandwich Mfg. Co. v. Earl, 56–390, 57+938; Hinckley v. Kettle River Ry., 80–32, 82+1088.

[2] Hunter v. Cleveland C. S. Co., 31–505,

5144. For illegality in organization of court—A judgment of a domestic court of superior jurisdiction has been held not subject to collateral attack on the ground that the court rendering it had no legal existence,[3] or that the judge was disqualified.[4]

5145. For error and irregularity—A judgment of a domestic court of superior jurisdiction cannot be attacked by parties or strangers for error or irregularity.[5] Mere irregularity in practice does not render a judgment void, though it appears on the face of the record.[6] Irregularity in this connection may be defined as a failure to follow appropriate and necessary rules of practice or procedure, omitting some act essential to the due and orderly conduct of the action or proceeding, or doing it in an improper manner.[7] Defects in pleadings, or in findings of the court do not render a judgment subject to collateral attack.[8] In a collateral proceeding it is conclusively presumed that every entry made in the records of the court is a statement of the action of the court, and was made by its direction and authority.[9] The general rule applies to judgments of federal courts sitting in this state,[10] to judgments of the probate court,[11] to judgments for taxes[12] and special assessments,[13] and to judgments of justices of the peace.[14] A judgment cannot be impeached, either in or out of the state, by showing that it was based on a mistake of law.[15] In an early case of questionable authority it was said that where jurisdiction is specially conferred by statute, and the court expressly prohibited from exercising it, unless certain conditions have been complied with, its judgment is not valid, unless it appears affirmatively that the conditions were complied with.[16]

18+645; Frost v. St. Paul B. & I. Co., 57–325, 59+308. See Ferguson v. Kumler, 11–104(62); Pabst v. Jensen, 68–293, 71+384; Nolan v. Dyer, 75–231, 77+786; Schmitt v. Dahl, 88–506, 93+665; Irish v. Daniels, 100–189, 110+968.

[3] Burt v. Winona etc. Ry., 31–472, 18+285, 289.

[4] State v. Brown, 12–538(448).

[5] Hotchkiss v. Cutting, 14–537(408) (failure of clerk to sign judgment); Robertson v. Davidson, 14–554(422) (judgment in replevin not in alternative); Wood v. Myrick, 16–494(447) (error in probate decree of distribution); Smith v. Valentine, 19–452(393) (omission to enter rule to plead and order for publication); Newman v. Home Ins. Co., 20–422(378) (error in judgment determining title); Hayes v. Shaw, 20–405(355) (rendering judgment in favor of party after his death); Stocking v. Hanson, 22–542 (rendering judgment against party after his death); State v. Macdonald, 24–48 (judgment of naturalization); Brown v. Atwater, 25–520 (want of proof of service of summons, want of findings of fact, and want of clerk's signature); Weld v. Weld, 28–33, 8+900 (order for support of wife though no divorce granted); Dillon v. Porter, 36–341, 31+56 (error in entering judgment against three instead of four defendants); Hersey v. Walsh, 38–521, 38+613 (entry of default judgment by clerk without assessment of damages); In re Williams, 39–172, 39+65 (prisoner sentenced for less than the prescribed term); Lane v. Innes, 43–137, 45+4 (sufficiency of finding to support judgment—defect in form of summons); Gale v. Townsend, 45–357, 47+1064 (action against partners by firm name—personal judgment against partners served); Crombie v. Little, 47–581, 50+823 (failure to file complaint); In re Ellis, 55–401, 56+1056 (trial in wrong county); Carlson v. Phinney, 56–476, 58+38 (judgment entered on stale claim); Mahoney v. Mahoney, 59–347, 61+334 (error in adjudging alimony a specific lien on homestead); Kiewert v. Anderson, 65–491, 67+1031 (proceedings to vacate plat—failure to record in office of register of deeds); Bradley v. Sandilands, 66–40, 68+321 (misnomer of plaintiff in summons); State v. Wolfer, 68–465, 71+681 (failure to sentence prisoner to hard labor); State v. Jamison, 69–427, 72+451 (judgment for alimony); West Duluth L. Co. v. Bradley, 75–275, 77+964 (judgment by default—failure to file note with clerk); Kubesh v. Hanson, 93–259, 101+73 (defective pleadings).

[6] Vaule v. Miller, 64–485, 488, 67+540.

[7] Sache v. Wallace, 101–169, 112+386.

[8] Lane v. Innes, 43–137, 45+4; Kubesh v. Hanson, 93–259, 101+73.

[9] Hennessy v. St. Paul, 54–219, 55+1123.

[10] Ames v. Slater, 27–70, 6+418; Plainview v. Winona etc. Ry., 36–505, 32+745.

[11] See §§ 3660, 7774.

[12] See § 9361.

[13] See § 6885.

[14] See § 5317.

[15] Fauntleroy v. Lum, 210 U. S. 230.

[16] Ullman v. Lion, 8–381(338).

5146. Presumption of validity—A judgment of a court of superior jurisdiction is presumed valid until the contrary is shown.[17]

HOW PROVED

5147. Domestic judgments—A domestic judgment is proved by the judgment record or an authenticated copy thereof.[18] It cannot be proved by the docket entries or copies thereof.[19] It may be proved by the judgment roll or an authenticated copy thereof.[20] After the filing of a transcript of a justice's judgment in the office of the clerk of the district court, and the entry of such judgment in the docket of district court judgments, exemplifications of such transcript and docket entry, attested by the clerk, with the seal of the court annexed, are competent evidence to prove the judgment.[21]

ACTIONS ON JUDGMENTS

5148. Nature—An action on a judgment is a collateral proceeding.[22] It is an action on contract.[23]

5149. Action will lie on domestic judgment—An action will lie on a domestic judgment, even though execution might issue thereon.[24]

5150. Limitation of actions—The statute provides that "no action shall be maintained upon a judgment or decree of a court of the United States, or of any state or territory thereof, unless begun within ten years after the entry of such judgment." [25] An action in the courts of this state upon any judgment, whether domestic or foreign, must be brought within ten years from the entry thereof, regardless of the residence of the judgment debtor during that time.[26] A judgment is not a contract within the statute of limitations and is an exception to the general rule that a part payment, acknowledgment, or new promise, tolls the statute.[27] A judgment is a nullity after the running of the statute and no action or proceeding can be had thereon.[28] But an action on a judgment, if commenced within the ten years, may proceed to trial and judgment thereafter.[29] Equity follows the statute and will not enforce by its peculiar remedies a judgment against which the statute has run.[30] The day on which the judgment is entered is to be excluded in computing the time.[31] Prior to Laws 1902 c. 2 § 83, the statute governed judgments for taxes.[32]

5151. Leave of court—Costs—Costs are not recoverable by the plaintiff in an action on a domestic judgment between the same parties, unless such action was brought with previous leave of court for cause shown.[33]

5152. Pleading—Cases are cited below involving questions of pleading.[34]

[17] Gemmell v. Rice, 13–400(371); Hotchkiss v. Cutting, 14–537(408); Cone v. Hooper, 18–531(476, 479); Smith v. Valentine, 19–452(393); Herrick v. Butler, 30–156, 14+794; Hersey v. Walsh, 38–521, 38+613. See § 2347.

[18] Williams v. McGrade, 13–46(39); Todd v. Johnson, 50–310, 52+864.

[19] Brown v. Hathaway, 10–303(238); Todd v. Johnson, 50–310, 52+864.

[20] In re Ellis, 55–401, 56+1056.

[21] Herrick v. Ammerman, 32–544, 21+836. See Todd v. Johnson, 50–310, 52+864.

[22] Vaule v. Miller, 69–440, 72+452.

[23] Midland Co. v. Broat, 50–562, 52+972.

[24] Dole v. Wilson, 39–330, 40+161; Merchants' Nat. Bank v. Gaslin, 41–552, 43+483; Sandwich Mfg. Co. v. Earl, 56–390, 57+938.

[25] R. L. 1905 § 4075.

[26] Gaines v. Grunewald, 102–245, 113+450.

[27] Olson v. Dahl, 99–433, 109+1001 (overruling Osborne v. Heuer, 62–507, 64+1151).

[28] Brown v. Dooley, 95–146, 103+894.

[29] Sandwich Mfg. Co. v. Earl, 56–390, 57+938; Gaines v. Grunewald, 102–245, 113+450. See Newell v. Dart, 28–248, 9+732.

[30] Newell v. Dart, 28–248, 9+732; Dole v. Wilson, 39–330, 40+161; Reed v. Siddall, 94–216, 102+453.

[31] Spencer v. Haug, 45–231, 47+794.

[32] See § 9526.

[33] R. L. 1905 § 4343; Merchants' Nat. Bank v. Gaslin, 41–552, 43+483.

[34] Lawrence v. Willoughby, 1–87(65) (requisite particularity in averments—variance in the amount and in the names of the parties held fatal); Holcombe v.

5153. Counterclaim—Equitable defence—Cancelation of judgment—By way of counterclaim or equitable defence, the defendant may plead facts which would justify a court of equity in canceling the judgment on the ground of want of jurisdiction in the court rendering it. A general denial of jurisdiction, or of service of summons is insufficient. The facts must be pleaded as fully as in an original action for the cancelation of the judgment.[35]

AS EVIDENCE

5154. Evidence of rendition and legal consequences—All judgments are conclusive evidence against all persons of the fact of their rendition and of the legal consequences thereof—of the existence of that state of things which they actually effect.[36]

5155. Between parties and privies—Whenever a judgment would operate between the parties or their privies as a bar or estoppel by verdict, they may use it as evidence of the facts upon which it is based, of the fact of its rendition, and of all the legal consequences resulting from its rendition, and as such it is conclusive.[37]

5156. Not evidence against strangers of facts on which based—Judgments are not evidence against strangers of the facts on which they are based.[38]

Tracy, 2–241(201) (answer alleging that judgment is not owned by plaintiff, but by another person, naming him, presents a good defence, though the particulars of the assignment are not stated); Holmes v. Campbell, 12–221(141) (defective complaint sustained as against objection first made after order for judgment); Gunn v. Peakes, 36–177, 30+466 (overruling Karns v. Kunkle, 2–313, 268; Smith v. Mulliken, 2–319, 273) (complaint on foreign judgment need not allege that court had jurisdiction of parties or subject-matter).

[35] Vaule v. Miller, 69–440, 72+452; Deering v. Poston, 78–29, 80+783; Stevenson v. Murphy, 106–243, 119+47.

[36] Williams v. McGrade, 13–46(39, 45) (existence of judgment as a fact); Newman v. Home Ins. Co., 20–422(378) (fact that party was a mortgagee of the premises); State v. Macdonald, 24–48 (fact of naturalization); Olmsted County v. Barber, 31–256, 261, 17+473 (existence of judgment as a fact); Hunter v. Cleveland etc. Co., 31–505, 512, 18+645 (fact of the rendition of the judgment and of all the legal consequences resulting from that fact); Corser v. Kindred, 40–467, 42+297 (existence of mechanic's lien); Charles v. Charles, 41–201, 204, 42+935 (fact of divorce); Frost v. St. Paul B. & I. Co., 57–325, 59+308 (evidence of its rendition and of all the legal consequences resulting from its rendition—transfer of title); Thurston v. Thurston, 58–279, 59+1017 (fact of divorce); Kurtz v. St. P. & D. Ry., 61–18, 24, 63+1 (all judgments whatever are conclusive proof, against all the world, of the existence of that state of things which they actually effect—probate proceedings—link in chain of title); Farrell v. St. Paul, 62–271, 276, 64+809 (evidence of all legal consequences of judgment—fact of divorce); Pabst v. Jensen, 68–293, 71+384 (conclusive evidence of the fact of the rendition of the judgment and of all legal consequences resulting from that fact); Minn. D. Co. v. Johnson, 94–150, 102+381 (link in chain of title). See §§ 5157, 5158.

[37] Knox v. Randall, 24–479, 494; Marvin v Dutcher, 26–391, 4+685; McClung v. Condit, 27–45, 6+399; Bowe v. Minn. M. Co., 44–460, 47+151.

[38] Mower v. Hanford, 6–535(372); Bruggerman v. Hoerr, 7–337(264); State v. Hogard, 12–293(191); Marsh v. Armstrong, 20–81(66); Braley v. Byrnes, 20–435(389); Gage v. Stinson, 26–64, 1+806; Schroeder v. Lahrman, 26–87, 1+801; Winona v. Minn. Ry. C. Co., 27–415, 6+795, 8+148; Wahl v. Walton, 30–506, 16+397; Casey v. Sevatson, 30–516, 16+407; Olmsted County v. Barber, 31–256, 17+473; Morin v. St. P. etc. Ry., 33–176, 22+251; Chadbourn v. Rahilly, 34–346, 25+633; Hartman v. Weiland, 36–223, 30+815; Talbot v. Barager, 37–208, 34+23; Windom v. Schuppel, 39–35, 38+757; St. Paul etc. Ry. v. Robinson, 40–360, 42+79; Maloney v. Finnegan, 40–281, 41+979; Harper v. East Side Syndicate, 40–381, 42+86; Corser v. Kindred, 40–467; 42+297; Nichols v. Wadsworth, 40–547, 42+541; Banning v. Sabin, 41–477, 43+329; Cannon River M. Assn. v. Rogers, 42–123, 43+792; Bloom v. Moy, 43–397, 45+715; Nowak v. Knight, 44–241, 46+348; Burbank v. Wright, 44–544, 47+162; Banning v. Sabin, 45–431, 48+8; Backdahl v. Grand Lodge, 46–61, 48+454; Pioneer S. & L. Co. v. Bartsch, 51–474, 478, 53+764; Bradshaw v. Duluth I. M. Co., 52–59, 53+1066; Am. B. & L. Assn. v. Stoneman, 53–212, 54+1115; O'Riley v. Clampet, 53–539, 55+740; Thompson v. Johnson, 55–515, 57+223;

There is a single exception to this general rule in the case of judgments of courts of admiralty condemning ships as prize.[39] The general rule applies to judgments in rem as well as judgments in personam.[40] It applies to probate judgments.[41] It is competent for the legislature to make a judgment prima facie evidence against a stranger.[42]

5157. As a link in a chain of title—The rule that a judgment is admissible in evidence against all the world, as a link in a party's chain of title, does not apply to all judgments. It applies more particularly to judgments in partition proceedings, probate decrees, actions to foreclose mortgages or liens, and to all judgments which operate proprio vigore to transfer title, or such as render valid a disclosed link, which, without the judgment, would be defective or invalid. Such rule does not apply to ordinary judgments in actions to determine adverse claims, which do not purport to transfer title, or render valid an otherwise defective link in the chain of title.[43]

5158. Evidence of debt and relation of debtor and creditor—All judgments for the recovery of money are conclusive evidence against all persons of the existence of the debt and relation of debtor and creditor created by the judgment,[44] but they are not evidence, as against strangers, of the prior existence of a debt between the parties or of any other facts upon which they are based.[45]

AS A BAR OR ESTOPPEL—RES JUDICATA

5159. Basis of doctrine—The doctrine of res judicata is founded on considerations of public policy which find expression in the two maxims, "a man should not be twice vexed for the same cause" and "it is for the public good that there be an end of litigation."[46]

5160. Doctrine to be applied cautiously—The doctrine of res judicata is to be applied cautiously. Especially is this true as regards estoppel by verdict.[47]

5161. Distinction between estoppel by judgment and estoppel by verdict—There is a material difference between the effect of a judgment as a bar to a second action on the same cause of action and its effect as an estoppel in

Kurtz v. St. P. & D. Ry., 65–60, 67+808; Falconer v. Cochran, 68–405, 71+386; Smith v. St. Paul, 69–276, 72+104; Aldrich v. Chase, 70–243, 247, 73+161; Thompson v. Chi. etc. Ry., 71–89, 73+707; Smith v. Nat. C. Ins. Co., 78–214, 80+966; Hibbs v. Marpe, 84–10, 86+612; Schmitt v. Dahl, 88–506, 93+665; Minn. D. Co. v. Johnson, 94–150, 102+381; Freeborn County v. Helle, 105–92, 117+153.

[39] Farrell v. St. Paul, 62–271, 274, 64+809; Brigham v. Fayerweather, 140 Mass. 411. See Whalley v. Eldridge, 24–358, 361.

[40] Farrell v. St. Paul, 62–271, 64+809.

[41] Morin v. St. P. etc. Ry., 33–176, 22+251; Backdahl v. Grand Lodge, 46–61, 48+454; Kosmerl v. Snively, 85–228, 88+753. A probate judgment may have the effect of proving the facts upon which they are based, as against strangers, because they cannot be collaterally attacked by disproving such facts. See Pick v. Strong, 26–303, 3+697; Minn. L. & T. Co. v. Beebe, 40–7, 41+232; Lyon v. Gleason, 40–434, 42+286; Dunnell, Minn. Trial Book §§ 1112–1116.

[42] Brown v. Markham, 60–233, 62+123.

[43] Minn. D. Co. v. Johnson, 94–150, 102+381. See Newman v. Home Ins. Co., 20–422(378); Goldschmidt v. Nobles County, 37–49, 33+544; Frost v. St. Paul B. & I. Co., 57–325, 59+308; Kurtz v. St. P. & D. Ry., 61–18, 24, 63+1.

[44] Newman v. Home Ins. Co., 20–422 (378); Nichols v. Wadsworth, 40–547, 42+541; Erickson v. Paterson, 47–525, 50+699; Frost v. St. Paul B. & I. Co., 57–325, 59+308; Pabst v. Jensen, 68–293, 71+384; Smith v. Nat. C. Ins. Co., 78–214, 80+966. See Gage v. Stimson, 26–64, 1+806.

[45] Schmitt v. Dahl, 88–506, 93+665 and cases cited; Irish v. Daniels, 100–189, 110+968.

[46] State of Wis. v. Torinus, 28–175, 180, 9+725; Washburn v. Van Steenwyk, 32–336, 335, 20+324; Jordahl v. Berry, 72–119, 122, 75+10.

[47] State of Wis. v. Torinus, 28–175, 180, 9+725; Bengtsson v. Johnson, 75–321, 325, 78+3. See § 5162.

another action on a different cause of action. In the former case the judgment is an absolute bar to the second action. In the latter case, though not an absolute bar to the second action, it operates as an estoppel or conclusive evidence of all matters in issue and actually determined in the former action.[48]

5162. Estoppel by verdict—Different cause of action—Where the second action between the same parties is upon a different claim or demand—a different cause of action, the judgment in the prior action operates as an estoppel only as to those matters in issue or points of controversy upon the determination of which the finding or verdict was rendered.[49] In other words, the estoppel extends to all matters actually litigated, but not to matters which might have been litigated.[50] This is true though the former judgment was in rem.[51] All matters directly in issue and actually litigated in the former action are res judicata in the subsequent action. As to such matters the former judgment operates, not as a bar to the subsequent action, but as an estoppel by verdict or conclusive evidence.[52] Extrinsic evidence, when not inconsistent with the record and not impugning its verity, is admissible to show the facts actually litigated in the former action. To the same end the entire record may be examined.[53] When the record shows that a fact was litigated extrinsic evi-

[48] West v. Hennessey, 58–133, 137, 59+984; Swank v. St. P. C. Ry., 61–423, 63+1088; N. P. Ry. v. Slaght, 205 U. S. 122.

[49] Cromwell v. Sac County, 94 U. S. 351; Adams v. Adams, 25–72; State v. Cooley, 58–514, 525, 60+338; West v. Hennessey, 58–133, 137, 59+984; Swank v. St. P. C. Ry., 61–423, 63+1088.

[50] State v. Cooley, 58–514, 525, 60+338.

[51] Farrell v. St. Paul, 62–271, 64+809.

[52] Dixon v. Merritt 21–196 (issue as to satisfaction of a mortgage); Adams v. Adams, 25–72 (issue as to illegal consideration for a note); Marvin v. Dutcher, 26–391, 4+685 (issue as to fitness of person to act as administrator); McClung v. Condit, 27–45, 6+399 (issue as to liability under a lease); Chadbourn v. Rahilly, 28–394, 10+420 (issue as to mortgage—amount of debt secured—subrogation); Boom v. St. Paul F. & M. Co., 33–253, 22+538 (issue of title to personalty); Goldschmidt v. Nobles County, 37–49, 33+544 (issue as to title to realty); Byrne v. Mpls. etc. Ry., 38–212, 36+339 (issue as to title to realty—issue as to whether a railway had been so constructed as to obstruct the natural flow of a stream); Ebert v. Long, 43–235, 45+226 (issue as to allowance of credits in adjusting an account); Guilford v. W. U. Tel. Co., 43–434, 46+70 (issue as to right to membership in a corporation and to have a certificate of stock issued); Bowe v. Minn. M. Co., 44–460, 47+151 (issue as to execution of a contract and its breach); Mpls. T. Co. v. Eastman, 47–301, 50+82, 930 (issue as to title to realty); Nash v. Adams, 55–46, 56+241 (issue as to priority between mortgage and mechanic's lien); Johnson v. Johnson, 57–100, 58+824 (issues in an action for divorce); Mitchell v. Chisholm, 57–148, 58+873 (issue as to title to realty and consideration for a note); West v. Hennessey, 58–133, 137, 59+984 (issues as to building contract and mechanics' liens); Johnson v. Vaule, 61–401, 63+1039 (issue as to value of property in replevin); Swank v. St. P. C. Ry., 61–423, 63+1088 (issues as to lease and rent); Thompson v. Crosby, 62–324, 64+823 (issue as to partnership); Augir v. Ryan, 63–373, 65+640 (issue as to issuance of corporate stock and illegal purposes of corporation); Eide v. Clarke, 65–466, 68+98 (issue as to title to realty); Breault v. Merrill, 72–143, 75+122 (issue as to lien on logs); Lytle v. Chi. etc. Ry., 75–330, 77+975 (issue as to execution and validity of assignment); O'Brien v. Manwaring, 79–86, 81+746 (issue as to good faith in the payment of money); Prendergast v. Searle, 81–291, 84+107 (issue as to relation of landlord and tenant); Wagener v. St. Paul, 82–148, 84+734 (issue as to title to realty); Clark v. Gaar, 84–270, 87+777 (issues as to fraud and payment); Keene v. Lobdell, 85–110, 88+251 (issues as to a lease and the amount of rent due); Phelps v. Western R. Co., 89–319, 94+1085, 1135 (issue as to certain contracts between an assignee of the purchaser at a mortgage sale and the mortgagor); Skordal v. Stanton, 89–511, 95+449 (issue as to consideration for a note); McLean v. Hughes, 102–174, 112+1013 (issue as to liability of holder of deed in escrow for refusal to deliver it); Dohs v. Holbert, 103–283, 114+961 (issue as to fraud on creditors in transfer of an insurance policy).

[53] Boom v. St. Paul F. & M. Co., 33–253, 22+538; Andrews v. School Dist., 35–70, 27+303; Irish Am. Bank v. Ludlum, 56–317, 57+927; Augir v. Ryan, 63–373, 65+640. See Estes v. Farnham, 11–423 (312, 322).

dence is inadmissible to prove that it was not.[54] A judgment containing a clear, precise, and certain adjudication of title, cannot be controlled by any admission or disclaimer in the answer contrary to the judgment.[55] When resort is had to extrinsic evidence, it must be made to appear that the issues claimed to have been litigated were necessarily involved in the former verdict or finding.[56] A former judgment is conclusive, by way of estoppel, only as to facts without the existence and proof or admission of which it could not have been rendered.[57] Where a material fact, which is decisive of the cause, is tendered as an issue, and not withdrawn, a determination adversely to the party tendering such issue is conclusive against him in a subsequent action involving the same fact, whether he introduced evidence to support such issue or not.[58] If there is reasonable doubt as to whether a fact was actually litigated in a former action there is no estoppel.[59] Matters which are passed upon only incidentally are not res judicata in a subsequent action.[60] If a matter was not in issue in the former action there is of course no estoppel.[61]

5163. Estoppel by judgment—Former judgment as a bar—General rule—A final judgment on the merits is an absolute bar to another action between the same parties on the same cause of action. It is a finality as to the claim or demand in controversy, concluding the parties and their privies, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. In other words, it is conclusive upon the parties and their privies not only as to every matter which was actually litigated, but also as to every matter either of claim or defence, which might have been litigated.[62] Where the cause of action is entire and indivisible, the judgment determines all the rights of the parties upon it, though it may be but partially presented to the court. And all claim for relief, special or general, upon the cause of action or defence, is disposed of and determined by the judgment, when the particular circumstances justifying such relief are not pleaded, as effectually as when they are fully set out.[63] That the remedy sought, or the mere form of action, may be different, does not prevent the estoppel of the former adjudication. If, upon the facts in issue in the former action, the plaintiff was entitled in that action to a remedy such as the law awards as compensation or redress for the alleged wrong, or if, upon those facts, he was entitled to no remedy, an adjudication of his right to recover in that action bars his right to afterwards seek a different remedy, upon the same facts or cause of action.[64] As a general rule a party asserting a right by action is barred by a judgment on the merits

[54] Long v. Webb, 24–380; Schmitt v. Schmitt, 32–130, 19+649.

[55] Mpls. T. Co. v. Eastman, 47–301, 50+82, 930.

[56] Irish Am. Bank v. Ludlum, 56–317, 57+927; Macomb v. Hanley, 61–350, 63+744.

[57] Macomb v. Hanley, 61–350, 63+744; Neilson v. Penn. C. & O. Co., 78–113, 80+859.

[58] O'Brien v. Manwaring, 79–86, 81+746.

[59] Augir v. Ryan, 63–373, 65+640.

[60] Marvin v. Dutcher, 26–391, 4+685.

[61] Smith v. Buse, 35–234, 28+220; Wetherell v. Stewart, 35–496, 29+196; Fuller v. Roller, 45–152, 47+651; Tykeson v. Bowman, 60–108, 61+909; Alexander v. Thompson, 101–5, 111+385.

[62] Cromwell v. Sac County, 94 U. S. 351; N. P. Ry. v. Slaght, 205 U. S. 122; Thompson v. Myrick, 24–4; Adams v. Adams, 25–72, 76; Hardin v. Palmerlee, 28–450, 10+773; Thomas v. Joslin, 36–1, 29+344; Bazille v. Murray, 40–48, 41+238; Guilford v. W. U. Tel. Co., 43–434, 46+70; Swank v. St. P. C. Ry., 61–423, 63+1088; Veline v. Dahlquist, 64–119, 121, 66+141; Northern T. Co. v. Crystal Lake C. Assn., 67–131, 69+708; Kaufer v. Ford, 100–49, 53, 110+364.

[63] Thompson v. Myrick, 24–4.

[64] Hardin v. Palmerlee, 28–450, 452, 10+773; Hatch v. Coddington, 32–92, 19+393.

as to all media concludendi or grounds for asserting the right known when the action was brought.[65]

5164. Verdict or findings must pass into judgment—A verdict,[66] or finding of the court,[67] must ordinarily pass into judgment before it can operate as a bar or estoppel. This seems like sacrificing substance to form.[68]

5165. Estoppel must be mutual—The estoppel must be mutual. Unless both parties are bound by the judgment it will not operate as a bar or estoppel in favor of either.[69] It is no objection that there are other parties to the action not bound.[70]

5166. Not a bar to subsequently accruing rights—A judgment is never a bar to the assertion of rights accruing subsequent to its rendition.[71]

5167. Indivisible causes of action—Splitting—A single and indivisible cause of action, either ex contractu or ex delicto, cannot be divided and made the subject of several actions. When one brings an action on a contract, he is bound to submit to the court all claim that he then has to its relief upon that contract. If there are several grounds for relief, they constitute but one cause of action, and the judgment determines them all. He cannot recover a part of his damages from the breach of the contract in one action and the remainder in another. And in an action ex delicto all the damages to which a party is entitled at the time, present or prospective, must be recovered in a single action.[72] Injuries to the person and injuries to the property of the person injured, both resulting from the same tortious act, are separate items of damage, constituting one cause of action within this rule.[73] The rule applies to a claim asserted by the defendant in his answer, as well as to a claim asserted by the plaintiff in his complaint.[74] There is no constitutional objection to splitting causes of action. It may be done when authorized by statute.[75]

5168. Independent causes of action—A party is not bound to unite in a single action several independent causes of action though they relate to the same subject-matter and might be joined. A judgment on one cause of action is never a bar to an action on another distinct cause of action. While a party is bound to litigate every question pertaining to a single cause of action in one action, he is not bound to litigate therein every question pertaining to the subject-matter thereof. Causes of action may be distinct though they re-

[65] U. S. v. California etc. Co., 152 U. S. 355; Fauntleroy v. Lum, 210 U. S. 230.

[66] Schurmeier v. Johnson, 10–319(250). See Craig v. Dunn, 47–59, 62, 49+396.

[67] Child v. Morgan, 51–116, 52+1127.

[68] See Downer v. Cripps, 170 Mass. 345.

[69] Nowak v. Knight, 44–241, 46+348; Connolly v. Connolly, 26–350, 4+233; State v. Linton, 42–32, 43+571; Whitcomb v. Hardy, 68–265, 71+263; Thompson v. Chi. etc. Ry., 71–89, 97, 73+707.

[70] Whitcomb v. Hardy, 68–265, 71+263.

[71] State of Wis. v. Torinus, 28–175, 9+725; Brakken v. Mpls. etc. Ry., 32–425, 21+414; McEvoy v. Bock, 37–402, 34+740; Ogden v. Ball, 40–94, 41+453; Ramsey County B. Soc. v. Lawton, 49–362, 51+1163; Woodcock v. Carlson, 49–536, 52+142; Guilford v. W. U. Tel. Co., 59–332, 61+324; McMullan v. Dickinson, 60–156, 62+120; Doescher v. Spratt, 61–326, 63+736; Wheelock v. Svensgaard, 63–486, 65+937. See Eide v. Clarke, 65–466, 68+98.

[72] Davis v. Sutton, 23–307; Thompson v. Myrick, 24–4, 14; Geiser v. Farmer, 27–428, 8+141; American etc. Co. v. Thornton, 28–418, 10+425; Memmer v. Carey, 30–458, 15+877; Pierro v. St. P. etc. Ry., 37–314, 34+38; Id., 39–451, 40+520; Ziebarth v. Nye, 42–541, 544, 44+1027; Bowe v. Minn. M. Co., 44–460, 47+151; Thurston v. Thurston, 58–279, 286, 59+1017; State v. Weyerhauser, 68–353, 368, 71+265; O'Brien v. Manwaring, 79–86, 81+746; King v. Chi. etc. Ry., 80–83, 82+1113; Gilbert v. Boak, 86–365, 90+767; Burgraf v. Byrnes, 94–418, 103+215; Wilson v. Farnham, 97–153, 106+342. See McPherson v. Runyon, 41–524, 43+392.

[73] King v. Chi. etc. Ry., 80–83, 82+1113. See 15 Harv. L. Rev. 752.

[74] Geiser v. Farmer, 27–428, 8+141.

[75] State v. Weyerhauser, 68–353, 368, 71+265.

late to the same subject-matter and the relief sought is the same.[76] The conclusive character of a judgment extends only to identical issues, and they must be such not merely in name, but in fact and in substance. If the vital issue of the later litigation has been in truth already determined by an earlier judgment, it may not again be contested, but if it has not—if it is intrinsically and substantially an entirely different issue, even though capable of being described in similar language, or by a common form of expression—then the truth is not excluded, and the judgment is no answer to the different issue.[77] While a judgment on one cause of action is not a bar to an action on another distinct cause of action, it may operate as an estoppel by verdict or as conclusive evidence of particular issues in the later action.[78]

5169. Test of distinct causes of action—A proper test, in determining whether a prior judgment between the same parties in relation to the same subject-matter, is a bar to a subsequent action, is to inquire whether the same evidence would sustain both actions.[79] The fact that much of the evidence in the two actions is the same is not decisive, where it clearly appears that the two causes of action are distinct.[80]

5170. Merger of original cause of action—Whenever a cause of action passes into judgment—transit in rem adjudicatam—it is merged in the judgment and cannot be made the basis of another action.[81]

5171. Inoperative against strangers—A judgment does not operate as a bar or estoppel against strangers.[82]

5172. Who may assert—One not a party defending—One not a party to an action, or in privity with a party, cannot avail himself of the judgment therein as a bar or estoppel,[83] though he may use it as evidence for certain purposes.[84] One not a party to an action, or in privity with a party, cannot claim the benefit of the judgment therein as a bar or estoppel or be bound thereby, on the ground that he was the real defendant in interest and conducted the defence, unless he did so openly, and to the knowledge of the plaintiff, and for the defence of his own interests.[85]

5173. Who are privies—A tenant is in privity with his landlord;[86] a wife with her husband, as regards her contingent interest in his realty;[87] a creditor, with a receiver appointed in supplementary proceedings at his instance;[88] a stockholder, with the corporation;[89] the voters of a county, with a relator in

[76] Stark v. Starr, 94 U. S. 485; First Nat. Bank v. Rogers, 22-224; State of Wis. v. Torinus, 28-175, 9+725; Linne v. Stout, 44-110, 46+319; Skoglund v. Mpls. St. Ry., 45-330, 47+1071; West v. Hennessey, 58-133, 59+984; State v. Cooley, 58-514, 60+338; Wheelock v. Svensgaard, 63-486, 65+937; Wayzata v. G. N. Ry., 67-385, 69+1073; Jordahl v. Berry, 72-119, 75+10; Rossman v. Tilleny, 80-160, 83+42; Wilson v. Farnham, 97-153, 106+342; Stitt v. Rat Portage L. Co., 101-93, 111+948 and cases under §§ 5205, 5206.

[77] Wayzata v. G. N. Ry., 67-385, 69+1073.

[78] See § 5162.

[79] West v. Hennessey, 58-133, 136, 59+984; Wheelock v. Svensgaard, 63-486, 65+937; Wayzata v. G. N. Ry., 67-385, 390, 69+1073; Rossman v. Tilleny, 80-160, 83+42; Kaaterud v. Gilbertson, 96-66, 104+763; Woodman v. Blue Grass L. Co., 98-87, 107+1052.

[80] Stitt v. Rat Portage L. Co., 101-93, 96, 111+948.

[81] Harlev v. Davis, 16-487(441); State of Wis. v. Torinus, 28-175, 9+725; Davison v. Harmon, 65-402, 67+1015; State v. Ward, 79-362, 368, 82+686; McKittrick v. Cahoon, 89-383, 95+223; Loomis v. Wallblom, 94-392, 395, 102+1114; Olson v. Dahl, 99-433, 109+1001. See Temple v. Scott, 3-419(306); Washington L. I. Co. v. Marshall, 56-250, 255, 57+658.

[82] See cases under § 5156.

[83] Whitcomb v. Hardy, 68-265, 71+263.

[84] See § 5154.

[85] Schroeder v. Lahrman, 26-87, 1+801; Cannon River M. Assn. v. Rogers, 42-123, 43+792; Hendricks v. Dean, 105-162, 117+426.

[86] Blew v. Ritz, 82-530, 85+548.

[87] Stitt v. Smith, 102-253, 113+632.

[88] Dohs v. Holbert, 103-283, 114+961.

[89] Willius v. Mann, 91-494, 98+341.

mandamus proceedings concerning the removal of a county seat;[90] persons interested in the estate of a decedent, with the executor or administrator thereof;[91] and railway bondholders, with a trustee under a mortgage.[92] To constitute one the privy by estate of another, it must appear that he succeeded, after the bringing of the action by which he is sought to be concluded, to an estate or interest held by a party to the judgment.[93]

5174. Parties must have been adversary—A judgment will not operate as a bar or estoppel between parties unless they were adversary parties in the action in which it was rendered.[94] It has been held, however, that where conflicting claims to the ownership of property are affirmatively made and set up in their answers by several defendants in an action, the court may by its judgment determine the rights of such defendants among themselves; and such judgment will be evidence of title in subsequent actions where the same is called in question.[95]

5175. Parties bound must be certain—A judgment will not operate as a bar or estoppel against a party unless it is clear from the record that it was rendered against him. A court will examine the entire record to ascertain the fact.[96]

5176. Persons answerable over—Sureties—Indemnitors—Where A is answerable over to B on account of a judgment recovered against B the judgment is conclusive against A, if he actually defended the action in which the judgment was rendered, or if he had due notice of the pendency of the action and an opportunity to defend it.[97] The notice need not be in writing, but it must clearly apprise the person to whom it is given of the pendency of the action and that the defendant expects him to defend it.[98] Sureties on official bonds are bound prima facie by judgments against their principals for official misconduct.[99] The order of a probate court on the final settlement of the account of a guardian has been held conclusive upon his sureties.[1] Whether sureties are bound by a judgment against their principal may depend on their contract.[2] A grantor of realty who, though not a party thereto, but to protect himself from liability under the covenants of his conveyance, defends an action brought by a third person against his grantee to recover the property and damages for its wrongful detention, is not personally liable to the plaintiff therein for the payment of the judgment. Having conducted the litigation, though not a party, he is bound by the judgment, but his personal obligation to pay and discharge it extends only to his grantee.[3]

5177. Parties bound by representation—Contingent interests—One not personally a party to an action may be bound by a judgment therein on the

[90] Kanfer v. Ford, 100-49, 110+364.
[91] Connolly v. Connolly, 26-350, 4+233.
[92] Grant v. Winona etc. Ry., 85-422, 89+60.
[93] Minn. D. Co. v. Johnson, 94-150, 102+381; Id., 96-91, 104+1149, 107+740. See Rogers v. Holyoke, 14-220(158); Fulton v. Andrea, 70-445, 452, 73+256.
[94] Pioneer S. & L. Co. v. Bartsch, 51-474, 53+764.
[95] Goldschmidt v. Nobles County, 37-49, 33+544.
[96] Banning v. Sabin, 41-477, 43+329; City Nat. Bank v. Hager, 52-18, 53+867.
[97] Hersey v. Long, 30-114, 14+508 (seller of personalty warranting title); Mpls. M. Co. v. Wheeler, 31-121, 16+698 (responsibility for negligence); Mackey v. Fisher, 36-347, 31+363 (contractor—liability for negligence—promise to "take care" of action); Reed v. McGregor, 62-94, 64+88 (surety on bond against mechanics' liens); Fleckten v. Spicer, 63-454, 65+926 (vendor of land agreeing to convey by a "good and sufficient deed"); Olson v. Schultz, 67-494, 70+779 (landlord—liability for negligence—unsafe premises); G. N. Ry. v. Akeley, 88-237, 92+959 (surety on indemnity bond against mechanics' liens).
[98] Hersey v. Long, 30-114, 14+508.
[99] Beauchaine v. McKinnon, 55-318, 56+1065; Hursey v. Marty, 61-430, 63+1090.
[1] Jacobson v. Anderson, 72-426, 75+607; Cross v. White, 80-413, 83+393.
[2] Pioneer S. & L. Co. v. Bartsch, 51-474, 53+764.
[3] Hendricks v. Dean, 105-162, 117+426.

principle of representation. A contingent interest in realty is bound by a judgment in an action to quiet the title thereto where the court has before it all the parties that can be brought before it, and it acts on the property according to the rights that appear, there being no fraud or collusion.[4]

5178. Parties must appear in same capacity—A judgment will not operate as a bar or estoppel against a person unless he appears in the two actions in the same capacity.[5]

5179. Judgment must be on the merits—To operate as an estoppel or bar a judgment must be on the merits.[6] The record of the action may be examined to determine whether the judgment was rendered on the merits.[7]

5180. Judgment of dismissal—Nonsuit—A dismissal of an action by the court on the trial before final submission, for failure of the plaintiff to prove a cause of action, is not a final determination on the merits, and the judgment entered thereon does not operate as a bar or estoppel.[8] This is also true of a dismissal entered by the plaintiff before trial,[9] or ordered by the court on the trial upon motion of the plaintiff.[10] A judgment that an action for a given cause "be dismissed without prejudice to another action," is, by its terms, no bar to another action for the same cause.[11] A written stipulation, before trial, that an action be dismissed, without costs, does not authorize the entry of a judgment as upon the merits, such as would bar a subsequent action for the same cause.[12] Though a judgment is in form one of dismissal, it will operate as a bar or estoppel if, in fact, it is on the merits.[13] It will so operate where it is entered in pursuance of a stipulation of the parties that the action be dismissed "on its merits." [14] A dismissal of an action under R. S. (Wis.) 1898 § 3072, has been held not a judgment on the merits.[15]

5181. Judgment by default—A judgment by default is just as conclusive an adjudication between the parties of whatever is essential to support the judgment as one rendered after an answer and contest. Findings of fact in such cases are a declaration of the court of the matters which it determines and are conclusive as to them in subsequent controversies between the parties. If there are no findings, then the facts set up in the complaint and essential to the judgment are binding upon the parties in subsequent litigation whether upon the same or a different cause of action.[16]

[4] Mayall v. Mayall, 63–511, 65+942; Mathews v. Lightner, 85–333, 88+992.

[5] Bamka v. Chi. etc. Ry., 61–549, 63+1116. See Whitney v. Pinney, 51–146, 53+198.

[6] Gerrish v. Pratt, 6–53(14); Terryll v. Bailey, 27–304, 7+261; State of Wis. v. Torinus, 28–175, 9+725; Andrews v. School Dist., 35–70, 27+303; Craver v. Christian, 34–397, 26+8; Daley v. Mead, 40–382, 42+85.

[7] Andrews v. School Dist., 35–70, 27+303.

[8] Craver v. Christian, 34–397, 26+8; Andrews v. School Dist., 35–70, 27+303; Woolsey v. Bohn, 41–235, 42+1022; McCune v. Eaton, 77–404, 80+355; Cartwright v. Hall, 88–349, 93+117; Woods v. Lindvall, 48 Fed. 62.

[9] Phelps v. Winona etc. Ry., 37–485, 35+273; Rolfe v. Burlington etc. Ry., 39–398, 40+267; Walker v. St. P. C. Ry., 52–127, 53+1068; Mulcahy v. Dieudonne, 103–352, 115+636; Holmgren v. Isaacson, 104–84, 116+205. See Day v. Mountin, 89–297, 94+887.

[10] Spurr v. Home Ins. Co., 40–424, 42+206. See Mulcahy v. Dieudonne, 103–352, 115+636.

[11] Gunn v. Peakes, 36–177, 30+466.

[12] Rolfe v. Burlington etc. Ry., 39–398, 40+267.

[13] State v. Hard, 25–460; Boom v. St. Paul F. & M. Co., 33–253, 22+538; Andrews v. School Dist., 35–70, 27+303; Thomas v. Joslin, 36–1, 29+344; Wagner v. Wagner, 36–239, 30+766; Winnebago P. Mills v. N. W. etc. Co., 61–373, 63+1024; Johnson v. Vaule, 61–401, 63+1039; Nielsen v. Albert Lea, 87–285, 91+1113; Day v. Mountin, 89–297, 94+887.

[14] Cameron v. Chi. etc. Ry., 51–153, 53+199.

[15] Kerrigan v. Chi. etc. Ry., 86–407, 90+976.

[16] Last Chance M. Co. v. Tyler M. Co., 157 U. S. 683; Doyle v. Hallam, 21–515; Adams v. Adams, 25–72; Holland v. Du-

5182. Judgment on the pleadings—A judgment on the pleadings is not a bar to a subsequent action based on materially different allegations of fact.[17]

5183. Judgment on demurrer—A judgment upon the facts of an action, as presented in the complaint and confessed by a general demurrer, is upon the merits, and is as effectual as a bar or estoppel as if there had been a verdict on the same facts.[18] This is so, as regards the facts so admitted, though the second action is on a different cause of action.[19] But a judgment sustaining a general demurrer is not a bar to a subsequent action based on a good complaint for the same cause of action.[20]

5184. Judgment on directed verdict—If, upon final submission of a case, the court directs a verdict, it is a disposition of the case on the merits.[21] But if the judgment roll shows that the court directed the verdict as a mode of dismissing the action, it will not operate as an estoppel.[22]

5185. Judgment on joint obligation—At common law a judgment against one or more of several joint obligors was a bar to a subsequent action against the other obligors.[23] This rule has been abrogated by statute in this state.[24]

5186. Judgment against one of several tortfeasors—A judgment against one or more of several tortfeasors is not a bar to an action against the others.[25]

5187. Vacated judgment—A judgment which has been vacated has no force as a bar or estoppel.[26]

5188. Judgment unenforceable by execution—The mere fact that a judgment is unenforceable by execution because of lapse of time, does not affect its operation as a bar or estoppel.[27]

5189. Judgment in action for divorce—The doctrine of res judicata is applicable to actions for divorce.[28]

5190. Mandamus—The doctrine of res judicata is applicable to mandamus.[29]

5191. Judgment in ejectment—The doctrine of res judicata now applies to a judgment in ejectment, but it did not at common law.[30]

5192. Foreign judgments—By virtue of the federal constitution a judgment of a sister state has the same effect as a bar or estoppel as a domestic judgment.[31]

5193. Criminal and civil actions—A judgment in a civil action does not operate as a bar or estoppel against the parties in a criminal action.[32]

5194. Erroneous decision—The fact that a judgment is erroneous in point of law does not affect its force as a bar or estoppel in a subsequent action on

luth etc. Co., 65-324, 68+50; Northern T. Co. v. Crystal Lake C. Assn., 67-131, 69+708; Sodini v. Sodini, 94-301, 102+861.

[17] Gerrish v. Pratt, 6-53(14); Woodcock v. Carlson, 49-536, 52+142. See White v. Behrens, 60-495, 62+1127.

[18] Carlin v. Brackett, 38-307, 37+342; Dohs v. Holbert, 103-283, 114+961; N. P. Ry. v. Slaght, 205 U. S. 122.

[19] Bissell v. Spring Valley, 124 U. S. 225.

[20] Gerrish v. Pratt, 6-53(14); West v. Hennessey, 58-133, 59+984; Swanson v. G. N. Ry., 73-103, 75+1033; Watson v. St. P. C. Ry., 76-358, 79+308.

[21] Andrews v. School Dist., 35-70, 27+303.

[22] Converse v. Sickles, 146 N. Y. 200.

[23] Davison v. Harmon, 65-402, 67+1015. See Engstrand v. Kleffman, 86-403, 90+1054.

[24] R. L. 1905 § 4282.

[25] Engstrand v. Kleffman, 86-403, 90+1054.

[26] Winona v. Minn. Ry. C. Co., 27-415, 6+795, 8+148; Hershey v. Meeker Co. Bank, 71-255, 73+967.

[27] Bazille v. Murray, 40-48, 41+238.

[28] Wagner v. Wagner, 36-239, 30+766; Evans v. Evans, 43-31, 44+524; Thurston v. Thurston, 58-279, 59+1017; Peterson v. Peterson, 68-71, 70+865; Sprague v. Sprague, 73-474, 76+268.

[29] State v. Hard, 25-460; Kaufer v. Ford, 100-49, 110+364. See State v. Cooley, 58-514, 60+338; Id., 65-406, 68+66.

[30] Doyle v. Hallam, 21-515; Bazille v. Murray, 40-48, 41+238; Lewis v. Hogan, 51-221, 53+367.

[31] Cone v. Hooper, 18-531(476); Washburn v. Van Steenwyk, 32-336, 357, 20+324. See § 5207.

[32] State v. Wenz, 41-196, 42+933. See State v. Hogard, 12-293(191).

the same cause of action.[33] An erroneous decision does not bind the parties in a subsequent action on a different cause of action.[34]

5195. Equitable relief not obtainable in former action—Where it is impossible to obtain equitable relief in an action, it may be sought in a subsequent action.[35]

5196. Necessity of asserting equities—A defendant is not ordinarily bound to assert equities entitling him to affirmative relief. He may reserve them for a separate action.[36] Under a former statute the rule was otherwise.[37]

5197. Necessity of asserting counterclaim—A judgment in an action in which a counterclaim might have been asserted is not a bar to a subsequent action on the counterclaim.[38]

5198. Time when judgment was rendered immaterial—It is immaterial whether a judgment was rendered before or after the commencement of the action in which it is interposed as a bar or estoppel.[39]

5199. Applicable in equity—The doctrine of res judicata is applicable in equity as well as at law. A judgment at law may be pleaded as a bar to a suit in equity.[40]

5200. Effect of granting new trial—The granting of a new trial defeats the operation of a judgment as a bar or estoppel,[41] but the pendency of a motion for a new trial does not.[42]

5201. Effect of appeal—It is an open question in this state whether an appeal from a judgment suspends its operation as a bar or estoppel. It has been held that an appeal from an order vacating a judgment does not reinstate the judgment so as to give it operation as a bar or estoppel.[43]

5202. Estoppel in pais—A person may be bound by a judgment by virtue of conduct creating an estoppel in pais.[44]

5203. Stipulation of parties—Pending an appeal in an action, the parties stipulated that certain rights then in controversy between them should be determined by the decision of a certain question by the supreme court on that appeal, and the opinion on such decision afterwards given purported to decide that question. After such decision, another action was brought to determine those rights, and on the trial the stipulation and the opinion were given in evidence by the agreement of the parties. It was held that the parties, by their stipulation and agreement, made the decision of the question conclusive on the trial, even though it was not a material question on the appeal.[45]

5204. How asserted—Pleading—Motion—Stay—The defence of a bar by former judgment is in the nature of confession and avoidance and must be specially pleaded as new matter.[46] In pleading the defence it is sufficient to allege in general terms that the facts alleged in the complaint in the former action were the same facts alleged in the complaint in the pending action.[47] A

[33] Bradshaw v. Duluth I. M. Co., 52–59, 66, 53+1066; Mitchell v. Chisholm, 57–148, 58+873.

[34] Swank v. St. P. C. Ry., 61–423, 427, 63+1088.

[35] First Nat. Bank v. Rogers, 22–224.

[36] See First Nat. Bank v. Rogers, 22–224; McCreary v. Casey, 45 Cal. 128.

[37] Fowler v. Atkinson, 6–503(350).

[38] Douglas v. First Nat. Bank, 17–35(18); Thoreson v. Mpls. H. Works, 29–341, 13+156; Osborne v. Williams, 39–353, 40+165.

[39] Allis v. Davidson, 23–442.

[40] Gerrish v. Pratt, 6–53(14).

[41] Winona v. Minn. Ry. C. Co., 27–415, 6+795, 8+148.

[42] Young v. Brehe, 19 Nev. 379.

[43] Hershey v. Meeker Co. Bank, 71–255, 73+967. See State v. Flint, 61–539, 541, 63+1113.

[44] St. Paul Nat. Bank v. Cannon, 46–95, 48+526.

[45] Abbott v. Anheuser, 60–266, 62+286.

[46] Bowe v. Minn. M. Co., 44–460, 47+151 See Schurmeier v. Johnson, 10–319(250) (defence insufficiently pleaded); Terryll v. Bailey, 27–304, 7+261 (necessity of alleging that former judgment was on the merits); Andrews v. School Dist., 35–70, 27+303 (id.).

[47] Whitcomb v. Hardy, 68–265, 71+263.

former judgment on a different cause of action need not be pleaded in order to take advantage of it as an estoppel by verdict.[48] When a judgment is sought to be used as evidence, rather than a bar or estoppel, it stands on the same footing as any other evidence and need not be pleaded.[49] If it appears on the face of a complaint that the cause of action is res judicata a general demurrer will lie.[50] A former judgment cannot be set up by motion after trial and verdict.[51] A former judgment may be a ground for a stay of proceedings.[52]

5205. Held a bar—A judgment in ejectment, a bar to an action to determine adverse claims;[53] a judgment in an action to foreclose a mortgage, a bar to an action to impeach the note and mortgage and secure their cancelation;[54] a judgment in an action for specific performance, a bar to an action for damages;[55] a judgment for damages, a bar to an action for specific performance;[56] a judgment in an action for breach of a contract to sell certain goods and for breach of a warranty of quality, a bar to an action for the price of certain of the goods delivered;[57] a dismissal of an alternative writ of mandamus, a bar to a subsequent application for a writ;[58] a judgment in replevin, a bar to an action for conversion;[59] a judgment in an action on a running account with a retail merchant, a bar to a subsequent action for another part of the same account;[60] a judgment in an action for conversion, a bar to an action of replevin;[61] a judgment in an action for specific performance, a bar to an action to reform the contract;[62] a judgment in an action for absolute divorce on the ground of cruel and inhuman treatment, a bar to an action for limited divorce on the same grounds;[63] a judgment in ejectment including recovery for use and occupation, a bar to an action for injury to the estate during the same period of occupation;[64] a judgment in an action by a parent for an injury to a child, a bar to an action by the child on reaching majority;[65] a judgment in replevin, a bar to an action for the value of the goods detained and damages;[66] a judgment in ejectment with damages for withholding, a bar to an action for damages for withholding;[67] a judgment of divorce including alimony, a bar to an action for alimony;[68] a judgment for rent, a bar to an action for the same rent;[69] a judgment in an action to abate a nuisance, a bar to an action to recover damages for the same nuisance;[70] a judgment in an action to determine boundary lines, a bar to an action of ejectment;[71] a judgment in an action to reform a deed, a bar to the assertion of title by a child of the grantor of the deed.[72]

5206. Held not a bar—A judgment for plaintiff in unlawful detainer proceedings to recover possession of lands after the time for redemption from

[48] Swank v. St. P. C. Ry., 61–423, 63+1088.
[49] Knox v. Randall, 24–479, 494; Marvin v. Dutcher, 26–391, 403, 4+685; McClung v. Condit, 27–45, 6+399.
[50] Monette v. Cratt, 7–234(176).
[51] Reilly v. Bader, 50–199, 52+522.
[52] Gerrish v. Pratt, 6–53(14).
[53] Doyle v. Hallam, 21–515; Bazille v. Murray, 40–48, 41+238.
[54] Allis v. Davidson, 23–442; Northern T. Co. v. Crystal Lake C. Assn., 67–131, 69+708.
[55] Thompson v. Myrick, 24–4.
[56] Thompson v. Myrick, 24–4, 13.
[57] Long v. Webb, 24–380.
[58] State v. Hard, 25–460.
[59] Hardin v. Palmerlee, 28–450, 10+773. See Woodcock v. Carlson, 49–536, 52+142; Veline v. Dahlquist, 64–119, 66+141.
[60] Memmer v. Carey, 30–458, 15+877.
[61] Hatch v. Coddington, 32–92, 19+393; Veline v. Dahlquist, 64–119, 66+141.
[62] Thomas v. Joslin, 36–1, 29+344.
[63] Wagner v. Wagner, 36–239, 30+766.
[64] Pierro v. St. P. etc. Ry., 37–314, 34+38; Id., 39–451, 40+520.
[65] Lathrop v. Schutte, 61–196, 63+493; Bamka v. Chi. etc. Ry., 61–549, 63+1116.
[66] Veline v. Dahlquist, 64–119, 66+141.
[67] Abrahamson v. Lamberson, 68–454, 71+676.
[68] Sprague v. Sprague, 73–474, 76+268.
[69] Keene v. Lobdell, 85–110, 88+251.
[70] Gilbert v. Boak, 86–365, 90+767.
[71] Krabbenhoft v. Wright, 101–356, 112+421.
[72] Lucy v. Lucy, 107–432, 120+754.

the foreclosure of a mortgage expired, in which the foreclosure proceedings were not put in issue, not a bar to an action by the mortgagor against the mortgagee to redeem from him as a mortgagee in possession, on the ground that the foreclosure was void;[73] a judgment by default in an action for the purchase price of goods, not a bar to an action for breach of warranty;[74] a judgment in an action for the purchase price of goods, not a bar to an action for a rescission of the sale for fraud;[75] a judgment for damages resulting from a nuisance, not a bar to an action for subsequently accruing damages from the same nuisance;[76] a judgment in an action against A and B to recover from A the price of property alleged to have been sold to him, no personal claim being asserted against B, not a bar to an action against B to recover the price of the property on a claim that the sale was to him instead of to A;[77] a judgment for an instalment of salary, not a bar to an action for a subsequently accruing instalment;[78] a judgment for a breach of a covenant of seizin, not a bar to an action for the breach of a covenant of quiet enjoyment;[79] a judgment for damages in replevin, not a bar to an action for malicious prosecution of replevin;[80] a judgment of limited divorce, not a bar to an action for absolute divorce;[81] a judgment in an action for the enforcement of a mechanic's lien, not a bar to an action to enforce a lien for the same materials, but on a different claim;[82] a judgment in favor of a husband for injury to his person, not a bar to an action by him for loss of services of his wife caused by the same act of negligence;[83] a judgment in an action for the recovery of money, not a bar to an action for damages for the breach of a separate contract to convey land;[84] a judgment for an instalment of money due, not a bar to an action for a subsequently accruing instalment;[85] a judgment on the pleadings in replevin, not a bar to an action for conversion;[86] a judgment in an action to rescind a contract for the sale of realty on the ground of fraud, not a bar to an action for damages for a breach of the contract;[87] a judgment in an action for breach of warranty on the sale of goods, not a bar to an action on a note given for the purchase price;[88] a judgment foreclosing a mortgage, not a bar to an action on a collateral promise to pay the debt secured by the mortgage;[89] a judgment of divorce, not a bar to an action for alimony;[90] a judgment in an action for a breach of a covenant to pay rent, not a bar to an action for negligence on the part of the tenant;[91] a judgment in favor of a physician for professional services, not a bar to an action by the patient against the physician for damages caused by malpractice in the performance of such services;[92] a judgment setting aside a foreclosure of a mortgage by advertisement, not a bar to an action to foreclose the mortgage;[93] a judgment in an action to

[73] Goenen v. Schroeder, 18–66(51).
[74] Thoreson v. Mpls. H. Works, 29–341, 13+156.
[75] Kraus v. Thompson, 30–64, 14+266.
[76] Brakken v. Mpls. etc. Ry., 32–425, 21+414; Byrne v. Mpls. etc. Ry., 38–212, 36+339; Bowers v. Miss. etc. Co., 78–398, 81+208.
[77] Richardson v. Richards, 36–111, 30+457.
[78] McEvoy v. Bock, 37–402, 34+740.
[79] Ogden v. Ball, 40–94, 41+453.
[80] McPherson v. Runyon, 41–524, 43+392.
[81] Evans v. Evans, 43–31, 44+524.
[82] Linne v. Stout, 44–110, 46+319.
[83] Skoglund v. Mpls. St. Ry., 45–330, 47+1071.
[84] Reynolds v. Franklin, 47–145, 49+648.
[85] Ramsey County B. Soc. v. Lawton, 49–362, 51+1163; McMullan v. Dickinson Co., 60–156, 62+120; Doescher v. Spratt, 61–326, 63+736.
[86] Woodcock v. Carlson, 49–536, 52+142.
[87] Marshall v. Gilman, 52–88, 53+811.
[88] Trautwein v. Twin City I. Works, 55–264, 56+750.
[89] Washington L. I. Co. v. Marshall, 56–250, 57+658; McRae v. Sullivan, 56–266, 57+659.
[90] Thurston v. Thurston, 58–279, 59+1017. See Sprague v. Sprague, 73–474, 76+268.
[91] Wright v. Tileston, 60–34, 61+823.
[92] Jordahl v. Berry, 72–119, 75+10.
[93] Lindgren v. Lindgren, 73–90, 75+1034.

recover a stipulated amount for services, not a bar to an action for the reasonable value of the services;[94] a judgment in an action to have a transaction declared a mortgage and to redeem, not a bar to an action for specific performance;[95] a judgment in an action to recover earnest money paid on a contract for the purchase of land, not a bar to an action for damages for fraud in connection with the contract;[96] a judgment in an action to foreclose a mortgage, not a bar to an action to foreclose another distinct mortgage;[97] a judgment for services, not a bar to an action for the same services but on a different contract.[98]

FOREIGN JUDGMENTS

5207. Full faith and credit—A judgment of a court of a sister state must be given full faith and credit in this state by virtue of the federal constitution. If the court had jurisdiction of the person and subject-matter, the judgment is as conclusive here as a bar, or as an estoppel, or as evidence, as in the state of its rendition.[99] The same rule applies to judgments of territorial courts.[1]

5208. Collateral attack—A judgment of a court of a sister state may be attacked collaterally by parties or strangers for want of jurisdiction either over the person or subject-matter, and this may be done notwithstanding jurisdictional averments in the record.[2] But jurisdiction in a superior court will be presumed in the absence of evidence to the contrary.[3] Such a judgment cannot be attacked collaterally by a party on the ground that it was obtained by fraud.[4] It cannot be collaterally attacked for error or irregularity.[5] The judgments of the courts of a territory stand on the same footing, as regards impeachment, as those of a state.[6]

5209. How proved—A foreign judgment may be proved by a copy thereof, duly authenticated by the duly-authenticated certificate of an officer properly authorized by law to give a copy.[7]

5210. Actions on—An action will lie in this state on a judgment of a court of a sister state.[8]

JUDICIAL—See note 9.
JUDICIAL NOTICE—See Evidence, 3448; Pleading, 7520.

[94] Rossman v. Tilleny, 80–160, 83+42.
[95] Kaaterud v. Gilbertson, 96–66, 104+763.
[96] Woodman v. Blue Grass L. Co., 98–87, 107+1052.
[97] Koppang v. Steenerson, 100–239, 111+153.
[98] Stitt v. Rat Portage L. Co., 101–93, 111+948.
[99] Cone v. Hooper, 18–531(476); Washburn v. Van Steenwyk, 32–336, 357, 20+324; Alden v. Dyer, 92–134, 99+784; Tillinghast v. U. S. etc. Co., 99–62, 108+472; Fauntleroy v. Lum, 210 U. S. 230. See, as to their effect as evidence, Morin v. St. P. etc. Ry., 33–176, 22+251.
[1] Suesenbach v. Wagner, 41–108, 42+925.
[2] State v. Armington, 25–29, 37; Morey v. Morey, 27–265, 6+783; In re Ellis, 55–401, 56+1056; Thelen v. Thelen, 75–433, 78+108; Boyle v. Musser, 88–456, 93+520; McHenry v. Bracken, 93–510, 101+960; Sammons v. Pike, 108–291, 120+540. See Cone v. Hooper, 18–531(476).
[3] Stahl v. Mitchell, 41–325, 43+385; McHenry v. Bracken, 93–510, 101+960; State v. Weber, 96–422, 105+490. See Cone v. Hooper, 18–531(476).
[4] In re Ellis, 55–401, 56+1056; Thurston v. Thurston, 58–279, 59+1017; Kern v. Field, 68–317, 71+393. See Tillinghast v. U. S. etc. Co., 99–62, 67, 108+472.
[5] Cone v. Hooper, 18–531(476); In re Ellis, 55–401, 56+1056; Fauntleroy v. Lum, 210 U. S. 230. See Washburn v. Van Steenwyk, 32–336, 357, 20+324.
[6] Suesenbach v. Wagner, 41–108, 42+925.
[7] Gunn v. Peakes, 36–177, 30+466; Bowman v. Hekla etc. Co., 58–173, 59+943. See § 3360.
[8] Thomas v. Hale, 82–423, 85+156; Engstrand v. Kleffman, 86–403, 90+1054.
[9] Home Ins. Co. v. Flint, 13–244(228. 230).

JUDICIAL POWERS—See Certiorari, 1397–1399; Constitutional Law, 1589, and note 10.

JUDICIAL PROCEEDINGS—See note 11.

JUDICIAL SALES

Cross-References

See Execution, 3531; Mortgages, 6338, 6447.

5211. What constitutes—A judicial sale is one made by a court as vendor, through an officer acting as its agent.[12] An execution sale is not a judicial sale,[13] nor is a foreclosure sale under a power in a mortgage.[14] A sale under a judgment in an action to foreclose a mortgage is a judicial sale.[15]

5212. Manner of sale—We have no statute regulating the conduct of judicial sales. The time, place, notice, and manner of sale should be specified in the order or judgment.[16]

5213. Disposition of proceeds by officer—An officer disposing of the proceeds of a sale in accordance with the judgment is protected thereby.[17]

5214. Vacation of judgment—Rights of purchasers—The title of a bona fide purchaser at a judicial sale is unaffected by the vacation of the judgment under which the sale was made for errors or irregularities not going to the jurisdiction of the court.[18]

5215. Title of purchaser—Caveat emptor—The rule of caveat emptor applies to judicial sales; not only as to the title, but also as to the condition of the property.[19] The purchaser may sometimes have the benefit of covenants of title.[20] The owner may be estopped as against the purchaser.[21]

5216. Irregularities—Mere irregularities in judicial sales do not affect their validity, unless they operate to prejudice some interested party.[22] A sale of separate tracts in gross does not render the sale void and subject to collateral attack.[23]

5217. Presumption of regularity—A presumption of regularity and authority is entertained in favor of judicial sales.[24]

5218. Redemption—A right of redemption is sometimes given by statute.[25]

5219. Confirmation—The confirmation of a sale has the effect of a judgment and cannot be attacked collaterally for mere error or irregularity.[26] It is open to direct attack by creditors.[27]

[10] Home Ins. Co. v. Flint, 13–244(228, 230).

[11] Nixon v. Dispatch P. Co., 101–309, 313, 112+258.

[12] See First Nat. Bank v. Rogers, 22–224, 230; Lord v. Hawkins, 39–73, 76, 38+689 ("a sale made pursuant to a judgment or to enforce a judgment").

[13] First Nat. Bank v. Rogers, 22–224; Willard v. Finnegan, 42–476, 478, 44+985; Johnson v. Laybourn, 56–332, 57+935. See Stone v. Bassett, 4–298(215).

[14] Willard v. Finnegan, 42–476, 478, 44+985.

[15] Stone v. Bassett, 4–298(215).

[16] Maki v. Maki, 106–357, 119+51.

[17] Hill v. Rasicot, 34–270, 25+604.

[18] Lord v. Hawkins, 39–73, 76, 38+689; Welch v. Marks, 39–481, 40+611; Branley v. Dambly, 69–282, 71+1026.

[19] Barron v. Mullin, 21–374; First Nat. Bank v. Rogers, 22–224; Johnson v. Laybourn, 56–332, 57+935.

[20] Security Bank v. Holmes, 65–531, 536, 68+113.

[21] Brown v. Union Depot etc. Co., 65–508, 68+107.

[22] Bottineau v. Aetna Life Ins. Co., 31–125, 128, 16+849.

[23] Merrill v. Nelson, 18–366(335, 340).

[24] Clossen v. Whitney, 39–50, 38+759.

[25] Stone v. Bassett, 4–298(215).

[26] Hotchkiss v. Cutting, 14–537(408).

[27] In re Shea, 57–415, 59+494.

5220. Inadequate price—The court may refuse to confirm a sale for an inadequate price and order a resale.[28]

JUNK SHOP—See note 29.
JURAT—See Affidavits, 133.
JURISDICTION—See Courts, 2345; Criminal Law, 2420; Judgments, 5137–5142; Justices of the Peace; Municipal Courts; Probate Court; Process, 7834, 7836; Supreme Court.

[28] Johnson v. Avery, 56–12, 57+217; Johnson v. Avery, 60–262, 62+283; Merchants' Bank v. Moore, 68–468, 71+671.
[29] Duluth v. Bloom, 55–97, 101, 56+580.

JURY

Cross-References

See Criminal Law, 2476 (sickness of jurors), 2480 (discharge for inability to agree), 2481 (separation), 2482 (polling); Evidence, 3224 (juror as witness); Grand Jury; Justices of the Peace, 5300, 5346; New Trial, 7104 (misconduct of jury); Trial, 9811 (taking pleadings to jury room), 9812 (keeping jury out—urging to agree), 9813-9829 (verdict), 9830-9833 (special verdict), 9837 (issues to jury in equitable actions).

IN GENERAL

5221. Definition—A petit jury is a body of twelve men, impaneled and sworn in the district court to try and determine, by a true and unanimous verdict, any question or issue of fact in a civil or criminal action or proceeding according to law and the evidence as given them in court.[30]

5222. Struck jury—There is now no provision in our statutes for a struck jury. Cases are cited below involving the construction of former statutes authorizing such a jury.[31]

5223. Knowledge of English—A court may exclude from a jury a person who is shown not to have a sufficient knowledge of English to enable him to try the cause intelligently, though no challenge is interposed on that ground.[32]

5224. Jury fee—The statute provides that "before the jury is sworn the plaintiff shall pay to the clerk a jury fee of three dollars, which the clerk shall pay forthwith to the county treasurer."[33] This provision is constitutional.[34] It applies to new trials.[35]

[30] R. L. 1905 § 4326; Lommen v. Mpls. G. Co., 65–196, 68+53.

[31] O'Brien v. Minneapolis, 22–378; Mark v. St. P. etc. Ry., 32–208, 20+131; Branch v. Dawson, 36–193, 30+545; Watson v. St. P. C. Ry., 42–46, 43+904; Bennett v. Syndicate Ins. Co., 43–45, 44+794; Lommen v. Mpls. G. Co., 65–196, 68+53; Riley v. Chi. etc. Ry., 67–165, 69+718.

[32] State v. Ring, 29–78, 11+233.

[33] R. L. 1905 § 4170.

[34] Adams v. Corriston, 7–456(365); McGeagh v. Nordberg, 53–235, 55+117.

[35] Schultz v. Bower, 66–281, 68+1080.

5225. Oath—The statute prescribes a form of oath to be administered to the jury.[36] Formerly there was a special form of oath in capital cases.[37] It is proper practice in criminal cases to swear each juror separately when accepted.[38]

5226. Sickness of juror—If, after the impaneling of a jury and before a verdict in a criminal case, a juror becomes so sick that he is unable to perform his duties, it is proper practice for the court to discharge the entire panel, and to summon a new jury at the same or a succeeding term, unless the accused consents to the substitution of another juror. A judicial determination by the court that a juror is sick may be reached from personal observation of the juror in connection with the statements of counsel, and such knowledge will justify action in excusing the sick juror from further service on the panel.[39]

RIGHT TO JURY TRIAL IN CIVIL ACTIONS

5227. Constitutional provision—Our state constitution provides that "the right of trial by jury shall remain inviolate and shall extend to all cases at law without regard to the amount in controversy, but a jury trial may be waived by the parties in all cases in the manner prescribed by law."[40] The effect of this provision is, first, to recognize the right of trial by jury as it existed in the territory of Minnesota at the time of the adoption of the state constitution; and, secondly, to continue such right unimpaired and inviolate. It neither takes from nor adds to the right as it previously existed, but adopts it unchanged except that the constitutional right is broader now than in territorial days. Then the only constitutional right was under the federal constitution and was limited to suits at common law when the amount in controversy exceeded twenty dollars. But a territorial statute gave the right in all cases at law without regard to the amount in controversy so that the constitution did not enlarge old rights or create new ones, but simply conserved rights already existing and placed them beyond legislative impairment.[41] The essential elements of a trial by jury are number, impartiality, and unanimity. The jury must consist of twelve men; they must be impartial and indifferent between the parties; and their verdict must be unanimous. The method of selecting the jury is subject to legislative control, but the method provided must be reasonably adapted to secure an impartial jury.[42] It has been held by a divided court that our legislature may provide for a struck jury.[43] It is to be observed that the constitutional right, as distinguished from the statutory right, is limited to "cases at law." That is, it does not extend to special proceedings, but is limited to the trial of issues of fact in ordinary common-law actions for the recovery of money only or of specific real or personal property, and actions for divorce on the ground of adultery.[44] The right depends on the nature of

[36] R. L. 1905 § 2679; Knauft v. St. P. etc. Ry., 22–173 (applicable to condemnation proceedings); State v. Worthingham, 23–528 (form in civil cases applicable to bastardy proceedings).

[37] See Maher v. State, 3–444(329).

[38] State v. Brown, 12–538(448).

[39] State v. Ronk, 91–419, 98+334. See R. L. 1905 § 4173.

[40] Const. art. 1 § 4. See Judson v. Reardon, 16–431(387, 392).

[41] Whallon v. Bancroft, 4–109(70); St. Paul & S. C. Ry. v. Gardner, 19–132(99); Ames v. Lake Superior & M. Ry., 21–241, 292; Mille Lacs County v. Morrison, 22–178; Bruggerman v. True, 25–123; In re Howes, 38–403, 38+104; State v. Minn. Thresher Mfg. Co., 40–213, 41+1020; Schmidt v. Schmidt, 47–451, 50+598; Lommen v. Minneapolis G. Co., 65–196, 68+53; State v. Kingsley, 85–215, 88+742; Lauritsen v. Seward, 99–313, 323, 109+404.

[42] Lommen v. Minneapolis G. Co., 65–196, 68+53.

[43] Id.

[44] State v. Minn. Thresher Mfg. Co., 40–213, 41+1020 and cases under § 5228.

the rights to be adjudicated and not on the form of the action or proceeding.[45] The right is not impaired by the statute which makes a resident of a municipality a competent juror in cases to which the municipality is a party,[46] or by the statute which authorizes judgment notwithstanding the verdict.[47]

5228. Statutory provision—The statute provides that "issues of law, unless referred as provided by the statutes relating to referees, shall be tried by the court. In actions for the recovery of money only, or of specific real or personal property, or for a divorce on the ground of adultery, the issues of fact shall be tried by a jury, unless a jury trial be waived or a reference be ordered. All other issues of fact shall be tried by the court, subject to the right of the parties to consent, or of the court to order, that the whole issue, or any specific question of fact involved therein, be tried by a jury or referred." [48] This statutory provision was in force at the time of the adoption of the constitution.[49] Its effect is to preserve in substance the common-law distinction between actions at law and suits in equity. The distinction in the forms of actions—that is, in the modes of commencing them, in the number, names, and forms of pleadings, and in those matters of practice necessary for presenting causes to the court for its determination, and for enforcing such determination—can be and has been abolished. But the distinction in the mode of trial, or rather in the tribunal which may try causes, which prevailed at common law, is preserved in code procedure, by this statute.[50]

5229. Right determined by complaint—Whether a plaintiff is entitled as of right to a jury trial is to be determined by his complaint.[51]

5230. Legal actions—In general—A party is entitled to a jury trial in an action of replevin though it involves an issue as to a secret trust;[52] in an action by an assignee in insolvency to recover money paid by the insolvent to a creditor as an unlawful preference;[53] in an action on a policy of insurance for the recovery of a loss;[54] in an action for conversion, though it involves an account;[55] in an action by a contractor for labor and materials, though a long account is involved;[56] in an action for trespass upon land;[57] in an action for money had and received;[58] in an action for the recovery of rent;[59] in an action for the recovery of money only;[60] in an action on a stated account between partners;[61] and in an action to recover for labor and materials furnished in the repair of a homestead.[62]

5231. Equitable actions—In equitable actions pure and simple, that is, in actions based on an equitable cause of action or to obtain equitable relief solely, there is no right to demand a jury trial of any of the issues.[63]

[45] Mille Lacs County v. Morrison, 22–178.
[46] McClure v. Red Wing, 28–186, 9+767.
[47] Kernan v. St. P. C. Ry., 64–312, 67+71.
[48] R. L. 1905 § 4164.
[49] State v. Minn. Thresher Mfg. Co., 40–213, 41+1020.
[50] Berkey v. Judd, 14–394(300); Shipley v. Bolduc, 93–414, 101+952.
[51] Greenleaf v. Egan, 30–316, 15+254; Bond v. Welcome, 61–43, 63+3; Nordeen v. Buck, 79–352, 82+644; Shipley v. Bolduc, 93–414, 101+952.
[52] Blackman v. Wheaton, 13–326(299); Tanere v. Reynolds, 35–476, 29+171.
[53] Tripp v. N. W. Nat. Bank, 45–383, 48+4.
[54] Crich v. Williamsburg City Fire Ins. Co., 45–441, 48+198. See Levine v. Lancashire Ins. Co., 66–138, 68+855.
[55] St. Paul etc. Ry. v. Gardner, 19–132 (99). See Greenleaf v. Egan, 30–316, 15+254.
[56] Nordeen v. Buck, 79–352, 82+644.
[57] Chadbourne v. Zilsdorf, 34–43, 24+308.
[58] Lace v. Fixen, 39–46, 38+762.
[59] Peterson v. Ruhnke, 46–115, 48+768.
[60] Martin v. N. P. B. Assn., 68–521, 525, 71+701; State v. Kingsley, 85–215, 217, 88+742.
[61] Shipley v. Bolduc, 93–414, 416, 101+952.
[62] Hasey v. McMullen, 109–332, 123+1078.
[63] Jordan v. White, 20–91(77); Garner v. Reis, 25–475; Judd v. Dike, 30–380, 15+672; Fair v. Stickney, 35–380, 29+49; Roussain v. Patten, 46–308, 48+1122; Bond v. Welcome, 61–43, 63+3; Shipley v. Bolduc, 93–414, 101+952; Farmer v. Stillwater W. Co., 108–41, 121+418.

5232. Actions including both legal and equitable causes of action—In mixed actions based on both a legal and an equitable cause of action a party has a constitutional right to have the legal cause submitted to a jury. But he is not entitled to a jury trial of both causes, and a demand for such a trial is properly denied unless it is strictly limited to the legal cause.[64] Under our system of pleading, equitable defences and counterclaims may be interposed in actions at law. In such cases the legal issues are triable by a jury, the equitable ones by the court, and the order of the trial is a matter of discretion with the court, to be determined by the exigencies of the particular case.[65] In an action not of a strictly legal nature where the plaintiff seeks both legal and equitable relief there is no right to a jury trial.[66]

5233. Miscellaneous actions and proceedings—In the following actions and proceedings there is no constitutional right of trial by jury: proceedings on information in the nature of quo warranto;[67] mandamus proceedings;[68] proceedings under the right of eminent domain;[69] proceedings for the assessment and collection of taxes;[70] proceedings in laying out highways;[71] proceedings to enforce a mechanic's lien;[72] proceedings under the state insolvency law of 1881;[73] in garnishment proceedings where issues are formed by supplemental complaint;[74] proceedings for contempt;[75] in election contests;[76] in proceedings for the recommitment of a pardoned convict except on the question whether he is the same person who was convicted;[77] on appeal to the district court in proceedings to test the validity of a will;[78] proceedings for the commitment of infants to the reform school;[79] an action to determine adverse claims;[80] an action to remove a cloud;[81] an action in the nature of a bill of peace or to prevent multiplicity of suits;[82] an action in the nature of a creditors' bill;[83] an action to foreclose a mortgage;[84] an action to have land discharged from the lien of a mortgage;[85] an action for the adjustment and settlement of mutual accounts;[86] an action for an accounting of a trustee, a partition and the appointment of a receiver;[87] an action to abate a dam and for damages;[88] an action against an agent by his principal for an accounting;[89]

[64] Greenleaf v. Egan, 30-316, 15+254; Judd v. Dike, 30-380, 15+672; Herber v. Christopherson, 30-395, 15+676; Chadbourne v. Zilsdorf, 34-43, 24+308; Butman v. James, 34-547, 27+66; Lace v. Fixen, 39-46, 38+762; Peterson v. Ruhnke, 46-115, 48+768; Spalti v. Blumer, 63-269, 65+454; Levine v. Lancashire Ins. Co., 66-138, 68+855; Crosby v. Scott, 93-475, 101+610; Stein v. Berrisford, 108-177, 121+879; Koeper v. Louisville, 109-519, 124+218. See Marshall v. Gilman, 47-131, 49+688.

[65] Crosby v. Scott, 93-475, 101+610.

[66] Finch v. Green, 16-355(315); Koeper v. Louisville, 109-519, 124+218.

[67] State v. Minn. T. M. Co., 40-213, 41+1020.

[68] State v. Sherwood, 15-221(172); State v. Lake City, 25-404. See State v. Burr, 28-40, 8+899.

[69] Weir v. St. P. etc. Ry., 18-155(139); Ames v. Lake Superior & M. Ry., 21-241; Minneapolis v. Wilkin, 30-140, 14+581; St. Paul v. Nickl, 42-262, 44+59.

[70] Mille Lacs County v. Morrison, 22-178; Wade v. Drexel, 60-164, 62+261.

[71] Bruggerman v. True, 25-123.

[72] Sumner v. Jones, 27-312, 7+265.

[73] Wendell v. Lebon, 30-234, 15+109; In re Howes, 38-403, 38+104. But see Tripp v. N. W. Nat. Bank, 45-383, 48+4.

[74] Weibeler v. Ford, 61-398, 63+1075.

[75] State v. Becht, 23-411.

[76] Whallon v. Bancroft, 4-109(70); Ford v. Wright, 13-518(480); Newton v. Newell, 26-529, 6+346.

[77] State v. Wolfer, 53-135, 54+1065.

[78] Schmidt v. Schmidt, 47-451, 50+598. See Marvin v. Dutcher, 26-391, 4+685.

[79] State v. Brown, 50-353, 52+935.

[80] Roussain v. Patten, 46-308, 48+1122; Johnson v. Peterson, 90-503, 97+384.

[81] Butman v. James, 34-547, 27+66; Yanish v. Pioneer F. Co., 64-175, 66+198; McAlpine v. Resch, 82-523, 85+545.

[82] State v. Kingsley, 85-215, 88+742.

[83] Weibeler v. Ford, 61-398, 63+1075.

[84] Sumner v. Jones, 27-312, 7+265; Herber v. Christopherson, 30-395, 15+676.

[85] Jordan v. White, 20-91(77).

[86] Garner v. Reis, 25-475; Fair v. Stickney, 35-380, 29+49; Bond v. Welcome, 61-43, 63+3; Shipley v. Bolduc, 93-414, 101+952.

[87] Judd v. Dike, 30-380, 15+672.

[88] Finch v. Green, 16-355(315).

[89] Greenleaf v. Egan, 30-316, 15+254.

an action for an injunction to restrain a trespass upon land and to determine that the defendant has no interest or easement therein;[90] an action for an accounting between partners;[91] an action to reform a written lease;[92] an action to set aside an award and recover on an insurance policy;[93] an action to reform a policy of insurance;[94] an action for divorce on the ground of cruelty;[95] an action to compel specific performance;[96] an action for the cancelation of instruments;[97] an action to restrain the foreclosure of a mortgage;[98] an action for an accounting in a case where a deed absolute in form was in fact a mortgage;[99] an action for the correction of a stated account;[1] an action to restrain a trespass whereby the flow of a river is obstructed;[2] an action to have a deed absolute in form declared a mortgage;[3] an action to compel a party to close an opening made by him in the bank of a lake whereby the land of the plaintiff was flooded, to restrain him from maintaining such flooding, and for incidental damages.[4]

5234. Waiver of trial by jury in civil cases—Provision is made by statute for the waiver of a jury trial.[5] A party waives a jury trial by failing to appear at the trial;[6] by consenting, upon the call of the calendar, that the case be set down as a court case;[7] by proceeding to trial by the court without objection;[8] or by consenting to a reference.[9] In a mixed action, that is, in an action including both a legal and an equitable cause, if a party proceeds to trial without specifically demanding a jury trial for the legal cause he will be deemed to have waived his right to such a trial.[10] A motion for a directed verdict is not a waiver of a jury trial.[11] Bringing an action for rescission on the ground of fraud is not a waiver of the right to bring a separate action for damages and have them assessed by a jury.[12] The waiver of a jury when a cause is called for trial is a waiver only as to issues then formed and not as to new and different issues thereafter formed under amended pleadings.[13] At the close of the evidence offered by plaintiff, each party moved that the jury be instructed to return a verdict in his favor. Without waiting for a decision on the motions, the following proceedings and agreement took place: "The jury are excused from the case, and it is agreed that it be submitted to the court for determination." This was held a submission of the case to the court on the merits.[14] A waiver of a jury trial on the first trial of an action in ejectment is not a waiver of a second trial under the statute.[15] The court may, in its discretion, in actions other than on contract, disregard a waiver of a jury by the parties. A waiver not yet acted upon may be withdrawn with the consent

[90] Chadbourne v. Zilsdorf, 34–43, 24+308
[91] Lace v. Fixen, 39–46, 38+762.
[92] Peterson v. Ruhnke, 46–115, 48+768.
[93] Levine v. Lancashire Ins. Co., 66–138, 68+855.
[94] Guernsey v. Am. Ins. Co., 17–104(83).
[95] Schmitt v. Schmitt, 31–106, 16+543.
[96] Piper v. Packer, 20–274(245).
[97] Russell v. Reed, 32–45, 19+86; Banning v. Hall, 70–89, 72+817.
[98] Russell v. Reed, 32–45, 19+86.
[99] Sloan v. Becker, 31–414, 18+143.
[1] Cobb v. Cole, 44–278, 46+364.
[2] Pint v. Bauer, 31–4, 16+425.
[3] Niggeler v. Maurin, 34–118, 24+369.
[4] Koeper v. Louisville, 109–519, 124+218.
[5] R. L. 1905 § 4184.
[6] R. L. 1905 § 4184(2); Newman v. Newman, 68–1, 70+776.
[7] St. Paul Distilling Co. v. Pratt, 45–215, 47+789.
[8] Davis v. Smith, 7–414(328); Gibbens v. Thompson, 21–398; Smith v. Barclay, 54–47, 55+827; Banning v. Hall, 70–89, 72+817.
[9] St. Paul etc. Ry. v. Gardner, 19–132 (99); Deering v. McCarthy, 36–302, 30+813.
[10] See § 5232.
[11] Stauff v. Bingenheimer, 94–309, 102+694. See Chezick v. Mpls. etc. Co., 66–300, 68+1093; Poppitz v. German Ins. Co., 85–118, 88+438.
[12] Marshall v. Gilman, 47–131, 49+688.
[13] McGeagh v. Nordberg, 53–235, 55+117.
[14] Chezick v. Mpls. etc. Co., 66–300, 68+1093. See Poppitz v. German Ins. Co., 85–118, 88+438.
[15] Cochran v. Stewart, 66–152, 68+972.

of the court. A waiver agreed to with reference to the exigencies of a particular term will not be extended to a subsequent term.[16] In an action of a legal nature the parties may agree, the court consenting, that a part of the issues be tried by the court and a part by the jury.[17] The modes of waiving a jury prescribed by the statute are not exclusive. But when it is sought to base a waiver on implication from the conduct of the parties every reasonable presumption is to be indulged against a waiver. Even written stipulations of waiver are to be strictly construed. The law zealously guards the right of trial by jury and waivers are not to be lightly inferred.[18]

RIGHT TO JURY TRIAL IN CRIMINAL ACTIONS

5235. Constitutional right—"In all criminal prosecutions the accused shall enjoy the right to a speedy, public trial, by an impartial jury of the county or district wherein the crime shall have been committed, which county or district shall have been previously ascertained by law." [19] A jury impaneled under a statute providing for the selection of jurors exclusively from the qualified electors of a city is a "jury of the county." [20] An accused person has a constitutional right to trial by jury in all prosecutions for the commission of offences against the state regardless of the grade of the offence, the extent of the punishment or the court in which the trial is had.[21] But the violation of a municipal ordinance, at least if the punishment is not excessive, may be punished summarily without trial by jury.[22] A member of the national guard may be punished by court-martial without trial by jury, even in time of peace.[23] A convict conditionally pardoned may be re-committed without trial by jury unless an issue is raised as to his identity.[24] There is no right to trial by jury in proceedings for the prevention of crime.[25] The constitutional provision for trial by jury is not violated by the statute for the commitment of incorrigible children to the state reform school; [26] or by the statute for a change of venue; [27] or by the statute fixing the place of trial when an offence is committed within one hundred rods of the dividing line between two counties; [28] or by the statute for commitment in supplementary proceedings.[29]

5236. Waiver of right—In a criminal prosecution for an offence cognizable by a justice of the peace the accused may waive a jury and consent to trial by the court.[30] A jury under the constitution means a jury of twelve men; [31] but an accused person may, when permitted by the court, the state not objecting, consent to a trial by eleven jurors.[32] A waiver once made cannot be recalled at will.[33]

[16] Wittenberg v. Onsgard, 78–342, 81+14.
[17] Lane v. Lenfest, 40–375, 42+84.
[18] St. Paul etc. Ry. v. Gardner, 19–132 (99); Wittenberg v. Onsgard, 78–342, 81+14; Poppitz v. German Ins. Co., 85–118, 88+438; Hasey v. McMullen, 109–332, 123+1078.
[19] Const. art. 1 § 6. See Lauritsen v. Seward, 99–313, 323, 109+404.
[20] State v. Kemp, 34–61, 24+349.
[21] State v. Everett, 14–439(330); Mankato v. Arnold, 36–62, 30+305; State v. West, 42–147, 43+845.
[22] Mankato v. Arnold, 36–62, 30+305; State v. Harris, 50–128, 52+387, 531; State v. Robitshek, 60–123, 61+1023; State v. Grimes, 83–460, 86+449; State v. Marciniak, 97–355, 105+965; State v. Collins, 107–500, 120+1081; State v. Nugent, 108–267, 121+898; Madison v. Martin, 109–292, 123+809.
[23] State v. Wagener, 74–518, 77+424.
[24] State v. Wolfer, 53–135, 54+1065.
[25] State v. Sargent, 74–242, 76+1129.
[26] State v. Brown, 50–353, 52+935.
[27] State v. Miller, 15–344(277).
[28] State v. Robinson, 14–447(333).
[29] State v. Becht, 23–411.
[30] State v. Green, 32–433, 21+547 (findings by the court); State v. Woodling, 53–142, 54+1068; State v. Bannock, 53–419, 55+558. See 21 Harv. L. Rev. 212.
[31] State v. Everett, 14–439(330).
[32] State v. Sackett, 39–69, 38+773. See State v. Ronk, 91–419, 98+334.
[33] State v. Bannock, 53–419, 55+558.

SUMMONING AND DRAWING

5237. Statutes directory—Waiver—The statutes regulating the selection and summoning of jurors are generally held to be directory merely. A defendant in a criminal action may waive a compliance with them.[34]

5238. Presumption of regularity—From the certificate of the clerk to the list of petit jurors, that the persons were selected by the county board at a regular meeting in January, it will be presumed that it was done at the annual meeting in January, as required by law.[35]

5239. Filing jury list—The failure to file forthwith, in the office of the clerk of the court, the list of petit jurors selected by the commissioners, is not ground of challenge to the panel.[36]

5240. Special venire—The statute provides that "whenever at any term there is an entire absence or a deficiency of jurors, whether from an omission to draw or to summon such jurors, or because of a challenge to the panel, or from any other cause, the court may order a special venire to issue to the sheriff of the county, commanding him to summon from the county at large a specified number of competent persons to serve as jurors for the term, or for any specified number of days." [37] Under the statute jurors are not "drawn" but simply "summoned," that is, selected by the sheriff from the county at large.[38] The venire does not state the names of the jurors to be summoned but leaves the selection to the sheriff.[39] In making the selection it is improper for the sheriff to inquire as to the opinions of the jurors in regard to the case and to make the selection with reference thereto.[40] The deficiency may be due to any cause, as, for example, sickness, death, or challenges to the panel or to individual jurors.[41] A special venire may be ordered when the whole of the original panel has been discharged; [42] when a challenge to the original panel has been sustained; [43] or when a portion of the original jurors do not appear.[44] The court may summon a grand as well as a petit jury by special venire.[45] The grounds of challenge to the panel of a special venire are the same as to the original panel.[46] A second special venire may be issued upon the exhaustion of the first,[47] or talesmen may be summoned.[48] It is unnecessary that there should be an entire absence of jurors before a special venire can be issued. The additional jurors may be summoned in anticipation of the exhaustion of the regular panel.[49]

5241. Talesmen—The statute authorizes a court to summon talesmen when, "by reason of challenge or other cause a sufficient number of jurors, drawn and summoned, cannot be obtained for the trial of any cause." [50] It is discretionary with the court to discharge talesmen, if, before they are impaneled in a particular case, the jurors on the regular panel become available.[51]

5242. Sheriff's return—A mere verbal error in the return of a sheriff upon a venire will be disregarded. The fact that a sheriff returns a venire to the clerk the day before the court meets, instead of at the opening of court, is immaterial.[52]

[34] State v. Quirk, 101–334, 112+409. See State v. Nerbovig, 33–480, 24+321.
[35] State v. Gut, 13–341(315).
[36] Id.
[37] R. L. 1905 § 103; Jeremy v. Matsch, 106–543, 118+1008.
[38] State v. Peterson, 61–73, 63+171.
[39] State v. Stokely, 16–282(249).
[40] State v. McCartey, 17–76(54).
[41] State v. Froiseth, 16–313(277).
[42] Steele v. Maloney, 1–347(257); State v. McCartey, 17–76(54).
[43] Dayton v. Warren, 10–233(185); State v. Gut, 13–341(315); State v. Grimes, 50–123, 52+275.
[44] State v. Brown, 12–538(448).
[45] State v. Grimes, 50–123, 52+275.
[46] State v. Gut, 13–341(315).
[47] State v. Stokely, 16–282(249).
[48] State v. Brown, 12–538(448).
[49] State v. Quirk, 101–334, 112+409.
[50] R. L. 1905 § 4335; State v. Brown, 12–538(448).
[51] Leystrom v. Ada, 125+507.
[52] State v. Gut, 13–341(315).

5243. Drawing—Jury box—Where the jurors on the regular panel, who are in attendance at the court, have been called, it is proper for the court to direct the clerk to place in the jury box and draw the names of jurors on a special venire, without calling for or sending for those on the regular panel not in attendance at the court. Where all the names of the jurors on a special venire were drawn and called without completing the jury, the court directed the clerk to replace in the box and draw and recall the names of those who on the first call did not answer. This was held not error.[53] The jury law would seem to require that the names of all the jurors not serving should be in the jury box, but this is not alway possible in populous counties. Under the system of procedure in Hennepin county, where six judges and as many courts must be kept going, it is customary, when a case is called for trial, to draw the names of eighteen jurors from the box and send the jurors whose names are thus drawn to a courtroom where the case is to be tried. The jury is then drawn from this list of eighteen names. The next jury is then drawn from the names which remain in the box.[54] When a special venire issues the new names should not be placed in the box until all the original names are withdrawn.[55]

5244. Elisor—Courts of record having common-law jurisdiction may appoint a disinterested person as elisor to act in the selection and drawing of a jury, when the officers designated by the statute for the discharge of such duty are either absent or disqualified. The character and form of the evidence to show such disqualification rests in the discretion of the trial court.[56]

5245. Local acts—Cases are cited below involving the construction of local acts regulating the summoning of jurors.[57]

IMPANELING

5246. General method of calling jurors—In criminal cases a full panel is not called in the first instance. Jurors are called one at a time and challenged when called, the jury box being filled gradually as each juror is accepted.[58] It is proper practice to swear each juror separately when accepted and not wait until the jury box is filled.[59] In civil cases a full panel is called in the first instance.[60]

5247. Challenging a matter of right—The right to challenge jurors is one given and secured by law, and cannot be taken away by the court. Until the challenges to which a party is entitled under the statutes are exhausted, the right extends to every juror called.[61]

5248. Challenge to the panel—The statute provides that "a challenge to the panel is an objection made to all the petit jurors returned, and may be taken by either party. It can be founded only on a material departure from the forms prescribed by law in respect to the drawing and return of the jury, and shall be taken before a jury is sworn, and be in writing, specifying plainly and distinctly the facts constituting the ground of challenge." [62] This provision is

[53] State v. Brown, 12-538(448).
[54] State v. Quirk, 101-334, 112+409.
[55] Id.
[56] Wellcome v. Berkner, 108-189, 121+882.
[57] State v. Owens, 22-238 (Laws 1870 c. 88 relating to Ramsey county—when names of petit jurors are exhausted court may issue special venire); State v. Maben, 45-56, 47+306 (act relating to municipal court of Minneapolis—criminal trial—special venire); State v. Goodrich, 67-176, 69+815 (act relating to Washington county); Marr v. Sherry, 94-131, 102+220 (act of 1903 relating to Benton county—discretion to summon jury embracing the April term 1904 as well as subsequent April terms); State v. Quirk, 101-334, 112+409 (act applicable to Hennepin county).
[58] State v. Armington, 25-29.
[59] State v. Brown, 12-538(448).
[60] R. L. 1905 § 4170.
[61] Swanson v. Mendenhall, 80-56, 82+1093.
[62] R. L. 1905 § 5383.

exclusive.[63] Objections to a petit jury must be made by challenge to the panel and not by motion to quash the indictment or by plea in abatement.[64] The failure of the chairman of the county board to sign or certify the petit jury list is a material departure from the requirements of the law and ground of challenge to the panel.[65] Putting fewer names in the box from which the jurors for the term are taken than the law requires is a material departure.[66] The law is watchful, and properly so, of the manner in which jurors are selected.[67] The following objections have been held not good grounds of challenge to the panel: the failure to file forthwith, in the office of the clerk of the court, the list of petit jurors selected by the commissioners;[68] the fact that the sheriff, while serving a special venire endeavored to ascertain the opinions of the jurors and selected them with reference thereto;[69] that the venire describes the action as a "civil" instead of a "criminal" action, the jurors all appearing pursuant to it;[70] that the jurors were taken from among jurors summoned on two previous special venires.[71] In the absence of fraud or collusion in the selection of a jury, objection to the panel after verdict is too late.[72]

5249. Mode of stating challenge—A challenge for "actual bias" is sufficient; it is unnecessary to state the nature of the bias or to recite the statute.[73]

5250. Order of challenging as between parties—The statute provides that "every challenge to an individual juror shall be taken first by the defendant, and then by the state; and each party shall exhaust all his challenges of such juror before the other shall begin. The challenges of either party need not all be taken at once, but may be taken separately in the following order, including in each challenge all the causes of challenge belonging to the same class: (1) To the panel; (2) To an individual juror for a general disqualification; (3) To an individual juror for implied bias; (4) To an individual juror for actual bias."[74] In civil cases the statute provides that "unless the court shall otherwise direct, challenges shall be made alternately, beginning with the defendant."[75] It is proper practice in civil cases to require the parties to exercise their right of peremptory challenge alternately, one challenge at a time, beginning with the defendant.[76]

5251. Time of challenge—The defendant, in a criminal trial, who waives his right to challenge a juror peremptorily when the juror is called, has not the right to do so after the panel is completed, though the jury has not been sworn.[77] When a party challenges a juror for actual bias, but subsequently withdraws the challenge, it is discretionary with the court to allow him to renew it at any time before the jury is complete.[78] It is discretionary with the court to permit a challenge after a juror is sworn and before the jury is complete.[79]

5252. Examination of juror—It is now provided by statute that "before challenging a juror, either party may examine him in reference to his qualifications to sit as a juror in the cause."[80] Prior to the revision of 1905 the matter

[63] State v. Gut, 13-341(315).
[64] State v. Thomas, 19-484(418).
[65] State v. Greenman, 23-209; State v. Schumm, 47-373, 50+362.
[66] State v. Brecht, 41-50, 42+602. See also, State v. Greenman, 23-209.
[67] State v. Greenman, 23-209.
[68] State v. Gut, 13-341(315).
[69] State v. McCartey, 17-76(54).
[70] State v. Nerbovig, 33-480, 24+321.
[71] Dayton v. Warren, 10-233(185).
[72] Steele v. Maloney, 1-347(257); State v. Quirk, 101-334, 112+409.
[73] State v. Durnam, 73-150, 75+1127.
[74] R. L. 1905 § 5399; State v. Smith, 20-376(328); State v. Armington, 25-29.
[75] R. L. 1905 § 4170. See, as to discretion of court under a former statute, St. Anthony Falls etc. Co. v. Eastman, 20-277(249).
[76] Swanson v. Mendenhall, 80-56, 82+1093.
[77] State v. Armington, 25-29; State v. Scott, 41-365, 43+62.
[78] State v. Dumphey, 4-438(340).
[79] State v. Ames, 91-365, 98+190.
[80] R. L. 1905 § 5386.

rested in the discretion of the court.[81] A party has a right to put any question to the juror properly tending to disclose his bias, prejudice, leanings, or general qualifications. The range of such inquiry is almost wholly in the discretion of the trial court. A party has a right, in good faith, to challenge a juror for cause and upon the examination to elicit information to be used in determining whether to interpose a peremptory challenge.[82] A juror may be asked whether he is a stockholder or interested in an insurance company that has insured the defendant against the liability involved in the action.[83] And to lay a foundation for such an inquiry counsel has been permitted to examine a representative of an insurance company, in the presence of the jury, to show the fact of insurance.[84] When a juror is challenged on the ground that he is not a citizen of the United States, his own testimony is competent evidence of the fact of naturalization, without other evidence; but his testimony may be disputed by the challenger.[85] The questions propounded, after a challenge, must be pertinent to the particular ground of challenge specified.[86] The court has discretionary power to prevent useless iteration of questions.[87] Whether a court will delay the trial to bring in other witnesses is purely discretionary.[88]

5253. Challenge for implied bias—The statute defines the ground of challenge for implied bias,[89] and makes the grounds therein specified exclusive.[90]

5254. Peremptory challenges—In a criminal action a peremptory challenge can be taken either by the state or the defendant, and may be oral. It is an objection to a juror for which no reason need be given, but upon which the court shall exclude him. If the offence charged be punishable with death, or with imprisonment in the state prison for life, the state shall be entitled to ten, and the defendant to twenty, peremptory challenges. On a trial for any other offence the state shall be entitled to three, and the defendant to five, peremptory challenges.[91] In a civil action but three peremptory challenges are allowed on either side.[92] In a criminal action a party waives the right to challenge peremptorily by failing to exercise the right when the juror appears.[93] Either party may at any time indicate to the court that he is satisfied with the jury, and, when he does so, cannot thereafter, without leave of court, challenge peremptorily one of the jurors so accepted.[94] But if the adverse party thereafter makes a further challenge, and a new juror is called, the right to challenge such

[81] State v. Lautenschlager, 22–514; State v. Smith, 56–78, 57+325. See Spoonick v. Backus, 89–354, 94+1079.

[82] State v. Bresland, 59–281, 61+450; Spoonick v. Backus, 89–354, 94+1079; Antletz v. Smith, 97–217, 106+517; Viou v. Brooks, 99–97, 104, 108+891.

[83] Spoonick v. Backus, 89–354, 94+1079; Antletz v. Smith, 97–217, 106+517; Viou v. Brooks, 99–97, 108+891.

[84] Viou v. Brooks, 99–97, 108+891; Granrus v. Croxton, 102–325, 113+693.

[85] R. L. 1905 § 5396. See State v. Lawlor, 28–216, 9+698; State v. Barrett, 40–65, 41+459.

[86] State v. Hanley, 34–430, 26+397.

[87] State v. Frelinghuysen, 43–265, 45+432.

[88] State v. Barrett, 40–65, 41+459.

[89] R. L. 1905 § 5391; Williams v. McGrade, 18–82(65) (juror on prior trial of same cause); State v. Thomas, 19–484 (418) (fact that juror was member of jury in justice court—charge of perjury in civil action); Bryant v. Livermore, 20–313(271) (consanguinity); Wells v. Bowman, 59–364, 61+135 (relationship between juror and general manager and stockholder of plaintiff corporation); Spoonick v. Backus, 89–354, 94+1079 (juror a stockholder in an accident insurance company which has insured the defendant); Sorseleil v. Red Lake Falls M. Co., 126+903 (that a juror is a client of one of the attorneys is not a ground for challenging for implied bias).

[90] State v. Thomas, 19–484(418); State v. Hanley, 34–430, 26+397. See, however, Wells v. Bowman, 59–364, 61+135; Spoonick v. Backus, 89–354, 94+1079.

[91] R. L. 1905 § 5387.

[92] R. L. 1905 § 4170.

[93] State v. Armington, 25–29; State v. Scott, 41–365, 43+62.

[94] Swanson v. Mendenhall, 80–56, 82+1093; State v. Ronk, 91–419, 98+334.

juror remains and may be exercised unless the party has previously exhausted his peremptory challenges.[95]

5255. Effect of admission of challenge—Whenever a challenge is interposed by one party and admitted by the other, there is nothing to try, and the juror must stand aside, unless the court, in its discretion, allows the challenge to be withdrawn. The challenging party has no right to examine the juror.[96]

5256. Withdrawal of challenges—It is purely discretionary with the court to allow a party to withdraw a challenge.[97] A challenge for actual bias which has been withdrawn may be renewed, with permission of the court, at any time before the jury is complete.[98]

5257. Waiver—A defendant in a criminal action may waive the right to challenge jurors.[99]

5258. Trial of challenge—The two modes of trying a challenge prescribed by the statute [1] are distinct.[2] The triers need not be resworn for every challenge.[3] A defendant in a criminal action has been held to have consented to a trial by the court.[4] The decision of the court upon a question of actual bias submitted to it for determination by consent is final.[5]

JURY FEE—See Jury, 5224.

JURY TRIAL—See Jury.

JUSTICE—All general rules touching the administration of justice must be so understood as to be made consistent with the fundamental principles of justice, and consequently all cases where a strict adherence to the rule would clash with those fundamental principles are to be considered as so many exceptions to it.[6] More mischief will always result from attempting to mould the law to what seems natural justice in a particular case than from a steady adherence to general principles.[7]

[95] Swanson v. Mendenhall, 80–56, 82+1093; Lerum v. Geving, 97–269, 105+967.
[96] Morrison v. Lovejoy, 6–319(224); State v. Lautenschlager, 22–514; State v. Smith, 56–78, 57+325.
[97] State v. Dumphey, 4–438(340); Morrison v. Lovejoy, 6–319(224); State v. Lautenschlager, 22–514; State v. Smith, 56–78, 57+325.
[98] State v. Dumphey, 4–438(340).
[99] State v. Ronk, 91–419, 98+334.
[1] R. L. 1905 § 5395.
[2] State v. Hanley, 34–430, 26+397.
[3] State v. Brown, 12–538(448).
[4] State v. Smith, 78–362, 81+17.
[5] Morrison v. Lovejoy, 6–319(224); State v. Mims, 26–183, 2+494, 683; Hawkins v. Manston, 57–323, 59+309; Perry v. Miller, 61–412, 63+1040; State v. Durnam, 73–150, 75+1127; Bennett v. Backus, 77–198, 79+682; State v. Feldman, 80–314, 83+182; State v. Evans, 88–262, 92+976.
[6] State v. Sommers, 60–90, 61+907.
[7] Erkens v. Nicolins, 39–461, 40+567.

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APPOINTMENT, QUALIFICATION, AND TENURE

5259. Election and term of office—The election and term of office of justices in cities and villages is generally fixed by provisions in the charter or by special act.[8]

5260. Disqualification from interest—A justice cannot sit in a cause in which he is interested. A warrant issued by a justice for the search of his own property is void and affords no protection to the officer acting under it.[9]

5261. Oath of office—A justice is not qualified to act officially until he has taken his oath of office. He is not a justice to whom a case may be properly transferred.[10]

5262. De facto justice—Where a person was appointed a justice to a court legally established he was held a justice de facto, though his appointment might have been illegal. The acts of a de facto justice are as valid as if he were a justice de jure. In fact, as to everybody except the state in proceedings by quo warranto to test his right to office, he is, in effect, a justice de jure.[11]

JURISDICTION AND POWERS

5263. Limited to county—Denied in certain cities—The jurisdiction of justices of the peace is coextensive only with the limits of the county in which they reside, except that writs of attachment and garnishee summons may issue to any county of the state.[12] A justice cannot acquire jurisdiction over the person of a defendant by issuing a writ of attachment to another county. Such a writ can only be used for the ancillary purpose of attaching property.[13] The statute makes an exception where the city or village in which the justice resides is in two or more counties.[14] Justices are denied jurisdiction in certain cities.[15]

5264. Limited by amount in controversy—The constitution provides that "no justice of the peace shall have jurisdiction of any civil cause where the amount in controversy shall exceed one hundred dollars," [16] and the same rule is embodied in the statute.[17] The "sum claimed" in the statute means the same as the "amount in controversy" in the constitution.[18] In determining the

[8] See Kane v. Arneson, 94–451, 103+218 (term of office of justice in East Grand Forks).

[9] R. L. 1905 § 4098; Jordan v. Henry, 22–245.

[10] In re Arctander, 26–25, 1+43.

[11] State v. McMartin, 42–30, 43+572.

[12] R. L. 1905 § 3882; Bunker v. Hanson, 99–426, 109+827. See Tyrrell v. Jones, 18–312(281) (under Laws 1870 c. 79 summons might be served in an adjoining county though neither party resided in the county where it issued).

[13] Perkins v. Meilicke, 66–409, 69+220.

[14] R. L. 1905 § 3882; Mpls. T. M. Co. v. Voigt, 63–145, 65+261.

[15] R. L. 1905 § 3894. See Marsh v. Smith, 22–46 (denied jurisdiction in St. Paul under Sp. Laws 1875 c. 2); Burke v. St. P. etc. Ry., 35–172, 28+190 (denied jurisdiction in Minneapolis under Sp. Laws 1885 c. 74); Higgins v. Beveridge, 35–285, 28+506 (id.); Smith v. Victorin, 54–338, 56+47 (id.).

[16] Const. art. 6 § 8.

[17] R. L. 1905 § 3886.

[18] Turner v. Holleran. 8–451(401); Barber v. Kennedy, 18–216(196); Greenman v. Smith, 20–418(370); Wagner v. Nagel, 33–348, 23+308; Crawford v. Hurd, 57–187, 58+985; Parker v. Bradford, 68–437, 71+619.

amount in controversy costs are to be disregarded.[19] The amount in controversy is to be determined as of the commencement of the action. Interest accruing thereafter is not to be considered.[20] In actions for the recovery of money only, a party may waive part of his claim so as to bring the case within the jurisdiction of the justice.[21] Where a complaint originally claimed more than one hundred dollars, but was amended so as to claim only one hundred dollars, and the trial proceeded without objection, it was held that the justice had jurisdiction.[22] The amount in controversy is not affected by a counterclaim.[23] In replevin, where the value of the property and the damages claimed together exceed one hundred dollars, a justice is without jurisdiction.[24] The defendant may plead that the value of the property exceeds one hundred dollars, but the mere pleading of the fact does not affect the jurisdiction. The fact must be proved and determined in favor of the defendant. If this is done the justice loses jurisdiction except to enter a judgment of dismissal.[25] Where the value of the property, as alleged in the affidavit and complaint, does not exceed one hundred dollars, but the evidence shows that it exceeds that amount, the jurisdiction of the justice is not affected, if the defendant made no issue in his answer as to the value.[26] Where the claim alleged exceeded one hundred dollars, but the demand for judgment was for only one hundred dollars, it was held that the justice had no jurisdiction, it appearing that the plaintiff did not intend to waive the balance.[27] In an action for conversion, if the damages claimed do not exceed one hundred dollars, a justice has jurisdiction, though the real value of the property converted exceeds that amount.[28] Objection that the amount in controversy exceeds the jurisdiction of a justice is waived by appealing on questions of law and fact, and proceeding in the district court without objection.[29] A single cause of action without the jurisdiction of a justice cannot be split so as to make two causes of action within his jurisdiction.[30]

5265. Actions involving title to realty—Justices of the peace have no jurisdiction of actions involving title to realty.[31] They have jurisdiction of actions for damages to realty where the amount claimed does not exceed one hundred dollars.[32]

5266. Actions of an equitable nature—Justices of the peace have no jurisdiction of actions of an equitable nature, and cannot grant equitable relief.[33]

5267. Place of bringing actions—The statutory requirement as to the place where civil actions shall be brought is jurisdictional.[34]

5268. Place of holding court and of return of process—The statute provides that "every justice of the peace shall keep his office in the town, village, city, or ward for which he is elected; but he may issue process in any place in the county, and, in his discretion, for the convenience of parties, may make any civil or criminal process issued by him returnable, and may hold his court, at

[19] Watson v. Ward, 27-29, 6+407.
[20] Ormond v. Sage, 69-523, 72+810.
[21] Lamberton v. Raymond, 22-129; Wagner v. Nagel, 33-348, 23+308; Parker v. Bradford, 68-437, 71+619. See Poirier v. Martin, 89-346, 94+865.
[22] Lamberton v. Raymond, 22-129.
[23] Barber v. Kennedy, 18-216(196); Parker v. Bradford, 68-437, 439, 71+619.
[24] Stevers v. Gunz, 23-520.
[25] Parker v. Bradford, 68-437, 71+619.
[26] Hecklin v. Ess, 16-51(38); Parker v. Bradford, 68-437, 71+619.
[27] Poirier v. Martin, 89-346, 94+865.
[28] Parker v. Bradford, 68-437, 71+619.
[29] Lee v. Parrett, 25-128.
[30] Bunker v. Hanson, 99-426, 109+827.
[31] Const. art. 6 § 8; R. L. 1905 § 3887; Tordsen v. Gummer, 37-211, 34+20; State v. Hays, 38-475, 477, 38+365; Simmonsen v. Curtis, 43-539, 45+1135.
[32] R. L. 1905 § 3886; Turner v. Holleran, 8-451(401).
[33] Fowler v. Atkinson, 6-503(350); Fox v. Ellison, 43-41, 44+671 (action as for money had and received on sale of logs held not equitable).
[34] R. L. 1905 § 3888; Union S. Co. v. Lang, 103-466, 115+271; Stevenson v. Murphy, 106-243, 119+47.

any place which he shall appoint in the town, village, or ward within his county adjoining the town or ward in which he resides, or in any village located within his town." [35] A judgment of a justice of the peace, rendered after a trial of the action outside the territorial limits of his jurisdiction, is not void, where it appears that the trial and proceedings outside his territory were there had for the convenience of the parties or with their consent. Where no objection to such a trial appears from the record it will be presumed to have been with the consent of the parties.[36]

5269. Record must show jurisdiction—A justice court is a court of special and limited jurisdiction,[37] and the record of an action therein must affirmatively show jurisdiction both of the person and of the subject-matter. Neither the nature of the action or the jurisdiction can be shown by the judgment.[38] But where the record shows that jurisdiction has once attached, silence in respect to subsequent jurisdictional steps is not fatal.[39] Nothing is presumed in favor of the jurisdiction of a justice court.[40]

5270. Powers statutory—The powers of a justice are such only as are conferred by statute.[41]

5271. State officers—Justices of the peace are state rather than municipal or local officers, and their courts are state courts.[42]

RIGHTS, DUTIES, AND LIABILITIES

5272. Fees—Action to recover—A justice of the peace is not a salaried officer, his compensation being his costs and fees.[43] After a justice has rendered judgment in a case he may recover his unpaid fees in an action upon an implied contract. Where a judgment against the plaintiff was affirmed on appeal to the district court and no judgment was in fact entered because the plaintiff in the original suit settled with the defendant in that suit, and retained the fees of the justice in the sum fixed by the order of the district court, it was held that the justice could recover such amount from the plaintiff in the original suit in an action on implied contract.[44] Where a party on appeal pays the justice's fees in full as taxed, he cannot object to them on the appeal.[45]

5273. Liability for official acts—A justice cannot be called to an account in a civil action for his acts and decisions in his judicial capacity, however erroneous, or by whatever motives prompted,[46] but he is liable on his bond for a failure to discharge mere ministerial duties, such as entering a judgment in his docket.[47] Moneys improperly received by a justice as security for the appearance of a prisoner may be recovered from him.[48] A justice is not liable for neglecting to pay over money received by him till a demand, or for withholding information till it is asked.[49]

[35] R. L. 1905 § 3883; State v. Marvin, 26-323, 3+991; State v. Bowen, 45-145, 47+650; Beseman v. Weber, 53-174, 54+1053.

[36] Holmes v. Igo, 124+974.

[37] Holgate v. Broome, 8-243(209). See, as to whether it is a court of record, Petrie v. Hubbard County, 96-64, 104+680.

[38] Barnes v. Holton, 14-357(275); Bidwell v. Coleman, 11-78(45); McGinty v. Warner, 17-41(23). See Clark v. Norton, 6-412(277) (pleading process of justice court).

[39] Ellegaard v. Haukaas, 72-246, 75+128.

[40] Clark v. Norton, 6-412(277).

[41] Holgate v. Broome, 8-243(209); State v. Miesen, 96-466, 105+555.

[42] State v. Dreger, 97-221, 225, 106+904.

[43] Lueck v. St. P. & D. Ry., 57-30, 58+821.

[44] Conlon v. Holste, 99-493, 110+2.

[45] Clague v. Hodgson, 16-329(291).

[46] Murray v. Mills, 56-75, 57+324 (not liable for improper entry of judgment after time limit).

[47] Larson v. Kelly, 64-51, 66+130.

[48] Cressy v. Gierman, 7-398(316).

[49] State v. Coon, 14-456(340).

5274. Liability on official bond—Cases are cited below involving the liability of a justice and his sureties on his official bond.[50]

5275. Criminal liability—A justice has been held not criminally liable for a neglect to pay over certain moneys without a demand therefor, or for neglecting to advise a party concerning a judgment, or for giving certain advice as to selling a judgment.[51]

DOCKET

5276. In general—Effect of informality or omission—A failure of a justice to make the entries in his docket required by the statute does not render the judgment erroneous.[52] Mere informalities and inaccuracies of expression in a docket will be disregarded. Technical accuracy is not required. It is enough if the meaning is ascertainable and conformable to law.[53] Unauthorized entries are to be disregarded as surplusage.[54] It is proper, but not indispensable, that the justice sign his docket.[55]

5277. Facts required to be entered—The statute [56] requires a justice to enter in his docket, the title of all causes commenced before him; [57] the time when the process issued, the nature thereof, when returnable, and the return of the officer; [58] the time when the parties appeared before him; [59] a brief statement of the nature of the plaintiff's demand; [60] every adjournment, stating at whose request, and to what time and place; [61] the verdict of the jury, and when rendered; [62] exceptions; [63] and any material matter, such as a transfer of the action.[64] It is unnecessary to enter the evidence in a cause,[65] the reasons for judgments or findings of fact,[66] the verification of pleadings,[67] or an affidavit for a transfer of a cause.[68]

5278. Entries as evidence—The entries of a justice in his docket relating to official matters before him are prima facie evidence of the facts recited. It is not essential that the docket be signed by the justice. It may be authenticated by him or by any other competent evidence.[69] An entry, relating to costs on execution, has been held insufficient to establish, prima facie, a right to recover the costs in an action on the judgment.[70]

[50] Cressey v. Gierman, 7-398(316) (refusal of justice to return money received as security for appearance of a prisoner held not a breach of official duty for which action would lie on bond); Larson v. Kelly, 64-51, 66+130 (the words "judicial duties" in a bond construed as meaning "official duties"—liability on bond for neglect to enter judgment).

[51] State v. Coon, 14-456(340).

[52] Payson v. Everett, 12-216(137); Tyrrell v. Jones, 18-312(281); Steinhart v. Pitcher, 20-102(86); Meister v. Russell, 53-54, 54+935; Smith v. Victorin, 54-338, 56+47; Wheeler v. Paterson, 64-231, 66+964.

[53] McGinty v. Warner, 17-41(23); State v. Myers, 70-179, 72+969.

[54] Neuhauser v. Banish, 84-286, 87+774.

[55] Chapman v. Dodd, 10-350(277).

[56] R. L. 1905 § 3889.

[57] State v. Graffmuller, 26-6, 46+445; Faribault v. Wilson, 34-254, 25+449.

[58] Bidwell v. Coleman, 11-78(45).

[59] Tyrrell v. Jones, 18-312(281).

[60] Payson v. Everett, 12-216(137); Barnes v. Holton, 14-357(275); Tyrrell v. Jones, 18-312(281); Burt v. Bailey, 21-403.

[61] Steinhart v. Pitcher, 20-102(86); Anderson v. Southern Minn. Ry., 21-30; Wheeler v. Paterson, 64-231, 66+964.

[62] State v. Myers, 70-179, 72+969.

[63] Witherspoon v. Price, 17-337(313); Craighead v. Martin, 25-41; Franek v. Vaughan, 81-236, 83+982.

[64] See § 5292.

[65] Kloss v. Sanford, 77-510, 80+628; State v. McGinnis, 30-48, 14+256; Barber v. Kennedy, 18-216(196).

[66] Neuhauser v. Banish, 84-286, 289, 87+774.

[67] Tyrrell v. Jones, 18-312(281); Burt v. Bailey, 21-403, 406.

[68] McGinty v. Warner, 17-41(23).

[69] Chapman v. Dodd, 10-350(277); Cole v. Curtis, 16-182(161); State v. Bliss, 21-458, 462. See Baumgartner v. Hodgdon, 105-22, 116+1030 (as best evidence of facts recited).

[70] Vaule v. Miller, 69-440, 72+452.

PLEADING

5279 Construed liberally—Aider by verdict—Pleadings in justice courts, whether oral or written, are to be construed with great liberality.[71] A defective complaint is cured by intendment after verdict or judgment, when the defendant has answered and gone to trial upon the merits without making any objection to the defective pleading, if the defects arise wholly out of an omission to plead expressly such facts as may be fairly implied from the allegations of the complaint.[72]

5280. Objections to pleadings—Amendment—A justice cannot dismiss an action for the insufficiency of a complaint without first ordering an amendment.[73] If a party refuses to amend a defective pleading it may be disregarded.[74] A delivery of a note to the court has been held to constitute an amendment of a defective complaint thereon.[75]

5281. Time to plead—The pleadings must take place at the time mentioned in the summons for the appearance of the parties, or at such time thereafter, not exceeding one week, as the justice may appoint for the convenience of the parties and by their consent.[76] A justice has no power in the matter except as prescribed by the statute. Pleadings cannot take place before the time mentioned in the summons for the appearance of the parties.[77] Without the consent of the parties pleadings can only take place at the time mentioned in the summons for the appearance of the parties. Without the consent of all the parties and the justice, pleadings cannot be received after one week from the return day. Mere consent to an adjournment over a week is not a consent that pleadings may be filed at such time.[78] When the parties to an action in a justice court appear on the return day named in the summons, and on motion of the plaintiff the hearing is adjourned for one week, the answer may be filed on the day to which the hearing is adjourned. By implication the justice designates that day for the pleading and by moving the adjournment the plaintiff consents thereto.[79] Loss of jurisdiction by an adjournment for more than a week without pleadings may be waived by the parties. They do so when they take or consent to any step in the cause which assumes that the jurisdiction exists or continues. A stipulation for an adjournment has been held to have that effect.[80] With the consent of the justice, parties are at full liberty to agree to adjournments for any length of time, and to agree as to the time when pleadings shall be filed.[81] Where a complaint is filed on the return day and

[71] Johnson v. Knoblauch, 14–16(4) (complaint for sale of lumber); Royce v. Gray, 21–329 (complaint on note); Guthrie v. Olson, 32–465, 21+557 (complaint for services); Rauen v. Burg, 38–389, 37+946 (claim for bill of groceries); McGrath v. O'Brien, 42–13, 43+486 (answer pleading statute of limitations); Polk v. Am. M. L. Co., 68–169, 70+1078; Continental Ins. Co. v. Richardson, 69–433, 72+458 (oral complaint on note); Harm v. Davies, 79–311, 82+585 (action on note—answer pleading extension of note to damage of defendant sustained); State v. Brathovde, 81–501, 84+340 (complaint in bastardy proceedings sustained); Kubesh v. Hanson, 93–259, 101+73 (action to charge wife on judgment against her husband by virtue of special agreement—complaint sustained); Black v. Berg, 101–9, 111+386 (partnership—account stated on settlement—complaint held insufficient).

[72] Chesterson v. Munson, 27–498, 8+593; Thompson v. Killian, 25–111. See Holgate v. Broome, 8–243(209).

[73] R. L. 1905 § 3914; Middelstadt v. McIntyre, 55–69, 56+464.

[74] R. L. 1905 § 3914; Rauen v. Burg, 38–389, 37+946.

[75] Royce v. Gray, 21–329.

[76] R. L. 1905 § 3904; Nohre v. Wright, 98–477, 108+865.

[77] Taylor v. Walther, 97–490, 107+162.

[78] Holgate v. Broome, 8–243(209); Mattice v. Litcherding, 14–142(110); O'Brien v. Pomroy, 22–130; Johnson v. Hagberg, 48–221, 50+1037. See West v. Berg, 66–287, 290, 68+1077.

[79] Nohre v. Wright, 98–477, 108+865.

[80] Johnson v. Hagberg, 48–221, 50+1037.

[81] West v. Berg, 66–287, 68+1077; Caley v. Rogers, 72–100, 75+114.

the defendant, omitting to plead, consents to an adjournment beyond a week, the pleadings are closed and his right to answer is gone, in the absence of agreement to the contrary.[82] Fractions of a day are disregarded in computing the time to plead.[83]

5282. Oral or in writing—Pleadings may be either oral or in writing.[84]

5283. Equitable defences—Equitable defences cannot be interposed.[85]

5284. Counterclaims—Provision is made by statute for the pleading of setoffs or counterclaims.[86]

5285. Reply—Admission by failure to reply—A counterclaim is admitted by a failure to reply, but nothing else.[87] A failure to reply to an unverified answer is not an admission.[88] An unauthorized reply, where no counterclaim is pleaded, may be taken as an admission.[89] In replevin a claim of the defendant for damages for the detention of the property during the pendency of the action is not a counterclaim.[90]

5286. Variance—A variance must be disregarded unless the court is satisfied that the adverse party was prejudiced thereby.[91]

5287. Verification—Every complaint, answer, or reply must be verified.[92] An unverified pleading is a nullity and may be disregarded,[93] but a verification may be waived.[94] It will be presumed on appeal that an oral pleading was verified.[95] A verification need not be entered in the docket.[96] Objection to the want of a verification cannot ordinarily be made for the first time on appeal.[97]

5288. Filing—The failure of a justice to file pleadings is not a jurisdictional defect.[98]

5289. Actions on accounts or instruments for payment of money—It is provided by statute that "when a cause of action or counterclaim arises upon an account or instrument for the payment of money only, it shall be sufficient for the party to deliver the account or instrument to the court, and to state that there is due to him thereon, from the adverse party, a specified sum, which he claims to recover or set off. The court may at the time of pleading require that such writing or account be exhibited to the adverse party for inspection, with liberty to copy the same, and, if not so exhibited, may prohibit its afterward being given in evidence." [99]

[82] O'Brien v. Pomroy, 22–130.
[83] Rauen v. Burg, 38–389, 37+946.
[84] R. L. 1905 § 3906; Davidson v. Farrell, 8–258(225).
[85] Fowler v. Atkinson, 6–503(350).
[86] R. L. 1905 §§ 3920–3922; Folsom v. Carli, 6–420(284) (statute embodies general features of English statutes—not as broad as statute regulating subject in district court); La Due v. First Nat. Bank, 31–33, 16+426 (setoffs against assignees of bills and notes); Ward v. Anderberg, 36–300, 30+890 (in replevin a claim of the defendant for damages for the detention of the property during the pendency of the action is not a counterclaim).
[87] R. L. 1905 § 3913; Taylor v. Bissell. 1–225(186); Walker v. McDonald, 5–455 (368).
[88] Thompson v. Killian, 25–111.
[89] Warder v. Willyard, 46–531, 49+300.
[90] Ward v. Anderberg, 36–300, 30+890.
[91] R. L. 1905 § 3915; Johnston v. Clark, 30–308, 15+252; Olson v. Minn. etc. Ry. 89–280, 94+871.
[92] R. L. 1905 § 3912.
[93] Thompson v. Killian, 25–111.
[94] Taylor v. Bissell, 1–225(186); Burt v. Bailey, 21–403. See Thompson v. Killian. 25–111.
[95] Burt v. Bailey, 21–403.
[96] Tyrrell v. Jones, 18–312(281).
[97] Taylor v. Parker, 17–469(447).
[98] Barber v. Kennedy, 18–216(196).
[99] R. L. 1905 § 3911; Taylor v. Parker 17–469(447) (an account held a sufficient complaint); Royce v. Gray, 21–329 (defective complaint on note remedied by delivery of note to justice); Tune v. Sweeney, 34–295, 25+628 (failure to file note not a ground for reversal of judgment); Continental Ins. Co. v. Richardson, 69–433, 72+458 (complaint on note sustained).

PROCEDURE

5290. Statutory provisions to be followed strictly—It is generally held that statutory provisions governing procedure in justice courts must be followed strictly.[1] Some of our cases adopt a more liberal rule.[2]

5291. Expiration of term of justice—Effect on pending action—An action pending before a justice at the time of his retirement from office at the end of his term, is not transferred by operation of law to his successor, so as to invest the latter with jurisdiction therein.[3]

5292. Transfer of action—Change of venue—Change of venue is regulated by statute.[4] In transferring an action to another justice, a justice of the peace should make an entry in his docket stating the name of the justice to whom the case is transferred, and the time and place when and where the parties are to appear before him; and if the justice to whom the case is transferred, in the absence and without the consent of one of the parties, tries the case at some other place, the judgment is void as to such party.[5] A failure to make the requisite entries is waived by a voluntary general appearance before the justice to whom the action is transferred.[6] It cannot be cured by entries in the docket of the justice to whom the action is transferred.[7] An order transferring a criminal case, without specifying the time for appearance before the justice to whom the action was transferred, has been held to require an appearance forthwith.[8] If a party obtains a transfer upon an insufficient affidavit he cannot question the transfer on that ground.[9] An application for a transfer after demanding a jury trial has been held too late.[10] An application may be made after preliminary motions have been made and determined. A party does not waive his right to a transfer by going to trial after his application is denied.[11] If a justice, upon an application for a change of venue, transfers the action to a person not in fact a justice, and adjourns the trial of the action to a future time, to be had before such supposed justice, and adjourns his own court as to such action, he has no jurisdiction thereafter, upon learning that such person is not a justice, to make a further order transferring the action to another justice.[12] A certificate of transfer to the effect "that I have compared the foregoing with the docket entries made in the above-entitled cause, and that the same is a correct transcript therefrom, and that herein inclosed are all the papers appertaining to said cause, which are numbered from 1 to 14, inclusive," has been held sufficient.[13] An affidavit for transfer need not be entered in the docket.[14] The statute is inapplicable to a proceeding before a justice acting as a committing magistrate.[15] A change of venue in an action brought before a village justice should, under Laws 1897 c. 151, be made to a justice of the same village, or to a justice of a town adjoining the village; not to a justice of a town adjoining the town in which the village is located. The town within which the village is located is an adjoining town within the

[1] May v. Grawert, 86-210, 90+383; Watier v. Buth, 87-205, 208, 91+756, 92+331.
[2] Sorenson v. Swensen, 55-58, 56+350.
[3] Anderson v. Hanson, 28-400, 10+429.
[4] R. L. 1905 § 3901. See, under a former statute, Cooper v. Brewster, 1-94(73).
[5] Larson v. Dukleth, 74-402, 77+220; McGinty v. Warner, 17-41(23); Rahilly v. Lane, 15-447(360); Barber v. Kennedy, 18-216(196).
[6] Anderson v. Hanson, 28-400, 10+429 (overruling Rahilly v. Lane, 15-447, 360); Larson v. Dukleth, 74-402, 77+220. See Oltman v. Yost, 62-261, 64+564.
[7] Rahilly v. Lane, 15-447(360).
[8] State v. Bliss, 21-458.
[9] Oltman v. Yost, 62-261, 64+564.
[10] Lueck v. St. P. & D. Ry., 57-30, 58+821.
[11] Curtis v. Moore, 3-29(7).
[12] State etc. Co. v. Gran, 76-32, 78+862.
[13] Lyons v. Rafferty, 30-526, 16+420. See State v. Bliss, 21-458.
[14] McGinty v. Warner, 17-41(23).
[15] State v. Bergman, 37-407, 34+737.

meaning of the statute.[16] A justice is not required to transfer an action until all his costs are paid.[17]

5293. Actions how commenced—Voluntary general appearance—The statute provides that "actions may be instituted before a justice of the peace, either by the voluntary appearance and agreement of the parties, or by the usual process." [18] The two modes specified are exclusive.[19] Jurisdiction of the person is conferred by a voluntary general appearance.[20] Litigating issues without objection has been held equivalent to "voluntary appearance and agreement" within the statute.[21]

5294. Special appearance—A special appearance merely denying the jurisdiction of the justice will not confer jurisdiction.[22] Where a party appears specially and objects to the jurisdiction of the court, he does not waive his objection by proceeding to trial after his objection is overruled.[23]

5295. Summons—*a. Requisites*—In all cases not otherwise provided for, the first process in an action is a summons issued by the justice, the requisites of which are specifically prescribed by statute.[24] Among the essential things which the summons must contain, is a statement of the time and place, when and where the defendant is required to appear, to answer in the action. The designation of this time, within the statutory limits, is a matter solely for the determination of the justice, in the exercise of his judicial discretion. No one else can do it.[25] Blanks in a summons, when issued, render it void.[26] But a blank in the copy of a summons served on the defendant has been held not to invalidate the service.[27]

b. Service and return—Service on the eleventh of the month returnable on the seventeenth is sufficient.[28] It is presumed that officers do their duty in serving a summons and that they make service as the circumstances require. Where a return certified that the summons was served "by reading, handing to, and leaving a true copy at his usual place of abode, with a person of suitable age and discretion, who was residing therein," it was held that the return was not vitiated by a failure to state that the defendant could not be found, or by the omission of the word "last" before the words "usual place of abode." The "last usual place of abode" means the defendant's actual abode at the time the summons is served. The return need not state the name of the person with whom the copy of the summons is left.[29] A blank in the copy of a summons served on the defendant has been held not to invalidate the service.[30] Service by publication must be in strict conformity to the statute.[31] Irregularities in the service are waived by a voluntary general appearance.[32] It is the fact of

[16] Wadena C. Co. v. Gaylord, 93–199, 101+72.

[17] Lueck v. St. P. & D. Ry., 57–30, 58+821.

[18] R. L. 1905 § 3891.

[19] Craighead v. Martin, 25–41, 43.

[20] Anderson v. Hanson, 28–400, 10+429 (overruling Rahilly v. Lane, 15–447, 360); Johnson v. Knoblauch, 14–16(4); Tyrrell v. Jones, 18–312(281); Steinhart v. Pitcher, 20–102(86); Anderson v. Southern Minn. Ry., 21–30. See Larson v. Dukleth, 74–402, 77+220.

[21] Lamberton v. Raymond, 22–129.

[22] Higgins v. Beveridge, 35–285, 28+506.

[23] Perkins v. Meilicke, 66–409, 69+220; May v. Grawert, 86–210, 90+383.

[24] R. L. 1905 §§ 3893, 3894; Craighead v. Martin, 25–41; Beseman v. Weber, 53–174, 175, 54+1053.

[25] Craighead v. Martin, 25–41.

[26] R. L. 1905 § 3893; Craighead v. Martin, 25–41; Seurer v. Horst, 31–479, 18+283.

[27] Martin v. Lindstrom, 73–121, 75+1038

[28] Smith v. Force, 31–119, 16+704.

[29] Vaule v. Miller, 64–485, 67+540; Goener v. Woll, 26–154, 2+163.

[30] Martin v. Lindstrom, 73–121, 75+1038.

[31] Bird v. Norquist, 46–318, 48+1132 (return day less than six days after expiration of period of publication vitiates service).

[32] Tyrrell v. Jones, 18–312(281). See Higgins v. Beveridge, 35–285, 28+506 (special appearance held not to confer jurisdiction).

service and not the proof thereof that gives jurisdiction. In an action commenced by attaching the personal property of the defendant, the defendant residing in another county in the state, the summons may be served upon him personally in the county of his residence, and such service gives the justice jurisdiction to render a judgment which will be valid, at least to the extent of the property attached.[33] Evidence has been held to show that a defendant was duly served.[34]

5296. Misnomer of defendant—Correction—In an action commenced by attachment, the justice, may, upon a plea in abatement for misnomer of the defendant, order the process and proceedings corrected by inserting the true name. To justify this, it is unnecessary that the process should state that the defendant's true name is unknown.[35]

5297. Time to appear—One hour after return time—It is provided by statute that parties are entitled to one hour after the time mentioned in the summons in which to appear.[36] This provision is inapplicable to forcible entry and unlawful detainer proceedings.[37] It will be presumed on appeal that the justice waited the hour.[38]

5298. Adjournments—*a. On return day*—With the consent of the justice parties are at full liberty to agree to adjournments for any length of time.[39] An adjournment may be had by consent on the return day, though no issue is joined and no answer interposed.[40] Loss of jurisdiction by an adjournment for more than a week without pleadings may be waived by the parties.[41] When the defendant does not appear on the return day, the justice may adjourn the case for the convenience of the plaintiff in proving his claim.[42]

b. As of right after pleadings closed—When the pleadings are closed, whether on the return day or on an adjourned day, either party is entitled as of right to an adjournment not exceeding one week, and no showing therefor is necessary. An improper denial of an application for such an adjournment deprives the justice of jurisdiction to proceed further in the cause, without the consent of the parties.[43] There must be some issue to be tried before a party is entitled to an adjournment as of right. A sham plea does not make an issue within this rule.[44] After ordering an adjournment a justice cannot change the date to which the adjournment is made, in the absence of the parties.[45] Whether a justice has any discretion in fixing the date, within a week, to which adjournment shall be made is an open question.[46]

c. After the first—It is provided by statute that "every adjournment after the first shall be for such reasonable time as will enable the party to procure such absent testimony or witness as is necessary and material, which the party applying for the adjournment has not been able to procure by the use of proper diligence." [47]

d. During trial—Whether, after the commencement of a trial before a jury, it is error or abuse of discretion for the justice to adjourn court for six days,

[33] Flohrs v. Forsyth, 78–87, 80+852.
[34] Kubesh v. Hanson, 93–259, 101+73.
[35] Morse v. Barrows, 37–239, 33+706.
[36] R. L. 1905 § 3902.
[37] Spooner v. French, 22–37.
[38] Ellegaard v. Haukaas, 72–246, 75+128.
[39] West v. Berg, 66–287, 290, 68+1077; Caley v. Rogers, 72–100, 75+114.
[40] O'Brien v. Pomroy, 22–130; Thompson v. Killian, 25–111.
[41] Johnson v. Hagberg, 48–221, 50+1037.
[42] Gillitt v. Truax, 27–528, 8+767.
[43] R. L. 1905 § 3917; O'Brien v. Pomroy, 22–130; Wheeler v. Paterson, 64–231, 66+964; Franck v. Vaughan, 81–236, 83+982; Johnson v. Little, 82–69, 84+648; Kennedy v. Kellum, 90–325, 96+792. See, under former statute, as to showing necessary, School Dist. v. Thompson, 5–280(221).
[44] Larson v. Shook, 68–30, 70+775.
[45] Wardlow v. Besser, 3–317(223).
[46] Larson v. Shook, 68–30, 70+775.
[47] R. L. 1905 § 3919. See, as to the showing of diligence, Washington County v. McCoy, 1–100(78); School Dist. v. Thompson, 5–280(221).

without the consent of a party, is an open question. If error, it is waived by the party failing to except and appearing and proceeding with the trial at the time to which it is adjourned.[48]

e. Entries in docket—A justice is required to enter in his docket the fact of an adjournment, stating at whose request and to what time and place it is had.[49] A failure to state at whose request an adjournment is made is not fatal.[50]

5299. Certifying case when title to realty involved—The statute requires a justice to certify a case to the district court when it appears on the trial that title to realty is involved.[51] He is not authorized to certify a case merely because such an issue is made by the pleadings. He cannot certify a case unless it appears, on the trial, from the evidence adduced, that the title to realty is involved and disputed by the adverse party.[52] Title is not involved if it is not disputed.[53] To justify certification there must be a real issue necessarily involved in the determination of the action.[54] Title is not ordinarily involved in unlawful detainer proceedings by a landlord against his tenant, so as to justify a certification.[55] An improper certification ousts both courts of jurisdiction, and the district court has no authority to remand the case to the justice for trial. The only order the district court can make in such a case is one of dismissal.[56] In an action in which, upon the pleadings, title to realty may be involved, and in which the justice has jurisdiction of the subject-matter and of the parties, the effect of the making of an entry in his docket, and of the making of a certificate and return in accordance with the statute is prima facie to invest the district court with complete jurisdiction of the case. If it did not in fact appear on the trial before the justice, from the evidence of either party, that the title to realty was involved in the action, this should be taken advantage of by seasonably bringing it to the notice of the district court upon affidavit, and upon a motion for a further return from the justice showing what the evidence, if any, upon the matter of title was.[57] The statute is inapplicable to criminal actions.[58]

5300. Jury—A party calling for a jury must pay the jurors' fees into court in advance, and if he refuses to do so, the justice may proceed to try the case without a jury. If there is a mistrial because of the disagreement of a jury, and a party calls for a second one, he must also pay its fees. Where a jury had been out fourteen hours, including a night, it was held that the justice was justified in discharging them for inability to agree on a verdict.[59] The justice should not enter the jury-room while the jury is deliberating.[60] Objection that the officer in charge of a jury was not sworn is waived unless seasonably taken.[61] A presumption will be entertained in favor of the regularity of the proceedings of the jury and of the conduct of the justice in relation thereto.[62] Authority

[48] Mead v. Sanders, 57–108, 58+683.
[49] R. L. 1905 § 3889; Steinhart v. Pitcher, 20–102(86); Anderson v. Southern Minn. Ry., 21–30; Wheeler v. Paterson, 64–231, 66+964.
[50] Wheeler v. Paterson, 64–231, 66+964.
[51] R. L. 1905 § 3918.
[52] Sorenson v. Torvestad, 94–410, 103+15; Goenen v. Schroeder, 8–387(344); Merriam v. Baker, 9–40(28); Goenen v. Schroeder, 18–66(51); Ferguson v. Kumler, 25–183; Steele v. Bond, 28–267, 9+772; State v. Cotton, 29–187, 12+529; Radley v. O'Leary, 36–173, 30+457; Tordsen v. Gummer, 37–211, 34+20; Herrick v. Newell, 49–198, 51+819. See Bassett v. Fortin, 30–27, 14+56; Petsch v. Biggs, 31–392, 18+101.
[53] Radley v. O'Leary, 36–173, 30+457.
[54] Merriam v. Baker, 9–40(28); Herrick v. Newell, 49–198, 51+819.
[55] Judd v. Arnold, 31–430, 433, 18+151; Suchaneck v. Smith, 45–26, 47+397.
[56] Sorenson v. Torvestad, 94–410, 103+15.
[57] Lindekugel v. Angelhofer, 24–324.
[58] State v. Sweeney, 33–23, 21+847.
[59] Rollins v. Nolting, 53–232, 54+1118.
[60] Helmbrecht v. Helmbrecht, 31–504, 18+449. See Snow v. Hardy, 3–77(35).
[61] Robert v. Brooks, 23–138.
[62] Clague v. Hodgson, 16–329(291).

to issue a new venire may be lost by delay.[63] Misconduct of the jury has been held a ground for reversing a judgment.[64]

5301. Reducing evidence to writing—A justice is not required to reduce to writing the evidence offered or received on the trial of a cause, unless requested to do so by one of the parties.[65]

5302. Exceptions—It is necessary to except to the rulings of a justice of the peace as to the admission of evidence, the competency of witnesses, and to all other rulings made on the trial, in order to review them on appeal on questions of law alone, except that, where the record shows that there is no cause of action or defence or jurisdiction, it is unnecessary to reserve an exception in order to review rulings as to such matters.[66]

5303. Findings of fact—The statute does not contemplate that justices should make findings of fact as a basis for their judgments.[67]

5304. Offer of judgment—The defendant is allowed by statute to make an offer of judgment. The right is purely statutory.[68]

5305. Security for costs—The plaintiff may be required to give security for costs.[69]

5306. Replevin—*a. Affidavit*—The affidavit and not the complaint is the basis of the proceeding and jurisdictional. It must state the value of the property,[70] and describe it.[71] An affidavit in the language of the statute, as to exemption from seizure under process, is sufficient.[72] Objection to the sufficiency of an affidavit cannot be made for the first time on appeal.[73]

b. Bond—The plaintiff is required by statute to execute a bond to the defendant.[74]

c. Writ—Service and effect—Upon the filing of a proper affidavit and bond the justice is required to issue the writ. He has no discretion in the matter.[75] The service of the writ gives the justice jurisdiction over the person of the defendant, whether the property is seized or not.[76] Defects in the writ, or the papers on which it is issued, are waived by answering without objection.[77] If possible the property is taken under the writ and delivered to the plaintiff.[78]

d. Judgment—Where the judgment is in favor of the defendant, whether of dismissal or on the merits, he is entitled, if the property has been taken from him, to a judgment in the alternative, for a return of the property to him, or for its value if a return cannot be had, with damages for its detention and costs. A judgment which is defective in this regard may be corrected on appeal.[79]

[63] May v. Grawert, 86–210, 90+383.

[64] Snow v. Hardy, 3–77(35).

[65] State v. Clemmensen, 92–191, 99+640.

[66] Franek v. Vaughan, 81–236, 83+982; Mead v. Sanders, 57–108, 58+683; Craighead v. Martin, 25–41; Witherspoon v. Price, 17–337(313); Egbert v. Mpls. etc. Ry., 106–23, 117+998.

[67] Neuhauser v. Banish, 84–286, 289, 87+774.

[68] R. L. 1905 § 3903; Thompson v. Ferch, 78–520, 81+520 (statute inapplicable to municipal courts established under Laws 1895 c. 229).

[69] R. L. 1905 § 3892; Starlocki v. Williams, 34–543, 26+909 (statutory obligation covers costs incurred on appeal in district court—action will lie in district court on obligation).

[70] R. L. 1905 § 3959; Hecklin v. Ess, 16–51(38).

[71] Goodell v. Ward, 17–17(1).

[72] Carlson v. Small, 32–492, 21+737.

[73] Goodell v. Ward, 17–17(1).

[74] R. L. 1905 § 3960; Clark v. Norton, 6–412(277) (liability on bond in case of a dismissal without judgment for a return); Wheeler v. Paterson, 64–231, 66+964 (jurisdiction unaffected by fact that name of surety was omitted in body of bond, that sureties did not justify, and there was no acknowledgment).

[75] Hecklin v. Ess, 16–51(38).

[76] McKee v. Metraw, 31–429, 18+148; White v. Flamme, 64–5, 6, 65+959. See, under former statute, St. Martin v. Desnoyer, 1–41(25).

[77] McKee v. Metraw, 31–429, 18+148.

[78] Terryll v. Bailey, 27–304, 306, 7+261.

[79] R. L. 1905 §§ 3965, 3966; Kates v. Thomas, 14–460(343); Terryll v. Bailey, 27–304, 7+261; Pabst v. Butchart, 68–303, 71+273. See Parker v. Bradford, 68–437, 71+619.

Where the plaintiff recovers, but has not obtained possession of the property, the judgment should be in the alternative, for a return of the property to him, or for its value if a return cannot be had. A judgment which is defective in this regard may be corrected on appeal.[80]

5307. Attachment—An attachment may issue in actions on contract in which the damages are unliquidated. It cannot issue in actions ex delicto.[81] A writ of attachment is sufficient in form if it conforms substantially to the statutory form.[82] An affidavit for an attachment is sufficient if it is in the language of the statute,[83] or conforms to the statute substantially.[84] An affidavit which shows by recital merely, that the person procuring it is the agent of the plaintiff, is to be deemed to be made on behalf of the plaintiff, and is sufficient.[85] The fact of agency need not appear from the affidavit, if it appears from the files and records in the action.[86] The fact that the affidavit is false justifies a dismissal, but the objection may be waived by a general appearance or appeal upon questions of both law and fact.[87] If an affidavit states facts authorizing a writ returnable in three days, and also facts authorizing one returnable in six days, and one returnable in six days is issued, the justice has jurisdiction.[88] The statute provides for the service of a certified inventory of the property attached,[89] but a failure to make such service does not invalidate the levy.[90] The defendant may recover possession of attached property by executing a forthcoming bond.[91] The obligors on the bond cannot question the levy or the want of sureties.[92] Provision is made by statute for the dissolution of an attachment on motion and a bond by the defendant to pay any judgment rendered against him and costs.[93] A justice is authorized by R. L. 1905 § 3882 to issue writs of attachment, directed to the proper officer of any county in the state, for the purpose of causing an attachment of property in said county. But such justice cannot obtain jurisdiction over the person of a party by issuing such a writ, in the form prescribed in R. L. 1905 § 3998, causing property to be attached, and the writ to be read to such party, in the county to which it is sent for service, and a return of such service made and filed in his office.[94]

5308. Garnishment—It is provided by statute that "no judgment shall be rendered against a garnishee in a justice court where the judgment against the defendant is less than ten dollars, exclusive of costs, nor where the indebtedness of the garnishee to the defendant, or the value of the property or money of the defendant in the hands of the garnishee or under his control, as proved, is less than ten dollars."[95] A payment by garnishees of a judgment against them without execution discharges them, though the judgment against the defendant was upon default, upon service of the summons by publication, and subsequent to the payment, within the year it was set aside, and the defendant was permitted to defend and succeeded in his defence.[96] Garnishment proceedings inadvertently commenced in a justice court, but subsequently dismissed, have

[80] R. L. 1905 § 3967; Larson v. Johnson, 83–351, 86+350. See McKee v. Metraw, 31–429, 18+148 (statute cited).
[81] Baumgardner v. Dowagiac Mfg. Co., 50–381, 52+964.
[82] Hines v. Chambers, 29–7, 11+129; Beseman v. Weber, 53–174, 54+1053.
[83] Curtis v. Moore, 3–29(7).
[84] Baumgardner v. Dowagiac Mfg. Co., 50–381, 52+964; Smith v. Victorin, 54–338, 56+47.
[85] Smith v. Victorin, 54–338, 56+47.
[86] West v. Berg, 66–287, 68+1077.
[87] McCubrey v. Lankis, 74–302, 77+144.
[88] Curtis v. Moore, 3–29(7).
[89] R. L. 1905 § 3972.
[90] West v. Berg, 66–287, 68+1077.
[91] R. L. 1905 § 3975.
[92] Scanlan v. O'Brien, 21–434.
[93] R. L. 1905 § 3979; Rossiter v. Minn. etc. Co., 37–296, 33+855.
[94] Perkins v. Meilicke, 66–409, 69+220.
[95] R. L. 1905 § 4253; Sheehan v. Newpick, 77–426, 80+356.
[96] Troyer v. Schweizer, 15–241(187).

been held not a ground for dismissing garnishment proceedings in the district court.[97]

JUDGMENTS

5309. Form and entry—It is unnecessary for a justice to enter a formal order for judgment in his docket. It is sufficient if it is stated therein that the court rendered judgment in favor of a party for a certain sum and for a designated sum as costs.[98] An entry of a verdict and costs has been held a sufficient judgment.[99] It cannot be expected that justices will use apt or technical language, and hence their judgments must be construed with great liberality in order to give them effect.[1] In construing a judgment with respect to its form and sufficiency, recourse must be had to the pleadings in the action, to ascertain whether the relief awarded is within the issues there made; and any matter appearing in the judgment, not pertinent to such issues, may be rejected as surplusage, if what remains grants definite and specific relief within the issues. The evidence may not be referred to on this subject, except, perhaps, where it is made part of the record, and then only for the purpose of ascertaining whether a matter covered by the judgment was within an issue litigated on the trial by consent of parties.[2] It is proper, but not indispensable, that a justice should sign a judgment.[3] He need not make findings of fact as a basis for his judgments or enter the reasons for his judgments in his docket.[4] The statute provides that a justice shall render judgment "forthwith." [5] This means within a reasonable time.[6] The parties may waive an immediate entry.[7] In certain cases the statute provides that judgment shall be rendered and entered within three days after the action is submitted.[8] This limitation is absolute. A judgment entered thereafter is void.[9]

5310. Proof on default—The statute does not authorize a judgment in an action to recover unliquidated damages without proof of the amount of the damages.[10] The mere failure of a defendant to appear is not a confession of judgment, or of the claim of the plaintiff. The plaintiff must prove his claim notwithstanding the default, and the justice has three days in which to render and enter judgment.[11] Where the defendant appeared and pleaded three days before the return day, but there was no appearance for him on the return day, it was held that the justice properly entered judgment for the plaintiff upon proof.[12]

5311. By confession—Provision is made by statute for the entry of a judgment by confession.[13] A mere default of a defendant to appear is not a confession of judgment within the statute.[14]

5312. Costs and disbursements—Provision is made by statute for awarding the prevailing party costs and disbursements.[15] It is error to insert a party's costs in a judgment against him.[16]

[97] Hopkins v. McCusker, 103–79, 114+468.
[98] Glaucke v. Gerlich, 91–282, 98+94.
[99] State v. Myers, 70–179, 72+969; Smith v. Petrie, 70–433, 73+155.
[1] Boe v. Irish, 69–493, 72+842; Hanlon v. Hennessy, 87–353, 92+1.
[2] Hanlon v. Hennessy, 87–353, 92+1.
[3] State v. Bliss, 21–458; Chapman v. Dodd, 10–350(277).
[4] Neuhauser v. Banish, 84–286, 289, 87+774. See Chapman v. Dodd, 10–350(277) (the reasons of a justice for his judgment are immaterial).
[5] R. L. 1905 § 3935.
[6] Sorenson v. Swensen, 55–58, 56+350.
[7] Rucker v. Miller, 50–360, 52+958.
[8] R. L. 1905 § 3935.
[9] Murray v. Mills, 56–75, 57+324; May v. Grawert, 86–210, 90+383. See, as to liability of justice and his sureties on his bond for a neglect to enter judgment, Larson v. Kelly, 64–51, 66+130.
[10] Nohre v. Wright, 98–477, 108+865.
[11] Larson v. Kelly, 72–116, 75+13.
[12] Taylor v. Walther, 97–490, 107+162.
[13] R. L. 1905 § 3933.
[14] Larson v. Kelly, 72–116, 75+13.
[15] R. L. 1905 § 2703.
[16] Trigg v. Larson, 10–220(175); Payson v. Everett, 12–216(137).

5313. Transcript—Docketing in district court—Execution—Provision is made by statute for docketing transcripts of judgments of justices in the district court and for execution thereon.[17] A transcript must be a literal copy of the judgment and not a mere abstract thereof. But a defect in this regard renders a judgment only voidable and not void.[18] An exemplified copy of a transcript and docket entry is competent to prove the judgment,[19] but a mere certified copy of the docketing is insufficient.[20] An execution out of the district court on such transcript and docketing is presumptively valid. It is unnecessary for one claiming thereunder to prove that execution had been previously issued by the justice.[21]

5314. Execution—Sale—An irregularity in reissuing an old execution and a misrecital of the date of the judgment therein, has been held not to invalidate a sale thereunder.[22]

5315. Bond for restitution—Provision is made by statute for the execution of a bond for restitution before judgment, where the summons is served by publication or by leaving a copy thereof at the last usual place of abode of the defendant.[23] A failure to require the bond renders a judgment irregular, but not void.[24] A judgment or docket need not show that a bond was given.[25]

5316. Amendment—An amendment of a judgment made on motion after an appeal to the district court has been held a nullity.[26]

5317. Presumptions in favor of judgments—Collateral attack—It is provided by statute that "whenever a judgment rendered by a justice of the peace has remained undisturbed for a period of not less than two years, the jurisdiction of the justice over the parties and subject-matter of the action at the time of rendering the same shall be presumed, when it appears from the docket or a transcript thereof on file in the office of the clerk of the district court of the proper county that at the time of rendering such judgment he had acquired such jurisdiction." [27] The statutory presumption is conclusive on collateral attack. It is inapplicable to a direct attack.[28] It has been said that the statute prescribes a mere rule of evidence.[29] Where a justice has jurisdiction his judgment is entitled to the same presumptions of validity as the judgments of a court of record. It is not subject to collateral attack for mere error or irregularity.[30] The judgment of a justice cannot be collaterally attacked by showing his reasons therefor.[31]

5318. Opening default—Provision is made by statute for opening a default judgment and allowing the defendant to appear and defend.[32]

5319. Action to vacate—A complaint, in an action to vacate a judgment upon the ground that the summons was issued by one not a justice of the peace de jure or de facto, has been held defective in not sufficiently alleging that the justice issuing the summons had not been elected at the general election preceding and had not duly qualified.[33] An action to vacate a judgment will not lie on the ground that the complaint does not state a cause of action.[34]

[17] R. L. 1905 § 3942-3944.
[18] Boe v. Irish, 69-493, 72+842.
[19] Herrick v. Ammerman, 32-544, 21+836.
[20] Todd v. Johnson, 50-310, 52+864.
[21] Herrick v. Ammerman, 32-544, 21+836.
[22] Millis v. Lombard, 32-259, 20+187.
[23] R. L. 1905 § 3940. See, prior to statute, Troyer v. Schweizer, 15-241(187).
[24] Vaule v. Miller, 69-440, 72+452.
[25] Vaule v. Miller, 64-485, 67+540.
[26] Larson v. Johnson, 83-351, 86+350.
[27] R. L. 1905 § 3945.
[28] Vaule v. Miller, 69-440, 72+452.
[29] Plummer v. Hatton, 51-181, 53+460.
[30] Clague v. Hodgson, 16-329(291); Gillitt v. Truax, 27-528, 8+767; State v. Bowen, 45-145, 47+650; Smith v. Victorin, 54-338, 56+47; Vaule v. Miller, 64-485, 67+540; Ellegaard v. Haukaas, 72-246, 75+128.
[31] Chapman v. Dodd, 10-350(277).
[32] R. L. 1905 § 3941; Troyer v. Schweizer, 15-241(187) (bond).
[33] Kane v. Arneson, 94-451, 103+218.
[34] Kubesh v. Hanson, 93-259, 101+73.

Where the rights of third parties have not intervened, an action will lie to set aside the judgment of a justice, rendered by default, upon a constable's certificate of service of the summons, if in fact such summons was not served; and in such action the return of the officer may be impeached.[35] An action may be maintained to set aside a judgment valid on its face on the ground that the summons was never served on the defendant. Such an action is not a collateral, but a direct, attack upon the judgment.[36]

APPEAL TO DISTRICT COURT

5320. Who may appeal and in what cases—In determining whether a judgment exceeds fifteen dollars, for the purposes of an appeal, costs are disregarded.[37] The right of a plaintiff to appeal is unaffected by a counterclaim.[38] The defendant may appeal on questions of law and fact where the amount claimed exceeds thirty dollars, though the recovery against him is less than fifteen dollars.[39]

5321. City in two counties—Where a city lies in two counties appeal lies to the district court in either county.[40]

5322. Notice of appeal—It is a jurisdictional prerequisite to the allowance of an appeal that the original notice of appeal and proof of service thereof be filed with the justice within the prescribed time and the return must include these papers to give the district court jurisdiction. An omission to file the notice, or a defect in the notice or proof of service, cannot be remedied by an amendment after the time to appeal has expired.[41] Notice may no doubt be waived,[42] but an early case held the contrary.[43] A notice signed by a party's attorney as such is good, though neither the party or his attorney appeared in the justice court.[44] The notice must be in writing and properly signed.[45] A notice which wholly fails to show by what justice, or in what county, the judgment was rendered, is a nullity.[46] An error in the date of the judgment is immaterial.[47] The notice must state specifically the grounds upon which the appeal is taken, whether upon questions of law or upon questions of law and fact.[48] Docket entries certified to the district court are not conclusive as against jurisdictional facts contained in the notice itself.[49] An affidavit of service of notice is to be liberally construed.[50] Proof of service on the "wife" of a party, without showing that it was at his residence, is insufficient.[51] Proof of service of notice by the admission of an agent who did not act or appear for the party on the trial, and whose authority is not shown, is insufficient.[52]

[35] Knutson v. Davies, 51-363, 53+646.
[36] Vaule v. Miller, 69-440, 72+452.
[37] Dodd v. Cady, 1-289(223).
[38] Ross v. Evans, 30-206, 14+897.
[39] Shunk v. Hellmiller, 11-164(104); Koetke v. Ringer, 46-259, 48+917.
[40] Mpls. T. M. Co. v. Voigt, 63-145, 65+261.
[41] Larrabee v. Morrison, 15-196(151); Marsile v. Mil. etc. Ry., 23-4; Pettingill v. Donnelly, 27-332, 7+360; Cremer v. Hartmann, 34-97, 24+341; Stolt v. Chi. etc. Ry., 49-353, 51+1103; Graham v. Conrad, 66-471, 69+334; Looney v. Drometer, 69-505, 72+797; Smith v. Kistler, 84-102, 86+876; Treat v. Court Minn., 109-110, 123+62.
[42] See Wrolson v. Anderson, 53-508, 55+597; McCubrey v. Lankis, 74-302, 77+144.
[43] Larrabee v. Morrison, 15-196(151).
[44] Conrad v. Swanke, 80-438, 83+383.
[45] Larrabee v. Morrison, 15-196(151).
[46] Pettingill v. Donnelly, 27-332, 7+360.
[47] Rahilly v. Lane, 15-447(360).
[48] Smith v. Kistler, 84-102, 86+876; Buie v. G. N. Ry., 94-405, 103+11.
[49] Smith v. Kistler, 84-102, 86+876.
[50] Toner v. Advance T. Co., 45-293, 47+810 (affidavit to effect that service was made "by delivering to and leaving with him, personally, a copy thereof, at his residence in said township, by delivering to and leaving with his father, James Toner, a true copy thereof," held sufficient).
[51] Stolt v. Chi. etc. Ry., 49-353, 51+1103.
[52] Cremer v. Hartmann, 34-97, 24+341.

An admission of service may be a sufficient proof of service.[53] Proof of service on "Empey & Empey," is not proof of service on "E. E. Empey."[54] Proof of admission of service by an attorney who did not act or appear for the party and whose authority or agency was not shown has been held insufficient.[55] Attempted service on an adverse party which does not purport to show that the notice was served personally or by leaving a copy at the residence is ineffectual.[56] Objection to the want of due service of a notice cannot be made for the first time in the supreme court.[57]

5323. Affidavit—The statutory affidavit to the effect that the appeal is made in good faith, and not for the purpose of delay,[58] is jurisdictional.[59] All appellants in a joint judgment must join in the affidavit, or make separate affidavits.[60] An affidavit purporting to be made before a notary public is a nullity without the notarial seal. A defective affidavit cannot be amended after the statutory time for appealing has expired.[61] The affidavit must appear on its face to have been made before a proper officer;[62] but if it appears on its face that the person subscribing the jurat was a proper officer to take the affidavit it is sufficient, though his official designation is not affixed.[63] It need not be made before the justice who tried the case. It is not vitiated by a mistake in the date of the judgment.[64]

5324. Bond—Defect or omission not fatal—The statute provides for an appeal bond conditioned that the appellant shall prosecute his appeal with effect, and abide the order of the court therein.[65] It is also provided that "no appeal allowed by a justice shall be dismissed on account of there being no bond, or of the bond given being defective or insufficient, if the appellant, before the motion to dismiss is determined, shall execute a sufficient bond, approved by the judge of the district court, and pay all costs incurred by reason of such default or omission."[66] This provision is applicable to forcible entry and unlawful detainer proceedings,[67] but inapplicable to criminal actions.[68] Provision was made by Laws 1897 c. 46 for excepting to the sufficiency of sureties to the bond.[69]

5325. Return—The return must show affirmatively compliance with every jurisdictional prerequisite to an appeal; otherwise the district court will not acquire jurisdiction and must dismiss the appeal unless the defect is remedied by a supplementary return.[70] A supplementary or amended return may be ordered.[71] The return cannot be controverted or supplemented by affidavits.[72]

[53] Rahilly v. Lane, 15-447(360).
[54] Graham v. Conrad, 66-471, 69+334.
[55] Treat v. Court Minn., 109-110, 123+62.
[56] Id.
[57] Cordello v. Deponte, 107-573, 120+902.
[58] R. L. 1905 § 3982.
[59] McFarland v. Butler, 11-72(42); Knight v. Elliott, 22-551; Stolt v. Chi. etc. Ry., 49-353, 51+1103; Harm v. Davies, 79-311, 82+585; Grimes v. Fall, 81-225, 83+835.
[60] Harm v. Davies, 79-311, 82+585.
[61] Grimes v. Fall, 81-225, 83+835.
[62] Knight v. Elliott, 22-551; Grimes v. Fall, 81-225, 83+835.
[63] Bandy v. Chi. etc. Ry., 33-380, 23+547.
[64] Rahilly v. Lane, 15-447(360).
[65] R. L. 1905 § 3982. See, as to sufficiency of bond, State v. Fitch, 30-532, 16+411; State v. Austin, 35-51, 26+906; Schwede v. Burnstown, 35-468, 29+72; Anderson v. Meeker County, 46-237, 48+1022.
[66] R. L. 1905 § 3989; Rahilly v. Lane, 15-447(360, 368); Marsile v. Mil. etc. Ry., 23-4; Eidam v. Johnson, 79-249, 82+578.
[67] Mills v. Wilson, 59-107, 60+1083.
[68] State v. Mattson, 105-63, 117+227.
[69] Eidam v. Johnson, 69-249, 82+578; Betts v. Newman, 91-5, 97+371; Peterson v. Kjellin, 93-422, 101+948.
[70] McFarland v. Butler, 11-72(42); Looney v. Drometer, 69-505, 72+797.
[71] R. L. 1905 § 3988; McFarland v. Butler, 11-72(42); Rahilly v. Lane, 15-447(360, 368); State v. Christensen, 21-500; Plymat v. Brush, 46-23, 48+443; Cour v. Cowdery, 53-51, 54+935; Smith v. Victorin, 54-338, 56+47; Looney v. Drometer, 69-505, 72+797; Smith v. Kistler, 84-102, 86+876.

Upon the filing of the return the district court becomes possessed of the action.[73] Upon an appeal on questions of law the justice is not required to return the evidence unless requested, and unless it affirmatively appears from the return that such a request was made, or that all the evidence is returned without request, it will be presumed that sufficient competent evidence was introduced under the issues to support the judgment.[74] If all the evidence is returned it will be considered by the district court, though no request was made by the appellant for its return.[75] The certificate of a justice that the return contains all the evidence should be positive and certain, but it will be construed with liberality.[76] If the return contains only a part of the evidence a supplementary return may be ordered.[77] A return is to be construed as a whole.[78] It must show jurisdiction both of the person and of the subject-matter.[79] It need not show the county of the justice court.[80] Docket entries of a justice, certified to the district court by the justice on appeal, are not conclusive as against jurisdictional facts contained in the notice itself. A certificate of a justice, on appeal, that all papers have been returned, will be presumed to refer to the only notice found in the files so returned, and, if its identity is questioned, the burden is upon the party who denies it to secure an amended return, if necessary to determine that question.[81] In dismissing an appeal for want of a return the court cannot enter a judgment of affirmance under Laws 1895 c. 24.[82] The summons is one of the papers to be returned.[83] Where the transcript of the docket in the return states that a notice of appeal was served and filed, and the notice returned is void, the return shows want of jurisdiction.[84] It was formerly the rule that the justice's minutes of the evidence was no part of the return.[85]

5326. Payment of fees for return—The payment of the fees of the justice for making the return is one of the jurisdictional prerequisites to an appeal.[86]

5327. Entry of appeal on district court calendar—Judgment for failure—The right of an appellant to enter his appeal [87] terminates with the second day of the term, and does not continue until the appellee has exercised his right under the statute to have the judgment of the justice affirmed and entered against the appellant.[88] The omission of the appellant to cause the entry does not affect the jurisdiction of the district court. The court may relieve the appellant from the consequences of his omission and try the cause on its merits.[89] Where such relief has been improvidently granted, the court may

[72] Plymat v. Brush, 46–23, 48+443. See Larson v. Dukleth, 74–402, 77+220.

[73] R. L. 1905 § 3984; Lehmicke v. St. P. etc. Ry., 19–464(406, 412); Chesterson v. Munson, 27–498, 501, 8+593; Christian v. Dorsey, 69–346, 72+568.

[74] Hinds v. Am. Ex. Co., 24–95; Warner v. Fischbach, 29–262, 13+47; Tune v. Sweeney, 34–295, 25+628; Continental Ins. Co. v. Richardson, 69–433, 72+458.

[75] Smith v. Force, 31–119, 16+704.

[76] Payson v. Everett, 12–216(137); Smith v. Force, 31–119, 16+704; Plymat v. Brush, 46–23, 48+443; Dean v. St. P. & D. Ry., 53–504, 55+628; Continental Ins. Co. v. Richardson, 69–433, 72+458; Kloss v. Sanford, 77–510, 80+628; Davies v. Von Berg, 79–233, 82+311.

[77] Plymat v. Brush, 46–23, 48+443; Cour v. Cowdery, 53–51, 54+935; Davies v. Von Berg, 79–233, 82+311.

[78] Larrabee v. Morrison, 15–196(151).

[79] Barnes v. Holton, 14–357(275); Larrabee v. Morrison, 15–196(151). See Barber v. Kennedy, 18–216(196).

[80] Barber v. Kennedy, 18–216(196).

[81] Smith v. Kistler, 84–102, 86+876.

[82] Rowell v. Zier, 66–432, 69+222.

[83] Barber v. Kennedy, 18–216(196).

[84] Larrabee v. Morrison, 15–196(151).

[85] Barber v. Kennedy, 18–216(196); Palmer v. St. P. & D. Ry., 38–415, 38+100.

[86] R. L. 1905 § 3982. See, under former statutes, Trigg v. Larson, 10–220(175); Rahilly v. Lane, 15–447(360).

[87] R. L. 1905 § 3986.

[88] Sundet v. Steenerson, 69–351, 72+569.

[89] Christian v. Dorsey, 69–346, 72+568; Sundet v. Steenerson, 69–351, 72+569; Wentworth v. Nat. etc. Co., 124+977.

subsequently vacate its order and restore the appellee to the right to enter the judgment of the justice against the appellant.[90] The setting aside of a judgment entered on motion of appellee for failure to place an appeal on the calendar is largely discretionary with the district court and its action will not be reversed on appeal except for a clear abuse of discretion.[91] An appeal may be placed on the calendar and brought on for argument at the next term of court after the return of the justice is made and filed, unless continued for cause, though thirty days have not elapsed since its allowance.[92]

5328. Time of trial—All appeals allowed thirty days before the first day of the term of the district court held next after the appeal is allowed must be determined at such term, unless continued for cause.[93] Such appeal may be placed upon the calendar and brought on for argument at the next term of the district court after the return of the justice is made and filed, unless continued for cause, though thirty days may not have elapsed since the allowance of the appeal.[94] An appeal on questions of law alone may be brought on for hearing at any time.[95]

5329. Place of trial—An appeal upon questions of law alone, from a justice's judgment to the district court, may, with the consent of the parties, be heard and determined by the court in any county within its judicial district. Appearing and arguing such appeal before the court in another county than the one wherein the appeal is pending, without objecting to the jurisdiction of the court to try the same in such other county, is a waiver of all objections of that character.[96]

5330. Appeals on questions of law alone—Effect—Scope of review—Trial—Judgment—On an appeal upon questions of law alone the district court does not act strictly as an appellate court to "review" the determination of the justice court; it tries the issues presented by the record and renders the proper judgment. The statute does not say that the judgment appealed from shall be reversed, affirmed, or modified, but that the appeal shall be tried.[97] Such an appeal brings before the district court for review all errors of law, jurisdictional or otherwise, apparent on the return and properly excepted to, when an exception is necessary.[98] The appeal is to be determined solely upon the return and the district court cannot relieve a party from an admission made of record upon the trial in the justice court.[99] The district court may affirm, reverse, or modify the judgment of the justice; and, in case of a reversal, it may, in a proper case, determine the merits, and render judgment thereon for the appellant.[1] Where a justice in his decision excludes a material issue under the pleadings from his consideration, the district court, on appeal, is authorized to pass upon the question so excluded upon the evidence, as if it was an original issue in the district court.[2] A simple reversal, not determining the merits, has the same effect as a judgment of dismissal. It annuls all the pro-

[90] Sundet v. Steenerson, 69–351, 72+569.
[91] Locke v. Osborne, 80–22, 82+1084.
[92] Chesterson v. Munson, 27–498, 8+593.
[93] R. L. 1905 § 3990.
[94] Chesterson v. Munson, 27–498, 8+593.
[95] Rollins v. Nolting, 53–232, 54+1118.
[96] Chesterson v. Munson, 27–498, 8+593.
[97] Kates v. Thomas, 14–460(343); Craighead v. Martin, 25–41.
[98] Craighead v. Martin, 25–41; Mattice v. Litcherding, 14–142(110).
[99] Merriman v. Anselment, 86–6, 89+1125.
[1] Kates v. Thomas, 14–460(343); State v. Bliss, 21–458 (a criminal case, but the rule is the same in criminal and civil cases); Hinds v. Am. Ex. Co., 24–95; Craighead v. Martin, 25–41; Watson v. Ward, 27–29, 6+407; Terryll v. Bailey, 27–304, 7+261; Johnston v. Clark, 30–308, 15+252; Meister v. Russell, 53–54, 54+935; Thorson v. Sauby, 68–166, 70+1083; Larson v. Johnson, 83–351, 86+350; Hardenburg v. Roesner, 83–7, 85+719; Neuhauser v. Banish, 84–286, 87+774. See, under former statute, St. Martin v. Desnoyer, 1–41(25).
[2] Neuhauser v. Banish, 84–286, 87+774.

ceedings before the justice and leaves the parties to proceed de novo as though no action had been commenced; and in rendering such a judgment the court may and ought to restore the parties to the situation they were in before the action was commenced. Upon such a judgment, in an action of replevin, where the property has been delivered to the plaintiff on the writ, the defendant is entitled to a judgment in the district court for a return of the property, or its value.[3] A case is never remanded to the justice for a retrial. An appeal, properly perfected, operates to supersede the judgment of the justice, whether it is upon questions of law alone or upon questions of law and fact, and the judgment on appeal is to be entered in the district court as if the action originated there.[4] When all the evidence is returned the appellant may raise, as a question of law, the point that there is no evidence to justify the judgment; but in such a case the district court can go no further than to determine whether there is any evidence reasonably tending to support the judgment and cannot consider the question of the preponderance of the evidence.[5] The district court will consider the sufficiency of the evidence, if all the evidence is returned, though it was returned without request.[6] If the return does not contain all the evidence, or any request for its return, the sufficiency of the evidence will not be considered, but it will be presumed that sufficient competent evidence was introduced under the issues to support the judgment.[7] A judgment should not be reversed merely because the justice, having been requested to do so, has not returned all the evidence. The remedy is a motion for an order to compel the justice to make a supplementary return.[8] By appealing on questions of law alone a party does not waive objections to the jurisdiction of the justice.[9] After the district court has rendered its decision it may reconsider and modify it.[10] Where the return fails to specify the items of the costs taxed, the judgment will not be reversed or modified on that account, unless it appears that items not taxable have been erroneously included. The remedy is an amended return.[11] A judgment will not be reversed for any mere defect in the return.[12] Dismissing an appeal instead of affirming the judgment, where the respondent is entitled to affirmance, is harmless error.[13] Failure to file a note sued on is not a ground for reversal.[14] Admissions in an unauthorized reply in the justice court may be treated in the district court as formal admissions on the trial.[15] Under the present statutes the scope of review in the district court is not limited to objections raised and passed upon in the justice court.[16] Formerly the rule was otherwise.[17] But it is still necessary to except to rulings of a justice as to the admission of evidence, the competency of witnesses, and to all other rulings made during the course of the trial, in order to review them on appeal on ques-

[3] Terryll v. Bailey, 27–304, 7+261; Daley v. Mead, 40–382, 42+85.

[4] State v. Bliss, 21–458 (a criminal case, but the rule is the same in criminal and civil cases); Terryll v. Bailey, 27–304, 7+261; Daley v. Mead, 40–382, 42+85.

[5] Palmer v. St. P. & D. Ry., 38–415, 38+100; Croonquist v. Flatner, 41–291, 43+9; Franek v. Vaughan, 81–236, 83+982; Larson v. Johnson, 83–351, 86+350; Neuhauser v. Banish, 84–286, 87+774; Rahm v. Newton, 87–415, 92+408; Trace v. Voight, 94–527, 103+1134; Egbert v. Mpls. etc. Ry., 106–23, 117+998.

[6] Smith v. Force, 31–119, 16+704; Dean v. St. P. & D. Ry., 53–504, 55+628.

[7] Hinds v. Am. Ex. Co., 24–95; Warner v. Fischbach, 29–262, 13+47; Tune v. Sweeney, 34–295, 25+628; Continental Ins. Co. v. Richardson, 69–433, 72+458; Durenberger v. Peck, 125+121.

[8] Cour v. Cowdery, 53–51, 54+935.

[9] Mattice v. Litcherding, 14–142(110); Craighead v. Martin, 25–41; McCubrey v. Lankis, 74–302, 305, 77+144.

[10] Meister v. Russell, 53–54, 54+935.

[11] Smith v. Victorin, 54–338, 56+47.

[12] Rahilly v. Lane, 15–447(360).

[13] Schroeder v. Harris, 43–160, 45+4.

[14] Tune v. Sweeney, 34–295, 25+628.

[15] Warder v. Willyard, 46–531, 49+300.

[16] Franek v. Vaughan, 81–236, 83+982; Neuhauser v. Banish, 84–286, 87+774.

[17] Bennett v. Phelps, 12–326(216).

have no jurisdiction where the punishment may be for both a fine and imprisonment.[42] In determining the amount of a punishment costs are to be disregarded.[43] The jurisdiction of a justice is not affected by such incidental consequences of a conviction as sentence to a workhouse or hard labor,[44] or the revocation of a liquor license,[45] or the suspension of the right to procure such a license.[46] The legislature cannot invest justices of the peace with jurisdiction of offences punishable by imprisonment in the state prison.[47] The commitment of children to the state reform school is not "punishment" within the constitutional limitation on the jurisdiction of justices of the peace.[48] A justice has no jurisdiction to try a case in which the title to realty is involved.[49]

5341. Offences near county lines—Offences committed within one hundred rods of the line dividing two counties may be prosecuted before a justice of either county.[50]

5342. Death of justice pending action—A criminal prosecution, pending and undetermined before a justice of the peace at the time of his death, terminates and ends upon the death of the justice, and is not a bar to further action on the same charge before another justice or court of competent jurisdiction.[51]

5343. Complaint—Warrant—When a written complaint showing an offence is presented to a justice and sworn to before him, it is a sufficient examination of the complainant under the statute.[52] The complaint is the first step in the proceedings, and if it charges the commission of an offence it confers jurisdiction, and irregular subsequent proceedings are not ordinarily fatal.[53] Jurisdiction to issue a warrant, acquired by a duly verified complaint in writing, charging an offence in direct and positive terms, is not lost by proof upon the trial that the complainant had no knowledge of the commission of the offence, except upon information and belief.[54] Any person may make complaint.[55] The statute provides for the examination of others than the complainant.[56] Cases are cited below involving the sufficiency of particular warrants.[57]

5344. Dismissal—Reinstatement—Where a justice dismisses a criminal case and discharges the accused, however erroneous his decision may be, he cannot reinstate the case, or bring the accused before him for trial, without commencing anew.[58]

5345. Entries in docket—A justice is not required to enter the evidence introduced on a criminal trial in his docket or to keep a record thereof.[59] Error in entitling an action has been held immaterial.[60] Entries are presumptively true.[61] A justice is required to make substantially the same entries in a criminal as in a civil action.[62] Where there is a conflict between docket entries and statements in the papers returned on appeal, the justice may be required to make an amended or supplementary return in relation thereto.[63]

[42] State v. West, 42–147, 43+845; State v. Anderson, 47–270, 50+226.
[43] State v. Larson, 40–63, 41+363.
[44] State v. West, 42–147, 43+845; State v. Harris, 50–128, 52+387.
[45] State v. Harris, 50–128, 52+387.
[46] State v. Larson, 40–63, 41+363.
[47] State v. Charles, 16–474(426).
[48] State v. Brown, 50–353, 52+935.
[49] State v. Cotton, 29–187, 12+529.
[50] R. L. 1905 § 5316; State v. Anderson, 25–66.
[51] State v. Miesen, 96–466, 105+555.
[52] State v. Nerbovig, 33–480, 24+321.
[53] State v. Bates, 96–150, 104+890; State v. Graffmuller, 26–6, 46+445.
[54] State v. Graffmuller, 26–6, 46+445.
[55] State v. Galvin, 27–16, 6+380.
[56] Shafer v. Hertzig, 92–171, 174, 99+796.
[57] Rochester v. Upman, 19–108(78); State v. Reckards, 21–47.
[58] State v. Secrest, 33–381, 23+545.
[59] State v. McGinnis, 30–48, 14+256.
[60] State v. Graffmuller, 26–6, 46+445; Faribault v. Wilson, 34–254, 25+449.
[61] State v. Christensen, 21–500.
[62] R. L. 1905 § 4002. See §§ 5276–5278.
[63] State v. Christensen, 21–500.

5346. Jury trial—The accused may waive a jury trial.[64] The statute provides that the evidence shall be given in the presence of the accused, but this provision may be waived by him, at least when his counsel is present for him.[65] It will be presumed that the verdict was rendered publicly as required by the statute.[66]

5347. Judgment on conviction—Commitment—A judgment on conviction may include costs.[67] A commitment may be issued at any time while the judgment stands unexecuted, except during the pendency of an appeal.[68]

5348. Judgment against complainant on acquittal—It is provided by statute, that on the acquittal of the accused, if the justice shall certify in his docket that the complaint was wilful and malicious, and without probable cause, he shall enter judgment against the complainant for all costs that shall have accrued in the proceedings had upon the complaint.[69]

5349. Appeal—Bond—Return—Trial—Judgment—An appeal bond or recognizance must be conditioned as prescribed by the statute.[70] A failure to return evidence which the justice was not seasonably requested to reduce to writing is not a ground for reversal.[71] Prior to Laws 1883, c. 61, there was no provision for returning the evidence.[72] If the appeal is on questions of law and fact the trial proceeds de novo, as if commenced in the district court.[73] Irregularity in delivering the return of the justice to the jury is waived by failure to make proper objection.[74] If the evidence is not returned, alleged errors in the admission or exclusion of evidence cannot be considered.[75] The appeal supersedes the judgment of the justice and the district court may render such judgment as the law of the case requires.[76] If the judgment of the justice is affirmed, or upon trial in the district court defendant is convicted and a fine assessed, judgment for said fine and costs in both courts may be rendered against defendant and his sureties.[77] Notice of appeal served on a county attorney need not designate him as such.[78]

KEROSENE OIL—See Adulteration, 101.
KLEPTOMANIA—See note 79.
KNOWINGLY—See note 80.
KNOWLEDGE—See Evidence, 3231.
LABORER, LABORING MAN—See note 81.
LABOR UNIONS—See Parties, 7320; Trade Unions.

[64] State v. Woodling, 53-142, 54+1068.
[65] State v. Reckards, 21-47.
[66] State v. Schmail, 25-370.
[67] R. L. 1905 § 4031; State v. Schmail, 25-370, 372. See Elbow Lake v. Holt, 69-349, 72+564 (effect of failure to include costs in judgment).
[68] R. L. 1905 § 4031; In re Shaw, 31-44, 16+461; State v. Long, 103-29, 114+248.
[69] R. L. 1905 § 4017; Casey v. Sevatson, 30-516, 16+407 (entry that complaint was wilful and malicious inadmissible in action for malicious prosecution); Dean v. Renville County, 50-232, 52+650 (entry of judgment against complainant for costs does not defeat officer's right to fees).
[70] R. L. 1905 § 4018; State v. Mattson, 105-63, 117+227; Id., 105-164, 117+503. See Elbow Lake v. Holt, 69-349, 72+564.
[71] State v. Clemmensen, 92-191, 99+640.
[72] State v. McGinnis, 30-48, 14+256.
[73] State v. Tiner, 13-520(488).
[74] State v. Nichols, 29-357, 13+153.
[75] State v. Clemmensen, 92-191, 99+640.
[76] State v. Bliss, 21-458; State v. Dist. Ct., 77-405, 80+355; Elbow Lake v. Holt, 69-349, 72+564.
[77] R. L. 1905 § 4023; Baker v. U. S., 1-207 (181); State v. Bliss, 21-458, 461; State v. Schmail, 25-370, 372; Fairmont v. Meyer, 83-456, 86+457.
[78] State v. Jones, 55-329, 56+1068.
[79] Lewis v. Lewis, 44-124, 125, 46+323.
[80] State v. Stein, 48-466, 470, 51+474.
[81] Knight v. Norris, 13-473(438); King v. Kelly, 25-522; Wildner v. Ferguson, 42-112, 43+794; Boyle v. Vanderhoof, 45-31, 47+396.

LACHES

Cross-References

See Judgments, 5114, 5134; Limitation of Actions, 5596; Specific Performance, 8798

5350. Definition—Laches is unreasonable delay. The term is usually employed to denote unreasonable delay in bringing an equitable action, or in otherwise seeking relief or asserting one's rights in equity.[82] It is a strictly equitable defence as distinguished from the absolute defence of the statute of limitations.[83]

5351. General principles—Statutes of limitation govern equitable as well as legal actions.[84] Where there is no statute of limitations courts of equity refuse to grant equitable relief to a party who has failed to exercise reasonable diligence in the assertion of his rights—in other words they refuse to enforce stale demands.[85] The principle is embodied in the maxim that equity aids the vigilant and not the negligent.[86] Nothing can call a court of equity into activity but conscience, good faith, and reasonable diligence.[87] The doctrine of laches is based on grounds of public policy, which require, for the peace of society, the discouragement of stale demands.[88] Its application depends upon the facts of the particular case and rests largely in the discretion of the trial court.[89] Whether a right to equitable relief has been lost by laches depends on a variety of considerations of which the mere lapse of time is only one.[90] Delay does not constitute laches unless it is culpable under the circumstances. Whether delay is culpable depends on such considerations as knowledge of the facts, infancy or other personal disability, mistake, undisturbed possession, and the consequences to others. The practical question in each case is whether there has been such unreasonable delay in asserting a known right, resulting in prejudice to others, as would make it inequitable to grant the relief sought.[91] It is essential that the party should have knowledge of the facts requiring action, or should have failed to acquire obtainable knowledge after notice, or that there should be circumstances which would put a person of ordinary prudence upon inquiry leading to knowledge.[92] Though the doctrine may be applied where there is no evidence of actual prejudice,[93] the presence or absence of prejudice, and the probability of prejudice, are considerations affecting the application of the doctrine.[94] There is a growing tendency to extend

[82] Brandes v. Carpenter, 68–388, 71+402; Lloyd v. Simons, 97–315, 105+902.

[83] Schmitt v. Hager, 88–413, 93+110.

[84] See § 5596.

[85] Ayer v. Stewart, 14–97(68); State v. Torinus, 28–175, 185, 9+725; Taylor v. Whitney, 56–386, 57+937; Brandes v. Carpenter, 68–388, 71+402.

[86] Brandes v. Carpenter, 68–388, 71+402.

[87] Sullivan v. Portland etc. Ry., 94 U. S. 806.

[88] Taylor v. Whitney, 56–386, 57+937; Brandes v. Carpenter, 68–388, 71+402; St. P. etc. Ry. v. Eckel, 82–278, 84+1008; Schmitt v. Hager, 88–413, 93+110; Hanson v. Sommers, 105–434, 117+842.

[89] Parsons v. Noggle, 23–328, 332; Taylor v. Whitney, 56–386, 57+937; Berryhill v. Peabody, 77–59, 63, 79+651; St. P. etc. Ry. v. Eckel, 82–278, 84+1008; Schmitt v. Hager, 88–413, 93+110; Shevlin v. Shevlin, 96–398, 105+257; Lloyd v. Simons, 97–315, 105+902; Sheffield v. Sheffield, 105–315, 117+447; Hanson v. Sommers, 105–434, 117+842.

[90] Burke v. Backus, 51–174, 53+458; Schmitt v. Hager, 88–413, 93+110.

[91] Bausman v. Kelley, 38–197, 208, 36+333; Sanborn v. Eads, 38–211, 36+338; Lloyd v. Simons, 97–315, 105+902. See, as to the effect of poverty and ignorance, Niggeler v. Maurin, 34–118, 24+369.

[92] Myrick v. Edmundson, 2–259(221); Stocking v. Hanson, 35–207, 28+507; Bausman v. Kelley, 38–197, 36+333; Marcotte v. Hartman, 46–202, 48+767; Wall v. Meilke, 89–232, 94+688.

[93] McQueen v. Burhans, 77–382, 80+201.

[94] See Plummer v. Whitney, 33–427, 23+841; Burke v. Backus, 51–174, 53+458;

the application of the doctrine.[95] The doctrines of estoppel, laches, and acquiescence are akin.[96]

5352. Application to legal proceedings—The doctrine of laches, though strictly equitable in its origin, is now applicable to legal proceedings where there is no statute of limitations.[97] The doctrine has no application to an action at law for damages.[98]

5353. Who may invoke doctrine—An intervener in an action has been held not entitled to object to the laches of the plaintiff in prosecuting it.[99]

5354. Cannot affect statutes of limitation—Where an action is governed by a statute of limitations the doctrine of laches has no application.[1]

5355. Delay in asserting equitable interests in land—Laches will not be imputed to one in the peaceable possession of land under an equitable title for delay in resorting to a court of equity for protection against the legal title.[2] The rule is otherwise if the equitable owner is out of possession.[3]

5356. Of public officers and agents—The state and its governmental subdivisions are not affected by the laches of public officers or agents. In other words the doctrine of laches cannot be invoked against the public.[4]

5357. Prosecution of action—The doctrine of laches applies to the prosecution of an action after it is begun. If the plaintiff fails to exercise reasonable diligence in the prosecution, the action may be dismissed or other appropriate relief awarded.[5]

5358. Waiver—Invoking on appeal—The doctrine of laches cannot be invoked for the first time on appeal.[6]

5359. Pleading—Demurrer—A complaint should state facts explaining or excusing delays which appear to be unreasonable.[7] Owing to the nature of laches it is rare that a complaint is demurrable on that ground.[8] One may take advantage of laches without pleading it.[9]

5360. Cases—Cases are cited below involving an application of the doctrine of laches.[10]

State v. Murphy, 81–254, 83+991; Lloyd v. Simons, 97–315, 105+902.

[95] Brandes v. Carpenter, 68–388, 71+402.

[96] See Bice v. Walcott, 64–459, 67+360; Brandes v. Carpenter, 68–388, 71+402; Barton v. Pioneer S. & L. Co., 69–85, 71+906; Shevlin v. Shevlin, 96–398, 105+257; Hanson v. Sommers, 105–434, 117+842.

[97] Brandes v. Carpenter, 68–388, 71+402; Hanson v. Swenson, 77–70, 79+598; Coleman v. Akers, 87–492, 92+408.

[98] Neibuhr v. Gage, 99–149, 108+884.

[99] Hunt v. O'Leary, 84–200, 87+611.

[1] Morris v. McClary, 43–346, 46+238; O'Mulcahey v. Gragg, 45–112, 47+543; Neibuhr v. Gage, 99–149, 108+884.

[2] Hayes v. Carroll, 74–134, 76+1017; Mpls. etc. Ry. v. Chisholm, 55–374, 57+63. See Cameron v. Chi. etc. Ry., 60–100, 61+814.

[3] Hanson v. Sommers, 105–434, 117+842.

[4] Hennepin County v. Dickey, 86–331, 90+775. See Bice v. Walcott, 64–459, 67+360; State v. Duluth St. Ry., 88–158, 92+516.

[5] Coleman v. Akers, 87–492, 92+408. See Hunt v. O'Leary, 84–200, 87+611.

[6] Burke v. Backus, 51–174, 53+458.

[7] Marcotte v. Hartman, 46–202, 48+767.

[8] Sanborn v. Eads, 38–211, 36+338. See Mowry v. McQueen, 80–385, 83+348.

[9] Schmitt v. Hager, 88–413, 93+110.

[10] Myrick v. Edmundson, 2–259(221) (action to restrain sheriff from paying redemption money to judgment creditor); Johnson v. Williams, 4–260(183) (action to set aside foreclosure sale under power); Ayer v. Stewart, 14–97(68) (action to recover surplus at foreclosure sale); Knox v. Randall, 24–479 (purchase by part of several cestuis que trust—delay of others in claiming share); Dickerson v. Hayes, 26–100, 1+834 (action to redeem from foreclosure sale); Dutton v. McReynolds, 31–66, 16+468 (action to set aside sale on execution); Plummer v. Whitney, 33–427, 23+841 (id.); Stocking v. Hanson, 35–207, 28+507 (action to vacate judgment); Abbott v. Peck, 35–499, 29+194 (action to set aside foreclosure sale); Holterhoff v. Mead, 36–42, 29+675 (action by one cotenant against another to establish title); Bausman v. Kelley, 38–197, 36+333 (action to remove a cloud on title); Sanborn v. Eads, 38–211, 36+338 (id.); Dole v. Wilson, 39–330, 40+161 (action to enforce judgment—reliance of judgment creditor on statements of judgment debtor); Marcotte v. Hartman, 46–202, 48+767 (action to set aside foreclosure under power); Lewis v. Welch, 47–193, 48+608, 49+665

LAKES—See Boundaries, 1067; Drains, 2822; Maritime Liens; Navigable Waters.

LAND GRANTS—See Public Lands.

LAND OFFICE—See Public Lands.

(action by heirs to charge administrator as trustee); Holingren v. Piete, 50–27, 52+266 (cancelation of contract for sale of realty); Burke v. Backus, 51–174, 53+458 (action to determine adverse claims—attacking foreclosure sale); Berkey v. St. P. Nat. Bank, 54–448, 56+53 (action by judgment creditor of estate of decedent to subject property to his judgment); Taylor v. Whitney, 56–386, 57+937 (action for damages for non-performance of contract to purchase realty); Dunn v. State Bank, 59–221, 61+27 (action for cancelation of bank stock); Colby v. Colby, 59–432, 61+460 (action to vacate judgment of divorce); Cameron v. Chi. etc. Ry., 60–100, 61+814 (ejectment); Bice v. Walcott, 64–459, 67+360 (highway—true line—laches or acquiescence of public); Brandes v. Carpenter, 68–388, 71+402 (action on guardian's bond); Berryhill v. Peabody, 77–59, 79+651 (action on bond of assignee in insolvency); Hanson v. Swenson, 77–70, 79+598 (claim of ward against guardian); Langworthy v. Washburn, 77–256, 79+974 (action by receiver to recover assessment made on insurance premium notes); McQueen v. Burhans, 77–382, 80+201 (rescission of contract for fraud); Gilbert v. Hewetson, 79–326, 82+655 (action to enforce constructive trust); Mowry v. McQueen, 80–385, 83+348 (action for fraud and conspiracy of widow and heirs in preventing sale of lands for the benefit of creditors); St. P. etc. Ry. v. Eckel, 82–278, 84+1008 (ejectment—claim against heirs); Lamberton v. Youmans, 84–109, 86+894 (action to enforce express trust); Coleman v. Akers, 87–492, 92+408 (failure to prosecute action begun); Wall v. Meilke, 89–232, 94+688 (action to reform instrument for mistake); Dickman v. Dryden, 90–244, 95+1120 (action to cancel deed); Shevlin v. Shevlin, 96–398, 105+257 (abuse of confidence—action to set aside contract); Lloyd v. Simons, 97–315, 105+902 (action to establish lost deed and to cancel other deeds); Sheffield v. Sheffield, 105–315, 117+447 (unfair competition—infringement of trademark—injunction); Fallon v. Fallon, 124+994 (money payable on demand—money deposited with defendant to be kept for plaintiff); Roberts v. Herzog, 124+997 (action by minority stockholder to set aside a sale of the assets of the corporation to a stockholder).

LANDLORD AND TENANT

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Cross-References

See Adverse Possession, 114; Estates; Ground Rent; Nuisance, 2259; Use and Occupation.

IN GENERAL

5361. When relation exists—The relation of landlord and tenant exists where one person occupies the premises of another in subordination to that other's title and with his consent.[11] The relation may exist between cotenants.[12] A tenant may be defined as one who has the occupation or temporary possession of lands or tenements whose title is in another.[13] The interest of a lessee is commonly termed a leasehold interest.[14]

5362. Attornment—The common-law doctrine of attornment by tenants is not in force in this state,[15] An attornment to another without the consent of the landlord does not affect his possession.[16]

5363. Tenant cannot deny landlord's title—It is a general rule, founded upon considerations of public policy and good faith, that a tenant in possession is estopped from denying the title of his landlord.[17] The relation of landlord and tenant must exist before any estoppel therefrom can arise. The estoppel does not arise from the lease, but from the relation established by it, and you cannot make use of the lease to estop the parties from denying the relation, and then make use of the relation to estop them from attacking the lease. The grounds usually stated for this doctrine of estoppel are that the tenant has admitted the landlord's title, and has obtained the possession from the landlord upon his agreement to pay rent, and to restore the possession; therefore, that he

[11] Lightbody v. Truelsen, 39-310, 40+67; Place v. St. Paul etc. Co., 67-126, 129, 69+706. See Steele v. Bond, 32-14, 18+830; East Norway Lake etc. Church v. Froislie, 37-447, 35+260; Bowe v. Hyland, 44-88, 46+142; Crosby v. Horne, 45-249, 47+717; Rochester Lodge v. Graham, 65-457, 68+79; Melby v. Gjesdahl, 99-526, 109+1134.

[12] Schmidt v. Constans, 82-347, 85+173.

[13] Place v. St. Paul etc. Co., 67-126, 69+706.

[14] Sanford v. Johnson, 24-172.

[15] Jones v. Rigby, 41-530, 43+390.

[16] Trimble v. Lake Superior etc. Co., 99-11, 108+867; Hanson v. Sommers, 105-434, 117+842.

[17] R. L. 1905 § 3329; Allen v. Chatfield, 8-435(386); St. Anthony etc. Co. v. Morrison, 12-249(162); Cole v. Maxfield, 13-235(220); Morrison v. Bassett, 26-235, 2+851; Steele v. Bond, 28-267, 9+772. See Preiner v. Meyer, 67-197, 69+887; McLaughlin v. Betcher, 87-1, 91+14; Hanson v. Sommers, 105-434, 117+842; Note, 89 Am. St. Rep. 62.

ought not to be allowed to set up any claim of right to the land, or to the possession, not derived under the lease, until he has first put the landlord in as good position as he was before the lease, by restoring the possession. The doctrine is not latterly regarded with special favor, and should not be extended to any case to which its reasons do not apply.[18] A tenant cannot assert against his landlord that the title is in the government.[19] By statute an exception to the general rule is made where, at the time of the lease, the tenant was in possession under a claim of title adverse to the landlord.[20] The tenant may deny his landlord's title as against a stranger,[21] and he may always show that since his lease the title of his landlord has terminated.[22] A parol promise by one in possession to pay rent to one out of possession who has neither title or right of possession, is void for want of consideration, and is not a basis for an estoppel.[23] The general rule applies to one who goes into possession under a tenant.[24] The estoppel may be avoided by fraud or mistake.[25]

5364. Right of landlord to enter—As a general rule, unless a landlord reserves in the lease a right to enter upon the land, an entry by him is unauthorized and amounts to a trespass, whether injury results or not.[26] Unless otherwise agreed he has no right to enter to make repairs.[27] By statute he may enter to post a notice under the mechanic's lien law.[28]

5365. Entry for repairs—In the absence of agreement a landlord has no right of entry to make repairs. An agreement allowing him to enter for that purpose at certain times gives him no right to enter at other times.[29] An agreement requiring the landlord to repair gives him a right of entry for that purpose by implication.[30]

5366. Eviction of tenant by landlord—Where a landlord unlawfully evicts a tenant, takes possession of the premises, and deprives the tenant of the beneficial use and enjoyment of the same, a cause of action arises in favor of the tenant.[31] Where a tenant or under-tenant is wrongfully and forcibly ejected from the leased premises, he may recover treble damages under the statute, or may proceed, as in an ordinary action of trespass, for the recovery of damages actually suffered by him, including special damages to his property.[32]

5367. Refusal to accept premises—Alterations—It is sufficient ground for a refusal on the part of the lessee to accept the premises when tendered, that material changes have been made in the arrangement and condition of the building between the time of the execution of the lease and the time of delivery. This rule is not changed by the fact that the outgoing tenants caused the change in the condition of the premises without the knowledge or consent of the lessor.[33]

5368. Duty to make repairs—In the absence of express agreement a landlord owes his tenant no duty to make repairs,[34] or improvements.[35] This rule

[18] Steele v. Bond, 28–267, 9+772.
[19] St. Anthony etc. Co. v. Morrison, 12–249(162).
[20] R. L. 1905 § 3329. See, prior to statute, Steele v. Bond, 28–267, 9+772; Sage v. Halverson, 72–294, 75+229; Clary v. O'Shea, 72–105, 75+115.
[21] Cole v. Maxfield, 13–235(220).
[22] Tilleny v. Knoblauch, 73–108, 75+1039.
[23] Clary v. O'Shea, 72–105, 75+115. See Sage v. Halverson, 72–294, 75+229.
[24] Dickinson v. Fitterling, 69–162, 71+1030; Weide v. St. Paul B. Co., 92–76, 99+421.
[25] Sage v. Halverson, 72–294, 75+229.
[26] Wacholz v. Griesgraber, 70–220, 73+7.
[27] Goebel v. Hough, 26–252, 2+847.
[28] Congdon v. Cook, 55–1, 56+253.
[29] Goebel v. Hough, 26–252, 2+847.
[30] Barron v. Liedloff, 95–474, 104+289.
[31] Wacholz v. Griesgraber, 70–220, 73+7; Aldrich v. Shoe Mart Co., 108–15, 121+422.
[32] Bagley v. Sternberg, 34–470, 26+602.
[33] Rosenstein v. Cohen, 96–336, 104+965.
[34] Krueger v. Ferrant, 29–385, 13+158; Harris v. Corlies, 40–106, 41+940; Harpel v. Fall, 63–520, 65+913; Eggensperger v. Lanpher, 92–503, 100+372; Barron v. Liedloff, 95–474, 104+289; Myhre v. Schleuder, 98–234, 108+276.
[35] Harris v. Corlies, 40–106, 41+940; Eggensperger v. Lanpher, 92–503, 100+372.

has been applied to a common roof over several tenants.[36] Where it is expressly stipulated that the landlord shall not be required to make repairs, he is not liable for injury to the goods of his tenant resulting from the disrepair of the premises.[37] The measure of damages, for a breach of a covenant to repair, is the difference between the agreed rent and the rental value without the repairs.[38] Where a lessor agrees by the terms of his lease to make certain specific repairs upon the leased premises within a time extending beyond the commencement of the tenancy, the lessee does not waive the agreement to repair by entering into possession before they are made. The rights and liabilities of the parties to a written lease are measured by their engagements therein expressed. A violation of the agreement by the lessor to make certain repairs upon the premises is none the less a breach of the contract because his failure to repair did not materially lessen the enjoyment of the premises by the lessee.[39]

5369. Unsafe premises—Liability of landlord and tenant—If a landlord has not agreed to keep the premises in repair, he is not liable to his tenant or others for injuries from obvious defects in the premises when he is not guilty of fraud or concealment. He is not bound to keep the premises in a reasonably safe condition.[40] If he agrees to keep the premises in repair he is liable to his tenant, and others rightfully upon the premises, for injuries resulting from his negligence in making or failing to make repairs.[41] Where a porch or stairway is used in common by the different occupants of a tenement house or flat building, the landlord will be presumed to have reserved possession thereof for the benefit of all the tenants, and he is under obligation to all parties having occasion to use the premises to exercise ordinary or reasonable care to keep the same in repair.[42] If he retains control over a portion of a building he is liable to his tenant, and others rightfully upon the premises, for injuries resulting from his negligence in failing to keep such portion in a reasonably safe condition, even in the absence of an agreement to keep in repair.[43] But a landlord has been held not liable for the disrepair of a common roof over several tenants.[44] If a landlord makes repairs or improvements he is liable for his negligence in making them, though he was under no obligation to make them. A landlord who authorizes his tenant on the second floor of a building to reconstruct a porch and stairway suitable for such tenant's purposes, at his own cost, the same to be under the tenant's exclusive control, is liable to another tenant, or servants, occupying the first floor, for a failure to exercise ordinary care in seeing that the improvement is made reasonably safe. The landlord does not escape such obligation by turning the whole matter over to the upper tenant with full authority to act; himself remaining in ignorance of the plan and manner of executing the work. In such case he stands in the same relation to his lower tenant as though he had himself made the improvement.[45] A landlord has been held liable for injuries to a child of a tenant resulting from a defective railing about the porch of an apartment house, the porch being used in common by the chil-

[36] Krueger v. Ferrant, 29–385, 13+158.
[37] Beneteau v. Stubler, 79–259, 82+583; Erikson v. Propp, 106–238, 119+390.
[38] Barron v. Liedloff, 95–474, 104+289.
[39] Craven v. Skobba, 108–165, 121+625.
[40] Harnel v. Fall, 63–520, 65+913; Kayser v. Lindell, 73–123, 125, 75+1038; Barron v. Liedloff, 95–474, 104+289. See Widing v. Penn. M. L. Ins. Co., 95–279, 104+239 (defective railing about porch of apartment house).
[41] Barron v. Liedloff, 95–474, 104+289 (defective floor of porch); Olson v. Schultz, 67–494, 70+779 (defective freight elevator). See Note, 92 Am. St. Rep. 499.
[42] Farley v. Byers, 106–260, 118+1023.
[43] Rosenfield v. Newman, 59–156, 60+1085 (closet with sink and faucet—evidence held not to show want of due care). See Widing v. Penn. M. L. Ins. Co., 95–279, 104+239 (defective railing about porch of apartment house).
[44] Krueger v. Ferrant, 29–385, 13+158.
[45] Myhre v. Schleuder, 98–234, 108+276.

dren of the apartment, though there was no agreement to keep in repair.[46] A landlord is liable under the statute for failure to place guards about dangerous machinery.[47] A landlord has been held liable for a defective platform over a canal in front of leased premises,[48] and entitled to indemnity from his tenant.[49] A landlord has been held not liable for injuries to a guest of a tenant from falling into an excavation near the demised building.[50] A tenant is liable for a failure to provide safety devices for elevators as required by statute.[51]

5370. Nuisance—If the owner of land demises it with a nuisance upon it, he is presumed to authorize its continuance, and is liable to third persons subsequently injured thereby. The fact that his tenant agrees to repair does not relieve him of liability.[52] He is not liable for a nuisance arising subsequent to the demise and without his fault.[53]

5371. Liability between tenants—A tenant of an upper floor in a building has been held liable to a tenant of a lower floor for negligence in allowing water to flow from a faucet.[54]

5372. Duty to remove property—A tenant has been held liable under his lease to remove from the demised premises certain property of his rendered worthless by a fire.[55]

5373. Acts of other tenants—It is no defence to a tenant's claim that his rights under a lease have been invaded and infringed upon to say that the invasion and infringement were the acts of another tenant, when they have been performed with the landlord's consent and active concurrence.[56]

5374. Effect of platting demised premises—The rights of a tenant in possession of land under a valid unexpired lease are not affected by a replatting of the land by the owner in fee, or the dedication of a portion of such land for a public alley. He cannot be disturbed in the possession of the land until his lease is legally terminated. But such platting cannot confer upon him the right to remain in possession after his lease is legally terminated, and he must therefore surrender possession to the owners of the fee.[57]

TENANCIES FROM MONTH TO MONTH

5375. What constitutes—Tenancies from month to month are tenancies at will, with the rent payable monthly.[58] They arise whenever a tenant under any kind of a lease, with the rent payable monthly, holds over.[59] The mere payment of one month's rent, with nothing further said or done, does not create a tenancy from month to month.[60] Where one goes into possession as a tenant without any agreement as to the length of the term and pays rent monthly there is a tenancy from month to month.[61]

[46] Widing v. Penn. M. L. Ins. Co., 95–279, 104+239.

[47] Tvedt v. Wheeler, 70–161, 72+1062. See Welker v. Anheuser, 103–189, 114+745.

[48] Nash v. Mpls. Mill Co., 24–501.

[49] Mpls. Mill Co. v. Wheeler, 31–121, 16+698.

[50] Fredenburgh v. Baer, 89–241, 94+683.

[51] Welker v. Anheuser, 103–189, 114+745.

[52] Isham v. Broderick, 89–397, 95+224; Harpel v. Fall, 63–520, 65+913; Hannem v. Pence, 40–127, 41+657; Cahill v. Eastman, 18–324(292).

[53] Korte v. St. Paul T. Co., 54–530, 56+246.

[54] Rosenfield v. Arrol, 44–395, 46+768.

[55] Boardman v. Howard, 90–273, 96+84.

[56] City Power Co. v. Fergus Falls W. Co., 55–172, 56+685.

[57] Budds v. Frey, 104–481, 117+158.

[58] Hunter v. Frost, 47–1, 49+327; Thompson v. Baxter, 107–122, 119+797.

[59] See § 5380.

[60] Alworth v. Gordon, 81–445, 84+454.

[61] Johnson v. Albertson, 51–333, 53+642; Finch v. Moore, 50–116, 52+384; Rogers v. Brown, 57–223, 58+981; Thompson v. Baxter, 107–122, 119+797.

[62] Bouvier L. Dict. See Gould v. Sub-Dist. No. 3, 8–427(382); Engels v. Mitchell, 30–122, 14+510; In re Emerson, 58–450, 60+23; Quade v. Fitzloff, 93–115, 100+660.

TENANCIES FOR YEARS

5376. What constitutes—A tenancy for years is a tenancy for a fixed period, as for a year, quarter, or month.[62]

TENANCIES AT WILL

5377. What constitutes—Strictly a tenancy at will is one which may be terminated at any time by either party without notice. In this strict sense they do not exist in this state, because of the statute requiring notice to quit. And they ceased to exist at common law at an early date. A tenancy at will is equally at the will of both parties. Tenancies from year to year are a species of tenancies at will.[63] Where no term is fixed in a lease the tenancy is at will.[64] Where a person enters into possession and pays rent under a lease void as within the statute of frauds, or because of the incapacity of the parties, the tenancy is at will,[65] but no tenancy at will or of any other character is created by going into possession under a lease for an unlawful purpose.[66] Where a tenant holds over pending negotiations for a new lease the tenancy is at will.[67] Tenancies at will may be created by express words, or they may arise by implication of law. Where created by express contract, the writing necessarily so indicates, and reserves the right of termination to either party, as where the lease provides that the tenant shall occupy the premises so long as agreeable to both parties. Such tenancies arise by implication of law where no definite time is stated in the contract, or where the tenant enters into possession under an agreement to execute a contract for a specific term and he subsequently refuses to do so, or where he enters under a void lease, or where he holds over pending negotiations for a new lease. The chief characteristics of this form of tenancy are uncertainty respecting the term, and the right of either party to terminate it by proper notice; and these features must exist, whether the tenancy is created by the express language of the contract or by implication of law.[68]

TENANCIES FROM YEAR TO YEAR

5378. What constitutes—Tenancies from year to year are a species of tenancies at will. They exist in this state as at common law, except that the length of notice to terminate them has been shortened by statute. A tenancy from year to year, though indeterminate as to duration until notice given, has most of the qualities and incidents of a term for years. A tenant from year to year has a lease for a year certain, with a growing interest during every year thereafter, springing out of the original contract, and parcel of it. The tenancy is not determined by the death of either lessor or lessee; it is assignable and demisable, and may be pleaded as a term.[69] In the case of urban property, occupation thereof, and monthly payments of rent, as from month to month, are insufficient, standing alone, to create a tenancy from year to year. An entry under a void lease for years, or under a void lease for one or more years, to commence in futuro, followed by payment of rent, may create a tenancy from year to year, if the tenant holds over upon the expiration of the first year.[70]

[63] Hunter v. Frost, 47–1, 49+327; Thompson v. Baxter, 107–122, 119+797.

[64] Sanford v. Johnson, 24–172; Paget v. Electrical E. Co., 82–244, 84+800; Rogers v. Brown, 57–223, 58+981.

[65] Goodwin v. Clover, 91–438, 98+322; Berni v. Boyer, 90–469, 97+121; Van Brunt v. Wallace, 88–116, 92+521; Johnson v. Albertson, 51–333, 53+642.

[66] Berni v. Boyer, 90–469, 97+121.

[67] Fall v. Moore, 45–515, 48+404.

[68] Thompson v. Baxter, 107–122, 119+797.

[69] Hunter v. Frost, 47–1, 49+327. See Gardner v. Dakota County, 21–33; Smith v. Bell, 44–524, 47+263; Thompson v. Baxter, 107–122, 119+797.

[70] Johnson v. Albertson, 51–333, 53+642; Backus v. Sternberg, 59–403, 61+335.

TENANCIES AT SUFFERANCE

5379. What constitutes—A tenant who holds over after the expiration of his term without the consent of his landlord is a tenant at sufferance.[71] A tenancy at sufferance arises in all cases where a person who enters lawfully into the possession wrongfully holds possession after his estate or right has ended. It arises where a mortgagor holds over after the expiration of the period of redemption on foreclosure. A tenant at sufferance has a naked possession without right, and independent of statute is not entitled to notice to quit.[72]

HOLDING OVER

5380. Effect at common law—At common law, if a tenant holds over after the expiration of his term without the consent of the landlord, he is liable for another term with the same conditions as the prior term.[73] The landlord has an election to treat the tenant as a tenant at sufferance or as a tenant for another term. Acceptance of rent according to the terms of the prior tenancy, if there is nothing to prevent that effect, terminates the right to elect. Mere notice by the tenant, before his term expires, that he does not wish the premises for another term will not change the effect of his holding over.[74] If, before the termination of a lease, a tenant is notified by his landlord that if he holds over he will be required to pay an additional amount as rent, he will be bound by the terms of the notification, and this is true though he objects to the new terms.[75] A notice of this nature was sent by registered letter addressed to the tenant at his usual place of business, on the leased premises. In the absence of the tenant, who was confined to his house by sickness, it was received and opened by his bookkeeper in the customary discharge of his duties. It was held that the notice was properly served.[76] If a tenant holds over for a time, with the consent of the landlord, he will not be liable for a new term.[77] Where a landlord notified his tenant, whose term was about expiring, that it would not be extended or the lease renewed on the conditions of the existing lease, and a subsequent holding over is referable to a contemplated new lease, or pending negotiations therefor, which are not consummated, and in the meantime rent at a different rate is paid for each month, such continued occupation or holding over will not be held to be under a lease from year to year, but at will.[78] Where a landlord has the right of election, and may treat the tenant as a trespasser or as a tenant holding over, the exercise of that right by the landlord is conclusive against him, and he cannot impose new terms upon the tenant without his consent.[79]

5381. Statute—Urban realty—By statute, upon the holding over of urban realty without express contract with the owner, "no tenancy for any other period than the shortest interval between the times of payment of rent under the terms of the expired lease shall be implied."[80] The statute has been held constitutional,[81] and inapplicable to leases executed before its passage.[82] Under the

[71] Smith v. Bell, 44–524, 47+263; Thompson v. Baxter, 107–122, 119+797.
[72] Thompson v. Baxter, 107–122, 119+797.
[73] Gardner v. Dakota County, 21–33; Smith v. Bell, 44–524, 47+263; Flint v. Sweeney, 49–509, 52+136; Shirk v. Hoffman, 57–230, 58+990; Quade v. Fitzloff, 93–115, 100+660; Slafter v. Siddall, 97–291, 106+308; O'Connor v. Delaney, 53–247, 54+1108; Johnson v. Albertson, 51–333, 53+642. See Backus v. Sternberg, 59–403, 61+335.
[74] Smith v. Bell, 44–524, 47+263.
[75] Gardner v. Dakota County, 21–33; Stees v. Bergmeier, 91–513, 98+648.
[76] Stees v. Bergmeier, 91–513, 98+648.
[77] Dobbin v. McDonald, 60–380, 62+437; Fall v. Moore, 45–515, 48+404; Blackwood v. Tanner, 54–349, 56+45.
[78] Fall v. Moore, 45–515, 48+404.
[79] Johnson v. Johnson, 62–302, 64+905.
[80] R. L. 1905 § 3333.
[81] Stees v. Bergmeier, 91–513, 98+648.
[82] Caley v. Thornquist, 89–348, 94+1084.

statute a tenant in possession under a written lease for a year, which contains no provision for renewal, but provides for monthly payment of rent, by holding over without any new agreement becomes a tenant from month to month, but in other respects the covenants and obligations of the original lease are presumed to be in force.[83] The statute is inapplicable to leases providing for renewal.[84] A holding over by a tenant after notice from the landlord that if he held over he would be required to pay additional rent has been held an "express contract" within the statute.[85]

LEASES

5382. Definition—A lease is a conveyance of lands or tenements, for a term less than the party conveying has in the premises, in consideration of rent or other recompense. It is essential that some reversionary interest be left in the lessor. Generally a lease is something more than a mere conveyance of an estate—it is a contract for the possession and profits of lands or tenements for a certain period.[86]

5383. What constitutes—No particular form of words is necessary to create a tenancy. Any words that show an intention of the lessor to divest himself of possession, and confer it upon another in subordination to his title is sufficient.[87] The usual words of conveyance are "demise" or "let." [88]

5384. What passes by—A lease of a building eo nomine is a lease of the land on which the building stands.[89]

5385. Meeting of minds—Where a party offered a lease to another, but before the offer was accepted it was withdrawn, it was held that there was no lease, the minds of the parties not having met.[90]

5386. Execution—Attestation—A lease for a term not exceeding three years need not be attested by witnesses.[91]

5387. Property covered—Evidence held not to show that the property conveyed by a new lease was the same as that conveyed by a prior lease.[92] It has been held inadmissible to enlarge the description of the property covered by parol.[93]

5388. Construction—In general—Here, as elsewhere in the construction of written instruments,[94] the object is to ascertain and enforce the intention of the parties as expressed in the language used.[95] Any ambiguity in the language used is to be resolved against the lessor.[96] The practical construction of the parties is controlling in case of doubt.[97]

5389. Parol evidence—The general rule excluding parol evidence to vary the terms of written instruments applies to leases.[98] A verbal agreement to make certain improvements in the premises, in consideration of which a

[83] Slafter v. Siddall, 97–291, 106+308.
[84] Quade v. Fitzloff, 93–115, 100+660.
[85] Stees v. Bergmeier, 91–513, 98+648.
[86] Craig v. Summers, 47–189, 49+742; Morrison v. St. P. etc. Ry., 63–75, 79, 65+141.
[87] Lightbody v. Truelsen, 39–310, 40+67. See Dickinson v. Fitterling, 69–162, 71+1030; Id., 72–483, 75+731 (a contract held a lease and not merely a contract for a lease).
[88] Wilkinson v. Clauson, 29–91, 12+147.
[89] Lanpher v. Glenn, 37–4, 33+10.
[90] Schumacher v. Pabst, 78–50, 80+838.
[91] Chandler v. Kent, 8–524(467).
[92] Day v. Mpls. Mill Co., 23–334.
[93] Haycock v. Johnston, 81–49, 83+494, 1118.
[94] See § 1866.
[95] Leppla v. Mackey, 31–75, 16+470; Lightbody v. Truelsen, 39–310, 40+67; Thompson v. Baxter, 107–122, 119+797.
[96] Swank v. St. P. C. Ry., 72–380, 75+594.
[97] Hall v. Smith, 16–58(46).
[98] Stewart v. Murray, 13–426(393); McLean v. Nicol, 43–169, 45+15; Haycock v. Johnston, 81–49, 83+494, 1118; Erikson v. Propp, 106–238, 119+390. See Trainor v. Schutz, 98–213, 107+812.

written lease is executed, remains obligatory upon the lessor during the term of the lease, and if, after that period, the lessee remains in possession and becomes a tenant from month to month, such agreement is presumed to remain in force.[99] The fact of a tenancy may be proved by oral evidence though there is a written lease.[1]

5390. Reservations and exceptions—Whether a clause reserving the right to construct and maintain a tunnel was a "reservation" or an "exception" has been held immaterial.[2]

5391. Restrictions on use—The purpose for which property is leased must be observed. To accept a lease of premises for a certain purpose, amounts to a covenant on the part of the lessee that he will so use them, and an inconsistent use may be enjoined.[3] A covenant that the lessee, "his heirs, administrators, or assigns," will not put the premises to a specified use—sale of liquors—may be enforced by injunction to restrain its breach, against a subtenant of the lessee.[4] A breach of a covenant to keep the premises "open, clean, and free from rubbish," held not waived by accepting rent after prior breaches.[5] A covenant to keep the premises "clean," held broken by the keeping of decomposed bodies at a morgue.[6] A stipulation in a contract against leasing premises as a drug store construed.[7] The measure of damages for the breach of a covenant to destroy weeds on a farm, has been held to be what it would reasonably cost the landlord to remove them after the default of the tenant.[8]

5392. Continuing condition—Waiver—Conditions of a continuing nature are waived, by the acceptance of rent, only as to past breaches.[9]

5393. Implied covenants—The words "demise or let," or their equivalent, in a lease, imply a covenant for title and quiet enjoyment.[10] There is no implied covenant in a lease that the premises are or will continue to be fit for the purposes for which they are let,[11] or that they are supplied with proper drainage,[12] or that the landlord will make repairs.[13] There may be an implied covenant on the part of the lessor to put the lessee into possession at the beginning of his term.[14]

5394. Covenants running with land—When a covenant relates to or is to operate upon a thing in being, parcel of the demise, the thing to be done by force of the covenant is, as it were, annexed to the thing demised, and goes with the land, binding the assignee to the performance, though not named; and the assignee, by accepting possession of the land, subjects himself to all the covenants that run with the land. The foundation of this liability is the privity of estate that exists between the assignee and the lessor.[15] A covenant for a renewal,[16] and a covenant to pay rent and taxes,[17] have been held to run with the land.

[99] Slafter v. Siddall, 97–291, 106+308.
[1] Minn. D. Co. v. Johnson, 96–91, 104+1149, 107+740.
[2] Knapheide v. Eastman, 20–478(432).
[3] Spalding v. Emerson, 69–292, 72+119.
[4] Stees v. Kranz, 32–313, 20+241.
[5] Gluck v. Elkan, 36–80, 30+446.
[6] Clementson v. Gleason, 36–102, 30+400.
[7] Cook v. Finch, 19–407(350).
[8] Prudoehl v. Randall, 108–185, 121+913.
[9] Gluck v. Elkan, 36–80, 30+446. See Douglas v. Herms, 53–204, 54+1112; Kenny v. Seu Si Lun, 101–253, 112+220; 23 Harv. L. Rev. 630.
[10] Wilkinson v. Clauson, 29–91, 12+147.
[11] Wilkinson v. Clauson, 29–91, 12+147; Krueger v. Ferrant, 29–385, 13+158; Harpel v. Fall, 63–520, 65+913.
[12] Wilkinson v. Clauson, 29–91, 12+147.
[13] See § 5368.
[14] Davis v. Jacoby, 54–144, 55+908.
[15] Trask v. Graham, 47–571, 50+917. See Rochester Lodge v. Graham, 65–457, 68+79.
[16] Leppla v. Mackey, 31–75, 16+470.
[17] Trask v. Graham, 47–571, 50+917; Wills v. Summers, 45–90, 47+463.

5395. Covenant for quiet enjoyment—An answer held to show a breach of a covenant for quiet enjoyment.[18] The words "demise" or "let" imply a covenant for quiet enjoyment.[19]

5396. Covenants as to destruction, etc. of buildings—Leases frequently make provision for a termination of the lease, and the liability of the tenant for rent, in the event of the buildings being destroyed, or injured by the elements, or rendered untenantable by any cause.[20]

5397. Covenants as to repairs, etc.—Leases often contain express covenants for repairs by the lessor,[21] but such covenants are never implied.[22] It is sometimes expressly covenanted that the lessor shall not be liable to make alterations, improvements, or repairs of any kind.[23]

5398. Covenants to surrender in good condition—Leases generally include a covenant on the part of the lessee to surrender the premises at the expiration of his term in as good condition as when he took them, usual wear and tear and damages from fire and the elements excepted.[24]

5399. Covenant to pay taxes—Where a lease contains a covenant to pay the taxes assessed upon the premises during the continuance of the lease, an assignee thereof in possession is bound by the covenant to pay them, and if paid by the lessor he may recover the same, after they become due, of such assignee. But, if such lessor has parted with all his interest in the land, his right to recover of the assignee taxes paid after that date cannot be sustained, unless, by reason of his covenant with his grantee, he is bound to indemnify the latter against the same. And where the lessor conveyed away the leased premises, after taxes had become a lien thereon as between grantor and grantee, by deed, with covenants of warranty and against incumbrances, it was held that he was entitled to pay the same in performance of his covenant, and to recover the amount thereof ultimately of the tenant in possession under the lease. A general covenant to pay taxes is satisfied if paid at any time before they become delinquent.[25] Where, by the terms of a lease, the lessee assumed to pay "all taxes, levies, or assessments on the premises during the continuance of the lease," he is liable for taxes and assessments which have been "duly levied, charged, and confirmed" upon the leased property during the term, though they may be payable thereafter.[26] Covenants in a lease to pay rent and taxes upon the demised premises run with the land, and an assignee of a lease is in privity of estate with the lessor, and, by accepting possession under an assignment, in the absence of stipulations to the contrary, assumes the liability for obligations maturing by virtue of such covenants while he holds the estate.[27] A claim against an assignee of a lease for taxes has been held extinguished by a judgment against him terminating his interest under the lease for his failure to pay the taxes as covenanted.[28] A breach of a covenant to pay taxes has been held to give the lessor a right to re-enter without any demand.[29] A foreclosure of a mortgage has been held to extinguish a claim against a tenant for

[18] Collins v. Lewis, 53–78, 54+1056.
[19] Wilkinson v. Clauson, 29–91, 12+147.
[20] Harris v. Corlies, 40–106, 41+940; Weeber v. Hawes, 80–476, 83+447; Rosenstein v. Cohen, 96–336, 104+965; Viehman v. Boelter, 105–60, 116+1023.
[21] Olson v. Schultz, 67–494, 70+779; Weeber v. Hawes, 80–476, 83+447; Peterson v. Kreuger, 67–449, 70+567.
[22] See § 5368.
[23] Rosenstein v. Cohen, 96–336, 104+965.
[24] See Harris v. Corlies, 40–106, 41+940; Wright v. Tileston, 60–34, 61+823; Boardman v. Howard, 90–273, 96+84; Reed v. Bernstein, 103–66, 114+261.
[25] Wills v. Summers, 45–90, 47+463.
[26] Craig v. Summers, 47–189, 49+742.
[27] Trask v. Graham, 47–571, 50+917.
[28] Cook v. Parker, 67–374, 69+1099.
[29] Byrane v. Rogers, 8–281(247); Chandler v. Kent, 8–536(479).

failure to pay taxes as covenanted.[30] Certain stipulations as to a forfeiture, for non-payment of taxes, construed.[31]

5400. Covenant to insure—That the lessor might have procured insurance is no defence to an action for breach of a covenant by the lessee to keep the buildings insured.[32]

5401. Covenants as to heat and elevator service—Leases sometimes provide that the lessor shall furnish heat and elevator service.[33]

5402. Covenants as to improvements—Leases frequently contain covenants relating to improvements.[34]

5403. Covenants as to cutting timber—Leases of farm lands often contain covenants relating to the cutting of timber for domestic or other purposes.[35]

5404. Privilege of lessee to purchase—Leases frequently give the lessee an option to purchase the property upon specified terms.[36] The absolute part of the lease is a sufficient consideration for the option.[37] Payment of the stipulated sum or tender thereof within the time limited is an essential condition to the consummation of any binding contract of sale. Equity cannot vary the terms of the offer by an extention of the privilege or require an accounting of moneys paid to secure the option, in the absence of fraud or mistake.[38]

5405. Agreement as to other premises—An agreement in a lease not to let other premises of the lessor for the same purpose does not entitle the lessee to an injunction against subsequent lessees of such other premises, restraining them from the enjoyment of their lease; they being neither parties nor privies in respect to the former contract.[39]

5406. Subletting—Subletting is a leasing by the lessee of a whole or part of the premises for a portion of the unexpired balance of his term. A transfer is not a subletting unless the lessor retains a reversionary interest.[40] Unless restrained by agreement any tenant for years may sublet.[41] A license to a railway company to run its tracks across the premises has been held not a subletting.[42] A condition against using the premises for the sale of liquor has been held enforceable against a subtenant.[43] A lease from a lessee, without the written consent of the lessor indorsed thereon, has been held prima facie evidence that no consent had been given, the original lease requiring such an indorsement.[44] A condition in a lease reserving the right to re-enter in case of subletting without the lessor's consent has been held not defeated by the erasure, before execution of the lease, of a covenant against subletting.[45] Leases frequently contain covenants against subletting.[46] Such a covenant may be waived by the landlord.[47]

[30] Stewart v. Parcher, 91–517, 98+650.
[31] Douglas v. Herms, 53–204, 54+1112.
[32] Rhone v. Gale, 12–54(25).
[33] Mpls. Co-op. Co. v. Williamson, 51–53, 52+986; Bass v. Rollins, 63–226, 65+348. See Sargent v. Mason, 101–319, 112+255 (separate agreement as to heating—breach—action for damages).
[34] See Cahill v. Eastman, 18–324(292) (lease held not to terminate until payment by the lessor for improvements as stipulated); Slafter v. Siddall, 97–291, 106+308 (oral agreement to make improvements—holding over—continuance of agreement).
[35] Prudoehl v. Randall, 108–185, 121+913.
[36] Stewart v. Murray, 13–426(393).
[37] Staples v. O'Neal, 64–27, 65+1083; Steele v. Bond, 32–14, 22, 18+830.
[38] Steele v. Bond, 32–14, 18+830.
[39] Napa Valley W. Co. v. Boston B. Co., 44–130, 46+239.
[40] Craig v. Summers, 47–189, 49+742; Gould v. Sub-Dist. No. 3, 8–427(382); Cameron v. Tobin, 104–333, 116+838.
[41] Gould v. Sub-Dist. No. 3, 8–427(382).
[42] Pence v. St. P. etc. Ry., 28–488, 11+80.
[43] Stees v. Kranz, 32–313, 20+241.
[44] Berryhill v. Healey, 89–444, 95+314.
[45] Pond v. Holbrook, 32–291, 20+232.
[46] State v. Burr, 29–432, 13+676.
[47] Aldrich v. Shoe Mart Co., 108–15, 121+422.

5407. Surrender—A surrender is a yielding up of an estate for life, or for years, to him who has the immediate reversion or remainder, wherein the particular estate becomes extinct by a mutual agreement between the parties.[48] A surrender takes place by agreement of the parties, express or implied, or by operation of law.[49] A surrender by operation of law takes place where the owner of a particular estate has been a party to some act, the validity of which he is by law afterwards estopped from disputing, and which would not be valid if his particular estate had continued to exist.[50] In other words, it arises from a condition of facts, voluntarily assumed, incompatible with the existence of the relation of landlord and tenant between the parties.[51] Any acts which are equivalent to an agreement, express or implied, on the part of the tenant to surrender and on the part of the landlord to resume possession of the premises, constitute a surrender.[52] If the tenant accepts a new lease from the landlord there is a surrender of the old one.[53] If the landlord accepts a third party as a tenant in place of a prior tenant there is a surrender. The substitution of tenants may be shown by parol.[54] But a surrender by operation of law is not to be implied from the mere fact that the landlord assents to the assignment of a lease and accepts rent from the assignee in possession.[55] If the tenant abandons possession and the landlord re-enters and relets the premises there will be a surrender if the evidence shows unequivocally an intention on the part of the landlord to terminate the old lease.[56] Such an intention is not to be inferred from the fact that the landlord enters temporarily for the purpose of caring for the property, as for example, to see that the water is turned off.[57] The acceptance of a surrender is a question for the jury, unless the evidence is conclusive.[58] A surrender may be made to the duly authorized agent of the landlord.[59] The effect of a surrender is to terminate the relation of landlord and tenant and relieve the tenant of the obligation to pay rent.[60] If the landlord takes unqualified possession and deals with the premises in a way wholly inconsistent with the continuance of an already existing and unexpired term there is a surrender by operation of law.[61] Evidence held to show a surrender by agreement of the parties. An answer held sufficient to admit proof of a surrender by operation of law as well as by agreement of the parties.[62] Whether an agreement for a surrender is within the statute of frauds is con-

[48] Dayton v. Craik, 26–133, 1+813.

[49] Dayton v. Craik, 26–133, 1+813; Nelson v. Thompson, 23–508; Lafferty v. Hawes, 63–13, 65+87; Trimble v. Lake Superior etc. Co., 99–11, 108+867.

[50] Nelson v. Thompson, 23–508; Smith v. Pendergast, 26–318, 3+978; Stern v. Thayer, 56–93, 57+329; Haycock v. Johnston, 97–289, 106+304; Millis v. Ellis, 109–81, 122+1119.

[51] Levering v. Langley, 8–107(82); Bowen v. Haskell, 53–480, 55+629; Stern v. Thayer, 56–93, 57+329; Rees v. Lowy, 57–381, 59+310.

[52] Dayton v. Craik, 26–133, 1+813; Stern v. Thayer, 56–93, 57+329; Buckingham v. Dafoe, 78–268, 80+974; Peterson v. Ruhnke, 46–115, 48+768. See, as to the effect of accepting keys from the tenant: Nelson v. Thompson, 23–508; Lucy v. Wilkins, 33–441, 23+861; Stern v. Thayer, 56–93, 57+329; Buckingham v. Dafoe, 78–268, 80+974; Finch v. Moore, 50–116, 52+384; Paget v. Electrical E. Co., 85–311, 88+844.

[53] Smith v. Pendergast, 26–318, 3+978.

[54] Levering v. Langley, 8–107(82); Bowen v. Haskell, 53–480, 55+629.

[55] Levering v. Langley, 8–107(82); Rees v. Lowy, 57–381, 59+310.

[56] Stern v. Thayer, 56–93, 57+329; Haycock v. Johnston, 97–289, 106+304. See 14 Harv. L. Rev. 158.

[57] Finch v. Moore, 50–116, 52+384.

[58] Van Brunt v. Wallace, 88–116, 92+521.

[59] Buckingham v. Dafoe, 78–268, 80+974; Paget v. Electrical E. Co., 85–311, 88+844.

[60] Stern v. Thayer, 56–93, 96, 57+329; Mpls. Co-op. Co. v. Williamson, 51–53, 52+986; Bowen v. Haskell, 53–480, 55+629; Baker v. Anglim, 74–246, 77+45.

[61] Nelson v. Thompson, 23–508; Stern v. Thayer, 56–93, 57+329.

[62] Lafferty v. Hawes, 63–13, 65+87.

sidered elsewhere.[63] Evidence held not to show a right of action for tort in connection with the surrender of the lease of a hotel.[64] A finding that there was no surrender by agreement has been sustained.[65]

5408. Assignment—Wherever a lessee grants or transfers the whole term for which the premises were leased to him, leaving no reversionary interest in himself, it amounts to an assignment, and is not a sublease. This results by operation of law, without regard to the form of the instrument. A mere reservation of rent, or of a right of re-entry for a breach of any of the conditions of the lease, will not change the legal relations of the parties; and the introduction of covenants into the instrument, whatever may be their effect between the immediate parties thereto, does not change the legal effect of giving up the reversion.[66] Unless restrained by agreement any tenant for years may assign his interest.[67] A covenant of warranty in an assignment and transfer of a building and ground lease, which is limited to the right, title, and interest of the assignor in the premises, does not include a liability for accruing rent and taxes.[68] An assignee is liable on covenants running with the land,[69] but being liable solely in privity of estate, he is liable only for obligations maturing or breaches occurring while he holds the estate as assignee, and not for those which occurred before he became assignee or after he ceased to be such.[70] When a third person is in possession of leased premises under the lessee, the law presumes that the lease has been assigned to him.[71] An assignment does not affect the liability of the lessee for rent.[72] An indorsement on a lease by the lessor approving an assignment, has been held to show a renewal of the lease and an assignment.[73]

5409. Modification—Consideration—A modification of a lease reducing the amount of rent is enforceable as based on a sufficient consideration.[74] So is an agreement changing a tenancy at will to a tenancy for a fixed term.[75] Evidence held not to show a modification of a lease.[76]

5410. Repudiation—Where the lessee repudiates the lease the lessor has an immediate right of action for all his damages present and prospective. This general rule has been applied where the receiver of an insolvent corporation refused to adopt a lease held by the insolvent.[77]

5411. Duration—A statement in the habendum of a lease repugnant to the term granted is void.[78] Cases are cited below involving the duration of particular leases.[79]

5412. Termination—The stipulations of a lease, as to the right of the landlord, at his election, to declare the lease terminated for non-payment of rent and taxes, construed.[80] The termination of a lease by surrender,[81] and by

[63] See § 8877.
[64] Baker v. Anglim, 74-246, 77+45.
[65] Forman v. Saunders, 89-306, 94+1134.
[66] Craig v. Summers, 47-189, 49+742; Ohio Iron Co. v. Auburn Iron Co., 64-404, 67+221; Cameron v. Tobin, 104-333, 116+838.
[67] Gould v. Sub-Dist. No. 3, 8-427(382).
[68] Trask v. Graham, 47-571, 50+917.
[69] See § 5394.
[70] Trask v. Graham, 47-571, 50+917.
[71] Dickinson v. Fitterling, 69-162, 71+1030; Weide v. St. Paul B. Co., 92-76, 99+421.
[72] Oswald v. Fratenburgh, 36-270, 31+173; Rees v. Lowy, 57-381, 59+310.
[73] Cutler v. Whitcher, 21-373.
[74] Wharton v. Anderson, 28-301, 9+860; Ten Eyck v. Sleeper, 65-413, 67+1026.
[75] Engels v. Mitchell, 30-122, 14+510.
[76] Rees v. Storms, 105-303, 117+498; Trunk v. Malm, 109-268, 123+663.
[77] Kalkhoff v. Nelson, 60-284, 62+332; Mpls. B. Co. v. City Bank, 74-98, 76+1024.
[78] Munzer v. Parker, 108-505, 122+375.
[79] Cahill v. Eastman, 18-324(292); Ely v. Randall, 68-177, 70+980; Mittwer v. Stremel, 69-19, 71+698; Kirschbaum v. Sonnenberg, 96-533, 104+1149; Budds v. Frey, 104-481, 117+158; Munzer v. Parker 108-505, 122+375.
[80] Douglas v. Herms, 53-204, 54+1112.
[81] See § 5407.

notice to quit,[82] is considered elsewhere. A lease can be terminated only by mutual agreement between the lessor and lessee, or by some act of the party against whom it is claimed inconsistent with the continuance of the term and the validity of which he is estopped to deny.[83]

5413. Renewals—The effect of provisions for renewals depends upon the language of the particular lease.[84] A covenant for a renewal ordinarily runs with the land in favor of an assignee of the lessee and against a grantee of the lessor.[85] The absolute parts of a lease are a sufficient consideration for an option for renewal.[86] Where a lease gives the lessee an option to renew the lease for a certain time, and he holds over and pays rent without objection, there is a renewal.[87] Under the ordinary form of lease there is a distinction between a stipulation to renew the lease for an additional term, and a stipulation to extend the lease for an additional term. The former requires the making of a new lease, the latter does not.[88] In the case of an option of renewal in a lease to two joint tenants both tenants must exercise the option.[89]

5414. Rights of third parties—A new lease taken by a tenant under an old lease is subject to the rights of a party entitled to the benefits of the old one.[90]

5415. Liability of third parties—A mortgagee in possession has not an estate which brings him in privity with the lessee under a lease executed by the mortgagor, so as to make him liable to the lessee upon the covenants of the lease. Neither has an assignee of rents growing out of a lease, assigned to him as security, such an estate.[91]

5416. Erasures—An erasure, before execution, of a covenant against subletting, held not to defeat a condition reserving the right to re-enter in case of subletting without the consent of the lessor.[92]

5417. Fraud—Cases are cited below involving fraud in connection with leases.[93]

5418. Pleading—A general allegation that a person took possession of land as a lessee has been held a sufficient allegation that it was leased to him, as against an objection first raised on appeal.[94]

[82] See § 5440.

[83] Trimble v. Lake Superior etc. Co., 99–11, 108+867.

[84] Cutler v. Whitcher, 21–373 (renewal at option of lessor—indorsement by lessor approving assignment of lease held a renewal); Leppla v. Mackey, 31–75, 16+470 (covenant for renewal conditional on lessor not wanting land for building purposes); Barge v. Schiek, 57–155, 58+874 (option held to cover whole premises); Swank v. St. P. C. Ry., 61–423, 63+1088 (covenant conditional on land not being sold or leased—covenant held conditional and executory); Id., 72–380, 75+594 (same covenant held not mutual); Tilleny v. Knoblauch, 73–108, 75+1039 (stipulation for notice by lessee and valuation by appraisers); Trainor v. Schutz, 98–213, 107+812 (option of lessor to continue lease if lessee failed to give notice to quit—option exercised by allowing lessee to remain in possession). See Note, 123 Am. St. Rep. 460.

[85] Leppla v. Mackey, 31–75, 16+470.

[86] Staples v. O'Neal, 64–27, 65+1083.

[87] Caley v. Thornquist, 89–348, 94+1084; Quade v. Fitzloff, 93–115, 100+660.

[88] Tilleny v. Knoblauch, 73–108, 75+1039.

[89] Tweedie v. Olson, 96–238, 104+895, 1089; Id., 98–11, 107+557.

[90] See Day v. Mpls. M. Co., 23–334.

[91] Cargill v. Thompson, 57–534, 59+638.

[92] Pond v. Holbrook, 32–291, 20+232.

[93] Wilkinson v. Clauson, 29–91, 12+147 (representations as to sewer held mere expressions of opinion); Bell v. Baker, 43–86, 44+676 (disaffirmance for fraud must be prompt); Haycock v. Johnston, 81–49, 83+494, 1118 (evidence held insufficient to show fraud); Van Brunt v. Wallace, 88–116, 92+521 (misrepresentations of husband as to heating plant held inadmissible in action by wife for rent); Trainor v. Schutz, 98–213, 107+812 (facts constituting fraud must be pleaded); Ahern v. Hindman, 101–34, 111+734 (evidence held not to show fraudulent representation as to a road).

[94] Bendikson v. G. N. Ry., 80–332, 83+194.

5419. Contracts to lease—A contract for the construction of a building and its leasing construed and held sufficiently certain.[95] A contract held to be a lease and not merely a contract for a lease.[96] Where a person contracts to lease at a certain rent land which he does not own and hence is unable to perform the contract, the measure of damages is the loss of the bargain—that is, the difference between the rent agreed on and the actual rental value of the premises.[97] Certain independent stipulations accompanying an agreement for a lease have been held not merged in or superseded by the lease, subsequently executed.[98] A and B entered into a contract by which B agreed to give A a lease of certain premises and put him in possession "within thirty days from date, or as soon thereafter or before as he can get the present tenant out." A deposited the money to pay the first month's rent with a bank, to be turned over to B when possession of the premises was given. After waiting about nine months, A brought an action to recover the money he had deposited with the bank. It was held for the jury to determine from the evidence whether B had done all that he was required to do under the lease to put A in possession of the premises, and that it was error for the court to order judgment for B notwithstanding a verdict in favor of A.[99]

RENT

5420. Amount—The amount of rent is generally specified in the lease.[1]

5421. Certainty—Rent is sufficiently fixed and certain if it can be made certain by computation.[2]

5422. Valuation by appraisers—Leases sometimes provide for the valuation of rent by appraisers.[3]

5423. Time of payment—Leases generally specify the time for the payment of rent.[4] When no time is fixed in the lease, and the rent reserved is in gross, it is probably not payable until the end of the term.[5] Rent does not accrue to the lessor as a debt or claim, unless payable in advance, until the lessee has enjoyed the use of the premises.[6]

5424. Destruction, etc. of buildings—Statute—At common law the liability of a lessee of land for rent was not affected by a destruction of the buildings on the land by fire, in the absence of express agreement.[7] By statute, if a building is destroyed, or so injured by the elements or any other cause as to be untenantable or unfit for occupancy, the lessee, if not at fault, may surrender possession and relieve himself of liability for rent.[8] Under the statute the lessee is liable for rent unless he surrenders possession within a reasonable time after the building is destroyed or injured or becomes untenantable. He cannot retain possession and at the same time refuse to pay rent. He is put to an election and if he elects to remain his election is final,[9] unless the con-

[95] Bradley v. Met. Music Co., 89–516, 95+458.

[96] Dickinson v. Fitterling, 72–483, 75+731.

[97] Knowles v. Steele, 59–452, 61+557.

[98] Pillsbury v. Morris, 54–492, 56+170.

[99] Leininger v. Clarke Nat. Bank, 97–364, 107+396.

[1] See Bradley v. Met. Music Co., 89–516, 95+458 (contract for construction and leasing of building construed as to amount of rent to be paid).

[2] Dutcher v. Culver, 24–584.

[3] Goddard v. King, 40–164, 41+659.

[4] Gibbens v. Thompson, 21–398 (lease held to require payment of rent monthly and not at the end of the term); Hall v. Smith, 16–58(46) (stipulations as to repairs held not to affect time of payment).

[5] Johanson v. Hoff, 63–296, 65+464.

[6] Wilder v. Peabody, 37–248, 33+852. See Chapman v. Fabian, 104–176, 116+207.

[7] Lanpher v. Glenn, 37–4, 33+10.

[8] R. L. 1905 § 3331.

[9] Roach v. Peterson, 47–291, 50+80; Id., 47–462, 50+601; Flint v. Sweeney, 49–509, 52+136. See Fink v. Weinholzer, 109–381, 123+931.

ditions become worse.[10] The statute is inapplicable to a failure to furnish steam heat and elevator service.[11] If a building becomes untenantable and the tenant moves out to allow repairs to be made and after the repairs are made he resumes possession, he is liable for future rent.[12] Evidence held not to show that premises were rendered "untenantable and unfit for occupancy" by fire.[13] It is not well settled what "the elements" are within the meaning of the statute.[14] The fact that the lessee was not at fault may be inferred from the fact that the lessor made repairs. A finding that a building was "untenantable and unfit for occupancy" sustained.[15]

5425. Building untenantable, etc.—Constructive eviction—Tenants may sometimes relieve themselves from liability for rent by surrendering possession of premises that have become untenantable.[16] Where the failure of a landlord to make agreed repairs amounts to a constructive eviction, the tenant is justified in abandoning the premises, and his liability for rent will thereupon terminate.[17] The subject is partially regulated by statute.[18] Evidence held not to show a constructive eviction.[19]

5426. Breach of covenants by lessor—The breach of an independent covenant in a lease to recover the stipulated rent that the lease contains void but merely gives him a cause of action or counterclaim for damages.[20] If the breach renders the premises untenantable the rule is otherwise, provided the lessee surrenders possession.[21]

5426a. Effect of void covenants—It is no defence to an action upon a covenant in a lease to recover the stipulated rent that the lease contains void stipulations for extraordinary remedies for enforcing payment of rent, which are independent of the lessee's covenant to pay rent in consideration of the demise of the premises.[22]

5427. Effect of re-entry—A re-entry by the lessor may have the effect of an acceptance of a surrender and so terminate the liability of the lessee for rent.[23] But a re-entry does not necessarily have that effect on such liability. If, after re-entry, the lessor exacts rent from the lessee he may have to account for the value of the possession.[24] Where a lessor wrongfully evicted a tenant, it was

[10] Damkroger v. Pearson, 74–77, 76+960. See Bass v. Rollins, 63–226, 65+348; Mpls. Co-op. Co. v. Williamson, 51–53, 52+986.

[11] Mpls. Co-op. Co. v. Williamson, 51–53, 52+986.

[12] Boston B. Co. v. Buffington, 39–385, 40+361.

[13] Wampler v. Weinmann, 56–1, 57+157.

[14] See Harris v. Corlies, 40–106, 41+940; Mpls. Co-op. Co. v. Williamson, 51–53, 52+986; Rosenstein v. Cohen, 96–336, 104+965.

[15] Weeber v. Hawes, 80–476, 83+447; Schmitt v. Standard B. Co., 127+189.

[16] See Harris v. Corlies, 40–106, 41+940 (damages from the percolation of water through side walls held not caused by the "elements" within the covenants of a lease); Mpls. Co-op. Co. v. Williamson, 51–53, 52+986 (failure to furnish heat and elevator service—when tenant bound to surrender possession to avoid liability for rent held a question for the jury); Bass v. Rollins, 63–226, 65+348 (failure to heat); Weeber v. Hawes, 80–476, 83+447 (partial destruction by fire—finding that premises were untenantable when the lessee vacated sustained—fact that tenant was not at fault inferable from repairs by landlord); Rosenstein v. Cohen, 96–336, 104+965 (building becoming untenantable from decay and faulty construction); Rea v. Algren, 104–316, 116+580 (failure of landlord to make agreed repairs—defective plumbing and leaky roof—constructive eviction); Viehman v. Boelter, 105–60, 116+1023 (leaky roof—constructive eviction—necessity of surrendering premises within reasonable time).

[17] Rea v. Algren, 104–316, 116+580; Viehman v. Boelter, 105–60, 116+1023.

[18] See § 5424.

[19] Cohen v. Conrad, 124+992.

[20] McLean v. Nicol, 43–169, 45+15; Peterson v. Kreuger, 67–449, 70+567; Hall v. Smith, 16–58(46); Long v. Gieriet, 57–278, 59+194; Pioneer P. Co. v. Hutchinson, 63–481, 65+938. See Cohen v. Conrad, 124+992.

[21] See §§ 5424, 5425.

[22] Cohen v. Conrad, 124+992.

[23] See § 5407.

[24] Stees v. Kranz, 32–313, 20+241.

held that he could not recover for rent for a part of a month prior to the eviction.[25]

5428. Attornment to third party—To be valid an attornment must be made with the privity or consent of the original landlord or the tenant must attorn to one having a superior title, under circumstances placing him in the same position as if he had gone out of possession, and had come in again under the new landlord.[26] An attornment to another without the consent of the landlord does not affect the landlord's possession.[27]

5429. Assignment of lease—The assignment of a lease does not relieve the lessor from liability on a covenant for rent.[28]

5430. Liability of assignees—An assignee of a lease is not relieved of liability for rent by the fact that the assignment was made without the consent of the lessor.[29]

5431. Assignment of claim—A claim for rent is assignable.[30]

5432. Effect of surrender—The surrender of a lease relieves the lessee from liability for future rent.[31] Where it does not appear that the value of the use of demised premises is impaired by a surrender of a portion of them, the lessor may recover the entire rent reserved, notwithstanding such partial surrender.[32]

5433. Tenant holding over—If a landlord elects to treat a tenant holding over as a trespasser he cannot thereafter recover rent from him.[33]

5434. Demand—At common law great strictness was required in making a demand for rent as a condition of declaring a forfeiture for non-payment.[34] A demand is no longer required before action.[35]

5435. Distress—The remedy of distress for rent is abolished by statute.[36] Prior to Laws 1877 c. 140 it existed in this state.[37]

5436. Satisfaction—A claim for rent has been held satisfied by a decree adjudging the interest of lessees terminated, the landlord entering and retaining possession under the decree.[38]

FORFEITURE AND RE-ENTRY

5437. In general—Unless provided by statute or express agreement, the mere breach of a covenant or condition does not work a forfeiture or give a right of re-entry.[39] By statute the non-payment of rent gives the landlord a right to bring an action at once for the recovery of possession, whether the lease contains a re-entry clause or not,[40] but it does not give a right of re-entry or work a forfeiture of the lease.[41] The lessor, having the jus disponendi, may annex to the grant whatever conditions he pleases in respect to re-entry or the termination of the lease; and upon the breach of such conditions, subject to

[25] Chapman v. Fabian, 104–176, 116+207.
[26] Johnson v. Sackrison, 78–107, 80+858. See Pace v. Chadderdon, 4–499(390).
[27] Trimble v. Lake Superior etc. Co., 99–11, 108+867; Hanson v. Sommers, 105–434, 117+842.
[28] Oswald v. Fratenburgh, 36–270, 31+173; Rees v. Lowy, 57–381, 59+310.
[29] Dickinson v. Fitterling, 72–483, 75+731.
[30] Potts v. Newell, 22–561.
[31] Mpls. Co-op. Co. v. Williamson, 51–53, 52+986; Bowen v. Haskell, 53–480, 55+629; Stern v. Thayer, 56–93, 96, 57+329; Swank v. St. P. C. Ry., 61–423, 63+1088. See Lucy v. Wilkins, 33–441, 23+861.
[32] Smith v. Pendergast, 26–318, 3+978. See Haycock v. Johnston, 97–289, 106+304.
[33] Johnson v. Johnson, 62–302, 64+905. See § 5380.
[34] Byrane v. Rogers, 8–281(247).
[35] See § 5453.
[36] R. L. 1905 § 3327.
[37] Dutcher v. Culver, 24–584. See Rochester Lodge v. Graham, 65–457, 68+79.
[38] Cook v. Parker, 67–374, 69+1099.
[39] Bauer v. Knoble, 51–358, 53+805; Woodcock v. Carlson, 41–542, 43+479.
[40] See § 5449.
[41] Woodcock v. Carlson, 41–542, 43+479.

statutory provisions, may avoid the lease.[42] Whenever a lessee transfers and assigns the whole term for which he has leased premises, reserving no reversionary interest whatsoever to himself, the right of re-entry for a breach of a condition subsequent is not reserved or retained. The right of re-entry cannot exist as an independent condition, but only as an incident to an estate or interest for the protection of which it is reserved. The right of re-entry is not an estate or interest in land, nor does it imply the reservation of a reversion. It is a mere thing in action, and, when enforced, the grantor is in through the breach of the condition, and not by reverter. Conceding that the statute 32 Hen. VIII. c. 34, is part of the common law of this country, it has no application in a case where there is simply a reservation of rent out of an estate for years, without reversion. The right of re-entry for a breach of a condition subsequent is not assignable before the breach.[43] A right of re-entry may not afford an adequate remedy so as to bar resort to injunction.[44] A forfeiture clause includes the right of re-entry. The violation of a lease may be enjoined though the lease contains no forfeiture or re-entry clause.[45]

5438. Peaceable re-entry—A landlord from whom his tenant wrongfully withholds possession may as a general rule re-enter peaceably and retain the possession thus gained against the tenant, but he cannot do so during the pendency of litigation.[46]

5439. Waiver—Receipt of rent—A right of re-entry for condition broken may be waived.[47] The receipt of rent by that name, accruing after the occurrence of causes of forfeiture under the terms of a lease for a definite term, to the knowledge of the lessor, bars his right of entry for condition broken.[48]

NOTICE TO QUIT

5440. Necessity—A notice is necessary to terminate all tenancies at will, such as tenancies from year to year,[49] or from month to month,[50] or where no term is agreed upon.[51] It is unnecessary where the tenancy is for a fixed term.[52] It is not a condition precedent to an action for the recovery of possession on the ground of non-payment of rent.[53] It is sometimes required by a covenant in the lease.[54]

5441. Reciprocal duty—The duty to serve a notice to terminate a tenancy at will is reciprocal, resting on the landlord and tenant alike.[55]

[42] Bauer v. Knoble, 51–358, 53+805. See Byrane v. Rogers, 8–281(247); Stees v. Kranz, 32–313, 20+241; Douglas v. Herms, 53–204, 54+1112; Hall v. Smith, 16–58 (46).

[43] Ohio Iron Co. v. Auburn Iron Co., 64–404, 67+221; Craig v. Summers, 47–189, 49+742; Cameron v. Tobin, 104–333, 116+838.

[44] Stees v. Kranz, 32–313, 20+241.

[45] Spalding v. Emerson, 69–292, 72+119.

[46] Mercil v. Broulette, 66–416, 69+218; Lobdell v. Keene, 85–90, 88+426.

[47] Douglas v. Herms, 53–204, 54+1112.

[48] Kenny v. Seu Si Lun, 101–253, 112+220.

[49] Hunter v. Frost, 47–1, 49+327; Ingalls v. Oberg, 70–102, 72+841. See Smith v. Bell, 44–524, 47+263.

[50] Finch v. Moore, 50–116, 52+384; Shirk v. Hoffman, 57–230, 58+990; Eastman v. Vetter, 57–164, 58+989; Waggoner v. Preston, 83–336, 86+335; Fall v. Moore, 45–515, 48+404. See Prendergast v. Searle, 74–333, 77+231.

[51] Sanford v. Johnson, 24–172; Rogers v. Brown, 57–223, 58+981; Grace v. Michaud, 50–139, 52+390; Paget v. Electrical E. Co., 82–244, 84+800; Van Brunt v. Wallace, 88–116, 92+521; Goodwin v. Clover, 91–438, 98+322. See Prendergast v. Searle, 74–333, 77+231.

[52] Engels v. Mitchell, 30–122, 14+510.

[53] Radley v. O'Leary, 36–173, 30+457; Caley v. Rogers, 72–100, 75+114; Seeger v. Smith, 74–279, 77+3.

[54] Trainor v. Schutz, 98–213, 107+812.

[55] Finch v. Moore, 50–116, 52+384; Grace v. Michaud, 50–139, 52+390; Shirk v. Hoffman, 57–230, 58+990; Eastman v. Vetter, 57–164, 58+989; Paget v. Electrical E. Co., 82–244, 84+800; Van Brunt v. Wallace, 88–116, 92+521.

5442. Formal sufficiency—Substantial, not technical, accuracy is required in a notice.[56] A notice to quit only a part of the demised premises, where the whole thereof is held under one lease, is insufficient.[57] A notice is a distinct act which must be sufficient in itself, without reference to subsequent events or proceedings.[58] Where service is on an agent, it is not fatal that the notice is not addressed to the agent as such.[59]

5443. Length—A tenancy at will from month to month, rent payable monthly, can only be terminated by one month's notice.[60] Where, in a tenancy from month to month, the month commences on the first day, a notice served a month before the day named in it, requiring the tenant to quit on the last day of the month, is sufficient.[61]

5444. When to terminate—The notice must terminate with the month, quarter, or year, according to the nature of the tenancy. A present demand or notice to quit is insufficient.[62] It is proper to notify a tenant from month to month to remove on the day his monthly term expires, but a notice is not insufficient which notifies him to move the following day.[63]

5445. Mode of service—Any mode of service is sufficient if the notice actually reaches the proper party. When practicable personal service should be made. If the tenant is absent the mode of service best calculated to reach him should be adopted. Service by mail is sufficient if it actually reaches the party within the required time, but the risk is on the party giving the notice.[64] Service on an agent having charge of his principal's business relating to the tenancy is sufficient.[65]

5446. By agent—Notice may be given by the duly authorized agent of the landlord.[66]

5447. Waiver—A notice to quit given to a tenant by a landlord may be waived by agreeing to allow the tenant to remain despite the notice; by giving a second notice; or by accepting rent.[67] An agreement that a tenant may quit at any time is not a waiver of the right to notice.[68] A mere tender of the keys of the house by a third party is not equivalent to such notice, nor does the landlord waive his right to the notice, nor does he accept the premises, by entering the house with a person who has been sent by the tenant to remove articles left there by the latter, nor by entering the house to see that the water is properly turned off.[69]

SUMMARY ACTION BY LANDLORD FOR POSSESSION — UNLAWFUL DETAINER

5448. Nature and object of action—The action is summary in its nature and the mode of proceeding is of the essence of it.[70] Its sole object is to restore the landlord to possession summarily in the cases specified by the

[56] Alworth v. Gordon, 81–445, 84+454; Waggoner v. Preston, 83–336, 86+335.
[57] Alworth v. Gordon, 81–445, 84+454.
[58] Eastman v. Vetter, 57–164, 58+989.
[59] Prendergast v. Searle, 81–291, 84+107.
[60] Eastman v. Vetter, 57–164, 58+989.
[61] Petsch v. Biggs, 31–392, 18+101; Budds v. Frey, 104–481, 117+158.
[62] Hunter v. Frost, 47–1, 49+327; Grace v. Michaud, 50–139, 52+390; Eastman v. Vetter, 57–164, 58+989; Alworth v. Gordon, 81–445, 452, 84+454; Waggoner v. Preston, 83–336, 86+335.
[63] Searle v. Powell, 89–278, 94+868.
[64] Alworth v. Gordon, 81–445, 84+454; Arcade I. Co. v. Gieriet, 99–277, 109+250; Prendergast v. Searle, 81–291, 84+107. See Stees v. Bergmeier, 91–513, 98+648.
[65] Prendergast v. Searle, 81–291, 84+107.
[66] Arcade I. Co. v. Gieriet, 99–277, 109+250.
[67] Arcade I. Co. v. Gieriet, 99–277, 109+250.
[68] Paget v. Electrical E. Co., 82–244, 84+800.
[69] Finch v. Moore, 50–116, 52+384.
[70] Gray v. Hurley, 28–388, 10+417; State v. Dist. Ct., 53–483, 55+630; Whitaker v. McClung, 14–170(131). See Van Vlissingen v. Oliver, 102–237, 113+383.

statute.[71] It is not designed for the trial of title;[72] or as a substitute for ejectment;[73] or to enforce agreements for the surrender of realty, when the relation of landlord and tenant does not exist.[74]

5449. When action will lie—It will lie only where there is or has been a conventional relation of landlord and tenant.[75] It will lie though the detainer is not forcible.[76] It will lie where the tenant withholds possession after the expiration of a fixed term;[77] or after termination of his term by notice to quit;[78] or contrary to the conditions or covenants of the lease or agreement under which he holds;[79] or after any rent becomes due according to the terms of his lease or agreement, whether the lease contains a re-entry clause or not.[80] Where a lease contains no provision for the termination thereof, or for re-entry upon the breach of the covenants therein, a mere breach of covenant or the commission of waste does not work a forfeiture or give a right of re-entry, so as to authorize an action.[81]

5450. Election of remedies—A landlord from whom his tenant wrongfully withholds possession may bring ejectment in the district court, and recover possession and damages for withholding possession, or he may bring unlawful detainer proceedings in a justice or municipal court and recover possession summarily, but without damages.[82]

5451. Jurisdiction—The district court has not original jurisdiction of the action. Such jurisdiction is confined to justice and municipal courts.[83]

5452. Limitation of actions—The action may be maintained at any time during the pendency of the lease, or within three years after the termination of the leasehold estate.[84]

5453. Demand—Notice to quit—If the action is based on the ground of non-payment of rent no notice to quit,[85] or demand of rent,[86] is necessary before suit, whether the tenancy is for a fixed term or at will. If the action is based on the ground of the expiration of a fixed term no notice to quit is necessary before suit;[87] otherwise if the tenancy is at will.[88]

5454. Parties plaintiff—A subsequent lessee from the owner may maintain an action against a prior lessee.[89] The statute gives the remedy to any party entitled to the possession of the demised premises, whether he is the lessor or

[71] Chandler v. Kent, 8–524(467); Ferguson v. Kumler, 25–183; Peterson v. Kreuger, 67–449, 70+567; George v. Mahoney, 62–370, 64+911.

[72] Ferguson v. Kumler, 25–183.

[73] Ferguson v. Kumler, 25–183; Steele v. Bond, 28–267, 9+772; Alworth v. Gordon, 81–445, 84+454.

[74] Steele v. Bond, 28–267, 9+772.

[75] Steele v. Bond, 28–267, 9+772; Pioneer S. & L. Co. v. Powers, 47–269, 50+227; Judd v. Arnold, 31–430, 18+151. See Chandler v. Kent, 8–524(467); Burton v. Rohrbeck, 30–393, 15+678; Tilleny v. Knoblauch, 73–108, 75+1039; Alworth v. Gordon, 81–445, 84+454.

[76] Gluck v. Elkan, 36–80, 30+446.

[77] Engels v. Mitchell, 30–122, 14+510; State v. Burr, 29–432, 13+676.

[78] Hunter v. Frost, 47–1, 49+327.

[79] Gluck v. Elkan, 36–80, 30+446; Clementson v. Gleason, 36–102, 30+400; State v. Burr, 29–432, 13+676; Pond v. Holbrook, 32–291, 20+232; Bauer v. Knoble, 51–358, 53+805; Berryhill v. Healey, 89–444, 95+314.

[80] Suchaneck v. Smith, 45–26, 47+397; Woodcock v. Carlson, 41–542, 546, 43+479; Caley v. Rogers, 72–100, 75+114; Seeger v. Smith, 74–279, 77+3; Wright v. Gribble, 26–99, 1+820; Gibbens v. Thompson, 21–398; Spooner v. French, 22–37.

[81] Bauer v. Knoble, 51–358, 53+805.

[82] State v. Dist. Ct., 53–483, 55+630.

[83] Id.

[84] R. L. 1905 § 4039; Suchaneck v. Smith, 45–26, 47+397; Alworth v. Gordon, 81–445, 84+454. See, under former statute, Brown v. Brackett, 26–292, 3+705.

[85] See § 5440.

[86] Gibbens v. Thompson, 21–398; Spooner v. French, 22–37. See Chandler v. Kent, 8–536(479); Byrane v. Rogers, 8–281 (247).

[87] Engels v. Mitchell, 30–122, 14+510.

[88] See § 5440.

[89] Burton v. Rohrbeck, 30–393, 15+678.

his grantee, or some one claiming under him, against a party in possession who is or has been a lessee thereof, or who claims under such lessee.[90] A lessee, who has, by means of an instrument in form a sublease, parted with his whole term as to a portion of the premises leased by him, cannot maintain an action against the person with whom he has so contracted by virtue of the attempted reservation of a right of entry for breach of the covenant contained in that instrument.[91]

5455. Parties defendant—All who are in possession under the tenant may be joined as defendants with him.[92] A subtenant cannot be ousted unless he is made a defendant, either with or without the principal tenant. Servants, or agents of the tenant, or members of his family, should not be made defendants.[93]

5456. Summons—Substituted service—Under the statute, jurisdiction of the court does not depend upon its being made to appear at the time of filing the complaint that the defendant is absent from the county, so as to justify substituted service of the summons, but jurisdiction depends upon the fact of such absence; and, if the summons is duly issued and served, it is not error to permit the complaint to be amended at the time of the trial to show the fact of such absence.[94] A summons in the municipal court of St. Paul is returnable on the first day of a regular weekly term, being not less than three nor more than ten days from the date of its issuance.[95]

5457. Complaint—It need not state that the plaintiff is the owner, or that he is entitled to the possession, of the demised premises, if it shows a leasing by him to defendant, and an entry and possession by the latter under such leasing.[96] The premises must be described,[97] including the place where they are located.[98] It has been held on appeal fairly inferable from a complaint that while the original letting was for only a month, the defendant continued in the occupancy of the premises as tenant from month to month.[99] Certain allegations as to service of notice to quit held sufficient.[1]

5458. Answer—Plea of not guilty—The answer must be made, if at all, at the opening of the court upon the day the summons is made returnable, or at such other time, as may be designated by the court.[2] An oral plea of "not guilty" is sufficient to put in issue the allegations of the complaint, and is equivalent to a general denial. Matters in excuse, justification, or avoidance, must be alleged by a written answer.[3] They are such as are termed "new matter" under the general practice act.[4]

5459. Counterclaim unauthorized—A counterclaim is not authorized.[5]

5460. Defences—Facts calling for affirmative equitable relief cannot be pleaded in defence, and do not justify the certification of the case to the district

[90] Alworth v. Gordon, 81-445, 84+454. See Tilleny v. Knoblauch, 73-108, 75+1039.
[91] Cameron v. Tobin, 104-333, 116+838.
[92] Judd v. Arnold, 31-430, 18+151; Bagley v. Sternberg, 34-470, 26+602.
[93] Bagley v. Sternberg, 34-470, 26+602; Hodgson v. St. Paul P. Co., 78-172, 80+956.
[94] Berryhill v. Healey, 89-444, 95+314.
[95] Kenny v. Seu Si Lun, 101-253, 112+220.
[96] Engels v. Mitchell, 30-122, 14+510. See Pinney v. Fridley, 9-34(23).
[97] Lewis v. Steele, 1-88(67) (statute since changed as to particularity of description).
[98] See Gibbens v. Thompson, 21-398.
[99] Dorr v. McDonald, 43-458, 45+864.
[1] Prendergast v. Searle, 81-291, 84+107.
[2] Universalist G. Convention v. Bottineau, 42-35, 43+687.
[3] Berryhill v. Healey, 89-444, 95+314; Sodini v. Gaber, 101-155, 111+962; Bartleson v. Munson, 105-348, 117+512.
[4] Sodini v. Gaber, 101-155, 111+962.
[5] See Peterson v. Kreuger, 67-449, 70+567; Barker v. Walbridge, 14-469(351).

court.[6] Matters which control the legal effect of the lease, and show that the relation of landlord and tenant was not created by it and does not exist between the parties, may be pleaded in defence.[7] It has been held no defence that the defendant owned and occupied a building on the premises as a homestead;[8] that the plaintiff had broken his covenant to keep the premises in good repair;[9] or that the plaintiff had waived prior defaults of the tenant.[10] The defendant may assert as a defence that the plaintiff has executed to him a lease for a further term not yet expired.[11]

5461. Payment of rent and costs—Restitution—In an action on the ground of non-payment of rent the tenant has a right by statute to defeat the action and to be restored to possession by paying or tendering the rent, costs, etc., at any time before the plaintiff is put into possession.[12] Prior to Laws 1901 c. 72 payment might be made at any time within six months.[13] If the landlord thereafter wrongfully evicts the tenant the latter has a cause of action for damages.[14]

5462. Variance—A variance as to the time a notice to quit was served has been held fatal.[15]

5463. Construction of pleadings—The pleadings are to be construed as in an ordinary civil action.[16]

5464. Burden of proof—The burden is ordinarily upon the plaintiff to prove that he leased the premises to the defendant.[17]

5465. Waiver of jury—Trial by jury is waived unless demanded upon the return and before the justice proceeds to hear the case.[18]

5466. Unnecessary to wait an hour—The justice may proceed to hear the case at the time appointed in the summons, without waiting an hour for the appearance of the defendant.[19]

5467. Adjournment—A justice has been held not to lose jurisdiction by an adjournment.[20]

5468. Dismissal—If the complaint is insufficient the defendant may move for a dismissal on that ground without answering.[21]

5469. Findings—There must be findings.[22] When the complaint is in the ordinary form it is sufficient to find "that the allegations of the complaint are true."[23] A justice has a reasonable time in which to make his findings.[24]

5470. Judgment on pleadings—If the answer admits the material allegations of the complaint, and alleges no defence, judgment on the pleadings may be rendered as in ordinary civil actions.[25]

[6] Steele v. Bond, 28–267, 9+772; Petsch v. Biggs, 31–392, 18+101; Norton v. Beckman, 53–456, 55+603; Tilleny v. Knoblauch, 73–108, 75+1039; Lundberg v. Davidson, 68–328, 71+395, 72+71. See Barker v. Walbridge, 14–469(351); Stewart v. Murray, 13–426(393).

[7] Steele v. Bond, 28–267, 9+772. See Sodini v. Gaber, 101–155, 111+962.

[8] Lloyd v. Secord, 61–448, 63+1099.

[9] Peterson v. Kreuger, 67–449, 70+567.

[10] Douglas v. Herms, 53–204, 54+1112.

[11] Judd v. Arnold, 31–430, 18+151.

[12] R. L. 1905 § 3328; George v. Mahoney, 62–370, 64+911 (pleading tender—payment into court—dismissal of action); Seeger v. Smith, 74–279, 77+3 (tender not including costs ineffectual).

[13] Cook v. Parker, 67–374, 69+1099; Wacholz v. Griesgraber, 70–220, 73+7.

[14] Wacholz v. Griesgraber, 70–220, 73+7.

[15] Waggoner v. Preston, 83–336, 86+335.

[16] Norton v. Beckman, 53–456, 55+603.

[17] Chandler v. Kent, 8–524(467). See Sodini v. Gaber, 101–155, 111+962.

[18] Gibbens v. Thompson, 21–398.

[19] Spooner v. French, 22–37.

[20] Caley v. Rogers, 72–100, 75+114.

[21] Gray v. Hurley, 28–388, 10+417.

[22] Hennessey v. Pederson, 28–461, 11–63.

[23] See Wright v. Gribble, 26–99, 1+820.

[24] Gibbens v. Thompson, 21–398.

[25] Norton v. Beckman, 53–456, 55+603; Lloyd v. Secord, 61–448, 63+1099.

5471. Damages—Rent—Damages for withholding are not recoverable.[26] Rent is not recoverable unless an issue thereon is tried by consent.[27]

5472. Judgment—Proof on default—The justice has a reasonable time in which to enter judgment.[28] The judgment may allow the tenant a reasonable time in which to remove fixtures.[29] To entitle the plaintiff to restitution he must prove his case unless it is admitted. The default of the defendant to appear does not authorize a judgment of restitution without proof.[30] An informal judgment has been held sufficient.[31]

5473. Writ of restitution—If a writ of restitution is directed to the wrong person it is void and the officer executing it is liable for damages.[32] Servants may be removed under a writ, though not named in it.[33] An alias writ may be issued.[34]

5474. Restitution—Appeal—Stay—In an action on a written lease against a tenant holding over after the expiration of his term, a writ of restitution may issue notwithstanding an appeal, if the plaintiff files a bond as provided by statute.[35] The statute is inapplicable to actions begun in the district court.[36] An appeal by defendant (a proper supersedeas bond being filed) from a judgment in an action not founded on a written lease, the terms of which have expired, awarding possession of the premises involved to the plaintiff therein, stays all proceedings in the action, preserves all rights of the parties, and secures to defendant, by force of statutory provisions, the right to remain in the possession of the premises pending the appeal. Pending such appeal the owner of the property, plaintiff in that proceeding, has no right, during the defendant's mere temporary absence from the property, to take possession thereof and forcibly resist his return thereto.[37] A defect in a bond may be remedied by a new bond.[38]

5475. Appeal—An appeal can only be taken from a final judgment.[39] But a judgment of dismissal, entered at the request of the defendant upon a withdrawal of the plaintiff from the trial, has been held a final judgment within this rule.[40] If the tenant appeals he may remain in possession upon giving a bond as required by statute. He is entitled to crops sown and harvested by him pending the appeal.[41]

ACTIONS FOR RENT

5476. Parties—A guarantor of the payment of rent accruing on a lease, whose undertaking is indorsed thereon, may be sued jointly with the principal debtor.[42] One who takes under a lessee and assumes his covenant to pay rent may be sued by the lessor in his own name and for his own benefit.[43] One of several parties to a joint lease may be sued separately.[44]

[26] State v. Dist. Ct., 53–483, 55+630.
[27] See Keene v. Lobdell, 85–110, 88+251.
[28] Gibbens v. Thompson, 21–398.
[29] Kenny v. Seu Si Lun, 101–253, 112+220.
[30] Hennessey v. Pederson, 28–461, 11+63.
[31] Norton v. Beckman, 53–456, 55+603.
[32] Rauma v. Bailey, 80–336, 83+191.
[33] Hodgson v. St. Paul P. Co., 78–172, 80+956.
[34] Suchaneck v. Smith, 53–96, 54+932.
[35] R. L. 1905 § 4046; Laws 1909 c. 496; State v. Burr, 29–432, 13+676.
[36] State v. Dist. Ct., 53–483, 55+630.
[37] Lobdell v. Keene, 85–90, 88+426.
[38] Mills v. Wilson, 59–107, 60+1083.
[39] Gray v. Hurley, 28–388, 10+417.
[40] Van Vlissingen v. Oliver, 102–237, 113+383.
[41] Woodcock v. Carlson, 41–542, 43+479.
[42] Lucy v. Wilkins, 33–21, 21+849.
[43] Dickinson v. Fitterling, 72–483, 75+731.
[44] Hoatson v. McDonald, 97–201, 106+311. See Minn. S. A. Soc. v. Swanson, 48–231, 51+117.

5477. Pleading—Cases are cited below involving the sufficiency of particular complaints,[45] answers,[46] and replies.[47]

5478. Counterclaim—Recoupment—A cause of action for interference with the enjoyment of possession by the tenant or for an eviction may be set up as a counterclaim.[48] So may a cause of action for repairs made by the defendant under agreement with the plaintiff.[49] When lessees enter into and retain possession of the rented premises under a covenant in the lease that the landlord will make improvements, which he fails to do, the lessees, when sued for the rent, may recoup the damages resulting from such breach of the covenant, or set up the resulting damages as a counterclaim. Such counterclaim arises out of the contract sued upon as the foundation of the landlord's claim, and is connected with the subject of the action.[50] A failure to furnish certain material for repairs held not a ground for counterclaim.[51] A claim for damages resulting from the suspension of certain railway privileges held not a ground for counterclaim.[52]

5479. Consistency of defences—The defence of a surrender is not inconsistent with the defence that the premises have become untenantable.[53] An admission of indebtedness for rent is not inconsistent with a counterclaim for repairs made by the defendant under agreement with the plaintiff.[54] A general denial, and a subsequent oral agreement inconsistent with plaintiff's right to recover, held not inconsistent.[55]

5480. Variance—When the plaintiff declares on a written lease it seems that he may recover upon proof of possession by the defendant as tenant, though the lease is void.[56] Various cases are cited below involving questions of variance.[57]

[45] Dean v. Leonard, 9–190(176) (where the plaintiff pleads double by declaring upon a lease and also for use and occupation he may recover upon proof of either a lease or a tenancy by permission, if the defendant fails to make seasonable objection to the double pleading); Rhone v. Gale, 12–54(25) (upon an allegation of ownership by the lessor at the date of the lease such ownership is presumed to continue till the contrary appears—a complaint which alleges that a lease was executed with a certain date, the term to commence on that date, and that the lessee took possession under the lease, sufficiently avers possession by the lessee from the date of the lease); Lucy v. Wilkins, 33–441, 23+861 (complaint held not to admit a surrender and acceptance).

[46] Roach v. Peterson, 47–291, 50+80 (answer held insufficient in not showing that a building was destroyed or injured without the fault of the tenant); Collins v. Lewis, 53–78, 54+1056 (answer held to allege a breach of a covenant for quiet enjoyment); Lafferty v. Hawes, 63–13, 65+87 (answer held sufficient to admit proof of a surrender by operation of law as well as by agreement of the parties); Pioneer P. Co. v. Hutchinson, 63–481, 65+938 (answer held sufficient to admit proof of damages arising from the lessor's failure to make improvements); Hausman v. Mulheran, 68–48, 70+866 (answer setting up a counterclaim for repairs held sufficient though it did not allege that the repairs were necessary); Fegelson v. Dickerman, 70–471, 73+144 (answer held to put in issue the material allegations of the complaint); Trainor v. Schutz, 98–213, 107+812 (necessity of alleging facts constituting fraud); Viehman v. Boelter, 105–60, 116+1023 (constructive eviction—held unnecessary to allege surrender of building).

[47] Johnson v. Sackrison, 78–107, 80+858 (attornment held sufficiently pleaded).

[48] Goebel v. Hough, 26–252, 2+847; Collins v. Lewis, 53–78, 54+1056. See City Power Co. v. Fergus Falls W. Co., 55–172, 56+685; Chapman v. Fabian, 104–176, 116+207.

[49] Hausman v. Mulheran, 68–48, 70+866.

[50] Pioneer P. Co. v. Hutchinson, 63–481, 65+938; Long v. Gieriet, 57–278, 59+194.

[51] Hall v. Smith, 16–58(46).

[52] McCormick v. Milburn, 57–6, 58+600.

[53] Mpls. Co-op. Co. v. Williamson, 51–53, 52+986.

[54] Hausman v. Mulheran, 68–48, 70+866.

[55] Rees v. Storms, 101–381, 112+419.

[56] Finch v. Moore, 50–116, 52+384; Prendergast v. Searle, 74–333, 77+231; Buckingham v. Dafoe, 78–268, 80+974; Van Brunt v. Wallace, 88–116, 92+521.

[57] Nelson v. Thompson, 23–508 (variance disregarded—objection first made on ap-

5481. Burden of proof—Cases are cited below involving the burden of proof.[58]

5482. Evidence—Admissibility—Cases are cited below holding evidence admissible,[59] or inadmissible.[60]

5483. Relief allowable—A judgment awarding the plaintiff rent, possession, and forfeiture of a contract on certain conditions, has been held proper.[61] A judgment in favor of one of two joint landlords has been sustained.[62]

RENTING ON SHARES—FARM CONTRACTS

5484. Rights of parties—In general—The rights of the parties to a contract for farming on shares necessarily depends upon the language of the particular contract. Such contracts sometimes create the relation of landlord and tenant between the parties, but generally in this state they do not.[63] Under a form of contract in common use in this state the parties are tenants in common of the crops until a division. But the title to all the crops remains in the owner of the land until a division as security for the performance of the contract by the cropper. The cropper is entitled to such possession of the land and the crops as is necessary to enable him to perform the contract on his part, but beyond this he is not entitled to the possession of the crops until a division thereof.[64] Prior to a division the cropper has an interest which he may sell, mortgage, or otherwise dispose of subject to the rights of the owner of the land.[65] After a division the cropper is full owner of his share free of any lien of the landowner.[66] After the cropper has complied with all the terms of the contract on his part, and is entitled to his share of the crop, the landowner is liable to him for a conversion.[67] In order to divest the legal

peal); Erickson v. Schuster, 44–441, 46+914 (variance as to time of commencement of term held immaterial); Weide v. St. Paul B. Co., 92–76, 99+421 (assignee of lease held not entitled to object to a variance relating to the assignment).

[58] Wampler v. Weinmann, 56–1, 57+157 (burden of proving that premises were untenantable held on the defendant); Mittwer v. Stremel, 69–19, 71+698 (burden of proving that a reletting was for a year held on the landlord); Weide v. St. Paul B. Co., 92–76, 99+421 (one in possession under a lease held to have the burden of proving that he had not taken an assignment of the lease and assumed its obligations); Montgomery v. Leuwer, 94–133, 102+367 (burden of proving payment held on tenant). See Yale v. Olney, 126+625.

[59] Wilkinson v. Clauson, 29–91, 12+147 (evidence as to due care in constructing a sewer); Egan v. Gordon, 63–505, 68+103 (acts and reputation tending to show the character of an alleged brothel); Hausman v. Mulheran, 68–48, 70+866 (testimony of defendant as to what he paid for repairs and that the prices paid were fair and reasonable).

[60] Paget v. Electrical E. & S. Co., 67–31, 69+475 (declarations of a third party as to the time of the execution and acceptance of a lease); Mittwer v. Stremel, 69–19, 71+698 (evidence of collateral matters—issue as to whether a lease was for a year or from month to month); Opera House Co. v. Baxter, 90–334, 96+1133 (evidence bearing on the validity of a transfer by a board of directors); Trainor v. Schutz, 98–213, 107+812 (declarations of lessee's son upon delivering keys of a flat to the janitor as directed by his father—parol evidence that a covenant was inserted in a lease fraudulently).

[61] Hall v. Smith, 16–58(46).

[62] Forman v. Saunders, 92–369, 100+93.

[63] Strangeway v. Eisenman, 68–395, 71+617; Porter v. Chandler, 27–301, 7+142; Schmitt v. Cassilius, 31–7, 16+453; Gould v. Sub-Dist. No. 3, 8–427(382); Strong v. Colter, 13–82(77); Prouty v. Barlow, 74–130, 76+946; McNeal v. Rider, 79–153, 81+830; Agne v. Skewis, 98–32, 107+415; Prudoehl v. Randall, 108–185, 121+913.

[64] Strangeway v. Eisenman, 68–395, 71+617; Anderson v. Liston, 69–82, 72+52; Avery v. Stewart, 75–106, 77+560, 78+244; McNeal v. Rider, 79–153, 81+830; Graves v. Walter, 93–307, 101+297; Denison v. Sawyer, 95–417, 104+305; Rector v. Anderson, 96–123, 104+884; Johnson v. Stone, 126+720.

[65] Denison v. Sawyer, 95–417, 104+305; McNeal v. Rider, 79–153, 81+830; Potts v. Newell, 22–561.

[66] Graves v. Walter, 93–307, 101+297; Thorne v. Allen, 72–461, 75+706.

[67] Northness v. Hillestad, 87–304, 91+

title of the landowner to the crops the cropper must account for all the crops raised on the farm.[68] A lease giving the tenant a right to cut and haul off wood and requiring him to destroy weeds has been construed.[69] Cases are cited below in which farm contracts are involved incidentally.[70]

5485. As chattel mortgages—The contract may be so far a chattel mortgage as to require its filing as such,[71] or as to be void within the statute against mortgaging future crops.[72]

LAND WARRANT—See Public Lands, 7865.
LAPSED DEVISES—See Wills, 10291, 10292.
LAPSED LEGACIES—See Wills, 10291, 10292.

LARCENY

Cross-References

See Embezzlement; False Pretences.

5486. Different forms—The Penal Code abolished all prior forms of larceny and enacted one general provision for all forms including embezzlement, obtaining property by false pretences, and felonious breach of trust—offences which had hitherto been treated separately and required different forms of indictment and different proof on the trial.[73] These distinctions remain. There being, under R. L. 1905 § 5078, several distinct acts or ways by which a person may commit or be guilty of larceny, some of which were not larceny at common law, an indictment under that section should charge the act constituting the larceny so as to inform the accused in which one of these different ways he is charged with having committed the offence. An indictment for larceny in the common form is insufficient to charge embezzlement or obtaining money under false pretences,[74] but an indictment which is sufficient to charge the latter offences is not vitiated by unnecessary allegations appropriate to an indictment for larceny.[75] The word "defraud" as used in this section applies to the second subdivision as well as the first.[76] The effect of the Code is to do away with the necessity of a trespass, which was an essential element of every larceny at common law.[77]

5487. Simple larceny—Nature and elements of offence—An intent to deprive or defraud the true owner of his property, or of the use and benefit thereof, or to appropriate the same to the use of the taker or of some other person, is an essential element of the crime of larceny.[78] It is unnecessary that

1112. See Robine v. Little, 88–122, 92+1130.

[68] Avery v. Stewart, 75–106, 77+560, 78+244.

[69] Prudoehl v. Randall, 108–185, 121+913.

[70] Smith v. Roberts, 43–342, 46+336; Cummings v. Newell, 86–130, 90+311; Mueller v. Olson, 90–416, 97+115; Flour City Nat. Bank v. Bayer, 89–180, 94+557; Somerdorf v. Schliep, 43–150, 44+1084; Engler v. Schneider, 66–388, 69+139; Bowe v. Hyland, 44–88, 46+142; Chadbourn v. Rahilly, 34–346, 25+633.

[71] Wright v. Larson, 51–321, 53+712; McNeal v. Rider, 79–153, 81+830; Agne v. Skewis, 98–32, 107+415.

[72] Ward v. Rippe, 93–36, 100+386.

[73] State v. Kortgaard, 62–7, 64+51; State v. Friend, 47–449, 50+692. See State v. Rieger, 59–151, 60+1087.

[74] State v. Henn, 39–464, 40+564; State v. Friend, 47–449, 50+692; State v. Comings, 54–359, 56+50; State v. Farrington, 59–147, 60+1088.

[75] State v. Comings, 54–359, 56+50.

[76] State v. Southall, 77–296, 79+1007.

[77] State v. Rieger, 59–151, 60+1087. See § 5490.

[78] State v. Miller, 103–24, 114+88.

the property be taken with intent to convert it to the use of the party taking it. It is sufficient that it is taken with the felonious intent to convert it to the use of a person other than the owner.[79] It must be taken from the possession, actual or constructive, of the owner and without his consent.[80] A taking from a servant may be larceny though the servant consents to the taking, the servant having the custody as distinguished from the possession of the property. A person may be guilty of simple larceny by obtaining property through one whose relations to the owner are such as to make him guilty of embezzling.[81] A larceny at common law necessarily involves a trespass.[82] The taking must always be animo furandi.[83] It is the general rule that the intent to steal and the act of taking and carrying away must concur, but it is sufficient if the intent is formed at the time of carrying away.[84]

5488. What may be the subject of larceny—Lost property—Illuminating gas,[85] money given in change,[86] or a receipted voucher,[87] may be the subject of larceny. Unsigned railway passes are not subjects of larceny under G. S. 1894 § 6718 (R. L. 1905 § 5084).[88] One who finds lost property under circumstances which give him knowledge or means of inquiry as to the true owner and who appropriates it to his own use, or to the use of another not entitled thereto, without first making reasonable efforts to find the owner and restore it to him is guilty of larceny.[89]

5489. Attempt to commit—What constitutes—An attempt to commit the crime of larceny is an overt act or acts done with intent to deprive the true owner of his property, or of the use and benefit thereof, or to appropriate the same to the use of the taker, and tending to effect the commission of the crime, but failing to accomplish it.[90]

5490. Indictment for simple larceny—Since, under the Penal Code, there are several distinct acts or ways by which a person may commit, or be guilty of larceny, an indictment must charge the act constituting the alleged larceny so as to advise the accused in which one of these different ways he is charged with having committed the crime.[91] It must state the name of the owner of the property and from whom it was taken.[92] It is unnecessary to give the name of the owner of the building from which the property is taken, if the building is fully described.[93] It is unnecessary to allege that the taking was in the daytime.[94] The intent to deprive the true owner of the property must be alleged, but when it is explicitly charged that the accused feloniously took, stole, and carried away personalty from another person alleged to be the owner, the intent to deprive the true owner thereof is sufficiently alleged.[95] The taking from the possession of the true owner must be alleged, but it may be done by the use of the word "take." This word has a definite and well understood signification in connection with the offence of larceny and implies a trespass; and the averment, "did wrongfully and feloniously take, steal, and carry away,"

[79] State v. Wellman, 34–221, 25+395.
[80] State v. Friend, 47–449, 50+692.
[81] State v. McCartey, 17–76(54).
[82] State v. McCartey, 17–76(54); State v. Anderson, 25–66; State v. Friend, 47–449, 50+692; State v. Farrington, 59–147, 60+1088. See State v. Rieger, 59–151, 60+1087.
[83] State v. Welch, 21–22; State v. Anderson, 25–66; State v. Fisher, 38–378, 37+948.
[84] State v. Anderson, 25–66.
[85] State v. Wellman, 34–221, 25+395.
[86] State v. Anderson, 25–66.
[87] State v. Scanlan, 89–244, 94+686.
[88] State v. Musgang, 51–556, 53+874.
[89] R. L. 1905 § 5086; State v. Hoshaw, 89–307, 94+873; State v. Boyd, 36–538, 32+780; State v. Levy, 23–104.
[90] State v. Miller, 103–24, 114+88 (indictment held sufficient).
[91] State v. Henn, 39–464, 40+564; State v. Farrington, 59–147, 60+1088.
[92] State v. Nelson, 79–373, 82+674; State v. Blakeley, 83–432, 86+419.
[93] State v. Minck, 94–50, 102+207.
[94] State v. Scanlan, 89–244, 94+686.
[95] State v. Hackett, 47–425, 50+472.

involves the possession, and the wrongful taking of the property from the actual or constructive possession, of the owner, general or special, and without his consent.[96] The property stolen must be described with sufficient certainty to enable the court to determine that it is subject to larceny as charged and to pronounce judgment on conviction, to enable the accused to prepare for trial, and to render the judgment an effective bar to a subsequent prosecution for the same offence.[97] But when it is impossible for the jury to ascertain a particular description, it is sufficient to give a general description and add "that a more particular description of the articles is unknown to the grand jury." Such an allegation is not traversable.[98] A description which is well known and in common use is sufficient.[99] Cases are cited below involving the sufficiency of the description of various forms of property.[1] Whether it is necessary to state the value of the property is an open question.[2] An indictment for petit larceny is not vitiated by the use of the word "feloniously."[3] An indictment good at common law for larceny is good under the statute for simple larceny.[4] An indictment charging the accused "of the crime of burglary, committed as follows," but stating facts constituting the crime of simple larceny, has been held sufficient for the latter offence.[5] An indictment has been held sufficiently direct and specific.[6]

5491. Indictment for larceny by trustee under R. L. 1905 § 5088—A common-law form of indictment is insufficient under this section. It must be special and allege all the facts necessaryy to constitute the offence.[7]

5492. Indictment for stealing railway tickets—An indictment under G. S. 1878 c. 95 § 26, for stealing railway tickets, has been held sufficiently definite as to the description of the tickets. The statute was framed to meet, inter alia, the case of an appropriation of tickets which had been sold by a railway company to a passenger and taken up by a conductor, so as again to become the property of the company by which they were issued, but which, instead of being returned to the proper depositary, were otherwise disposed of by the conductor or some other person with a larcenous intent.[8]

5493. Indictment for stealing warehouse receipts—An indictment has been held sufficient though it did not allege that the company had legal authority under its charter to issue the receipts.[9]

5494. Claim of title—It is provided by statute that "upon an indictment for larceny it shall be a sufficient defence that the property was appropriated openly and avowedly, under a claim of title preferred in good faith, even though the claim be untenable. But this shall not excuse the retention of the property of another to offset or pay demands held against him."[10]

[96] State v. Friend, 47–449, 50+692.

[97] State v. Hinckley, 4–345(261); State v. Anderson, 25–66; State v. O'Connor, 38–243, 36+462; State v. Quackenbush, 98–515, 108+953.

[98] State v. Hinckley, 4–345(261); State v. Taunt, 16–109(99); State v. Beebe, 17–241(218); State v. Quackenbush, 98–515, 108+953.

[99] State v. Friend, 47–449, 50+692.

[1] State v. Hinckley, 4–345(261) (coin—bank bills); State v. Taunt, 16–109(99) (treasury and bank notes); State v. Beebe, 17–241(218) (id.); State v. Anderson, 25–66 (lawful money of the United States); State v. Brin, 30–522, 16+406 (railway tickets); State v. O'Connor, 38–243, 36+462 (contracts—evidences of debt); State v. Friend, 47–449, 50+692 (mare); State v. Scanlan, 89–244, 94+686 (receipted voucher); State v. Quackenbush, 98–515, 108+953 (money).

[2] See State v. Anderson, 25–66; State v. Friend, 47–449, 50+692.

[3] State v. Hogard, 12–293(191).

[4] State v. Friend, 47–449, 50+692.

[5] State v. Coon, 18–518(464).

[6] State v. King, 88–175, 92+965.

[7] State v. Farrington, 59–147, 60+1088.

[8] State v. Brin, 30–522, 16+406.

[9] State v. Loomis, 27–521, 8+758.

[10] R. L. 1905 § 5091; State v. Colwell, 43–378, 45+847; State v. Brame, 61–101, 63+250.

5495. Variance—Cases are cited below involving the effect of variances.[11]

5496. Possession of stolen goods—Possession of the stolen goods by the accused is evidence of his guilt. Its force depends on the facts of the particular case. It does not raise a legal presumption of guilt, but is simply an item of evidence from which the jury may infer guilt.[12]

5497. Evidence—Admissibility—Cases are cited below involving the admissibility of evidence.[13]

5498. Evidence—Sufficiency—Cases are cited below holding evidence sufficient [14] or insufficient [15] to warrant a conviction.

5499. Verdict—Where an indictment alleges the value of the several articles stolen, a verdict of "guilty" is a finding that the accused stole every one of them and that their several values were as alleged.[16] A verdict of "guilty of grand larceny" without specifying the value of the articles stolen has been held insufficient.[17]

5500. Conviction of lesser offence—Upon a charge of larceny from the person a conviction may be had for simple larceny.[18]

LARD—See Food, 3779.

LATENT AND PATENT AMBIGUITIES—See Evidence, 3406; Wills, 10262.

LATENT EQUITIES—See Assignments, 572.

LATERAL SUPPORT—See Adjoining Landowners, 96; Eminent Domain, 3042; Highways, 4187; Municipal Corporations, 6637.

LAW—Law is the sum of the rules administered by courts of justice.[19] The main sources of law are statutes, judicial precedents, opinions of experts.

[11] State v. Beebe, 17-241(218) (held not a variance as to the character of money stolen); State v. Blakeley, 83-432, 86+419 (variance in name of prosecuting witness held not fatal on a motion in arrest of judgment); State v. Whitman, 103-92, 114+363 (accessory before the fact—held not a material variance as to ownership of the property stolen or of the building from which it was taken).

[12] State v. Miller, 10-313(246); State v. Hogard, 12-293(191); State v. Johnson, 33-34, 21+843; State v. Miller, 45-521, 48+401; State v. Hoshaw, 89-307, 94+873.

[13] Hoberg v. State, 3-262(181) (evidence that accused had committed another distinct larceny held inadmissible); State v. Hogard, 12-293(191) (evidence of the finding of a jury in a civil action as to the ownership of the property held inadmissible—evidence of admissions of the accused as to the ownership of the property held admissible); State v. Palmer, 79-428, 82+685 (on a charge of stealing a pocketbook evidence that a person who had returned the pocketbook to the owner was the attorney of the defendant and had withdrawn his defence held inadmissible); State v. King, 88-175, 92+965 (on a charge of being an accessory after the fact to the stealing of a diamond circumstantial evidence held admissible).

[14] State v. Johnson, 33-34, 21+843; State v. Wellman, 34-221, 25+395; State v. Summers, 38-324, 37+451; State v. Colwell, 43-378, 45+847; State v. Miller, 45-521, 48+401; State v. Floyd, 61-467, 63+1096; State v. Berndgen, 75-38, 77+408; State v. Brooks, 84-276, 87+779; State v. King, 88-175, 92+965; State v. Minck, 94-50, 102+207.

[15] State v. Miller, 10-313(246).

[16] State v. Colwell, 43-378, 45+847.

[17] State v. Coon, 18-518(464).

[18] State v. Eno, 8-220(190).

[19] Pollock and Maitland, History of English Law, Introduction; Thayer, Ev. 192 (those rules which courts of justice apply and enforce); Gray, Nature and Sources of Law, § 191 (the rules which the courts lay down for the determination of legal rights and duties); Holland, Jurisprudence (10 ed.), c. 3 (a general rule of external human action enforced by a sovereign political authority); Pollock, Jurisprudence (2 ed.), c. 1; Salmond, Jurisprudence, 9 (the law consists of the rules recognized and acted on in courts of justice); Dillon, Laws and Jurisprudence of England and America, c. 1; 21 Harv. L. Rev. 120. See Mason v. Callender, 2-350 (302, 306) (a rule of law is, from the very nature of the case, exclusive and independent of agreements); Sanborn v. Rice County, 9-273(258, 263) (a law is a rule of conduct); Blake v. Winona etc. Ry., 19-418(362, 372) (id.); Walter v. Greenwood, 29-87, 12+145 (law includes both statute and common law); Citizens' State Bank v. Bonnes, 83-1, 85+718 (law

custom, reason, and considerations of justice, convenience, and public policy.[20] Courts must find a solution, with or without authority, for every case that comes before them, and general considerations of justice and convenience must be relied on in default of positive authority. There is no reason why they should not be openly invoked, for the alternative method of pretending to follow authority where there is really none is now discredited.[21] Courts do not make law in the sense of formulating and declaring it,[22] but they make it incidentally in the process of deciding cases. Law, at least the common law, is a result of the decision of cases by the courts. And in a very real sense this is also true of so-called statutory law. In a strict sense statutes are not law but sources of law. The idea of law as an entity or metaphysical abstraction existing independent of judicial decisions—that judicial decisions are not law, but merely evidence of the law—still finds expression in the cases, but it is no longer entertained by competent legal scholars.[23]

LAW AND FACT—See Criminal Law, 2477; Trial, 9707.
LAW BOOKS—See Trial, 9799.
LAWFUL MONEY—See note 24.
LAW MERCHANT—See Bills and Notes.
LAW OF CASE—See Appeal and Error, 398, 404, 454; Trial, 9792.
LAW OF NATIONS—See International Law.
LAW OF NATURE—See Law.
LAW OF ROAD—See Highways, 4163.
LAW OF THE LAND—See Constitutional Law, 1637.
LEADING QUESTIONS—See Appeal and Error, 399; Witnesses, 10317.
LEASEHOLD ESTATES—See Landlord and Tenant.
LEASES—See Landlord and Tenant, 5382; Navigable Waters, 6967; Tenancy in Common, 9606, 9608.
LEGACIES—See Wills, 10275.
LEGAL AND EQUITABLE ACTIONS—See Action, 95.
LEGAL TENDER—See Tender.
LEGISLATIVE JOURNALS—See Evidence, 3454; State, 8841; Statutes, 8897, 8963.
LEGISLATIVE POWER—See Constitutional Law, 1602.
LEGISLATURE—See New Trial, 7072; State, 8832.
LEGITIMACY—See Bastardy, 844; Marriage, 5793.
LEGITIMATION—See Bastardy.
LETTERPRESS COPIES—See Evidence, 3279.
LETTERS—See Evidence, 3363.

distinguished from an administrative rule or order); Fitzpatrick v. Simonson, 86-140, 148, 90+378 (law includes both statute and common law).

[20] Gray, Nature and Sources of Law, § 274; Markby, Elements of Law, c. 2; Salmond, Jurisprudence, 117; 21 Harv. L. Rev. 120. See, as to reason and the law of nature or natural law as sources of law, Pollock, Expansion of Common Law, 107; Bryce, Studies in History and Jurisprudence, 556. See, as to public policy as a source of law, Holmes, Common Law, 35.

[21] Pollock, Expansion of Common Law, 130.

[22] Johnson v. Harrison, 47-575, 579, 50+923; Salmond, Jurisprudence, 175. Judges are indeed bound to find some rule for deciding every case that comes before them, but they must do it without contradicting established principles, and in conformity with the reasons on which previous decisions were founded. They may supplement and enlarge the law as they find it, or rather they must do so from time to time, as the novelty of questions coming before them may require; but they must not reverse what has been settled. Only express legislation can do that. Pollock, Expansion of Common Law, 49.

[23] Gray, Nature and Sources of Law.

[24] State v. Quackenbush, 98-515, 520, 108+953.

LETTERS OF ADMINISTRATION—See Executors and Administrators, 3561.

LETTERS PATENT—See Evidence, 3356.

LETTERS TESTAMENTARY—See Executors and Administrators, 3564.

LEVEE—See note 25.

LEVY—See Attachment; Execution.

LIABILITY—See note 26.

[25] St. Paul v. Chi. etc. Ry., 63-330, 63+267, 65+649, 68+458; Sanborn v. Van Duyne, 90-215, 96+41; Betcher v. Chi. etc. Ry., 124+1096.

[26] Crowell v. N. W. etc. Co., 99-214, 219, 108+962.

LIBEL AND SLANDER

Cross-References

See Criminal Law, 2477; Limitation of Actions, 5655.

IN GENERAL

5501. Definitions—A libel is a malicious publication, expressed in print, writing, or by signs, tending to injure the reputation of another, and expose him to public hatred, contempt, or ridicule.[27] A defamatory publication is

[27] Smith v. Coe, 22-276. See also, Wilkes v. Shields, 62-426, 64+921. Bentham sarcastically defined a libel as anything of which any one thinks proper to complain. McDermott v. Union Credit Co., 76-84, 78+967, 79+673.

one which is false, and calculated to bring the person defamed into disrepute, but it is not necessarily malicious.[28] Slander is defamation without legal excuse published orally by words spoken, being the object of the sense of hearing.[29] The term "actionable per se" means actionable without allegation or proof of damages.[30] The word "character" in this connection means reputation.[31]

5502. Distinction between libel and slander—Publications calculated to expose one to public contempt, hatred, or ridicule, are actionable without an allegation of special damages; while spoken words of the same import are not.[32]

5503. Who liable—A corporation may be liable even where actual malice is essential.[33] Prior to Laws 1897 c. 10, it was held that a husband was liable for slanderous words uttered by his wife, though he was not present and did not participate therein in any way.[34] One partner in a firm of furniture dealers has been held not liable for a libel published by another partner, or a servant of the firm, by placing a placard on a piece of furniture, the property of the firm, offering it for sale.[35] Where one authorizes an item to be inserted in a newspaper without directing in what part of it, he is responsible for the insertion in any part in which the publisher of the paper may place it. Where one publishes a libel in a newspaper, and without his knowledge, a third person cuts the libel from the paper and sends it to another person, the first is responsible for its being so sent, if the sending it was a natural consequence of its publication in the newspaper, of which the jury are to judge.[36] Where a libel is published in the name of a person, but without his authority, or previous knowledge, his subsequent neglect to disavow it, his mere silence, will not render him liable.[37] A principal is liable for defamation committed by his agent in the line of his duty.[38]

5504. Application of words to plaintiff—The application of the words to the plaintiff is an essential element of the wrong.[39] Where the language of an alleged libel is in itself so vague and uncertain that it could not be intended to have been used in reference to any particular person or persons it is not actionable. Where the words amount to a libelous charge against some person, but it is left uncertain as to the application thereof to the plaintiff, such application may be shown by proof of extrinsic facts.[40] It is sufficient if the article contains a reference to matters of description or to facts and circumstances from which the readers may infer that the plaintiff was intended, though he is not mentioned by name.[41]

5505. Intention—Good faith—It is immaterial what meaning the defendant intended to convey. The language must speak for itself in the light of the circumstances. It is no defence that the defendant did not intend to convey a defamatory meaning,[42] or that he was speaking in jest,[43] or that he

[28] Marks v. Baker, 28–162, 9+678.
[29] Fredrickson v. Johnson, 60–337, 62+388.
[30] Pratt v. Pioneer P. Co., 35–251, 28+708.
[31] Lydiard v. Daily News Co., 124+985.
[32] Holston v. Boyle, 46–432, 49+203; Byram v. Aiken, 65–87, 67+807; Richmond v. Post, 69–457, 72+704; McDermott v. Union C. Co., 76–84, 78+967, 79+673.
[33] Aldrich v. Press P. Co., 9–133(123); Peterson v. W. U. Tel. Co., 75–368, 77+985.
[34] Pett-Morgan v. Kennedy, 62–348, 64+912.
[35] Woodling v. Knickerbocker, 31–268, 17+387.
[36] Zier v. Hofflin, 33–66, 21+862.
[37] Simmons v. Holster, 13–249(232).
[38] Peterson v. W. U. Tel. Co., 75–368, 77+985.
[39] See § 5545.
[40] Petsch v. Dispatch P. Co., 40–291, 41+1034.
[41] Dressel v. Shipman, 57–23, 58+684.
[42] Shull v. Raymond, 23–66; Gribble v. Pioneer P. Co., 37–277, 34+30; Davis v. Hamilton, 88–64, 92+512; Quist v. Kiichli, 92–160, 99+642; Harms v. Proehl, 104–303, 116+587.
[43] Shull v. Raymond, 23–66.

in good faith believed the charge to be true.[44] The fact that other charges against the plaintiff by the defendant were allowed to go unchallenged is no defence.[45] The fact that a third party had libeled the defendant is no defence.[46] It is a defence that the words were not spoken and understood in a defamatory sense, though in their natural significance they are actionable per se.[47]

5506. Malice—When words are actionable per se, and are not privileged, a recovery may be had without proof of malice, that is, malice is not an element of the wrong.[48] It is commonly said in such cases that malice is implied.[49] Proof of actual malice, however, is admissible in such cases to justify exemplary damages;[50] and proof of the want of actual malice is admissible in mitigation of damages.[51] When communications are privileged there can be no recovery except on proof of actual malice.[52] Actual malice consists of improper or unjustifiable motives.[53]

5507. Publication—A transmission of a written message by telegraph has been held to constitute a publication.[54] Words uttered to the plaintiff at his request and heard by no one else have been held not published.[55] It is not a publication when the words used are only communicated to the person defamed.[56] Defendant wrote a libelous letter of and concerning plaintiff, and mailed it, properly addressed, to the plaintiff's wife. Plaintiff received the letter from the postal authorities, opened and read a few lines on the back thereof written to himself personally, and then handed it to his wife. Plaintiff and his wife then read the letter together, or practically at the same time. This was held a publication by defendant.[57]

5508. Damage essential—It is not every false charge against an individual, though reduced to writing and maliciously published, that will sustain an action for damages. It must appear that the plaintiff has sustained some special loss or damage, following as the necessary or natural and proximate consequence of the publication, or the nature of the charge itself must be such that the court can legally presume that the party has been injured in his reputation or business, or in his social relations, or has been subjected to public scandal, scorn, or ridicule, in consequence of the publication.[58] The gist of an action for libel is the damage occasioned to the reputation or general character of the party defamed.[59]

WHAT ACTIONABLE

5509. Classification of words—Words may be divided into three classes: (1) those that cannot possibly bear a defamatory meaning; (2) those that are

[44] Shull v. Raymond, 23–66; Allen v. Pioneer P. Co., 40–117, 41+936.

[45] Davis v. Hamilton, 88–64, 92+512.

[46] Dressel v. Shipman, 57–23, 58+684.

[47] McCarty v. Barrett, 12–494(398).

[48] Sharpe v. Larson, 67–428, 70+1, 554; Marks v. Baker, 28–162, 9+678. Malice is sometimes said to be of the gist of the action. Allen v. Pioneer P. Co., 40–117, 41+936.

[49] McCarty v. Barrett, 12–494(398); Simmons v. Holster, 13–249(232); Moore v. Dispatch P. Co., 87–450, 92+396; Aldrich v. Press P. Co., 9–133(123); Jacobs v. Cater, 87–448, 92+397; Pratt v. Pioneer P. Co., 32–217, 18+836, 20+87; Burch v. Bernard, 107–210, 120+33.

[50] See § 5563.

[51] See § 5532.

[52] Marks v. Baker, 28–162, 9+678; Hebner v. G. N. Ry., 78–289, 80+1128; Simmons v. Holster, 13–249(232); Aldrich v. Press P. Co., 9–133(123).

[53] Allen v. Pioneer P. Co., 40–117, 41+936.

[54] Peterson v. W. U. Tel. Co., 72–41, 74+1022.

[55] Irish-Am. Bank v. Bader, 59–329, 61+328.

[56] Fredrickson v. Johnson, 60–337, 62+388.

[57] Kramer v. Perkins, 102–455, 113+1062.

[58] Stewart v. Minn. T. Co., 40–101, 41+457; McDermott v. Union C. Co., 76–84, 88, 78+967, 79+673; Herringer v. Ingberg, 91–71, 97+460.

[59] Lydiard v. Daily News Co., 124+985.

reasonably susceptible of a defamatory meaning as well as an innocent one, and (3) those that are clearly defamatory on their face.[60]

5510. Construction of language—In construing the language of an alleged libel, as set forth in a complaint, courts must give it its obvious and natural meaning, unless it is alleged to have been used and understood in a different sense.[61] Courts will understand language as other people would. The question always is, how would ordinary men naturally understand the language?[62] The head-lines to an article are to be considered.[63] Where only a portion of an article referred to the plaintiff, it was held proper to consider the whole.[64] It is immaterial what meaning the defendant intended to convey. The language must speak for itself in the light of the circumstances.[65] Witnesses cannot testify as to the meaning which they understood the language to convey, or that they understood it to apply to the plaintiff.[66] In determining whether part of an article is libelous it is proper to read the entire article.[67] A publication is to be considered as a whole and not in detached fragments.[68] Words may be given or deprived of a defamatory meaning by construction with other parts of the context.[69]

5511. Actionable words not used in actionable sense—If words spoken of another, whether actionable in themselves or not, were not used by the speaker, or understood by the bystanders, in an injurious sense, an action for slander cannot be maintained.[70]

5512. Words apparently innocent actionable by averment—Words not defamatory on their face may be defamatory by reason of the circumstances under which they were used.[71]

5513. Pecuniary damage—Any language concerning a person is actionable per se, which, from its nature, necessarily must, or naturally and presumably will, as its natural and proximate consequence, cause pecuniary damage to the person of whom it is published.[72]

5514. Spoken words imputing a crime—Spoken words are not actionable per se unless they charge the commission of a crime.[73] It has been laid down broadly that words imputing the commission of any indictable offence are actionable per se.[74] But it has been suggested that this rule may need qualification so as to exclude offences not involving moral turpitude.[75] Words imputing the commission of a punishable offence involving moral turpitude are actionable per se,[76] whether indictable or not,[77] and whether the offence constitutes a felony or a mere misdemeanor.[78] It is unnecessary that the punishment should be by imprisonment or "infamous;" it is sufficient if it

[60] Pratt v. Pioneer P. Co., 30–41, 14+62; Zier v. Hofflin, 33–66, 21+862.

[61] Stewart v. Wilson, 23–449; Herringer v. Ingberg, 91–71, 97+460; Tawney v Simonson, 109–341, 124+229; Sweaas v. Evenson, 125+272.

[62] Stroebel v. Whitney, 31–384, 18+98; Davis v. Hamilton, 85–209, 88+744.

[63] Landon v. Watkins, 61–137, 63+615; Pratt v. Pioneer P. Co., 30–41, 14+62; Craig v. Warren, 99–246, 109+231.

[64] State v. Shippman, 83–441, 86+431.

[65] Quist v. Kiichli, 92–160, 99+642.

[66] Gribble v. Pioneer P. Co., 37–277, 34+30.

[67] Blethen v. Stewart, 41–205, 42+932.

[68] Pratt v. Pioneer P. Co., 30–41, 14+62; Tawney v. Simonson, 109–341, 124+229.

[69] Tawney v. Simonson, 109–341, 124+229.

[70] McCarty v. Barrett, 12–494(398).

[71] Glatz v. Thein, 47–278, 50+127; Schmidt v. Witherick, 29–156, 12+448; Zier v. Hofflin, 33–66, 21+862. See cases under § 5539.

[72] Pratt v. Pioneer P. Co., 35–251, 28+708.

[73] Schaefer v. Schoenborn, 101–67, 111+843.

[74] St. Martin v. Desnoyer, 1–156(131); West v. Hanrahan, 28–385, 10+415; Pett-Morgan v. Kennedy, 62–348, 64+912.

[75] Pett-Morgan v. Kennedy, 62–348, 64+912.

[76] Reitan v. Goebel, 33–151, 22+291; Burch v. Bernard, 107–210, 120+33.

[77] Reitan v. Goebel, 33–151, 22+291.

[78] Earle v. Johnson, 81–472, 84+332.

is by fine or imprisonment.[79] It is unnecessary that the language used, in order to be slanderous, should be so spoken as, if true, to expose the person concerning whom it is uttered to a criminal prosecution. That is one of the tests by which to determine whether it constitutes a good cause of action, but it is not the only one. The other is that it imputes to a person a species of misconduct to which the law attaches a criminal punishment, and that thereby he is subjected to obloquy and social degradation and disrepute.[80] It is unnecessary that the words should carry upon their face an open and direct imputation of crime. They need not necessarily bear a criminal import. If, in their ordinary acceptation, they would naturally and presumably be understood, in the connection and under the circumstances in which they were used, as imputing a charge of crime, they are actionable per se.[81] This rule does not preclude proof that in the connection and under the circumstances in which they were used the words did not convey the meaning which they presumptively bear on their face.[82] It is unnecessary that the words should cover all the legal elements of a crime,[83] or that a crime should actually have been committed.[84] It is wholly immaterial that, according to the lexicographers, the words used, when taken by themselves and independently, do not impute crime. All that was said, and the connection and circumstances, are to be considered.[85]

5515. Words held actionable per se as charging a crime—"You have stolen my belt;"[86] a publication stating that certain property has been stolen and that "the thief is believed to be one W. H. S.;"[87] charging fornication;[88] charging an unmarried female with incontinence;[89] a publication stating that a person had "disappeared with some of his employer's funds, and the police have been notified;"[90] a publication charging the counterfeiting a patent medicine;[91] charging drunkenness;[92] charging the burning of property to obtain insurance;[93] charging an appraiser of fraud;[94] "You get out of here. You came in here to see what you could find to steal;"[95] charging the foreman of a grand jury of demanding a bribe;[96] charging a servant with obtaining a "rake-off" on purchases made by him for his master;[97] charging a person with being a "robber" and a "thief;"[98] charging a person with having stolen or embezzled money;[99] charging a woman with having "worked" a man;[1] charging a woman with running a brothel.[2]

[79] Reitan v. Goebel, 33-151, 22+291.
[80] Laury v. Evans, 87-396, 92+224.
[81] Stroebel v. Whitney, 31-384, 18+98; Richmond v. Post, 69-457, 72+704; Martin v. Paine, 69-482, 72+450; Schmidt v. Witherick, 29-156, 12+448; Radke v. Kolbe, 79-440, 82+977; Nord v. Gray, 80-143, 82+1082; Johnson v. Force, 80-315, 83+182; State v. Shippman, 83-441, 86+431; Laury v. Evans, 87-396, 92+224; Reitan v. Goebel, 33-151, 22+291; Quist v. Kiichli, 92-160, 99+642; Mallory v. Pioneer P. Co., 34-521, 26+904; Simmons v. Holster, 13-249(232); Landon v. Watkins, 61-137, 63+615; Earle v. Johnson, 81-472, 84+332; Schaefer v. Schoenborn, 101-67, 111+843.
[82] Stroebel v. Whitney, 31-384, 18+98; McCarty v. Barrett, 12-494(398).
[83] State v. Shippman, 83-441, 86+431; West v. Hanrahan, 28-385, 10+415.
[84] West v. Hanrahan, 28-385, 10+415.
[85] Johnson v. Force, 80-315, 83+182.
[86] St. Martin v. Desnoyer, 1-156(131).
[87] Simmons v. Holster, 13-249(232).
[88] Stroebel v. Whitney, 31-384, 18+98.
[89] Reitan v. Goebel, 33-151, 22+291; Johnson v. Force, 80-315, 83+182; Jacobs v. Cater, 87-448, 92+397.
[90] Mallory v. Pioneer P. Co., 34-521, 26+904.
[91] Landon v. Watkins, 61-137, 63+615.
[92] Pett-Morgan v. Kennedy, 62-348, 64+912.
[93] West v. Hanrahan, 28-385, 10+415; Larson v. Krostue, 125+262.
[94] Earle v. Johnson, 81-472, 84+332.
[95] Laury v. Evans, 87-396, 92+224.
[96] Quist v. Kiichli, 92-160, 99+642.
[97] Nord v. Gray, 80-143, 82+1082.
[98] Fredrickson v. Johnson, 60-337, 62+388.
[99] Glatz v. Thein, 47-278, 50+127.
[1] Schaefer v. Schoenborn, 101-67, 111+843.
[2] Burch v. Bernard, 107-210, 120+33.

5516. Words held not actionable per se as charging a crime—Words charging the plaintiff with having "robbed" a city;[3] charging the stealing of letters and using them for purposes of extortion;[4] the publication of an answer in an action, with comments thereon;[5] "he has sworn falsely in the case with my brother;"[6] charging the keeping of a house of prostitution;[7] "Mr. R. had to work awful hard on the section every day, and his woman went some nights with other men folks;"[8] charging a candidate for the position of county auditor with having pledged himself to give his support to certain persons in a contest for a change of county seat.[9]

5517. Words tending to bring one into hatred, contempt, or ridicule—Written or printed words are actionable per se when they tend to blacken the memory of one who is dead, or to injure the reputation of one who is alive, and thereby expose him to public hatred, contempt, or ridicule, degrade him in society, lessen him in public esteem, or lower him in the confidence of the community, even though the words do not impute to him criminality or immorality.[10] In this regard the law of libel differs from the law of slander.[11] All discommendatory written or printed language is not actionable per se, but only such as would naturally cause appreciable injury.[12] The law of libel cannot be invoked to redress every breach of good morals or good manners.[13] It is impossible to mark out the exact line of cleavage between what is and what is not actionable per se. The courts have, for practical reasons and considerations of public policy, to draw the line somewhere, and this has often to be done by a gradual process of exclusion and inclusion, depending upon the particular facts of each case as it arises.[14] It has been held actionable per se to publish that a person is a dead-beat;[15] that a person used indecent language in the presence of women;[16] that persons "will burn their old log houses and gull the insurance companies out of enough to build palatial mansions;"[17] that a person is "a dangerous, able and seditious agitator;"[18] that "one of the B. M. U.'s occupied a pulpit in a local church on Sunday night. Saturday he was engaged in the endeavor to rob his neighbor, and Monday returned to his regular avocation of doing the Meehans up, as well as their friends and sympathizers. This religious hypocrite was the first man to cry 'boycott;' "[19] that a person is "slippery;"[20] that a candidate for office used dishonorable means in his campaign;[21] that a person is "disreputable" and maliciously published in a newspaper a false report tending to injure the credit of the city in which he lived;[22] that a person "wrecked his business and expended his means in defending himself from prosecutions brought for his open and persistent violations of the laws of the state;"[23] that a person has

[3] McCarty v. Barrett, 12-494(398).
[4] Smith v. Coe, 22-276.
[5] Stewart v. Wilson, 23-449.
[6] Schmidt v. Witherick, 29-156, 12+448.
[7] Richmond v. Post, 69-457, 72+704.
[8] Radke v. Kolbe, 79-440, 82+977.
[9] Sweaas v. Evenson, 125+272.
[10] McDermott v. Union C. Co., 76-84, 78+967, 79+673; Byram v. Aiken, 65-87, 67+807; State v. Shippman, 83-441, 86+431; Davis v. Hamilton, 85-209, 88+744; Alwin v. Liesch, 86-281, 90+404; Herringer v. Ingberg, 91-71, 97+460; Craig v. Warren, 99-246, 109+231; Cole v. Millspaugh, 126+626.
[11] See § 5502.
[12] Stewart v. Minn. T. Co., 40-101, 41+457; McDermott v. Union C. Co., 76-84, 78+967, 79+673; Herringer v. Ingberg, 91-71, 97+460.
[13] Stewart v. Minn. T. Co., 40-101, 41+457.
[14] McDermott v. Union C. Co., 76-84, 78+967, 79+673.
[15] Woodling v. Knickerbocker, 31-268, 17+387. See Zier v. Hofflin, 33-66, 21+862.
[16] Holston v. Boyle, 46-432, 49+203.
[17] Dressel v. Shipman, 57-23, 58+684.
[18] Wilkes v. Shields, 62-426, 64+921.
[19] Knox v. Meehan, 64-280, 66+1149.
[20] Peterson v. W. U. Tel. Co., 65-18, 67+646.
[21] Byram v. Aiken, 65-87, 67+807.
[22] Trebby v. Transcript P. Co., 74-84, 76+961.
[23] Davis v. Hamilton, 85-209, 88+744; Id., 88-64, 92+512.

been guilty of dishonest and disreputable conduct of so gross and disgraceful a character that, if made public, would subject him to public disgrace and infamy, that he defrauded his partner and caused his failure, and that in consequence the wife of his partner was driven insane;[24] that an alderman was a member of a "city hall ring" conspiring to defeat a city comptroller who stood in the way of their corrupt schemes;[25] that a prosecutrix at the trial of a criminal charge carried a cocked revolver with the intention of killing the defendant, that many expressed doubts of her sanity, that her actions were suspicious, and that a charge of threatening to kill would probably be placed against her;[26] that a person fabricated the story of an assault and robbery for the purpose of accounting for his wounds received in a row over a woman;[27] that a person was a "dishonest swindler" and "an irresponsible, unadulterated, first-class humbug and fraud;"[28] that the plaintiff was an absconding debtor;[29] that the plaintiff was a "grafter."[30]

5518. Defamation in relation to business—In general—Words are actionable per se which directly tend to the prejudice or injury of any one in his office, profession, trade or business. The injury consists in falsely and maliciously charging another with any matter in relation to his particular trade or vocation which, if true, would render him unworthy of employment.[31]

5519. Defamation of business men—It has been held actionable per se to charge a merchant with using false scales;[32] to charge a merchant, banker, or other person engaged in a pursuit in which credit is essential to success, with want of credit or responsibility, or insolvency, past, present, or future;[33] to charge a business man with endeavoring to rob his neighbor and "doing" people;[34] to charge a merchant with imitating a patent medicine and being engaged in base and dishonest efforts to palm it off on the public as the genuine article.[35]

5520. Defamation of professional men—It has been held actionable per se to charge a lawyer with being a "shyster;"[36] to charge a lawyer with falsely claiming in court that he had never received a notice of appeal;[37] to charge a doctor with negligence in the care of a patient;[38] to charge an architect with unfaithfulness and dishonesty;[39] to charge an actor with ungentlemanly and discourteous conduct.[40] It has been held not actionable per se to charge a lawyer with removing his office to his house to save expense;[41] with being habitually "slow" in the payment of his personal debts.[42]

5521. Defamation of public officer—Defamation of a person in an office of profit and relating to him in such office, importing a charge of unfitness, either in respect of morals or capacity, for the duties of such office, or a want of integrity, or corruption, culpable neglect or other misconduct therein, is

[24] Alwin v. Liesch, 86–281, 90+404.
[25] Petsch v. Dispatch P. Co., 40–291, 41+1034.
[26] Moore v. Dispatch P. Co., 87–450, 92+396.
[27] Gray v. Times N. Co., 74–452, 77+204.
[28] Smith v. Stewart, 41–7, 42+595.
[29] Zier v. Hoffbin, 33–66, 21+862.
[30] Craig v. Warren, 99–246, 109+231.
[31] Williams v. Davenport, 42–393, 44+311; Knox v. Meehan, 64–280, 66+1149.
[32] See State v. Shippman, 83–441, 86+431.
[33] Newell v. How, 31–235, 17+383; Svendsen v. State Bank, 64–40, 65+1086; Martin Co. Bank v. Day, 73–195, 75+1115; Davis v. Hamilton, 85–209, 88+744; Id., 88–64, 92+512; Lowry v. Vedder, 40–475, 42+542.
[34] Knox v. Meehan, 64–280, 66+1149.
[35] Landon v. Watkins, 61–137, 63+615.
[36] Gribble v. Pioneer P. Co., 34–342, 25+710.
[37] Sharpe v. Larson, 67–428, 70+1, 554; Id., 70–209, 72+961.
[38] Pratt v. Pioneer P. Co., 30–41, 14+62; Id., 32–217, 18+836, 20+87; Id., 35–251, 28+708.
[39] Dennis v. Johnson, 42–301, 44+68.
[40] Williams v. Davenport, 42–393, 44+311.
[41] Stewart v. Minn. T. Co., 40–101, 41+457.
[42] McDermott v. Union C. Co., 76–84, 78+967, 79+673.

actionable per se.[43] It is unnecessary that the person should still hold the office at the time of the defamation.[44] A citizen has the legal right to comment fairly and with an honest purpose upon the conduct of public officers; and the publication of such comments, fair and temperate in tone, will not subject the author to an action for damages. A criticism may reasonably be applied to a public officer which would be libelous if applied to a private individual.[45] If a public officer is guilty of a dishonorable act in connection with his office it is proper to publish the fact.[46] It has been held actionable per se to charge a justice of the peace with rendering a corrupt and malicious decision;[47] to charge a county treasurer with being an embezzler and defaulter;[48] to charge a county attorney of failing to prosecute a person "purely out of political fear;"[49] to charge a county attorney with falsely claiming in court that he had never received a notice of appeal;[50] to charge a county auditor with dropping railway lands from the tax list;[51] to charge an alderman with being a member of a "city hall ring" conspiring to defeat a city comptroller who stood in the way of their corrupt schemes;[52] to charge a county treasurer with illegal withholding of funds belonging to a school district;[53] to charge a Congressman with being a falsifier of public documents.[54]

5522. Republication after verdict—A republication of a libel after a verdict, substantially reiterating the charge, but in different language, has been held actionable.[55]

PRIVILEGED COMMUNICATIONS

5523. Legislative proceedings—It is the general rule that statements made in the course of legislative proceedings are privileged.[56] A resolution of a city council, not within the scope of its duties, defaming a private citizen, has been held not privileged.[57] A member of a city council is protected from responsibility for words used on a proper occasion which are pertinent to any proper inquiry or investigation pending before the council, but he has no privilege to wander from the subject and wantonly assail the character of an individual.[58]

5524. Judicial proceedings—Statements made in the course of judicial proceedings must at least be pertinent and material to the case to be privileged.[59] A newspaper account of a trial not confined to a recital of the actual facts, but including defamatory inferences and innuendoes, has been held not privileged.[60] A publication in a newspaper to the effect that the plaintiff had "disappeared with some of his employee's funds, and the police have been notified," has been held not privileged.[61] It is the general rule that statements made in the course of judicial or legal proceedings are privileged.[62] A com-

[43] Gove v. Blethen, 21–80; Sharpe v. Larson, 67–428, 70+1, 554; Martin v. Paine, 69–482, 72+450; Larrabee v. Minn. T. Co., 36–141, 30+462; Tawney v. Simonson, 109–341, 124+229.

[44] Sharpe v. Larson, 67–428, 70+1, 554.

[45] Wilcox v. Moore, 69–49, 71+917; Herringer v. Ingberg, 91–71, 97+460.

[46] Wilcox v. Moore, 69–49, 71+917.

[47] Gove v. Blethen, 21–80. See also, Quinn v. Scott, 22–456.

[48] Stoll v. Houde, 34–193, 25+63.

[49] Larrabee v. Minn. T. Co., 36–141, 30+462.

[50] Sharpe v. Larson, 67–428, 70+1, 554; Id., 70–209, 72+961.

[51] Martin v. Paine, 69–482, 72+450.

[52] Petsch v. Dispatch P. Co., 40–291, 41+1034.

[53] State v. Norton, 109–99, 123+59.

[54] Tawney v. Simonson, 109–341, 124+229.

[55] Sharpe v. Larson, 70–209, 72+961.

[56] Aldrich v. Press P. Co., 9–133(123).

[57] Trebby v. Transcript P. Co., 74–84, 76+961; Wilcox v. Moore, 69–49, 71+917.

[58] Burch v. Bernard, 107–210, 120+33.

[59] Sherwood v. Powell, 61–479, 63+1103 (statement in answer held not privileged).

[60] Moore v. Dispatch P. Co., 87–450, 92+396.

[61] Mallory v. Pioneer P. Co., 34–521, 26+904.

[62] Aldrich v. Press P. Co., 9–133(123).

plaint or other pleading in a civil action, which has never been presented to the court for its action, is not a judicial proceeding within the rule, and its publication, if it contains libelous matter, can only be justified by showing that it is true.[63]

5525. Criticism of candidates for office and public officers—Defamatory charges made in good faith against a candidate for office relating to his conduct of the office are prima facie privileged, at least, if made by a resident of the district and to the people of the district.[64] But defamatory charges against a candidate relating to his private character and conduct are not prima facie privileged.[65] Every one has a right to comment fairly and with an honest purpose on the conduct of public officials,[66] but a publication falsely and maliciously charging a public officer with misconduct in office is not privileged.[67]

5526. Statements made in the discharge of duty—Statements made in good faith in regard to any subject in which the party making them has an interest, or in reference to which he has a duty, public or private, legal, moral, or social, made to a person having a corresponding interest or duty, are prima facie privileged.[68] That the subject of the statement is one of public interest in the community of which the parties are members is sufficient, as respects interest, to confer the privilege.[69] To render a statement privileged it must be relevant and proper in the connection in which it is made.[70] It must be made without actual malice,[71] in good faith, and in an honest belief that it is true.[72] A publication which goes beyond the occasion exceeds the privilege.[73] It must be based on a reasonable and probable necessity in the premises.[74] It must be made on a proper occasion, from a proper motive, and must be based on reasonable or probable cause.[75] When a statement is privileged there can be no recovery except on proof of actual malice.[76] The burden of proving all the essential elements of privilege rests on the party claiming it.[77] The question of privilege is for the jury unless the evidence is conclusive.[78]

5527. Reports to commercial agency—Reports to and by a commercial agency may be privileged if made confidentially, in good faith, and not volunteered.[79]

5528. Publication of news by newspaper—The publication in a newspaper of false and defamatory matter is not privileged merely because made

[63] Nixon v. Dispatch P. Co., 101-309, 112+258.

[64] Marks v. Baker, 28-162, 9+678.

[65] Byram v. Aiken, 65-87, 67+807; Aldrich v. Press P. Co., 9-133(123).

[66] Wilcox v. Moore, 69-49, 71+917; Herringer v. Ingberg, 91-71, 97+460.

[67] Martin v. Paine, 69-482, 72+450; Tawney v. Simonson, 109-341, 124+229. See State v. Ford, 82-452, 85+217.

[68] Marks v. Baker, 28-162, 9+678; Quinn v. Scott, 22-456; Aldrich v. Press P. Co., 9-133(123); Nord v. Gray, 80-143, 82+1082; Trebby v. Transcript P. Co., 74-84, 76+961; Brown v. Radebaugh, 84-347, 87+937; State v. Ford, 82-452, 85+217; Burch v. Bernard, 107-210, 120+33. See R. L. 1905 § 4922.

[69] Marks v. Baker, 28-162, 9+678. See in general as to freedom of public discussion, 23 Harv. L. Rev. 413.

[70] Quinn v. Scott, 22-456; Traynor v. Sielaff, 62-420, 64+915.

[71] Lowry v. Vedder, 40-475, 42+542; Hebner v. G. N. Ry., 78-289, 80+1128.

[72] Quinn v. Scott, 22-456; State v. Ford, 82-452, 85+217; Burch v. Bernard, 107-210, 120+33.

[73] Landon v. Watkins, 61-137, 63+615.

[74] Traynor v. Sielaff, 62-420, 64+915.

[75] Hebner v. G. N. Ry., 78-289, 80+1128.

[76] Marks v. Baker, 28-162, 9+678; Hebner v. G. N. Ry., 78-289, 80+1128.

[77] Quinn v. Scott, 22-456; Mallory v. Pioneer P. Co., 34-521, 26+904; State v. Shippman, 83-441, 86+431; Moore v. Dispatch P. Co., 87-450, 92+396.

[78] Landon v. Watkins, 61-137, 63+615. Nord v. Gray, 80-143, 82+1082; Brown v. Radebaugh, 84-347, 87+937. See State v. Shippman, 83-441, 86+431.

[79] See Lowry v. Vedder, 40-475, 42+542; Traynor v. Sielaff, 62-420, 64+915; 22 Harv. L. Rev. 62.

in good faith as a matter of news.[80] Except as provided by statute[81] the press does not possess any immunities not shared by every individual.[82]

5529. Matter held privileged—A charge of official misconduct against a public officer, who was a candidate for re-election made in good faith;[83] fair comment on the official conduct of a public officer made with an honest purpose;[84] the record of a servant's service, including the reasons for his discharge, kept by a corporation for the guidance of its officers.[85]

5530. Matter held not privileged—A defamatory charge against a candidate for office by a newspaper;[86] a charge of corruption and misconduct in office against a justice of the peace;[87] a charge of embezzlement by a servant made by a newspaper;[88] a report of a person's financial standing made to a commercial agency;[89] a circular sent by a manufacturer to his customers warning them against imitations of his goods;[90] a charge of insolvency and dishonesty in business made in a circular of a commercial agency;[91] defamatory matter in a pleading irrelevant to the issues involved in the action;[92] a telegram defamatory on its face;[93] a defamatory charge against the private character of a candidate for office made by a newspaper;[94] a defamatory charge against a county attorney;[95] a defamatory charge made by members of a city council outside the line of their official duty;[96] a publication charging a public officer with misconduct in office;[97] a resolution of a city council, not within the scope of its duties, defaming a private citizen;[98] an account in a newspaper of the conduct of a prosecutrix in connection with the trial of a criminal charge;[99] an article in a newspaper charging the plaintiff with fabricating a story of assault and robbery to account for his wounds received in a row over a woman;[1] a statement made by a member of a city council charging a woman with keeping a brothel;[2] an article in a newspaper charging a member of Congress with falsifying public documents in a speech on the floor of Congress.[3]

JUSTIFICATION AND MITIGATION

5531. Justification—The truth as a defence—The truth, when relied upon in justification of a libel, must, to constitute a complete defence, be as broad as the defamatory accusation.[4] A justification must be complete; that is to say, it must justify the publication of the entire libelous matter constituting the substance of a distinct and indivisible charge, save so far as the publication of the same is denied.[5] When a person is charged in a publication with the commission of a specific offence, the publisher may, when sued for damages, allege and prove that the offence was committed; but it is not per-

[80] Mallory v. Pioneer P. Co., 34–521, 26+904; Trebby v. Transcript P. Co., 74–84, 76+961; Gray v. Times N. Co., 74–452, 77+204. See State v. Ford, 82–452, 85+217.

[81] See § 5533.

[82] Aldrich v. Press P. Co., 9–133(123); Pratt v. Pioneer P. Co., 30–41, 14+62.

[83] Marks v. Baker, 28–162, 9+678.

[84] Wilcox v. Moore, 69–49, 71+917; Herringer v. Ingberg, 91–71, 97+460.

[85] Hebner v. G. N. Ry., 78–289, 80+1128.

[86] Aldrich v. Press P. Co., 9–133(123).

[87] Quinn v. Scott, 22–456.

[88] Mallory v. Pioneer P. Co., 34–521, 26+904.

[89] Lowry v. Vedder, 40–475, 42+542.

[90] Landon v. Watkins, 61–137, 63+615.

[91] Traynor v. Sielaff, 62–420, 64+915.

[92] Sherwood v. Powell, 61–479, 63+1103.

[93] Peterson v. W. U. Tel. Co., 65–18, 67+646.

[94] Byram v. Aiken, 65–87, 67+807.

[95] Sharpe v. Larson, 67–428, 70+1, 554.

[96] Wilcox v. Moore, 69–49, 71+917.

[97] Martin v. Paine, 69–482, 72+450.

[98] Trebby v. Transcript P. Co., 74–84, 76+961.

[99] Moore v. Dispatch P. Co., 87–450, 92+396.

[1] Gray v. Times N. Co., 74–452, 77+204.

[2] Burch v. Bernard, 107–210, 120+33.

[3] Tawney v. Simonson, 109–341, 124+229.

[4] Thompson v. Pioneer P. Co., 37–285, 33+856; Trebby v. Transcript P. Co., 74–84, 76+961; Pratt v. Pioneer P. Co., 30–41, 14+62.

[5] Palmer v. Smith, 21–419.

missible to establish the fact by alleging and proving other acts of wrongdoing.[6] The burden rests on the defendant to prove the truth of the charge.[7] Where an article contains distinct and independent libels, proof of the truth of either may be shown, though the truth of one would not bar a recovery for those not shown to be true.[8] Mere "belief" in the truth of the charge is no defence.[9] Matters alleged in justification, if not shown to be true, may be considered by the jury in aggravation of plaintiff's damages, if on the whole case he is entitled to recover. But the failure to establish all the allegations of the justification cannot be made an independent basis of recovery.[10] Cases are cited below involving the sufficiency of evidence to prove justification.[11]

5532. Mitigation of damages—It may be shown in mitigation of damages that the defendant received the information from trustworthy sources; that he believed it to be true; and that he made the publication in good faith.[12] Any fact tending to show that at the time of publishing the defamatory matter the defendant reasonably believed it to be true may be proved.[13] Any fact tending to show a want of malice is admissible.[14] It may be shown that prior to the publication by the defendant he had seen the same matter published in other newspapers;[15] that the words were spoken in the heat of passion aroused by the abusive language of the plaintiff;[16] that the defendant made a retraction;[17] and that the plaintiff has a bad general reputation, but not particular wrongful acts of the plaintiff.[18] It is not permissible to prove a prior libel of the defendant without connecting the plaintiff with its publication;[19] or to prove common talk sustaining the charge unless it is shown that such talk had come to the knowledge of and was believed in and relied on by the defendant in making the publication;[20] or to prove information on which the defendant did not rely;[21] or to prove facts and circumstances sufficient to create a belief in the truth of the alleged defamatory matter, if neither known or relied on by the defendant;[22] or to prove a provocation in the form of a libel of the defendant by the plaintiff, where cooling time intervened;[23] or to prove acts of the plaintiff's agent of which the defendant was ignorant at the time of the libel;[24] or to prove prior similar libels of the plaintiff by the defendant, unquestioned by the plaintiff; or to prove dismissed indictments in an action on a charge that the plaintiff was a persistent law-breaker;[25] or to prove that

[6] Lydiard v. Daily News Co., 124+985.
[7] Wilcox v. Moore, 69–49, 71+917.
[8] Davis v. Hamilton, 88–64, 92+512.
[9] See Allen v. Pioneer P. Co., 40–117, 41+936.
[10] Olson v. Aubolee, 92–312, 99+1128.
[11] Mallory v. Pioneer P. Co., 34–521, 26+904; Trebby v. Transcript P. Co., 74–84, 76+961; Thompson v. Pioneer P. Co., 37–285, 33+856; Dennis v. Johnson, 42–301, 44+68.
[12] Pratt v. Pioneer P. Co., 35–251, 28+708; Davis v. Hamilton, 88–64, 92+512; Harms v. Prochl, 104–303, 116+587.
[13] Hewitt v. Pioneer P. Co., 23–178; Marks v. Baker, 28–162, 9+678; Moore v. Dispatch P. Co., 87–450, 92+396. See Gray v. Times N. Co., 74–452, 77+204.
[14] Hewitt v. Pioneer P. Co., 23–178; Allen v. Pioneer P. Co., 40–117, 41+936; Marks v. Baker, 28–162, 9+678; Sharpe v. Larson, 74–323, 77+233; Davis v. Hamilton, 88–64, 92+512; Brown v. Radebaugh, 84–347, 87+937. See Quist v. Kiichli, 92–160, 99+642.
[15] Hewitt v. Pioneer P. Co., 23–178; Larrabee v. Minn. T. Co., 36–141, 30+462; Davis v. Hamilton, 88–64, 92+512.
[16] Warner v. Lockerby, 31–421, 18+145, 821. See Quinby v. Minn. T. Co., 38–528, 38+623; Stewart v. Minn. T. Co., 41–71, 42+787.
[17] Allen v. Pioneer P. Co., 40–117, 41+936.
[18] Davis v. Hamilton, 88–64, 92+512; Warner v. Lockerby, 31–421, 18+145, 821; Lydiard v. Daily News Co., 124+985. See Dennis v. Johnson, 47–56, 49+383.
[19] Dressel v. Shipman, 57–23, 58+684.
[20] Larrabee v. Minn. T. Co., 36–141, 30+462.
[21] Pratt v. Pioneer P. Co., 35–251, 28+708.
[22] Quinn v. Scott, 22–456.
[23] Quinby v. Minn. T. Co., 38–528, 38+623. See Stewart v. Minn. T. Co., 41–71, 42+787.
[24] Landon v. Watkins, 61–137, 63+615.
[25] Davis v. Hamilton, 88–64, 92+512.

after the publication of a libel charging a crime the plaintiff was reputed to be guilty of the crime.[26]

RETRACTION BY NEWSPAPER

5533. Constitutionality of act—Laws 1887 c. 191 has been held constitutional against the objection that its subject is not expressed in its title; that it is partial or class legislation; and that it deprives a person of "a certain remedy in the laws." [27] Other constitutional objections have been urged but not passed upon.[28]

5534. Requisites of retraction—The retraction need not be in any particular form. It must, however, clearly refer to and admit the publication, and directly, fully and fairly, without any uncertainty, evasion or subterfuge, retract the alleged false and defamatory statements.[29]

5535. Service of notice—The statutory notice is sufficient if it declares the entire publication to be false and defamatory, without specifying those particular parts which constitute libelous matter per se.[30] Personal service of the notice may be made elsewhere than at the office of the publisher, provided it is made at such a place and under such circumstances as to afford reasonable opportunity to act upon it for the purpose of publishing a retraction.[31] Failure to serve the notice does not go to the cause of action, but only to the damages recoverable. To recover actual damages it is unnecessary to allege in the complaint the service of notice; but to recover general damage such an allegation is necessary.[32] The statute does not affect the general rule requiring special damages to be pleaded.[33]

5536. What constitutes good faith—Mere belief in the truth of the publication is not necessarily enough to constitute "good faith" on the part of the publisher; there must have been an absence of negligence as well as improper motives in making the publication. It must have been honestly made in the belief of its truth, and on reasonable grounds for the belief, after the exercise of such means to verify its truth as would be taken by a man of ordinary prudence under like circumstances. The question of good faith is for the jury, unless the evidence is conclusive.[34]

5537. Damages—The statute does not modify the general rule that special damages must be pleaded.[35] The retraction, if made, does not affect in the least the recovery of actual damages, but only the recovery of general damages.[36] Under the statute damages may be recovered for all pecuniary injuries if they are properly pleaded.[37] If general damages are sought the service of notice as provided by statute must be alleged.[38]

SLANDER OF PROPERTY OR TITLE

5538. In general—False and malicious statements disparaging an article of property, when followed, as a natural, reasonable, and proximate result, by special damage to the owner, are actionable. Special damage is of the gist of the action; and, where the special damage relied on is loss of a sale of the

[26] Simmons v. Holster, 13-249(232).
[27] Allen v. Pioneer P. Co., 40-117, 41+936.
[28] Gray v. Times N. Co., 74-452, 77+204; Gray v. Minn. T. Co., 81-333, 84+113.
[29] Id.
[30] Craig v. Warren, 99-246, 109+231.
[31] Holston v. Boyle, 46-432, 49+203.
[32] Clementson v. Minn. T. Co., 45-303, 47+781.
[33] Holston v. Boyle, 46-432, 49+203.
[34] Allen v. Pioneer P. Co., 40-117, 41+936; Gray v. Times N. Co., 74-452, 77+204. See, further, as to what constitutes good faith, Marks v. Baker, 28-162, 9+678.
[35] Holston v. Boyle, 46-432, 49+203.
[36] Clementson v. Minn. T. Co., 45-303, 47+781.
[37] Allen v. Pioneer P. Co., 40-117, 41+936.
[38] Clementson v. Minn. T. Co., 45-303, 47+781.

thing disparaged, it is indispensable to allege and show loss of sale to some particular person.[39] A complaint in an action to remove a cloud insufficient for that purpose has been held not sustainable as a complaint for slander of title because not showing that defendant's claim was made in bad faith.[40] Whether a notice constituted a slander on the plaintiff's right to manufacture and sell a patent medicine has been held a question for the jury.[41]

ACTIONS

5539. Inducement—Colloquium—Innuendo—If the words alleged are not actionable per se, but owe their defamatory significance to extraneous facts, such facts must be alleged by way of inducement and connected with the words alleged by a colloquium, that is, an averment that the words were spoken or published with reference to such facts.[42] And, generally, in addition, the complaint must also contain an innuendo, that is, an averment that the defendant spoke or published the words alleged with a specified defamatory meaning or application and was so understood by the persons hearing or reading them.[43] But where the words, read in connection with the inducement are obviously defamatory, no innuendo is necessary.[44] An innuendo cannot take the place of an inducement and colloquium. It cannot change the ordinary meaning of words.[45] If an innuendo is inserted unnecessarily, it does not vitiate the complaint, but may be treated as surplusage.[46]

5540. Alleging good reputation of plaintiff—It is unnecessary to allege the good reputation of the plaintiff, but if such an allegation is made an issue thereon may be made by a denial in the answer.[47]

5541. Alleging jurisdiction of officer—A complaint in an action for slander charging a justice of the peace with rendering a corrupt decision has been held to allege sufficiently the jurisdiction of the justice.[48]

5542. Setting out defamatory matter—The defamatory matter must be set out in haec verba. It is not sufficient merely to state the effect of the language, or that the publication was of a certain defamatory tenor or import.[49] But where a libelous charge is contained in an article published in a newspaper, the complaint need set out only so much of the article as contains the libel. The defendant, in his answer, may set up the remainder, if it in any way qualifies the part set up in the complaint or renders it less libelous.[50] If the defamatory words were spoken or written in a foreign language, they must be alleged in haec verba in such language, coupled with a literal translation

[39] Wilson v. Dubois, 35–471, 29+68. See Landon v. Watkins, 61–137, 63+615.

[40] Walton v. Perkins, 28–413, 10+424.

[41] Landon v. Watkins, 61–137, 63+615.

[42] Richmond v. Post, 69–457, 72+704; Smith v. Coe, 22–276; Stewart v. Wilson, 23–449; Newell v. How, 31–235, 17+383; Radke v. Kolbe, 79–440, 82+977; Quist v. Kiichli, 92–160, 99+642. Complaints held sufficient in this regard: Knox v. Meehan, 64–280, 66+1149; Traynor v. Sielaff, 62–420, 64+915; Glatz v. Thein, 47–278, 50+127.

[43] Schmidt v. Witherick, 29–156, 12+448; Petsch v. Dispatch P. Co., 40–291, 41+1034; Glatz v. Thein, 47–278, 50+127. Complaints held sufficient in this regard: Traynor v. Sielaff, 62–420, 64+915; Knox v. Meehan, 64–280, 66+1149; Glatz v. Thein, 47–278, 50+127.

[44] Sharpe v. Larson, 70–209, 72+961.

[45] Richmond v. Post, 69–457, 72+704; Radke v. Kolbe, 79–440, 82+977; State v. Shippman, 83–441, 86+431; Herringer v. Ingberg, 91–71, 97+460; Fredrickson v. Johnson, 60–337, 62+388. The term innuendo is sometimes improperly used as synonymous with inducement and colloquium. See, for example, State v. Shippman, 83–441, 86+431.

[46] Fredrickson v. Johnson, 60–337, 62+388; State v. Shippman, 83–441, 86+431.

[47] Dennis v. Johnson, 47–56, 49+383. See Lotto v. Davenport, 50–99, 52+130.

[48] Gove v. Blethen, 21–80.

[49] American B. Co. v. Kingdom P. Co., 71–363, 73+1089; Warner v. Lockerby, 28–28, 8+879.

[50] Blethen v. Stewart, 41–205, 42+932; Oleson v. Journal P. Co., 47–300, 50+80.

thereof and an averment that the words were understood by the persons who heard or read them.[51]

5543. Uniting several libels—Whether, in an action for libel based on a defamatory publication containing several independent libels, plaintiff should plead them as separate causes of action, is an open question. The failure to do so is waived by answering to the merits.[52] When the entire publication is set out, the plaintiff may indicate by his allegations an intention to rely exclusively on a particular portion thereof, and if he does, his damages must be restricted accordingly.[53]

5544. Alleging a charge of crime—In a complaint for a charge of crime it is unnecessary to allege the actual commission of a crime, or aver any fact to exist, the existence of which would be a necessary element in the crime.[54]

5545. Application of words to plaintiff—It is provided by statute that in actions for libel or slander, it shall be sufficient instead of stating extrinsic facts showing the application to plaintiff of the defamatory matter complained of, to allege, generally, that the same was published or spoken concerning the plaintiff; and if such allegation is controverted, the plaintiff is bound to establish on the trial that it was so published or spoken.[55] But this statute does not obviate the necessity of alleging that the defamatory words were spoken or published of and concerning the plaintiff.[56] The actionable quality of the words, as respects the plaintiff, must be made to appear.[57] Where the words amount to a libelous charge against some person, but it is left uncertain as to the application thereof to the plaintiff, such application may be shown by proof of extrinsic facts, and under this statute it is unnecessary to allege them in the complaint.[58] The statute merely dispenses with an inducement to show the application of the language to the plaintiff. It does not dispense with the necessity of averments of extrinsic facts to show the meaning of ambiguous language, and what it was understood to mean.[59] While a party is not required to plead extrinsic facts to show the application to the plaintiff, yet if he does so, and the facts thus pleaded show that it applied to some one else, and not to him, the special allegation would control the general and the complaint would be bad.[60] Where the language of a libel as pleaded shows on its face that it was used of and concerning the plaintiff in an official capacity or special character, an express averment that it was so used is unnecessary.[61] Though a defamatory article appears on its face to refer to the managing agent of a corporation individually, it may be shown by extrinsic facts that it was published of and concerning the corporation.[62]

5546. Alleging publication—In an action for slander it is necessary to allege that the words were spoken in the presence and hearing of others, but it is unnecessary to allege the names of such third parties.[63] In an action for

[51] See Glatz v. Thein, 47–278, 50+127; Blakeman v. Blakeman, 31–396, 18+103.

[52] Davis v. Hamilton, 85–209, 88+744. See Realty R. G. Co. v. Farm etc. Co., 79–465, 82+857.

[53] Davis v. Hamilton, 85–209, 88+744.

[54] West v. Hanrahan, 28–385, 10+415.

[55] R. L. 1905 § 4152; Martin Co. Bank v. Day, 73–195, 75+1115.

[56] Carlson v. Minn. T. Co., 47–337, 50+229; Warner v. Lockerby, 28–28, 8+879. Complaints held sufficient in this regard: Knox v. Meehan, 64–280, 66+1149; Cady v. Mpls. T. Co., 58–329, 59+1040; Martin Co. Bank v. Day, 73–195, 75+1115.

[57] Carlson v. Minn. T. Co., 47–337, 50+229; Smith v. Coe, 22–276; Gove v. Blethen, 21–80; Petsch v. Dispatch P. Co., 40–291, 41+1034.

[58] Petsch v. Dispatch P. Co., 40–291, 41+1034.

[59] Richmond v. Post, 69–457, 72+704.

[60] Martin Co. Bank v. Day, 73–195, 75+1115.

[61] Stoll v. Houde, 34–193, 25+63. See Gove v. Blethen, 21–80.

[62] Martin Co. Bank v. Day, 73–195, 75+1115; Realty R. G. Co. v. Farm etc. Co., 79–465, 82+857.

[63] Warner v. Lockerby, 28–28, 8+879. See Weicherding v. Krueger, 109–461, 124+225 (objection that complaint for slander did

libel an allegation of publication has been held sufficient and the defendant estopped by his answer from questioning its sufficiency.[64]

5547. Alleging publication by defendant—It is necessary to allege that the words were spoken or published by the defendant.[65]

5548. Alleging falsity and malice—It is necessary to allege the falsity of the words spoken or published.[66] It is customary to allege that they were spoken or published maliciously.[67] It is necessary to allege malice when the words are privileged.[68]

5549. Alleging service of notice—In an action for libel against a newspaper, where general damages are sought, the service of notice as provided by R. L. 1905 § 4269 must be alleged.[69]

5550. Alleging damages—When the words are actionable per se no special damages need be alleged to constitute a cause of action,[70] but if the words are not actionable per se special damages must be alleged to constitute a cause of action.[71] In no case can special damages be recovered unless they are pleaded.[72] A general allegation of loss of trade is ordinarily sufficient.[73] When words are actionable per se such general facts as the vocation and position in life of the plaintiff are admissible on the question of general damages without being specially pleaded.[74]

5551. Alleging matter in mitigation—The statute provides that the defendant "may" allege in his answer any matter in mitigation.[75] Prior to the statute there was much uncertainty as to when a defendant might prove mitigating circumstances.[76] Under the statute it is apparently necessary to plead mitigating circumstances in order to prove them.[77] A plea in mitigation held not inconsistent with a general denial.[78] Matter in mitigation held improperly stricken out on motion before trial.[79]

5552. Alleging privilege—Though never explicitly decided it is probable that the defence of privilege cannot be proved unless pleaded.[80] A plea of privilege on the ground that the article related to a public trial held sufficient.[81]

5553. Alleging justification—Though never explicitly decided it is probable that the truth of the charge is not admissible as a defence unless specially pleaded.[82] Matter pleaded in justification has been held properly stricken out as irrelevant.[83]

5554. Variance—In actions for slander, it is enough that the words proved are the same in substance as those set out in the complaint. A verbal difference, not changing the meaning of the slanderous words, is immaterial.[84]

not name the person to whom the words were addressed and the other circumstances held waived when not raised until after verdict).

[64] Hemphill v. Holley, 4–233(166).

[65] Warner v. Lockerby, 28–28, 8+879; Hemphill v. Holley, 4–233(166).

[66] Warner v. Lockerby, 28–28, 8+879; Wilcox v. Moore, 69–49, 71+917.

[67] See Warner v. Lockerby, 28–28, 8+879.

[68] Aldrich v. Press P. Co., 9–133(123).

[69] Clementson v. Minn. T. Co., 45–303, 47+781.

[70] Holston v. Boyle, 46–432, 49+203; West v. Hanrahan, 28–385, 10+415; Pratt v. Pioneer P. Co., 35–251, 28+708.

[71] Stewart v. Minn. T. Co., 40–101, 41+457.

[72] Holston v. Boyle, 46–432, 49+203 (loss of appointment to an office); Metcalf v. Collinson, 95–238, 103+1022 (subsequent discharge of employee).

[73] Landon v. Watkins, 61–137, 63+615.

[74] Mallory v. Pioneer P. Co., 34–521, 26+904.

[75] R. L. 1905 § 4152.

[76] Hewitt v. Pioneer P. Co., 23–178.

[77] Hewitt v. Pioneer P. Co., 23–178; Dennis v. Johnson, 47–56, 49+383.

[78] Warner v. Lockerby, 31–421, 18+145, 821.

[79] Stewart v. Minn. T. Co., 41–71, 42+787.

[80] See Quinn v. Scott, 22–456; Brown v. Radebaugh, 84–347, 87+937; Realty R. G. Co. v. Farm etc. Co., 79–465, 82+857; Aldrich v. Press P. Co., 9–133(123).

[81] Moore v. Dispatch P. Co., 87–450, 92+396.

[82] See R. L. 1905 § 4152; Trebby v. Transcript P. Co., 74–84, 76+961.

[83] Stewart v. Minn. T. Co., 41–71, 42+787.

[84] Wischstadt v. Wischstadt, 47–358, 50+225; Blakeman v. Blakeman, 31–396, 18+

While it is unnecessary to prove the exact words charged, yet the words proved must be substantially the same. Proof of different words, though conveying the same general idea, is not sufficient.[85] An allegation of words in the second person is not proved by evidence of words spoken in the third person.[86] Evidence pertinent to the issues made by the pleadings cannot be considered upon an issue not made therein.[87]

5555. Evidence—Admissibility—In general—In an action for libel, evidence that plaintiff did not bring an action against defendant for the publication of other libelous articles containing the same or similar imputations is inadmissible. The defendant cannot ordinarily testify that the published article was true. Where a defamatory article is actionable per se, evidence that defendant did not intend to charge plaintiff with a crime, or to impute to him that which the language of the article fairly imports is inadmissible. Declarations and statements of a party libeled which tend to prove the truth of the libelous article are admissible against him in an action for damages.[88] Facts tending to disprove the commission of the crime charged are admissible.[89] The financial standing of the defendant may be shown for the purpose of affecting compensatory damages.[90] Cases are cited below involving various questions of evidence.[91]

5556. Evidence to prove application to plaintiff—Though a defamatory article appears on its face to refer to the managing agent of a corporation individually, it may be shown by extrinsic facts that it was published of and concerning the corporation acting through its agent, and would be so understood by those who read it.[92] The defendant may testify as to whom he intended the language to apply.[93]

5557. Evidence to prove publication—In proving the publication of a newspaper it is unnecessary to produce a copy actually published; it is sufficient to prove that similar copies were published. In an action against advertisers for a libelous advertisement in a newspaper, copies of another paper containing a similar advertisement are inadmissible without connecting the defendant therewith.[94] In an action for slander, in order to prove the uttering of the words, plaintiff may prove defendant's plea of guilty in a criminal

103; Earle v. Johnson, 81–472, 84+332; Traynor v. Sielaff, 62–420, 64+915.

[85] Irish-Am. Bank v. Bader, 59–329, 61+328.

[86] McCarty v. Barrett, 12–494(398).

[87] Payette v. Day, 37–366, 34+592.

[88] Davis v. Hamilton, 88–64, 92+512; Harms v. Prochl, 104–303, 116+587.

[89] Mallory v. Pioneer P. Co., 34–521, 26+904.

[90] Burch v. Bernard, 107–210, 120+33.

[91] Zier v. Hofflin, 33–66, 21+862 (copy of newspaper to show circumstances of publication); Stewart v. Minn. T. Co., 41–71, 42+787 (a verdict for A, in an action for libel against B, held inadmissible in an action for libel by B against C); Dennis v. Johnson, 47–56, 49+383 (specific acts of dishonesty not pleaded inadmissible to prove a general reputation for dishonesty); Traynor v. Sielaff, 62–420, 64+915 (questions to a defendant on cross-examination under the statute relating to his understanding of an alleged libelous commercial list in which he had inserted plaintiff's name held proper); Davis v. Hamilton, 88–64, 92+512 (plaintiff charged with being an open and persistent law-breaker—indictments against plaintiff dismissed on demurrer held inadmissible); Olson v. Aubolee, 92–312, 99+1128 (evidence to prove justification held immaterial); Metcalf v. Collinson, 95–238, 103+1022 (under a general issue in an action for slander by an employee against his employer, evidence of a subsequent discharge of the employee held inadmissible); Harms v. Prochl, 104–303, 116+587 (action for slander—record of church trial at which same matter was investigated and determined held inadmissible); Burch v. Bernard, 107–210, 120+33 (other statements of defendant bearing on his good faith—evidence as to transfers of realty).

[92] Martin Co. Bank v. Day, 73–195, 75+1115; Realty R. G. Co. v. Farm etc. Co., 79–465, 82+857.

[93] Davis v. Hamilton, 88–64, 92+512.

[94] Simmons v. Holster, 13–249(232). See Zier v. Hofflin, 33–66, 21+862.

proceeding in the warrant in which the slanderous words were, in substance, set forth as the basis of the criminal charge.[95]

5558. Evidence as to the meaning of the language used—In an action for libel expressed in ordinary language, witnesses cannot testify as to the meaning which they understood the libel to convey or that they understood it to apply to the plaintiff an offensive term found in the article.[96] In an action for slander, where the charge is not made in direct terms, but by equivocal expressions, insinuations, and gestures, it is competent for witnesses who heard and saw them to state what they understood by them, and to whom they understood them to be applied. Where the slanderous words contain a phrase or word in a foreign language, which, in common parlance among the people who speak that language has a meaning somewhat different from its definition by lexicographers, it is competent to prove that it is commonly used and understood by them in that sense.[97] The defendant may testify as to whom he intended the language to apply.[98]

5559. Burden of proof—Where words are privileged, the burden of proving actual malice is on the plaintiff.[99] The burden of proving all the elements of privilege is on the defendant,[1] and the same is true of justification.[2] Where the good reputation of the plaintiff is alleged in the complaint and denied in the answer, the plaintiff need not introduce evidence of good reputation in the first instance.[3] In an action for a newspaper libel, where the defence is that the article was published in good faith and that the defendant published a full and fair retraction, the burden is on the defendant to establish the defence.[4] Where words are innocent on their face, it is incumbent on the plaintiff to prove that they were used in a defamatory sense.[5]

5560. Law and fact in actions for libel—If the language used is reasonably susceptible of either a defamatory or an innocent meaning, according to the occasion and circumstances, the question of libel is for the jury.[6] If the language used is not reasonably susceptible of an innocent meaning, but is manifestly defamatory, it is the duty of the court to direct the jury, as a matter of law, that it constitutes a libel and that they must find for the plaintiff in the absence of justification, or privilege.[7] But the failure to so instruct is not error in the absence of a request from counsel.[8] If the language used is not reasonably susceptible of a defamatory meaning the court should direct a verdict for the defendant.[9] Whether the language was used with reference to the plaintiff is a question for the jury, unless the evidence is conclusive.[10] The same is true of the questions of privilege[11] and malice.[12] In an action for a

[95] Wischstadt v. Wischstadt, 47–358, 50+225.

[96] Gribble v. Pioneer P. Co., 37–277, 34+30.

[97] Blakeman v. Blakeman, 31–396, 18+103. See McCarty v. Barrett, 12–494 (398).

[98] Davis v. Hamilton, 88–64, 92+512.

[99] Simmons v. Holster, 13–249(232); Aldrich v. Press P. Co., 9–133(123).

[1] Quinn v. Scott, 22–456; Mallory v. Pioneer P. Co., 34–521, 26+904; Moore v. Dispatch P. Co., 87–450, 92+396; State v. Shippman, 83–441, 86+431.

[2] Wilcox v. Moore, 69–49, 71+917; Moore v. Dispatch P. Co., 87–450, 92+396.

[3] Lotto v. Davenport, 50–99, 52+130.

[4] Gray v. Times N. Co., 74–452, 77+204.

[5] McCarty v. Barrett, 12–494(398).

[6] Woodling v. Knickerbocker, 31–268, 17+387; Pratt v. Pioneer P. Co., 30–41, 14+62; Zier v. Hofflin, 33–66, 21+862; Landon v. Watkins, 61–137, 63+615; Traynor v. Sielaff, 62–420, 64+915; Sharpe v. Larson, 67–428, 70+1, 554; Peterson v. W. U. Tel. Co., 65–18, 67+646.

[7] Smith v. Stewart, 41–7, 42+595; Sharpe v. Larson, 67–428, 70+1, 554; Trebby v. Transcript P. Co., 74–84, 76+961; Alwin v. Liesch, 86–281, 90+404.

[8] Olson v. Aubolee, 92–312, 99+1128.

[9] See § 5562.

[10] Dressel v. Shipman, 57–23, 58+684; Traynor v. Sielaff, 62–420, 64+915; Gribble v. Pioneer P. Co., 37–277, 34+30.

[11] Landon v. Watkins, 61–137, 63+615; Brown v. Radebaugh, 84–347, 87+937; Nord v. Gray, 80–143, 82+1082. See State v. Shippman, 83–441, 86+431.

[12] Simmons v. Holster, 13–249(232);

newspaper libel, where the defence is that the article was published in good faith and that the defendant published a full and fair retraction, under R. L. 1905 § 4269, the question of good faith and whether the falsity of the article was due to a mistake of the facts is for the jury, unless the evidence is conclusive. The question whether the retraction published was full and fair is for the court unless resort must be had to extrinsic evidence.[13] Whether a fact is a natural consequence of the publication of a libel is for the jury, unless the evidence is conclusive.[14]

5561. Law and fact in actions for slander—If the application or meaning of the words is ambiguous, or the sense in which they were used is uncertain, but they are capable of the defamatory meaning charged, it is for the jury to determine, upon all the circumstances, whether they were applied to the plaintiff, and whether used in the defamatory sense alleged.[15] It is for the court to determine whether a given state of facts in any case will constitute a cause of action, but the speaking of the words, the intention of the defendant in speaking them, and the existence of the facts in each case, are questions for the jury.[16]

5562. Evidence—Sufficiency—Cases are cited below holding the evidence sufficient to justify a verdict for the plaintiff;[17] to justify a verdict for the defendant;[18] to require a submission of the case to the jury;[19] insufficient to require a submission to the jury.[20]

5563. Exemplary damages—Evidence to justify—Exemplary damages may be awarded where the defamation was with actual malice,[21] or, as the rule is sometimes stated, where the defendant acted "wilfully, maliciously, and with a reckless disregard of the rights of the plaintiff."[22] A corporation may be liable for exemplary damages.[23] Mere negligence of a corporation in employing its servants is not a ground for awarding exemplary damages.[24] The utterance of other slanderous words, of similar import with those charged, may be admitted as evidence of malice, and it is immaterial whether they are addressed to third persons or to the person defamed.[25] In an action for libel evidence of other publications by defendant containing substantially the same imputation as that sued on, whether made before or after the latter, or even after suit, is admissible to show malice.[26] In an action for slander, language which is not actionable per se, and which does not contain the same imputation as that sued on is not admissible.[27] A refusal to retract is admissible to show malice.[28] Matters alleged in justification, if not shown to be true, may be considered by the jury in aggravation of damages.[29]

Peterson v. W. U. Tel. Co., 65–18, 67+ 646.

[13] Allen v. Pioneer P. Co., 40–117, 41+ 936; Gray v. Times N. Co., 74–452, 77+ 204; Moore v. Dispatch P. Co., 87–450, 92+ 396.

[14] Zier v. Hofflin, 33–66, 21+862.

[15] Blakeman v. Blakeman, 31–396, 18+ 103; St. Martin v. Desnoyer, 1–156(131); McCarty v. Barrett, 12–494(398); Nord v. Gray, 80–143, 82+1082.

[16] McCarty v. Barrett, 12–494(398).

[17] Mallory v. Pioneer P. Co., 34–521, 26+ 904; Traynor v. Sielaff, 62–420, 64+915; Lowry v. Vedder, 40–475, 42+542.

[18] McCarty v. Barrett, 12–494(398); Olson v. Aubolee, 92–312, 99+1128.

[19] Laury v. Evans, 87–396, 92+224.

[20] Irish-Am. Bank v. Bader, 59–329, 61+ 328.

[21] Hewitt v. Pioneer P. Co., 23–178; Peterson v. W. U. Tel. Co., 75–368, 77+ 985; Burch v. Bernard, 107–210, 120+33.

[22] Traynor v. Sielaff, 62–420, 64+915.

[23] Peterson v. W. U. Tel. Co., 75–368, 77+ 985.

[24] Peterson v. W. U. Tel. Co., 72–41, 74+ 1022.

[25] Reitan v. Goebel, 33–151, 22+291; Fredrickson v. Johnson, 60–337, 62+388; Severns v. Brainard, 61–265, 63+477; Weicherding v. Krueger, 109–461, 124+225.

[26] Gribble v. Pioneer P. Co., 34–342, 25+ 710; Larrabee v. Minn. T. Co., 36–141, 30+462; Severns v. Brainard, 61–265, 63+ 477.

[27] Jacobs v. Cater, 87–448, 92+397.

[28] Pratt v. Pioneer P. Co., 35–251, 28+ 708.

[29] Olson v. Aubolee, 92–312, 99+1128.

5564. Excessive damages—Cases are cited below involving the excessiveness of damages awarded in particular actions.[30]

CRIMINAL LIABILITY

5565. What constitutes criminal libel—A letter for publication containing language that exposes one to obloquy, hatred, or contempt, is libelous, under G. S. 1894 § 6496 (R. L. 1905 § 4916), even though the person against whom it is directed is not charged with a criminal act or conduct that would subject him to prosecution.[31]

5566. Libel of two or more one offence—A libel on two or more persons, though not associated in business, contained in a single writing, and published by a single act, constitutes but one offence.[32]

5567. Justification—Suspicions and rumors of improper and unlawful conduct by a citizen in a public place will not, as a matter of law, justify a newspaper in giving the same circulation.[33]

5568. Law and fact—By statute the jury are judges of both the law and the facts.[34]

5569. Burden of proof—Upon proof of the publication of the libel, the burden is on the defendant to show that it was published on justifiable grounds of belief in its truth, and for good motives to justify the same, which is a question of fact for the jury, rather than the court.[35]

5570. Evidence—Sufficiency—Evidence held sufficient to justify a conviction.[36]

LIBERTY—See Constitutional Law, 1652.
LIBERTY OF CONSCIENCE—See Intoxicating Liquors, 4905.
LIBERTY OF CONTRACT—See Constitutional Law, 1652; Contracts, 1870.
LIBERTY OF THE PRESS—See Constitutional Law, 1654.
LIBRARIES—See Municipal Corporations, 6684.
LICENSEE—See note 37.

[30] St. Martin v. Desnoyer, 1-156(131) (slander—verdict for $212.50 sustained); Blakeman v. Blakeman, 31-396, 18+103 (slander of woman—verdict for $4,000 sustained); Pratt v. Pioneer P. Co., 35-251, 28+708 (libel—verdict for $4,275 reduced to $2,000); Pratt v. Pioneer P. Co., 32-217, 18+836, 20+87 (libel—verdict for $5,000 held excessive and new trial granted); Zier v. Hofflin, 33-66, 21+862 (libel—verdict for $1,500 sustained); Dennis v. Johnson, 42-301, 44+68 (libel—verdict for $5,000 held excessive and new trial granted); Dennis v. Johnson, 47-56, 49+383 (libel—verdict for $8,500—reduced to $3,000); Fredrickson v. Johnson, 60-337, 62+388 (slander—verdict for $5,000—reduced to $3,000 on appeal); Peterson v. W. U. Tel. Co., 65-18, 67+646 (libel—verdict for $5,200 held excessive and new trial granted on appeal); Sharpe v. Larson, 74-323, 77+233 (libel—verdict for $750 held excessive on appeal); Peterson v. W. U. Tel. Co., 75-368, 77+985 (libel—verdict for $2,000 held excessive on appeal and reduced to $1,000); Gray v. Times N. Co., 78-323, 81+7 (libel—verdict for $1,800 held excessive and new trial granted); Gray v. Minn. T. Co., 81-333, 84+113 (libel—verdict for $1,000 held excessive and new trial granted); Earle v. Johnson, 81-472, 84+332 (slander—verdict for $1,500 sustained); Blume v. Scheer, 83-409, 86+446 (slander—verdict for $550 held excessive by trial court and reduced to $100—held not excessive on appeal); Burch v. Bernard, 107-210, 120+33 (slander—charging woman with running a brothel—verdict for $1,875 held not excessive).

[31] State v. Shippman, 83-441, 86+431.

[32] State v. Hoskins, 60-168, 62+270.

[33] State v. Ford, 82-452, 85+217.

[34] State v. Ford, 82-452, 85+217; State v. Shippman, 83-441, 86+431. See Smith v. Stewart, 41-7, 42+595.

[35] State v. Ford, 82-452, 85+217; State v. Shippman, 83-441, 86+431.

[36] Id.

[37] Klugherz v. Chi. etc. Ry., 90-17, 19, 95+586.

LICENSES

Cross-References

See Constitutional Law, 1608; Easements, 2851; Intoxicating Liquors; Municipal Corporations, 6794; Physicians and Surgeons.

5571. Nature—A license is a mere power, authority, or personal privilege. It does not create an estate or interest in land. It may be created by parol.[38]

5572. What constitutes—Where it is sought to couple with a license a parol grant of an interest in the realty, the attempted grant being void, the transaction remains a mere license.[39] Cases are cited below holding various deeds or transactions licenses or the reverse.[40]

5573. Protection for acts—A license is a protection for acts done under it and before revocation.[41] A person in possession under a license cannot be treated as a trespasser or a tenant.[42]

5574. To cut timber—Construction—An instrument has been held to grant a license to cut and remove only such trees on the land described as were owned by the licensor, the licensor being held not liable for unauthorized cuttings under such license.[43]

5575. Not assignable—A license is a personal privilege and not assignable or transferable,[44] but the licensor may acquiesce in a transfer and thereby confirm it.[45]

5576. Revocation—It is the general rule that a license is revocable at the pleasure of the licensor.[46] It is revoked, without notice, by the death of the licensor,[47] or a conveyance.[48] In other cases it seems that notice is essential.[49]

[38] Johnson v. Skillman, 29-95, 12+149; Mpls. etc. Ry. v. Mpls. etc. Ry., 58-128, 59+983.

[39] Johnson v. Skillman, 29-95, 12+149.

[40] Knapheide v. Eastman, 20-478(432) (a lease held not to grant a license to build a tunnel); Johnson v. Skillman, 29-95, 12+149 (an agreement relating to the erection of a mill and the flowage of land held not to create an easement but to take effect as a license); Little v. Willford, 31-173, 17+282 (a void deed of trust held to operate as a license); Olson v. St. P. etc. Ry., 38-479, 482, 38+490 (a transaction held not a contract but a license to excavate a ditch); Lidgerding v. Zignego, 77-421, 80+360 (a deed without words of inheritance held to grant an easement in the nature of a private way and not a mere license); Bolland v. O'Neal, 81-15, 83+471 (a deed granting a right to cut and remove timber held to grant an interest in the land and not merely a license); Caughie v. Brown, 88-469, 93+656 (an instrument held to grant a license to cut and remove timber); Mackay v. Minn. S. A. Soc., 88-154, 92+539 (a contract held to grant a mere license to conduct a vaudeville show on the state fair grounds); St. John v. Sinclair, 108-274, 122+164 (permit to enter land and to cut and remove timber).

[41] Johnson v. Skillman, 29-95, 98, 12+149; Kremer v. Chi. etc. Ry., 51-15, 52+977; Wilson v. St. P. etc. Ry., 41-56, 42+600; St. John v. Sinclair, 108-274, 122+164.

[42] Reed v. Lammel, 40-397, 42+202; Kremer v. Chi. etc. Ry., 51-15, 52+977.

[43] Caughie v. Brown, 88-469, 93+656.

[44] Johnson v. Skillman, 29-95, 12+149; Cameron v. Chi. etc. Ry., 60-100, 103, 61+814.

[45] Cameron v. Chi. etc. Ry., 60-100, 103, 61+814.

[46] Johnson v. Skillman, 29-95, 12+149; Ellsworth v. Southern etc. Co., 31-543, 18+822; Olson v. St. P. etc. Ry., 38-479, 482, 38+490; Ingalls v. St. P. etc. Ry., 39-479, 481, 40+524; Wilson v. St. P. etc. Ry., 41-56, 42+600; Cameron v. Chi. etc. Ry., 42-75, 43+785; Mpls. M. Co. v. Mpls. etc. Ry., 51-304, 53+639; Mpls. etc. Ry. v. Mpls. etc. Ry., 58-128, 59+983; St. John v. Sinclair, 108-274, 122+164.

[47] Little v. Willford, 31-173, 180, 17+282; Watson v. Chi. etc. Ry., 46-321, 330, 48+1129; St. John v. Sinclair, 108-274, 122+164.

[48] Little v. Willford, 31-173, 180, 17+282; Wilson v. St. P. etc. Ry., 41-56, 42+600; Watson v. Chi. etc. Ry., 46-321, 330, 48+1129; Kremer v. Chi. etc. Ry., 51-15, 21, 52+977; Mpls. etc. Ry., v. Mpls. etc. Ry., 58-128, 132, 59+983; St. John v. Sinclair, 108-274, 122+164.

[49] Wilson v. St. P. etc. Ry., 41-56, 58, 42+600.

A license is not revocable at will if it is coupled with a valid grant, or if executed under such circumstances as to warrant the interposition of equity; or if it operates as an abandonment or waiver of a negative easement.[50] A license is revocable though in writing and upon a consideration.[51] The mere fact that the licensor without objection permits the licensee to expend money on the land upon faith of the license, will not operate as an estoppel.[52] If a licensee builds on the land he has a reasonable time to remove the building after a revocation of the license.[53] If one sells a chattel situated on the land of the seller, the purchaser to take it away, there arises by implication a license to the purchaser to enter upon the land for the purpose of removing the chattel and this cannot be revoked until he has had a reasonable opportunity to do so.[54] A right to revoke a license and recover the land is not lost by delay short of the running of the statute of limitations.[55] A contract granting a person a right to conduct a show on the state fair grounds has been held to grant a mere license upon the conditions named, subject to revocation by a violation of such conditions.[56]

LICENSING EMPLOYMENTS—See Municipal Corporations, 6794.

LIENS

Cross-References

See Agency, 204; Agriculture, 246, 247; Assignments, 568; Attorney and Client, 703; Brokers, 1133; Carriers, 1322; Chattel Mortgages; Conflict of Laws, 1556; Corporations, 2038; Exchanges, 3487; Factors, 3727; Innkeepers, 4514; Judgments; Livery Stable Keeper; Logs and Logging, 5698; Maritime Liens; Mechanics' Liens; Mortgages; Pledge; Sales, 8583; Vendor and Purchaser, 10051; Warehousemen, 10147.

5577. Definition—A lien is a hold or claim which one person has upon the property of another as security for a debt or charge;[57] a charge upon property for the payment of a debt or duty.[58] A common-law lien is a right to enforce a charge upon a thing by withholding possession from the owner until the charge is satisfied.[59] A lien upon realty is not an estate or interest therein.[60]

5578. For wages—Every mechanic, salesman, clerk, operative, or other employee of a manufacturer, merchant, or dealer in merchandise is given a lien by statute upon all the property of his employer, as security for wages earned during the preceding six months, to an amount not exceeding two hundred dollars.[61]

[50] Johnson v. Skillman, 29–95, 12+149, See 22 Harv. L. Rev. 384.

[51] Johnson v. Skillman, 29–95, 12+149; Mpls. M. Co. v. Mpls. etc. Ry., 51–304, 53+639.

[52] Mpls. M. Co. v. Mpls. etc. Ry., 51–304, 53+639; Munsch v. Stelter, 109–403, 124+14.

[53] Wilson v. St. P. etc. Ry., 41–56, 42+600.

[54] Id.

[55] Kremer v. Chi. etc. Ry., 51–15, 52+977.

[56] Mackay v. Minn. S. A. Soc., 88–154, 92+539.

[57] Atwater v. Manchester S. Bank, 45–341, 346, 48+187.

[58] Minn. D. Co. v. Dean, 85–473, 476, 89+848.

[59] Century Dict.

[60] Bidwell v. Webb, 10–59(41, 44).

[61] R. L. 1905 §§ 3541–3543. See Kruse v. Thompson, 26–424, 4+814 (necessity of filing claim under former statute); Schilling v. Carter, 35–287, 28+658 (statute does not give farm laborers a lien on farm products); Olson v. Pennington, 37–298, 33+791 (requisites of lien statement under former statute—time of filing—sufficiency in insolvency proceedings); Liljengren v. Ege, 46–488, 49+250 (execution sale—property subject to liens for wages—rights of lienors—duty and liability of sheriff).

5579. For labor on articles—The statute gives a possessory lien for making, altering, or repairing any article, or expending any labor, skill, or material thereon.[62]

5580. On rights of action—Independent of statute a lien cannot be created upon a mere right of action for a personal tort.[63]

5581. On fund—A promise by a debtor to pay his creditor out of a designated fund, of which the debtor retains control, when the same is received by him, is a personal agreement only, and not a lien on the fund.[64]

5582. Sale by lienor at common law—If a lienor of personalty sells not merely the lien, but the property, the sale is tortious and works a forfeiture of the lien. The purchaser is not liable in an action for trespass, or replevin in the cepit, by the owner, if the property is actually delivered to him.[65]

5583. Detention on unfounded claim—A detention of property under an unfounded claim to a lien thereon is wrongful, though the claim is made in good faith.[66]

5584. Waiver—A lien may be lost or waived if the lienable claim is so mingled with non-lienable claims that it is impossible to distinguish between the two.[67] A lienor may lose his lien by standing by and allowing the property to be sold without asserting his claim.[68]

LIEUTENANT GOVERNOR—See State, 8844.
LIFE ESTATE—See Adverse Possession, 114; Estates, 3164.
LIFE INSURANCE—See Insurance, 4806.
LIFE TABLES—See Death by Wrongful Act, 2619; Evidence, 3353, 3450.

[62] Laws 1907 c. 114; Itasca C. & T. Co. v. Brainerd L. & M. Co., 109–120, 123+58 (statute affords a cumulative remedy for a lien on logs—taking timber out of water, piling, trimming, sorting, and preparing it for the market gives a right to a lien).
[63] Hammons v. G. N. Ry., 53–249, 54+1108.
[64] Hale v. Dressen, 76–183, 78+1045.
[65] Coit v. Waples, 1–134(110).
[66] Fargusson v. Winslow, 34–384, 25+942.
[67] Akeley v. Miss. etc. Co., 64–108, 67+208.
[68] Wilson v. Sherffbillich, 30–422, 15+876.

LIMITATION OF ACTIONS

IN GENERAL

RUNNING OF STATUTE

NEW PROMISE AND ACKNOWLEDGMENT

PART PAYMENT

PARTICULAR ACTIONS

PLEADING

Cross-References

See Adverse Possession; Conflict of Laws, 1546; Laches; and specific actions.

IN GENERAL

5585. Statutory origin—At common law there was no limitation as to the time within which an action could be brought aside from that resulting from the presumption of payment and the adverse possession of real property.[69] The first general statute was 21 James I. c. 16.[70]

5586. General policy of statute—Statutes of limitation prescribe a period within which a right may be enforced, afterwards withholding a remedy for reasons of private justice and public policy. It would encourage fraud, oppression, and interminable litigation, to permit a party to delay a contest until it is probable that papers may be lost, facts forgotten, or witnesses dead.[71] The law respecting adverse possession rests upon considerations of public policy peculiar to itself.[72]

5587. Generally affects remedy alone—It is a frequent expression in the books that the statute of limitations affects the remedy alone and not the right.[73] This is generally true, but the effect of adverse possession for the statutory period is to destroy old rights and create new ones.[74]

5588. Cannot compel party to bring action against adverse claimants—Limitation laws necessarily operate to compel a party to enforce or prosecute his claim within a reasonable time, but a party who is in the enjoyment of his rights cannot be compelled to take measures against an adverse claimant, and a law taking away the rights of a party in such cases is an unlawful confiscation, and in no sense a limitation law.[75]

5589. Constitutional questions—Legislative discretion—Vested rights—The legislature has full authority to enlarge or lessen the time limited for the commencement of actions except that it cannot withhold a reasonable opportunity to appeal to the courts or impair the obligation of contracts or vested rights. The legislature cannot deny a person a reasonable time within which to bring an action.[76] What is a reasonable time is generally a matter for legislative and not judicial determination. Statutes must allow a reasonable time after they are passed for the commencement of suits upon existing

[69] Hoyt v. McNeil, 13-390(362); Hauenstein v. Lynham, 100 U. S. 488.

[70] Whitaker v. Rice, 9-13(1); Olson v. Dahl, 99-433, 109+1001.

[71] Baker v. Kelley, 11-480(358); Brasie v. Mpls. B. Co., 87-456, 92+340; Nebola v. Minn. I. Co., 102-89, 112+880.

[72] See § 109.

[73] Holcombe v. Tracy, 2-241(201); Fletcher v. Spaulding, 9-64(54); Baker v. Kelley, 11-480(358); Burwell v. Tullis, 12-572(486); Cook v. Kendall, 13-324(297); Brisbin v. Farmer, 16-215(187); Archambau v. Green, 21-520; Bradley v. Norris, 63-156, 168, 65+357; Brasie v. Mpls. B. Co., 87-456, 92+340.

[74] See § 120.

[75] Baker v. Kelley, 11-480(358); Hill v. Lund, 13-451(419); Kipp v. Johnson, 31-360, 17+957; Sanborn v. Petter, 35-449, 29+64; Feller v. Clark, 36-338, 340, 31+175; Burk v. Western L. Assn., 40-506, 42+479; Taylor v. Winona etc. Ry., 45-66, 47+453; Russell v. Akeley, 45-376, 48+3; Whitney v. Wegler, 54-235, 55+927; Vaule v. Miller, 69-440, 72+452; Hayes v. Carroll, 74-134, 76+1017; London etc. Co. v. Gibson, 77-394, 80+205, 777; Henningsen v. Stillwater, 81-215, 83+983; State v. Westfall, 85-437, 89+175; Risch v. Jensen, 92-107, 99+628; Holmes v. Loughren, 97-83, 105+558; Willard v. Hodapp, 98-269, 107+954; Priebe v. Ames, 104-419, 422, 116+829.

[76] Holcombe v. Tracy, 2-241(201); Heyward v. Judd, 4-483(375); Thornton v. Turner, 11-336(237); Baker v. Kelley, 11-480(358); Burwell v. Tullis, 12-572(486); Wetherill v. Stone, 12-579(499); Stine v. Bennett, 13-153(138); Cook v. Kendall, 13-324(297); Brisbin v. Farmer, 16-215(187); Archambau v. Green, 21-520; Streeter v. Wilkinson, 24-288; State v. Messenger, 27-119, 125, 6+457; State v. Waholz, 28-114, 9+578; Duncan v. Cobb, 32-460, 21+714; In re Ackerman, 33-54, 21+852; Powers v. St. Paul, 36-87, 30+433; Burk v. Western L. Assn., 40-506, 42+479; Hill v. Townley, 45-167, 47+653; Russell v. Akeley, 45-376, 48+3; Rice v. Dickerman, 47-527, 50+698; Bradley v. Morris, 63-156, 65+357; Kelley v. Gallup, 67-169, 69+812; State v. Foster, 104-408, 116+826; Priebe v. Ames, 104-419, 116+829; Gray v. St. Paul, 105-19, 116+1111; State v. Krahmer, 105-422, 117+780.

causes of action, but what is a reasonable time must depend upon the sound discretion of the legislature, considering the nature of the subject and the purposes of the enactment; and the courts will not inquire into the wisdom of the exercise of this discretion by the legislature in fixing the period of legal bar, unless the time allowed is manifestly so short as to amount to a practical denial of justice.[77] No one has a vested right to a mere remedy, or in an exemption from it.[78] The legislature may therefore revive a cause of action on a personal claim against which a statute of limitations has run by a repeal of the statute.[79] The rule is otherwise where the running of the statute gives a vested interest in real or personal property. When the period prescribed by statute has once run, so as to cut off the remedy which one might have had for the recovery of property in the possession of another, the title of the property, irrespective of the original right, is regarded in the law as vested in the possessor, who is entitled to the same protection in respect to it which the owner is entitled to in other cases. A subsequent repeal of the limitation law could not be given a retroactive effect, so as to disturb this title. It is vested as completely and perfectly, and is as safe from legislative interference, as it would have been if it had been perfected in the owner by grant, or by any species of assurance. But what are often indiscriminately called statutes of limitation consist of two distinct classes. The first class are those where the prescription operates as the foundation of title to property in possession. The lapse of time limited by such statutes not only bars the remedy, but extinguishes the right, and vests a perfect title in the adverse holder. The second class are those which merely take away or suspend certain remedies or forms of action, but leave the property rights of the parties unaffected. This last class is rather an exemption from the servitude of certain forms of action than a means of the acquisition of title. In such a case the legislature would have a perfect right to restore the remedy already barred, because it would not take away any vested rights of property.[80]

5590. Courts cannot modify—The courts have no power to extend or modify the periods of limitation prescribed by statute.[81] They have no dispensing power in favor of parties who do not discover their rights until their remedy is gone.[82]

5591. A statute of repose—The statute of limitations is to be upheld and enforced, not as resting only on a presumption of payment from lapse of time, but according to its intent and object, as a statute of repose.[83]

5592. Where party has alternative rights of action—Where a party has alternative rights of action on the same state of facts one is not necessarily barred because the other is.[84]

[77] Streeter v. Wilkinson, 24–288; State v. Messenger, 27–119, 6+457; Miller v. Corinna, 42–391, 44+127; Hill v. Townley, 45–167, 47+653; Russell v. Akeley, 45–376, 48+3; Rice v. Dickerman, 47–527, 50+698; State v. Westfall, 85–437, 89+175; State v. Krahmer, 105–422, 117+780.

[78] Kipp v. Johnson, 31–360, 17+957; State v. Foster, 104–408, 116+826. See Gray v. St. Paul, 105–19, 116+1111.

[79] Campbell v. Holt, 115 U. S. 620; Hulbert v. Clark, 128 U. S. 295. See Kipp v. Johnson, 31–360, 17+957; 16 Harv. L. Rev. 129.

[80] Streeter v. Wilkinson, 24–288; Kipp v. Johnson, 31–360, 17+957; Gates v. Shugrue, 35–392, 29+57; Morrison v. Rice, 35–436, 29+168; Sanborn v. Petter, 35–449, 29+64; Feller v. Clark, 36–338, 31+175; Flynn v. Lemieux, 46–458, 49+238; Whitney v. Wegler, 54–235, 55+927; Pine County v. Lambert, 57–203, 58+990; O'Connor v. Finnegan, 60–455, 62+618; Kipp v. Elwell, 65–525, 68+105.

[81] Humphrey v. Carpenter, 39–115, 39+67.

[82] Cock v. Van Etten, 12–522(431); Mast v. Easton, 33–161, 22+253.

[83] McNab v. Stewart, 12–407(291); Denny v. Marrett, 29–361, 13+148; Willoughby v. Irish, 35–63, 27+379; Shepherd v. Thompson, 122 U. S. 231.

[84] Jackson v. Holbrook, 36–494, 32+852.

5593. Joint obligation—In an action against two persons, on a joint contract, judgment may be recovered against one of them, though as to the other the action is barred by the statute of limitations.[85]

5594. Not applicable to defences—Statutes of limitation do not run against defences, but only against remedies.[86]

5595. Construction of statutes—Statutes of limitation, being now regarded as statutes of repose based on considerations of public policy, are to be liberally construed.[87] Formerly a strict construction prevailed.[88] They will not be construed as retroactive if any other construction is possible.[89] Exceptions must be clear,[90] but express exceptions are to be liberally construed.[91]

5596. In equity—Statutes of limitation apply to equitable as well as legal actions. Courts of equity have no power to modify them or relieve parties from their operation. They operate absolutely and without regard to the equities of the particular case.[92] A court of equity cannot read an exception into a statute of limitations, but it may sometimes restrain a debtor from pleading the statute.[93] There are many equitable actions which are not covered by any statute of limitations. In such cases equity either determines what is a reasonable time by reference to analogous cases governed by statutes of limitation,[94] or it applies the flexible equitable doctrine of laches.[95]

5597. Applicable to legal proceedings generally—Statutes of limitation, though in terms applicable only to "actions" are to be applied as a rule to all proceedings that are analogous in their nature to actions, so as to make the right sought to be enforced, and not a form of procedure, the test as to whether or not the statute applies. Upon this principle they are held to apply to all claims which may be the subject of actions, however presented; also that they furnish a rule for cases analogous in their subject-matter, but for which a remedy unknown to the common law has been provided.[96]

5598. Enforcement—Option of parties—Courts do not volunteer the enforcement of statutes of limitation, but they do not refuse to enforce them when they are invoked by parties. They will not aid or encourage parties in their attempts, by "mere strategy in judicial proceedings," or by circuitous route of action, to avoid them. They are to be applied alike to all.[97] Courts may assume that parties will invoke the statutes when they are sued.[98]

5599. Exceptions must be express—There are no exceptions to statutes of limitation except as expressly provided.[99] A court of equity cannot read an exception into a statute.[1]

5600. Limitation by contract—The parties to a contract may, by the terms of the contract, limit the time within which an action may be brought thereon.[2]

[85] Town v. Washburn, 14–268(199); Foster v. Johnson, 44–290, 46+350.

[86] Aultman v. Torrey, 55–492, 57+211; Hayes v. Carroll, 74–134, 76+1017.

[87] Redwood County v. Winona etc. Co., 40–512, 41+465, 42+473; St. Paul v. Chi. etc. Ry., 45–387, 48+17; Brasie v. Mpls. B. Co., 87–456, 464, 92+340.

[88] See Baker v. Kelley, 11–480(358); Town v. Washburn, 14–268(199).

[89] Powers v. St. Paul, 36–87, 30+433.

[90] Erickson v. Johnson, 22–380.

[91] Nebola v. Minn. I. Co., 102–89, 112+880.

[92] Ozmun v. Reynolds, 11–459(341); Cock v. Van Etten, 12–522(431); McClung v. Capehart, 24–17; Humphrey v. Carpenter, 39–115, 39+67; Lewis v. Welch, 47–193, 48+608; Schmitt v. Hager, 88–413, 93+110; Lagerman v. Casserly, 107–491, 120+1086.

[93] Lagerman v. Casserly, 107–491, 120+1086.

[94] Parsons v. Noggle, 23–328; O'Mulcahey v. Gragg, 45–112, 47+543; Mowry v. McQueen, 80–385, 83+348.

[95] See § 5350.

[96] Redwood County v. Winona etc. Co., 40–512, 41+465, 42+473.

[97] Brasie v. Mpls. B. Co., 87–456, 92+340.

[98] Sundberg v. Goar, 92–143, 99+638.

[99] Cock v. Van Etten, 12–522(431).

[1] Lagerman v. Casserly, 107–491, 120+1086.

[2] Willoughby v. St. Paul etc. Co., 68–373, 71+272. See In re St. Paul etc. Co., 58–163, 59+996.

5601. Applicable to the state and municipalities—The legislature having adopted the policy of making the statutes of limitation applicable to the state[3] they are to be given as liberal a construction against the state as against citizens.[4] They were formerly applicable to proceedings for the collection of taxes.[5] They are applicable to actions brought by municipal corporations whether suing in a sovereign or proprietary capacity.[6] Statutes of limitation do not operate against the state or federal government unless there is an express provision or necessary implication to that effect and title to public lands cannot be acquired by adverse possession.[7]

RUNNING OF STATUTE

5602. In general—The statute of limitations commences to run against a cause of action from the time it accrues—in other words, from the time an action thereon can be commenced.[8] An action can be maintained on a promise to pay a sum of money "on demand" or "when requested" immediately and without any previous demand.[9] Where it appears from a contract that it was the intention of the parties thereto that the money or claim which is the subject-matter thereof was to be paid upon a demand in fact, the statute of limitations does not begin to run until an actual demand for payment is made.[10] The demand, however, must be made within a reasonable time, which is ordinarily the period of the statute of limitations; but, where the parties contemplated a delay in making the demand to some indefinite time in the future, the statutory period for bringing the action is not controlling as to the question of reasonable time.[11] When a right depends upon some condition or contingency, the cause of action accrues and the statute runs upon the fulfilment of the condition or the happening of the contingency.[12] But where the condition precedent to bringing suit is not a part of the right or cause of action, but merely a part of or one step in the remedy it does not delay the running of the statute.[13] The necessity of taking an account to ascertain how much the vendee must pay for a conveyance does not prevent the running of the statute against a cause of action for specific performance.[14] A cause of action for breach of contract accrues immediately on a breach, though actual damages resulting therefrom do not occur until afterwards.[15]

5603. Computation of time—In determining whether a cause of action is barred the day on which it accrues is excluded.[16]

[3] R. L. 1905 § 4072.

[4] Redwood County v. Winona etc. Co., 40-512, 41+465, 42+473; St. Paul v. Chi. etc. Ry., 45-387, 48+17. See Brown County v. Winona etc. Co., 38-397, 37+949.

[5] See § 9525.

[6] St. Paul v. Chi. etc. Ry., 45-387, 48+17.

[7] See § 110.

[8] Thornton v. Turner, 11-336(237); Ayer v. Stewart, 14-97(68); Lambert v. Slingerland, 25-457; Mast v. Easton, 33-161, 22+253; Sloggy v. Dilworth, 38-179, 36+451; In re Hess, 57-282, 59+193; Heinbokel v. Nat. Sav. etc. Assn., 58-340, 59+1050; Pinch v. McCulloch, 72-71, 74+897; Lumbermen's Ins. Co. v. St. Paul, 82-497, 85+525; Ganser v. Ganser, 83-199, 86+18; Everett v. O'Leary, 90-154, 95+901; Willius v. Albrecht, 100-436, 111+387; Nebola v. Minn. I. Co., 102-89, 112+880.

[9] McArdle v. McArdle, 12-98(53); Brown v. Brown, 28-501, 11+64; Branch v. Dawson, 33-399, 23+552; Mitchell v. Easton, 37-335, 33+910.

[10] Brown v. Brown, 28-501, 11+64; Branch v. Dawson, 33-399, 23+552; Mitchell v. Easton, 37-335, 33+910; Easton v. Sorenson, 53-309, 55+128; Horton v. Seymour, 82-535, 85+551; Portner v. Wilfahrt, 85-73, 88+418.

[11] Fallon v. Fallon, 124+994.

[12] Johnson v. Gilfillan, 8-395(352); In re Hess, 57-282, 59+193.

[13] Litchfield v. McDonald, 35-167, 28+191; Easton v. Sorenson, 53-309, 55+128; State v. Norton, 59-424, 61+458; Hantzch v. Massolt, 61-361, 63+1069; Stillwater & St. P. Ry. v. Stillwater, 66-176, 68+836; McCollister v. Bishop, 78-228, 80+1118.

[14] Short v. Van Dyke, 50-286, 52+643.

[15] Everett v. O'Leary, 90-154, 95+901.

[16] Spencer v. Haug, 45-231, 47+794; Ne-

5604. When action is begun—Statute—It is provided by statute that an action shall be deemed begun, for the purposes of statutes of limitation, "against each defendant when the summons is served on him, or on a codefendant who is a joint contractor or otherwise united in interest with him, or is delivered to the proper officer for such service; but, as against any defendant not served within the period of limitation, such delivery shall be ineffectual, unless within sixty days thereafter the summons be actually served on him or the first publication thereof be made." [17]

5605. In particular cases—Action for surplus at foreclosure sale; [18] on account for goods sold and delivered; [19] for specific performance; [20] on a certificate of deposit in the ordinary form issued by a bank; [21] for an accounting and balance due in a partnership; [22] on the official bond of a constable; [23] for money collected by an agent and not accounted for; [24] on a general deposit in a bank; [25] on a loan of money payable whenever the party making the loan should demand it; [26] to enforce stockholder's liability; [27] against county for money paid at a void tax sale; [28] for breach of covenant of warranty in a deed; [29] on a guardian's bond; [30] action against city for amount held in trust by city for owner in condemnation proceedings; [31] on bond of assignee; [32] in relation to tax proceedings; [33] against a grantee in a deed on an assumption and agreement to pay a mortgage; [34] on an assessment in a mutual insurance company; [35] to abate a nuisance; [36] for services rendered by one party to another under an agreement that the former shall be compensated out of the estate of the latter after his death; [37] to compel holders of bonus stock to pay for the same for the benefit of creditors; [38] against reversioners; [39] for instalment of salary; [40] on interest coupons; [41] on a guaranty of land warrants; [42] by surety against principal for amount paid by surety on account of principal; [43] on the official bond of an executor where the statute authorized an action only upon leave of court; [44] on a Minnesota standard insurance policy; [45] on an insurance policy when there is an adjustment of the loss and a promise

bola v. Minn. I. Co., 102–89, 112+880.

[17] R. L. 1905 § 4081. In the following cases reference is made to the statutory rule: Hooper v. Farwell, 3–106(58) (service on joint contractor); Blackman v. Wheaton, 13–326(299); Auerbach v. Maynard, 26–421, 4+816; Steinmetz v. St. P. T. Co., 50–445, 52+915; Smith v. Hurd, 50–503, 52+922; Carlson v. Phinney, 56–476, 58+38; Foot v. Ofstie, 70–212, 73+4; State v. Kipp, 70–286, 73+164; Spencer v. Koell, 91–226, 97+974; Webster v. Penrod, 103–69, 114+257.

[18] Ayer v. Stewart, 14–97(68).

[19] Cousins v. St. P. etc. Ry., 43–219, 45+429.

[20] Thompson v. Myrick, 20–205(184); Lewis v. Prendergast, 39–301, 39+802; Short v. Van Dyke, 50–286, 52+643.

[21] Mitchell v. Easton, 37–335, 33+910.

[22] McClung v. Capehart, 24–17; Broderick v. Beaupre, 40–379, 42+83; Thompson v. Crosby, 62–324, 64+823.

[23] Litchfield v. McDonald, 35–167, 28+191.

[24] Mast v. Easton, 33–161, 22+253.

[25] Branch v. Dawson, 33–399, 23+552; Mitchell v. Easton, 37–335, 33+910; Easton v. Sorenson, 53–309, 55+128.

[26] Brown v. Brown, 28–501, 11+64.

[27] Harper v. Carroll, 62–152, 64+145.

[28] Easton v. Sorenson, 53–309, 55+128.

[29] Wagner v. Finnegan, 65–115, 67+795; Brooks v. Mohl, 104–404, 116+931.

[30] Hantzch v. Massolt, 61–361, 63+1069.

[31] Stillwater etc. Ry. v. Stillwater, 66–176, 68+836.

[32] McCollister v. Bishop, 78–228, 80+1118.

[33] See § 9525.

[34] Pinch v. McCulloch, 72–71, 74+897.

[35] Langworthy v. Garding, 74–325, 77+207; Langworthy v. Washburn, 77–256, 79+974.

[36] Mueller v. Fruen, 36–273, 30+886.

[37] In re Hess, 57–282, 59+193.

[38] Hospes v. N. W. etc. Co., 48–174, 50+1117.

[39] Lindley v. Groff, 37–338, 34+26.

[40] Wood v. Cullen, 13–394(365).

[41] Cushman v. Carver County, 19–295 (252).

[42] Johnson v. Gilfillan, 8–395(352).

[43] Barnsback v. Reiner, 8–59(37).

[44] Ganser v. Ganser, 83–199, 86+18 (overruling Wood v. Myrick, 16–494, 447; Lanier v. Irvine, 24–116).

[45] Rottier v. German Ins. Co., 84–116, 86+888.

to pay;[46] for damages resulting from the erection of a mill-dam;[47] for damages resulting from a nuisance;[48] for breach of a contract to insure;[49] to set aside a fraudulent conveyance.[50]

5606. Performance of condition precedent—Where there is a condition precedent to the accruing of a cause of action, and it is in the power of the plaintiff to perform that condition, the statute of limitations, by analogy, applies and will commence to run as soon as the proper time to perform the condition arrives, and when performance is thereby barred it will prevent the cause of action from ever accruing.[51]

5607. Payment of money into court—Payment of money into court in an action on a debt takes the debt out of the statute as to the money so paid.[52]

5608. Fraudulent concealment of cause of action—A fraudulent concealment of a cause of action will prevent the running of the statute of limitations.[53]

5609. Ignorance of cause of action—Except in the case of fraud ignorance of a cause of action will not prevent the running of the statute.[54]

5610. Absence from state—Statute—It is provided by statute that "if, when a cause of action accrues against a person, he is out of the state, an action may be commenced within the times herein limited after his return to the state; and if, after a cause of action accrues, he departs from and resides out of the state, the time of his absence is not part of the time limited for the commencement of the action." [55] The statute is applicable only to actions the subject-matter of which arises or originates in this state, and the debtor is out of the state when the cause of action accrues, or afterwards departs therefrom.[56] The mere fact that a note is made payable in this state does not make the statute applicable.[57] It is inapplicable to an action of ejectment,[58] to an action to foreclose a mortgage;[59] to an action on a judgment;[60] or to foreign corporations with offices in this state.[61] If when a cause of action accrues against a person he is out of the state, the action may be commenced within the statutory time after his return to the state.[62] If after a cause of action accrues against a person, he leaves the state and resides elsewhere his foreign residence must, in order to toll the statute, be not merely temporary or occasional, but of such character and with such intent as to constitute a new domicil.[63]

5611. Actions against non-residents—In general—Out statutes of limitation do not run in favor of a non-resident until he comes within the jurisdiction.[64]

5612. Causes of action arising out of state—Statute—It is provided by statute that "when a cause of action has arisen outside of this state, and, by

[46] McCallum v. Nat. Credit Ins. Co., 84–134, 86+892.
[47] Thornton v. Turner, 11–336(237).
[48] Sloggy v. Dilworth, 38–179, 36+451.
[49] Everett v. O'Leary, 90–154, 95+901.
[50] Brasie v. Mpls. B. Co., 87–456, 92+340.
[51] State v. Norton, 59–424, 61+458; Lake Phalen etc. Co. v. Lindeke, 66–209, 68+974.
[52] In re St. Paul etc. Co., 58–163, 59+996.
[53] Wellner v. Eckstein, 105–444, 460, 117+830.
[54] Cock v. Van Etten, 12–522(431); Mast v. Easton, 33–161, 22+253; Everett v. O'Leary, 90–154, 95+901.
[55] R. L. 1905 § 4082.
[56] Powers v. Blethen, 91–339, 97+1056.
[57] Drake v. Bigelow, 93–112, 100+664.
[58] St. Paul v. Chi. etc. Ry., 45–387, 48+17; Ramsey v. Glenny, 45–401, 48+322.
[59] R. L. 1905 § 4074. See § 6431.
[60] Gaines v. Grunewald, 102–245, 113+450.
[61] St. Paul v. Chi. etc. Ry., 45–387, 48+17.
[62] Town v. Washburn, 14–268(199); Wilkinson v. Estate of Winne, 15–159(123); Duke v. Balme, 16–306(270); Gill v. Bradley, 21–15; O'Mulcahey v. Gragg, 45–112, 47+543.
[63] Venable v. Paulding, 19–488(422); Kerwin v. Sabin, 50–320, 52+642.
[64] Hoyt v. McNeil, 13–390(362); Smith v. Glover, 44–260, 46+406; Way v. Colyer, 54–14, 55+744.

the laws of the place where it arose, an action thereon is there barred by lapse of time, no such action shall be maintained in this state unless the plaintiff be a citizen of the state who has owned the cause of action ever since it accrued." [65] The statute is applicable only to actions the subject-matter of which arises or originates out of this state.[66] If a cause of action not arising in this state or accruing to a citizen thereof is barred by the law of another state it is barred here.[67] The statute of limitations in this state controls in actions brought here, except that in an action against a person by one not a citizen of this state, or a citizen who has not had the cause of action ever since it accrued, the defendant may avail himself of the law of limitations of the state or country in which the cause of action arose, if it is more favorable to him than our own.[68]

5613. Disabilities—Statute—Time of disability—It is provided by statute that certain disabilities shall suspend the running of the period of limitation.[69] Under the statute the disability must exist at the time the cause of action accrues. If the statute begins to run against a party no subsequent disability, not even insanity, will arrest it.[70] The period is extended in no case for more than one year after the disability ceases.[71]

5614. Insanity—Insanity arising subsequent to the accrual of a cause of action does not arrest the running of the statute.[72] Insanity arising on the same day as the accrual of a cause of action exists at the time the cause of action accrues within the meaning of the statute. Fractions of a day will not be considered in this connection.[73] The period is not extended for more than one year after the insanity ceases.[74]

5615. Pendency of an action—Dismissal—The commencement of an action arrests the running of the statute during its pendency, if the action is prosecuted to final judgment; but if the action is dismissed, without a determination on the merits, it is otherwise, in the absence of a statute to the contrary.[75]

5616. Infancy—Infancy of the plaintiff is one of the statutory disabilities arresting the running of the statute.[76]

5617. Stay by paramount authority—Whenever a person is prevented from exercising his legal remedy by some paramount authority, the time during which he is thus prevented is not to be counted against him in determining whether the statute of limitations has barred his right.[77] This rule applies only when the paramount authority is invoked and the restraint induced by the debtor.[78]

5618. Injunction—The statutory provision, suspending the running of the period of limitation during the time the beginning of an action is stayed by an injunction or other statutory prohibition, applies only between parties to an action, and not where the injunction is granted in an action to which the debtor is not a party.[79]

[65] R. L. 1905 § 4083.
[66] Powers v. Blethen, 91-339, 97+1056.
[67] Luce v. Clarke, 49-356, 51+1162; Powers v. Blethen, 91-339, 97+1056; Drake v. Bigelow, 93-112, 100+664. See 22 Harv. L. Rev. 62.
[68] Fletcher v. Spaulding, 9-64(54).
[69] R. L. 1905 § 4084.
[70] Kelley v. Gallup, 67-169, 69+812. See Nebola v. Minn. I. Co., 102-89, 112+880.
[71] Langer v. Newmann, 100-27, 110+68.
[72] Kelley v. Gallup, 67-169, 69+812.
[73] Nebola v. Minn. I. Co., 102-89, 112+880.
[74] Langer v. Newmann, 100-27, 110+68.
[75] Holmgren v. Isaacson, 104-84, 116+205. See Backus v. Burke, 63-272, 65+459; Downer v. Union L. Co., 103-392, 115+207.
[76] R. L. 1905 § 4084(1); Backus v. Burke, 63-272, 65+459. See Minn. D. Co. v. Dean, 85-473, 89+848.
[77] St. Paul etc. Ry. v. Olson, 87-117, 91+294. See Holmgren v. Isaacson, 104-84, 116+205.
[78] Lagerman v. Casserly, 107-491, 120+1086.
[79] Id.

5619. Pendency of contest in General Land Office—The pendency of a contest in the General Land Office has been held to arrest the running of the statute.[80]

5620. Insolvency proceedings—Insolvency or bankruptcy proceedings are generally held to arrest the running of the statute.[81]

5621. Sequestration proceedings—Sequestration proceedings against insolvent corporations arrest the running of the statute.[82]

5622. Amendment of pleading—Unless the amendment introduces a new cause of action the statute of limitations is arrested by the service of the original pleading.[83] If the amendment introduces a new cause of action the pleading is to be construed as of its own date and the statute of limitations runs against it to the date of service.[84]

NEW PROMISE AND ACKNOWLEDGMENT

5623. Necessity of writing—Statute—It is provided by statute that no acknowledgment or promise shall be evidence of a new or continuing contract sufficient to take the case out of the statute unless the same is contained in some writing signed by the party to be charged thereby.[85] Our statute follows Lord Tenterden's Act.[86]

5624. Sufficiency of promise or acknowledgment—There must be either an express promise, or an acknowledgment expressed in such words, and attended by such circumstances, as give to it the meaning, and therefore the force and effect, of a new promise. In the case of an acknowledgment or implied promise, there should be a direct recognition of the indebtedness sued on, from which a willingness to pay the same may reasonably be implied. If there be no express promise, but a promise is to be raised by implication of law from the acknowledgment of the party, such acknowledgment ought to contain an unqualified and direct admission of a previous subsisting debt which the party is liable and willing to pay. If there be accompanying circumstances which repel the presumption of a promise or intention to pay, if the expression be equivocal, vague and indeterminate, leading to no certain conclusion, but at best to probable inferences which may affect different minds in different ways they ought not to go to the jury as evidence of a new promise to revive the cause of action.[87] The willingness to pay need not be express but is implied from the unqualified and unconditional acknowledgment of the debt. The acknowledgment must be an admission, not that the debt was just originally but that it continues due at the time of the acknowledgment.[88] The statute of limitations does not operate to raise a presumption of payment, but is a statute of repose; hence, to revive a legal obligation once terminated by the effect of

[80] St. P. etc. Ry. v. Olson, 87–117, 91+294; Sage v. Rudnick, 91–325, 98+89.

[81] Davidson v. Fisher, 41–363, 43+79; In re St. Paul etc. Co., 58–163, 59+996.

[82] London etc. Co. v. St. P. etc. Co., 84–144, 86+872; Potts v. St. P. etc. Assn., 84–217, 87+604. See Downer v. Union L. Co., 103–392, 115+207.

[83] Bruns v. Schreiber, 48–366, 51+120; Markell v. Ray, 75–138, 77+788; Case v. Blood, 71 Iowa, 632; McKeighen v. Hopkins, 19 Neb. 33.

[84] Schulze v. Fox, 53 Md. 37; Atkinson v. Amador etc. Co., 53 Cal. 102; Hester v. Mul'en, 107 N. C. 724; Hil's v. Ludwig, 46 Ohio, 374; Monticello v. Grant, 104 Ind. 168. See Boen v. Evans, 72–169, 75+116.

[85] R. L. 1905 § 4086; Erpelding v. Ludwig, 39–518, 40+829; Pfenninger v. Kokesch, 68–81, 70+867; McManaman v. Hinchley, 82–296, 84+1018; Atwood v. Lammers, 97–214, 106+310.

[86] Olson v. Dahl, 99–433, 109+1001.

[87] Whitney v. Reese, 11–138(87); Smith v. Moulton, 12–352(229); McNab v. Stewart, 12–407(291); Brisbin v. Farmer, 16–215(187); Denny v. Marrett, 29–361, 13+148; Willoughby v. Irish, 35–63, 27+379; Drake v. Sigafoos, 39–367, 40+257; Russ'l v. Davis, 51–482, 53+766; Osborne v. Heuer, 62–507, 64+1151.

[88] Russell v. Davis, 51–482, 53+766.

the statute, requires something more than a mere acknowledgment that a past debt is still unpaid.[89] The acknowledgment must be on the one hand broad enough to include the specific debt in question, and on the other sufficiently precise and definite in its terms to show that this debt was the subject-matter of the acknowledgment. It ought clearly to appear in all cases that it relates to the identical debt which is sought to be recovered on the strength of it; and where there are more debts than one due from the defendant to the plaintiff, it must appear to which it applies.[90]

5625. Judgments—A judgment is not a contract, and an acknowledgment or new promise does not have the effect of reviving the cause of action merged in the judgment or of extending the life of the judgment.[91]

5626. Rule limited to contracts—Torts and specialties—The doctrine of a new promise or acknowledgment is limited to contracts, express or implied, and does not extent to obligations ex delicto or to specialties.[92]

5627. Acknowledgment cannot be withdrawn—An acknowledgment taking a debt out of the statute cannot be withdrawn so as to restore the bar.[93]

5628. Acknowledgment of corporation—When the action of a corporation, as, for example, a school district, constitutes in substance an acknowledgment or promise sufficient to take a debt out of the statute, and such action is made a matter of record, the record is a writing which satisfies the statute.[94]

5629. Conditional promise—A conditional promise to pay a debt will not take it out of the statute unless the condition is performed.[95]

5630. Parol evidence inadmissible—The written acknowledgment or promise must itself describe or furnish the means of identifying the debt or debts to which it refers and cannot be supplemented by parol evidence.[96]

5631. Account stated—An account stated, which is not supported by evidence of some writing signed by the party to be charged, will not prevent the running of the statute against previously existing liabilities included therein. An action on an account stated may, of course, be established by oral promises or acknowledgments; but such proof will not operate to take the case out of the general rule of limitation. The stating of the account does not, either with an express oral promise or an implied promise to pay it, fix a new period from which the statute starts to run.[97]

PART PAYMENT

5632. In general—It is the general rule that part payment of a subsisting debt sets the statute of limitations running afresh as to the balance.[98] But to have such effect the payment must be a voluntary one, made as part of a larger indebtedness, and under such circumstances as will warrant the court or jury in finding an implied promise to pay the balance.[99] As to what will justify a court or jury in finding an implied promise to pay the balance our cases are not entirely harmonious. It has been held that mere part payment of a debt, without words or acts to indicate its character, is not evidence from which a new promise may be inferred.[1] On the other hand it has been held that a

[89] Denny v. Marrett, 29–361, 13+148; Willoughby v. Irish, 35–63, 27+379.
[90] Whitney v. Reese, 11–138(87).
[91] Olson v. Dahl, 99–433, 109+1001.
[92] Id.
[93] Sanborn v. School Dist., 12–17(1).
[94] Id.
[95] McNab v. Stewart, 12–407(291).
[96] Russell v. Davis, 51–482, 53+766.
[97] Erpelding v. Ludwig, 39–518, 40+829.
[98] Downer v. Read, 17–493(470); Fisk v. Stewart, 24–97; Gordon v. Ven, 55–105, 56+581; Clarkin v. Brown, 80–361, 83+351.
[99] Brisbin v. Farmer, 16–215(187); Chadwick v. Cornish, 26–28, 1+55; Willoughby v. Irish, 35–63, 27+379; Erpelding v. Ludwig, 39–518, 40+829; Clarkin v. Brown, 80–361, 83+351.
[1] Brisbin v. Farmer, 16–215(187); Chadwick v. Cornish, 26–28, 1+55; Young v. Perkins, 29–173, 12+515; Smith v. St. P. etc. Co., 56–202, 57+475.

voluntary payment in part of a larger indebtedness, without reservation, qualification, protest, or other act negativing the inference that the debtor regarded the balance as a subsisting obligation, justifies a court or jury in finding an implied promise to pay the balance.[2] To infer a new promise the debt or obligation must be definitely pointed out by the debtor and an intention to discharge it in part made manifest.[3] The original consideration is sufficient to sustain the new promise.[4]

5633. Theory of rule—It is sometimes said that the rule that the partial payment of a debt takes is out of the operation of the statute of limitations is founded upon the theory that a payment of a part of a subsisting debt is an acknowledgment that the debt exists, from which the law implies a new promise to pay the balance.[5] It must appear that the debtor intended to recognize the obligation of an entire debt of which he has paid a part so as to imply a promise. Part payment is only evidence of a promise or a fact from which a promise may be implied. It is the new promise or contract, upheld by the original consideration, which must be relied on to support an action otherwise barred by lapse of time, though the declaration in form pursues the old contract or cause of action. It matters not whether the payment was made before or after the running of the statute. There must be a new promise, express or implied, to keep a debt alive as well as to revive it.[6]

5634. Comment on rule—The doctrine of part payment, and of a new promise or acknowledgment, originated at an early day when the statute of limitations was looked upon with disfavor by the courts and was regarded as simply raising a presumption of payment. It is opposed to the modern view that statutes of limitation are statutes of repose, based on considerations of public policy, and favored by the courts.[7] The doctrine of part payment ought to be abolished or restricted by statute. If it is a good rule why should it not apply to obligations ex delicto, to specialties, and to judgments? Why should not the same principle apply to a debt as to land? When the statute has run in favor of a disseizor his subsequent acknowledgment of the title of disseizee will not restore the rights of the latter. Since the doctrine of part performance is opposed to the modern conception of statutes of limitation it ought to be restricted so far as possible, and the present tendency is that way.[8]

5635. Several debts—General payment—In order to infer a new promise from part payment of an obligation already barred by the statute of limitations, the debt must be definitely and specifically pointed out, and an intention to discharge it in part made manifest. This must appear from the act of the debtor, as no new promise can be inferred from the conduct of the creditor in applying the payment upon one of several obligations. Where the creditor holds several separate claims, and the debtor makes a general payment upon his indebtedness, without directing or authorizing the application thereof upon any one of the claims, all of which are then barred by the statute, the bar of the statute is not removed as to any of them.[9]

5636. Note and mortgage—A part payment of a note secured by mortgage which tolls the statute as to the note tolls it also as to the mortgage.[10]

[2] Oevermann v. Loebertmann, 68–162, 70+1084; Wolford v. Cook, 71–77, 73+706; Clarkin v. Brown, 80–361, 83+351.

[3] Anderson v. Nystrom, 103–168, 114+742.

[4] Mason v. Campbell, 27–54, 6+405; Willoughby v. Irish, 35–63, 66, 27+379. See Anderson v. Nystrom, 103–168, 114+742.

[5] Erpelding v. Ludwig, 39–518, 40+829; Oevermann v. Loebertmann, 68–162, 70+1084; Wolford v. Cook, 71–77, 73+706.

[6] Willoughby v. Irish, 35–63, 27+379.

[7] Whitaker v. Rice, 9–13(1).

[8] See Olson v. Dahl, 99–433, 109+1001; Anderson v. Nystrom, 103–168, 114+742; 16 Harv. L. Rev. 517.

[9] Anderson v. Nystrom, 103–168, 114+742.

[10] Carson v. Cochran, 52–67, 53+1130;

5637. Series of notes—The payment of one of a series of notes does not toll the statute as to the others.[11]

5638. Judgments—The part payment of a judgment does not have the effect of reviving the cause of action merged in the judgment or of extending the life of the judgment.[12]

5639. Rule limited to contracts—Torts and specialties—The doctrine of part payment is limited to contracts, express or implied, and does not extend to obligations ex delicto or to specialties.[13]

5640. Application of collaterals—An application of the proceeds of the sale of collaterals has been held not a part payment within the rule.[14]

5641. Indorsement of payment on notes—To make an indorsement on a note of a partial payment thereon evidence to prevent the bar of the statute of limitations it must appear by evidence dehors the indorsement that it was made at a time when it was against the interest of the holder of the note to make it.[15] An indorsement on a note of the proceeds of the sale of collateral securities which were deposited with the note at the time it was given does not constitute a part payment which will interrupt the running of the statute.[16]

5642. Part payment not conclusive—Part payment is not of itself conclusive evidence to take a case out of the statute. The circumstances that attend such a payment may wholly disprove a promise to pay more. A payment in full settlement and satisfaction does not operate to take a cause of action out of the operation of the statute.[17]

5643. By whom made—Joint and several debtors—Principal and surety—In order to prevent the running of the statute a partial payment must have been made by the debtor himself, or for him by his authority, or subsequently ratified if made in his name without his authority.[18] It is the law of this state that a partial payment by one of several joint and several debtors is inoperative to prevent the running of the statute as to the others.[19] A partial payment of a partnership debt, made by one partner after a dissolution of the firm will prevent the running of the statute as to the other partners, in favor of a creditor who has had dealings with the partnership and has had no notice of its dissolution.[20] Where one of two joint and several debtors makes a payment in his own behalf, the mere fact that the other debtor, after knowledge of such payment, verbally promises to pay the balance, will not constitute a ratification of the payments as having been made for him or in his behalf.[21] A partial payment by the principal debtor will not toll the statute as to the guarantor of a note unless the contract of guaranty expressly so provides.[22] Where an attorney makes collections for a client and applies the amounts collected in payment of previous services due him, an entry of such credits on

Kenaston v. Lorig, 81–454, 84+323; McManaman v. Hinchley, 82–296, 84+1018.

[11] McManaman v. Hinchley, 82–296, 84+1018.

[12] Olson v. Dahl, 99–433, 109+1001. See 20 Harv. L. Rev. 421.

[13] Olson v. Dahl, 99–433, 109+1001.

[14] Wolford v. Cook, 71–77, 73+706; Atwood v. Lammers, 97–214, 106+310.

[15] R. L. 1905 § 4731; Young v. Perkins, 29–173, 12+515.

[16] Atwood v. Lammers, 97–214, 106+310.

[17] Conway v. Wharton, 13–158(145); Brisbin v. Farmer, 16–215(187).

[18] Pfenninger v. Kokesch, 68–81, 70+867; Wolford v. Cook, 71–77, 73+706; Clarkin v. Brown, 80–361, 83+351; Atwood v. Lammers, 97–214, 106+310; Woodcock v. Putnam, 101–1, 111+639; Northwest T. Co. v. Dahltorp, 104–130, 116+106.

[19] Willoughby v. Irish, 35–63, 27+379 (overruling Whitaker v. Rice, 9–13, 1); Davison v. Sherburne, 57–355, 59+316; Pfenninger v. Kokesch, 68–81, 70+867; Atwood v. Lammers, 97–214, 106+310; Northwest T. Co. v. Dahltorp, 104–130, 116+106.

[20] Davison v. Sherburne, 57–355, 59+316; Robertson v. Anderson, 96–527, 105+972; Id., 100–137, 110+623.

[21] Pfenninger v. Kokesch, 68–81, 70+867.

[22] Northwest T. Co. v. Dahltorp, 104–130, 116+106.

his account books will not suspend the operation of the statute of limitations as to portions of the account previously barred.[23] A partial payment made by a trustee or assignee of an insolvent debtor does not interrupt the running of the statute.[24]

5644. Must clearly apply to debt in action—It must unequivocally appear that the payment was made on the specific debt involved in the action.[25] But it will be presumed to have made on the debt proved by the creditor unless another is shown to exist by his evidence or that of the debtor.[26]

5645. Part payment need not be in money—It is unnecessary, for the purpose of interrupting the statute, that the part payment should be in actual money. A payment in goods may be sufficient for that purpose. So, the indorsement and delivery by the debtor of the note of a third party as collateral security for his indebtedness to another, the proceeds when collected to be applied on the debt, may operate as a payment sufficient to take it out of the statute. But if collateral securities which were given contemporaneously with the original obligation are subsequently realized upon and the proceeds applied to the part payment of the debt the debtor's passive acquiescence in such application does not interrupt the running of the statute. If a debtor voluntarily, and in the absence of any circumstances repelling the inference of an implied promise to pay the whole debt, transfers to his creditor new and additional collateral securities for the payment of his debt, the proceeds of which, when realized on, to be applied towards its payment, it will constitute a "part payment," which will interrupt the running of the statute, as of the date of the transfer of the securities.[27]

5646. Entry of credits in account—The entry of a credit on an account, for an amount which the debtor claims to have paid on it at some former time, does not amount to a part payment on the date of the credit which will prevent the statute from running.[28] Where an attorney makes collections for a client and applies the amounts collected in payment of previous services due him, an entry of such credits on his account books will not suspend the operation of the statute of limitations as to portions of the account previously barred.[29]

5647. Time of part payment—A distinction is sometimes made, in the degree of proof required, between a part payment made before the running of the statute and one made after it has run.[30]

PARTICULAR ACTIONS

5648. Actions on contracts and obligations generally—The statute provides that actions "upon a contract or other obligation, express or implied, as to which no other limitation is expressly prescribed" shall be commenced within six years.[31] Under Laws 1895 c. 8 § 347, actions ex contractu against cities were required to be commenced within two years.[32] The following actions must be commenced within six years, under the general statute: an action on the implied contract of a ferry company to carry safely;[33] an action to compel specific performance of a contract for the sale of real property;[34] an action

[23] Reeves v. Sawyer, 88–218, 92+962.
[24] Smith v. St. P. etc. Co., 56–202, 57+475.
[25] Oevermann v. Loebertmann, 68–162, 70+1084.
[26] Whitcomb v. Whiting, 1 Smith, Leading Cases, 1016, 991. See Whitney v. Reese, 11–138(87).
[27] Wolford v. Cook, 71–77, 73+706.
[28] Erpelding v. Ludwig, 39–518, 40+829.
[29] Reeves v. Sawyer, 88–218, 92+962.
[30] See Clarkin v. Brown, 80–361, 83+351.
[31] R. L. 1905 § 4076.
[32] Thornton v. East Grand Forks, 106–233, 118+834.
[33] Blakeley v. Le Duc, 22–476.
[34] Lewis v. Prendergast, 39–301, 39+802.

by a mortgagor against a mortgagee to recover a surplus at a sale under a power;[35] an action on an account for goods sold and delivered at different dates;[36] an action to foreclose a mortgage, so far as the right to a deficiency judgment is concerned;[37] an action for an accounting;[38] an action on a bond to secure distribution of estate of decedent;[39] an action on the official bond of a constable;[40] an action against a municipality for damages set apart for the owner in condemnation proceedings;[41] an action to enforce an implied trust;[42] an action for the recovery of part payments on a contract for the sale of land;[43] an action on a guardian's bond;[44] an action on a promissory note;[45] an action on instalments of salary;[46] an action to secure refundment of money paid at a void tax sale;[47] and an action on implied contract in relation to corporate stock.[48]

5649. Actions on mutual accounts—The statute provides that "if the action be to recover a balance due upon a mutual, open, and current account, and there have been reciprocal demands between the parties, the limitation shall begin to run from the date of the last item proved on either side."[49] If credit is given for an article of personal property delivered by the debtor to his creditor at a valuation agreed upon the account is within the statute.[50] An account showing on one side items for goods sold and delivered at different dates and payments made by the purchaser on the other side does not come within the statute, for the credit is all on one side and there is nothing to offset.[51]

5650. Actions on running accounts not mutual—In the case of an ordinary open running account, as distinguished from an open, running, mutual account, the statute runs on each item from it own date, in the absence of any part payment.[52] A part payment or acknowledgment of such an account takes all the items out of the statute, up to that time.[53] When such an account becomes a stated account the statute begins to run afresh, if the accounting is in writing and signed by the party sought to be charged.[54]

5651. Actions on accounts stated—An action on an account stated must be brought within six years from the time the cause of action accrues. When the statement of the account is in writing, signed by the party sought to be charged, the statute begins to run from the time of the settlement. If the statement is not in writing the statute runs from the dates of the various previously existing liabilities included therein.[55] The statute does not begin to run against a cause of action on an account stated from the date of the last item of the debit account therein but only from the date when the account became an account stated.[56]

[35] Ayer v. Stewart, 14–97(68).
[36] Cousins v. St. P. etc. Ry., 43–219, 45+429.
[37] Slingerland v. Sherer, 46–422, 49+237.
[38] McClung v. Capehart, 24–17; Muus v. Muus, 29–115, 12+343; Thompson v. Crosby, 62–324, 64+823.
[39] Olson v. Fish, 75–228, 77+818.
[40] Litchfield v. McDonald, 35–167, 28+191.
[41] Stillwater etc. Ry. v. Stillwater, 66–176, 68+836.
[42] Id. But see Burk v. Western L. Assn., 40–506, 42+479.
[43] Jorgenson v. Jorgenson, 81–428, 84+221.
[44] Brandes v. Carpenter, 68–388, 71+402.
[45] Fletcher v. Spaulding, 9–64(54).
[46] Wood v. Cullen, 13–394(365).
[47] State v. Olson, 58–1, 59+634.
[48] Woodworth v. Carroll, 104–65, 112+1054, 115+946.
[49] R. L. 1905 § 4079.
[50] Taylor v. Parker, 17–469(447).
[51] Cousins v. St. P. etc. Ry., 43–219, 45+429.
[52] Id.
[53] Gordon v. Ven, 55–105, 56+581; Clarkin v. Brown, 80–361, 83+351; Day v. Mayo, 154 Mass. 472.
[54] Erpelding v. Ludwig, 39–518, 40+829; Chace v. Trafford, 116 Mass. 529.
[55] Erpelding v. Ludwig, 39–518, 40+829; Chace v. Trafford, 116 Mass. 529.
[56] King v. Davis, 168 Mass. 133.

5652. Actions for relief on the ground of fraud—The statute provides that an action for relief on the ground of fraud shall be commenced within six years, but that the cause of action shall not be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud.[57] The statute is applicable alike to legal and equitable actions.[58] The statute runs only from the discovery of the fraud or from the time it ought to have been discovered. Actual discovery is not always necessary. The means of knowledge are equivalent to actual knowledge, that is, a knowledge of facts which would put a man of ordinary prudence upon inquiry which, if followed up, would result in a discovery of the fraud, is equivalent to actual discovery.[59] Mere constructive notice of the record of a deed is insufficient to set the statute running.[60] The title of a fraudulent grantee is protected by the statute.[61] When an action for relief on the ground of fraud is not commenced until more than six years after the commission of the acts constituting the fraud, the burden is on the plaintiff to allege and prove that he did not discover the facts constituting the fraud until within six years before the commencement of the action.[62] The following actions fall under this statute: an action by a county against its treasurer for fraudulent conversion of county funds;[63] an action by a principal against an agent for the fraudulent conversion of funds of the principal;[64] an action by stockholders to have a deed of a corporation set aside for fraud;[65] an action by heirs to charge an administrator as trustee;[66] an action to set aside a fraudulent conveyance;[67] an action to set aside a deed obtained by "threats, intimidation, and undue influence," and to recover possession of the land;[68] an action based on the legal fraud involved in the refusal of a person who has been invested with the legal title to lands to convey the same to the real owner, or to account to him for the proceeds in case the land has been sold;[69] and an action to set aside a partnership accounting on the ground of fraud.[70]

5653. Actions involving trusts—The statute provides that an action "to enforce a trust or compel a trustee to account, where he has neglected to discharge the trust, or claims to have fully performed it, or has repudiated the trust relation," shall be commenced within six years.[71] The statute commences to run against an action for the recovery of trust funds upon the performance of the trust, or when the trustee repudiates the trust, and the cestui que trust is notified thereof. The mere lapse of time, without inquiry into the trusteeship, does not of itself constitute such laches as to preclude recovery.[72] This statute does not change the previous rule of equity that actions to enforce an express and continuing trust, or to compel an accounting, do not accrue

[57] R. L. 1905 § 4076(6).

[58] Cock v. Van Etten, 12–522(431); Humphrey v. Carpenter, 39–115, 39+67; Lewis v. Welch, 47–193, 48+608. See Bausman v. Kelley, 38–197, 36+333.

[59] Cock v. Van Etten, 12–522(431); Mower County v. Smith, 22–97; Berkey v. Judd, 22–287; Humphrey v. Carpenter, 39–115, 39+67; Lewis v. Welch, 47–193, 48+608; Morrill v. Little Falls Mfg. Co., 53–371, 55+547; Duxbury v. Boice, 70–113, 72+838; First Nat. Bank v. Strait, 71–69, 73+645; Id., 75–396, 78+101; Johnston v. Johnston, 107–109, 119+652. See Sage v. St. P. etc. Ry., 44 Fed. 817; St. P. etc. Ry. v. Sage, 49 Fed. 315.

[60] Berkey v. Judd, 22–287; Duxbury v. Boice, 70–113, 72+838. See St. Paul etc. Ry. v. Sage, 49 Fed. 315.

[61] Brasie v. Mpls. B. Co., 87–456, 92+340. See § 3890.

[62] See § 5660.

[63] Mower County v. Smith, 22–97.

[64] Cock v. Van Etten, 12–522(431).

[65] Morrill v. Little Falls Mfg. Co., 53–371, 55+547.

[66] Lewis v. Welch, 47–193, 48+608.

[67] Duxbury v. Boice, 70–113, 72+838; Brasie v. Mpls. B. Co., 87–456, 92+340.

[68] McMillan v. Cheeney, 30–519, 16+404.

[69] St. Paul etc. Ry. v. Sage, 49 Fed. 315.

[70] Johnston v. Johnston, 107–109, 119+652.

[71] R. L. 1905 § 4076(7); Woodworth v. Carroll, 104–65, 70, 112+1054.

[72] Johnston v. Johnston, 107–109, 119+652.

until the trustee has neglected to discharge the trust, or has repudiated his trust, or has fully performed the same. It simply recognizes the equity rule, and fixes definitely the time within which such actions must be brought after they accrue. Like the equity rule which it follows, the statute applies only to express, technical, and continuing trusts. It has no application to cases of implied trusts and those which the law forces on a party. In such cases the statute of limitations runs from the time the act was done by which the party became chargeable as trustee by implication; that is from the time when the cestui que trust could have enforced his right by action. If the statute was not permitted to operate where an implied trust exists, the exceptions would be endless, as in fact every case of deposit or bailment, in certain sense, creates a trust, and the instances in which an implied trust may be raised are almost innumerable.[73] The mere fact that a contract creates a relation in the nature of a trust, or that the action to enforce the obligations growing out of such contract is of an equitable nature, does not bring the action within this section of the statute.[74] In the case of express trusts, unless repudiated, the statute does not run. The equitable doctrine of diligence applies. Where there is fraud of which the plaintiff is ignorant, or a trust is shown to have been entered on and kept on foot, or acknowledged and acted on, so that a denial of it would work a fraud, the statute will not be set in motion until notice of the facts constituting the fraud or a denial of the trust.[75] Express trusts are created by contracts and agreements which directly and expressly point out the persons, property and purposes of the trust. Implied trusts are those which the law implies from the language of the contract and the evident intent and purpose of the parties.[76]

5654. Actions for personal injury—Negligence—Actions for personal injury resulting from negligence may generally be brought within six years.[77] If they are against a municipality they must be brought within one year.[78]

5655. Actions for various torts—The statute provides that actions "for libel, slander, assault, battery, false imprisonment, or other tort resulting in personal injury," shall be brought within two years.[79] An action for false imprisonment falls within this provision,[80] and so does an action for wrongfully securing a person to be placed in the state insane asylum.[81] An action for personal injury resulting from negligence does not.[82] The actions for battery which fall within this provision are those founded on an intentionally administered injury to the person—such an injury as could be made the basis of a criminal prosecution.[83]

5656. Actions on statutory liabilities—The statute provides that an action "upon a liability created by statute, other than those arising upon a penalty or forfeiture," shall be commenced within six years.[84] The statute is inapplicable to an action by the state under Laws 1895 c. 163 to recover for timber cut

[73] Dole v. Wilson, 39–330, 40+161; Stillwater etc. Ry. v. Stillwater, 66–176, 68+836. See Burk v. Western L. Assn., 40–506, 42+479 (an action to enforce an implied trust improperly held to come within this section), and Naddo v. Bardon, 47 Fed. 782.

[74] McClung v. Capehart, 24–17.

[75] Randall v. Constans, 33–329, 23+530; Smith v. Glover, 44–260, 46+406; Donahue v. Quackenbush, 62–132, 64+141; Thompson v. Crosby, 62–324, 64+823; Wilson v. Welles, 79–53, 81+549; Lamberton v. Youmans, 84–109, 86+894; Johnston v. Johnston, 107–109, 119+652.

[76] Wilson v. Welles, 79–53, 81+549.

[77] R. L. 1905 § 4076(5); Brown v. Heron Lake, 67–146, 69+710; Ackerman v. Chi. etc. Ry., 70–35, 72+1134; Ott v. G. N. Ry., 70–50, 72+833.

[78] R. L. 1905 § 768.

[79] R. L. 1905 § 4078(1).

[80] Bryant v. Am. S. Co., 69–30, 71+826.

[81] Langer v. Newmann, 100–27, 110+68.

[82] See § 5654.

[83] Ott v. G. N. Ry., 70–50, 72+833.

[84] R. L. 1905 § 4076(2).

by trespassers on state lands.[85] Prior to Laws 1902 c. 2 § 82, it was applicable to liability for taxes,[86] and prior to Laws 1902 c. 2 § 61, it was applicable to an action for the recovery of money paid at a void tax sale.[87] It is applicable to the liability of stockholders and directors of corporations under R. L. 1905 § 2865.[88] It is inapplicable to curative statutes legalizing municipal obligations which the municipality had attempted to create, but did not by reason of informalities not affecting substantial rights.[89] Various actions have been suggested as probably falling under this statute.[90]

5657. Actions for penalties and forfeitures—An action under a statute for a penalty or forfeiture to the party aggrieved must be brought within three years.[91] An action for a penalty or forfeiture to the state must be brought within two years.[92] An action for a penalty given to a prosecutor must be brought within one year.[93]

5658. Actions against sureties on official bonds—The statute provides that actions against sureties upon the official bond of any public officer, whether of the state or of any county, town, school district, or municipality therein, shall be commenced within six years; and that the limitation shall not begin to run until the term of the officer has expired.[94]

PLEADING

5659. Demurrer—It seems still to be the law in this state that if it conclusively appears on the face of a complaint that the cause of action therein alleged is barred by the statute of limitations a general demurrer will lie.[95] But inasmuch as it is unnecessary to negative in a complaint all the exceptions which prevent the running of the statute it is rare indeed that a complaint is demurrable on this ground,[96] except in actions for fraud.[97] To hold that a demurrer will lie is wrong on principle.[98]

5660. Anticipating defence in complaint—Negativing exceptions—Fraud—We have an absurd rule in this state that in an action for fraud

[85] State v. Buckman, 95–272, 104+240; State v. Bonness, 99–392, 109+703.

[86] See § 9525.

[87] See § 9500.

[88] Flowers v. Bartlett, 66–213, 68+976 (overruling Merchants' Nat. Bank v. N. W. etc. Co., 48–349, 51+117).

[89] Thornton v. East Grand Forks, 106–233, 118+834.

[90] Merchants' Nat. Bank v. N. W. etc. Co., 48–349, 51+117; Stillwater etc. Ry. v. Stillwater, 66–176, 68+836.

[91] R. L. 1905 § 4077(2). This provision is not applicable to an action to enforce the liability of stockholders and directors of corporations under R. L. 1905 § 2865. Nat. New Haven Bank v. N. W. etc. Co., 61–375, 63+1079 (overruling Merchants' Nat. Bank v. N. W. etc. Co., 48–349, 51+117); Flowers v. Bartlett, 66–213, 68+976; Rice v. Madelia etc. Co., 78–124, 80+853. An action by the state to recover for the value of timber cut by trespassers on state lands brought under Laws 1895 c. 163 falls within this provision. State v. Buckman, 95–272, 104+240, 289; State v. Bonness, 99–392, 109+703. See State v. Rat Portage L. Co., 106–1, 115+162, 117+922. An action in conversion brought by the state to recover the value of timber cut on state lands contrary to a permit does not fall within this provision. State v. Rat Portage L. Co., 106–1, 115+162, 117+922.

[92] R. L. 1905 § 4078(2). An action by the state to recover for the value of timber cut by trespassers on state lands brought under Laws 1895 c. 163 does not fall within this provision. State v. Buckman, 95–272, 104+240; State v. Bonness, 99–392, 109+703. An action in conversion brought by the state to recover the value of timber cut on state lands contrary to a permit does not fall within this provision. State v. Rat Portage L. Co., 106–1, 115+162, 117+922.

[93] R. L. 1905 § 4080; State v. Buckman, 95–272, 104+240.

[94] R. L. 1905 § 4076(8); Adams v. Overboe, 105–295, 117+496. See Itasca County v. Miller, 101–294, 112+276.

[95] Thornton v. East Grand Forks, 106–233, 118+834.

[96] Trebby v. Simmons. 38–508, 38+693; Henkel v. Pioneer S. & L. Co., 61–35, 63+243; Itasca County v. Miller, 101–294, 112+276.

[97] See § 5660.

[98] See 12 Harv. L. Rev. 355; 14 Id. 623.

brought more than six years after the fraudulent acts it is necessary for the plaintiff to allege in his complaint that he did not discover the fraud until within six years before the commencement of the action, and if he fails to do so the complaint is subject to a general demurrer.[99] This rule is opposed to the general principle that a complaint need not anticipate and negative permissible defences,[1] and to a recent holding by the supreme court that the statute of limitations is an affirmative defence and the plaintiff is not required to negative all exceptions which prevent the running of the statute.[2] It is permissible to allege in a complaint facts taking the case out of the statute.[3]

5661. Waiver by not pleading—The statute of limitations is an affirmative defence and is ordinarily waived unless asserted by answer.[4] If a party answers and does not plead the statute, and goes to trial without invoking it, he waives it, even though it conclusively appears on the face of the complaint that the cause of action is barred.[5] If a party does not answer or demur he may, perhaps, on an appeal from a default judgment, raise the objection that it conclusively appears on the face of the complaint that the cause of action is barred.[6] These rules apply to equitable as well as legal actions.[7]

5662. Negativing exceptions—In pleading the statute of limitations it is unnecessary to negative exceptions thereto.[8] It is unnecessary for the plaintiff to negative exceptions in his complaint.[9]

5663. Part payment—An allegation in a complaint is sufficient which alleges an indebtedness and part payments thereon at such times as would prevent the statute from operating as a bar to the cause of action. Words or acts indicating that the debtor acknowledged that more was due and would be paid need not be alleged. The rule that part payment of a debt will not take the case out of the statute unless the payment be made under circumstances which will warrant the jury in inferring therefrom a promise to pay the residue is one of evidence and not of pleading. It is unnecessary to plead implied promises.[10]

5664. Amendment of complaint—An amended complaint has been held not to allege a new cause of action which would be barred by the running of the statute subsequent to the filing of the original complaint.[11]

5665. Reply—Where the complaint alleges the date when a cause of action accrued, showing that it was within the time within which, under the statute of limitations, an action may be brought, and the answer alleges that the cause of action did not accrue within that time, a reply is unnecessary.[12] A reply to a plea of the statute simply alleging that the cause of action did arise within six years from the commencement of the action has been held sufficient.[13]

[99] Humphrey v. Carpenter, 39–115, 39+67; Burk v. Western L. Assn., 40–506, 42+479; Morrill v. Little Falls Mfg. Co., 53–371, 55+547; Id., 60–405, 62+548; Duxbury v. Boice, 70–113, 72+838; Brasie v. Mpls. B. Co., 87–456, 92+340; Mpls. T. M. Co. v. Jones, 89–184, 94+551.

[1] See § 7535.

[2] Itasca County v. Miller, 101–294, 112+276. See 14 Harv. L. Rev. 623.

[3] Hoyt v. McNeil, 13–390(362).

[4] Itasca County v. Miller, 101–294, 112+276.

[5] Hardwick v. Ickler, 71–25, 73+519; Gilbert v. Hewetson, 79–326, 82+655; Schmitt v. Hager, 88–413, 93+110. See Savage v Madelia etc. Co., 98–343, 108+296.

[6] See Trebby v. Simmons, 38–508, 38+693 and cases cited; Hardwick v. Ickler, 71–25, 73+519. It might well be held that a party waives the defence by failing to move to open the default.

[7] Schmitt v. Hager, 88–413, 93+110.

[8] McMillan v. Cheeney, 30–519, 16+404.

[9] Itasca County v. Miller, 101–294, 112+276.

[10] Oevermann v. Loebertmann, 68–162, 70+1084. See Kennedy v. Williams, 11–314(219); Davenport v. Short, 17–24(8).

[11] Bruns v. Schreiber, 48–366, 51+120.

[12] West v. Hennessey, 58–133, 59+984.

[13] Barnsback v. Reiner, 8–59(37).

5666. Defence of statute "new matter"—The statute of limitations is an affirmative defence to be pleaded in the answer as "new matter." [14]

5667. Foreign statutes—Foreign statutes of limitation must be pleaded and proved as facts.[15]

LIMITED PARTNERSHIPS—See Partnership.
LINSEED OIL—See Adulteration, 101.
LIQUIDATED DAMAGES—See Damages, 2536–2538.

LIS PENDENS

Cross-References

See Abatement and Revival (pendency of another action); Mechanics' Liens, 6103.

5668. General doctrine at common law—At common law purchasers and incumbrancers pendente lite took subject to the judgment finally entered in the action, regardless of good faith, notice, or valuable consideration.[16]

5669. Statutory notice of lis pendens—The statute provides for the filing of a notice of lis pendens in certain actions relating to realty.[17] Purchasers and incumbrancers pendente lite are not charged with notice of the action unless the statutory notice is filed.[18] The notice operates only from the date of its filing; it does not operate retroactively. It is notice only to persons acquiring rights pendente lite, or after judgment. Persons claiming under conveyances made prior to the filing of the notice, but not recorded until thereafter, are unaffected by it.[19] A subsequent judgment does not give a notice retroactive force.[20] A notice advises parties to an uncompleted transaction concerning the premises described in it, of the pendency of the controversy.[21] It was held, prior to Laws 1907 c. 332, that a notice filed before the service of summons or before the commencement of publication thereof was a nullity.[22] A notice filed in an improper action is a nullity. A notice filed in a proper action cannot be canceled by order of court, on motion or otherwise, so long as the action is pending and undetermined. But a notice filed in an improper action, or an insufficient notice filed in a proper action, may be canceled by the court on motion in the action.[23] The office of a notice of lis pendens is merely to charge subsequent purchasers and incumbrancers with notice of the pendency of the action.[24] It has the effect of preserving the rights and equities of the party filing it to the premises.[25] It has no greater effect than

[14] Davenport v. Short, 17–24(8); Hardwick v. Ickler, 71–25, 73+519; Itasca County v. Miller, 101–294, 112+276.

[15] Hoyt v. McNeil, 13–390(362); Way v. Colyer, 54–14, 55+744; Mowry v. McQueen, 80–385, 83+348.

[16] Steele v. Taylor, 1–274(210); Hart v. Marshall, 4–294(211); Conkey v. Dike, 17–457(434, 440); Jorgenson v. Mpls. etc. Ry., 25–206; Banning v. Sabin, 51–129, 137, 53+1; Moulton v. Kolodzik, 97–423, 107+154. See Montgomery v. McEwen, 9–103(93, 97).

[17] R. L. 1905 § 4389; Laws 1907 c. 332.

[18] Jorgenson v. Mpls. etc. Ry., 25–206; West Missabe L. Co. v. Berg, 92–2, 99+209.

[19] Bennett v. Hotchkiss, 20–165(148); Johnson v. Robinson, 20–170(153); Jorgenson v. Mpls. etc. Ry., 25–206; Windom v. Schuppel, 39–35, 38+757; Shepherd v. Ware, 46–174, 48+773; West Missabe L. Co. v. Berg, 92–2, 99+209; Moulton v. Kolodzik, 97–423, 107+154.

[20] West Missabe L. Co. v. Berg, 92–2, 99+209.

[21] Moulton v. Kolodzik, 97–423, 107+154.

[22] Spencer v. Koell, 91–226, 97+974. See Hokanson v. Gunderson, 54–499, 56+172; Joslyn v. Schwend, 89–71, 74, 93+705.

[23] Joslyn v. Schwend, 89–71, 93+705.

[24] Jewett v. Iowa L. Co., 64–531, 67+639; Joslyn v. Schwend, 89–71, 74, 93+705.

[25] Lebanon S. Bank v. Hollenbeck, 29–322, 13+145. See Hill v. Rasicot, 34–270, 25+604.

the pendency of the action would have had prior to the statute.[26] Certain proof of the publication of a notice of lis pendens has been held sufficient.[27] The statute applies to an action in a federal court.[28]

5670. Duration—It is generally held that an appeal continues the lis pendens until final judgment on the appeal. The rule at common law, as well as in chancery, was that the lis pendens terminated with the final judgment or decree. A writ of error or a bill of review, which were new actions, constituted a new lis pendens which, however, would not affect purchasers between the date of the final judgment or decree and the date of serving out the writ or of filing the bill. Under R. L. 1905 § 4160 an action is, after final judgment, still under the control of the court for the purposes of that section, yet the action is not pending (at least after the time for appealing has expired), so as to render a purchaser from a party to the action of property the title of which is affected by the judgment a purchaser pendente lite.[29] One who takes a conveyance of the premises from the party in whom title is adjudged in ejectment holds his title subject to the rights and equities of the party filing the notice of lis pendens, from the time of filing until the final determination of the second trial.[30]

5671. Purchaser with actual notice—A purchaser or incumbrancer pendente lite, with actual notice of the pendency of the action, takes subject to the final judgment in the action, regardless of a statutory notice.[31]

LITERARY PROPERTY

5672. Title—Publication—The author of unpublished literary work has a property right in it which the law protects. Others cannot copy or publish it without his consent.[32] This right is not lost by a limited, private circulation.[33]

LITIGATION—See note 34.

LIVERY STABLE KEEPER

5673. Lien for services—At common law a livery stable keeper has no lien on horses or vehicles left with him for care.[35] In this state he is given a lien by statute,[36] and the statute has been held constitutional though it gives the lien precedence over a pre-existing chattel mortgage,[37] and is applicable to exempt property.[38] Possession is essential to the lien. If the keeper voluntarily surrenders possession of the property his lien is gone.[39] The statute has been held not to give a lien to a groom hired by the owner.[40]

LIVE STOCK INSURANCE—See Insurance, 4860.
LIVING ISSUE—See note 41.

[26] Conkey v. Dike, 17-457(434, 441).
[27] Inglee v. Welles, 53-197, 55+117.
[28] U. S. v. Chi. etc. Ry., 172 Fed. 271.
[29] Aldrich v. Chase, 70-243, 73+161.
[30] Voight v. Woll, 124+446.
[31] Dorr v. Steichen, 18-26(10, 16).
[32] Banker v. Caldwell, 3-94(46). See 4 Harv. L. Rev. 198; 12 Id. 553; 20 Id. 143.
[33] Chamber of Com. v. Wells, 100-205, 111+157. See 17 Harv. L. Rev. 266.
[34] Manuel v. Fabyanski, 44-71, 46+208.
[35] Skinner v. Caughey, 64-375, 67+203.
[36] R. L. 1905 §§ 3521-3523; Laws 1905 c. 328.
[37] Smith v. Stevens, 36-303, 31+55. See, as to precedence over chattel mortgage, Petzenka v. Dallimore, 64-472, 67+365.
[38] Flint v. Luhrs, 66-57, 68+514.
[39] Ferriss v. Schreiner, 43-148, 44+1083.
[40] Skinner v. Caughey, 64-375, 67+203.
[41] Hemenway v. Draper, 91-235, 97+874.

LOAN BROKERS—See Brokers, 1129.
LOBBYING—See Contracts, 1871.
LOCAL—See note 42.
LOCAL ACTIONS—See Venue.
LOCAL GOVERNMENT—See Constitutonal Law, 1601.
LOCAL IMPROVEMENTS—See Municipal Corporations, 6850.
LOCAL OPTION—See Intoxicating Liquors, 4906.
LOCUS PENITENTIAE—See note 43.
LOGGING DAMS—See Logs and Logging, 5697.
LOG ROLLING—See Constitutional Law, 1676.

[42] State v. Dist. Ct., 33-295, 310, 23+222. [43] Graham v. Burch, 53-17, 22, 55+64.

LOGS AND LOGGING

Cross-References

See Navigable Waters, 6943; Woods and Forests.

CONTRACTS AND CONVEYANCES

5674. Sale of logs—It is provided by statute that no sale, transfer, or incumbrance of any logs or timber cut in this state shall be binding on persons not parties thereto, unless the same is in writing and duly filed for record with the proper surveyor general.[44] The sale of logs is governed by the general rules applicable to sales of personalty in general. Cases are cited below involving the construction of particular contracts of sale.[45]

[44] R. L. 1905 § 2578.

[45] Brewster v. Leith, 1–56(40) (symbolical delivery); Martin v. Hurlbut, 9–142(132) (executory contract); Gaslin v. Pinney, 24–322 (statute of frauds—contract for designated scaler); Jesmer v. Rines, 37–477, 35+180 (executory contract—stipulation as to scaling at particular place); Clarke v. Hall, 41–105, 42+785 (effect of custom); Haven v. Neal, 43–315, 45+612; Id., 51–94, 52+1069 (fraud); Ostrander v. Everest, 44–419, 47+54 (priority between two buyers); Douglas v. Leighton, 53–176, 54+1053 (stipulated mode of performance waived); Gasper v. Heimbach, 53–414, 55+559 ("logs to be "boomed and delivered to tug"—parol evidence inadmissible to vary contract); Id., 59–102, 60+1080 (verdict for plaintiff not justified by the evidence); St. Anthony L. Co. v. Bardwell, 60–199, 62+274 (acceptance held question for jury—quality of logs—measure of damage for inferior quality); Staples v. O'Neal, 64–27, 65+1083 (stipulation as to time of arrival of logs in a boom—contract held not lacking in mutuality); Matthews v. Hershey, 65–372, 67+1008 (delivery); Graves v. Backus, 69–532, 72+811 (modification of contract as to place of delivery); Watts v. Howard, 70–122, 72+840 (authority of agent); Day v. Gravel, 72–159, 75+1 (executory contract); Beatty v. Howe, 77–272, 79+1013 (payment in instalments—breach); State v. Meehan, 92–283, 100+6 (executory contract); Mead v. Rat Portage L. Co.,

5675. Sale of standing timber—Conveyance of timbered land—License to cut timber—An instrument which grants the right to enter upon land and cut timber standing thereon at any time within a specified period is a conveyance of an interest in the land, and not a license revocable at will.[46] Standing timber is as much a part of the realty as the soil itself or stone in a quarry. A purchaser of standing timber for a valuable consideration from the owner of the land acquires a vested interest in such land when the transfer is evidenced by a duly executed instrument transferring the same, and authorizing said purchaser to cut and remove the timber within a fixed time. The same rules as to recording such instruments apply as in other conveyances of realty. A person purchasing land after the execution by the owner of an instrument conveying the timber thereon to a third person, and who enters into possession prior to the cutting of the timber, without actual or constructive notice of such sale, acquires a paramount interest in such timber.[47] Under the terms of a contract whereby defendant was to have until a certain time to cut and remove logs from plaintiff's land, a portion thereof were cut before the limitation provided for in the contract expired, but were not removed until six months afterwards. It was held that upon the failure to remove the logs before the time limited, the title thereof did not revert to and become reinvested in the owner of the land; that the title to the logs cut after the time limited was in the owner of the land, who might recover the same; and that the extent of the remedy in favor of the landowner for the logs cut within the limitation were such damages as he might have sustained by reason of the trespass and occupation of his land.[48] The grant of all of the pine on a tract of land, which is inaccessible except over other land of the grantor or that of strangers, with the right to enter and remove the timber, carries by implication a right of way for that purpose over such other land of the grantor.[49] Cases are cited below involving the construction of various contracts and licenses relating to the cutting of timber.[50]

5676. Contracts for cutting, hauling, and banking logs—Cases are cited below involving the construction of particular contracts for cutting, hauling, and banking logs.[51]

93–343, 101+299 (partial delivery—damages); Graves v. Bonness, 97–278, 107+163 (action for balance due on sale—verdict for plaintiff justified by the evidence); Id., 104–135, 116+209 (new trial granted).

[46] Pine County v. Tozer, 56–288, 57+796; Clark v. Richards, 68–282, 71+389; Bolland v. O'Neal, 81–15, 83+471; Neils v. Hines, 93–505, 101+959. See St. John v. Sinclair, 108–274, 122+164.

[47] Neils v. Hines, 93–505, 101+959.

[48] Alexander v. Bauer, 94–174, 102+387.

[49] Pine Tree L. Co. v. McKinley, 83–419, 86+414.

[50] Scheffer v. Tozier, 25–478 (party held not entitled to recover for logs cut on land which he did not own—application of payments); King v. Merriman, 38–47, 35+570 (right, privilege, and permission to enter and cut—right to cut limited to two logging seasons); Mathews v. Mulvey, 38–342, 37+794 (executed sale of timber—condition subsequent—taxes to be paid by purchaser—attempted purchase from the state held a payment); Clark v. Richards, 68–282, 71+389 (sale of standing timber—retaining title—recording agreement); Caughie v. Brown, 88–469, 93+656 (license to cut trees—ownership of land); Grand Forks L. Co. v. McClure, 103–471, 115+406 (statute of frauds—breach of contract); St. Paul etc. Ry. v. Blackmar, 44–514, 47+172 (contract for sale of timbered land); Holmes v. Park Rapids L. Co., 108–196, 121+877 (land acquired by mixed-blood Indians as an additional allotment—timber deed—time to cut and remove timber); St. John v. Sinclair, 108–274, 122+164 (license to cut and remove timber—revocation). See Stitt v. Rat Portage L. Co., 96–27, 104+561; Id., 104–347, 116+643 (mortgage).

[51] Leighton v. Grant, 20–345(298) (stipulation for scaling by surveyor general); Elmier v. Brant, 48–258, 51+284 (controversy as to number of feet); Shepard v. Carpenter, 54–153, 55+906 (negotiations for a contract—material terms left for future agreement—no contract); Revor v. Bagley, 76–326, 79+171 (action for services—verdict for plaintiff justified by the

5677. Contracts for sawing logs—Cases are cited below involving the construction of particular contracts for sawing logs.[52]

5678. Contract for cutting timber on government land—Deposit—Plaintiffs deposited with the Treasury Department of the United States a sum of money as security for the performance of a contract given them for cutting certain standing pine timber upon government land. They assigned the contract to defendant, in consideration of which defendant agreed to repay them the amount of such deposit whenever the government should permit the same to be applied in payment for timber cut under the contract. The proper department of the government adopted a rule that money so deposited might be applied annually, in proportion to the amount of timber cut upon procuring the consent of the contractor's surety. It was held that the contract imposed upon defendant the obligation of repayment to plaintiffs so soon as the deposit could, by rule of the government, be resorted to in whole or in part for the purpose stated; and that it was defendant's duty to obtain the consent of the surety to such application.[53]

5679. Grants of boomage and shore rights—Cases are cited below involving the construction of grants of boomage and shore rights.[54]

LOG MARKS

5680. Recording—Evidence of title—Statute—The statute provides for the recording of log marks and makes a recorded mark on logs prima facie evidence of title to the logs in the owner of the mark.[55] It is not conclusive evidence of title.[56] A former statute, making the recording of log marks compulsory, was held inapplicable to logs on land in the actual possession of the owner.[57]

5681. Transfer—Necessity of recording—The statute provides that no transfer of a log mark shall be binding on persons not parties thereto, unless the same is in writing and duly filed for record with the proper surveyor general.[58] The statute is not intended to protect a mere stranger or trespasser, who has no show of right beyond what arises from his unlawful appropriation or possession.[59]

5681a. Unmarked logs—Floating—Title—Under R. L. 1905 § 2580, unmarked logs floating in the St. Croix river, though within the jurisdiction of the St. Croix Boom Company, become the property of the person who picks them up and causes them to be properly marked with his own mark before they reach the boom or sorting works of the company. No title to unmarked logs vests in the boom company under the provisions of its charter until they are driven or float into its booms or works.[60]

evidence); Boyle v. Musser, 77-206, 79+659 (scale of surveyor general conclusive); Beatty v. Howe, 77-272, 79+1013 (payment in instalments—effect of breach); Porteous v. Com. L. Co., 80-234, 83+143 (agreement for rescale—consideration); Boyle v. Musser, 86-160, 90+319 (option as to scale—annual settlement); Stitt v. Rat Portage L. Co., 92-365, 100+1125 (verdict for plaintiff sustained); Nelson v. Mashek, 95-217, 103+1027 (modification of contract as to place of delivery—effect on place of scaling—conspiracy between logging contractor and deputy scaler); Blake v. Bonness, 103-532, 115+1133 (action for breach of contract—verdict for plaintiff sustained).

[52] Minneapolis M. Co. v. Goodnow, 40-497, 42+356 (contract held not invalid for want of mutuality); Bergloff v. Mille Lacs L. Co., 47-564, 50+829 (issue as to capacity of mill).

[53] Yanish v. Neils, 101-78, 111+921.

[54] Farrand v. Clarke, 63-181, 65+361; Rasicot v. Little Falls I. & N. Co., 65-543, 68+212.

[55] R. L. 1905 § 2579.

[56] Fox v. Ellison, 43-41, 44+671.

[57] Plummer v. Mold, 14-532(403); Stanchfield v. Sartell, 35-429, 29+145.

[58] R. L. 1905 § 2578.

[59] Gaslin v. Bridgman, 26-442, 4+1111.

[60] Astell v. McCuish, 124+458.

SCALING

5682. Necessity of official scaling—The law does not require an official scaling of logs upon a private sale thereof.[61] The provisions of G. S. 1878 c. 32 tit. 3 § 25, providing for compulsory official scaling of logs in Lake St. Croix, were constitutional.[62]

5683. Scale bills as evidence—Official scale bills of the surveyor general or his deputy, and the record and certified copies thereof, are by statute made prima facie evidence of the facts recited therein.[63] They are not exclusive evidence of the survey;[64] and they are not conclusive evidence, in the absence of express agreement to that effect.[65] Where a witness producing a scale bill testifies that it is the original scale bill of the surveyor general, this is sufficient to render it admissible as prima facie evidence of the facts recited therein, though it has not the official seal of the surveyor general attached to it, and does not show on its face that the scaler was his deputy.[66] A scale bill showing on its face that part of the logs were "averaged," instead of being "scaled on the bank," as provided by the agreement of the parties, has been held inadmissible.[67] A scale bill made at a point far down the driving stream from the agreed destination, has been held inadmissible to prove a failure to drive the logs to the agreed destination.[68]

5684. Impeachment of scale bills—In the absence of a contrary agreement a scale bill may be impeached for mistake without a showing of fraud or bad faith.[69]

5685. Private scaler—Scale bill as evidence—The person appointed by a corporation organized under Laws 1883 c. 138, to examine weights, scales, and measures, and to weigh, gauge, or inspect flour, produce, etc., may be authorized by the corporation to measure or scale logs afloat, and his certificate (if he be so authorized) of the measurement or scale of logs will be evidence between the members of the corporation, and between others assenting thereto, in the manner prescribed in the act.[70]

5686. Secondary evidence—It has been held competent to prove by the testimony of a deputy surveyor general that he made a survey, and the result thereof.[71]

5687. Rescaling—An agreement for a rescaling has been sustained against an objection that it was without consideration.[72]

5688. Contracts relating to scaling—Cases are cited below involving the construction of particular contracts relating to the scaling of logs.[73]

[61] Leighton v. Grant, 20-345(298).

[62] Hospes v. O'Brien, 24 Fed. 145.

[63] R. L. 1905 §§ 2567, 2571, 2576; Leighton v. Grant, 20-345(298); Clark v. Nelson, 34-289, 25+628; Libby v. Johnson, 37-220, 33+783; Porteous v. Com. L. Co., 80-234, 83+143; Glaspie v. Keator, 56 Fed. 203; Lindsay v. Mullen, 176 U. S. 126.

[64] Antill v. Potter, 69-192, 71+935.

[65] Leighton v. Grant, 20-345(298); Jesmer v. Rines, 37-477, 35+180; Boyle v. Musser, 77-206, 79+659; Nelson v. Betcher, 88-517, 93+661; Id., 96-76, 104+833; Nelson v. Mashek L. Co., 95-217, 103+1027.

[66] Glaspie v. Keator, 56 Fed. 203.

[67] Pratt v. Ducey, 39-517, 38+611. See Douglas v. Leighton, 53-176, 54+1053.

[68] Itasca L. Co. v. Gale, 62-356, 64+916.

[69] Nelson v. Betcher, 88-517, 93+661. See Boyle v. Musser, 77-206, 79+659.

[70] State v. Lumbermen's Board of Exchange, 33-471, 23+838.

[71] Antill v. Potter, 69-192, 71+935.

[72] Porteous v. Com. L. Co., 80-234, 83+143.

[73] Leighton v. Grant, 20-345(298) (stipulation making scale of surveyor general conclusive); Gaskin v. Pinney, 24-322 (sale of logs with stipulation for scaling by a particular person—duty of buyer to secure scaling by such person); Jesmer v. Rines, 37-477, 35+180 (stipulation for scaling in a certain boom); Pratt v. Ducey, 38-517, 38+611 (sale of logs—logs to be "scaled on the bank" by the surveyor general); Douglas v. Leighton, 53-176, 54+1053 (sale of logs—logs to be

5689. Fees of surveyor general—The fees of the surveyor general for scaling are prescribed by statute.[74]

DRIVING, FLOATING, RAFTING, AND BOOMING LOGS

5690. Definition of boom—The word "boomage" is a term of rather indefinite meaning. The usual definition of a boom is an inclosure formed upon the surface of a stream or other body of water by means of spars, for the purpose of collecting or storing logs or timber. They are usually formed by extending a series of spars for some distance at right angles to the shore, and then continuing them up stream parallel to the shore, leaving the upper end open. As the logs float down stream, they are guided into the boom, and there arrested and held.[75]

5691. Boom companies—Powers and liabilities—Booms and piers—The legislature may authorize a corporation to construct and maintain booms in a stream within certain limits, and to receive and take entire control of all logs coming within such limits, to boom, scale, and deliver them to the owners and to collect boomage charges therefor. Such corporations are of a quasi public nature.[76] Their incorporation is authorized by general statute.[77] Their duties are prescribed by their charters or the general statute.[78] The degree of care over logs of others in its possession required of a boom company is that degree of care which an ordinarily prudent man, in charge of his own property, would exercise. Its liability is not as extensive as that of a common carrier. When a plaintiff, suing for loss, by negligence, of his logs, has shown them to have come into the charge of a boom company, and that on demand they were not redelivered to him, the defendant, to discharge itself, must prove that

scaled on the bank—duty of seller to bank logs for scaling—certain logs "averaged" instead of scaled—conclusiveness of "averaged" scale bill—waiver of objection to averaging instead of scaling); Watts v. Howard, 70–122, 72+840 (authority of agent to buy logs to agree as to scaling); Boyle v. Musser, 77–206, 79+659 (stipulation that surveyor general's scale be conclusive); Porteous v. Com. L. Co., 80–234, 83+143 (stipulation for scaling by scaler agreeable to both parties—rescaling); Carver v. Crookston L. Co., 84–79, 86+871 (agreement for scaling by deputy surveyor general not of the district in which the logs were cut and banked); Boyle v. Musser. 86–160, 90+319 (logging contract—option as to scale—annual settlement); Nelson v. Betcher, 88–517, 93+661; Id., 96–76, 104+833 (sale of logs in river at Minneapolis—agreement for scaling by surveyor general at St. Paul—scale subject to impeachment for mistake without a showing of fraud or bad faith); Nelson v. Mashek L. Co., 95–217, 103+1027 (agreement for scaling at time of loading logs on cars—modification of contract without mentioning scaling).

[74] R. L. 1905 § 2574. See Merritt v. Knife Falls B. Corp., 34–245, 25+403 (Sp. Laws 1872 c. 106 § 3, providing a special scale of fees for a particular boom company, held not unconstitutional as partial and unequal); Lovejoy v. Itasca L. Co., 46–216, 48+911 (double recovery of fees denied—effect of usage to exact and pay illegal fees); O'Brien v. St. Croix B. Corp., 75–343, 77+991 (title of Sp. Laws 1870 c. 116, relating to fees to be paid by the defendant for scaling, held sufficient); Brown v. Potter, 81–4, 83+457 (action by surveyor for fees—counterclaim for damages caused by failure to complete scaling—evidence held not to justify verdict); Lindsay v. Mullen, 176 U. S. 126.

[75] Farrand v. Clarke, 63–181, 65+361.

[76] Osborne v. Knife Falls B. Corp., 32–412, 21+704; Miss. etc. Co. v. Prince, 34–79, 24+361; St. Louis Dalles I. Co. v. Nelson, 43–130, 44+1080; Lindsay v. Mullen, 176 U. S. 126.

[77] R. L. 1905 §§ 2933, 2934. See Northwestern I. & B. Co. v. O'Brien, 75–335, 77+989; International B. Co. v. Rainy Lake River B. Corp., 97–513, 107+735; Rainy Lake River B. Corp. v. Rainy River L. Co., 162 Fed. 287 (effect of extending booms into Canadian waters).

[78] See Miss. etc. Co. v. Prince, 34–79, 24+361 (the plaintiff's charter imposed no other or further duty upon it, in respect to logs destined below the Falls of St. Anthony, than to separate and turn them loose in the Mississippi river, and conduct them, by means of a sheer-boom, west of the pier at the head of the dam above the falls, and below the suspension bridge, as directed by section 14 of the charter).

it used the degree of care required of it.[79] A boom company is liable if it unreasonably obstructs the navigation of the stream.[80] It has no right, independent of contract or condemnation, to construct permanent piers and booms opposite the land of a riparian owner in the non-navigable part of a stream and thereby cut him off from access to the navigable part of the stream.[81] It has no right, independent of contract or condemnation, to overflow the property of riparian owners, and if it does so without right, it is liable even though it acted with due care.[82] It is liable if it negligently overflows or otherwise injures such property.[83] A corporation which is authorized by statute to construct booms upon a river for the purpose of holding and storing logs acquires thereby no right to appropriate and use the banks, except by the consent of the owners or in the exercise of the power of eminent domain. This property cannot be taken for a purely private purpose; and the fact that booming companies and companies for the improvement of the navigation are quasi public corporations, and hold their franchises for a public use, does not give them the privileges of a riparian owner, or enable them, by legislative authority, to devote the river banks to the purposes of their charter, without compensation to the riparian owners. Compensation is also necessary where the banks are flooded by public improvements, or by dams erected for the collection and storage of logs, or by a collection of logs in great numbers.[84]

5692. Charges for boomage—Lien—The right to charge tolls does not depend upon the improvement or service having been actually beneficial to the owner in the particular instance.[85] Charges may be authorized not only for particular services, but also to compensate the company for its outlays and expenses in maintaining booms, and for its services in receiving, driving, and assorting logs as required by its charter.[86] To entitle a company organized under the general statute,[87] to collect tolls, it is unnecessary that it take possession of or improve the whole stream, or all thereof not improved by some one else; it is only necessary to take possession of a considerable portion thereof. A company attempted to be organized under the general statute to improve a stream for driving logs, but which is not empowered by its charter to drive or handle logs, cannot collect the tolls provided for by the statute.[88] Under an act authorizing the exaction of tolls on all logs "driven" down a river, it has been held that tolls might be collected on logs driven only by the unaided action of the stream—logs retained in booms above, and not intended to be floated down the stream, but which accidentally escaped from the upper boom, and were carried down in a great freshet.[89] Usage has been held admissible upon an issue as to which one of two parties was bound to pay for

[79] Chesley v. Miss. etc. Co., 39–83, 38+769.

[80] Swanson v. Miss. etc. Co., 42–532, 44+986.

[81] Reeves v. Backus, 83–339, 86+337.

[82] Weaver v. Miss. etc. Co., 28–534, 11+114; Rasicot v. Little Falls I. & N. Co., 65–543, 68+212; Hueston v. Miss. etc. Co., 76–251, 79+92; Gravel v. Little Falls I. & N. Co., 74–416, 77+217; Nelson v. Miss. etc. Co., 99–484, 109+1118; Casey v. Miss. etc. Co., 108–497, 122+376; Funk v. Miss. etc. Co., 108–529, 121+1134. See Cotton v. Miss. etc. Co., 19–497(429); Ramgren v. McDermott, 73–368, 76+47.

[83] Doucette v. Little Falls I. & N. Co., 71–206, 73+847; Coyne v. Miss. etc. Co., 72–533, 75+748; Kretzschmar v. Meehan, 81–432, 84+220; Bowers v. Miss. etc. Co., 78–398, 81+208; Osborn v. Miss. etc. Co., 95–149, 103+879. See Ramgren v. McDermott, 73–368, 76+47; Akin v. St. Croix L. Co., 88–119, 92+537.

[84] Carlson v. St. Louis etc. Co., 73–128, 75+1044.

[85] Osborne v. Knife Falls B. Corp., 32–412, 21+704; Osborne v. Nelson, 33–285, 22+540; Chesley v. De Graff, 35–415, 29+167; St. Louis Dalles I. Co. v. Nelson, 43–130, 134, 44+1080; Lindsay v. Mullen, 176 U. S. 126.

[86] Miss. etc. Co. v. Prince, 34–79, 24+361.

[87] G. S. 1894 § 2633; R. L. 1905 §§ 2933, 2934.

[88] Northwestern I. & B. Co. v. O'Brien, 75–335, 77+989.

[89] St. Louis Dalles I. Co. v. Nelson, 43–130, 44+1080.

boomage.[90] The right to collect tolls depends on the continued existence of the improvements which the company was organized to make.[91] Such companies are generally given a lien for their boomage charges.[92]

5693. Intermingling of logs—Whoever undertakes to float logs in the Mississippi river, or its tributaries, does so subject to the common right of other log owners to a like use of the stream, and to the risk of their being intermingled with the logs of other owners, and also subject to the risk of their being transported beyond the intended place of destination, unless suitable precautions are taken, or there exist suitable facilities, natural or artificial, for separating and stopping them.[93]

5694. Driving intermingled or obstructive logs—Statute—It is provided by statute that "any person desiring to float logs or other timber in any of the streams or waters of this state, and being hindered or obstructed in so doing by the logs or timber of another, or any person whose logs or timber shall become so intermingled therein with those of another as to make it difficult to separate his own without floating all to other waters, may drive all such obstructing or mingled logs or timber, with his own, to some point where the same can conveniently be assorted and his own separated from the mass.[94] This statute is of a remedial nature and to be liberally construed.[95] It is applicable where an artificial supply of water is necessary,[96] and where logs are intermingled by consent, or under a contract for driving the performance of which has been abandoned.[97] If the logs of A are in the way of the logs of B, so that B cannot drive his until A's are got out of the way, B is hindered or obstructed, within the meaning of the statute. To constitute such hindrance or obstruction, it is unnecessary that the logs of B should come in actual contact with those of A.[98] Notice to the person to be charged is unnecessary. A custom cannot affect the statutory liability.[99] The driver must exercise good faith, and ordinary or reasonable care and skill, in the manner and time of making the drive,[1] and he must actually drive the logs. It is not enough for him merely to get them out of his own way, without further effort to keep them afloat in the stream.[2] Where logs belonging to one person are so intermingled with those of other owners that they cannot be conveniently separated till they reach a particular place, such other owners may drive them, in connection with their own logs, to such place, and recover reasonable compensation therefor, under the statute, notwithstanding such logs were required by the owner thereof to be left at an intermediate point.[3] In an action under the statute to recover compensation for driving the logs of A, which had become intermingled with the logs of B, it appeared that B did not drive the intermingled logs to a place where they could be conveniently separated, because, before arriving at such a place, they reached the limits in the river beyond which a boom company was exercising exclusive control in driving all logs floating down the river. The

[90] Clarke v. Hall, 41–105, 42+785.

[91] St. Louis River etc. Co. v. Nelson, 51–10, 52+976.

[92] Clough v. Miss. etc. Co., 64–87, 66+200 (release of lien by extension of time of payment); Akeley v. Miss. etc. Co., 64–108, 67+208 (lien on logs in possession held valid as against bona fide purchasers though not recorded in the office of the surveyor general—effect on lien of partial delivery of logs—waiver); International B. Co. v. Rainy Lake River B. Corp., 97–513, 107+735 (lien under Laws 1889 c. 221—partial delivery—waiver).

[93] Chesley v. De Graff, 35–415, 29+167.

[94] R. L. 1905 § 3535.

[95] Merriman v. Bowen, 33–455, 23+843; Backus v. Scanlon, 78–438, 81+216.

[96] Merriman v. Bowen, 33–455, 23+843; Beard v. Clarke, 35–324, 29+142.

[97] Walker v. Bean, 34–427, 26+232; Beard v. Clarke, 35–324, 29+142.

[98] Anderson v. Maloy, 32–76, 19+387.

[99] Osborne v. Nelson, 33–285, 22+540.

[1] Beard v. Clarke, 35–324, 29+142; Boyle v Musser, 77–153, 79+664. See Itasca L. Co. v. Gale, 62–356, 64+916.

[2] Miller v. Chatterton, 46–338, 48+1109.

[3] Chesley v. De Graff, 35–415, 29+167.

intermingled logs then passed into the control of the boom company, and were driven by it to its booms, where they were separated. It was held that B drove and caused the logs to be driven to a place where they could be separated, and was entitled to recover.[4] Where the logs of various owners have become intermingled in a driving stream, so that they cannot be separated, and an owner fails and neglects to furnish enough men to drive his own, and thus compels another owner, also engaged in driving, to furnish more than his share of men and to perform more than his share of the work of driving the mass of logs to market, the latter may file a lien, maintain an action, and recover reasonable compensation for his services of the former, under the statute. It is immaterial that the owner in fault is also engaged in driving the mass. When logs are intermingled in a driving stream, so that they cannot be separated, one owner cannot arbitrarily and unreasonably put an unnecessary force of men upon the work, simply because he is in haste to float his own logs to market, and recover under the statute. Nor can another log owner unjustly hinder and obstruct the stream with his own drive, by putting on too few men for his own work, and thus prevent a recovery. Good faith and reasonable prudence are demanded of all who have an equal right to use the water.[5] The person liable under the statute is the person in whose name the logs are recorded.[6] The driver is entitled to recover the reasonable value of his services.[7] The compensation is to be measured by the value of the labor performed in driving the logs of the defendant, and not by the value or extent of the benefit thereby conferred.[8] It is proper to estimate the entire expense of driving the logs and to charge the defendant for his pro rata share thereof.[9] The statute gives the driver a lien on the logs for his charges.[10] It does not take away the common-law right of action for injuries resulting from wrongfully causing, or neglecting to remove, an obstruction in the stream, as by logs negligently allowed to become or to remain jammed therein.[11] Certain evidence has been held sufficient to justify a finding that logs were driven to a point where they could be conveniently separated.[12]

5695. Contracts for driving, floating, and sorting logs—Cases are cited below involving the construction of contracts for driving, floating, and sorting logs.[13]

5696. Contracts for towage—Cases are cited below involving the construction of contracts for the towage of rafts of logs.[14]

LOGGING DAMS AND SLUICEWAYS

5697. In general—Provision is made by statute for logging dams and sluiceways.[15] The statute is intended for the benefit and protection of the public and does not limit the easement to logging operations, as to the owners of the submerged land.[16] The right of the public to the use of streams for driving logs is not paramount and unqualified, but subject to the incidental delays and hindrances occasioned by dams, if the means of passage through or around them

[4] Boyle v. Musser, 77–153, 79+664.
[5] Backus v. Scanlon, 78–438, 81+216.
[6] O'Brien v. Glasow, 72–135, 75+7; Boyle v. Musser, 77–153, 79+664.
[7] Anderson v. Maloy, 32–76, 19+387; Chesley v. De Graff, 35–415, 29+167.
[8] Osborne v. Nelson, 33–285, 22+540.
[9] Backus v. Scanlon, 78–438, 81+216.
[10] See § 5707.
[11] Miller v. Chatterton, 46–338, 48+1109.
[12] Osborne v. Nelson, 33–285, 22+540.
[13] Miss. R. Co. v. Ankeny, 18–17(1); Glaspie v. Glassow, 28–158, 9+699; Itasca L. Co. v. Gale, 62–356, 64+916; McGuire v. Neils, 97–293, 107+130.
[14] Miss. R. Co. v. Ankeny, 18–17(1); Pevey v. Schulenburg, 33–45, 21+844; Magee v. Scott, 78–11, 80+781.
[15] R. L. 1905 §§ 2933, 2934, 2547–2551; International B. Co. v. Rainy Lake River B. Corp., 97–513, 107+735; Minn. C. & P. Co. v. Pratt, 101–197, 219, 112+395.
[16] Simons v. Munch, 107–370, 120+373.

is reasonably sufficient for the purpose. What constitutes a sufficient means of passage must depend upon the conditions of each particular case. A dam constructed with sufficient sluiceways to permit the free passage of logs, but which is not equipped with piling or piers to which sheer booms may be attached, or some other means provided by which the logs may be directed to the sluiceways, does not meet the requirements of the statute, and creates an unreasonable hindrance to the passage of logs at periods of high water, when it is difficult and impracticable to attach sheer booms, and guide the logs into the sluiceways, and keep them from running over the crest of the dam.[17] The owner of a sluicing dam operated under a license from the county board is not required to conduct or drive logs, timber, or lumber through the sluiceway. This is no part of the "operation" of the dam within the meaning of the statute. The statute gives the county board no authority to take a bond from the licensee requiring him to conduct or drive logs, timber, or lumber through the sluiceway; and if it should take a bond containing such a condition, it would not be a statutory condition, and hence would be void, and would not inure to the benefit of third persons, or give them any right of action for its non-performance.[18] A license to maintain a sluicing dam has been held not assignable.[19] The statute provides for notice prior to the granting of a license for a logging dam by a county board.[20] The statute providing for a license does not make it unlawful for the owner, without license, to construct across a stream a dam which does not obstruct the free passage of logs, timber, or lumber down such stream, and a contract between the owner of such a dam and the owner of logs for sluicing them over it is valid.[21] If riparian lands are unlawfully flooded by logging dams, damages are recoverable.[22] An owner of a logging dam is liable for negligence in its management resulting in injury to persons driving logs down the stream.[23]

LIENS

5698. Lien for labor—Validity, application, and construction of statute—The statute gives a lien to one performing manual labor or other personal service for hire, in, or in aid of, the cutting, hauling, banking, driving, rafting, towing, cribbing, or booming any logs, cross-ties, poles, or other timber.[24] It has been held constitutional against various objections.[25] It is to be liberally construed.[26] It has been held to give a lien to one furnishing a team and servants.[27] to a camp cook and blacksmith,[28] and to contractors and subcontractors.[29] A former statute was limited to laborers and did not include contractors.[30] Government property is exempt.[31] Under a former statute possession of the property by the party claiming a lien was essential.[32] The lien is purely statutory.[33] A lien may also be acquired under the general statute.[34]

[17] Crookston etc. Co. v. Sprague, 91–461, 98+347, 99+420.
[18] Anderson v. Munch, 29–414, 13+192.
[19] Mille Lacs I. Co. v. Bassett, 32–375, 20+363.
[20] R. L. 1905 § 2548; Lamprey v. Nelson, 24–304.
[21] Lamprey v. Nelson, 24–304; Kretzschmar v. Meehan, 74–211, 77+41.
[22] Gniadek v. N. W. etc. Co., 73–87, 75+894; Ramgren v. McDermott, 73–368, 76+47; Carlson v. St. Louis River etc. Co., 73–128, 75+1044.
[23] O'Brien v. N. W. etc. Co., 82–136, 84+735.
[24] R. L. 1905 § 3524. See § 5579.
[25] Brown v. Markham, 60–233, 62+123; Foley v. Markham, 60–216, 62+125.
[26] Martin v. Wakefield, 42–176, 43+966; Breault v. Archambault, 64–420, 67+348; Carver v. Bagley, 79–114, 81+757.
[27] Martin v. Wakefield, 42–176, 43+966; Breault v. Archambault, 64–420, 67+348.
[28] Breault v. Archambault, 64–420, 67+348.
[29] Carver v. Bagley, 79–114, 81+757.
[30] King v. Kelly, 25–522; Breault v. Archambault, 64–420, 424, 67+348.
[31] Rowley v. Conklin, 89–172, 94+548.
[32] Walsh v. Kattenburgh, 8–127(99); Davis v. Mendenhall, 19–149(113).
[33] Griffin v. Chadbourne, 32–126, 19+647.
[34] See § 5579.

5699. Compliance with statute—The statutory provisions for securing and enforcing the lien must be complied with in all essential particulars.[35] A substantial compliance is sufficient.[36]

5700. Labor performed on logs of different marks—Where the whole of the services are performed under one contract of employment in getting out a single lot of logs, two different marks, however, being put on different portions of them, according to their grade or quality, the laborer may claim and enforce his lien for his entire services upon that part bearing one of these marks.[37]

5701. Assignment of lien—The lien is assignable and enforceable by the assignee,[38] if the assignment is properly recorded.[39]

5702. Lien statement—The statute provides for the filing of a lien statement,[40] and this is essential to the creation of a lien.[41] Inaccuracies in the particulars of the statement are not fatal.[42] If the statement is not made by the claimant personally, it must be made by some one with authority from him to make it, and the verification should show such authority.[43] The provisions of the statute for filing in the surveyor general's office a statement of a claim for driving the logs of another intermingled with those of the plaintiff, have reference only to the continuance and enforcement of a specific lien on the logs. The filing of such a statement is unnecessary for the purpose of maintaining an action for personal judgment against the owner.[44] A lien claimant is entitled to a foreclosure of his lien only to the extent of the indebtedness specified in his lien statement.[45] The statement must contain a description of the logs or timber on which the lien is claimed.[46]

5703. Enforcement—Attachment—The statutory mode of enforcing the lien by attachment is exclusive.[47] The attachment proceedings are governed by R. L. 1905 § 4215, as to the time of issuing the writ, except as modified by R. L. 1905 § 3526. The remedy is provisional, and the issuance of the writ is not jurisdictional. It may issue at the time of issuing the summons, or at any time thereafter, within ninety days from the time of filing the lien.[48] It is not essential that the writ contain a description of the logs to be attached.[49] The return should show everything necessary to constitute a valid levy. A return failing to show that a copy of the writ was filed in the office of the surveyor general, has been held insufficient.[50] Where a writ and return contained all that the statute requires, but the sheriff improperly certified that he had "attached all of the right, title, and interest of the defendant in the described logs," it was held that the irregularity should be disregarded.[51] The return should specify the quantity of logs attached.[52] Where an action to foreclose a lien was commenced in one county, and the logs were in another county and judicial district, a service of the writ and a return thereto in the latter was held proper.[53]

5704. Judgment—It is error to include in a judgment an item of indebtedness not mentioned in the lien statement.[54] The judgment is prima facie evi-

[35] Griffin v. Chadbourne, 32–126, 19+647.
[36] Carver v. Bag'ey, 79–114, 81+757.
[37] Martin v. Wakefield, 42–176, 43+966.
[38] R. L. 1905 §§ 3525, 3548.
[39] Griffin v. Chadbourne, 32–126, 19+647.
[40] R. L. 1905 § 3525.
[41] Griffin v. Chadbourne, 32–126, 19+647.
[42] R. L. 1905 § 3549.
[43] Griffin v. Chadbourne, 32–126, 19+647.
[44] O'Brien v. Glasow, 72–135, 75+7.
[45] Carver v. Bagley, 79–114, 81+757. See R. L. 1905 § 3549.
[46] Carver v. Crookston L. Co., 84–79, 86+871. See Carver v. Bag'ey, 79–114, 81+757.
[47] R. L. 1905 § 3527; Griffin v. Chabbourne, 32–126, 19+647.
[48] Breckke v. Duluth L. Co., 101–110, 111+949.
[49] Carver v. Bagley, 79–114, 81+757.
[50] Scott v. Sharvy, 62–528, 64+1132. See Breault v. Merrill, 72–143, 75+122.
[51] Brown v. Markham, 60–233, 62+123.
[52] R. L. 1905 § 3529; Breault v. Merrill. 72–143, 75+122.
[53] Fo'ey v. Markham, 60–216, 62+125.
[54] Carver v. Bagley, 79–114, 81+757.

dence of the lien against the owner of the logs though he is not made a party.[55] A judgment for the plaintiff does not preclude the owner of the logs from denying the right of the plaintiff to a lien upon them in an action brought to recover the logs, or their value in case recovery cannot be had. But in such action the judgment in the original proceedings to establish the lien, regular on its face, must be held valid, unless the contrary affirmatively appears, and all reasonable presumptions consistent with the record must be made to sustain it.[56] Parties to an action to foreclose a lien cannot impeach the judgment therein collaterally for error or irregularity.[57]

5705. Intervention by owner—In an action to foreclose a lien the owner is entitled to intervene for the purpose of asserting his rights and contest the claim for a lien.[58]

5706. Wrongful deprivation of lien—Action for damages—Where, pending an action to foreclose a log lien, the logs were wrongfully taken from the sheriff, who had seized and held them under the writ of attachment issued in the action, it was held that he might maintain against the persons who took and sawed them up an action for damages for depriving him of his statutory lien though the log-lien claimant was not entitled to the possession of the logs.[59]

5707. Lien for driving intermingled logs—The statute gives a special lien for driving intermingled logs. This lien is enforced substantially in the same manner as the lien of laborers.[60]

5708. Lien for boom charges—Boom companies are sometimes given a lien to secure payment of their charges for booming logs.[61]

5709. Lien of surveyor general for his fees—The statute gives the surveyor general a lien to secure the payment of his official fees.[62]

5710. Release—A lien may be released by granting an extension of time for payment.[63]

LOOK AND LISTEN RULE—See Carriers, 1214; Railroads, 8170, 8188; Street Railways, 9026.

LOST CORNERS—See Boundaries, 1081.

LOST INSTRUMENTS

Cross-References

See Evidence, 3273; Judgments, 5106.

5711. Lost bill or note—Indemnity bond—Provision is made by statute for the execution of an indemnity bond before recovery may be had on a lost bill or note.[64] The owner of a bank check, which is lost without his fault before presentment to the bank upon which it was drawn, may recover thereon

[55] Brown v. Markham, 60–233, 62+123; Scott v. Sharvy, 62–528, 64+1132.
[56] Brown v. Markham, 60–233, 62+123.
[57] Breault v. Merrill, 72–143, 75+122.
[58] Brown v. Markham, 60–233, 62+123.
[59] Breault v. Merrill, 72–143, 75+122.
[60] R. L. 1905 §§ 3535–3538; Chesley v. De Graff, 35–415, 29+167 (right to enforce lien limited to the amount claimed in the account therefor filed with the surveyor general); O'Brien v. Glasow, 72–135, 75+7 (filing lien statement not a condition precedent to action for a personal judgment); Backus v. Scanlon, 78–438, 81+216 (duty of several owners to supply men for driving mass of commingled logs—lien where one of several owners is compelled to furnish more than his share).
[61] Clough v. Miss. etc. Co., 64–87, 66+200; Akeley v. Miss. etc. Co., 64–108, 67+208.
[62] R. L. 1905 §§ 3539, 3540; Lindsay v. Mullen, 176 U. S. 126.
[63] Clough v. Miss. etc. Co., 64–87, 66+200.
[64] R. L. 1905 § 4718; Armstrong v. Lewis, 14–406(308); First Nat. Bank v. McConnell, 103–340, 114+1129.

against the drawer of the same upon filing a proper indemnity bond under the statute.[65]

5712. Instrument destroyed by third party—The payee of a note has been held entitled to recover thereon against the maker, though it had been destroyed by a third party to whom it had been delivered by the payee.[66]

5713. Pleading—A complaint, in an action to establish an unrecorded lost deed, has been sustained, as against an objection, first made on appeal, that the plaintiff had an adequate remedy at law and was guilty of laches.[67]

5714. Defences—In an action to establish a lost deed, it is immaterial that the deed was made in pursuance of an illegal or non-enforceable contract, at least unless the deed was voidable even if it had not been lost.[68]

5715. Burden of proof—In an action to prove and to establish a deed alleged to have been unrecorded and lost, as against a defendant whose rights are asserted under a recorded, but subsequently executed and delivered deed of the premises, the burden of proof is first upon the plaintiff to establish prima facie such deed and its loss, and then, under the provisions of R. L. 1905 § 3357, is upon the defendant to show, either as an alleged owner or as a mortgagee, his own good faith, or that of a predecessor in interest, and also that the property was purchased or the mortgage taken for a valuable consideration.[69]

5716 Evidence—Admissibility—The existence and contents of a lost or destroyed instrument of great age may be shown by the best evidence obtainable under the circumstances.[70] Where a deed has been incorrectly recorded and the original has been lost, it is competent to prove, by parol or other competent evidence, the contents of the original, and that it was incorrectly recorded.[71]

5717. Evidence—Sufficiency—To establish a lost deed the evidence must be clear and certain, and, besides proper proof of loss, the deed must be shown to have been duly executed, and its contents clearly established.[72]

LOST PROPERTY—See Larceny, 5488.
LOST RECORDS—See Evidence, 3352.
LOT—See Homestead, 4204, and note 73.

LOTTERIES

Cross-References

See Contracts, 1878.

5718. Definition—A lottery is a scheme for the distribution of property by chance, among persons who have paid or agreed to pay a valuable consideration for the chance.[74]

5719. What constitutes—Under the statute, any scheme for the distribution of property by chance among persons who have paid or agreed to pay a valuable consideration for the chance is a lottery. The statute is intended to reach all devices in the nature of lotteries, in whatever form, and the courts will tolerate

[65] First Nat. Bank v. McConnell, 103–340, 114+1129.
[66] Homberg v. Kikhaffer, 43–205, 45+154.
[67] Lloyd v. Simons, 97–315, 105+902.
[68] Towle v. Sherer, 70–312, 73+180.
[69] Lloyd v. Simons, 90–237, 95+903; Id., 97–315, 105+902.
[70] Rogers v. Clark, 104–198, 116+739.
[71] Gaston v. Merriam, 33–271, 22+614.
[72] Wakefield v. Day, 41–344, 43+71; Towle v. Sherer, 70–312, 73+180; Lloyd v. Simons, 97–315, 105+902; Diamond v. Dennison, 102–302, 113+696.
[73] Lax v. Peterson, 42–214, 44+3; Menzel v. Tubbs, 51–364, 53+653, 1017; State v. Lewis, 72–87, 75+108.
[74] R. L. 1905 § 4959. See State v. Sperry, 126+120; 21 Harv. L. Rev. 148.

no evasions for the continuance of the mischief which it is intended to remedy.[75] A company which invests no funds, but distributes money collected from its patrons, less a percentage retained as a commission, in accordance with priority in the number of certificate given each so-called investor, is engaged in a lottery business, or in a business which is in the nature of a lottery, and is in result a legal fraud, when it appears that the priority of such number is determined by chance, and that the redemption of such certificate is also dependent upon the chance of solvency of the company, based upon writing of new and lapsation of old contracts.[76]

5720. Contracts relating to lottery tickets—An offer of a reward, printed upon the back of a lottery ticket, to any person producing any ticket which has not been promptly cashed according to agreement, has been held illegal and void.[77]

LOW-WATER MARK—See Boundaries; Navigable Waters.
LUGGAGE—See Carriers, 1240.
LUNATICS—See Insane Persons.
MAIL—See Evidence, 3445; Service of Notices and Papers, 8731.

MAIMING

5721. What constitutes—Under R. L. 1905 § 4896 the injury must be wilfully inflicted, with the intent to injure, disfigure, or disable; but the "intent" is to be presumed from the act of maiming, unless the contrary appears. The "intent" may be defined to be the purpose at the time to do, without lawful authority or necessity, that which the statute forbids; and the words "intent to injure" refer to injuries of the same class specified in the statute, or such as might reasonably be expected to be dangerous, or result in serious bodily harm. The offence may be committed in the heat of passion or in sudden combat. Premeditation is unnecessary.[78]

5722. Evidence—Sufficiency—Evidence held sufficient to warrant the submission of a case to the jury.[79]

MAINTENANCE—See Deeds, 2677; Mortgages, 6199.
MAJORITY—See note 80.
MALA IN SE—See Contracts, 1868.
MALA PROHIBITA—See Contracts, 1868.
MALICE, MALICIOUS, MALICIOUSLY—These words have no fixed, inflexible meaning in the law. The word "malice" is sometimes used in the law in its popular sense of ill will or desire or intention to harm another. It generally means an intention to do a wrongful act injurious to another, without legal excuse or justification. Whatever is done wilfully and purposely, if it be at the same time wrong and unlawful, and that known to the party, is in legal contemplation malicious. That which is done contrary to one's own con-

[75] State v. Moren, 48-555, 51+618 (scheme for the distribution of clothing by tailor). See State v. Sperry, 126+120 (business of issuing and redeeming trading stamps held not a lottery).
[76] State v. U. S. Ex. Co., 95-442, 104+556.
[77] Dieckhoff v. Fox, 56-438, 57+930.
[78] State v. Hair, 37-351, 34+893.
[79] Id.
[80] Taylor v. Taylor, 10-107(81); Bayard v. Klinge, 16-249(221); Board of Ed. v. Moore, 17-412(391); Everett v. Smith, 22-53; Dayton v. St. Paul, 22-400; Mower v. Staples, 32-284, 20+225; Slingerland v. Norton, 59-351, 357, 61+322.

viction of duty, or with a wilful disregard of the rights of others, whether it be to compass some unlawful end or some lawful end by unlawful means, or, to do a wrong or unlawful act, knowing it to be such, constitutes legal malice.[81]

MALICIOUS ATTACHMENT—See Malicious Prosecution, 5751.

MALICIOUS MISCHIEF

5723. Severing growing crops—A person who in good faith, and without malice, and in the honest belief of a legal right to do so, severs growing crops from the land of another, the same being ripe and suitable for harvest, without destroying, injuring, or concealing the same, is not guilty of a criminal offence under G. S. 1894 § 6781 subd. 3 (R. L. 1905 § 5133 subd. 3). The word "wilfully" as used in the statute involves an element of maliciousness.[82]

MALICIOUS PROSECUTION

Cross-References

See Attachment, 663; Process, 7838.

5724. Basis of action—The action lies because of the disgraceful imputation put upon the accused, the injury caused by his arrest, and the trouble and expense he is put to in defending himself.[83] It is akin to an action for slander or libel.[84]

5725. Public policy to protect prosecutor—The policy of the law is to favor prosecutions for crimes, and it will afford such protection to the citizen prosecuting as is essential to public justice.[85] If every man were bound, under the penalty of heavy damages, to ascertain before he commences a prosecution that he has such evidence as will secure conviction, few prosecutions would be set on foot. The law, therefore, protects the prosecutor, if he has reasonable and probable ground for the prosecution, that is, has such ground as would induce a man of ordinary prudence and discretion to believe in the guilt, and to expect the conviction, of the person prosecuted, and if he acts in good faith on such belief and expectation.[86] Actions for malicious prosecutions are not to be encouraged, as they tend to prevent prosecutions for crimes, and the law looks upon them with a jealous eye.[87]

5726. Who may be liable—A corporation may be liable for malicious prosecution.[88] A principal may be liable for a malicious prosecution instituted by his agent in the course and within the scope of the agency, though the principal never authorized, participated in, or ratified the prosecution.[89] An instruction

[81] Century Dict.; Lynd v. Picket, 7–184 (128, 144); Judson v. Reardon, 16–431 (387, 394); Seeman v. Feeney, 19–79(54); Bartlett v. Hawley, 38–308, 37+580; Reison v. Mott, 42–49, 51, 43+691; Benton v. Mpls. etc. Co., 73–498, 506, 76+265; Joyce v. G. N. Ry., 100–225, 110+975; Anderson v. International H. Co., 104–49, 116+101. See Conspiracy, 1565; Damages, 2540; Homicide, 4227; Libel and Slander, 5506; Malicious Mischief; Malicious Prosecution, 5734; Torts, 9634; 18 Harv. L. Rev. 422.

[82] Price v. Denison, 95–106, 103+728. See generally as to malicious mischief, Note, 128 Am. St. Rep. 163.

[83] Potter v. Gjertsen, 37–386, 34+746.

[84] Bryant v. Am. Surety Co., 69–30, 71+826.

[85] Cole v. Curtis, 16–182(161); Hlubek v. Pinske, 84–363, 87+939; Shafer v. Hertzig, 92–171, 99+796.

[86] Smith v. Munch, 65–256, 68+19.

[87] Chapman v. Dodd, 10–350(277).

[88] Larson v. Fidelity M. L. Assn., 71–101, 73+711; Mundal v. Mpls. etc. Ry., 92–26, 99+273, 100+363.

[89] Id., Smith v. Munch, 65–256, 68+19.

as to the joint liability of partners for a prosecution instituted by one of them has been held erroneous.[90]

5727. Termination of proceeding—It is the general rule that an action for malicious prosecution will not lie until the prosecution has terminated in favor of the accused.[91] But this rule is not applicable where the prosecution has terminated under such circumstances that the accused had no opportunity to controvert the facts alleged against him, and to secure a determination thereon in his favor.[92] In an action for maliciously and without probable cause procuring the issuance and execution of a search warrant for goods alleged to have been stolen, proof that upon search the property was not found, has been held to show a termination of the proceeding.[93] Where a magistrate has authority only to bind over or discharge a person accused a discharge is equivalent to an acquittal.[94] The reasons of a justice of the peace for the discharge are immaterial.[95] Where the termination of a prosecution has been brought about by the procurement of the defendant, or by compromise or agreement of the parties, an action for malicious prosecution cannot be maintained.[96]

5728. Conviction of plaintiff—Reversal on appeal—A conviction of the plaintiff, which is reversed on appeal and the plaintiff discharged, is not conclusive but strong prima facie evidence of probable cause, which may be rebutted, not only by evidence tending to show that the conviction was procured by fraud or perjury, but also by any competent evidence which satisfies the jury that the prosecutor did not have probable cause for instituting the prosecution.[97]

5729. Institution or instigation of proceeding—It is an essential element of the wrong that the prosecution was instituted or instigated by the defendant. Merely laying the facts before a county attorney, committing magistrate, or grand jury, does not render a party liable.[98] But a party renders himself liable by requesting the county attorney to commence proceedings.[99] A principal may be liable for the acts of his agent in instituting proceedings.[1]

5730. What constitutes probable cause—Probable cause for instituting a prosecution for crime is "a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the person is guilty of the offence." [2] It may also be defined as "the existence of such facts and circumstances as would excite the belief in a reasonable mind, acting on the facts within the knowledge of the prosecutor, that the person charged was guilty of the offence for which he was prosecuted." [3] It is not required that the prosecutor should act impartially, reasonably, and without prejudice. It is enough if he acts with such a degree of impartiality, reasonableness, and freedom from prejudice, as can fairly be expected of a man of ordinary prudence and caution, acting without malice.[4] It is unnecessary

[90] Cole v. Curtis, 16-182(161).
[91] Pixley v. Reed, 26-80, 1+800; Rossiter v. Minn. etc. Co., 37-296, 33+855; McPherson v. Runyon, 41-524, 43+392; Chapman v. Dodd, 10-350(277).
[92] Swensgaard v. Davis, 33-368, 23+543; Rossiter v. Minn. etc. Co., 37-296, 33+855.
[93] Olson v. Tvete, 46-225, 48+914.
[94] Chapman v. Dodd, 10-350(277).
[95] Id.
[96] Wickstrom v. Swanson, 107-482, 120+1090.
[97] Skeffington v. Eylward, 97-244, 105+638.
[98] Cole v. Andrews, 74-93, 76+962. See Potter v. Gjertsen, 37-386, 34+746.
[99] Cole v. Andrews, 70-230, 73+3.
[1] Larson v. Fidelity M. L. Assn., 71-101, 73+711; Smith v. Munch, 65-256, 68+19; Mundal v. Mpls. etc. Ry., 92-26, 99+273, 100+363.
[2] Cole v. Curtis, 16-182(161); Burton v. St. P. etc. Ry., 33-189, 22+300; Gilbertson v. Fuller, 40-413, 42+203; Boyd v. Mendenhall, 53-274, 55+45; Mundal v. Mpls. etc. Ry., 92-26, 99+273, 100+363; Price v. Denison, 95-106, 103+728.
[3] Smith v. Munch, 65-256, 68+19.
[4] Cole v. Curtis, 16-182(161); Casey v.

that the facts on which the prosecutor acts shall be true. It is enough if he believed them to be true, and had reasonable grounds for so believing.[5] The innocence of the accused is not the test of want of probable cause.[6] Probable cause does not depend on the actual state of the case in point of fact, but upon the honest and reasonable belief of the party commencing the prosecution.[7] In determining whether the prosecutor acted without probable cause, his conduct is to be weighed in view of what appeared to him when he made the complaint, and not in the light of facts appearing subsequently.[8] Want of probable cause is not inferable from malice alone.[9]

5731. Advice of counsel—It is a defence to an action for a malicious prosecution that it was instituted, in reliance in good faith, on the advice of competent legal counsel, based on a full statement to him of all the material facts of the case known to the prosecutor, or which he had reason to suppose existed.[10] Strictly, the reliance on the advice of counsel is not a defence, but operates to defeat the action because the honest belief in the guilt of the plaintiff after such advice is probable cause.[11] It is not a defence in the nature of confession and avoidance requiring a reply.[12] Every material fact must be disclosed to counsel.[13] The defendant must have acted in good faith on the advice. Information obtained subsequent to the advice may show the innocence of the plaintiff.[14] Such advice is not a defence if the prosecutor knew or had reason to believe that the advice was not given in good faith. But it is unnecessary for the defendant to prove that the advice was given by counsel in good faith.[15] It is immaterial that the counsel giving the advice was the general counsel of the defendant.[16] When the advice is given by the county attorney,[17] or the attorney general,[18] it is accorded even greater force than in the case of private counsel. Statements made to the county attorney are not privileged.[19] Whether a full and fair disclosure of the facts was made to counsel,[20] whether his advice was sought and relied on in good faith,[21] and whether he gave the advice in good faith,[22] are questions for the jury, unless the evidence is conclusive. A person is not bound to consult the county attorney, and he may act in good faith in following the advice of other counsel in opposition to his own.[23]

5732. Duty to make inquiry—The prosecutor is chargeable, on the question of probable cause, with knowledge of all facts which would have been disclosed

Sevatson, 30–516, 16+407; Shafer v. Hertzig, 92–171, 99+796.

[5] Smith v. Munch, 65–256, 68+19.

[6] Genevey v. Edwards, 55–88, 56+578; Mundal v. Mpls. etc. Ry., 92–26, 99+273, 100+363; Shafer v. Hertzig, 92–171, 99+796.

[7] Chapman v. Dodd, 10–350(277); Cole v. Curtis, 16–182(161); Bartlett v. Hawley, 38–308, 37+580.

[8] Tabert v. Cooley, 46–366, 49+124.

[9] Eickhoff v. Fidelity & C. Co., 74–139, 76+1030.

[10] Moore v. N. P. Ry., 37–147, 33+334; Gilbertson v. Fuller, 40–413, 42+203; Shea v. Cloquet L. Co., 92–348, 100+111; Genevey v. Edwards, 55–88, 56+578 (advice of assistant county attorney and city attorney); Baldwin v. Capitol S. L. Co., 109–38, 122+460 (advice of county attorney).

[11] Genevey v. Edwards, 55–88, 56+578; Bartlett v. Hawley, 38–308, 37+580.

[12] Olson v. Tvete, 46–225, 48+914.

[13] Norrell v. Vogel, 39–107, 38+705; Jeremy v. St. Paul B. Co., 84–516, 88+13; Boyd v. Mendenhall, 53–274, 55+45.

[14] Cole v. Curtis, 16–182(161); Bartlett v. Hawley, 38–308, 37+580.

[15] Shea v. Cloquet L. Co., 92–348, 100+111.

[16] Shea v. Cloquet L. Co., 92–348, 100+111; Moore v. N. P. Ry., 37–147, 33+334.

[17] Moore v. N. P. Ry., 37–147, 33+334; Baldwin v. Capitol S. L. Co., 109–38, 122+460.

[18] Gilbertson v. Fuller, 40–413, 42+203.

[19] Cole v. Andrews, 74–93, 76+962.

[20] Mundal v. Mpls. etc. Ry., 92–26, 99+273, 100+363; Shea v. Cloquet L. Co., 92–348, 100+111.

[21] Cole v. Curtis, 16–182(161); Cole v. Andrews, 70–230, 73+3; Mundal v. Mpls. etc. Ry., 92–26, 99+273, 100+363; Bartlett v. Hawley, 38–308, 37+580.

[22] Shea v. Cloquet L. Co., 92–348, 100+111.

[23] Bartlett v. Hawley, 38–308, 37+580.

by such an investigation as would have been made by a man of ordinary prudence and caution, and with honest motives, before instituting the prosecution.[24]

5733. Reliance on statements of third parties—The prosecutor may act on statements made to him by others, if he has reasonable ground for believing, and does believe, that they are true;[25] but he cannot rely on the belief of others as to the guilt of the accused.[26]

5734. Malice essential—Malice is an essential element of the wrong.[27] Actual malice, in the sense of ill-will or desire to harm, may be shown,[28] but it is not essential.[29] It is enough to prove that the prosecutor instituted a groundless prosecution knowingly and wilfully. To do an unlawful act wilfully and purposely, knowing it to be unlawful, is to do it maliciously, in contemplation of law.[30] Malice is a distinct issue to be found as a question of fact by the jury.[31] Actual malice implies a wrongful purpose or intent in the mind of the person whose conduct is in question.[32] When a person is acting in accordance with what he believes his legal right he cannot be regarded in law as acting with a malicious intent.[33]

5735. Malice inferable from want of probable cause—The jury may infer malice from the want of probable cause, but they are not required to do so.[34]

5736 Imputing malice to principal—Malice is not to be imputed to a principal merely because of facts known only to his agent.[35]

5737. Sufficiency of indictment or complaint—It is not essential that the indictment should be sufficient. A complaint for a criminal offence, if a warrant is procured upon it, and the party accused is arrested, may be a basis for an action for malicious prosecution, though the specific facts stated in such complaint do not show the offence to have been committed.[36] The fact that a complaint is not signed by the prosecutor is not fatal.[37]

5738. Jurisdiction of court—Whether an action will lie for instituting a prosecution before a court or magistrate having no jurisdiction to entertain it, is an open question.[38]

5739. Guilt of the accused—The guilt of the accused is a complete defence to the action.[39]

5740. Limitation of actions—An action for malicious prosecution must be brought within two years.[40]

5741. Pleading—It is sufficient to allege that the action or prosecution was instituted "maliciously and without probable cause."[41] An inferential allegation of malice and want of probable cause has been held sufficient, where objection was first made on the trial.[42] A termination of the proceeding favorable to the plaintiff must be alleged.[43] The defence of advice of counsel is not new matter requiring a reply.[44] Special damages must be pleaded.[45]

[24] Tabert v. Cooley, 46-366, 49+124; Boyd v. Mendenhall, 53-274, 55+45; Jeremy v. St. Paul B. Co., 84-516, 88+13; Price v. Denison, 95-106, 103+728.

[25] Smith v. Munch, 65-256, 68+19; Shafer v. Hertzig, 92-171, 99+796.

[26] Norrell v. Vogel, 39-107, 38+705.

[27] Garrett v. Mannheimer, 24-193.

[28] Chapman v. Dodd, 10-350(277); Bartlett v. Hawley, 38-308, 37+580.

[29] Price v. Denison, 95-106, 103+728.

[30] Bartlett v. Hawley, 38-308, 37+580.

[31] Smith v. Maben, 42-516, 44+792; Mundal v. Mpls. etc. Ry., 92-26, 99+273, 100+363.

[32] Reisan v. Mott, 42-49, 43+691.

[33] Garrett v. Mannheimer, 24-193.

[34] Eickhoff v. Fidelity & C. Co., 74-139, 76+1030; Bartlett v. Hawley, 38-308, 37+580; Smith v. Maben, 42-516, 44+792; Olson v. Tvete, 46-225, 48+914; Chapman v. Dodd, 10-350(277); Price v. Denison, 95-106, 103+728.

[35] Reisan v. Mott, 42-49, 43+691.

[36] Potter v. Gjertsen, 37-386, 34+746.

[37] Chapman v. Dodd, 10-350(277).

[38] See Potter v. Gjertsen, 37-386, 34+746; Chapman v. Dodd, 10-350(277).

[39] See Jeremy v. St. Paul B. Co., 84-516 88+13.

[40] Bryant v. Am. Surety Co., 69-30, 71+826.

[41] O'Neill v. Johnson, 53-439, 55+601.

[42] Beyersdorf v. Sump, 39-495, 41+101.

[43] Pixley v. Reed, 26-80, 1+800.

[44] Olson v. Tvete, 46-225, 48+914.

[45] Reisan v. Mott, 42-49, 43+691.

5742. Variance—Cases are cited below involving questions as to variance.[46]

5743. Burden of proof—The burden is on the plaintiff to prove that the prosecution was instituted by the defendant without probable cause and with malice.[47] But it is often the case that the only proof possible from the plaintiff is of a negative character and relating to matters peculiarly within the knowledge of the defendant. Hence less satisfactory and convincing proof is required of the plaintiff to shift the burden on the defendant than would otherwise be necessary.[48] The burden also rests on the plaintiff of proving the termination of the prosecution in his favor.[49]

5744. Law and fact—What facts, and whether particular facts, constitute probable cause is a question exclusively for the court. What facts exist in a particular case, where there is a dispute in reference to them, is a question exclusively for the jury. When the facts are in controversy, the subject of probable cause should be submitted to the jury, either for specific findings of the facts, or with instructions from the court as to what facts will constitute probable cause.[50] What constitutes probable cause is essentially a question of fact, but it is withheld from the jury from considerations of public policy founded in the necessity of not discouraging public prosecutions.[51] The question of malice is ordinarily for the jury,[52] but the evidence of want of probable cause and of intentional wrong may be so clear as to authorize the court to hold that certain undisputed facts establish a prima facie case, warranting a verdict unless rebutted.[53] Whether the defendant sought and acted upon the advice of counsel in good faith;[54] whether counsel gave advice in good faith;[55] whether the defendant instigated the prosecution;[56] and whether the defendant instigated the prosecution in good faith[57] are all questions for the jury, unless the evidence is conclusive.

5745. Damages—The plaintiff may recover as part of his damages the necessary cost of defending the malicious suit, including the proper fees of his attorney.[58] If special damages are sought they must be pleaded. The condition of plaintiff's family cannot be shown to affect the amount of damages.[59] Remote and speculative damages cannot be recovered.[60] The bad reputation of the plaintiff may be shown in mitigation of damages.[61] The wealth of the de-

[46] Chapman v. Dodd, 10–350(277) (variance as to termination of the prosecution before a justice held immaterial); Cole v. Curtis, 16–182(161) (variance as to the complaint and proceedings before a justice of the peace); Burton v. St. P. etc. Ry., 33–189, 22+300 (in an action for malicious prosecution and attachment plaintiff cannot recover as for the conversion of the goods attached).

[47] Burton v. St. P. etc. Ry., 33–189, 22+300; Tabert v. Cooley, 46–366, 49+124; Olson v. Tvete, 46–225, 48+914; Mundal v. Mpls. etc. Ry., 92–26, 99+273, 100+363.

[48] Olson v. Tvete, 46–225, 48+914; Chapman v. Dodd, 10–350(277).

[49] Chapman v. Dodd, 10–350(277); Pixley v. Reed, 26–80, 1+800. See § 5727.

[50] Cole v. Curtis, 16–182(161); Burton v. St. P. etc. Ry., 33–189, 22+300; Moore v. N. P. Ry., 37–147, 33+334; Bartlett v. Hawley, 38–308, 37+580; Gilbertson v. Fuller, 40–413, 42+203; Smith v. Munch, 65–256, 68+19; Eickhoff v. Fidelity & C. Co., 74–139, 76+1030; Jeremy v. St. Paul B. Co., 84–516, 88+13; Fiola v. McDonald, 85–147, 88+431; Shafer v. Hertzig, 92–171, 99+796; Blazek v. McCartin, 106–461, 119+215; Baldwin v. Capitol S. L. Co., 109–38, 122+460.

[51] Burton v. St. P. etc. Ry., 33–189, 22+300. See Thayer, Ev., 221–232; Keener, Quasi Contracts, 110.

[52] Shafer v. Hertzig, 92–171, 99+800; Reisan v. Mott, 42–49, 43+691; Bartlett v. Hawley, 38–308, 37+580; Mundal v. Mpls. etc. Ry., 92–26, 99+273, 100+363.

[53] Bartlett v. Hawley, 38–308, 37+580.

[54] Cole v. Curtis, 16–182(161); Cole v. Andrews, 70–230, 73+3; Jeremy v. St. Paul B. Co., 84–516, 88+13; Mundal v. Mpls. etc. Ry., 92–26, 99+273, 100+363.

[55] Shea v. Cloquet L. Co., 92–348, 100+111.

[56] Cole v. Andrews, 74–93, 76+962.

[57] Shafer v. Hertzig, 92–171, 99+796.

[58] Mitchell v. Davies, 51–168, 53+363; Hlubek v. Pinske, 84–363, 87+939; Blazek v. McCartin, 106–461, 119+215.

[59] Reisan v. Mott, 42–49, 43+691.

[60] O'Neill v. Johnson, 53–439, 55+601; Cochrane v. Quackenbush, 29–376, 13+154.

[61] Hlubek v. Pinske, 84–363, 87+939.

fendant, but not his "influence," may be shown to affect exemplary damages.[62] The amount of damages is largely discretionary with the jury and their verdict will not be set aside unless it is obvious that they were influenced by passion, prejudice, or other improper motive.[63] Evidence that the plaintiff invited the prosecution has been held admissible, apparently in mitigation of damages.[64]

5746. Evidence—Admissibility in general—On the examination of a criminal charge before an examining magistrate, where the complainant is the only witness for the prosecution, and he testifies positively to the offence, a discharge of the defendant is prima facie evidence of want of probable cause.[65] But where witnesses are examined for the defence and the facts on which the prosecution is based are not within the personal knowledge of the prosecutor, the discharge of the defendant is not evidence of want of probable cause.[66] Proof of acquittal from the criminal charge complained of is prima facie evidence of want of probable cause.[67] Evidence of the good reputation of the plaintiff for honesty and integrity has been held admissible where the charge was larceny or concealing stolen goods.[68] Evidence of the general good reputation of the plaintiff as a peaceable citizen has been held admissible where the prosecution was for an assault.[69] Evidence of the bad reputation of the accused, when limited to the issue involved, is admissible to show probable cause and to repel malice.[70] Evidence of facts which the prosecutor would have learned, if he had made proper investigation before instituting the prosecution, is admissible.[71] An entry in the docket of a justice to the effect that the complaint was malicious and without probable cause is inadmissible.[72] An entry in the docket of a justice to the effect that the justice found no evidence in the case sufficient to justify a conviction of the plaintiff of the offence charged has been held admissible.[73] Statements made by the defendant to the county attorney in connection with the charge are not privileged and are admissible,[74] a proper foundation being laid.[75] The declarations of the officer in making an arrest under the charge are not admissible against the prosecutor.[76] In an action for maliciously suing out a writ of attachment, it has been held admissible for the plaintiff to prove that at the time the writ was issued he was indebted to no one but the defendant; that the sheriff, after the levy, turned the property over to the attaching creditor, and the conduct of such creditor in connection therewith; and that immediately after the attachment was dissolved, the attaching creditor brought replevin for the property thereby released.[77] Where the charge was for fraudulently disposing of mortgaged chattels, evidence that the accused had a large amount of property was held admissible.[78] Depositions of witnesses on an examination before a justice on a criminal charge are not admissible.[79] The docket of a justice is admissible to prove the proceedings before him, though not signed by him.[80] The testimony of the defendant on the trial of the charge is admissible.[81] The delay of the defendant in making the charge is admissible.[82] The docket of a justice

[62] Peck v. Small, 35–465, 29+69.
[63] Chapman v. Dodd, 10–350(277); Peck v. Small, 35–465, 29+69; Tykeson v. Bowman, 60–108, 61+909; Fiola v. McDonald, 85–147, 88+431; Shea v. Cloquet L. Co., 92–348, 100+111; Id., 97–41, 105+552.
[64] Smith v. Maben, 42–516, 44+792.
[65] Chapman v. Dodd, 10–350(277).
[66] Cole v. Curtis, 16–182(161); Fiola v. McDonald, 85–147, 88+431; Shafer v. Hertzig, 92–171, 99+796.
[67] Fiola v. McDonald, 85–147, 88+431; Blazek v. McCartin, 106–461, 119+215.
[68] Olson v. Tvete, 46–225, 48+914.
[69] Shea v. Cloquet L. Co., 97–41, 105+552.
[70] Hlubek v. Pinske, 84–363, 87+939.
[71] See § 5732.
[72] Casey v. Sevatson, 30–516, 16+407.
[73] Price v. Denison, 95–106, 103+728.
[74] Cole v. Andrews, 74–93, 76+962.
[75] Olson v. Berg, 87–277, 91+1103.
[76] Reisan v. Mott, 42–49, 43+691.
[77] Tykeson v. Bowman, 60–108, 61+909.
[78] Reisan v. Mott, 42–49, 43+691.
[79] Chapman v. Dodd, 10–350(277).
[80] Id.
[81] Id.
[82] Id.

may be identified by the justice or any other competent proof.[83] It is permissible to ask the defendant, being a witness in his own behalf, whether, at the time when he instituted the prosecution complained of, he believed that the claim upon which the same was founded was a valid and legal claim against the person prosecuted.[84]

5747. Evidence admissible to prove or disprove malice—Malice may be proved by evidence of an intention to use criminal process as a means of compelling the settlement of a disputed claim;[85] by evidence of defendant's conduct, admissions, and declarations, showing ill-will, passion, or vindictiveness;[86] and his forwardness or activity in exposing the plaintiff, by a publication of the proceedings against him;[87] by the institution of a second action for the same offence;[88] or by the circumstances attending the arrest.[89] The absence of malice may be proved by the direct testimony of the defendant;[90] by the advice of counsel;[91] by the bad reputation of the accused;[92] by evidence that at the time of instituting the prosecution the defendant believed the claim on which it was founded to be a valid legal claim;[93] or by any evidence which tends to show that the mind of the prosecutor was free from actual malice.[94]

5748. Evidence—Sufficiency—Cases are cited below holding evidence sufficient,[95] or insufficient[96] to justify a verdict for the plaintiff, and sufficient,[97] or insufficient,[98] to require a submission of the case to the jury.

5749. Question of probable cause on appeal—On appeal the supreme court will consider the question of probable cause as one of law, as if presented to them originally, and without regard to the determination of the trial court.[99]

5750. Malicious prosecution of a civil action—An action will lie for the prosecution of a civil action maliciously and without probable cause, even though there is no interference with the person or property of the defendant.[1] But to sustain such an action the want of probable cause must be very palpable. A greater latitude in the doctrine of reasonable cause must be exercised in such cases than in an action for maliciously prosecuting a criminal case. To compel

[83] Cole v. Curtis, 16–182(161).
[84] Garrett v. Mannheimer, 24–193.
[85] Bartlett v. Hawley, 38–308, 37+580.
[86] Chapman v. Dodd, 10–350(277); Bartlett v. Hawley, 38–308, 37+580.
[87] Bartlett v. Hawley, 38–308, 37+580; Smith v. Maben, 42–516, 44+792.
[88] Severns v. Brainard, 61–265, 63+477.
[89] Jeremy v. St. Paul B. Co., 84–516, 88+13. See Reisan v. Mott, 42–49, 43+691.
[90] Garrett v. Mannheimer, 24–193.
[91] Bartlett v. Hawley, 38–308, 37+580.
[92] Hlubek v. Pinske, 84–363, 87+939.
[93] Garrett v. Mannheimer, 24–193.
[94] Garrett v. Mannheimer, 24–193; Bartlett v. Hawley, 38–308, 37+580; Mundal v. Mpls. etc. Ry., 92–26, 99+273, 100+363; Price v. Denison, 95–106, 103+728.
[95] Norrell v. Vogel, 39–107, 38+705; Mitchell v. Davies, 51–168, 53+363; Flikkie v. Oberson, 82–82, 84+651; Jeremy v. St. Paul B. Co., 84–516, 88+13; Fiola v. McDonald, 85–147, 88+431; Jenkinson v. Koester, 86–155, 90+382; Price v. Denison, 95–106, 103+728; Shea v. Cloquet L. Co., 97–41, 105+552; Skeffington v. Eylward, 97–244, 105+638.
[96] Moore v. N. P. Ry., 37–147, 33+334; Genevey v. Edwards, 55–88, 56+578; Smith v. Munch, 65–256, 68+19; Eickhoff v. Fidelity & C. Co., 74–139, 76+1030; Mundal v. Mpls. etc. Ry., 92–26, 99+273, 100+363. See Miller v. Scovell, 93–258, 101+74 (new trial granted for insufficiency of evidence).
[97] Burton v. St. P. etc. Ry., 33–189, 22+300; Olson v. Tvete, 46–225, 48+914; Norrell v. Vogel, 39–107, 38+705; Fiola v. McDonald, 85–147, 88+431; Chapman v. Dodd, 10–350(277); Cole v. Curtis, 16–182(161); Cole v. Andrews, 70–230, 73+3.
[98] Potter v. Gjertsen, 37–386, 34+746; Smith v. Munch, 65–256, 68+19; Wickstrom v. Swanson, 107–482, 120+1090.
[99] Burton v. St. P. etc. Ry., 33–189, 22+300; Moore v. N. P. Ry., 37–147, 33+334; Eickhoff v. Fidelity & C. Co., 74–139, 76+1030.
[1] McPherson v. Runyon, 41–524, 43+392; O'Neill v. Johnson, 53–439, 55+601; Eickhoff v. Fidelity & C. Co., 74–139, 76+1030; Garrett v. Mannheimer, 24–193; Severns v. Brainard, 61–265, 63+477. See also, Burton v. St. P. etc. Ry., 33–189, 22+300; Cochrane v. Quackenbush, 29–376, 13+154; Note, 93 Am. St. Rep. 454.

a party who brings a civil action and fails to maintain it to pay the costs is, as a rule, all that a practical administration of justice requires, and is usually sufficient to make him cautious about bringing such suits. Any other rule would make litigation interminable.[2] Probable cause, as applicable to the prosecution of a civil action, is such reason, supported by facts and circumstances as will warrant a cautious man in the belief that his action, and the means taken in prosecuting it, are legally just and proper.[3] An action will lie for the malicious prosecution of an action of replevin though the plaintiff (defendant in replevin) recovered in that action the damages suffered from the taking and detention of the goods.[4]

5751. Malicious attachment—An action for malicious attachment is in the main governed by the same rules as an ordinary action for malicious prosecution. The plaintiff must allege and show that the attachment was vacated in the action in which it issued, or that he had no opportunity to make a motion to vacate it.[5]

MALPRACTICE—See Physicians and Surgeons, 7488.

MANDAMUS

Cross-References

See Constitutional Law, 1593; Intoxicating Liquors, 4911; Judgments, 5190.

IN GENERAL

5752. Definition and nature—Mandamus is a writ issued by a superior court in the name of the state, to an inferior tribunal, corporation, board, or person, commanding the performance of an act which the law specifically enjoins as a duty resulting from an office, trust, or station.[6] The writ has had a long and interesting history, which is summarized in one of our cases.[7] It is not a mere writ of right. It is a legal remedy granted on equitable principles. In ordinary cases parties are left to their ordinary remedies. They are entitled to mandamus only because of such conditions of necessity or of exceptional circumstances as would result in a failure of justice if the extraordinary relief were refused, and then only in the exercise of judicial discretion.[8] It is not a creative remedy. It does not call into existence any new liability or duty, and cannot command the performance of an act which was not authorized prior to its issuance. The present existence of a legal right or obligation is the foundation of every writ. It is not a law or the source of law.[9] It is a special proceeding.[10]

[2] Eickhoff v. Fidelity & C. Co., 74–139, 76+1030.

[3] Eickhoff v. Fidelity & C. Co., 74–139, 76+1030; Burton v. St. P. etc. Ry., 33–189, 22+300.

[4] McPherson v. Runyon, 41–524, 43+392.

[5] Pixley v. Reed, 26–80, 1+800 (nature of action); Cochrane v. Quackenbush, 29–376, 13+154 (parties—joint injury—special damages—complaint sustained—gravamen of action—damages held too remote); Rossiter v. Minn. etc. Co., 37–296, 33+855 (requisites of complaint—no opportunity to vacate attachment); Beyersdorf v. Sump, 39–495, 41+101 (requisites of complaint); Grimestad v. Lofgren, 105–286, 117+515 (distinguished from action for abuse of process); Hansen v. Wyman, 105–491, 117+926 (malicious attachment of corporate property is not a personal tort, but gives rise to a cause of action for injury to property, which passes to the trustee in bankruptcy of the corporation).

[6] State v. Ames, 31–440, 18+277; State v. Krahmer, 92–397, 100+105.

[7] Lauritsen v. Seward, 99–313, 109+404.

[8] State v. U. S. Ex. Co., 95–442, 104+556; State v. Foot, 98–467, 108+932. See State v. Minneapolis, 32–501, 21+722.

[9] Lauritsen v. Seward, 99–313, 109+404.

[10] Harrington v. St. P. etc. Ry., 17–215 (188, 202).

5753. Matters of discretion—Mandamus will not lie to control discretion,[11] but it will lie to compel an officer to exercise his discretion.[12]

5754. Other adequate remedy—Mandamus will lie only where there is no other plain, speedy, and adequate remedy in the ordinary course of law.[13] Injunction is a remedy "in the ordinary course of law." [14] The other legal remedy which will defeat mandamus must be one which is reasonably efficient and adequate to reach the end intended, and actually compel the performance of the duty refused.[15]

5755. Control of executive department—To what extent the executive department may be controlled by mandamus is considered elsewhere.[16]

5756. Right and duty must be clear and complete—Mandamus will lie only for the enforcement of legal rights which are clear and complete and the reciprocal obligation must be a complete and perfect legal obligation.[17]

5757. Technical rights—Mandamus will not lie to compel a technical compliance with the letter of a law, when such compliance would violate the spirit of the law.[18]

5758. Misconduct of applicant—An applicant for a writ of mandamus must come into court with clean hands. Where the conduct of the applicant has been tainted with fraud or corruption, the writ will be denied, however meritorious the application may be on other grounds.[19]

5759. When it would be futile—Mandamus will not be granted where it is obvious that it would prove futile or practically unavailing.[20]

5760. Unauthorized or illegal acts—Mandamus will not lie to compel an officer to do what the law does not authorize him to do. In other words, mandamus cannot create a duty and compel its performance.[21]

5761. Equitable rights—Mandamus will not lie to enforce equitable rights.[22]

[11] Chouteau v. Rice, 1-121(97, 100); State v. State M. E. Board, 32-324, 20+238; Brown County v. Winona etc. Co., 38-397, 37+949; State v. Somerset, 44-549, 47+163; State v. Carver County, 60-510, 62+1135; State v. Geib, 66-266, 68+1081; State v. Powers, 69-429, 72+705; State v. Teal, 72-37, 74+1024; State v. Copeland, 74-371, 77+221; State v. Dist. Ct., 77-302, 307, 79+960; State v. Kingsley, 85-215, 88+742; St. Paul v. Freedy, 86-350, 90+781; State v. Northfield, 94-81, 101+1063; State v. Powers, 102-509, 113+1135; Gleason v. University of Minn., 104-359, 116+650.

[12] State v. Otis, 58-275, 59+1015; State v. Teal, 72-37, 74+1024; St. Paul v. Freedy, 86-350, 90+781; Gleason v. University of Minn., 104-359, 116+650.

[13] R. L. 1905 § 4557; Baker v. Marshall, 15-177(136); State v. Sherwood, 15-221(172); State v. Churchill, 15-455(369); Harrington v. St. P. etc. Ry., 17-215(188, 202); State v. Williams, 25-340; State v. Ames, 31-440, 18+277; State v. Nelson, 41-25, 42+548; Lee v. Thief River Falls, 82-88, 84+654; State v. Krahmer, 92-397, 100+105; State v. U. S. Ex. Co., 95-442, 104+556; Lauritsen v. Seward, 99-313, 109+404; State v. Dist. Ct., 108-535, 122+314.

[14] Harrington v. St. P. etc. Ry., 17-215 (188, 202).

[15] State v. Dist. Ct., 77-302, 307, 79+960.

[16] See § 1593.

[17] Warner v. Hennepin County, 9-139 (130); State v. Sherwood, 15-221(172); State v. Davis, 17-429(406); Allen v. Robinson, 17-113(90, 97); State v. Southern Minn. Ry., 18-40(21); State v. Highland, 25-355; State v. Roscoe, 25-445; State v. Reed, 27-458, 8+768; State v. Minneapolis, 32-501, 21+722; State v. Cooley, 58-514, 521, 60+338; State v. U. S. Ex. Co., 95-442, 104+556.

[18] State v. U. S. Ex. Co., 95-442, 104+556.

[19] State v. U. S. Ex. Co., 95-442, 104+556. See State v. Minneapolis, 32-501, 21+722.

[20] State v. Secrest, 33-381, 23+545; State v. Archibald, 43-328, 45+606; State v. Copeland, 74-371, 77+221.

[21] Clark v. Buchanan, 2-346(298); State v. Register of Deeds, 26-521, 6+337; State v. McLeod County, 27-90, 6+421; State v. Webber, 31-211, 17+339; State v. Hill, 32-275, 20+196; State v. Secrest, 33-381, 23+545; State v. U. S. Ex. Co., 95-442, 104+556; Lauritsen v. Seward, 99-313, 109+404.

[22] State v. Southern Minn. Ry., 18-40 (21).

5762. Duties resulting from an office—Mandamus is a proper remedy to compel the performance of an act which the law enjoins as a duty resulting from an office. It is no objection to the issuance of the writ against a public officer that the respondent's predecessor in office, and not the respondent, was the one who failed in the performance of the duty sought to be enforced.[23]

ACTS WHICH MAY BE COMPELLED

5763. Right to office—Election contests—Mandamus will not lie to determine an election contest, or the title to a public office. It will lie to compel a certificate of election to issue upon the returns, in accordance with a decision made by the proper body; but when it becomes necessary to go beyond the returns, and consider questions touching the legality of elections, or of fraud, illegal voting, or the like, mandamus is not the proper remedy, and it is necessary to resort to quo warranto, or statutory proceedings.[24] But mandamus will lie to put into physical possession of an office, its records, furniture, etc., one who is prima facie entitled thereto by virtue of a certificate of election, if it may be done without necessarily determining the title to the office.[25] Where, however, the title to the office is necessarily involved, mandamus will not lie though in form the proceeding is merely to obtain possession of the office and its records.[26] While a court cannot determine the right of a party to hold a seat in the legislature, it can determine his right to a certificate of election to the legislature, and will, by mandamus, compel its issuance to the party entitled to it.[27]

5764. Orders of railroad and warehouse commission—Mandamus will lie to enforce the orders of the railroad and warehouse commission.[28]

5765. Mandates of supreme court on remand—The supreme court may employ the writ of mandamus to compel compliance with its orders and directions upon remanding a cause to a lower court.[29]

5766. Mandamus granted—Miscellaneous cases—Mandamus has been granted to compel the issuance of a certificate of election to the legislature;[30] to compel a register of deeds to deliver certain books and papers relating to taxes to a board of supervisors;[31] to compel the attorney general to bring an action against a corporation;[32] to compel a judge to settle and certify a case;[33] to compel a mayor of a city to sign an order for the payment of a claim duly audited by the comptroller and allowed by the council;[34] to compel a city comptroller to countersign a contract;[35] to compel a railway company to bridge its tracks, or build a viaduct under them;[36] to compel county officers to re-

[23] State v. Holgate, 107-71, 119+792; State v. Johnson, 126+479.

[24] Lauritsen v. Seward, 99-313, 109+404; Burke v. Leland, 51-355, 53+716; State v. Williams, 25-340; State v. Sherwood, 15-221(172); State v. Churchill, 15-455(369).

[25] Crowell v. Lambert, 10-369(295); State v. Sherwood, 15-221(172); State v. Churchill, 15-455(369); Allen v. Robinson, 17-113(90); State v. Stratte, 83-194, 86+20.

[26] State v. Williams, 25-340.

[27] O'Ferrall v. Colby, 2-180(148).

[28] State v. Chi. etc. Ry., 38-281, 37+782 (reversed, 134 U. S. 418); State v. Mpls. E. Ry., 40-156, 41+465; State v. Adams, 66-271, 68+1085; State v. Mpls. etc. Ry., 76-469, 79+510; Id., 80-191, 83+60; State v. U. S. Ex. Co., 81-87, 83+465; State v. Mpls. etc. Ry., 87-195, 91+465; State v. Willmar etc. Ry., 88-448, 93+112; State v. N. P. Ry., 89-363, 95+297; State v. N. P. Ry., 90-277, 96+81.

[29] State v. Dist. Ct., 91-161, 97+581. See Benz v. St. Paul, 77-375, 79+1024, 82+1118.

[30] O'Ferrall v. Colby, 2-180(148).

[31] Ramsey County v. Heenan, 2-330(281).

[32] State v. Berry, 3—(190).

[33] State v. Cox, 26-214, 2+494; State v. Macdonald, 30-98, 14+459; State v. Baxter, 38-137, 36+108; State v. Egan, 62-280, 64+813.

[34] State v. Ames, 31-440, 18+277; State v. Vasaly, 98-46, 107+818.

[35] State v. Dist. Ct., 32-181, 19+732.

[36] State v. St. P. etc. Ry., 35-131, 28+3; Id., 38-246, 36+870; State v. Mpls. etc.

move their offices to the county seat;[37] to compel county commissioners to sign the proper certificate for the refundment of money paid at a void tax sale;[38] to compel a judge to exercise his discretion as to the allowance of a writ of quo warranto;[39] to compel a county auditor to allow a redemption from a tax sale and to execute a certificate of redemption;[40] to compel a city comptroller to audit and adjust a claim and report it to the council for payment;[41] to compel a county surveyor to turn over to his successor official field notes;[42] to compel county commissioners to restore names to a petition for the removal of a county seat;[43] to compel a justice of the peace to issue an execution;[44] to compel a county auditor to place certain railway lands on the tax lists;[45] to compel the transfer of the files in a case upon a change of venue;[46] to compel the transfer of a certificate of membership in a corporation;[47] to compel a judge of probate to proceed with the settlement of an estate without requiring payment of an inheritance tax;[48] to compel a mayor to sign an order for the services of the relator as city attorney;[49] to compel the county boards of two counties to rebuild a bridge across a river forming a boundary between the two counties;[50] to compel county commissioners to provide for the payment of the county's share of indebtedness upon a division of a county;[51] to compel a commissioner of public works to take action as to the location of telephone poles and wires;[52] to compel a mayor to sign certain bonds of the city;[53] to compel a city comptroller to audit a certain resolution of the city council;[54] to compel a street railway company to construct its line on a certain street;[55] to compel the president of a board of education to sign certain warrants on the treasurer of his district to pay the salary of a teacher;[56] to compel a county auditor to issue his warrant to a school district for money paid as liquor license fees;[57] to compel the officers of a school district to admit children of the relator into the schools of the district;[58] to compel county commissioners to take the necessary action to provide for the payment of a county warrant;[59] to compel a clerk of the district court to search his records for judgments at the request of an abstracter;[60] to compel a city comptroller to join in the execution of certain armory bonds;[61] to compel the trustees of a school district to remove a schoolhouse to a new location;[62] to compel a city recorder to execute an order on the city treasurer;[63] to compel compliance with the orders and directions of the supreme court on the remand of a case to the trial court;[64] to compel the delivery of the seal, books, and papers of a corporation by a secretary who refused to deliver them to his successor in of-

Ry., 39–219, 39+153; State v. St. P. etc. Ry., 75–473, 78+87; Id., 79–57, 81+544; State v. Minn. T. Ry., 80–108, 83+32; State v. Chi. etc. Ry., 85–416, 89+1.

[37] State v. Weld, 39–426, 40+561.

[38] State v. Olson, 58–1, 59+634.

[39] State v. Otis, 58–275, 59+1015.

[40] State v. Halden, 62–246, 64+568; State v. Nord, 73–1, 75+760; State v. Johnson, 83–496, 86+610; State v. Butler, 89–220, 94+688; State v. Scott, 92–210, 99+799.

[41] State v. McCardy, 62–509, 64+1133.

[42] State v. Patton, 62–388, 64+922.

[43] State v. Geib, 66–266, 68+1081.

[44] State v. Myers, 70–179, 72+969.

[45] State v. Stearns, 72–200, 75+210.

[46] State v. Dist. Ct., 77–302, 79+960; State v. Dist. Ct., 85–283, 88+755; State v. Dist. Ct., 90–118, 95+591; State v. Dist. Ct., 92–205, 99+806; State v. Dist. Ct., 94–370, 102+869.

[47] State v. Chamber of Com., 77–308, 79+1026.

[48] Drew v. Tifft, 79–175, 81+839; State v. Bazille, 87–500, 92+415.

[49] State v. Nichols, 83–3, 85+717.

[50] State v. Renville County, 83–65, 85+830.

[51] State v. Demann, 83–331, 86+352.

[52] St. Paul v. Freedy, 86–350, 90+781.

[53] State v. Ames, 87–23, 91+18.

[54] State v. McCardy, 87–88, 91+263.

[55] State v. Duluth St. Ry., 88–158, 92+516.

[56] Snell v. Glasgow, 90–111, 95+881.

[57] State v. Bailer, 91–186, 97+670.

[58] State v. Board of Ed., 91–268, 97+885.

[59] State v. Gunn, 92–436, 100+97.

[60] State v. Scow, 93–11, 100+382.

[61] State v. Rogers, 93–55, 100+659.

[62] State v. Giddings, 98–102, 107+1048.

[63] State v. Hodapp, 104–309, 116+589.

[64] State v. Dist. Ct., 91–161, 97+581.

fice, it appearing that he did not hold them under any color of right to the office;[65] to compel a county treasurer to pay a draft properly drawn by the state auditor for taxes collected for the state;[66] to compel a chairman of a county board and a county auditor to issue a warrant for the payment of a claim allowed by the county board and afterwards improperly disallowed;[67] to compel a county auditor to issue a warrant for the amount of money paid in for the redemption of lands from a tax sale;[68] to compel the secretary of a domestic corporation to call a stockholders' meeting pursuant to a by-law of the corporation;[69] to enforce the liability of a new county for its proportionate share of the debts of the parent county;[70] to enforce the right of a stockholder to inspect the books of the corporation;[71] to compel a county auditor to make and file a lien statement in drainage proceedings after the time limited in order to perfect the lien of a county for money expended on a drainage improvement.[91]

5767. Mandamus denied—Miscellaneous cases—Mandamus has been denied to compel a board of election canvassers to act after they had adjourned sine die;[72] to compel county commissioners to open a road;[73] to compel the issuance of stock in a corporation;[74] to compel a railway company to institute condemnation proceedings;[75] to compel a railway company to construct its road to a certain point;[76] to compel a town to issue its bonds in aid of a railway;[77] to compel a register of deeds to record a deed without a certificate as to payment of taxes;[78] to compel county commissioners to issue county orders in connection with a state road;[79] to compel the warden and inspectors of the state prison to execute a certain lease;[80] to compel a judge of a district court to enforce a prior writ stayed by an appeal with a supersedeas bond;[81] to compel a city comptroller to countersign an order;[82] to compel the state medical examining board to issue a certificate;[83] to compel a justice of the peace to proceed with a criminal action which he had dismissed;[84] to compel a district court to certify a case to the supreme court in tax proceedings;[85] to compel a county treasurer to certify that all taxes are paid when taxes remain unpaid, though the unpaid taxes are illegal;[86] to compel a city to pay damages under abandoned condemnation proceedings;[87] to compel an assessor to assess certain property not legally within his territory;[88] to compel town supervisors to rebuild a bridge forming part of a town highway;[89] to compel the issuance of a liquor license;[90] to compel a county auditor to certify on a deed, "taxes paid and transfer entered;"[91] to compel a judge to settle and allow a case after the time limited by statute;[92] to compel the reinstatement of a deputy

[65] State v. Guertin, 106-248, 119+43.
[66] State v. Holgate, 107-71, 119+792.
[67] State v. Peter, 107-460, 120+896.
[68] State v. Brasie, 96-209, 104+962.
[69] State v. De Groat, 109-168, 123+417.
[70] Beltrami County v. Clearwater County, 109-479, 124+372.
[71] State v. Monida etc. Co., 124+971.
[91] State v. Johnson, 126+479.
[72] Clark v. Buchanan, 2-346(298).
[73] Warner v. Hennepin County, 9-139 (130).
[74] Baker v. Marshall, 15-177(136).
[75] Harrington v. St. P. etc. Ry., 17-215 (188).
[76] State v. Southern Minn. Ry., 18-40 (21).
[77] State v. Highland, 25-355. See State v. Lake City, 25-404; State v. Roscoe, 25-445; State v. Minneapolis, 32-501, 21+722.
[78] State v. Register of Deeds, 26-521, 6+337.
[79] State v. McLeod County, 27-90, 6+421.
[80] State v. Reed, 27-458, 8+768.
[81] State v. Webber, 31-211, 17+339.
[82] State v. Hill, 32-275, 20+196.
[83] State v. State M. E. Board, 32-324, 20+238.
[84] State v. Secrest, 33-381, 23+545.
[85] Brown County v. Winona etc. Co., 38-397, 37+949.
[86] State v. Nelson, 41-25, 42+548.
[87] State v. Minneapolis, 40-483, 42+355.
[88] State v. Archibald, 43-328, 45+606.
[89] State v. Somerset, 44-549, 47+163.
[90] State v. Carver County, 60-510, 62+1135; State v. Schreiner, 86-253, 90+401; State v. Northfield, 94-81, 101+1063.
[91] State v. Weld, 66-219, 68+1068; State v. Krahmer, 92-397, 100+105.
[92] State v. Powers, 69-429, 72+705; State

oil inspector after the expiration of his term;[93] to compel the director and clerk of a school district to approve a bond of the treasurer;[94] to compel a board of education to furnish a county superintendent of schools with a certain room in a schoolhouse for the purpose of holding a teachers' examination;[95] to compel the president and secretary of a political convention to issue a certificate of nomination;[96] to compel the employment of an honorably discharged union soldier;[97] to compel a judge of the district court to take the deposition of a person under the statute relating to the perpetuation of testimony;[98] to compel a county auditor and treasurer to allow an owner to redeem from a tax sale;[99] to compel a compliance with the mandate of the supreme court upon remanding a case to the lower court;[1] to compel county commissioners and county auditor to reconsider a petition for the removal of a county seat;[2] to compel a judge of probate to approve a bond and make return in proceedings for the appointment of a guardian;[3] to compel a county auditor and county treasurer to enforce the collection of certain taxes;[4] to compel a city to pay a judgment against its predecessor;[5] to compel the president of a village to sign an order for the salary of a village marshal who had failed to qualify by taking oath;[6] to compel a judge of probate to take action after a final decree of distribution;[7] to compel the chairman of a county board to sign and execute certain county orders for the benefit of the county surveyor;[8] to compel a clerk of the district court to allow an abstracter to have access to the records of his office;[9] to compel a judge of the district court to submit certain issues of fact to a jury;[10] to compel action in the making up of an official election ballot;[11] to compel a county auditor to issue his certificate of the amount required to redeem certain land from the forfeited tax sale of 1900;[12] to compel a board of school inspectors to admit a child to school without vaccination;[13] to compel a city comptroller to sign a warrant relating to a so-called teachers' retirement fund;[14] to compel a city council to appropriate money for a contingent fund for the mayor;[15] to compel the transfer of the files of an action from one county to another upon a change of venue;[16] to compel an express company to take a parcel from a person conducting a lottery;[17] to compel a county treasurer to pay a judgment against the county;[18] to cancel a tax judgment;[19] to compel the secretary of a foreign corporation to call a meeting of its stockholders for the purpose of taking action necessary to bring about a change in the articles of incorporation of two other foreign corporations.[20]

v. Searle, 81–467, 84+324; State v. Kelly, 94–407, 103+15; State v. Powers, 102–509, 113+1135. See State v. Quinn, 107–503, 120+1088; State v. Qvale, 109–530, 124+22.

[93] State v. Barrows, 71–178, 73+704.
[94] State v. Teal, 72–37, 74+1024.
[95] State v. Board of Ed., 73–375, 76+43.
[96] Phillips v. Gallagher, 73–528, 76+285.
[97] State v. Copeland, 74–371, 77+221.
[98] State v. Elliott, 75–391, 77+952.
[99] State v. Halden, 75–512, 78+16.
[1] Benz v. St. Paul, 77–375, 79+1024, 82+1118.
[2] State v. Butler, 81–103, 83+483.
[3] State v. Bazille, 81–370, 84+120.
[4] State v. Hynes, 82–34, 84+636.
[5] Lee v. Thief River Falls, 82–88, 84+654.
[6] State v. Schram, 82–420, 85+155.
[7] State v. Probate Ct., 84–289, 87+783.
[8] State v. Smith, 84–295, 87+775.
[9] State v. McCubrey, 84–439, 87+1126.
[10] State v. Kingsley, 85–215, 88+742.
[11] State v. Jensen, 86–19, 89+1126; Brown v. Jensen, 86–138, 90+155; State v. Johnson, 87–221, 91+604, 840; State v. Moore, 87–308, 92+4; State v. Scott, 87–313, 91+1101.
[12] State v. Peltier, 86–181, 90+375.
[13] State v. Zimmerman, 86–353, 90+783.
[14] State v. Rogers, 87–130, 91+430.
[15] State v. Minneapolis, 87–156, 91+298.
[16] State v. Dist. Ct., 90–427, 97+112; State v. Dist. Ct., 92–402, 100+2.
[17] State v. U. S. Ex. Co., 95–442, 104+556.
[18] State v. Foot, 98–467, 108+932.
[19] State v. Dist. Ct., 108–535, 122+314.
[20] State v. De Groat, 109–168, 123+417.

PROCEDURE

5768. Jurisdiction of supreme and district courts—The district court has exclusive original jurisdiction in all cases of mandamus, except where such writ is to be directed to a district court or a judge thereof in his official capacity, in which case the supreme court has exclusive original jurisdiction.[21] In such case the supreme court, or a judge thereof, shall first make an order, returnable in term, that such district court or judge show cause before the court why a peremptory writ of mandamus should not issue, and upon the return day of such order the district court or judge may show cause by affidavit or record evidence; and, upon the hearing, the supreme court shall award a peremptory writ or dismiss the order.[22]

5769. Parties defendant—All persons who have a special interest in the subject matter of the proceeding and whose rights will be collaterally determined or substantially affected by the judgment are proper parties defendant, and may be heard for the protection of their rights.[01] Mandamus will lie against a corporation to compel it to perform a specific duty, imposed by its charter or the general law, when the right to have it performed is a complete and perfect legal right, and there is no other specific adequate remedy.[23] A railway company is a quasi public corporation, and all its rights and powers are conferred upon it, not merely for the benefit of the corporation itself, but also in trust for the benefit of the public; and, whenever it neglects or fails to perform any of its corporate duties, it may generally be compelled to perform the same by mandamus.[24] In proceedings for a refundment on an invalid tax sale the county must be made a defendant.[25] The board of regents of the state university may be proceeded against by mandamus.[26] New parties may be brought in as in ordinary civil actions.[27]

5770. On whose information issued—It is provided by statute that the writ shall issue on the information of the party beneficially interested.[28] When the writ is sought for the purpose of enforcing a private right the person directly interested in having the right enforced must be the relator.[29] Where the object is to enforce a public duty not due to the government as such, any private citizen may move to enforce it, and it is unnecessary that he should have any greater interest than other citizens.[30] Public wrongs are to be redressed by public authority.[31]

5771. Successive applications—Res judicata—A denial on the merits of a petition for a writ of mandamus is a bar to another application on the same state of facts. The doctrine of res judicata applies to mandamus proceedings, as to an ordinary civil action. Parties and their privies are concluded in all the issues that were, or might have been, litigated in the proceeding.[32] The

[21] R. L. 1905 § 4566; State v. Burr, 28-40, 8+899; State v. Whitcomb, 28-50, 8+902; State v. Chi. etc. Ry., 38-281, 293, 37+782; State v. Dist. Ct., 77-302, 79+960; State v. Dist. Ct., 91-161, 97+581; Lauritsen v. Seward, 99-313, 109+404. See, under former statutes and prior to adoption of constitution, Harkins v. Scott County, 2-342(294); Crowell v. Lambert, 10-369(295).

[22] State v. Macdonald, 30-98, 14+459.

[01] State v. Johnson, 126+479 (mandamus to compel county auditor to make and file a lien statement under drainage statute after time limited—owners of land affected proper parties defendant).

[23] State v. Southern Minn. Ry., 18-40 (21).

[24] State v. Minn. T. Ry., 80-108, 83+32.

[25] R. L. 1905 § 965; State v. Whitney, 101-539, 111+1134.

[26] Gleason v. University of Minn., 104-359, 116+650.

[27] State v. Mpls. etc. Ry., 39-219, 39+153.

[28] R. L. 1905 § 4557.

[29] State v. Weld, 39-426, 40+561.

[30] State v. Weld, 39-426, 40+561; State v. Archibald, 43-328, 45+606. See State v. Williams, 25-340.

[31] State v. Williams, 25-340.

[32] State v. Hard, 25-460; Kaufer v. Ford, 100-49, 110+364.

doctrine does not apply where the second application is on a different claim or demand.[33]

5772. Notice of application—Except under extraordinary circumstances a peremptory writ should not be allowed without notice, or an order to show cause, or a voluntary appearance of the party against whom the writ is sought.[34]

5773. Demand before suit—Mandamus will not lie to compel a public officer to perform an official duty without a prior demand on him to perform it.[35] Where the duty is owing to the public generally a prior demand is unnecessary. The law itself is a continuing demand.[36]

5774. Peremptory writ in first instance—It is provided by statute that "when the right to require the performance of the act is clear, and it is apparent that no valid excuse for non-performance can be given, a peremptory writ may be allowed in the first instance. In all other cases the alternative writ shall first issue." [37]

5775. Allowance of writ—Service—It is provided by statute that "writs of mandamus shall be issued upon the order of the court or judge, which shall designate the return day, and direct the manner of service thereof, and service of the same shall be by copies of the writ, order allowing same, and petition upon which the writ is granted." [38] The provision of the statute authorizing the judge to direct the manner of the service is constitutional. At common law the courts have always possessed the right and authority to direct the manner of service of writs of mandamus, and with respect to service upon private corporations the rule has been that service should be made on the head officer or upon the select body or person within the corporation whose province it is to put in motion the machinery necessary to secure performance of the duty. No reason exists why this rule should not be applicable when service is to be made upon a joint-stock association.[39] An order directing service "in the manner provided for by law" has been held sufficient.[01] The provisions of a former statute for allowance and indorsement did not apply to a peremptory writ.[40]

5776. Pleading—No pleading or written allegation, other than the writ, answer, or demurrer, is allowed.[41] Allegations in an answer may be on information and belief.[42] Cases are cited below involving the sufficiency of particular pleadings.[43]

5777. Jury trial—In the district court both parties have a right to a jury trial, as in an ordinary civil action.[44] In the supreme court there is no right

[33] State v. Cooley, 58–514, 60+338; Id., 65–406, 68+66.

[34] Clark v. Buchanan, 2–346(298); Harkins v. Scott County, 2–342(294); Home Ins. Co. v. Scheffer, 12–382(261); State v. Scott County, 42–284, 44+64.

[35] State v. Davis, 17–429(406); State v. Schaack, 28–358, 10+22. See State v. Macdonald, 29–440, 13+671; State v. Olson, 55–118, 56+585.

[36] State v. Weld, 39–426, 40+561.

[37] R. L. 1905 § 4559; Clark v. Buchanan, 2–346(298); Harkins v. Scott County, 2–342(294); Harkins v. Sencerbox, 2–344 (297); Home Ins. Co. v. Scheffer, 12–382 (261); State v. Scott County, 42–284, 44+64.

[38] Laws 1909 c. 408.

[39] State v. Adams, 66–271, 68+1085.

[01] State v. Brotherhood of American Yeomen, 126+404.

[40] State v. Giddings, 98–102, 107+1048.

[41] R. L. 1905 § 4563.

[42] State v. Cooley, 58–514, 60+338. See State v. Sherwood, 15–221(172) (denial of any knowledge or information sufficient to form a belief sustained).

[43] Clark v. Buchanan, 2–346(298) (complaint held insufficient); State v. Sherwood, 15–221(172) (answer sustained); State v. Lake City, 25–404, 421 (irrelevant and redundant matter in answer); State v. Macdonald, 29–440, 13+671 (affidavit on application insufficient—variance between affidavit and writ); State v. Ames, 31–440, 18+277 (allegation of incorporation—"duly authorized"—unnecessary to plead charter); State v. Somerset, 44–549, 47+163 (petition for writ to compel im-

to a jury trial,[45] but provision is made by statute for the transmission of the record in a case from the supreme court to a district court for the trial of issues of fact.[46] The record to be transmitted consists of the original papers in the proceedings, together with copies or transcripts of such proceedings in the supreme court as are not evidenced by original papers. The "proper county" to which to transmit the record is to be determined by the general statute regulating the place of trial of civil actions.[47]

5778. Judgment—Form of peremptory writ—The statute contemplates the entry of a formal judgment as in an ordinary civil action.[48] The peremptory writ need not precisely follow the alternative writ in matters of detail. Upon the hearing the court may grant the relief in any form consistent with the case made by the complaint and embraced within the issues. The manner of performing the duty may be specifically directed. The proceeding is more elastic under the statute than at common law.[49] In mandamus proceedings to compel a railway corporation to bridge its tracks where they cross a public street, the trial court, upon the hearing of a return to an alternative writ may determine from the evidence what plan ought to be adopted to best accomplish the desired object, and may entirely disregard plans and specifications for such a bridge, made a part of said writ, and may order the bridge to be constructed in accordance with new plans and specifications; and, for the purpose of determining the kind of a bridge to be built, may have expert evidence on the subject. The court has the right to direct that plans and specifications for such a bridge be prepared by an expert for its use when making its findings of fact, and may adopt as its own such plans and specifications, and may direct that the bridge be built in accordance therewith. That such plans and specifications are prepared by an expert in the employ of the municipality, which, through its council, institutes proceedings to compel the construction of the bridge, is not a valid objection to their adoption by the court. But it has been held error to incorporate new plans in a peremptory writ upon an ex parte order, without giving the railway company a hearing.[50] It is unnecessary that a peremptory writ should be specially allowed or indorsed by the presiding judge.[51]

5779. Vacation and amendment of orders—Orders in mandamus proceedings may be amended or vacated as in ordinary civil actions.[52]

5780. Violation—Contempt—Collateral attack—A judgment directing the issuance of a peremptory writ of mandamus commanding the doing of some act, which is within the authority and jurisdiction of the court to command, cannot be collaterally impeached or avoided in proceedings to punish a disobedience of the writ. If facts arise subsequent to the judgment rendering its modification proper, the exclusive remedy is by motion in the original action. Such new facts cannot be interposed as a defence in the contempt proceedings.[53]

provement of highway held insufficient); State v. Olson, 55–118, 56+585 (petition for writ to compel refundment on invalid tax sale held insufficient); State v. Dist. Ct., 77–302, 79+960 (petition for writ to compel transfer of papers on change of venue sustained).

[44] R. L. 1905 § 4567; State v. Burr, 28–40, 8+899.

[45] State v. Lake City, 25–404. See Clark v. Buchanan, 2–346(298).

[46] R. L. 1905 § 4567.

[47] State v. Lake, 28–362, 10+17.

[48] State v. Copeland, 74–371, 77+221; State v. McKellar, 92–242, 99+807.

[49] State v. Mpls. etc. Ry., 39–219, 39+153; State v. Weld, 39–426, 40+561; State v. St. P. etc. Ry., 75–473, 78+87.

[50] State v. St. P. etc. Ry., 75–473, 78+87.

[51] State v. Giddings, 98–102, 107+1048.

[52] State v. Krahmer, 98–507, 108+1119.

[53] State v. Giddings, 98–102, 107+1048.

5781. Appeal—An order denying a motion for a peremptory writ of mandamus is not appealable.[54] It has been held that an order granting a peremptory writ is appealable,[55] but the proper practice is to have a judgment entered on the order and appeal therefrom.[56] A supersedeas bond on an appeal from an order granting a peremptory writ stays all proceedings upon the order and saves all rights affected thereby.[57]

MANDATORY INJUNCTIONS—See Injunctions.
MANDATORY PROVISIONS—See Constitutional Law, 1580; Statutes, 8954; Taxation, 9178.
MANSLAUGHTER—See Homicide.
MANUAL LABOR—See note 58.
MANUFACTURING CORPORATIONS—See Corporations, 2080.
MAPS—See Boundaries, 1062; Evidence, 3259.
MARGINS—See Wagers, 10133.
MARINE INSURANCE—See Insurance, 4857.

MARITIME LIENS

5782. State and federal jurisdiction—Inland lakes lying within the limits of the state are not navigable waters of the United States, and suits to enforce a lien against boats or vessels thereon are not within the admiralty jurisdiction of the United States. It is competent for the legislature of the state to create liens upon boats and vessels navigating such inland waters for supplies, etc., and to enact reasonable rules and regulations prescribing the mode of their enforcement.[59]

5783. Statutory liens—Our statute gives a lien on vessels for certain obligations.[60] The statute is not limited to such liens as are recognized by the general maritime law of the United States. It has been held to give a lien for materials furnished and services rendered in raising a steamer from the waters of Lake Minnetonka and transporting it to the Minnesota river.[61]

MARKETABLE TITLE—See Vendor and Purchaser, 10022.
MARKET QUOTATIONS—See Contracts, 1747; Exchanges, 3488.
MARKETS OVERT—See Sales, 8595.
MARKET VALUE—See Eminent Domain, 3050; Evidence, 3247, 3322.

[54] State v. McKellar, 92-242, 99+807 (overruling State v. Churchill, 15-455, 369).
[55] State v. Webber, 31-211, 17+339; State v. Teal, 72-37, 74+1024. See State v. Copeland, 74-371, 77+221.
[56] State v. McKellar, 92-242, 99+807.
[57] State v. Webber, 31-211, 17+339.
[58] Martin v. Wakefield, 42-176, 43+966.
[59] Stapp v. St. Clyde, 43-192, 45+430.
[60] R. L. 1905 § 4603. See § 8768.
[61] Laing v. St. Forest Queen, 69-537, 72+809.

MARRIAGE

Cross-References

See Conflict of Laws, 1557; Divorce; Husband and Wife.

5784. A civil contract—By statute marriage is a civil contract so far as its validity in law is concerned.[62] The essence of the contract is the consent of the parties. If the contract is made per verba de praesenti and remains without cohabitation, or if made per verba de futuro and is followed by consummation, it is a valid marriage. To render competent parties husband and wife it is only necessary that they agree in the present tense to be such. If cohabitation follows it adds nothing in law, though it may be evidence of marriage.[63] It differs from all other contracts in that it cannot be dissolved by the parties themselves but only by the judgment of a competent court.[64]

5785. Ceremony unnecessary—No formal solemnization or ceremony is necessary.[65]

5786. License—A marriage may be valid without a license.[66] A clerk of the district court, in administering an oath to an applicant for a marriage license, is not required to affix the seal of the court to the jurat; and the application, if duly signed by the applicant and attested by the clerk, constitutes prima facie evidence that the oath was duly administered.[67]

5787. Unauthorized solemnization—Want of authority in the person solemnizing a marriage will not affect its validity if it is consummated in good faith.[68]

5788. Competency of parties—By statute a female is competent to marry at fifteen and a male at eighteen.[69] The marriage of a person who has not reached the age of statutory competency, but who is competent at common law, is not void, but voidable only by a judicial decree of nullity at the election of the party at any time before reaching the statutory age, or afterwards if there has been no voluntary cohabitation after reaching such age. Such a marriage is to be treated as valid for all civil purposes until so set aside.[70]

5789. Consanguinity—A marriage between persons within prohibited degrees of consanguinity is void without any judgment of court.[71]

5790. Secrecy—A marriage may be valid though it is kept secret, but the fact of secrecy is evidence of no marriage.[72] Marriage will not be presumed from a secret cohabitation.[73]

5791. When former spouse supposed dead—By statute a marriage by one whose former spouse has not been heard from for five years is not void though such spouse is living. It is valid until set aside by a competent court and cannot be assailed collaterally.[74]

5792. Indian marriages—A marriage of Indians according to the customs of their tribe is to be sustained in the state courts, and the children of such a marriage cannot be deemed illegitimate.[75]

[62] R. L. 1905 § 3552; State v. Worthingham, 23-528, 533.
[63] Hulett v. Carey, 66-327, 69+31.
[64] True v. True, 6-458(315, 318).
[65] State v. Worthingham, 23-528.
[66] Id.
[67] State v. Day, 108-121, 121+611.
[68] R. L. 1905 § 3566; State v. Brecht, 41-50, 42+602.
[69] R. L. 1905 § 3553; State v. Lowell, 78-166, 80+877; State v. Rollins, 80-216, 83+141; State v. Sager, 99-54, 108+812.
[70] State v. Lowell, 78-166, 80+877. See R. L. 1905 §§ 3570-3573.
[71] R. L. 1905 §§ 3554, 3569; Charles v. Charles, 41-201, 42+935; State v. Herges, 55-464, 57+205.
[72] Hulett v. Carey, 66-327, 337, 69+31. See Heminway v. Miller, 87-123, 91+428.
[73] Heminway v. Miller, 87-123, 91+428.
[74] R. L. 1905 § 3569; Charles v. Charles, 41-201, 42+935.
[75] Earl v. Godley, 42-361, 44+254.

5793. Presumptions—Every reasonable presumption is to be indulged in favor of marriage as against concubinage.[76] Persons who cohabit as husband and wife and hold themselves out as such in the community in which they live are presumed to be married, but such presumption does not arise unless the cohabitation is matrimonial. Marriage will not be presumed from occasional admissions, declarations, and secret cohabitation.[77] A cohabitation illicit in its origin is presumed to remain such during its continuance,[78] but this presumption is one of fact and the weight to be given to it is for the jury.[79]

5794. Mode of proving—By statute the fact of marriage may be proved by admissions, general repute, cohabitation, or other circumstantial evidence.[80] Prior to statute it could only be proved by direct evidence in prosecutions for adultery, bigamy, etc.[81] By statute the original certificate of marriage and the record thereof is prima facie evidence of the marriage.[82] Marriage may be proved by the direct testimony of the parties.[83] Documents executed by the parties in which they declare themselves single are admissible.[84] A letter written by an alleged wife with the knowledge and consent of the alleged husband in which she described the latter as her husband has been held admissible.[85] Marriage may be proved by inscriptions on grave stones and entries in family Bibles.[86]

5795. Degree of proof—A common-law marriage is not to be proved by slight and ambiguous evidence.[87]

5796. Evidence—Sufficiency—Cases are cited below holding evidence sufficient,[88] or insufficient,[89] to establish a common-law marriage.

5797. Annulment for fraud or incompetency—Provision is made by statute for the annulment of marriages on various grounds.[90] The courts are not authorized to decree a marriage contract void on the ground of the insanity of one of the parties, except for such want of understanding in such party as to render him or her incapable of assenting thereto. And though such person may be subject to some vice or uncontrollable impulse or propensity, yet, if otherwise sane, and able to understand the nature and obligations of the marriage contract, a decree of nullity will not be granted. A contract of marriage may be avoided when brought about by artifice or fraudulent practices, but, as a general rule, concealment by one of the parties of personal traits or defects of character, or habits, reputation, bodily health, or other peculiar infirmities, is not sufficient ground for avoiding a marriage.[91] A marriage by one under the statutory age may be annulled by judgment of court.[92] In an action for annulment the complainant must have resided in the state one year immediately preceding the time of exhibiting the complaint.[93]

MARRIED WOMEN—See Homestead; Husband and Wife.

[76] State v. Worthingham, 23-528; Fox v. Burke, 31-319, 17+861. See Heminway v. Miller, 87-123, 128, 91+428.

[77] Heminway v. Miller, 87-123, 91+428; In re Terry, 58-268, 274, 59+1013.

[78] State v. Worthingham, 23-528, 536; In re Terry, 58-268, 270, 59+1013.

[79] State v. Worthingham, 23-528, 537.

[80] R. L. 1905 § 4740; State v. Johnson, 12-476(378); Leighton v. Sheldon, 16-243(214); State v. Armington, 25-29; In re Terry, 58-268, 59+1013.

[81] State v. Armstrong, 4-335(251); State v. Johnson, 12-476(378); State v. Worthingham, 23-528, 534.

[82] R. L. 1905 § 4739; State v. Brecht, 41-50, 42+602.

[83] Leighton v. Sheldon, 16-243(214).

[84] Heminway v. Miller, 87-123, 91+428. See Hulett v. Carey, 66-327, 69+31.

[85] Hulett v. Carey, 66-327, 69+31.

[86] State v. Armstrong, 4-335(251, 260).

[87] In re Terry, 58-268, 275, 59+1013.

[88] In re Terry, 58-268, 59+1013; Heminway v. Miller, 87-123, 91+428.

[89] State v. Worthingham, 23-528.

[90] R. L. 1905 §§ 3570-3573; Waller v. Waller, 102-405, 113+1013 (opening judgment).

[91] Lewis v. Lewis, 44-124, 46+323. See Wilson v. Wilson, 95-464, 104+300; R. L. 1905 § 3573.

[92] State v. Lowell, 78-166, 80+877. See § 5788.

[93] Wilson v. Wilson, 95-464, 104+300.

MARSHALING ASSETS AND SECURITIES

Cross-References

See Chattel Mortgages, 1473; Mortgages, 6466.

5798. In general—It is a general rule that if one creditor has, by virtue of a lien or interest, a right to resort to two funds for his debt, and another creditor can resort to only one of them for his debt, equity will compel the former creditor to resort in the first instance to the fund to which the latter creditor cannot resort, where such a course is necessary to satisfy the claims of both creditors and would not operate to the prejudice of the creditor having the two funds.[94] The rule ordinarily applies only to creditors of a common debtor, to whom both funds or securities belong. To this general rule there are some apparent exceptions, which, however, are within its spirit. For example, it will be allowed between creditors of different persons where it appears that the debtor whose estate is sought to be charged is primarily liable, and this for the same reason that subrogation may be admitted where the two securities belong to different persons if the fund not taken be one which in equity is primarily liable.[95]

5799. Primary and secondary liability—It is a general rule of equity that where a creditor has a remedy against two funds for the payment of his debt, the one primarily and the other secondarily liable, he may be compelled to resort to the fund first liable for its payment, and to exhaust his remedy against it before resorting to the other.[96]

MARSHES—See Waters, 10171.

[94] Franklin v. Warden, 9-124(114); Miller v. McCarty, 47-321, 50+235.

[95] Merchants' Nat. Bank v. Stanton, 55-211, 222, 56+821.

[96] Willius v. Mann, 91-494, 502, 98+341. See N. W. etc. Co. v. Allis, 23-337, 342.

MASTER AND SERVANT

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Cross-References

See Conspiracy, 1565; Negligence; Trade Unions; Work and Labor.

THE CONTRACT

5800. A contract relation—The relation of master and servant rests upon contract, express or implied.[97]

5801. When relation exists—The relation of master and servant has been held to exist, under the circumstances, between a railway company and the servants of a union depot company.[98]

5802. Mutuality—Period of service—A contract for employment is not lacking in mutuality because the party employed does not bind himself to continue in the employment for a definite period.[99]

5803. Consideration—The general rule requiring a consideration for contracts [1] applies to contracts of employment.[2]

[97] Caron v. Powers, 96-192, 104+889.
[98] Floody v. G. N. Ry., 102-81, 112+875, 1081.
[99] Newhall v. Journal P. Co., 105-44, 117+228.
[1] See § 1750.
[2] Starkey v. Minneapolis, 19-203(166);

5804. Oral contract—Subsequent written contract—After a contract for service, made orally, had been partly performed, a written agreement was executed, specifying the term of service, including the past as well as the future time, and stating the compensation. It was held that the written agreement should be deemed to embody the contract relating to the past as well as to the future service.[3]

5805. Performance—Under a contract to serve as an actress for a period of several months, at a stated weekly salary, it was unnecessary, in order to constitute a performance of the contract for a particular week, that the actress appear upon the stage, she not being called upon to do so.[4]

5806. Substantial performance—The general rule that substantial performance of a contract is sufficient [5] applies to contracts of employment.[6]

5807. Breach—Disabling one's self—One who voluntarily disables himself from performing specifically his contract becomes at once liable in damages.[7] A contract employing one as manager of a sales department in a retail store is violated by reducing the rank of the servant to that of a sales clerk.[91]

5808. Duration—Particular contracts construed—Cases are cited below involving the construction of particular contracts as to their duration.[8]

ABANDONMENT OF CONTRACT BY SERVANT

5809. Grounds—As a general rule a wrongful and unlawful assault and battery committed by the master upon his servant will justify the latter in abandoning the service, though engaged for a fixed time, and without working a forfeiture of compensation for the time actually engaged under the contract.[9] The sicknesss of a servant justifies him in abandoning a contract.[10]

5810. For cause—Recovery—Where a servant abandons the contract for cause, as for sickness, he is entitled to his pro rata wages, or the value of his services, not exceeding the compensation fixed by the contract.[11]

5811. Without cause—Recovery—Where a contract of employment is for a definite term and entire and the servant abandons the service without cause before the completion of the term he is not entitled to recover anything for the partial performance of his contract.[12] The rule is otherwise when the contract is severable.[13]

WAGES

5812. Particular contracts construed—Cases are cited below involving the construction of particular contracts as regards compensation.[14]

Bolles v. Sachs, 37–315, 33+862; McMullan v. Dickinson Co., 63–405, 65+661.

[3] Blondel v. Le Vesconte, 41–35, 42+544.

[4] Sterling v. Bock, 37–29, 32+865.

[5] See § 1781.

[6] Peterson v. Mayer, 46–468, 49+245; Potter v. Barton, 86–288, 90+529.

[7] Bolles v. Sachs, 37–315, 33+862.

[91] Cooper v. Stronge, 126+541.

[8] Horn v. Western L. Assn., 22–233 (a contract at so much "per year" held a contract for at least a year); Frary v. Am. R. Co., 52–264, 53+1156 (for a specified time to the satisfaction of the master); Smith v. St. P. & D. Ry., 60–330, 62+392 (contract to give work as long as servant is able to perform it); McMullan v. Dickinson Co., 63–405, 65+661 (so long as servant should hold certain stock in the corporation); McCormick v. Louden, 64–509, 67+366 (promise that log drive should last a certain time—master turning drive over to another); Youngberg v. Lamberton, 91–100, 97+571 (terminable at will by either party upon a settlement); Egan v. Winnipeg B. Club, 96–345, 104+947 (base ball contract—stipulation not to "release" player within specified time).

[9] Erickson v. Sorby, 90–327, 96+791; Langguth v. Burmeister, 101–14, 111+653.

[10] La Du v. La Du, 36–473, 31+938.

[11] Id.

[12] Mason v. Heyward, 3–182(116); Nelichka v. Esterly, 29–146, 12+457; Kohn v. Fandel, 29–470, 13+904; Peterson v. Mayer, 46–468, 49+245.

[13] See McGrath v. Cannon, 55–457, 57+150.

[14] Horn v. Western L. Assn., 22–233 (employment of attorney on an annual sal-

5813. In absence of agreement—In the absence of express agreement the servant is entitled to recover what his services are reasonably worth.[15]

5814. To be determined by master—Where the contract provides that the master shall determine the amount of compensation after the services are performed his determination is conclusive in the absence of fraud or bad faith.[16]

5815. When payable—In the absence of a contrary agreement wages are due immediately upon the termination of the contract of service.[17]

5816. Computation of time of service—The day of hiring and the day of discharge are to be computed as full days in the absence of special agreement.[18]

5817. Extra services—Extra services may be rendered under such circumstances as to justify a recovery on the theory of an implied agreement to pay for them.[19]

5818. Sickness—If a servant is prevented by sickness from performing his contract he cannot recover wages for the period of his incapacity.[20]

RULES AND REGULATIONS

5819. Reasonableness—A requirement by the proprietor of a business school attended by minors and others that teachers therein shall not frequent saloons in the vicinity of such school, where intoxicating liquors are sold, is, as a matter of law, a reasonable regulation. The submission of such question to a jury to determine is error.[21]

DISCHARGE OF SERVANT

5820. What constitutes—No particular form of words is necessary to constitute a discharge. Any form of words which conveys to the servant the idea that his services are no longer required is sufficient.[22]

5821. Motive—Assignment of reasons—The motives which actuate a master in discharging a servant are wholly immaterial, for the act is justified if any legal ground therefor existed at the time; and it is also immaterial whether or not all of the grounds were known to the master when discharging the servant. Nor is it necessary for the master to assign a reason for the discharge, and, should he assign one, he is not bound by it; nor is he estopped to rely upon some other or different reason or cause, whether known to him at the time of the discharge or not.[23]

ary); Scase v. Gillette, 55–349, 57+58 (fixed monthly salary and percentage of profits in business); Metzdorf v. Western S. Co., 60–365, 62+397 (salesman—monthly salary—agreement as to increase); O'Brien v. Colchester R. Co., 60–535, 63+106 (commission on sale of goods—acceptance of orders); Morrison v. Arons, 65–321, 68+33 (share in profits of business); Crosby v. St. Paul etc. Co., 74–82, 76+958 (compensation conditional on success in procuring land for master); Citizens State Bank v. Bonnes, 76–45, 78+875 (wages of men in hauling logs); Wommer v. Segelbaum, 78–182, 80+952 (monthly salary and percentage of profits of business); Charron v. Pine T. L. Co., 79–425, 82+679 (services of man and team—controversy as to whether father or son was entitled to wages); Spinney v. Hill, 81–316, 84+116 (part of salary in cash and part in corporate stock); Pearson v. G. N. Ry., 90–227, 95+1113 (locating coal mines—fixed salary and additional amount if successful); Smith v. Hunt, 90–255, 95+907; (guaranty of stipulated sum); Youngberg v. Lamberton, 91–100, 97+571 (fixed monthly salary and percentage of profits of business).

[15] McKee v. Vincent, 33–508, 24+353. See § 10368.

[16] Butler v. Winona M. Co., 28–205, 9+697.

[17] Thompson v. Mpls. etc. Ry., 35–428, 29+148.

[18] Olson v. Rushfeldt, 81–381, 84+124.

[19] Fravell v. Nett, 46–31, 48+446.

[20] Powell v. Newell, 59–406, 61+335; Raley v. Victor Co., 86–438, 90+973.

[21] Koons v. Langum, 93–332, 101+490.

[22] Johnson v. Crookston L. Co., 92–393, 100+225; Bennett v. Morton, 46–113, 48+678. See Smith v. Herz, 92–254, 99+1134.

[23] Von Heyne v. Tompkins, 89–77, 93+901. See Ham v. Wheaton, 61–212, 63+495.

5822. Master acts at his peril—Masters assuming to be the final arbiters in their own behalf of the propriety of dismissing their servants during their terms of employment take the responsibility which attaches to a dismissal without cause.[24]

5823. After substantial performance—Where a contract for work and labor has been substantially performed as to time, and in its most material parts, a master has no right to dismiss a servant and to refuse to carry out a contract previously made for a term not yet expired.[25]

5824. Grounds—A servant may be discharged for disobedience;[26] dishonesty;[27] drunkenness;[28] or sickness.[29] The fact that a servant owning stock in the corporation by which he was employed pledged the stock as security for his personal debt has been held not a ground for discharging him.[30]

5825. Dissatisfaction with services—A stipulation in a contract of employment for personal services to the "satisfaction" of the master gives him the absolute right to discharge the servant whenever he is in good faith dissatisfied with him.[31]

5826. Waiver—A master ordinarily waives the right to discharge a servant for misconduct by keeping him after notice of the misconduct.[32]

5827. No duty to return—A servant who is wrongfully discharged is not bound to re-enter the service, upon the request of the master, in order to reduce the damages caused by the discharge.[33]

5828. No duty to offer performance—Where a servant is wrongfully discharged he is not bound to present himself to the master and offer to perform before he can recover damages for the breach of the contract.[34]

5829. Duty to seek other employment—A servant who is wrongfully discharged before the expiration of his term of service is bound to make an honest effort to obtain other similar employment and thereby diminish the loss resulting from the breach of the contract.[35]

5830. Duty of servant to quit master's premises—If a servant is discharged, he must, on request, quit the premises of the master; and if he refuses to go, the master may eject him, and for that purpose use such force as is reasonably necessary.[36]

5831. Discharge for cause—Recovery—Where a servant employed for a definite term under an entire contract is discharged for cause he can recover nothing for his services.[37]

5832. Remedies of servant for wrongful discharge—A servant wrongfully discharged may maintain an action in the nature of quantum meruit,[38] or an

[24] Potter v. Barton, 86-288, 90+529.

[25] Id.

[26] Von Heyne v. Tompkins, 89-77, 93+901; Koons v. Langum, 93-332, 101+490.

[27] Peterson v. Mayer, 46-468, 49+245. See Person v. McCargar, 92-294, 99+885; Lahr v. Kraemer, 91-26, 97+418.

[28] Smith v. St. P. & D. Ry., 60-330, 62+392.

[29] See Powell v. Newell, 59-406, 61+335; Raley v. Victor Co., 86-438, 90+973; Egan v. Winnipeg B. Club, 96-345, 104+947.

[30] McMullan v. Dickinson Co., 63-405, 65+661.

[31] Frary v. Am. Rubber Co., 52-264, 53+1156; Beissel v. Vermillion F. E. Co., 102-229, 113+575.

[32] See Person v. McCargar, 92-294, 99+885.

[33] Youngberg v. Lamberton, 91-100, 97+571.

[34] Mackubin v. Clarkson, 5-247(193, 198); McMullan v. Dickinson Co., 63-405, 65+661, 663; Bennett v. Morton, 46-113, 48+678.

[35] Williams v. Anderson, 9-50(39); Horn v. Western L. Assn., 22-233; McMullan v. Dickinson Co., 60-156, 62+120; Id., 63-405, 65+661, 663; Beissel v. Vermillion F. E. Co., 102-229, 113+575; Cooper v. Stronge, 126+541 (by "other employment" is meant employment of a character such as that in which he was employed, or not of a more menial kind).

[36] Lightbody v. Truelsen, 39-310, 40+67.

[37] Von Heyne v. Tompkins, 89-77, 93+901. See Peterson v. Mayer, 46-468, 49+245.

[38] Mackubin v. Clarkson, 5-247(193).

action for the breach of the contract, or an action for wages already earned at the time of the dismissal. He cannot maintain an action for wages subsequent to the discharge on the theory of constructive service.[39]

MASTER'S LIABILITY FOR SERVANT'S TORTS

5833. General rule—A master is liable for the torts of his servant committed in the course of his employment and in furtherance of his master's business. The liability of a master extends to wilful, wanton, or malicious acts as well as to acts of negligence. It may exist though the act was expressly forbidden by the master, or was contrary to his instructions, or was in excess of authority. The master is not liable where the act was not done in connection with his business. If a servant steps aside from his master's business, for however short a time, to do an act not connected with such business, the relation of master and servant is for the time suspended and the master is not liable. The test in all cases is whether the act was done by authority of the master, expressly conferred or fairly implied from the nature of the employment and the duties incident to it. The act must pertain to the duties which the servant is expressly or impliedly authorized to perform.[40] An exception to the general rule is made where the master is serving the public under such circumstances that his servant's acts must of necessity be relied upon by the public.[41] The expression "in the course of his employment" means, "while engaged in the service of the master." It is not synonymous with "during the period covered by his employment." [42] Some of our cases make it a condition of the master's liability that the act of the servant be done "with a view to the furtherance of his master's business." [43] This seems objectionable as suggesting that the intention of the servant is material.

5834. Who are servants—Volunteers—If a servant who is employed to perform certain work for his master procures another person to assist him, the master is liable for the negligence of the latter, only when the servant had authority to employ such assistant. But this authority may be implied from the nature of the work to be performed, or from the general course of conducting the business of the master by the servant; and it is unnecessary that there should be an express employment of the person in behalf of the master, or that compensation be paid or expected. It is enough to render the master liable if the person guilty of the negligence was at the time in fact rendering service for him by his consent, express or implied.[44] One who has an interest in the work to be performed, and for his own convenience, or to facilitate or expedite his own work or that of his employer, assists the servants of another, at their request or with their consent, is not thereby deprived of his right to be protected against the carelessness of the other's servants.[45]

[39] McMullan v. Dickinson Co., 60–156, 62+120.

[40] Walker v. Johnson, 28–147, 9+632; Morier v. St. P. etc. Ry., 31–351, 17+952; Ellegard v. Ackland, 43–352, 45+715; Theisen v. Porter, 56–555, 58+265; Smith v. Munch, 65–256, 68+19; Johanson v. Pioneer Fuel Co., 72–105, 75+719; Peterson v. W. U. Tel. Co., 75–368, 374, 77+985; Lesch v. G. N. Ry., 93–435, 101+965; Crandall v. Boutell, 95–114, 103+890; Slater v. Advance T. Co., 97–305, 107+133; Merrill v. Coates, 101–43, 111+836; Barrett v. Mpls. etc. Ry., 106–51, 117+1047; Kwiechen v. Holmes, 106–148, 118+668. See § 212.

[41] McCord v. W. U. Tel. Co., 39–181, 39+315. See 14 Harv. L. Rev. 297.

[42] Slater v. Advance T. Co., 97–305, 107+133.

[43] Barrett v. Mpls. etc. Ry., 106–51, 117+1047; Kwiechen v. Holmes, 106–148, 118+668.

[44] Haluptzok v. G. N. Ry., 55–446, 57+144; Setterstrom v. Brainerd etc. Ry., 89–262, 94+882.

[45] Meyer v. Kenyon, 95–329, 104+132; Kelly v. Tyra, 103–176, 114+750, 115+636.

5835. Independent contractors—The relation of master and servant does not exist between an employer and an independent contractor. As a general rule an employer is not liable to third parties for the acts of an independent contractor or his servants.[46] An independent contractor is one who, exercising an independent employment or occupation, contracts to do a piece of work according to his own methods and without being subject to the control of his employer except as to the result of the work.[47] He represents the will of his employer only as to the result of his work and not as to the means by which it is accomplished.[48] If an employer has the right or duty to control a person working for him as to the manner in which the work shall be done the doctrine of respondeat superior applies; otherwise not.[49] In other words, in determining whether the doctrine of respondeat superior applies, the test is whether, with reference to the matter out of which the alleged wrong sprung, the person sought to be charged had the right under the contract of employment, to control, in the given particular complained of, the action of the person doing the wrong.[50] The fact that the employer has the right to employ and discharge the person is not decisive.[51] The fact that the employer has the right to supervise the work to see that it conforms to the contract does not affect the independence of the relation.[52] The contract is not conclusive as to the relation of the parties, if, notwithstanding the contract, the employer assumes control of the work.[53] The foregoing principles apply as between an original contractor and a subcontractor.[54] Whether a person is an independent contractor is a question for the jury, unless the evidence is conclusive.[55] So it is for the jury to determine whether a contract of employment was made with an independent contractor or with his employer.[56]

5836. Liability of partners—Where it appears that two persons are jointly interested in the navigation and earnings of a steamboat, the presumption is that those employed in managing the boat are the servants of both, though one of them employed and controlled such servants, the presumption being that he did so by the authority of the other.[57]

[46] Shute v. Princeton, 58–337, 59+1050; Schip v. Pabst, 64–22, 66+3. See, for exceptions to the general rule, Bast v. Leonard, 15–304(235); Leber v. Mpls. etc. Ry., 29–256, 13+31; Haluptzok v. G. N. Ry., 55–446, 449, 57+144; Vosbeck v. Kellogg, 78–176, 80+957; Corrigan v. Elsinger, 81–42, 83+492; Ray v. Jones, 92–101, 99+782.

[47] Waters v. Pioneer F. Co., 52–474, 55+52; Barg v. Bousfield, 65–355, 68+45. It is probably unnecessary that the contractor should be exercising a distinct calling or occupation. See Shute v. Princeton, 58–337, 59+1050.

[48] Barg v. Bousfield, 65–355, 68+45; Vosbeck v. Kellogg, 78–176, 80+957.

[49] St. Paul v. Seitz, 3–297(205); Bast v. Leonard, 15–304(235, 244); Sewall v. St. Paul, 20–511(459); Rait v. New England etc. Co., 66–76, 68+729; Gahagan v. Aermotor Co., 67–252, 69+914; Whitson v. Ames, 68–23, 70+793; Vosbeck v. Kellogg, 78–176, 80+957; Corrigan v. Elsinger, 81–42, 83+492; Aldritt v. Gillette, 85–206, 88+741; Roe v. Winston, 86–77, 90+122; Klages v. Gillette, 86–458, 90+1116; Pierce v. Brennan, 88–50, 92+507; Johnson v. Crookston L. Co., 95–142, 103+891; Jones v. Minn. etc. Ry., 97–232, 106+1048; Northrup v. Hayward, 99–299, 109+241. See Smith v. Twin City R. T. Co., 102–4, 112+1001; Floody v. Chi. etc. Ry., 109–228, 123+815; Anderson v. Foley, 124+987.

[50] Gahagan v. Aermotor Co., 67–252, 69+914.

[51] Roe v. Winston, 86–77, 90+122; Johnson v. Crookston L. Co., 95–142, 103+891.

[52] Vosbeck v. Kellogg, 78–176, 80+957.

[53] Rait v. New England etc. Co., 66–76, 68+729; Klages v. Gillette, 86–458, 90+1116; Anderson v. Foley, 124+987.

[54] Aldritt v. Gillette, 85–206, 88+741; Klages v. Gillette, 86–458, 90+1116.

[55] Barg v. Bousfield, 65–355, 68+45; Rait v. New England etc. Co., 66–76, 68+729; Gahagan v. Aermotor Co., 67–252, 69+914; Whitson v. Ames, 68–23, 70+793; Johnson v. Crookston L. Co., 95–142, 103+891; Caron v. Powers, 100–341, 111+152.

[56] Caron v. Powers, 96–192, 104+889.

[57] McMahon v. Davidson, 12–357(232).

5837. Ratification—A promise to pay the damage, if it was not too much, has been held not to constitute a ratification of the act of a servant, if it was unauthorized.[58] The retention of a servant with the knowledge that he has done some negligent act for which the master is not liable, will not in itself render the master liable.[59]

5838. Pleading—A complaint against a master for a tort of his servant must show that it was committed while the servant was acting within the scope of his employment.[60]

5839. Burden of proof—The burden is ordinarily on the plaintiff to prove every fact necessary to establish the master's liability.[61]

5840. Sufficiency of evidence—Fires set by sectionmen—The fact that railway sectionmen were engaged during the ordinary hours of labor in performing work ordinarily done by them on the railway right of way at that time of year (of which courts and juries may take notice, as matters of common knowledge) is sufficient, in the absence of any rebutting evidence, to justify a jury in finding that the sectionmen were acting within the scope of their employment with the railway company.[62]

5841. Law and fact—Whether a servant was acting within the scope of his employment and whether he was negligent are questions for the jury, unless the evidence is conclusive.[63]

5842. Master held liable—Where the servant, engaged in hauling supplies to the master's logging camp converted the wagon of another, his own wagon having broken down;[64] where a servant, intrusted with an express wagon to do such business as he could secure, after delivering a trunk, on his return got a load of poles for himself and while taking them home negligently drove over a child;[65] where a servant employed to drive a team took the hay of another and fed it to the team;[66] where a clerk in a drug store failed to label a poison which he sold;[67] where a farm hand built a fire in grubbing and the fire spread to adjoining land and destroyed the plaintiff's trees;[68] where a bar-tender forcibly and tortiously ejected a person from a saloon;[69] where a servant of a grain elevator company started the machinery by which the elevator was run while a child was sitting on the wheel, the machine being run by horse power, and then left the premises with no one in charge;[70] where the servant of a fuel company was negligent in replacing the cover to a coalhole in a sidewalk;[71] where the superintendent of a factory caused the arrest of a person who entered the factory and attempted to induce the employees to quit work;[72] where a servant negligently operated a hoisting apparatus in connection with the construction of a building;[73] where the servant of a coal company negligently opened a coalhole in a sidewalk;[74] where a servant of a threshing machine company negligently started a threshing machine engine while a purchaser of the machine had

[58] Potulni v. Saunders, 37–517, 35+379.
[59] Kwiechen v. Holmes, 106–148, 118+668.
[60] Campbell v. N. P. Ry., 51–488, 53+768; Johanson v. Pioneer F. Co., 72–405, 75+719; Foran v. Levin, 76–178, 78+1047.
[61] Morier v. St. P. etc. Ry., 31–351, 17+952.
[62] Baxter v. G. N. Ry., 73–189, 75+1114. See Goul'd v. N. P. Ry., 50–516, 52+924.
[63] Waters v. Pioneer Fuel Co., 52–474, 55+52; Theisen v. Porter, 56–555, 58+265.
[64] Walker v. Johnson, 28–147, 9+632.
[65] Mulvehill v. Bates, 31–364, 17+959. This is a border case. See Slater v. Advance T. Co., 97–305, 313, 107+133.
[66] Potulni v. Saunders, 37–517, 35+379.
[67] Osborne v. McMasters, 40–103, 41+543.
[68] Ellegard v. Ackland, 43–352, 45+715.
[69] Brazil v. Peterson, 44–212, 46+331; Merrill v. Coates, 101–43, 111+836. See Cofield v. McCabe, 58–218, 59+1005.
[70] Gunderson v. N. W. El. Co., 47–161, 49+694.
[71] Waters v. Pioneer F. Co., 52–474, 55+52.
[72] Smith v. Munch, 65–256, 68+19.
[73] Eckman v. Lauer, 67–221, 69+893.
[74] Ray v. Jones, 92–101, 99+782.

his hand in the machinery;[75] where a servant of a stove company negligently neglected to clean out a chimney when setting up a stove;[76] where a servant of a railway company wrongfully entered a private house in search of property stolen from the company;[77] where a servant of a street railway company assaulted a person about to enter a car;[78] where sectionmen built a fire on a railway right of way and it spread to adjoining land;[79] where a bar-tender was negligent in not protecting a person in a saloon from the assault of third parties;[80] where a saleswoman in a department store threw a cord attached to a bundle-carrying apparatus out into the aisle and into the face of a customer;[81] where a servant negligently allowed a plank to fall whereby a servant of another master was injured;[82] where a servant of an ice company negligently drove one of its supply wagons into the carriage of the plaintiff;[83] where a brakeman ordered a boy stealing a ride on a freight train to get off while the train was in motion;[84] where a servant assaulted a person rightfully upon the premises of the master for the purpose of testing and inspecting certain materials to be furnished by the master.[85]

5843. Master held not liable—Where sectionmen kindled a fire on a railway right of way to warm their coffee for dinner and the fire spread to an adjoining field and burned the plaintiff's hay;[86] where a shipping clerk called to a person wishing to use an elevator to reach the offices of the defendant "all right," and in consequence the person fell down the shaft of the elevator;[87] where a bar-tender called a disorderly person into a back room adjoining the saloon and there assaulted him;[88] where a servant of a coal company assaulted a customer of the company, a dispute having arisen between them as to the honesty of the customer;[89] where sectionmen kindled a fire on a railway right of way;[90] where the servant of a threshing machine company, who was furnished with an automobile to use in the company's business, negligently operated the automobile while using it for his private purposes, so as to cause a runaway.[91] Where a servant employed to deliver coal tied his own horse to the rear of a box sled used by him for delivering coal, and the horse kicked a person on a sidewalk as the servant was driving the sled along a street on his way to deliver coal before going home, the servant owning the team and sled.[92]

SERVANT'S LIABILITY FOR NEGLIGENCE

5844. To master—A servant is liable to his master for negligence in the discharge of his duties.[93]

5845. To fellow servants—Where several persons are engaged in the same work, in which the negligent or unskilful performance of his part by one may

[75] Meyer v. Kenyon, 95-329, 104+132.
[76] Crandall v. Boutell, 95-114, 103+890.
[77] Lesch v. G. N. Ry., 93-435, 101+965; Id., 97-503, 106+955.
[78] Ford v. Mpls. St. Ry., 98-96, 107+817.
[79] Gould v. N. P. Ry., 50-516, 52+924. See Morier v. St. P. etc. Ry., 31-351, 17+952; Baxter v. G. N. Ry., 73-189, 75+1114.
[80] Curran v. Olson, 88-307, 92+1124.
[81] McQuade v. Golden Rule, 105-326, 117+484.
[82] Kelly v. Tyra, 103-176, 114+750, 115+636.
[83] Banker v. People's Ice Co., 63-411, 65+657.
[84] Barrett v. Mpls. etc. Ry., 106-51, 117+1047.
[85] Cressy v. Republic C. Co., 108-349, 122+484.
[86] Morier v. St. P. etc. Ry., 31-351, 17+952. See Baxter v. G. N. Ry., 73-189, 75+1114; Gould v. N. P. Ry., 50-516, 52+924.
[87] Mouso v. Kellogg, 58-406, 59+941.
[88] Cofield v. McCabe, 58-218, 59+1005.
[89] Johanson v. Pioneer F. Co., 72-405, 75+719.
[90] Baxter v. G. N. Ry., 73-189, 75+1114.
[91] Slater v. Advance T. Co., 97-305, 107+133.
[92] Kwiechen v. Holmes, 106-148, 116+668.
[93] Bidwell v. Madison, 10-13(1) (failing to make demand on note whereby indorser was discharged).

cause danger to the others, and in which each must necessarily depend for his safety upon the good faith, skill, and prudence of each of the others in doing his part of the work, it is the duty of each to the others engaged on the work to exercise the care and skill ordinarily employed by prudent men in similar circumstances, and he is liable for any injury occurring to any one of the others by reason of a neglect to use such care and skill.[94] The duty is of a common-law nature and does not rest on privity of contract.[95]

ACTIONS FOR BREACH OF CONTRACT AND FOR WAGES

5846. Action for breach of contract—Complaint—It is unnecessary to allege that the plaintiff has always been ready and willing to perform or that he has been unable to secure other employment.[96] The essential allegations are, that the parties mutually agreed, the one to do the work and the other to employ him; and that the plaintiff offered and the defendant refused to permit him to do it.[97]

5847. Recoupment—Negligence of servant—The master may plead, by way of recoupment and setoff, damages sustained by him through the negligence of the servant in the performance of the contract of employment.[98]

5848. Other employment—If a servant obtains other employment and compensation after his discharge that is affirmative matter in recoupment which the defendant is bound to allege and prove.[99]

5849. Defences—Dishonesty of servant—The fact that the servant embezzled from the master throughout the term of his service is a complete defence to an action for wages.[1]

5850. Damages—Where a servant engaged for a definite term is wrongfully discharged before the expiration thereof he is presumptively entitled, in an action begun or tried after the expiration of the term, to recover as damages the amount of the wages agreed upon, subject to a reduction for compensation earned, or which he had an opportunity to earn, in other employment during the remainder of the term.[2] Prospective damages beyond the time of trial are too contingent and uncertain to be allowed. Where, under a contract for personal service, the wages are payable in instalments, and, before the term of service expires, the master dismisses the servant without his fault, and the wages are paid up to the time of dismissal, the liability of the master to the servant is not an absolute liability for wages for constructive service during the balance of the term, but a contingent liability of indemnity for loss of wages. This liability accrues by instalments on successive contingencies, each of which consists in the failure of the servant without his fault to earn, during an instalment period, the amount of wages which he would have earned had the contract been performed, and the deficiency is the measure of damages. The original breach is not total, but the failure to pay the successive instalments constitutes successive breaches, and successive actions may be maintained for the recovery of

[94] Griffiths v. Wolfram, 22-185; Brower v. N. P. Ry., 109-385, 124+10.
[95] Brower v. N. P. Ry., 109-385, 124+10.
[96] Drea v. Cariveau, 28-280, 9+802. See McMullan v. Dickinson Co., 63-405, 65+661.
[97] Starkey v. Minneapolis, 19-203(166).
[98] Harlan v. St. P. etc. Ry., 31-427, 18+147. See Jordahl v. Berry, 72-119, 124, 75+10; Lyford v. Martin, 79-243, 82+479.
[99] Williams v. Anderson, 9-50(39); Horn v. Western L. Assn., 22-233; Bennett v. Morton, 46-113, 48+678; Beissel v. Vermillion F. E. Co., 102-229, 113+575.
[1] Peterson v. Mayer, 46-468, 49+245. See Lahr v. Kraemer, 91-26, 97+418; Person v. McCargar, 92-294, 99+885; Steele v. Crabtree (Iowa), 106+753.
[2] Horn v. Western L. Assn., 22-233; Bennett v. Morton, 46-113, 48+678; Beissel v. Vermillion F. E. Co., 102-229, 113+575.

the instalments of damages as they accrue, if any.[3] Where a contract for employment of a person in a particular business, as long as he may elect to serve, is broken by the master, if the servant has not fixed by his election the period of service he cannot recover substantial damages.[4]

5851. Burden of proof—In an action for breach of a contract of employment the plaintiff ordinarily has the burden of proving the contract and its breach.[5]

5852. Evidence—Admissibility—Cases are cited below holding evidence admissible [6] or inadmissible.[7]

5853. Evidence—Sufficiency—Cases are cited below holding evidence sufficient [8] or insufficient [9] to sustain the verdict or finding.

INDEMNIFYING SERVANT

5854. In general—A master has been held liable to indemnify a servant where the latter acted in violation of an injunction in obedience to the orders of his master.[10]

MASTER'S LIABILITY TO SERVANT FOR NEGLIGENCE

IN GENERAL

5855. Duty of master—In general—A master is bound to exercise ordinary or reasonable care to prevent injury to his servant in the course of his employment.[11] He is liable for injuries which might reasonably have been anticipated as likely to result from his negligent acts or omissions.[12] He is not an insurer of the safety of his servants.[13] It is generally sufficient if he conforms to customary practice.[14] The law fixes the duty of a master to his servant and a violation of the duty is a tort and not a breach of contract.[15]

[3] McMullan v. Dickinson Co., 60–156, 62+120; Smith v. St. P. & D. Ry., 60–330, 62+392.

[4] Bolles v. Sachs, 37–315, 33+862.

[5] Bennett v. Morton, 46–113, 48+678.

[6] Person v. Bowe, 79–238, 82+480 (offer of master to make payment if servant would throw off five dollars admissible on an issue as to the duration of the contract).

[7] Roles v. Mintzer, 27–31, 6+378 (price at which plaintiff had offered to work for another); Seurer v. Horst, 31–479, 18+283 (opinions of witnesses without special knowledge as to value of services—wages paid another servant); Ham v. Wheaton, 61–212, 63+495 (term for which other servants were hired); Healey v. Mannheimer, 74–240, 76+1126 (customary practice as to term of hiring servants in the dry goods business); Johnson v. Crookston L. Co., 92–393, 100+225 (master's custom in hiring other servants).

[8] Magoon v. Minn. T. P. Co., 34–434, 26+235; Metzdorf v. Western S. Co., 60–365, 62+397; Ham v. Wheaton, 61–212, 63+495; McCormick v. Louden, 64–509, 67+366; Healey v. Mannheimer, 74–240, 76+1126; Person v. Bowe, 79–238, 82+480; Potter v. Barton, 86–288, 90+529; Smith v. Herz, 92–254, 99+1134; Johnson v. Crookston L. Co., 92–393, 100+225; Egan v. Winnipeg B. Club, 96–345, 104+947; Greenberg v. Millette, 124+824 (bookkeeper with authority to sell goods and pay bills—shortage—accounting).

[9] Smith v. St. P. & D. Ry., 60–330, 62+392; Wommer v. Segelbaum, 78–182, 80+952; Dart v. Russell, 99–364, 109+702.

[10] Guirney v. St. P. etc. Ry., 43–496, 46+78.

[11] Cook v. St. P. etc. Ry., 34–45, 24+311; Bennett v. Syndicate Ins. Co., 39–254, 39+488; Myhre v. Tromanhauser, 64–541, 67+660; Raasch v. Elite L. Co., 98–357, 108+477; Milton v. Biesanz S. Co., 99–439, 109+999; Lohman v. Swift, 105–148, 117+418; Anderson v. Pittsburgh C. Co., 108–455, 122+794.

[12] Milton v. Biesanz S. Co., 99–439, 109+999.

[13] Brown v. Winona etc. Ry., 27–162, 6+484; N. P. Ry. v. Dixon, 194 U. S. 338.

[14] Kremkoski v. G. N. Ry., 101–501, 112+1025.

[15] Schumaker v. St. P. & D. Ry., 46–39, 42, 48+559.

5856. Statute—In 1895 a statute was enacted prescribing the duties of a master and defining a vice-principal.[16] The statute was held merely declaratory of common law [17] and has since been repealed.

5857. Volunteers—A "volunteer" is one who introduces himself into matters which do not concern him, and does, or undertakes to do, something which he is not legally or morally bound to do, or which is not in pursuance or protection of any interest. To such a person, in the absence of knowledge of peril, no affirmative duty to exercise care is due.[18] A master owes no duty, as such, to a mere volunteer. A person employed without authority by a servant to assist in the work of a master generally occupies the position of a volunteer.[19] One who has an interest in the work to be performed, and for his own convenience, or to facilitate or expedite his own work or that of his employer, assists the servants of another, at their request or with their consent, is not thereby deprived of his right to be protected against the carelessness of the other's servants.[20] If a servant voluntarily and without orders works outside the scope of his duties he is deemed a volunteer while so working.[21] If, after discovering that a volunteer has placed himself in a position of danger, even through his own negligence, the servants of a master fail to exercise reasonable care to avert the danger, the master is liable. This liability does not rest on any contract obligation, but on the general duty not to inflict a wanton or wilful injury on another. As respects this duty, a volunteer cannot occupy a less favorable position than a trespasser.[22]

5858. Servants off duty—Acting outside scope of employment—A master owes no duty, as such, to his servants while they are off duty,[23] or acting without orders outside the scope of their employment.[24] The relation of master and servant, in so far as it involves the obligation of the master to protect his servant while rightfully upon his premises, is not suspended during the noon hour, when the master expects, and expressly or by fair implication invites, the servant to remain upon the premises in the immediate vicinity of the work.[25] The liability of a master does not cease while a servant is sitting down to rest near his work.[26]

5859. Employing children without a certificate—It is made unlawful by statute to employ children under sixteen years of age in certain employments without a school certificate.[27] If a child is employed about machinery contrary to the statute and is injured by the machinery the master is prima facie liable.[28]

5860. Failure to give customary signals—Cases are cited below involving the question of negligence in not giving customary signals.[29] The subject is treated more fully elsewhere.[30]

[16] Laws 1895 c. 173.

[17] Hess v. Adamant Mfg. Co., 66–79, 68+774; Soutar v. Mpls. etc. Co., 68–18, 70+796; Lundberg v. Shevlin, 68–135, 70+1078.

[18] Kelly v. Tyra, 103–176, 114+750, 115+636.

[19] Church v. Chi. etc. Ry., 50–218, 52+647; Evarts v. St. P. etc. Ry., 56–141, 57+459; Wagen v. Mpls. etc. Ry., 80–92, 82+1107. See Olson v. G. N. Ry., 81–402, 84+219; Haluptzok v. G. N. Ry., 55–446, 57+144; Rickers v. Mission F. Co., 124+641.

[20] Meyer v. Kenyon, 95–329, 104+132.

[21] See § 5858.

[22] Evarts v. St. P. etc. Ry., 56–141, 57+459.

[23] See Sliney v. Duluth etc. Ry., 46–384, 49+187; Olson v. Mpls. etc. Ry., 76–149, 78+975; Benson v. Chi. etc. Ry., 78–303, 80+1050; Wallin v. Eastern Ry., 83–149, 86+76; Soderlund v. Chi. etc. Ry., 102–240, 113+449; Holden v. Gary, 109–59, 122+1018; Burgett v. Wis. C. Ry., 109–216, 123+411.

[24] See Soderlund v. Chi. etc. Ry., 102–240, 113+449; Bailey v. Grand Forks L. Co., 107–207, 119+787; Nat. F. P. Co. v. Andrews, 158 Fed. 294.

[25] Thomas v. Wis. C. Ry., 108–485, 122+456.

[26] Jacobson v. Merrill, 107–74, 119+510.

[27] R. L. 1905 § 1809.

[28] Perry v. Tozer, 90–431, 97+137; Fitzgerald v. International F. T. Co., 104–138, 116+475; Jacobson v. Merrill, 107–74, 119+510.

[29] Sobieski v. St. P. & D. Ry., 41–169,

5861. Failure to conform to customary practice—Cases are cited below involving the question of negligence in failing to conform to customary practice, other than in the giving of signals.[31] The subject is treated more fully elsewhere.[32]

5862. Duty to care for injured—Where a servant was caught in machinery it was held that the master was bound to use ordinary care to release and alleviate his sufferings.[33] Where a brakeman fell from a train and was injured it was held that the evidence did not show any negligence on the part of the conductor in caring for him.[34]

5863. Drunken servants—Where it was claimed that a railway company was negligent in not taking active measures for the protection of a drunken brakeman, it was held that the plaintiff could not recover in the absence of evidence that the other trainmen knew of the brakeman's condition.[35]

5864. Conditions at time of accident control—The question of negligence is to be determined with reference to the conditions as they existed at the time and place of the accident, as then known by the parties.[36]

5865. Assumption by engineer as to conduct of servants—An engineer may act, within reasonable limits, on the assumption that brakemen, and others whose duty calls them to be about switching tracks, will exercise ordinary or reasonable care to avoid being run over. It is much easier for such a person to keep out of the way of an engine than it is for an engine to avoid being in his way.[37]

5866. Notice—Notice to a mine captain, who has charge of all underground work, of previous accidents resulting from defects in the fuse in use, is notice to the mining company, though the superintendent of the mine has control over the matter of purchasing and supplying the fuse for the mine.[38]

5867. Proximate cause—Cases are cited below involving the question of proximate cause.[39] The subject is treated more fully elsewhere.[40]

42+863; Erickson v. St. P. & D. Ry., 41–500, 43+332; Anderson v. Northern M. Co., 42–424, 44+315; Rahman v. Minn. etc. Ry., 43–42, 44+522; Stewart v. St. P. etc. Ry., 43–268, 45+431; Bengtson v. Chi. etc. Ry., 47–486, 50+531; Britton v. N. P. Ry., 47–340, 50+231; Moran v. Eastern Ry., 48–46, 50+930; Lundquist v. Duluth St. Ry., 65–387, 67+1006; Moore v. G. N. Ry., 67–394, 69+1103; Hooper v. G. N. Ry., 80–400, 83+440; Manwaring v. Drake, 93–497, 101+1134; Hjelm v. Western G. C. Co., 94–169, 102+384; Id., 98–222, 108+803; Doerr v. Daily News P. Co., 97–248, 106+1044; Hartman v. Mpls. etc. Ry., 100–43, 110+102; Floan v. Chi. etc. Ry., 101–113, 111+957; Fitzgerald v. International F. T. Co., 104–138, 116+475; Raitila v. Consumers O. Co., 107–91, 119+490; Hawkins v. G. N. Ry., 107–245, 119+1070; Glines v. Oliver I. M. Co., 108–278, 122+161; Anderson v. Pittsburgh C. Co., 108–455, 122+794.

[30] See § 6982.

[31] Perras v. Booth, 82–191, 84+739; Schus v. Powers, 85–447, 89+68; Graham v. Mpls. etc. Ry., 95–49, 103+714; Bjorklund v. Gray, 106–42, 118+59.

[32] See § 6982.

[33] Raasch v. Elite L. Co., 98–357, 108+477. See Shaw v. Chi. etc. Ry., 103–8, 114+85; 56 Am. L. Reg. 217, 316.

[34] Shaw v. Chi. etc. Ry., 103–8, 114+85.

[35] Parker v. Winona etc. Ry., 83–212, 86+2. See § 7028.

[36] Murphy v. G. N. Ry., 68–526, 71+662. See § 6979.

[37] McGillis v. Duluth etc. Ry., 95–363, 104+231.

[38] Wiita v. Interstate I. Co., 103–303, 115+169.

[39] Ransier v. Mpls. etc. Ry., 32–331, 20+332; Doyle v. St. P. etc. Ry., 42–79, 43+787; Larson v. St. P. & D. Ry., 43–488, 45+1096; Moon v. N. P. Ry., 46–106, 48+679; Schumaker v. St. P. & D. Ry., 46–39, 48+559; Orth v. St. P. etc. Ry., 47–384, 50+363; Freeberg v. St. Paul P. Works, 48–99, 50+1026; Slette v. G. N. Ry., 53–341, 55+137; Mullin v. Northern Mill Co., 53–29, 55+1115; Truntle v. North Star etc. Co., 57–52, 58+832; McCallum v. McCallum, 58–288, 59+1019; Groff v. Duluth etc. Co., 58–333, 59+1049; Wood v. Chi. etc. Ry., 66–49, 68+462; Koslowski v. Thayer, 66–150, 68+973; Christianson v. Chi. etc. Ry., 67–94, 69+640; Friedrich v. St. Paul, 68–402, 71+387; Murphy v. G. N. Ry., 68–526, 71+662; Hughley v. Wabasha, 69–245, 249, 72+78; McGrath v. G. N. Ry., 76–146, 78+972; Weisel v. East-

PERSONAL OR ABSOLUTE DUTIES OF MASTER

5868. In general—A master has at least six personal, absolute, or non-delegable duties. They are these: to provide the servant a reasonably safe place in which to work;[41] to furnish the servant with reasonably safe and suitable instrumentalities for his work;[42] to employ fit servants;[43] to employ a sufficient number of servants;[44] to adopt and enforce rules and regulations;[45] and to warn and instruct his servants as to latent dangers and defects.[46] These duties the law imposes on the master absolutely, as a matter of public policy, for the protection of human life.[47] They are not contractual obligations.[01] The law imperatively requires that the master shall perform them either personally or by a representative. He cannot avoid them by a delegation of authority. The fellow-servant rule has no application. A servant to whom the master delegates the performance of these duties is not a fellow servant while he is performing them, but a vice-principal. His acts are the acts of the master and the master is responsible accordingly.[48] In addition to the above duties a master is bound. under special circumstances to supervise the work,[49] and to issue orders.[50]

DUTY TO FURNISH SAFE PLACE IN WHICH TO WORK

5869. General rule—A master is bound to exercise ordinary or reasonable care to furnish his servant with a reasonably safe place in which to work.[51] The master is not an insurer in this regard.[52] It is ordinarily sufficient if he conforms to customary practice.[53] His duty is not limited to such risks as he actually knows, but extends to such as he ought to know in the exercise of reasonable diligence.[54]

ern Ry., 79-245, 82+576; Wallin v. Eastern Ry., 83-149, 86+76; Baker v. G. N. Ry., 83-184, 86+82; Crandall v. G. N. Ry., 83-190, 86+10; Schus v. Powers, 85-447, 89+68; Green v. Brainerd etc. Ry., 85-318, 88+974; Kerrigan v. Chi. etc. Ry., 86-407, 90+976; Kurstelska v. Jackson, 89-95, 93+1054; Hermann v. Clark, 89-132, 94+436; Bender v. G. N. Ry., 89-163, 94+546; Setterstrom v. Brainerd etc. Ry., 89-262, 94+882; Bredeson v. Smith, 91-317, 97+977; Le Duc v. N. P. Ry., 92-287, 100+108; Jensen v. Commodore M. Co., 94-53, 101+944; Hebert v. Interstate Iron Co., 94-257, 102+451; Turrittin v. Chi. etc. Ry., 95-408, 104+225; Kohout v. Newman, 96-61, 104+764; Hagglund v. St. Hilaire L. Co., 97-94, 106+91; Vik v. Red Cliff L. Co., 99-88, 108+469; Strand v. G. N. Ry., 101-85, 111+958; Wolfe v. Mpls. etc. Ry., 100-306, 111+5; Anderson v. Smith, 104-40, 115+743; Fitzgerald v. International F. T. Co., 104-138, 116+475; Freberg v. Smith, 106-72, 118+57; Carlson v. G. N. Ry., 106-254, 118+832; Jacobson v. Merrill, 107-74, 119+510; Rase v. Mpls. etc. Ry., 107-260, 120+360; Hoover v. Nichols, 108-69, 121+416; Moores v. N. P. Ry., 108-100, 121+392; Musolf v. Duluth E. E. Co., 108-369, 122+499; Korcis v. Mpls. etc. Ry., 108-449, 122+668; Anderson v. Pittsburgh C. Co., 108-455, 122+794.

[40] See § 6999.

[41] See §§ 5869-5883.

[42] See §§ 5884-5915.

[43] See §§ 5916-5922.

[44] See § 5923.

[45] See §§ 5924-5928.

[46] See §§ 5928-5942.

[47] 16 Harv. L. Rev. 593.

[01] Schumaker v. St. P. & D. Ry., 46-39, 42, 48+559.

[48] Jemming v. G. N. Ry., 96-302, 313, 104+1079; N. P. Ry. v. Peterson, 162 U. S. 349; Huffcut, Ag.(2 ed.) § 276, and cases cited under § 5949.

[49] See § 5943.

[50] See § 5944.

[51] Cook v. St. P. etc. Ry., 34-45, 24+311; Bennett v. Synd. Ins. Co., 39-254, 39+488; Britton v. N. P. Ry., 47-340, 50+231; Lundquist v. Duluth St. Ry., 65-387, 67+1006; Perras v. Booth, 82-191, 84+739; Lohman v. Swift, 105-148, 117+418; Poczerwinski v. Smith, 105-305, 117+486; Waligora v. St. Paul F. Co., 107-554, 119+395; Brough v. Baldwin, 108-239, 121+1111.

[52] See Gates v. Southern Minn. Ry., 28-110, 9+579; Hughley v. Wabasha, 69-245. 248, 72+78; Barrett v. G. N. Ry., 75-113. 77+540; N. P. Ry. v. Dixon, 194 U. S. 338.

[53] Manley v. Mpls. P. Co., 76-169, 78+1050; Kremkoski v. G. N. Ry., 101-501, 112+1025.

[54] Cook v. St. P. etc. Ry., 34-45, 24+311; Bennett v. Synd. Ins. Co., 39-254, 39+488; Sneda v. Libera, 65-337, 68+36; Lohman v. Swift, 105-148, 117+418.

5870. A personal or absolute duty—This is one of the personal or absolute duties of a master.[55] It cannot be avoided by a delegation of authority. The fellow-servant rule is not applicable.[56]

5871. A continuing duty—Inspection and repairs—The duty of a master in this regard is a continuing one.[57] He is bound to exercise ordinary or reasonable care to keep the place of work safe by inspection and repairs.[58] While the duty is a continuing one the master is not bound to keep the place safe at every moment, so far as such safety depends on the due performance of the work by the servant and his fellow workmen.[59]

5872. Duty of railway companies as to tracks, etc.—In general—A railway company is bound to exercise ordinary or reasonable care to so construct and maintain its roadbed and tracks that they will be reasonably safe for its servants.[60] While a railway company has a right to construct its own road and to solve its own engineering problems in accordance with its own views and to determine what structures it will erect and at what places, it may not, without liability, thereby violate rules of law for the protection of passengers and employees. It is the duty of a railway company to place its structures at a reasonably safe distance from its tracks, so as not to be dangerous to brakemen and other operatives upon the trains, or to warn them of such dangers if they exist. Its employees are not presumed to assume the risk of such perils, in the absence of notice.[61] A railway track is sometimes regarded as a place in which to work and sometimes as an instrumentality.[62]

5873. Snow and ice in railway yards—Reasonable care does not require railway companies to remove all the snow from their yards, where cars are switched and trains made up. If they keep the surface of the snow practically level, and do not allow it to accumulate above the level of the rails, or in dangerous ridges or hummocks, or to form dangerous holes, they cannot be charged with negligence (at least, unless under very special and peculiar circumstances) for not removing the snow, or covering it with ashes or cinders.[63]

5874. Duty to cover railway culverts—It is the duty of a railway company to cover culverts on the line of its road in its yards, and within a reasonable distance of switches, wherever it would naturally be anticipated that brakemen, in the proper discharge of their duties, would be apt to go in making couplings.[64]

5875. Duty to block frogs—Railway companies are required by statute to block frogs in their tracks.[65]

[55] See § 5868.

[56] Cook v. St. P. etc. Ry., 34-45, 24+311; Blomquist v. Chi. etc. Ry., 60-426, 62+818; Lundquist v. Duluth St. Ry., 65-387, 67+1006; Perras v. Booth, 82-191, 84+739; Bjorklund v. Gray, 106-42, 118+59; Leionen v. Oliver I. M. Co., 108-337, 121+1107; Thomas v. Wis. C. Ry., 108-485, 122+456.

[57] Gates v. Southern Minn. Ry., 28-110, 9+579; Perras v. Booth, 82-191, 84+739; Thomas v. Wis. C. Ry., 108-485, 122+456; Sante Fe etc. Ry. v. Holmes, 202 U. S. 438; Kreigh v. Westinghouse, 214 U. S. 249.

[58] Campbell v. Ry. Trans. Co., 95-375, 104+547. See cases under § 5883. See, as to the frequency of inspection, 16 Harv. L. Rev. 593.

[59] Armour v. Hahn, 111 U. S. 313; Kreigh v. Westinghouse, 214 U. S. 249; Perry v. Rogers, 157 N. Y. 251, and cases under § 5878.

[60] Gates v. Southern Minn. Ry., 28-110, 9+579 (duty to guard against washouts, landslides, etc.); Sweeney v. Mpls. etc. Ry., 33-153, 22+289 (id.); Rosenbaum v. St. P. & D. Ry., 38-173, 36+447 (id.); Barrett v. G. N. Ry., 75-113, 77+540 (rail slightly splintered—brakeman injured—company held not liable). See Union Pac. Ry. v. O'Brien, 161 U. S. 451 and cases under § 6017.

[61] Johnson v. St. P. etc. Ry., 43-53, 44+884; Clay v. Chi. etc. Ry., 104-1, 115+949.

[62] See § 5915.

[63] Fay v. Chi. etc. Ry., 72-192, 75+15. See Rifley v. Mpls. etc. Ry., 72-469, 75+704; Lawson v. Truesdale, 60-410, 62+546.

[64] Franklin v. Winona etc. Ry., 37-409, 34+898.

[65] See § 8129.

5876. Place unsafe from nature of work—A master is not liable when a place is unsafe because of the nature of the work and not from a want of reasonable care on his part.[66]

5877. Servant in improper place—When one employed to do a designated kind of work, or to work at a particular place, voluntarily goes to a place different from that assigned by the contract of employment, he cannot successfully insist that he is within the protection of the rule that the master must exercise reasonable care to protect him against injury.[67] The obligation of the master extends to any part of his premises which he invites or permits his servant to use.[68]

5878. Place rendered unsafe by fellow servant—Where the place of work is rendered unsafe by the negligence of a fellow servant, and the master has not failed to exercise reasonable care, he is not liable, in the absence of statute.[69] But if the negligence of the master concurs with that of a fellow servant the master is liable.[70]

5879. Place made unsafe by independent contractor—Where a master places upon his premises in the immediate vicinity where his servants are engaged at work an independent contractor for a specific purpose, still retaining the general control of his own premises and continuing the conduct of his own business, his legal obligation to provide his servants with a safe place in which to perform their duties requires of him the exercise of reasonable care to protect them from the negligence of the independent contractor.[71]

5880. Safe place rendered unsafe by superior—Doctrine of Barrett v. Reardon—In the case of Barrett v. Reardon our supreme court laid down the rule that where a superintendent or foreman orders a servant to work in a certain place and thereafter negligently renders such place unsafe the master is liable for resulting injury to the servant.[72] If a superintendent or foreman orders a servant to work about machinery and thereafter negligently starts the machinery without warning the master is liable for resulting injury to the servant.[73] In the Barrett case the following language was used: "Although not his duty to do so, yet the master may, for reasons of his own, assume personal charge and direction of the movements of his men, and in such case he is responsible to them for his own negligent acts; and if, instead of attending to the business personally, the master sends another in his stead to represent him and carry out his purposes, upon what theory may he raise the defence of fellow servant, if in the conduct of the business such representative negligently causes injury to an employee who is acting in obedience to the direc-

[66] Olson v. McMullen, 34–94, 24+318; Pederson v. Rushford, 41–289, 42+1063; Carlson v. N. W. etc. Co., 63–428, 435, 65+914; Swanson v. G. N. Ry., 68–184, 186, 70+978. See Stahl v. Duluth, 71–341, 342, 74+143; Simone v. Kirk, 173 N. Y. 7; Am. Bridge Co. v. Seeds, 144 Fed. 605; Am. W. G. Co. v. Noe, 158 Fed. 777; Morgan v. Frank, 158 Fed. 964.

[67] Green v. Brainerd etc. Ry., 85–318, 88+974.

[68] Thomas v. Wis. C. Ry., 108–485, 122+456.

[69] Foster v. Minn. C. Ry., 14–360(277); Collins v. St. P. etc. Ry., 30–31, 14+60; Connelly v. Mpls. etc. Ry., 38–80, 35+582; Lundquist v. Duluth St. Ry., 65–387, 67+1006; Am. Bridge Co. v. Seeds, 144 Fed. 605.

[70] Franklin v. Winona etc. Ry., 37–409, 34+898.

[71] Thomas v. Wis. C. Ry., 108–485, 122+456.

[72] Barrett v. Reardon, 95–425, 104+309; Dizonno v. G. N. Ry., 103–120, 114+736; Raitila v. Consumers O. Co., 107–91, 119+490. See Am. W. G. Co. v. Noe, 158 Fed. 777. The Barrett case is distinguished in Doerr v. Daily News P. Co., 97–248, 106+1044; Berneche v. Hilliard, 101–366, 112+392.

[73] Hess v. Adamant Mfg. Co., 66–79, 68+774; Cody v. Longyear, 103–116, 114+735; Taubert v. Taubert, 103–247, 114+763; Fitzgerald v. International F. T. Co., 104–138, 116+475; Lohman v. Swift, 105–148, 117+418. See Anderson v. Pittsburgh C. Co., 108–455, 122+794.

tions of his superior? If such representative has authority to issue orders concerning the movements of the men, it follows that while engaged in so doing an employee may rest assured that his superior will exercise reasonable care to protect him, and will not render unsafe those conditions necessary to a compliance with directions given him." This commends itself to our sense of justice, but it is hardly consistent with the orthodox conception of the fellow-servant rule. The cases cited under this section are certainly border cases and difficult to justify on principle. They illustrate the present tendency of the courts to restrict or qualify the fellow-servant rule by enlarging the absolute duties of the master. If they are sound, there is no good reason why the court should not go a little further and hold that the master is liable in all cases for the negligence of his superintendent, foreman, or boss. Such is the rule by statute in England and some of our states.

5881. Assumption that place is safe—A servant has a right to act on the assumption that a place in which he is ordered to work by his master is safe, unless it is obviously unsafe.[74] The test is not the exercise of due care to discover dangers, but whether the defect is known or plainly observable.[75]

5882. Leased premises—The duty of the master in this regard is not affected by the fact that the premises where the work is carried on is leased from another.[76] A railway company, running its trains over the leased tracks of another company, is not relieved of the duty it owes its servants to use reasonable care to provide for the safe operation of its trains while upon such leased tracks.[77]

5883. Cases classified—The general principles stated in the foregoing paragraphs have been applied to the following places: second floor of a building;[78] railway track;[79] remnants of a burned grain elevator;[80] basement of a building into which a large tank was being lowered;[81] excavation containing holes filled with unexploded dynamite;[82] bin in grain elevator;[83] platform to warehouse;[84] embankment;[85] steps to platform covered with ice;[86] freight elevator;[87] trap-

[74] Johnson v. St. P. etc. Ry., 43–53, 44+884; Dieters v. St. Paul G. Co., 86–474, 91+15; Hagerty v. Evans, 87–435, 92+399; Wickham v. Chi. etc. Ry., 124+639.

[75] Choctaw etc. Ry. v. McDade, 191 U. S. 64; Kreigh v. Westinghouse, 214 U. S. 249; Johnson v. McLeod, 127+497.

[76] Dieters v. St. Paul G. Co., 86–474, 91+15. See Harding v. Ry. Trans. Co., 80–504, 83+395.

[77] Floody v. Chi. etc. Ry., 109–228, 123–815.

[78] Cook v. St. P. etc. Ry., 34–45, 24+311.

[79] Sherman v. Chi. etc. Ry., 34–259, 25+593 (unprotected frog); Robel v. Chi. etc. Ry., 35–84, 27+305 (trestle near track); Franklin v. Winona etc. Ry., 37–409, 34+898 (uncovered culverts); Johnson v. St. P. etc. Ry., 43–53, 44+884 (signal post near track); Harding v. Ry. Trans. Co., 80–504, 83+395 (steps to platform near track—ice on steps); Campbell v. Ry. Trans. Co., 95–375, 104+547 (board projecting from car so as to strike brakeman descending from another car); Fay v. Chi. etc. Ry., 72–192, 75+15 (snow and ice on track in switchyards); Rifley v. Mpls. etc. Ry., 72–469, 75+704 (id.); Barrett v. G. N. Ry., 75–113, 77+540 (splintered rail); Baker v. G. N. Ry., 83–184, 86+82 (soft and springy road bed); Flanders v. Chi. etc. Ry., 51–193, 53+544 (section house near track—striking brakeman in descending from car); Doyle v. St. P. etc. Ry., 42–79, 43+787 (splintered rail); Ross v. G. N. Ry., 101–122, 111+951 (culvert); Whitehead v. Wis. C. Ry., 103–13, 114+254, 467 (defective telltale); Clay v. Chi. etc. Ry., 104–1, 115+949 (platform too near track); Dolge v. N. P. Ry., 107–242, 119+1066 (defective split switch); Twitchell v. Mpls. etc. Ry., 107–383, 120+531 (defective frog).

[80] Bennett v. Synd. Ins. Co., 39–254, 39+488.

[81] Abel v. Butler, 66–16, 68+205.

[82] Stahl v. Duluth, 71–341, 74+143; Carlson v. Forrestal, 101–446, 112+626; Bjorklund v. Gray, 106–42, 118+59.

[83] Lund v. Woodworth, 75–501, 78+81.

[84] Manley v. Mpls. P. Co., 76–169, 78+1050.

[85] Nicholas v. Burlington etc. Ry., 78–43, 80+776.

[86] Harding v. Ry. Trans. Co., 80–504, 83+395.

door in sidewalk;[88] shaft in mine;[89] bridge in course of construction;[90] place where tree was being removed;[91] floor of building in course of construction;[92] scaffold;[93] excavation;[94] platform built on piling at edge of a lake in connection with logging operations;[95] space about rollers in sawmill;[96] place to stand in adjusting belts;[97] combustion chamber of stationary engine;[98] platform for derrick;[99] trench for gas mains;[1] derrick;[2] elevator shaft;[3] platform of windmill;[4] place under cars propped up for repairs.[5]

DUTY TO FURNISH SAFE INSTRUMENTALITIES

5884. General rule—A master is bound to exercise ordinary or reasonable care to provide his servants with reasonably safe and suitable instrumentalities for their work.[6] The care must be commensurate with the risks involved.[7] Reasonable care and ordinary care are synonymous.[8] He is bound to exercise the degree of care that an ordinarily prudent man exercises in providing himself with the instrumentalities of his occupation.[9] He is not an insurer of the safety of the instrumentalities furnished.[10] This duty of the master, like his other personal or absolute duties, is grounded in public policy.[11]

5885. Duty absolute or personal—This duty of the master is personal or absolute. It cannot be avoided by delegating the selection or inspection of the instrumentalities to another. The fellow-servant rule is not applicable.[12]

5886. Negligence of fellow servant—If a master furnishes proper instrumentalities and they are rendered unsafe by the negligence of a servant, a fellow servant who is injured thereby cannot recover of the master, in the absence of statute.[13]

[87] Perras v. Booth, 82–191, 84+739, 85+179 (elevator shifted without notice to servant).

[88] Dieters v. St. Paul G. Co., 86–474, 91+15.

[89] Renlund v. Commodore M. Co., 89–41, 93+1057; Leionen v. Oliver I. M. Co., 108–337, 121+1107.

[90] McKenna v. Chi. etc. Ry., 92–508, 100+373, 101+178.

[91] Owens v. Savage, 93–468, 101+790.

[92] Merrill v. Pike, 94–186, 102+393.

[93] Carlson v. Haglin, 95–347, 104+297.

[94] Kohout v. Newman, 96–61, 104+764.

[95] Bailey v. Swallow, 98–104, 107+727.

[96] Hendrickson v. Ash, 99–417, 109+830; Vik v. Red Cliff L. Co., 99–88, 108+469; Poczerwinski v. Smith, 105–305, 117+486.

[97] Samuelson v. Hennepin P. Co., 101–443, 112+537; Lee v. Wild Rice L. Co., 102–74, 112+887; Seely v. Tennant, 104–354, 116+648.

[98] Kremkoski v. G. N. Ry., 101–501, 112+1025.

[99] Blomquist v. Chi. etc. Ry., 60–426, 62+818.

[1] Johnson v. St. Paul G. Co., 98–512, 108+816.

[2] Berneche v. Hilliard, 101–366, 112+392.

[3] Larson v. Haglin, 103–257, 114+958.

[4] Miller v. Chi. etc. Ry., 103–443, 115+269.

[5] Wickham v. Chi. etc. Ry., 124+639.

[6] Soutar v. Mpls. etc. Co., 68–18, 70+796; Munch v. G. N. Ry., 75–61, 77+541; Attix v. Minn. S. Co., 85–142, 88+436; Gray v. Commutator Co., 85–463, 89+322; Jacobson v. Johnson, 87–185, 91+465; Anderson v. Fielding, 92–42, 99+357; Wiita v. Interstate I. Co., 103–303, 115+169; Rudquist v. Empire L. Co., 104–505, 116+1019; Waligora v. St. Paul F. Co., 107–554, 119+395; Koreis v. Mpls. etc. Ry., 108–449, 122+668.

[7] Wiita v. Interstate I. Co., 103–303, 115+169.

[8] Rudquist v. Empire L. Co., 104–505, 116+1019.

[9] Gates v. Southern Minn. Ry., 28–110, 9+579; McDonough v. Lanpher, 55–501, 57+152.

[10] Hughley v. Wabasha, 69–245, 72+78; Attix v. Minn. S. Co., 85–142, 88+436; N. P. Ry. v. Dixon, 194 U. S. 338.

[11] See § 5868.

[12] Drymala v. Thompson, 26–40, 1+255; Gates v. Southern Minn. Ry., 28–110, 9+579; Fay v. Mpls. etc. Ry., 30–231, 15+241; Brown v. Mpls. etc. Ry., 31–553, 555, 18+834; Fraker v. St. P. etc. Ry., 32–54, 57, 19+349; Kelly v. Erie etc. Co., 34–321, 25+706; Tierney v. Mpls. etc. Ry., 33–311, 23+229; Macy v. St. P. etc. Ry., 35–200, 28+249; Krogstad v. N. P. Ry., 46–18, 48+409; Munch v. G. N. Ry., 75–61, 77+541; Costello v. Frankman, 97–522, 107+739; Peterson v. Van Dusen, 101–50, 111+839; Bigum v. St. Paul etc. Co., 107–567, 119+481.

[13] Collins v. St. P. etc. Ry., 30–31, 14+60; Brown v. Mpls. etc. Ry., 31–553, 556, 18+834; Lundquist v. Duluth St. Ry., 65–387,

5887. Concurrent negligence of fellow servant—A master is not relieved of liability to a servant by the fact that a fellow servant is negligent in using unsafe appliances.[14]

5888. Duty continuing—Inspection and repair—This duty is of a continuing nature. A master is bound to exercise ordinary or reasonable care and diligence in keeping instrumentalities safe by inspection and repairs.[15] He cannot avoid this duty by issuing an order requiring his servants to make inspection.[16] An exception to the general rule is made in the case of simple and common tools. A master is not bound to inspect them to discover defects arising from their ordinary use.[17] The anterior negligence of one defendant does not shield another defendant from responsibility for his own negligence in failing to inspect.[18] The sufficiency of inspection is a question for the jury, unless the evidence is conclusive.[19]

5889. Notice to master of defects—Proof of the delivery of a written notice of a defect to a servant of the master, to be delivered to the master, the servant having been appointed by him to carry such messages, is at least prima facie proof of notice to the master.[20] Notice to a railway company that cars on passing over a certain place in its tracks had a "jumping" or "jarring" motion would not tend to prove notice to it of a latent internal seam in a rail at that place which subsequently caused the rail to split and break, there being no evidence that the uneven motion of the cars was caused by, or even suggestive of, the latent defect in the rail.[21]

5890. Master's knowledge of defects—A master's liability in this regard is not limited to defects of which he has actual knowledge, but extends to defects of which he ought to have knowledge in the exercise of reasonable care.[22]

5891. Reliance on opinion of expert—Where a servant is required to work upon and about dangerous instrumentalities, the master cannot shield himself from liability for injury caused from a neglect of this duty by reliance upon the opinion of an expert as to the safety of an appliance provided by him, when it does not appear that the examination of such expert was thorough and efficient, which is a question of fact for the jury.[23]

389, 67+1006; Am. Bridge Co. v. Seeds, 144 Fed. 605.

[14] Ransier v. Mpls. etc. Ry., 32-331, 20+332; Gila Valley etc. Ry. v. Lyon, 203 U. S. 465.

[15] Gates v. Southern Minn. Ry., 28-110, 9+579; Fay v. Mpls. etc. Ry., 30-231, 15+241; Tierney v. Mpls. etc. Ry., 33-311, 23+229; Macy v. St. P. & D. Ry., 35-200, 28+249; Steen v. St. P. & D. Ry., 37-310, 34+113; Anderson v. Minn. etc. Ry., 39-523, 41+104; McDonald v. Chi. etc. Ry., 41-439, 43+380; Moon v. N. P. Ry., 46-106, 48+679; Sheedy v. Chi. etc. Ry., 55-357, 57+60; Kennedy v. Chi. etc. Ry., 57-227, 58+878; Closson v. Oakes, 69-67, 71+915; Munch v. G. N. Ry., 75-61, 77+541; Thompson v. G. N. Ry., 79-291, 82+637; Thiel v. Kennedy, 82-142, 84+657; Attix v. Minn. S. Co., 85-142, 88+436; Miller v. G. N. Ry., 85-272, 88+758; Kerrigan v. Chi. etc. Ry., 86-407, 90+976; Vant Hul v. G. N. Ry., 90-329, 96+789; Le Duc v. N. P. Ry., 92-287, 100+108; Fry v. G. N. Ry., 95-87, 103+733; Campbell v. Ry. Trans. Co., 95-375, 104+547; Gomulak v. Smith, 98-149, 107+542; De Maries v. Jameson, 98-453, 108+830; Cedarberg v. Mpls. etc. Ry., 101-100, 111+953; Whitehead v. Wis. C. Ry., 103-13, 114+254; Engler v. La Crosse D. Co., 105-74, 117+242; Jenkins v. St. P. C. Ry., 105-504, 117+928; Bigum v. St. Paul etc. Co., 107-567, 119+481; Holden v. Gary, 109-59, 122+1018. See Murphy v. G. N. Ry., 68-526, 71+662.

[16] Le Duc v. N. P. Ry., 92-287, 100+108.

[17] Koschman v. Ash, 98-312, 108+514; Dessecker v. Phoenix Mills Co., 98-439, 108+516; Meyer v. Ladewig (Wis.) 110+419. But see Miller v. G. N. Ry., 85-272, 88+758 (crowbar).

[18] Campbell v. Ry. Trans. Co., 95-375, 104+547.

[19] Thompson v. G. N. Ry., 79-291, 82+637; Cedarberg v. Mpls. etc. Ry., 101-100, 111+953.

[20] Newhart v. St. P. C. Ry., 51-42, 52+983.

[21] James v. N. P. Ry., 46-168, 48+783.

[22] Gray v. Commutator Co., 85-463, 89+322. See Doyle v. St. P. etc. Ry., 42-79, 43+787; Corbin v. Winona etc. Ry., 64-185, 66+271.

[23] Jacobson v. Johnson, 87-185, 91+465.

5892. Instrumentalities not owned by master—The duty of the master is not affected by the fact that the instrumentality which he furnishes is owned by another.[24] As between the servant and master all appliances, owned or in possession of another, of such a character and use as to impose the duty of inspection, which the master directs or authorizes his servant to use in the business of the master, stand upon the same footing as those that actually belong to him. If the master is not in a position to safeguard his servants by an inspection of such appliances, he must refrain from giving them orders to use them, whereby their safety will be imperiled.[25] If a railway company uses the cars of another company its duty is the same as in the case of its own cars.[26]

5893. Best and safest machinery not required—A master is not bound to furnish the best and safest machinery and appliances obtainable. It is sufficient if he furnishes such as are reasonably safe,[27] or of the character in common use.[28] If a master buys instruments of an approved pattern, in common use, from a competent manufacturer, he is presumed to have discharged his duty.[29] But he is not excused by the mere fact that he bought the instrumentality secondhand, supposing it to be of the standard type, complete in all its parts, and suitable for the purpose for which it was sold.[30] It is for the jury to determine whether the particular instrumentality is or is not reasonably safe, and to aid them in determining this fact they may consider whether there are well-known devices in general use which, if adopted, would have reduced the danger to the servant.[31]

5894. Latest inventions and improvements not required—A master is not bound to provide the latest inventions and improvements in machinery.[32]

5895. Guards or fences for dangerous machinery—Statute—At common law it is the duty of a master to guard or fence dangerous machinery when ordinary or reasonable care for the safety of servants requires it.[33] By statute

[24] Harding v. Ry. Trans. Co., 80-504, 83+395; De Maries v. Jameson, 98-453, 108+830; Monsen v. Crane, 99-186, 108+933; Duchene v. Lefebvre, 101-473, 112+865; Holden v. Gary, 109-59, 122+1018. See § 5882.

[25] De Maries v. Jameson, 98-453, 108+830.

[26] Fay v. Mpls. etc. Ry., 30-231, 15+241; Moon v. N. P. Ry., 46-106, 48+679; Baltimore etc. Ry v. Mackey, 157 U. S. 72; Union etc. Co. v. Chi. etc. Ry., 196 U. S. 217. See Sawyer v. Mpls. etc. Ry., 38-103, 35+671, and § 5882.

[27] Monsen v. Crane, 99-186, 108+933; Stiller v. Bohn, 80-1, 82+981; Wiita v. Interstate I. Co., 103-303, 115+169.

[28] Manley v. Mpls. Paint Co., 76-169, 78+1050; Attix v. Minn. S. Co., 85-142, 88+436; Jacobson v. Johnson, 87-185, 188, 91+465; Wiita v. Interstate I. Co., 103-303, 115+169.

[29] Jacobson v. Johnson, 87-185, 188, 91+465; Jenkins v. St. P. C. Ry., 105-504, 117+928. See Johnson v. Atwood L. Co., 101-325, 112+262.

[30] Engler v. La Crosse D. Co., 105-74, 117+242.

[31] Monsen v. Crane, 99-186, 108+933.

[32] Lorimer v. St. P. C. Ry., 48-391, 51+125; Wiita v. Interstate I. Co., 103-303, 115+169; Williams v. Headrick, 159 Fed. 680.

[33] Craver v. Christian, 34-397, 26+8; Id., 36-413, 31+457; Barbo v. Bassett, 35-485, 29+198; Wuotilla v. Duluth L. Co., 37-153, 33+551; Carroll v. Williston, 44-287, 46+352; Mullin v. Northern M. Co., 53-29, 55+1115; Rothenberger v. N. W. etc. Co., 57-461, 59+531; Scharenbroich v. St. Cloud etc. Co., 59-116, 60+1093; Koslowski v. Thayer, 66-150, 68+973; Blom v. Yellowstone Park Assn., 86-237, 90+397; Slater v. Advance T. Co., 97-305, 314, 107+133; Rase v. Mpls. etc. Ry., 107-260, 120+360.

[34] R. L. 1905 § 1813; Pruke v. South Park etc. Co., 68-305, 71+276; Peterson v. Johnson, 70-538, 73+510; Jaroszeski v. Osgood, 80-393, 83+389; Parker v. Pine Tree L. Co., 85-13, 88+261; Walker v. Grand Forks L. Co., 86-328, 90+573; Spoonick v. Backus, 89-354, 94+1079; Perry v. Tozer, 90-431, 97+137; Erickson v. Northwest P. Co., 95-356, 104+291; Frazier v. Lloyd, 98-484, 108+819; Fitzgerald v. International F. T. Co., 104-138, 116+475; Callopy v. Atwood, 105-80, 117+238; Bigum v. St. Paul etc. Co., 107-567, 119+481; Davidson v. Flour City O. I. Works, 107-17, 119+483; Bean v. Keller, 107-162, 119+801; Abel v. Hardwood Mfg. Co., 107-214, 120+359; Rase v. Mpls. etc. Ry., 107-260, 120+360; Kerling v. Van Dusen, 108-

a master is required to guard or fence dangerous machinery and places in factories, mills, and workshops.[34] The object of the statute is to guard the safety of workmen, whether actually engaged in operating machinery or working about it, in the discharge of their duties, and it is to be liberally construed so as to carry out this humane object. A master may be liable under the statute though he could not reasonably have anticipated injury in the precise way in which it occurred.[35] The statute does not change the common-law rules as to contributory negligence and assumption of risk.[36] Where a servant, lawfully in the vicinity of dangerous and unguarded machinery, slips or, losing his balance, falls into or against the machine, and is injured, the fact that he knew the conditions does not of itself establish, as a matter of law, that he assumed the risk or was guilty of contributory negligence. Whether unguarded or dangerous machinery is so located as to menace servants in its vicinity, and whether a servant having knowledge of the condition assumes the risk of working in its vicinity, are generally questions of fact for the jury.[37] The duty of the master under the statute is a continuing one, requiring the guard to be kept in position while the machinery is in operation. The duty is not discharged by merely furnishing a suitable guard and exercising reasonable care in the selection of an operator.[38] Where a guard was kept off for a week or more for the purpose of discovering a defect in the machine, it was held a question for the jury whether it had been kept off an unreasonable time.[01] The duty is absolute. The master cannot avoid liability by delegating the duty to another. The fellow-servant rule does not apply.[39] A failure to comply with the statute constitutes negligence per se.[40] Whether it is practicable to guard machinery and the sufficiency of guards are questions of fact to be submitted to the jury, unless the evidence is conclusive.[41] The burden of proving the practicability of guarding machinery is ordinarily on the plaintiff.[42] Any evidence reasonably tending to show such practicability is admissible.[43] Owners and

51, 121+227; **Glockner v. Hardwood Mfg.** Co., 109–30, 122+465. See Seely v. Tennant, 104–354, 116+648.

[35] Tvedt v. Wheeler, 70–161, 72+1062; Christianson v. N. W. etc. Co., 83–25, 85+826; McGinty v. Waterman, 93–242, 101+300; Callopy v. Atwood, 105–80, 117+238; Davidson v. Flour City O. I. Works, 107–17, 119+483; Jacobson v. Merrill, 107–74, 119+510; Abel v. Hardwood Mfg. Co., 107–214, 120+359; Rase v. Mpls. etc. Ry., 107–260, 120+360.

[36] Anderson v. Nelson, 67–79, 69+630; Lally v. Crookston L. Co., 82–407, 85+157; Hermann v. Clark, 89–132, 94+436; Swenson v. Osgood, 91–509, 98+645; McGinty v. Waterman, 93–242, 101+300; Schutt v. Adair, 99–7, 108+811; Davidson v. Flour City O. I. Works, 107–17, 119+483; Jacobson v. Merrill, 107–74, 119+510; Bean v. Keller, 107–162, 119+801; Abel v. Hardwood Mfg. Co., 107–214, 120+359; Snyder v. Waldorf, 124+450; Peterson v. Merchants' El. Co., 126+534; Glenmont L. Co. v. Roy, 126 Fed. 524; Am. Linseed Co. v. Heins, 141 Fed. 45.

[37] Snyder v. Waldorf, 124+450.

[38] McGinty v. Waterman, 93–242, 101+300; Davidson v. Flour City O. I. Works, 107–17, 119+483.

[01] Peterson v. Merchants' El. Co., 126+534.

[39] Davidson v. Flour City O. I. Works, 107–17, 119+483.

[40] Christianson v. N. W. etc. Co., 83–25, 85+826; Perry v. Tozer, 90–431, 97+137; Erickson v. Northwest P. Co., 95–356, 104+291; Callopy v. Atwood, 105–80, 117+238; Davidson v. Flour City O. I. Works, 107–17, 119+483; Jacobson v. Merrill, 107–74, 119+510; Bean v. Keller, 107–162, 119+801; Glockner v. Hardwood Mfg. Co., 109–30, 122+465, 807.

[41] Peterson v. Johnson, 70–538, 73+510; Abel v. Hardwood Mfg. Co., 107–214, 120+359; Kerling v. Van Dusen, 108–51, 121+227; Id., 124+235.

[42] Glockner v. Hardwood Mfg. Co., 109–30, 122+465, 123+807; Rickers v. Mission F. Co., 124+641.

[43] Poczerwinski v. Smith, 105–305, 117+486 (question being as to whether a certain saw was properly protected, evidence that another saw of similar character, but different size, situated in the same mill, was differently and more securely protected by different kind of covering, admissible); Rase v. Mpls. etc. Ry., 107–260, 120+360 (kinds of machinery or appliances used elsewhere); Glockner v. Hardwood Mfg. Co., 109–30, 122+465, 123+807 (evidence

employers are not necessarily excused from supplying guards simply because the manufacturers do not make such machines with guards; nor are they necessarily justified in assuming such machines to be safe and suitable because factory inspectors make no objection. If by observation and experience an employer has reasonable ground to believe that such machines are dangerous in the hands of inexperienced or ignorant workmen, then he is called upon to use all reasonable means to protect them, if he continues to employ that class of labor. That duty requires him to be alert and to make his machine reasonably safe, and also to properly instruct the inexperienced in the use thereof, and to warn them of danger. Whether a master does all that is required of him under the circumstances is a question for the jury.[44] The dangers of operating a machine, and whether it can be guarded, so that it will be more safe than as manufactured, can only be determined by experience. An employer cannot be excused from operating a machine, though of standard type, when a reasonable amount of experience and observation has developed the fact that it is inherently dangerous, and can be made reasonably safe by attaching safeguard appliances.[45] The owner of a building cannot avoid the obligation of the statute by leasing the building.[46] The statute is limited to the protection of employees.[47] It is not merely declaratory of common law.[48] It has been held applicable to a jointer,[49] an emery wheel,[50] a tetoning machine,[51] a bag-turning machine,[52] a revolving belt in an engine room,[53] a shaft to a wood-sawing machine.[54]

5896. Barriers for elevator shafts—Statute—The statute requires masters to provide elevator shafts, etc., with barriers at each floor.[55]

5897. Belt shifters—Statute—The statute requires masters to provide belt shifters.[56]

5898. Automatic couplers—Grab irons—By act of Congress railway cars engaged in interstate commerce are required to be equipped with automatic couplers.[57] A statute of this state requires railway companies to equip their freight cars with automatic couplers and grab irons.[01]

5899. Loose pulleys—Exhaust fans—Masters are required by statute to provide machinery with loose pulleys whenever practicable, and to provide exhaust fans for carrying off dust from emery wheels and grindstones.[58]

5900. Safe appliances becoming unsafe—Appliances and implements may be suitable and safe when used in the performance of certain work under certain conditions, but utterly unsafe when employed in similar work under

that a guard was applied to a similar press in a competing factory, seven months after the accident, which tended to lessen the hazard, held insufficient alone to prove the practicability of applying a sufficient guard); Shaver v. Neils, 109-376, 123+1076 (fact that before accident there was no known practicable device whereby machinery might have been guarded).

[44] Carlin v. Kennedy, 97-141, 106+340.

[45] Johnson v. Atwood, 101-325, 112+262.

[46] Tvedt v. Wheeler, 70-161, 72+1062.

[47] Hamilton v. Mpls. etc. Co., 78-3, 80+693; Schutt v. Adair, 99-7, 108+811.

[48] Glockner v. Hardwood Mfg. Co., 109-30, 122+465, 123+807 (overruling dictum in Bredeson v. Smith, 91-317, 318, 97+977).

[49] Bigum v. St. Paul etc. Co., 107-567, 119+481.

[50] Davidson v. Flour City O. I. Works, 107-17, 119+483.

[51] Bean v. Keller, 107-162, 119+801.

[52] Abel v. Hardwood Mfg. Co., 107-214, 120+359.

[53] Rase v. Mpls. etc. Ry., 107-260, 120+360.

[54] Kerling v. Van Dusen, 108-51, 121+227.

[55] R. L. 1905 § 1815; Tvedt v. Wheeler, 70-161, 72+1062; Hamilton v. Mpls. etc. Co., 78-3, 80+693; Schutt v. Adair, 99-7, 108+811; Welker v. Anheuser, 103-189, 114+745; Healy v. Hoy, 127+482.

[56] R. L. 1905 § 1814; Hahn v. Plymouth El. Co., 101-58, 111+841; Sorseleil v. Red Lake Falls M. Co., 126+903 (applicable to owners of grain elevators).

[57] See Chittick v. Mpls. etc. Ry., 88-11, 92+462; Turrittin v. Chi. etc. Ry., 95-408, 104+225.

[01] Laws 1909 c. 488.

[58] R. L. 1905 § 1814.

other conditions. If the master furnishes appliances under conditions, when from the nature of the work they are liable to become unfastened and thus subject servants to injury, the master is open to the charge of having furnished unsafe and unsuitable appliances. The rule has been held not changed by the fact that the hooks and hinge gate in a pulley block might have been rendered safe by proper tying or mousing.[59]

5901. Unsafe use of safe appliances—Where a master furnishes his servant appliances to do the work in hand, and directs him how to use them, and warns him of the danger of using them in a different manner, and the servant, in disregard of such direction and warning, and without any necessity for so doing, uses the appliances in the manner in which he was told not to use them, and he is thereby injured, he cannot recover.[60]

5902. Selection of tools by servant—A master who provides and keeps proper tools for the use of his servants, whose duty it is to select such as they require for their work, is not generally responsible if a servant voluntarily uses a tool which has become obviously defective and unfit for use, and is injured by reason of such defect.[61] A master is not responsible to a servant for the negligence of a fellow servant in selecting a defective instrument, such selection being a proper detail of the work in which the servants are engaged.[62]

5903. Servant making repairs—The duty applies where the servant is engaged in making repairs.[63]

5904. Defects that servant might repair—A master's duty to repair instrumentalities when notified of defects by a servant is unaffected by the fact that the servant might have made the repair.[64]

5905. Adjustment of machinery—The duty of the master to see to it that the machinery furnished for the use of his servants is reasonably safe does not extend so far as to require him to attend to the proper regulation of those parts which necessarily have to be adjusted in the course of the use, and with regard to the particular work to be done, and the adjustment of which is incident to the ordinary use of the machine.[65]

5906. Instrumentalities constructed by servant—Where an instrumentality is constructed by servants as a part of or incidental to their work, such as a trestle, scaffold, or curb, out of materials furnished by the master, the latter is not responsible for its safety. His duty is limited to furnishing proper materials.[66]

5907. Temporary instrumentality selected by servant—A master is not liable for a defect in a temporary instrumentality selected by a servant.[67]

5908. Latent defects—A master is not liable for latent defects not discoverable by the exercise of reasonable care.[68] He is not required to dismantle

[59] Costello v. Frankman, 57–522, 107+739. See Jennings v. Iron Bay Co., 47–111, 49+685.

[60] Carlson v. Marston, 68–400, 71+398; Hostager v. Northwest P. Co., 125+902.

[61] Hefferen v. N. P. Ry., 45–471, 48+1, 526. See Morris v. Eastern Ry., 88–112, 92+535; Vant Hul v. G. N. Ry., 90–329, 96+789; Wexler v. Salisbury, 91–308, 98+95.

[62] Ling v. St. P. etc. Ry., 50–160, 52+378.

[63] Madden v. Mpls. etc. Ry., 32–303, 20+317.

[64] Gibson v. Mpls. etc. Ry., 55–177, 56+686.

[65] Eicheler v. Hanggi, 40–263, 41+975; Jennings v. Iron Bay Co., 47–111, 114, 49+685. See Frazier v. Lloyd, 98–484, 108+819; Hamlin v. Lanquist, 127+490.

[66] Lindvall v. Woods, 41–212, 42+1020; Bergquist v. Minneapolis, 42–471, 44+530; Fraser v. Red River L. Co., 45–235, 47–785; Marsh v. Herman, 47–537, 50+611; Oelschlegel v. Chi. etc. Ry., 73–327, 76+56, 409; Gittens v. Porten, 90–512, 97+378. See Sims v. Am. S. B. Co., 56–68, 57+322; Blomquist v. Chi. etc. Ry., 60–426, 62+818.

[67] Soutar v. Mpls. etc. Co., 68–18, 70+796 (box to stand on); Bell v. Lang, 83–228, 86+95 (tree selected as a tackle post).

[68] Attix v. Minn. S. Co., 85–142, 88+436;

complicated machinery for purposes of inspection.[69] It is a question of fact whether a railway company exercises reasonable care in the examination and repair of its engines, by inspecting the concealed portions of the piston rods upon those occasions only when the engine is being generally overhauled, or when some external defect in the rod is discovered. It has been held that it did not conclusively appear from the evidence that a company was guilty of negligence in not from time to time detaching the piston rod from the cross-head for the purpose of inspecting those portions not otherwise subject to observation.[70]

5909. No other instrumentality available—A railway company is not relieved from the charge of negligence in sending out a defective engine simply because it did not have time to repair it after notice of the defect and had no other engine in proper condition to send out.[71]

5910. Scaffolds—Scaffolds are sometimes treated as "instrumentalities" and sometimes as "places to work." Where the general work in which several servants are engaged includes the construction or preparation of the appliances with which they are to work, as where they are engaged in erecting a building, and they construct the scaffold on which they are to stand in doing the work, they are to be deemed fellow servants, as well in respect to the negligence of one of them in constructing such appliances as in respect to negligence in doing any other of their work.[72] But all servants who may be required to use a scaffold in the construction of a building are not necessarily fellow servants of those who constructed the scaffold, so as to relieve the master of liability.[73] It is not incumbent upon a master, who has caused a scaffold to be erected, on which planks, suitable in quantity and quality, are laid to walk upon in the customary manner, without being fastened, to see to it that these planks are adjusted and in proper place at all times. The adjustment of such planks is incident to the service required of a servant who uses the same.[74] Where a servant is required to work near a scaffold the master owes to him the duty of exercising ordinary or reasonable care in the construction and maintenance of the scaffold.[75]

5911. Duty to foreman or superintendent—A master owes this duty to a foreman or superintendent the same as to an ordinary servant.[76]

5912. Assumption that instrumentalities are safe—A servant may generally act on the assumption that instrumentalities are safe, when they are not obviously unsafe, and he has no notice of defects.[77]

Jones v. Chi. etc. Ry., 80–488, 83+446; James v. N. P. Ry., 46–168, 48+783.

[69] Jenkins v. St. P. C. Ry., 105–504, 117+928.

[70] Cederberg v. Mpls. etc. Ry., 101–100, 111+953.

[71] Greene v. Mpls. etc. Ry., 31–248, 17+378.

[72] Marsh v. Herman, 47–537, 50+611; Oelschlegel v. Chi. etc. Ry., 73–327, 76+56, 409.

[73] Sims v. Am. S. B. Co., 56–68, 57+322; Hagerty v. Evans, 87–435, 92+399; Carlson v. Haglin, 95–347, 104+297. See Fraser v. Red River L. Co., 42–520, 44+878; Blomquist v. Chi. etc. Ry., 60–426, 62+818; Eckman v. Lauer, 67–221, 69+893; Northrup v. Hayward, 99–299, 109+241; Olson v. Pike, 107–411, 120+378.

[74] Jennings v. Iron B. Co., 47–111, 49+685.

[75] Wyckoff v. Wunder, 107–119, 119+655.

[76] Attix v. Minn. S. Co., 85–142, 88+436; Viou v. Brooks, 99–97, 108+891.

[77] Russell v. Mpls. etc. Ry., 32–230, 234, 20+147; Wuotilla v. Duluth L. Co., 37–153, 155, 33+551; Johnson v. St. P. etc. Ry., 43–53, 44+884; Hefferen v. N. P. Ry., 45–471, 474, 48+1; Delude v. St. P. C. Ry., 55–63, 56+461; Anderson v. Nelson, 67–79, 69+630; Gray v. Commutator Co., 85–463, 89+322; Costello v. Frankman, 97–522, 107+739; Kjosnes v. Gray, 102–410, 113+1009; Rudquist v. Empire L. Co., 104–505, 116+1019; Patterson v. Melchior, 106–437, 119+402; Musolf v. Duluth E. E. Co., 108–369, 122+499; Holden v. Gary, 109–59, 122+1018.

5913. Law and fact—Whether an instrumentality is reasonably safe is a question for the jury, unless the evidence is conclusive.[78]

5914. Connecting carriers—Where, as between connecting lines of railway, the corporations controlling them are mutually bound to transport loaded freight cars over their respective roads, such duty is necessarily subject to proper rules and regulations, and involves mutual obligations, among which is that of reasonable care to provide safe cars for delivery to the servants of the company operating the connecting line to which they are transferred, and who would be exposed to danger from their defective or unsafe condition. The corporation receiving such cars is also subject to liabilities and duties to its servants growing out of the acceptance, possession, and subsequent use thereof. But the negligence of the latter does not relieve the former from liability for injuries resulting from its own negligence.[79]

5915. Cases classified—The general principles stated in the foregoing paragraphs have been applied in cases involving the following instrumentalities: railway tracks;[80] railway car couplings;[81] railway engines;[82] railway cars;[83] railway brakes;[84] railway switches;[85] railway handcars;[86] railway turntable;[87] boiler of steamboat;[88] telegraph and telephone poles;[89] pile driver;[90] frame work of circular rip saw;[91] derrick;[92] straw-cutter;[93] steps in lumber pile;[94] side-set;[95] chain attached to jack-screw;[96] electric motor of street car;[97] iron hook;[98] delivery wagon;[99] jack-screw;[1] trip hammer;[2] ice tongs;[3] lath ma-

[78] Monsen v. Crane, 99–186, 108+933; Lee v. Wild Rice L. Co., 102–74, 112+887; Wiita v. Interstate I. Co., 103–303, 115+169; King v. Chi. etc. Ry., 104–397, 116+918; Rudquist v. Empire L. Co., 104–505, 116+1019.

[79] Moon v. N. P. Ry., 46–106, 48+679.

[80] Drymala v. Thompson, 26–40, 1+255 (rail taken up in repairing track—no signals put out); Morse v. Mpls. etc. Ry., 30–465, 16+358 (broken rail and defective switch); Madden v. Mpls. etc. Ry., 32–303, 20+317 (track being repaired—derailment); Clapp v. Mpls. etc. Ry., 36–6, 29+340 (broken switch rail); James v. N. P. Ry., 46–168, 48+783 (broken rail); Harris v. Hewitt, 64–54, 65+1085 (split rail); Jelinek v. St. P. C. Ry., 104–249, 116+480 (greasy and slippery street railway tracks). See §§ 5883, 6017.

[81] See cases under §§ 6015, 6017.

[82] Collins v. St. P. etc. Ry., 30–31, 14+60 (headlight); Greene v. Mpls. etc. Ry., 31–248, 17+378 (chaffing irons between engine and tender); Gibson v. Mpls. etc. Ry., 55–177, 56+686 (platform in cab); Rogers v. Chi. etc. Ry., 65–308, 67+1003 (railing); Kerrigan v. Chi. etc. Ry., 86–407, 90+976 (step on pilot); Le Duc v. N. P. Ry., 92–287, 100+108 (footboard and tool chest on tender); Ellington v. G. N. Ry., 92–470, 100+218 (running board); Fry v. G. N. Ry., 95–87, 103+733 (defective step between seat and deck of cab); Wolfe v. Mpls. etc. Ry., 100–306, 111+5 (toe-guard to foot board); Strand v. G. N. Ry., 101–85, 111+958 (boiler); Cederberg v. Mpls. etc. Ry., 101–100, 111+953 (piston rod); Rudquist v. Empire L. Co., 104–505, 116+1019; Koreis v. Mpls. etc. Ry., 108–449, 122+668 (eccentric straps); Anderson v. Foley, 124+987 (footboard).

[83] Macy v. St. P. etc. Ry., 35–200, 28+249; Moon v. N. P. Ry., 46–106, 48+679 (brakestaff); Closson v. Oakes, 69–67, 71+915 (door of freight car); Thompson v. G. N. Ry., 79–291, 82+637 (grabiron—round of ladder); Wagen v. Mpls. etc. Ry., 80–92, 82+1107 (handhold); Scott v. Eastern Ry., 90–135, 95+892 (step).

[84] Ransier v. Mpls. etc. Ry., 32–331, 20+332; Sheedy v. Chi. etc. Ry., 55–357, 57+60; Kelley v. Chi. etc. Ry., 35–490, 29+173; Moon v. N. P. Ry., 46–106, 48+679.

[85] Clapp v. Mpls. etc. Ry., 36–6, 29+340; Neitge v. Chi. etc. Ry., 103–75, 114+467.

[86] Anderson v. Minn. etc. Ry., 39–523, 41+104; Wallin v. Eastern Ry., 83–149, 86+76.

[87] McDonald v. Chi. etc. Ry., 41–439, 43+380.

[88] McMahon v. Davidson, 12–357(232).

[89] Kelly v. Erie etc. Co., 34–321, 25+706; Holden v. Gary, 109–59, 122+1018.

[90] Steen v. St. P. & D. Ry., 37–310, 34+113; Swanson v. Oakes, 93–404, 101+949.

[91] Eicheler v. Hanggi, 40–263, 41+975.

[92] Sather v. Ness, 42–379, 44+128; Id., 44–443, 46+909; Attix v. Minn. S. Co., 85–142, 88+436; King v. Chi. etc. Ry., 104–397, 116+918; Hamlin v. Lanquist, 127+490.

[93] Snowberg v. Nelson, 43–532, 45+1131.

[94] Fraser v. Red River L. Co., 42–520, 44+878; Id., 45–235, 47+785.

[95] Hefferen v. N. P. Ry., 45–471, 48+1.526.

[96] Krogstad v. N. P. Ry., 46–18, 48+409.

[97] Lorimer v. St. P. C. Ry., 48–391, 51+125; Beardsley v. Mpls. St. Ry., 54–504, 56+176.

[98] Ling v. St. P. etc. Ry., 50–160, 52+378.

chine;[4] bolting or cut-off saw;[5] circular saw;[6] railway transfer table;[7] swamp chain;[8] rope;[9] paper-box creasing and embossing press;[10] drawing machine for pressing metal bars;[11] crowbar;[12] scaffold;[13] iron crane;[14] flogging hammer;[15] steam shovel;[16] hoist;[17] rollers in sawmill;[18] electrical apparatus in electric light plant;[19] block or pulley;[20] brace;[21] shavings baler;[22] steam log turner;[23] jointer;[24] log carriage;[25] chain carrier in sawmill;[26] bridge for tram cars in lumber yard;[27] stationary engine;[28] pulley and belt;[29] mangle in laundry;[30] sheathing for use in the construction of a sewer;[31] elevator;[32] dump car;[33] telltale;[34] fuse for the explosion of dynamite;[35] chain;[36] ax to knock at grab hooks in unloading logs;[37] plumber's furnace;[38] derrick and engine on a barge in a river used in the construction of a bridge;[39] brake attachments on ditching machine;[40] controller of electric street car;[41] hook to chain in ditching outfit;[42] air hoist;[43] glass water guage;[44] tongs of blacksmith;[45] cutting machine in box factory.[46]

DUTY TO EMPLOY FIT SERVANTS

5916. General rule—If a master has failed to exercise ordinary or reasonable care in the selection of his servants, in consequence of which he has in

[0] Schlitz v. Pabst, 57–303, 59+188.
[1] Kennedy v. Chi. etc. Ry., 57–227, 58+878.
[2] Nelson v. St. Paul P. Works, 57–43, 58+868.
[3] Neubauer v. N. P. Ry., 60–130, 61+912.
[4] Koslowski v. Thayer, 66–150, 68+973.
[5] Olmscheid v. Nelson, 66–61, 68+605.
[6] Wulff v. Wood, 67–423, 70+156; Stiller v. Bohn, 80–1, 82+981; Monsen v. Crane, 99–186, 108+933.
[7] Murphy v. G. N. Ry., 68–526, 71+662.
[8] Carlson v. Marston, 68–400, 71+398.
[9] Hughley v. Wabasha, 69–245, 72+78; Duchene v. Lefebvre, 101–473, 112+865; King v. Chi. etc. Ry., 104–397, 116+918; Westin v. Anderson, 107–49, 119+486; Olson v. Pike, 107–411, 120+378.
[10] O'Hara v. Collins, 84–435, 87+1023.
[11] Gray v. Commutator Co., 85–463, 89+322.
[12] Miller v. G. N. Ry., 85–272, 88+758.
[13] Hagerty v. Evans, 87–435, 92+399; Carlson v. Haglin, 95–347, 104+297; Northrup v. Hayward, 99–299, 109+241.
[14] Jacobson v. Johnson, 87–185, 91+465.
[15] Morris v. Eastern Ry., 88–112, 92+535; Vant Hul v. G. N. Ry., 90–329, 96+789.
[16] Bender v. G. N. Ry., 89–163, 94+546.
[17] Gittens v. Porten, 90–512, 97+378.
[18] Hendricks v. Lesure L. Co., 92–318, 99+1125.
[19] Wendler v. Red Wing etc. Co., 92–122, 99+625.
[20] Anderson v. Fielding, 92–42, 99+357; Costello v. Frankman, 97–522, 107+739; Westin v. Anderson, 107–49, 119+486.
[21] Haidt v. Swift, 94–146, 102+388; Lee v. Wild Rice L. Co., 102–74, 112+887; Kjosnes v. Gray, 102–410, 113+1009.
[22] Shalgren v. Red Cliff L. Co., 95–450, 104+531.
[23] Scarlotta v. Ash, 95–240, 103+1025.
[24] Frazier v. Lloyd, 98–484, 108+819; Bigum v. St. Paul etc. Co., 107–567, 119+481.
[25] Gomulak v. Smith, 98–149, 107+542.
[26] Hendrickson v. Ash, 99–417, 109+830.
[27] Viou v. Brooks, 99–97, 108+891.
[28] Peterson v. Van Dusen, 101–50, 111+839.
[29] Freeberg v. St. Paul P. Works, 48–99, 50+1026; Thiel v. Kennedy, 82–142, 84+657.
[30] Blom v. Yellowstone Park Assn., 86–237, 90+397.
[31] Kurstelska v. Jackson, 84–415, 87+1015; Id., 89–95, 93+1054; Id., 93–385, 101+606.
[32] McDonough v. Lanpher, 55–501, 57+152.
[33] Kjosnes v. Gray, 102–410, 113+1009.
[34] Whitehead v. Wis. C. Ry., 103–13, 114+254, 467.
[35] Laitinen v. Shenango F. Co., 103–88, 114+264; Wiita v. Interstate I. Co., 103–303, 115+169; Nustrom v. Shenango F. Co., 105–140, 117+480; Pintar v. Pitt, 107–256, 119+1053.
[36] Martin v. Gould, 103–467, 115+276.
[37] Brown v. Musser, 104–156, 116+218.
[38] Lehman v. Dwyer, 104–190, 116+352.
[39] King v. Chi. etc. Ry., 104–397, 116+918.
[40] Engler v. La Crosse D. Co., 105–74, 117+242.
[41] Jenkins v. St. P. C. Ry., 105–504, 117+928.
[42] Patterson v. Melchior, 106–437, 119+402.
[43] Waligora v. St. Paul F. Co., 107–554, 119+395.
[44] Nicolas v. Albert Lea L. & P. Co., 107–101, 119+503.
[45] Hoover v. Nichols, 108–69, 121+416.
[46] Gruenberg v. Heywood, 108–413, 122+324.

his employ a servant who, by reason of habitual drunkenness, negligence, or other vicious habits, or by reason of want of the requisite skill to discharge the duties which he is employed to perform, or for any other cause, is unfit for the service in which he is engaged, and if, in consequence of such unfitness, an injury happens to another servant, the master must answer for the damages suffered by such servant, unless the person injured had notice of the incompetency, or had equal opportunities with the employer to obtain notice.[47] The duty of a master to exercise ordinary or reasonable care to employ fit fellow servants is a personal or absolute duty which cannot be avoided by delegating the employment of servants to another.[48] The master is not an insurer of the fitness of fellow servants.[49]

5917. Concurring negligence of fellow servant—When an injury is due in part to the negligence of a master in employing or retaining an unfit servant, and in part to the concurring negligence of a fellow servant, the master is liable.[50]

5918. Assumption of risk—If a servant knows or ought to know of the unfitness of a fellow servant he assumes the risk of working with him, if he makes no complaint to the master.[51] But while a servant assumes the risk of negligence of fellow servants he does not assume any risk on account of the negligence of the master which is unknown to him. There is no assumption of risk where the servant is ignorant of the unfitness of his fellow servant.[52]

5919. Promise of master to dismiss—If a master promises to remove an unfit servant, upon the complaint of a fellow servant, the latter may ordinarily remain in the service a reasonable time after the promise without assuming the risk.[53] The same rules apply as where the master promises to remedy a defective instrumentality.[54]

5920. Burden of proof—When the unfitness of a servant is shown to have existed at the time of his employment a prima facie case of negligence is made out against the master and the burden is on him to disprove negligence.[55] It is incumbent on him to show affirmatively that his negligence was not an efficient cause of the injury.[56] The burden of proving the unfitness of the servant is ordinarily on the plaintiff.[57] In order to recover it is necessary for the plaintiff to prove that the servant was incompetent, that the defendant knew or ought to have known the fact, and yet retained him, and that the accident was caused by the particular incompetency alleged.[58]

[47] Nutzmann v. Ger. L. Ins. Co., 78-504, 81+518; Id., 82-116, 84+730; McMahon v. Davidson, 12-357(232); Crandall v. McIlrath, 24-127; Brown v. Winona etc. Ry., 27-162, 164, 6+484; Bunnell v. St. P. etc. Ry., 29-305, 13+129; Ransier v. Mpls. etc. Ry., 30-215, 14+883; Fraker v. St. P. etc. Ry., 32-54, 19+349; Lyberg v. N. P. Ry., 39-15, 38+632; Berger v. St. P. etc. Ry., 39-78, 38+814; Smith v. Backus, 64-447, 67+358; Morrow v. St. P. C. Ry., 71-326, 73+973; Jenson v. G. N. Ry., 72-175, 75+3; Morrow v. St. P. C. Ry., 74-480, 77+303; Vogt v. Honstain, 81-174, 83+533; Gray v. Red Lake Falls L. Co., 85-24, 88+24; Caron v. Powers, 100-341, 111+152; Kundar v. Shenango F. Co., 102-162, 112+1012; Pfudl v. Romer, 107-353, 120+302; Kronzer v. Spencer, 109-392, 124+6.

[48] Brown v. Winona etc. Ry., 27-162, 164, 6+484; Fraker v. St. P. etc. Ry., 32-54, 19+349; Jenson v. G. N. Ry., 72-175, 75+3; Kronzer v. Spencer, 109-392, 124+6.

[49] Kundar v. Shenango F. Co., 102-162, 112+1012.

[50] McMahon v. Davidson, 12-357(232); Jenson v. G. N. Ry., 72-175, 75+3.

[51] Bunnell v. St. P. etc. Ry., 29-305, 13+129; Nutzmann v. Ger. L. Ins. Co., 78-504, 81+518.

[52] Jenson v. G. N. Ry., 72-175, 75+3.

[53] Lyberg v. N. P. Ry., 39-15, 38+632; Smith v. Backus, 64-447, 67+358; Vogt v. Honstain, 81-174, 83+533; Gray v. Red Lake Falls L. Co., 85-24, 88+24.

[54] See § 5983.

[55] Crandall v. McIlrath, 24-127; Morrow v. St. P. C. Ry., 71-326, 73+973; Nutzmann v. Ger. L. Ins. Co., 78-504, 81+518.

[56] McMahon v. Davidson, 12-357(232).

[57] Morrow v. St. P. C. Ry., 71-326, 73+973.

[58] Pfudl v. Romer, 107-353, 120+302.

5921. Evidence—Admissibility—Evidence of certain acts done in one part of the work has been held admissible to show that a servant did not have sufficient judgment and presence of mind to be competent for the other part of the work in which he was employed.[59] The fact that an engineer is operating an engine without a license is evidence of negligence on the part of the master.[60] Prior specific acts of negligence on the part of the servant, of which the master had notice or of which he would have had notice if he had exercised ordinary or reasonable care, are admissible to prove the incompetency of the servant.[61]

5922. Contributory negligence—Contributory negligence is a defence in this class of cases as elsewhere.[62]

DUTY TO EMPLOY SUFFICIENT SERVANTS

5923. In general—A master is bound to exercise ordinary or reasonable care to provide a sufficient number of servants to perform the work safely. This is one of the personal or absolute duties of the master which he cannot avoid by a delegation of authority. The fellow-servant rule does not apply.[63] A breach of this duty does not render the master liable unless it was the proximate cause of the injury.[64]

DUTY TO ADOPT RULES

5924. In general—A master who employs many servants in a complicated and dangerous business is bound to adopt and enforce such rules as may be reasonably necessary to protect them from the dangers incident to their work. This is one of the personal or absolute duties of the master which cannot be avoided by a delegation of authority.[65] There is no such duty where the business is not complex or dangerous.[66] A failure of a servant to observe a reasonable rule constitutes contributory negligence.[67] A servant who remains in a service with knowledge that rules are habitually disregarded cannot recover from a master for failure to enforce them.[68]

5925. Rules must be reasonable—The rules adopted must be reasonable. Whether a rule is reasonable is a question of law for the court to determine.[69] But if a rule is of doubtful meaning or application the doubt presents an issue of fact upon the evidence for the determination of the jury.[70]

5926. Effect of rules in relieving master—A master cannot avoid his personal or absolute duty to furnish safe instrumentalities by promulgating a rule requiring his servants to make inspection.[71]

[59] Morrow v. St. P. C. Ry., 74-480, 77+303.

[60] Kundar v. Shenango F. Co., 102-162, 112+1012.

[61] Pfudl v. Romer, 107-353, 120+302.

[62] See Gray v. Red Lake Falls L. Co., 85-24, 88+24; Caron v. Powers, 100-341, 111+152; Kundar v. Shenango F. Co., 102-162, 112+1012.

[63] Peterson v. Am. G. T. Co., 90-343, 96+913; Manore v. Kilgore, 107-347, 120+340; Dougherty v. Mpls. S. & M. Co., 126+136. See McKenna v. Chi. etc. Ry., 92-508, 100+373, 101+178; Dell v. McGrath, 92-187, 99+629.

[64] Hagglund v. St. Hilaire L. Co., 97-94, 106+91.

[65] Fraker v. St. P. etc. Ry., 32-54, 19+349; Madden v. Mpls. etc. Ry., 32-303, 306, 20+317; Vogt v. Honstain, 81-174, 179, 83+533; Wallin v. Eastern Ry., 83-149, 86+76; Reberk v. Horne, 85-326, 88+1003; Boyer v. Eastern Ry., 87-367, 92+326; Scott v. Eastern Ry., 90-135, 140, 95+892; Johnson v. Smith, 99-343, 109+810; Fitzgerald v. International F. T. Co., 104-138, 116+475.

[66] Boyer v. Eastern Ry., 87-367, 92+326.

[67] See § 6014.

[68] Reberk v. Horne, 85-326, 88+1003.

[69] Merritt v. G. N. Ry., 81-496, 84+321; Scott v. Eastern Ry., 90-135, 95+892; Le Duc v. N. P. Ry., 92-287, 100+108; Burris v. Mpls. etc. Ry., 95-30, 103+717.

[70] Le Duc v. N. P. Ry., 92-287, 100+108.

[71] Id.

5927. Proof of rules—The mere supposition or "general understanding" of the servants is not competent evidence of the existence of a rule.[72] Parol evidence of a rule has been held sufficient where it did not appear that there was other evidence.[73]

5928. Violation of rules evidence of negligence—The violation of a rule is admissible as evidence of negligence on the part of a master. But such rules do not stand on the same footing as statutes or ordinances in the nature of police regulations in fixing a legal standard of conduct. A violation of them does not necessarily constitute negligence.[74]

DUTY TO WARN AND INSTRUCT

5929. General rule—A master is bound to warn his servants of latent defects and dangers of which he has knowledge, or of which he ought to have knowledge in the exercise of ordinary or reasonable care, and of which they have no knowledge.[75]

5930. Duty absolute—Vice-principal—This duty to warn and instruct is one of the personal or absolute duties of a master. He cannot avoid it by a delegation of authority. The fellow-servant rule does not apply. A superintendent or foreman is a vice-principal in this regard.[76]

5931. Instructions must be plain—A master must make his instructions or warnings plain and intelligible to his servants.[77]

5932. Obvious dangers—A master owes no duty to warn or instruct his servants of dangers obvious to a person of ordinary intelligence and judgment.[78] Unless the contrary is apparent or known to the master he may assume that his servant has ordinary intelligence and judgment.[79]

5933. Servants with knowledge—A master is not liable for a failure to warn or instruct a servant as to defects and dangers known to the servant from his own observation or from information derived from others.[80]

5934. Immature servants—The immaturity of a servant is an important consideration in this connection,[81] but it has been held that the age, knowledge,

[72] James v. N. P. Ry., 46–168, 48+783.

[73] Sobieski v. St. P. etc. Ry., 41–169, 42+863.

[74] Smithson v. Chi. etc. Ry., 71–216, 73+853.

[75] Olson v. St. P. etc. Ry., 38–117, 121, 35+866 (danger to sectionmen from irregular trains); Lane v. Minn. S. A. Soc., 62–175, 64+382 (track-bolting habit of race horse); Carlson v. N. W. etc. Co., 63–428, 65+914 (danger from caving in of ditch); Dell v. McGrath, 92–187, 99+629 (danger from piling logs on a skidway); Bernier v. St. Paul G. Co., 92–214, 99+788 (dangers from electric wires); Fleming v. Covington, 102–403, 113+1016 (vicious habit of horse); Balder v. Zenith F. Co., 103–345, 114+948 (crust of coal formed in bin of coal); Putz v. St. Paul G. Co., 108–243, 121+1109 (necessity of opening vent to trap in gasworks); Dougherty v. Mpls. S. & M. Co., 126+136 (danger in moving scaffold).

[76] Olson v. St. P. etc. Ry., 38–117, 121, 35+866; Carlson v. N. W. etc. Co., 63–428, 65+914; Holman v. Kempe, 70–422, 73+186; Borgerson v. Cook, 91–91, 97+734; Hjelm v. Western G. C. Co., 94–169, 102+384; Jacobson v. Hobart I. Co., 103–319, 114+951; Fitzgerald v. International F. T. Co., 104–138, 116+475; Anderson v. Pittsburgh C. Co., 108–455, 122+794.

[77] Small v. Brainerd L. Co., 95–95, 103+726; Fitzgerald v. International F. T. Co., 104–138, 116+475.

[78] Berger v. St. P. etc. Ry., 39–78, 38+814; Manley v. Mpls. P. Co., 76–169, 78+1050; Boyer v. Eastern Ry., 87–367, 92+326; Dixon v. Union Ironworks, 90–492, 97+375; McKenna v. Chi. etc. Ry., 92–508, 100+373; Johnson v. Smith, 99–343, 109+810; O'Neil v. G. N. Ry., 101–467, 112+625; Mattson v. Chi. etc. Ry., 103–239, 114+759.

[79] Manley v. Mpls. P. Co., 76–169, 78+1050.

[80] Truntle v. North Star etc. Co., 57–52, 58+832; Saxton v. N. W. etc. Co., 81–314, 84+109; Wendler v. Red Wing etc. Co., 92–122, 99+625; Dell v. McGrath, 92–187, 99+629. See Hagerty v. St. Paul B. Co., 98–502, 108+278.

[81] Kaillen v. N. W. Bedding Co., 46–187, 48+779; Barg v. Bousfield, 65–355, 68+45;

and experience of the servant are of importance only as evidence to be weighed by the jury in connection with the other circumstances of the case tending to show his knowledge and appreciation of the dangers of his employment.[82] When a master sets a servant, who is a minor, to do a dangerous work, other than that for which the minor was employed, the master is not liable for injuries caused to the minor while engaged in such dangerous work on the ground merely that he set him at the work, unless it was, under all the circumstances of the case, negligent on the part of the master to set him at such work.[83]

5935. Instructions and warnings as to machinery, etc.—It is the duty of the master to warn and instruct inexperienced servants in the use of dangerous machinery or other instrumentalities.[84] His own ignorance of the machinery will not excuse him.[85] He is bound to warn servants of obscure conditions or peculiar attributes in the machinery furnished which increase the hazards of the service.[86] If he makes a material change in machinery without the knowledge of an operator he is bound to inform him, if ignorance of the change might result in injury.[87]

5936. Duty to warn sectionmen—As a general rule a railway company is under no obligation to warn sectionmen, working upon or near its tracks, of the approach of trains. They assume the risk of the situation.[88] But if the company is in the habit of giving them warning by sounding the whistle or ringing the bell of the locomotive, or otherwise, it owes them the duty of active vigilance in giving them such warning. Under such circumstances sectionmen are not bound to be constantly on the lookout for trains, but they must nevertheless exercise reasonable care for their own safety. They cannot remain entirely oblivious to their surroundings or the dangers of their situation.[89] It is not ordinarily the duty of an engineer to stop his train or slacken speed as he approaches sectionmen if he gives the proper signals. He may assume that they will heed the warning and get out of the way. But if he sees that they do not hear his

Torske v. Com. L. Co., 86-276, 90+532; Johnson v. Crookston L. Co., 95-142, 103+891; Small v. Brainerd L. Co., 95-95, 103+726; Hagerty v. St. Paul B. Co., 98-502, 108+278; Mastey v. Villaume, 104-186, 116+207; Fitzgerald v. International F. T. Co., 104-138, 116+475.

[82] Gray v. Commutator Co., 85-463, 89+322; Peterson v. Am. G. T. Co., 90-343, 96+913.

[83] Anderson v. Morrison, 22-274.

[84] Kaillen v. N. W. Bedding Co., 46-187, 48+779 (wool machine or picker); Barg v. Bousfield, 65-355, 68+45 (circular saw); Torske v. Com. L. Co., 86-276, 90+532 (moulding machine); Carlin v. Kennedy, 97-141, 106+340 (roller in sawmill); Hagerty v. St. Paul B. Co., 98-502, 108+278 (brick-pressing machine); Frazier v. Lloyd, 98-484, 108+819 (jointer); Ludwig v. Spicer, 99-400, 109+832 (mangle in laundry); Hendrickson v. Ash, 99-417, 109+830 (carrier and rollers in sawmill); Johnson v. Smith, 99-343, 109+810 (system of tramways in sawmill); Vik v. Red Cliff L. Co., 99-88, 108+469 (saw, rollers, etc., in sawmill); Granrus v. Croxton M. Co., 102-325, 113+693 (operation of ore cars on gravity track); Mastey v. Villaume, 104-186, 116+207 (sawdust box under rip-saw); Bigum v. St. Paul etc. Co., 107-567, 119+481 (jointer); Arko v. Shenango F. Co., 107-220, 119+789 (ore car in mine—stopping with pinch bar); Gruenberg v. Heywood, 108-413, 122+324 (cutting machine in box factory).

[85] Raasch v. Elite L. Co., 98-357, 108+477.

[86] Gray v. Commutator Co., 85-463, 89+322; Peterson v. Am. G. T. Co., 90-343, 96+913; Dell v. McGrath, 92-187, 99+629; Small v. Brainerd L. Co., 95-95, 103+726; Granrus v. Croxton M. Co., 102-325, 113+693.

[87] Johnson v. Crookston L. Co., 95-142, 103+891. See Waligora v. St. Paul F. Co., 107-554, 119+395.

[88] Schulz v. Chi. etc. Ry., 57-271, 273, 59+192; Connelly v. Mpls. E. Ry., 38-80, 35+582. See Olson v. St. P. etc. Ry., 38-117, 35+866; Larson v. St. P. etc. Ry., 43-423, 45+722.

[89] Erickson v. St. P. & D. Ry., 41-500, 43+332; Britton v. N. P. Ry., 47-340, 50+231; Schulz v. Chi. etc. Ry., 57-271, 59+192; Joyce v. G. N. Ry., 100-225, 110+975; Floan v. Chi. etc. Ry., 101-113, 111+957; Glines v. Oliver I. M. Co., 108-278, 122+161. See Rutherford v. Chi. etc. Ry., 57-237, 59+302; Lundquist v. Duluth St. Ry., 65-387, 390, 67+1006; Magliani v. Minn. T. Ry., 108-148, 121+635.

signals and are making no effort to get out of the way he must slow down, or stop his train, if necessary to avoid an accident.[90] In station or switching yards a signal must be given of the movement of an engine.[91] Though servants of a railway company, while engaged in the performance of their duties in and about the switching yards of the company, may rely upon the custom, adopted for their protection, of giving signals of the approach of trains or engines moving about the yards, the same rule in all its force does not extend to them while not absorbed in their duties and passing leisurely through the yards.[92]

5937. Servant ordered to dangerous place without warnings—The general rule stated in section 5929 is applicable where a master or his superintendent or foreman orders a servant to work in an unsafe place without warning him of latent defects or dangers.[93]

5938. Duty to give warnings of impending dangers—Where, from the nature of the business, reasonable care for the safety of servants requires the giving of warnings of impending danger, it is the absolute duty of the master to give such warnings.[94] The mere fact that the master has ordered signals to be given, or has customarily assumed to give them, or the practice of giving them has been voluntarily adopted by servants, does not render it the absolute duty of the master that they be given.[95] Where a master has ordered warnings to be given of impending danger from independent work, or has assumed customarily to give them, it is his absolute duty to give them, at least if reasonable care for the safety of his servants under the circumstances requires them.[96]

5939. Explosions—Dynamite—The dangerous character of dynamite, when used for blasting or other like purposes, imposes upon the person so employing it the duty to provide reasonably safe and suitable methods for its use, and the duty to instruct and warn his inexperienced servants of its character and the manner in which it may be handled and used with safety.[97]

5940. Change of conditions unknown to servant—If a master changes the conditions under which a servant is working in such a way that ignorance of the change would endanger the servant the master is bound to acquaint the

[90] Erickson v. St. P. & D. Ry., 41–500, 43+332; Schulz v. Chi. etc. Ry., 57–271, 59+192.

[91] Sobieski v. St. P. & D. Ry., 41–169, 42+863.

[92] Magliani v. Minn. T. Ry., 108–148, 121+635.

[93] Carlson v. N. W. etc. Co., 63–428, 65+914; Stahl v. Duluth, 71–341, 74+143 (see Minneapolis v. Lundin, 58 Fed. 525); Lund v. Woodworth, 75–501, 78+81; Borgerson v. Cook, 91–91, 97+734; Owens v. Savage, 93–468, 101+790; Abel v. Butler, 66–16, 68+205; Johnson v. Mpls. etc. Co., 67–141, 69+713; Renlund v. Commodore M. Co., 89–41, 93+1057; Carlson v. Forrestal, 101–446, 112+626; Balder v. Zenith F. Co., 103–345, 114+948; Anderson v. Pitt I. M. Co., 103–252, 114+953; Tomazin v. Shenango F. Co., 103–334, 114+1128; McCoy v. Northern H. & E. Co., 104–234, 116+488; Bjorklund v. Gray, 106–42, 118+59; Wickham v. Chi. etc. Ry., 124+639. See Gonsior v. Mpls. etc. Ry., 36–385, 31+515; Hirsch v. Bayne, 127+389.

[94] Hjelm v. Western G. C. Co., 94–169, 102+384; Jacobson v. Hobart, 103–319, 114+951; Anderson v. Pittsburgh C. Co., 108–455, 122+794; Duff v. Bayne, 127+385.

[95] Lundquist v. Duluth St. Ry., 65–387, 67+1006; Doerr v. Daily News P. Co., 97–248, 106+1044.

[96] Anderson v. Pittsburgh C. Co., 108–455, 122+794. In this case the work was not "independent" and the rule seems to have been misapplied. The case is apparently inconsistent with Lundquist v. Duluth St. Ry., 65–387, 67+1006 and Doerr v. Daily News P. Co., 97–248, 106+1044.

[97] Pinney v. King, 98–160, 107+1127; Pintar v. Pitt, 107–256, 119+1053. See also Holman v. Kempe, 70–422, 73+186 blasting with powder); Hjelm v. Western etc. Co., 94–169, 102+384 (blasting with powder and dynamite—duty to give signals); Corneilson v. Eastern Ry., 50–23, 52+224 (removing unexploded blasting charge—fellow-servant rule applied); Stahl v. Duluth, 71–341, 74+143 (explosion of dynamite in excavating ditches for watermains); Carlson v. Forrestal, 101–446, 112+626 (digging out unexploded blasting holes).

servant with the change, if it is not observable by the exercise of ordinary care on the part of the servant.[98]

5941. Danger from wrongdoer—A master is bound not to expose his servant to danger from a wrongdoer or trespasser without proper warning.[99]

5942. Law and fact—Whether a master has been negligent in failing to warn or instruct a servant is a question of fact for the jury,[1] unless the evidence is conclusive.[2]

DUTY TO SUPERVISE WORK

5943. In general—It has been held to be one of the absolute or personal duties of a master to use ordinary or reasonable care to direct and supervise the performance of the work in a reasonably safe and prudent manner.[3] The rule requiring the master to exercise a general supervision over the work of his servants does not require their protection from the negligence and carelessness of fellow servants, nor extend to dangers and risks that are apparent and obvious, or that might be discovered by the exercise of reasonable care.[4]

DUTY TO ISSUE ORDERS

5944. In general—Whenever the nature and magnitude of the master's work, whether it be that of construction or otherwise, are such that it is necessary that orders be given regulating the conduct of his servants, and directing them where to work, it is not only the right but the absolute duty of the master to give such orders; and in obeying them the servants have a right to assume that the master, in giving them, has exercised due care for their safety.[5]

[98] Craver v. Christian, 34–397, 26+8 (uncovering machinery); Cleary v. Dakota P. Co., 71–150, 73+717 (change of signals); Perras v. Booth, 82–191, 84+739 (shift of elevator); Johnson v. Crookston L. Co., 95–142, 103+891 (adjustment of saws); Kohout v. Newman, 96–61, 104+764 (loosening of earth by blasting); Waligora v. St. Paul F. Co., 107–554, 119+395 (change in an air hoist).

[99] Guirney v. St. Paul etc. Ry., 43–496, 46+78.

[1] Kaillen v. N. W. Bedding Co., 46–187, 48+779; Barg v. Bousfield, 65–355, 68+45; Torske v. Com. L. Co., 86–276, 90+532; Carlin v. Kennedy, 97–141, 106+340; Johnson v. Smith, 99–343, 109+810.

[2] Johnson v. Smith, 99–343, 109+810.

[3] Hess v. Adamant Mfg. Co., 66–79, 68+774; Soutar v. Mpls. etc. Co., 68–18, 70+796; Lundberg v. Shevlin, 68–135, 70+1078. See also, Renlund v. Commodore M. Co., 89–41, 43, 93+1057; Doerr v. Daily News P. Co., 97–248, 106+1044; Pinney v. King, 98–160, 162, 107+1127; Jacobson v. Hobart I. Co., 103–319, 114+951. These cases, which do not appear to have been very carefully considered, should be taken as holding no more than that there is a duty to supervise so far as may be necessary to discharge the absolute, non-assignable duties of the master—in other words, that the duty to supervise is not a primary, but a secondary or subsidiary duty. See Whittaker v. Del. etc. Ry., 126 N. Y. 544; Dixon v. Union Ironworks, 90–492, 97+375; Pasco v. Mpls. S. & M. Co., 105–132, 117+479. There is some slight authority for the view that there is a general duty to supervise. See 1 Shearman & Redfield, Neg. (5 ed.) § 203a. But no such rule prevails generally in this country, and it apparently does not prevail here.

[4] Dixon v. Union Ironworks, 90–492, 97+375.

[5] Carlson v. N. W. etc. Co., 63–428, 65+914. This case is cited in Abel v. Butler, 66–16, 68+205; Hess v. Adamant Mfg. Co., 66–79, 86+774; Johnson v. Mpls. etc. Co., 67–141, 144, 69+713; Swanson v. G. N. Ry., 68–184, 187, 70+978; Holman v. Kempe, 70–422, 429, 73+186; Stahl v. Duluth, 71–341, 74+143; Hill v. Winston, 73–80, 75+1030; Kletschka v. Mpls. etc. Ry., 80–238, 242, 83+133; Perras v. Booth, 82–191, 196, 84+739, 85+179; Bell v. Lang, 83–228, 86+95; Hjelm v. Western G. C. Co., 94–169, 102+384; Barrett v. Reardon, 95–425, 104+309; Carlson v. Forrestal, 101–446, 112+626; Jacobson v. Hobart I. Co., 103–319, 114+951; Tomazin v. Shenango F. Co., 103–334, 114+1128; McCoy v. Northern H. & E. Co., 104–234, 116+488. See Renlund v. Commodore M. Co., 89–41, 93+1057; Borgerson v. Cook, 91–91, 97+734; Pinney v. King, 98–160, 107+1127; Doerr v. Daily News Pub. Co., 97–248, 106+1044; Johnson v. Smith, 99–343, 109+810. The result reached in the Carlson case was clearly right, for there was a breach of the master's duty to warn the servant, but in laying down the general

FELLOW SERVANTS

5945. Fellow-servant rule stated—A master who is guilty of no personal negligence is not liable to a servant for the negligence of a fellow servant,[6] except as provided by statute.[7]

5946. Basis of rule—There is great diversity of opinion as to the basis of the fellow-servant rule.[8] It is generally based on assumption of risk.[9] It may be considered as an exception to the doctrine of respondeat superior, grounded in justice and public policy.[10] It is sometimes based on an implied stipulation of the contract of employment,[11] but this view is not satisfactory.[12] It has been said, with questionable soundness, that "one of the substantial reasons upon which the liability of a master for injuries of fellow servants has been denied is that, where servants are working for the same employer, each has a better opportunity to observe the conduct of the others than the master, and likewise that it is the duty of the servant to warn the master of any such misconduct or negligent acts of his coemployees. This rule is founded upon considerations of public policy, which imposes the duty of giving such information by the servant for the benefit of his fellow servants as well as the master, in which conduct not only the employer, but all servants employed in the common service, are alike interested."[13] The rule was originally adopted because it was felt that a contrary rule would be unjust to employers and check business. At the present time the tendency of the courts is to restrict it so far as possible by enlarging the absolute duties of masters.

5947. Who are fellow servants—Fellow servants are persons in the service of the same master and engaged in the same general business, though they may not be in the same grade or department thereof.[14] This is not an exact definition and none is possible in the present uncertain state of the law upon the subject. It is defective in not excluding vice-principals and in using such a vague expression as "same general business." What is the same general business is the crux of the matter. It is settled in this state that fellow servants may be engaged in different departments, but departments of a great business like railroading, may be so disconnected that servants engaged in them could not reasonably be held fellow servants. For example, soliciting freight agents

rule as to the giving of orders the language of the court was perhaps too broad. The giving of orders is not generally considered as one of the absolute, non-assignable duties of the master, though it may be necessary to give orders, under special circumstances, in order to provide the servant with a safe place to work, etc. In other words the duty to give orders is not general, but subsidiary to the absolute, non-assignable duties. See comments on the Carlson case in 2 Labatt, M. & S. p. 1466. See, as bearing on the duty to give orders, Santa Fe etc. Ry. v. Holmes, 202 U. S. 438 (orders of train dispatcher); Haukins v. New York etc. Ry., 142 N. Y. 416 (id.); N. P. Ry. v. Dixon, 194 U. S. 338 (id.).

[6] Foster v. Minn. C. Ry., 14-360(277); Ling v. St. P. etc. Ry., 50-160, 52+378; N. P. Ry. v. Dixon, 194 U. S. 338 and cases under § 5954.

[7] See § 5955.

[8] See Labatt, M. & S. § 472.

[9] Brown v. Winona etc. Ry., 27-162, 6+484; Fraker v. St. P. etc. Ry., 32-54, 19+349; Cook v. St. P. etc. Ry., 34-45, 24+311; Kelley v. Chi. etc. Ry., 35-490, 29+173; Hefferen v. N. P. Ry., 45-471, 48+1; Marsh v. Herman, 47-537, 50+611; McLaren v. Williston, 48-299, 51+373; O'Niel v. G. N. Ry., 80-27, 82+1086; Boyer v. Eastern Ry., 87-367, 92+326; Dixon v. Union Ironworks, 90-492, 97+375.

[10] 17 Harv. L. Rev. 562. See Vogt v. Honstain, 81-174, 181, 83+533.

[11] Brown v. Winona etc. Ry., 27-162, 6+484; Vogt v. Honstain, 81-174, 181, 83+533.

[12] 20 Harv. L. Rev. 30; Huffcutt, Ag. (2 ed.) § 271; Burdick, Torts, p. 174.

[13] Reberk v. Horne, 85-326, 88+1003.

[14] Foster v. Minn. C. Ry., 14-360(277); Brown v. Mpls. etc. Ry., 31-553, 18+834; Lindvall v. Woods, 41-212, 215, 42+1020; Fraser v. Red River L. Co., 45-235, 47+785; Neal v. N. P. Ry., 57-365, 59+312; Floody v. Chi. etc. Ry., 109-228, 123+815; New England Ry. v. Conroy, 175 U. S. 323; N. P. Ry. v. Dixon, 194 U. S. 338. See Schoen v. Chi. etc. Ry., 127+433.

and sectionmen could not reasonably be held fellow servants though employed by the same master and engaged in the same business of railroading. The fellow-servant rule is generally based on assumption of risk. Hence the prevailing test here is, are the two departments of the business so related that the servants engaged in them ordinarily come in contact in their work in such a way that they may suffer from each other's negligence? Is the risk one which a servant of ordinary intelligence would understand that he was exposing himself to when entering the service? [15]

5948. Necessity of same master—As a general rule servants of different masters do not come within the fellow-servant rule, even though engaged in a common work.[16] Servants in the hire of a general employer and servants of his subcontractor, or of an independent contractor, are not fellow servants, unless the circumstances show that the servant submitted himself to the control of another person than his proper master, and either expressly or impliedly consented to accept that person as his master for the purpose of the common employment.[17]

5949. Vice-principals—A servant who is authorized to discharge a personal or absolute duty of the master is, to the extent of a discharge of such duty, a vice-principal or alter ego of the master, and not a mere fellow servant. The test as to whether a servant is a fellow servant or vice-principal is not his rank or title, but the character of his duties. A servant may occupy the dual position of a mere fellow servant and a vice-principal—a vice-principal while he is discharging the personal or absolute duties of the master, and a fellow servant while he is discharging his other duties.[18] The vice-principal doctrine is of lessening importance, as the courts are coming to recognize that the question of the master's liability generally turns on the character of the act rather than on the relation of the servants. The question is whether the negligence charged is the neglect of one of the absolute duties of the master.[19]

5950. Superintendents, foremen, etc.—Superior-servant doctrine—Persons may be fellow servants though one is subject to the orders of the other. The so-called superior-servant doctrine does not prevail in this state.[20] A superintendent or foreman is not necessarily a vice-principal simply because he occupies that position. Title or rank is not decisive in this connection. He is a vice-principal only when he is in the discharge of one of the personal or absolute duties of the master. The rule requiring the master to exercise a general supervision over the work of his servants does not make the person

[15] See N. P. Ry. v. Hambly, 154 U. S. 349; N. P. Ry. v. Dixon, 194 U. S. 338; McAndrews v. Burns, 39 N. J. L. 117; Baird v. Pettit, 70 Pa. St. 482.

[16] Carroll v. Minn. V. Ry., 13-30(18); Connolly v. Davidson, 15-519(428); Kelly v. Tyra, 103-176, 114+750, 115+636. See Smithson v. Chi. etc. Ry., 71-216, 73+853 (two railway companies using same track); Floody v. G. N. Ry., 102-81, 112+875, 1081 (servants of union depot company and of railway company).

[17] Kelly v. Tyra, 103-176, 114+750, 115+636.

[18] Brown v. Mpls. etc. Ry., 31-553, 18+834; Lindvall v. Woods, 41-212, 42+1020; Fraser v. Red River L. Co., 45-235, 47+785; Carlson v. N. W. etc. Co., 63-428, 65+914; Perras v. Booth, 82-191, 196, 84+739; Peterson v. Am. G. T. Co., 90-343, 96+913; Hjelm v. Western G. C. Co., 94-169, 102+384; Jemming v. G. N. Ry., 96-302, 313, 104+1079; Doerr v. Daily News Pub. Co., 97-248, 106+1044; McCoy v. Northern H. & E. Co., 104-234, 116+488; Pasco v. Mpls. S. & M. Co., 105-132, 117+479; Anderson v. Pitt, 108-261, 121+915; Leionen v. Oliver, 108-337, 121+1107; Anderson v. Pittsburgh C. Co., 108-455, 122+794.

[19] Bjorklund v. Gray, 106-42, 118+59; Peters v. George, 154 Fed. 634.

[20] Brown v. Winona etc. Ry., 27-162, 6+484; Walsh v. St. P. etc. Ry., 27-367, 8+145; Fraker v. St. P. etc. Ry., 32-54, 19+349; Gonsior v. Mpls. etc. Ry., 36-385, 31+515; Olson v. St. P. etc. Ry., 38-117, 35+866; Doerr v. Daily News P. Co., 97-248, 106+1044; Pasco v. Mpls. S. & M. Co., 105-132, 117+479. See, for a partial adoption of the superior-servant doctrine, § 5880.

exercising such supervision a vice-principal.[21] The mere fact that a superintendent or foreman in the due exercise of his authority orders a servant to do a particular thing whereby the servant is injured does not make the superintendent or foreman a vice-principal; and this is so though his order involves an assurance of safety.[22] A foreman of a switching crew is not a fellow servant of the members of the crew in the performance of such duties as are peculiar to his position. He is presumptively the representative of the master, to report on the safety of the instrumentalities with which the crew are obliged to work, and a promise to a member of the crew that a defective footboard on an engine would be repaired is binding on the company.[23]

5951. Minors—A servant, though a minor, assumes the risk of the negligence of fellow servants.[24]

5952. Negligence of master and fellow servant concurring—If the negligence of a master concurs with the negligence of a fellow servant in causing injury the master is liable.[25]

5953. Law and fact—Whether a servant at the time of an accident was acting as a vice-principal or fellow servant is ordinarily a question for the jury.[26] When the facts are undisputed it is for the court to determine whether the servant was a vice-principal or fellow servant.[27]

5954. Persons held fellow servants—Deck hand and engineer on steamboat;[28] sectionman and servant piling wood on a tender;[29] sectionman and roadmaster;[30] sectionman and engineer or fireman of locomotive;[31] railway station agent and engineer;[32] railway yard-master and workman under him;[33] baggage-master on train and switch-tender;[34] foreman of railway roundhouse and workman under him;[35] foreman of sectionmen and the sectionmen under him;[36] boiler-maker in railway shop and his helper;[37] foreman of gang constructing a railway trestle and the workmen under him;[38] workmen digging

[21] Dixon v. Union Ironworks, 90-492, 97+375; Pasco v. Mpls. S. & M. Co., 105-132, 117+479 and cases under § 5949.

[22] Pasco v. Mpls. S. & M. Co., 105-132, 117+479; Gonsior v. Mpls. etc. Ry., 36-385, 31+515; Corneilson v. Eastern Ry., 50-23, 52+224; Ling v. St. P. etc. Ry., 50-160, 52+378; Gittens v. Porten, 90-512, 97+378; Galland v. G. N. Ry., 101-540, 111+1133.

[23] Berglund v. Illinois C. Ry., 109-317, 123+928.

[24] Hefferen v. N. P. Ry., 45-471, 48+1; Glenmont L. Co. v. Roy, 126 Fed. 525. See 17 Harv. L. Rev. 562.

[25] McMahon v. Davidson, 12-357(232); Ransier v. Mpls. etc. Ry., 32-331, 20+332; Franklin v. Winona etc. Ry., 37-409, 34+898; Delude v. St. P. C. Ry., 55-63, 56+461; Tvedt v. Wheeler, 70-161, 72+1062; Jenson v. G. N. Ry., 72-175, 75+3; Thomas v. Smith, 90-379, 97+141; Swanson v. Oakes, 93-404, 101+949; Jensen v. Commodore M. Co., 94-53, 101+944; Kohout v. Newman, 96-61, 104+764. See McLaren v. Williston, 48-299, 51+373.

[26] Abel v. Butler, 66-16, 68+205; Hess v. Adamant Mfg. Co., 66-79, 68+774; Johnson v. Mpls. G. E. Co., 67-141, 69+713; Hill v. Winston, 73-80, 75+1030; Perras v. Booth, 82-191, 84+739; Renlund v. Commodore M. Co., 89-41, 93+1057; Borgerson v. Cook, 91-91, 95, 97+734; Comers v. Washburn, 91-105, 97+733; Pinney v. King, 98-160, 107+1127; Johnson v. St. Paul G. Co., 98-512, 108+816; King v. Chi. etc. Ry., 104-397, 116+918; Raitila v. Consumers O. Co., 107-91, 119+490; Olson v. Pike, 107-411, 120+378; Kronzer v. Spencer, 109-392, 124+6.

[27] Brown v. Mpls. etc. Ry., 31-553, 555, 18+834; Neal v. N. P. Ry., 57-365, 369, 59+312.

[28] McMahon v. Davidson, 12-357(232).

[29] Foster v. Minn. C. Ry., 14-360(277).

[30] Brown v. Winona etc. Ry., 27-162, 6+484.

[31] Collins v. St. P. etc. Ry., 30-31, 14+60; Connelly v. Mpls. E. Ry., 38-80, 35+582; Swartz v. G. N. Ry., 93-339, 101+504.

[32] Brown v. Mpls. etc. Ry., 31-553, 18+834.

[33] Fraker v. St. P. etc. Ry., 32-54, 19+349.

[34] Roberts v. Chi. etc. Ry., 33-218, 22+389.

[35] Gonsior v. Mpls. etc. Ry., 36-385, 31+515.

[36] Olson v. St. P. etc. Ry., 38-117, 35+866.

[37] Lavallee v. St. P. etc. Ry., 40-249, 41+974; Ling v. St. P. etc. Ry., 50-150, 52+378.

[38] Lindvall v. Woods, 41-212, 42+1020. See Woods v. Lindvall, 48 Fed. 62.

a ditch and workmen putting curbing in the ditch;[39] workmen engaged in piling lumber and workmen engaged in sorting and scaling lumber;[40] members of a crew of sectionmen;[41] members of a crew of men constructing a scaffold;[42] brakeman and engineer;[43] person directing blasting operations and the men under him;[44] a telegraph lineman and a blasting crew of a railway company;[45] workman on street-railway track and motorman;[46] workmen engaged in unloading lumber from wagon;[47] workmen engaged in building a trench;[48] foreman and member of his crew repairing cars;[49] workmen putting a hose on a locomotive tender;[50] foreman of railway crew and men under him engaged in tearing down a bridge;[51] foreman and workman loading heavy machinery on a wagon;[52] foreman and workmen unloading logs;[53] workmen who made a hoist and workmen who operated it;[54] foreman unloading machinery and servant working near;[55] engineer and pitman operating a steam shovel;[56] pressman and helper working on a printing press;[57] workmen at saws and rollers in sawmill;[58] foreman and crew operating a derrick;[59] foreman and excavating crew;[60] a helper or "straw boss" in a machine shop and a workman.[61]

STATUTE AS TO RAILWAY FELLOW SERVANTS

5955. Statute constitutional—The statute has been sustained as against the objection that it is class legislation and in conflict with the fourteenth amendment of the federal constitution.[62]

5956. Proviso as to new roads—The statute is expressly inapplicable to new roads not open to public travel or use,[63] and this exception is constitutional.[64]

5957. Construction of statute—The statute[65] does not apply to all the servants of a railway company, but only to those who are exposed to the peculiar hazards incident to the use and operation of railways.[66] It is unnecessary that

[39] Berquist v. Minneapolis, 42–471, 44+530.

[40] Fraser v. Red River L. Co., 45–235, 47+785.

[41] Pearson v. Chi. etc. Ry., 47–9, 49+302.

[42] Marsh v. Herman, 47–537, 50+611; Oelschlegel v. Chi. etc. Ry., 73–327, 76+56.

[43] McLaren v. Williston, 48–299, 51+373.

[44] Corneilson v. Eastern Ry., 50–23, 52+224.

[45] Neal v. N. P. Ry., 57–365, 59+312.

[46] Lundquist v. Duluth St. Ry., 65–387, 67+1006.

[47] Lundberg v. Shevlin, 68–135, 70+1078.

[48] Friedrich v. St. Paul, 68–402, 71+387.

[49] Holtz v. G. N. Ry., 69–524, 72+805.

[50] Weisel v. Eastern Ry., 79–245, 82+576.

[51] O'Niel v. G. N. Ry., 80–27, 82+1086.

[52] Bell v. Lang, 83–228, 86+95.

[53] Boyer v. Eastern Ry., 87–367, 92+326.

[54] Gittens v. Porten, 90–512, 97+378.

[55] Dixon v. Union Ironworks, 90–492, 97+375.

[56] Jemming v. G. N. Ry., 96–302, 104+1079.

[57] Doerr v. Daily News P. Co., 97–248, 106+1044.

[58] Vik v. Red Cliff L. Co., 99–88, 108+469.

[59] Berneche v. Hilliard, 101–366, 112+392.

[60] McCoy v. Northern H. & E. Co., 104–234, 116+488.

[61] Pasco v. Mpls. S. & M. Co., 105–132, 117+479.

[62] Herrick v. Mpls. etc. Ry., 31–11, 16+413; Lavallee v. St. P. etc. Ry., 40–249, 41+974; Kibbe v. Stevenson, 136 Fed. 147.

[63] Schneider v. Chi. etc. Ry., 42–68, 43+783; Moran v. Eastern Ry., 48–46, 50+930; Kline v. Minn. Iron Co., 93–63, 100+681.

[64] Kline v. Minn. Iron Co., 93–63, 100+681 (affirmed, 199 U. S. 593).

[65] R. L. 1905 § 2042. See Jemming v. G. N. Ry., 96–302, 104+1079 (reviewing all the prior cases).

[66] Lavallee v. St. P. etc. Ry., 40–249, 41+974; Johnson v. St. P. etc. Ry., 43–222, 45+156; Steffenson v. Chi. etc. Ry., 45–355, 47+1068; Kline v. Minn. Iron Co., 93–63, 100+681; Jemming v. G. N. Ry., 96–302, 104+1079; Kibbe v. Stevenson, 136 Fed. 147. See, for the construction of a similar statute of Iowa, Herrick v. Mpls. etc. Ry., 31–11, 16+413; Njus v. Chi. etc. Ry., 47–92, 49+527; and of Wisconsin, Roe v. Winston, 86–77, 90+122; Benson v. Chi. etc. Ry., 75–163, 77+798; Benson v. Chi. etc. Ry., 78–303, 80+1050; Britton v. N. P. Ry., 47–340, 50+231; Pope v. G. N. Ry., 94–429, 103+331.

the employment of the servant injured and of the servant causing the injury should be of the same kind.[67] No hard and fast rule or academic definition can be laid down as to what constitutes a railway hazard. The statute is a remedial one in favor of railway employees and it is only in exceptional cases that such an employee can be excluded from its benefits.[68] As a general rule a railroad hazard exists when the work is so intimately connected with the movement of engines, cars, and trains, as to render it more dangerous for that reason.[69]

5958. Who liable under statute—The statute has been held applicable to a railway company operating a line composed of the lines or tracks of several different companies;[70] to a private logging railway;[71] to contractors operating a railway in repairing the road bed;[72] to a private mining railway;[73] and to a receiver.[74] It is inapplicable to street railways.[75]

5959. Statute held applicable—The statute has been held applicable in case of injury to a sectionman run over by a passing train;[76] to sectionman pushed off a handcar;[77] to laborer boarding a construction train;[78] to sectionman against whom a handcar was thrown by a passing train;[79] to wiper in roundhouse hit by a wire cable;[80] to wiper in roundhouse injured by moving engine;[81] to laborer in stockyards required to step from platform to top of moving freight cars;[82] to sectionman injured by falling rail;[83] to brakeman coupling cars;[84] to brakeman boarding train;[85] to sectionman removing handcar from track;[86] to locomotive engineer;[87] to sectionman hit by stone thrown from moving engine;[88] to fireman;[89] to car cleaner;[90] to sectionman throwing iron bars from a car;[91] to a wiper cleaning cinders from an engine;[92] to a bridge carpenter, working on a trestle, run into by a car used in connection with the work;[93] to sectionman thrown on a crowbar by having a tie on which he was standing kicked from under him by a fellow servant;[94] to sectionman removing merchandise from wrecked cars for the purpose of clearing tracks for

[67] Smith v. St. P. etc. Ry., 44–17, 46+149.
[68] Tay v. Willmar etc. Ry., 100–131, 110+433; Christiansen v. Chi. etc. Ry., 107–341, 120+300.
[69] Hanson v. N. P. Ry., 108–94, 121+607. See Schoen v. Chi. etc. Ry., 127+433.
[70] Moran v. Eastern Ry., 48–46, 50+930.
[71] Schus v. Powers, 85–447, 89+68. See McLaren v. Williston, 48–299, 51+373; Vukelis v. Virginia L. Co., 107–68, 119+509; Williams v. Northern L. Co., 113 Fed. 382.
[72] Roe v. Winston, 86–77, 90+122 (Wisconsin statute).
[73] Kline v. Minn. Iron Co., 93–63, 100+681; Manwaring v. Drake, 93–497, 101+1134, 102+1134; Glines v. Oliver, 108–278, 122+161; Papkovich v. Oliver, 109–294, 123+824; Kibbe v. Stevenson, 136 Fed. 147; Mahoning O. & S. Co. v. Blomfelt, 163 Fed. 827.
[74] Mikkelson v. Truesdale, 63–137, 65+260.
[75] Funk v. St. P. C. Ry., 61–435, 63+1099; Lundquist v. Duluth St. Ry., 65–387, 67+1006. See Lorimer v. St. P. C. Ry., 48–391, 51+125.
[76] Smith v. St. P. & D. Ry., 44–17, 46+149.
[77] Steffenson v. Chi. etc. Ry., 45–355, 47+1068.
[78] Moran v. Eastern Ry., 48–46, 50+930.
[79] Slette v. G. N. Ry., 53–341, 55+137.
[80] Nichols v. Chi. etc. Ry., 60–319, 62+386.
[81] Mikkelson v. Truesdale, 63–137, 65+260.
[82] Leier v. Minn. etc. Co., 63–203, 65+269.
[83] Blomquist v. G. N. Ry., 65–69, 67+804.
[84] Schus v. Powers, 85–447, 89+68; Manwaring v. Drake, 93–497, 101+1134; Pope v. G. N. Ry., 94–429, 103+331.
[85] Roe v. Winston, 86–77, 90+122 (Wisconsin statute).
[86] Lindgren v. Mpls. etc. Ry., 86–152, 90+381; N. P. Ry. v. Behling, 57 Fed. 1037.
[87] Kline v. Minn. Iron Co., 93–63, 100+681.
[88] Swartz v. G. N. Ry., 93–339, 101+504.
[89] Schneider v. Chi. etc. Ry., 42–68, 43+783.
[90] Mitchell v. N. P. Ry., 70 Fed. 15.
[91] Njus v. Chi. etc. Ry., 47–92, 49+527 (Iowa statute).
[92] Stauning v. G. N. Ry., 88–480, 93+518.
[93] Johnson v. G. N. Ry., 104–444, 116+936.
[94] Christiansen v. Chi. etc. Ry., 107–341, 120+300.

the movement of trains;[95] to a laborer unloading rails from a flat car;[96] to an engine inspector in a roundhouse.[97]

5960. Statute held not applicable—The statute has been held not applicable in case of injury to a helper of a boiler-maker in railway shops;[98] to laborer repairing railway bridge;[99] to sectionman loading railway iron from ground to flatcar;[1] to laborer in repair shops;[2] to laborer about a steam shovel;[3] to laborer removing lumber of trestle work;[4] to laborers going to their dinner on handcar.[5]

5961. Servants of union depot company—A railway company is liable to its servants for the negligence of the servants of a union depot company, whose duty it is to operate the switches and direct the movement of the trains out of the depot yards. For the occasion, the servants of the depot company become the servants of the railway company. A switchman, who in the performance of his duty is required to ride on his engine while assisting in pulling a train out of the depot yards, is entitled to recover from his master, the railroad company, for injuries received by reason of the negligence of the depot company servants in operating a switch.[6]

5962. Contributory negligence—The statute does not change the rule as to the burden of proving contributory negligence.[7]

5963. Law and fact—Whether a person was exposed to a railway hazard is a question of fact for the jury,[8] unless the evidence is conclusive.[9]

ASSUMPTION OF RISK

5964. In general—Ordinary risks—A servant assumes the risks ordinarily incident to the employment in which he is engaged.[10]

[95] Hanson v. N. P. Ry., 108–94, 121+607.
[96] Janssen v. G. N. Ry., 109–285, 123+664.
[97] Hoveland v. Chi. etc. Ry., 125+266.
[98] Lavallee v. St. P. etc. Ry., 40–249, 41+974.
[99] Johnson v. St. P. & D. Ry., 43–222, 45+156. See Johnson v. G. N. Ry., 104–444, 116+936.
[1] Pearson v. Chi. etc. Ry., 47–9, 49+302.
[2] Holtz v. G. N. Ry., 69–524, 72+805.
[3] Birmingham v. Duluth etc. Ry., 70–474, 73+409; Weisel v. Eastern Ry., 79–245, 82+576; Jemming v. G. N. Ry., 96–302, 104+1079.
[4] O'Niel v. G. N. Ry., 80–27, 82+1086.
[5] Benson v. Chi. etc. Ry., 78–303, 80+1050 (Wisconsin statute).
[6] Floody v. G. N. Ry., 102–81, 112+875, 1081; Floody v. Chi. etc. Ry., 109–228, 123+815.
[7] Lorimer v. St. P. C. Ry., 48–391, 51+125.
[8] Anderson v. G. N. Ry., 74–432, 77+240 (sectionman injured by release of track jack without warning); Kreuzer v. G. N. Ry., 83–385, 86+413 (sectionman clearing away a wreck); Tay v. Willmar etc. Ry., 100–131, 110+433 (sectionmen injured by fall of rail); Christiansen v. Chi. etc. Ry., 107–341, 120+300 (sectionman repairing track); Hanson v. N. P. Ry., 108–94, 121+607 (sectionman removing merchandise from wrecked cars); Janssen v. G. N. Ry., 109–285, 123+664 (laborer unloading rails from flat cars).
[9] See Stauning v. G. N. Ry., 88–480, 93+518; Johnson v. G. N. Ry., 104–444, 116+936.
[10] Morse v. Mpls. etc. Ry., 30–465, 16+358 (bucking snow with two engines); Fraker v. St. P. etc. Ry., 32–54, 19+349 (removal of damaged cars); Madden v. Mpls. etc. Ry., 32–303, 20+317 (repairing road-bed of railway); Olson v. McMullen, 34–94, 24+318 (excavating—caving in of earth); Kelley v. Chi. etc. Ry., 35–490, 29+173 (handling damaged cars); Anderson v. Sowle, 37–539, 35+382 (coupling cars); Olson v. St. P. etc. Ry., 38–117, 35+866 (running extra trains with snow ploughs—assumption of risk of such trains by sectionmen); Woods v. St. P. & D. Ry., 39–435, 40+510 (coupling cars on trestle—cars kicked down an incline and weighed while in motion—coupled at foot of incline); Pederson v. Rushford, 41–289, 42+1063 (excavating—caving in of earth); Larson v. St. P. etc. Ry., 43–423, 45+722 (running extra trains with snow ploughs—assumption of risk by sectionmen); Sliney v. Duluth etc. Ry., 46–384, 49+187 (sectionmen running handcar at night while returning to their boarding car from neighboring village—not on duty—collision with car standing on track); McLaren v. Williston, 48–299, 51+373 (coupling cars); Bergquist v. Chandler, 49–511, 52+136 (min-

5965. Basis of doctrine—The doctrine of assumption of risk is a particular application of the general principle of the common law embodied in the maxim volenti non fit injuria. It is a manifestation of the strong individualistic tendency of the common law, which regards the freedom of individual action as a basic principle. Each individual is left free to work out his own destinies. While protecting him from external violence, from imposition and coercion, the common law does not assume to protect him from the effects of his own voluntary actions. In the common law the obligation to take care of others is not general, but special. Every one is expected to take care of himself, exceptions excepted. This is the spirit of the common law and of the English race. The doctrines of assumption of risk and contributory negligence are particular manifestations of it.[11] If a person freely and voluntarily encounters a risk he has only himself to thank if harm comes.[12] Economic considerations have no doubt had much to do with shaping and maintaining the doctrine. It has been felt that any other policy would unduly burden large industrial enterprises.[13] The doctrine is sometimes based on the ground of waiver, and sometimes on the ground of contributory negligence.[14] It is often based on implied contract,[15] but this theory is objectionable.[16]

5966. Not a form of contributory negligence—Assumption of risk is not a form or species of contributory negligence. The two defences are distinct.[17] Assumption of risk negatives the idea of even prima facie liability, while contributory negligence is an affirmative defence operating at a later stage to overcome a liability prima facie established. The one is based on deliberation, the other on inadvertence. One involves fault, while the other does not.[18]

5967. To be applied cautiously—It has been said that the doctrine of assumption of risk is not favored by the courts and ought to be very cautiously applied.[19] Special caution is needed when the servant is dead and the witnesses of the accident naturally biased.[20]

ing); Rutherford v. Chi. etc. Ry., 57-237, 59+302 (customary practice of running trains at excessive speed—absence of signals—assumption of risk by sectionman); Schulz v. Chi. etc. Ry., 57-271, 59+192 (id.); Puffer v. Chi. etc. Ry., 65-350, 68+39 (switching and coupling cars); Sieber v. G. N. Ry., 76-269, 79+95 (bucking snow with two engines); O'Niel v. G. N. Ry., 80-27, 82+1086 (sectionman removing trestle work—caught by bolt in timber); Kletschka v. Mpls. etc. Ry., 80-238, 83+133 (sectionman repairing road-bed after washout—caving in of earth); Kreuzer v. G. N. Ry., 83-385, 86+413 (sectionman clearing away a wreck—fall of roof of car); Sours v. G. N. Ry., 84-230, 87+766 (railway yardman standing near track to deliver lantern to conductor of passing train); Murran v. Chi. etc. Ry., 86-470, 90+1056 (sectionman clearing snow from tracks in switchyard—no one to signal approaching cars); Boyer v. Eastern Ry., 87-367, 92+326 (unloading poles from flat car); Wexler v. Salisbury, 91-308, 98+95 (hammering iron—danger of flying particles); Wiita v. Interstate I. Co., 103-303, 115+169 (use of fuse to explode dynamite in mining operations).

[11] Prof. Bohlen, 20 Harv. L. Rev. 14, 91; Rase v. Mpls. etc. Ry., 107-260, 120+360; O'Maley v. South Boston G. L. Co., 158 Mass. 135; Schlemmer v. Buffalo etc. Ry., 205 U. S. 1; 8 Harv. L. Rev. 459.

[12] Schlemmer v. Buffalo etc. Ry., 205 U. S. 1.

[13] See Walsh v. St. P. & D. Ry., 27-367, 370, 8+145.

[14] Greene v. Mpls. etc. Ry., 31-248, 17+378.

[15] Greene v. Mpls. etc. Ry., 31-248, 17+378; Brown v. Musser, 104-156, 116+218; St. Louis Cordage Co. v. Miller, 126 Fed. 495.

[16] Rase v. Mpls. etc. Ry., 107-260, 120+360. See 5 Columbia L. Rev. 158.

[17] Rase v. Mpls. etc. Ry., 107-260, 120+360 (overruling Thompson v. G. N. Ry., 70-219, 72+962); Choctaw etc. Ry. v. McDade, 191 U. S. 64; Schlemmer v. Buffalo etc. Ry., 205 U. S. 1, 16; St. Louis Cordage Co. v. Miller, 126 Fed. 495; Dempsey v. Sawyer, 95 Me. 295; Miner v. Conn. River Ry., 153 Mass. 398; Bradburn v. Wabash Ry., 134 Mich. 575; Crookston L. Co. v. Boutin, 149 Fed. 680; 20 Harv. L. Rev. 94; 21 Id. 245; 1 Labatt, M. & S. § 305; Bigelow, Torts (8 ed.) p. 178.

[18] See, for an elaboration of these distinctions, 21 Harv. L. Rev. 245.

[19] Scharenbroich v. St. Cloud etc. Co., 59-116, 60+1093. There seems no good rea-

5968. At what stage of trial question arises—The question of assumption of risk does not properly arise until the negligence of the master has been proved.[21]

5969. Violations of statutes—Statutes and ordinances imposing duties on a master do not abrogate the doctrine of assumption of risk unless expressly so provided.[22]

5970. Servant must appreciate risk—The mere fact that a servant is aware of the existence of a danger or defect does not charge him with assumption of risk. He is not so chargeable unless he knew and appreciated, or in the exercise of ordinary common sense and prudence ought to have known and appreciated, the risks to which he was exposed.[23] The fact that a servant was fearful of danger does not show, as a matter of law, that he appreciated the risk.[24]

5971. Age and intelligence of servant—Inasmuch as there is no assumption of risk unless the servant knows and appreciates the risk, his age, intelligence, and experience are determining factors.[25] In the absence of evidence to the contrary a person will be presumed to have ordinary intelligence.[26] If he has expert knowledge his conduct is judged accordingly.[27]

5972. Unsafe methods of business—A servant assumes the risks resulting from the unsafe methods of his master in conducting the business if such methods are, or ought to be, known to him.[28]

son why the doctrine should be either favored or disfavored. It should be applied in a spirit of reasonableness. Since the question is ordinarily left to the jury there is no danger of its being harshly applied against servants. On the contrary the danger is that it will not be applied, when it ought to be, in favor of masters—especially when they happen to be corporations.

[20] Johnson v. Atwood, 101-325, 112+262.

[21] O'Neil v. G. N. Ry., 101-467, 112+625.

[22] Fleming v. St. P. & D. Ry., 27-111, 6+448; Lundquist v. Duluth St. Ry., 65-387, 67+1006; Seely v. Tennant, 104-354, 116+648. See § 6000.

[23] Russell v. Mpls. etc. Ry., 32-230, 20+147; Cook v. St. P. etc. Ry., 34-45, 24+311; Robel v. Chi. etc. Ry., 35-84, 27+305; Craver v. Christian, 36-413, 31+457; Wuotilla v. Duluth L. Co., 37-153, 33+551; Steen v. St. P. & D. Ry., 37-310, 34+113; Rolseth v. Smith, 38-14, 35+565; McDonald v. Chi. etc. Ry., 41-439, 43+380; Hungerford v. Chi. etc. Ry., 41-444, 43+324; Doyle v. St. P. etc. Ry., 42-79, 43+787; Quick v. Minn. Iron Co., 47-361, 50+244; Newhart v. St. P. C. Ry., 51-42, 52+983; Scharenbroich v. St. Cloud etc. Co., 59-116, 60+1093; Neubauer v. N. P. Ry., 60-130, 61+912; Sneda v. Libera, 65-337, 68+36; Lund v. Woodworth, 75-501, 78+81; Stiller v. Bohn, 80-1, 82+981; Christianson v. N. W. etc. Co., 83-25, 85+826; Gray v. Commutator Co., 85-463, 89+322; Ziegler v. Gotzian, 86-290, 90+387; Blom v. Yellowstone Park Assn., 86-237, 90+397; Bender v. G. N. Ry., 89-163, 94+546; Krumdick v. Chi. etc. Ry., 90-260, 95+1122; Bernier v. St. Paul G. Co., 92-214, 99+788; McGinty v. Waterman, 93-242, 101+300; Campbell v. Ry. Trans. Co., 95-375, 104+547; Carlin v. Kennedy, 97-141, 106+340; Frazier v. Lloyd, 98-484, 108+819; Johnson v. St. Paul G. Co., 98-512, 108+816; Hendrickson v. Ash, 99-417, 109+830; Atlas v. Nat. B. Co., 100-30, 110+250; Hahn v. Plymouth E. Co., 101-58, 111+841; Johnson v. Atwood, 101-325, 112+262; Wiita v. Interstate I. Co., 103-303, 115+169; Balder v. Zenith F. Co., 103-345, 114+948; Sundvall v. Interstate I. Co., 104-499, 116+1118; Nustrom v. Shenango F. Co., 105-140, 117+480; Bailey v. Grand Forks L. Co., 107-192, 119+786; Rase v. Mpls. etc. Ry., 107-260, 120+360; Bigum v. St. Paul etc. Co., 107-567, 119+481; Manks v. Moore, 108-284, 122+5; Dougherty v. Mpls. S. & M. Co., 126+136; Peterson v. Merchants' El. Co., 126+534.

[24] Pinney v. King, 98-160, 107+1127.

[25] Walsh v. St. P. & D. Ry., 27-367, 8+145; Smith v. Winona etc. Ry., 42-87, 90, 43+968; Atlas v. Nat. B. Co., 100-30, 110+250; Mastey v. Villaume, 104-186, 116+207; Sundvall v. Interstate I. Co., 104-499, 116+1118; Bigum v. St. Paul etc. Co., 107-567, 119+481; Bailey v. Grand Forks L. Co., 107-192, 119+786; Spencer v. Albert Lea B. & T. Co., 107-403, 120+370.

[26] Walsh v. St. P. & D. Ry., 27-367, 8+145; Olson v. McMullen, 34-94, 24+318; Reiter v. Winona etc. Ry., 72-225, 75+219.

[27] Quick v. Minn. Iron Co., 47-361, 50+244; Spencer v. Albert Lea B. & T. Co., 107-403, 120+370.

[28] Hughes v. Winona etc. Ry., 27-137, 6+

5973. Hazardous employments—The doctrine of assumption of risk applies to hazardous as well as to ordinarily safe employments.[29]

5974. Obvious dangers—A servant assumes the risk of dangers and defects which are or ought to be obvious to one of his experience and intelligence. If the servant can see and appreciate the danger as well as the master he assumes the risk.[30]

5975. Law of gravitation—In several cases it has been said that a servant is bound to take notice of the ordinary operation of the law of gravitation and to govern himself accordingly.[31]

5976. Gravel-pit cases—Caving in of earth, etc.—In several cases a servant has been held to have assumed the risk of earth, sand, or gravel falling or caving in when undermined.[32]

5977. Extraordinary risks—A servant assumes not only the risks ordinarily incident to the employment in which he is engaged, but also such extraordinary risks as he may knowingly and voluntarily encounter.[33]

5978. Risk of unsafe place in which to work—If a servant, before he enters a service, knows, or after he has entered it, discovers, that the place in which he is required to work is unsafe, and understands, or by the exercise of ordinary observation ought to understand, the risks to which he is thereby exposed, and if, notwithstanding such knowledge, he, without objection, and without any promise on the part of the employer that such defects will be remedied, enters or continues in such service, he cannot recover for injuries re-

553; Sherman v. Chi. etc. Ry., 34–259, 25+593; Woods v. St. P. & D. Ry., 39–435, 40+510; Bengtson v. Chi. etc. Ry., 47–486, 50+531; Sieber v. G. N. Ry., 76–269, 79+95. See Bergquist v. Chandler Iron Co., 49–511, 52+136.

[29] Woods v. St. P. & D. Ry., 39–435, 40+510; Sours v. G. N. Ry., 84–230, 236, 87+766; Wexler v. Salisbury, 91–308, 98+95.

[30] Walsh v. St. P. & D. Ry., 27–367, 8+145; Jorgenson v. Smith, 32–79, 19+388; Olson v. McMullen, 34–94, 24+318; Anderson v. Sowle, 37–539, 35+382; Berger v. St. P. etc. Ry., 39–78, 38+814; Pederson v. Rushford, 41–289, 42+1063; Larson v. St. P. & D. Ry., 43–488, 45+1096; Quick v. Minn. Iron Co., 47–361, 50+244; McLaren v. Williston, 48–299, 51+373; Schlitz v. Pabst, 57–303, 59+188; Scharenbroich v. St. Cloud etc. Co., 59–116, 60+1093; Smith v. Tromanhauser, 63–98, 65+144; Anderson v. Nelson, 67–79, 69+630; Wulff v. Wood, 67–423, 70+156; Soutar v. Mpls. etc. Co., 68–18, 70+796; Holtz v. G. N. Ry., 69–524, 72+805; Fay v. Chi. etc. Ry., 72–192, 75+15; Manley v. Mpls. P. Co., 76–169, 78+1050; Boyer v. Eastern Ry., 87–367, 92+326; Hermann v. Clark, 89–132, 94+436; Jensen v. Regan, 92–323, 99+1126; Hagglund v. St. Hilaire L. Co., 97–94, 106+91; Thorne v. Mpls. etc. Co., 97–329, 106+253; O'Neil v. G. N. Ry., 101–467, 112+625; Galland v. G. N. Ry., 101–540, 111+1133; Mattson v. Chi. etc. Ry., 103–239, 114+759; De Greif v. N. W. K. Co., 106–15, 118+558; Rase v. Mpls. etc. Ry., 107–260, 120+360; Spencer v. Albert Lea B. & T. Co., 107–403, 120+370; Englund v. Mpls. etc. Ry., 108–380, 122+454; Glenmont L. Co. v. Roy, 126 Fed. 524; Am. Linseed Co. v. Henis, 141 Fed. 45; Butler v. Frazee, 211 U. S. 459. See Koreis v. Mpls. etc. Ry., 108–449, 122+668 (limitation of rule—railway servants—emergencies).

[31] Walsh v. St. P. & D. Ry., 27–367, 8+145; Olson v. McMullen, 34–94, 24+318; Pederson v. Rushford, 41–289, 42+1063; Carlson v. N. W. etc. Co., 63–428, 65+914; Swanson v. G. N. Ry., 68–184, 70+978; Reiter v. Winona etc. Ry., 72–225, 75+219; O'Neil v. G. N. Ry., 101–467, 112+625; Tomczek v. Johnson, 125+268.

[32] Olson v. McMullen, 34–94, 24+318; Pederson v. Rushford, 41–289, 42+1063; Swanson v. G. N. Ry., 68–184, 70+978; Reiter v. Winona etc. Ry., 72–225, 75+219; Kletschka v. Mpls. etc. Ry., 80–238, 83+133; O'Neil v. G. N. Ry., 101–467, 112+625. See Bergquist v. Minneapolis, 42–471, 44+530; Wolf v. G. N. Ry., 72–435, 75+702; Hill v. Winston, 73–80, 75+1030; Nicholas v. Burlington etc. Ry., 78–43, 80+776; Sneda v. Libera, 65–337, 68+36; Carlson v. N. W. etc. Co., 63–428, 65+914.

[33] Cook v. St. P. etc. Ry., 34–45, 24+311; Smith v. Winona etc. Ry., 42–87, 43+968; Bergquist v. Chandler, 49–511, 52+136; Sneda v. Libera, 65–337, 343, 68+36; O'Neil v. G. N. Ry., 101–467, 112+625. See Johnson v. St. P. etc. Ry., 43–53, 44+884; Smith v. Twin City R. T. Co., 102–4, 112+1001; Clay v. Chi. etc. Ry., 104–1, 115+949.

sulting therefrom, but will be deemed to have assumed all the risks of the employment thus known.[34]

5979. Risk of defective instrumentalities—If a servant, before he enters a service, knows, or afterwards discovers, that the instrumentalities furnished for his use are defective, and understands, or by the exercise of ordinary observation ought to understand, the risks to which he is thereby exposed, and if, notwithstanding such knowledge, he, without objection, and without any promise on the part of the master that such defects will be remedied, enters or continues in such service, he cannot recover for injuries resulting therefrom, but will be deemed to have assumed all the risks of the employment thus known.[35] If a servant is ignorant of defects, and justifiably so, there can be no assumption of risk.[36]

5980. Snow and ice—Railway servants in this latitude assume such risks as are usually incident to the falling of snow, the forming of ice, and the removal of the same from tracks and places where servants are required to work, when the removal or disposition thereof is done in a reasonable manner, and with due care for their safety.[37]

5981. Negligence of master—A servant does not assume the risk of negligence on the part of the master or his vice-principal,[38] unless he enters or remains in the service with notice.[39] He may generally assume that the master has discharged or will discharge the duties which the law imposes upon him.[40] But he cannot neglect to exercise ordinary care for his own safety against obvious dangers, upon the assumption that the master has done his duty.[41] He is not bound, however, to exercise reasonable care to discover dangers which are not obvious.[42]

[34] Sherman v. Chi. etc. Ry., 34–259, 25+593; Robel v. Chi. etc. Ry., 35–84, 27+305; Clapp v. Mpls. etc. Ry., 36–6, 29+340; Wilson v. Winona etc. Ry., 37–326, 33+908; Woods v. St. P. & D. Ry., 39–435, 40+510; Doyle v. St. P. etc. Ry., 42–79, 43+787; Quick v. Minn. Iron Co., 47–361, 50+244; Scharenbroich v. St. Cloud etc. Co., 59–116, 60+1093; Manley v. Mpls. P. Co., 76–169, 78+1050; Hermann v. Clark, 89–132, 94+436; Dixon v. Union Ironworks, 90–492, 97+375; Bernier v. St. Paul G. Co., 92–214, 99+788; Hahn v. Plymouth E. Co., 101–58, 111+841; Samuelson v. Hennepin P. Co., 101–443, 112+537; Lee v. Wild Rice L. Co., 102–74, 112+887; Granrus v. Croxton M. Co., 102–325, 113+693; Kjosnes v. Gray, 102–410, 113+1009; Whitehead v. Wis. C. Ry., 103–13, 114+254, 467; Larson v. Haglin, 103–257, 114+958; Wiita v. Interstate I. Co., 103–303, 115+169; Clay v. Chi. etc. Ry., 104–1, 115+949; Mastey v. Villaume, 104–186, 116+207; Seely v. Tennant, 104–354, 116+648. See Borchardt v. People's Ice Co., 106–134, 118+359.

[35] Greene v. Mpls. etc. Ry., 31–248, 17+378; Fleming v. St. P. & D. Ry., 27–111, 6+448; Walsh v. St. P. & D. Ry., 27–367, 8+145; Gates v. Southern Minn. Ry., 28–110, 9+579; Madden v. Mpls. etc. Ry., 32–303, 20+317; Craver v. Christian, 36–413, 31+457; Anderson v. Minn. etc. Ry., 39–523, 41+104; Doyle v. St. P. etc. Ry., 42–79, 43+787; Anderson v. Akeley, 47–128, 49+664; McLaren v. Williston, 48–299, 51+373; Olmscheid v. Nelson, 66–61, 68+605; Lally v. Crookston L. Co., 82–407, 85+157; Bartley v. Howell, 82–382, 85+167; Reberk v. Horne, 85–326, 88+1003; Gray v. Commutator Co., 85–463, 89+322; Kerrigan v. Chi. etc. Ry., 86–407, 90+976; Blom v. Yellowstone Park Assn., 86–237, 90+397; Swenson v. Osgood, 91–509, 98+645; Nelson v. Kelso, 91–77, 97+459; Jensen v. Regan, 92–323, 99+1126; McGinty v. Waterman, 93–242, 101+300; Dobsloff v. Nichols, 101–267, 112+218; De Greif v. N. W. etc. Co., 106–15, 118+558; Butler v. Frazee, 211 U. S. 459.

[36] Dobsloff v. Nichols, 101–267, 112+218.

[37] Lawson v. Truesdale, 60–410, 62+546; Fay v. Chi. etc. Ry., 72–192, 75+15; Rifley v. Mpls. etc. Ry., 72–469, 75+704.

[38] Madden v. Mpls. etc. Ry., 32–303, 306, 20+317; Hall v. Chi. etc. Ry., 46–439, 446, 49+239; Jensen v. G. N. Ry., 72–175, 75+3; Bernier v. St. Paul G. Co., 92–214, 99+788.

[39] See §§ 5978, 5979.

[40] See §§ 5881, 5912.

[41] Anderson v. Nelson, 67–79, 69+630.

[42] Rase v. Mpls. etc. Ry., 107–260, 120+360; Norfolk etc. Ry. v. Beckett, 163 Fed. 479; Johnson v. McLeod, 127+497.

5982. Refusal of master to repair defect—If a servant complains to his master of a defect in an instrumentality or place of work and the master refuses to remedy it, the servant assumes the risk if he continues in the service.[43]

5983. Promise of master to remedy defects—If a servant complains to his master of a defect in an instrumentality, or place of work, or of the unfitness of a fellow servant, and the master promises to remedy the defect, the servant may remain in the service a reasonable time thereafter without assuming the risk of the defect complained of, unless the danger is so imminent that an ordinarily prudent man would not remain. Any time is reasonable which does not preclude a reasonable expectation that the promise will be fulfilled. What is a reasonable time is a question for the jury, unless the evidence is conclusive; and so is the question whether the danger is so imminent that an ordinarily prudent man would not remain.[44] A promise made by a vice-principal of the master will bind the master.[45] The promise must be sufficiently definite and positive to justify the servant in relying on it.[46] When complaining of defective instrumentalities or machinery to the master, it is unnecessary that the servant state in exact words that he apprehends danger to himself by reason of the defects, nor need there be a formal notification that he will leave the service unless the defects are repaired or remedied. It is sufficient if, from the circumstances and the conversation, it can be fairly inferred that the servant is complaining on his own account, and that he was induced to continue in the service by reason of the promise.[47] The servant may recover though he is aware not only of the defects, but also of the risks to which they will naturally expose him.[48] He cannot recover if he fails to exercise ordinary care while he remains in reliance on the promise, and the degree of care which he is required to exercise is enhanced by his knowledge of the defects of which he has complained.[49] A promise to discontinue the use of an instrumentality has the same effect as a promise to remedy a defect in it.[50] An ordinary promise to remedy a defect does not go to the extent that the fellow servants of the complaining servant will not be guilty of sporadic or occasional acts of negligence. The liability of the master depends on his failure or neglect to perform one

[43] Anderson v. Akeley, 47–128, 49+664; Manore v. Kilgore, 107–347, 120+340; Stenvog v. Minn. T. Ry., 108–199, 121+903.

[44] Greene v. Mpls. etc. Ry., 31–248, 17+378; Lyberg v. N. P. Ry., 39–15, 38+632; Snowberg v. Nelson, 43–532, 45+1131; Ehmcke v. Porter, 45–338, 47+1066; Gibson v. Mpls. etc. Ry., 55–177, 56+686; Schlitz v. Pabst, 57–303, 59+188; Rothenberger v. N. W. etc. Co., 57–461, 59+531; Smith v. Backus, 64–447, 67+358; Harris v. Hewitt, 64–54, 65+1085; Vogt v. Honstain, 81–174, 83+533; Gray v. Red Lake Falls L. Co., 85–24, 88+24; Anderson v. Fielding, 92–42, 99+357; Shalgren v. Red Cliff L. Co., 95–450, 104+531; Thorne v. Mpls. G. E. Co., 97–329, 106+253; Antletz v. Smith, 97–217, 106+517; Bailey v. Swallow, 98–104, 107+727; Ludwig v. Spicer, 99–400, 109+832; Viou v. Brooks, 99–97, 108+891; Brown v. Musser, 104–156, 116+218; Nicolas v. Albert Lea L. & P. Co., 107–101, 119+503; Olson v. Pike, 107–411, 120+378; Gruenberg v. Heywood Mfg. Co., 108–413, 122+324; Crookston L. Co. v. Boutin, 149 Fed. 680; Note, 23 Am. St. Rep. 385.

[45] Ehmcke v. Porter, 45–338, 47+1066 (evidence held not to show that promisor was a vice-principal); Bailey v. Swallow, 98–104, 107+727 (promisor held a vice-principal); Berglund v. Illinois C. Ry., 109–317, 123+928 (foreman of switching crew held a vice-principal).

[46] Wilson v. Winona etc. Ry., 37–326, 33+908; Thorne v. Mpls. G. E. Co., 97–329, 106+253. See Vogt v. Honstain, 81–174, 83+533.

[47] Rothenberger v. N. W. etc. Co., 57–461, 59+531; Viou v. Brooks, 99–97, 108+891; Ludwig v. Spicer, 99–400, 109+832.

[48] Greene v. Mpls. etc. Ry., 31–248, 17+378.

[49] Snowberg v. Nelson, 43–532, 45+1131; Schlitz v. Pabst, 57–303, 59+188; Gray v. Red Lake Falls L. Co., 85–24, 88+24; Shalgren v. Red Cliff L. Co., 95–450, 104+531; Williams v. Headrick, 159 Fed. 680.

[50] Schlitz v. Pabst, 57–303, 59+188.

of his personal or absolute duties.[51] The rule is generally based on an implied agreement that if the servant remains the risk from the defect complained of is on the master.[52]

5984. Assurance that repairs have been made—A servant may act without assuming the risk on an assurance of the master or his vice-principal that a defect pointed out by the servant has been remedied, when it is not obvious that the defect has not been remedied.[53]

5985. Repairs—Assumption as to sufficiency—Where a master repairs an instrumentality the servant has a right, within reasonable limits, to act on the assumption that it is safe.[54]

5986. Assurance of no danger by superior—A servant assumes the risk of obvious danger though he is assured by his superior that there is no danger.[55] A servant who is assured by the master that the place in which he is about to do his work is safe and is directed to proceed with his work, may, within reasonable limits, defer to the judgment of the master, and rely thereon. The order and an assurance of safety may properly be considered by the jury, in connection with the other evidence in determining whether or not the servant at the time knew and appreciated the risk.[56]

5987. Assurance of protection—Where a master, or his superintendent or foreman, directs a servant to do a certain thing, and assures him that he will protect him from all injury in doing it, the servant does not assume the risk.[57]

5988. Acting under orders—A servant does not assume the risk of dangers involved in acting in accordance with the direct and specific orders of his superior, unless they are so great and obvious that a person of ordinary prudence would not incur them under the circumstances.[58] Where a servant is subject to the general orders of a general manager or superintendent of the master, and also subject to the direction of an immediate superior, he is not necessarily required to disobey the orders of the latter, even though in conflict with the general orders of the former.[59] When we say that a man appreciates a danger, we mean that he forms a judgment as to the future, and that his judgment is right. But if against this judgment is set the judgment of a superior, one, too, who from the nature of the callings of the two men and of the superior's duty seems likely to make the more accurate forecast, and if to this is added a command to go on with the work and to run the risk, it becomes a complex question, on the particular circumstances, whether the inferior is not justified as a prudent man in surrendering his own opinion and obeying the command. The nature and degree of the danger, the extent of the plain-

[51] Vogt v. Honstain, 81–174, 83+533.

[52] Greene v. Mpls. etc. Ry., 31–248, 17+378; Schlitz v. Pabst, 57–303, 59+188; Brown v. Musser, 104–156, 116+218. See 20 Harv. L. Rev. 91.

[53] Nelson v. St. Paul P. Works, 57–43, 58+868; Rogers v. Chi. etc. Ry., 65–308, 67+1003; Kerrigan v. Chi. etc. Ry., 86–407, 90+976.

[54] Kjosnes v. Gray, 102–410, 113+1009.

[55] Galland v. G. N. Ry., 101–540, 111+1133. See, however, Nustrom v. Shenango F. Co., 105–140, 117+480.

[56] Anderson v. Pitt I. M. Co., 103–252, 114+953; Id., 108–261, 121+915. See Manks v. Moore, 108–284, 122+5.

[57] Manks v. Moore, 108–284, 122+5.

[58] Carlson v. N. W. etc. Co., 63–428, 65+914; Anderson v. G. N. Ry., 95–212, 103+1021; Hagglund v. St. Hilaire L. Co., 97–94, 106+91; Galland v. G. N. Ry., 101–540, 111+1133; Kundar v. Shenango F. Co., 102–162, 112+1012; Anderson v. Pitt I. M. Co., 103–252, 114+953; Clay v. Chi. etc. Ry., 104–1, 115+949; McCoy v. Northern H. & E. Co., 104–234, 116+488; Nustrom v. Shenango F. Co., 105–140, 117+480. See Anderson v. Akeley, 47–128, 49+664; Manks v. Moore, 108–284, 122+5.

[59] Rudquist v. Empire L. Co., 104–505, 116+1019.

tiff's appreciation of it, and the exigency of the work, all enter into consideration, and no universal rule can be laid down.[60]

5989. Failure to use safety devices—Where a servant is an expert workman, and not only knows that a suitable device or shield has been furnished by the master for the purpose of guarding or covering machinery, but also understands the risks incident to its use in an unguarded condition, he assumes all risk of injury if he neglects to attach the device so furnished.[61]

5990. In making repairs—A servant cannot recover for an injury caused by a defect he is employed to repair.[62]

5991. Overtaxing one's strength—If a servant overtaxes his strength in his work the master is not liable for resulting injury.[63]

5992. Emergencies in railway service—A railway engineer owes duties to the public as well as to his master, and may take risks reasonably required by the service in cases of emergency, without losing his right of action for resulting injuries.[64]

5993. Working outside scope of employment—If a servant is injured while working, without orders, outside the scope of his employment, he cannot recover from the master.[65]

5994. Negligence of fellow servants—One of the risks which a servant assumes is the negligence of his fellow servants.[66]

5995. Minors—A servant who is a minor assumes the risk of the negligence of his fellow servants.[67]

5996. To whom defence available—The defence of assumption of risk is not available to a defendant who is not an employer of the person injured.[68]

5997. Burden of proof—Assumption of risk is a matter of defence and the burden of proving it is on the defendant.[69]

5998. Law and fact—Whether a servant assumed the risk is a question for the jury,[70] unless the evidence is conclusive.[71] If the risk was clearly incident to the employment it is error to submit the question to a jury.[72]

[60] Nustrom v. Shenango F. Co., 105–140, 117+480.

[61] McGinty v. Waterman, 93–242, 101+300. See Davidson v. Flour City O. I. Works, 107–17, 119+483.

[62] Broderick v. St. P. C. Ry., 74–163, 77+28; Saxton v. N. W. etc. Co., 81–314, 84+109. See Madden v. Mpls. etc. Ry., 32–303, 20+317; Holden v. Gary, 109–59, 122+1018.

[63] Stenvog v. Minn. T. Ry., 108–199, 121+903.

[64] Korcis v. Mpls. etc. Ry., 108–449, 122+668 (operating temporarily repaired engine until reaching next station).

[65] Mullin v. Northern M. Co., 53–29, 55+1115; Voyer v. Dispatch P. Co., 62–393, 64+1138; Nutzmann v. Ger. L. Ins. Co., 82–116, 84+730; Green v. Brainerd etc. Ry., 85–318, 88+974. See Olson v. Mpls. etc. Ry., 76–149, 78+975; Holden v. Gary, 109–59, 122+1018. See Note, 85 Am. St. Rep. 622.

[66] See § 5946.

[67] Hefferen v. N. P. Ry., 45–471, 48+1; Glenmont L. Co. v. Roy, 126 Fed. 525. See 17 Harv. L. Rev. 562.

[68] Campbell v. Ry. Trans. Co., 95–375, 104+547.

[69] Thompson v. G. N. Ry., 70–219, 72+962.

[70] Madden v. Mpls. etc. Ry., 32–303, 20+317; Sherman v. Chi. etc. Ry., 34–259, 25+593; Craver v. Christian, 34–397, 26+8; Id., 36–413, 31+457; Robel v. Chi. etc. Ry., 35–84, 27+305; Mullin v. Northern M. Co., 53–29, 55+1115; Neubauer v. N. P. Ry., 60–130, 61+912; Rogers v. Chi. etc. Ry., 65–308, 67+1003; Sneda v. Libera, 65–337, 68+36; Hess v. Adamant Mfg. Co., 66–79, 68+774; Holman v. Kempe, 70–422, 73+186; Wolf v. G. N. Ry., 72–435, 75+702; Hill v. Winston, 73–80, 75+1030; Lund v. Woodworth, 75–501, 78+81; Sieber v. G. N. Ry., 76–269, 79+95; Harding v. Ry. Trans. Co., 80–504, 83+395; Gray v. Commutator Co., 85–463, 89+322; Schus v. Powers, 85–447, 89+68; Coonan v. Am. H. F. Co., 86–12, 89+1130; Ziegler v. Gotzian, 86–290, 90+387; Walker v. Grand Forks L. Co., 86–328, 90+573; Kerrigan v. Chi. etc. Ry., 86–407, 90+976; Dieters v. St. Paul G. Co., 86–474, 91+15; Lyons v. Dee, 88–490, 93+899; Ready v. Peavy, 89–154, 94+442; Bender v. G. N. Ry., 89–

CONTRIBUTORY NEGLIGENCE

5999. Degree of care required of servants—Servants are bound to exercise ordinary or reasonable care while at their work. If they act as an ordinarily prudent man would act under the circumstances they cannot be charged with contributory negligence.[73] It is not the absolute duty of the servant, upon entering his work, to ascertain the dangers and risks thereof. The measure of his duty is ordinary or reasonable care.[74]

6000. Effect of statutes—Statutes imposing duties on masters do not abrogate the doctrine of contributory negligence unless they expressly so provide.[75]

6001. Sudden emergency—Distracting circumstances—Cases are cited below involving the effect of a sudden emergency and distracting circumstances upon the question of contributory negligence in this connection.[76] The subject is treated more fully elsewhere.[77]

6002. Wilful or wanton injury—Cases are cited below involving wilful or wanton injury.[78] The subject is more fully treated elsewhere.[79]

6003. Drunkenness—A drunken person receiving injuries by reason of the negligence of another is not, for that reason, as a matter of law, precluded from recovery, but his mental condition, so far as it affects the exercise of care on his part, is a question of fact to be considered by the jury.[80]

6004. Assumption as to conduct of others—It is not negligent for a servant to act, within reasonable limits, on the assumption that others will exercise ordinary care in the performance of their duties.[81] When a yardmaster, in the discharge of his duties, is required to occupy places of danger, he may, in

163, 94+546; Spoonick v. Backus, 89-354, 94+1079; Vant Hul v. G. N. Ry., 90-329, 96+789; Bredeson v. Smith, 91-317, 97+977; Bernier v. St. Paul G. Co., 92-214, 99+788; Hendricks v. Lesure L. Co., 92-318, 99+1125; Ellington v. G. N. Ry., 92-470, 100+218; Jensen v. Commodore M. Co., 94-53, 101+944; Merrill v. Pike, 94-186, 102+393; Fry v. G. N. Ry., 95-87, 103+733; Anderson v. G. N. Ry., 95-212, 103+1021; Barrett v. Reardon, 95-425, 104+309; Carlin v. Kennedy, 97-141, 106+340; Antletz v. Smith, 97-217, 106+517; Pinney v. King, 98-160, 107+1127; Frazier v. Lloyd, 98-484, 108+819; Johnson v. St. Paul G. Co., 98-512, 108+816; Hendrickson v. Ash, 99-417, 109+830; Atlas v. Nat. B. Co., 100-30, 110+250; Caron v. Powers, 100-341, 111+152; Johnson v. Atwood, 101-325, 112+262; Lee v. Wild Rice L. Co., 102-74, 112+887; Rudquist v. Empire L. Co., 104-505, 116+1019; Sundvall v. Interstate I. Co., 104-499, 116+1118; Nustrom v. Shenango F. Co., 105-140, 117+480; Choctaw etc. Ry. v. McDade, 191 U. S. 64.

[71] O'Neil v. G. N. Ry., 101-467, 112+625; Mattson v. Chi. etc. Ry., 103-239, 114+759; Manore v. Kilgore, 107-347, 120+340; Spencer v. Albert Lea B. & T. Co., 107-403, 120+370; Englund v. Mpls. etc. Ry., 108-380, 122+454; Butler v. Frazee, 211 U. S. 459.

[72] Morse v. Mpls. etc. Ry., 30-465, 16+358.

[73] Hefferen v. N. P. Ry., 45-471, 474, 48+1; Hall v. Chi. etc. Ry., 46-439, 49+239; Britton v. N. P. Ry., 47-340, 50+231; Wulff v. Wood, 67-423, 245, 70+156; Sours v. G. N. Ry., 84-230, 87+766.

[74] Holman v. Kempe, 70-422, 73+186.

[75] Akers v. Chi. etc. Ry., 58-540, 60+669; Anderson v. Nelson, 67-79, 69+630; Soutar v. Mpls. etc. Co., 68-18, 70+796; Turrittin v. Chi. etc. Ry., 95-408, 104+225; Seely v. Tennant, 104-354, 116+648; Schlemmer v. Buffalo etc. Ry., 205 U. S. 1, 15.

[76] Delude v. St. P. C. Ry., 55-63, 56+461; Corbin v. Winona etc. Ry., 64-185, 66+271; Munch v. G. N. Ry., 75-61, 77+541; Winczewski v. Winona & W. Ry., 80-245, 83+159; Dolson v. Dunham, 96-227, 104+964; Raasch v. Elite L. Co., 98-357, 365, 108+477; Arko v. Shenango F. Co., 107-220, 119+789; Spencer v. Albert Lea B. & T. Co., 107-403, 120+370.

[77] See § 7020.

[78] Evarts v. St. P. etc. Ry., 56-141, 57+459; Schulz v. Chi. etc. Ry., 57-271, 59+192; Guthrie v. G. N. Ry., 76-277, 79+107; McGillis v. Duluth etc. Ry., 95-363, 104+231; Hjelm v. Western G. C. Co., 98-222, 108+803.

[79] See § 7036.

[80] Lyons v. Dee, 88-490, 93+899. See § 7028.

[81] Setterstrom v. Brainerd etc. Ry., 89-262, 268, 94+882.

regulating his conduct, rely upon the custom of the railway company in the movement of its trains and engines.[82] It is not negligent for a railway servant to rely, within reasonable limits, on warnings and signals, given in accordance with the rules of the company or custom, for the protection of those working upon or about the tracks.[83] In the operation of railway trains, where the company's rules charge both the conductor and engineer with the control and management of their trains, if one assumes to attend to an act within their common line of duties, which act may be performed by one, the other may rely upon the presumption that such act was properly performed.[84]

6005. Assumption of compliance with rules—It is not negligent for a servant to act, within reasonable limits, on the assumption that fellow servants have complied with the rules of the master, at least where a disregard of the rules is not habitual.[85]

6006. Express promise to warn—A servant may act, within reasonable limits, on an express promise of his superior to give him warning of a danger, without being chargeable with contributory negligence.[86]

6007. Obeying orders of superior—A servant is not excused from exercising ordinary or reasonable care by simply obeying the orders of his superior,[87] but in determining whether a servant has been guilty of contributory negligence it is permissible to take into consideration the orders and directions of those in authority over him.[88]

6008. Taking position of danger unnecessarily—A servant who voluntarily takes a position of danger in his work, when a position of safety is reasonably available, is generally chargeable with negligence.[89]

6009. Failure to give notice of dangerous position—If a servant places himself in a dangerous position and fails to notify fellow servants who are likely to injure him, if ignorant of his position, he is negligent.[90]

6010. Failure to make repairs—Where by a rule of the master servants were required either to report or repair defects and a servant had reported a defect and been assured that it would be repaired, it was held that he was not negligent in continuing to use the instrumentality though he might have repaired it himself.[91]

6011. Disregarding warnings—If a servant disregards warnings and unnecessarily remains in or assumes a position of danger he is negligent.[92]

6012. Disregarding instructions as to appliances—Where a master, furnishes his servant appliances to do the work in hand, and directs him how to use them, and warns him of the danger of using them in a different manner, and the servant, in disregard of such directions and warnings, and without any

[82] Graham v. Mpls. etc. Ry., 95-49, 103+714.

[83] Glines v. Oliver, 108-278, 122+161.

[84] Merritt v. G. N. Ry., 81-496, 84+321.

[85] Merritt v. G. N. Ry., 81-496, 84+321; Glines v. Oliver, 108-278, 122+161.

[86] Larson v. Haglin, 103-257, 114+958.

[87] Smith v. St. P. & D. Ry., 51-86, 52+1068; Kundar v. Shenango F. Co., 102-162, 112+1012; Haidukovich v. Shenango F. Co., 106-230, 118+1017. See Slette v. G. N. Ry., 53-341, 55+137.

[88] Haidukovich v. Shenango F. Co., 106-230, 118+1017.

[89] Rutherford v. Chi. etc. Ry., 57-237, 59+302; Roskoyek v. St. P. & D. Ry., 76-28, 78+872; Guthrie v. G. N. Ry., 76-277, 79+107; Sours v. G. N. Ry., 84-230, 87+766; Id., 88-504, 93+517; Wilkinson v. Mpls. etc. Ry., 105-300, 117+611; Bean v. Keller, 107-162, 119+801; Spencer v. Albert Lea B. & T. Co., 107-403, 120+370. See McCarthy v. Lehigh Valley T. Co., 48-533, 51+480; Sundvall v. Interstate I. Co., 104-499, 116+1118; Engler v. La Crosse D. Co., 105-74, 117+242; Hawkins v. G. N. Ry., 107-245, 119+1070.

[90] Cleary v. Dakota P. Co., 71-150, 73+717; Id., 76-495, 79+531; Wilkinson v. Mpls. etc. Ry., 105-300, 117+611.

[91] Gibson v. Mpls. etc. Ry., 55-177, 56+686.

[92] Freeberg v. St. Paul P. Works, 48-99, 109, 50+1026; McCarthy v. Lehigh Valley T. Co., 48-533, 51+480.

necessity for so doing, uses the appliances in the manner in which he was told not to use them, and he is thereby injured, he cannot recover.[93] If a servant is informed of a particular danger and of the proper precautions to avoid it, it is no justification or excuse for a negligent exposure of himself to that danger, or for a negligent omission of such proper precautions, that he may not have realized the full magnitude of the injury to himself which was liable to result from such negligence.[94]

6013. Failure to use safety appliances—A servant who fails to use proper appliances furnished by the master for his protection and who is injured in consequence is guilty of contributory negligence.[95]

6014. Failure to observe rules or orders of master—A servant is generally bound to obey implicitly all reasonable rules or orders of his master of which he has notice. If he is injured while acting in violation of such a rule or order, and his disobedience is the proximate cause of his injury, he cannot, as a general rule, recover from the master. His disobedience is held to constitute contributory negligence as a matter of law.[96] If obedience to a general rule or order is rendered impossible by other and inconsistent orders and duties imposed by the master, the servant is not guilty of contributory negligence in disobeying the general rule.[97] A servant is not bound to obey a rule which has never been properly published or brought to his attention or which the master has habitually neglected to enforce.[98] No rule will justify an engineer in rushing into imminent danger.[99] It is not negligent to disobey a rule which is impracticable under the circumstances.[1] A rule of a railway company to the effect that all trains must approach terminals, the ends of double tracks, junctions, railway crossings at grade, and drawbridges prepared to stop, and must not proceed until switches or signals are seen to be right or the tracks seen to be clear, has been held not by its terms to require an engineer, in charge of a switch engine upon a cross-over track, to stop his engine in the clear of a main track until the switch light has been turned.[2]

6015. Coupling cars—It is not negligent as a matter of law, under all circumstances, for a brakeman to go between moving cars to uncouple them;[3] or to walk on the track in front of a moving car to couple it to a stationary

[93] Carlson v. Marston, 68–400, 71+398; Wulff v. Wood, 67–423, 70+156.

[94] Truntle v. North Star etc. Co., 57–52, 58+832.

[95] McGinty v. Waterman, 93–242, 101+300; Wulff v. Wood, 67–423, 70+156. See Johnson v. St. Paul G. Co., 98–512, 108+816; Chittick v. Mpls. etc. Ry., 88–11, 92+462.

[96] McCarthy v. Lehigh Valley T. Co., 48–533, 51+480; Merritt v. G. N. Ry., 81–496, 84+321; Green v. Brainerd etc. Ry., 85–318, 88+974; Kerrigan v. Chi. etc. Ry., 86–407, 90+976 (disobedience held not proximate cause of injury); Nordquist v. G. N. Ry., 89–485, 95+322; Scott v. Eastern Ry., 90–135, 95+892; Le Duc v. N. P. Ry., 92–287, 100+108; Ellington v. G. N. Ry., 92–470, 100+218; Burris v. Mpls. etc. Ry., 95–30, 103+717; Turrittin v. Chi. etc. Ry., 95–408, 104+225; Elmgren v. Chi. etc. Ry., 102–41, 112+1067. See Christianson v. Chi. etc. Ry., 67–94, 96, 69+640; Willard v. Iowa C. Ry., 108–304, 122+169 (evidence held to sustain finding that engineer was not negligent in construing certain orders as giving him the right of way); Dwyer v. N. P. Ry., 106–281, 118+1020; Steele v. G. N. Ry., 124+978 (conductor negligent in failing to place trainmen on leading car of train being pushed by engine).

[97] Hall v. Chi. etc. Ry., 46–439, 49+239; Maehren v. G. N. Ry., 98–375, 107+951; Scarfoss v. Chi. etc. Ry., 106–490, 119+66. See Rudquist v. Empire L. Co., 104–505, 116+1019.

[98] Fay v. Mpls. etc. Ry., 30–231, 15+241; Anderson v. G. N. Ry., 102–355, 113+913; Sprague v. Wis. C. Ry., 104–58, 116+104; Fitzgerald v. International F. T. Co., 104–138, 116+475; Berglund v. Illinois C. Ry., 109–317, 123+928.

[99] Sweeney v. Mpls. etc. Ry., 33–153, 22+289.

[1] Turrittin v. Chi. etc. Ry., 95–408, 104+225.

[2] Dwyer v. N. P. Ry., 106–281, 118+1020.

[3] Turrittin v. Chi. etc. Ry., 95–408, 104+225.

car;[4] or to open a coupler on a moving car instead of on a stationary one;[5] or to stand with his back to an approaching car;[6] or to stand in front of a bumper;[7] or to go between moving cars to ascertain the trouble with a defective coupler.[8] It is negligent for a brakeman to go between cars to uncouple them when a lever in good condition is available.[9] A disregard of a reasonable rule of the company as to coupling charges the servant with contributory negligence unless the rule is customarily disregarded with the knowledge of the master or the circumstances render the rule impracticable.[10]

6016. Miscellaneous cases involving contributory negligence—Cases are cited below involving questions of contributory negligence under particular circumstances.[11]

[4] Rifley v. Mpls. etc. Ry., 72-469, 75+704; Munch v. G. N. Ry., 75-61, 77+541. See Pope v. G. N. Ry., 94-429, 103+331.

[5] Chittick v. Mpls. etc. Ry., 88-11, 92+462.

[6] Rahman v. Minn. etc. Ry., 43-42, 44+522.

[7] Hooper v. G. N. Ry., 80-400, 83+440.

[8] Sprague v. Wis. C. Ry., 104-58, 116+104.

[9] Chittick v. Mpls. etc. Ry., 88-11, 92+462.

[10] Turrittin v. Chi. etc. Ry., 95-408, 104+225; Sprague v. Wis. C. Ry., 104-58, 116+104.

[11] Sweeney v. Mpls. etc. Ry., 33-153, 22+289 (engineer running at unsafe speed with knowledge of washouts); Craver v. Christian, 34-397, 26+8; Id., 36-413, 31+457 (working about unguarded machinery); Robel v. Chi. etc. Ry., 35-84, 27+305 (brakeman descending from car hit by object near track); Ludwig v. Pillsbury, 35-256, 28+505 (boy thirteen years old extending head outside of elevator); Barbo v. Bassett, 35-485, 29+198 (assistant to edger in sawmill—hand caught in uncovered cogs of roller); Kelley v. Chi. etc. Ry., 35-490, 25+173 (standing on a railway track and mounting an approaching car by stepping on the brakebeam and seizing the brake-staff); Wuotilla v. Duluth L. Co., 37-153, 33+551 (off-bearer in sawmill—clothes caught in gearing of rollers—working about uncovered machinery); Oleson v. Chi. etc. Ry., 38-412, 38+353 (two workmen going under car when one ought to have stood on guard); Eicheler v. Hanggi, 40-263, 41+975 (skilled mechanic failing to observe condition of table connected with circular saw); Sobieski v. St. P. & D. Ry., 41-169, 42+863 (switchman running upon track within station grounds); McDonald v. Chi. etc. Ry., 41-439, 43+380 (servant operating railway turntable); Rahman v. Minn. etc. Ry., 43-42, 44+522 (wiper in roundhouse coupling cars); James v. N. P. Ry., 46-168, 48+783 (switchman riding on front foot board of engine); Britton v. N. P. Ry., 47-340, 50+231 (sectionman removing handcar from track to avoid approaching train); Jennings v. Iron Bay Co., 47-111, 49+685 (carpenter failing to observe projecting plank on scaffold); McCarthy v. Lehigh Valley T. Co., 48-533, 51+480 (laborer standing under open hatchway of vessel through which freight was being lowered); Freeberg v. St. Paul P. Works, 48-99, 50+1026 (attempting to adjust belt to pulley with a stick); Smith v. St. P. & D. Ry., 51-86, 52+1068 (sectionman removing handcar from track to avoid approaching train); Flanders v. Chi. etc. Ry., 51-193, 53+544 (brakeman while descending from car struck by building near track); Mullin v. Northern M. Co., 53-29, 55+1115 (repairer in sawmill working near unguarded machinery—adjusting chain while machinery in motion); Slette v. G. N. Ry., 53-341, 55+137 (sectionman obeying orders of boss—failure to take handcar from track to avoid approaching train); Truntle v. North Star etc. Co., 57-52, 58+832 (boy fifteen years old—arm caught in rollers of carding machine); Rutherford v. Chi. etc. Ry., 57-237, 59+302 (sectionman unnecessarily on track run over by train); Groff v. Duluth etc. Co., 58-333, 59+1049 (oiler of machinery using ladder placed by him in an unsafe place); Lawson v. Truesdale, 60-410, 62+546 (switchman boarding moving cars); Moody v. Smith, 64-524, 67+633 (jointer in sash factory); Barg v. Bousfield, 65-355, 68+45 (boy taking refuse from near saw in factory); Sneda v. Libera, 65-337, 68+36 (removal of braces in excavation for cistern); Olmscheid v. Nelson, 66-61, 68+605 (boy seventeen years old operating bolting or cut-off saw); Wulff v. Wood, 67-423, 70+156 (operator of circular saw); Christianson v. Chi. etc. Ry., 67-94, 69+640 (sectionman falling from handcar); Anderson v. Nelson, 67-79, 69+630 (knot sawyer or shingle grader in sawmill injured while removing refuse from elevator box); Carlson v. Marston, 68-400, 71+398 (loading logs from skidways upon sleds—grab hook improperly fastened into swamp chain); Pruke v. South Park etc. Co., 68-305, 71+276 (putting belt on overhead pulley—sleeve caught in belt); Closson v. Oakes, 69-67, 71+915 (opening freight car

door—falling from car); Holtz v. G. N. Ry., 69-524, 72+805 (working under car through the floor of which bolts were being driven—head struck by bolt); Cleary v. Dakota P. Co., 71-150, 73+717 (entering hog-scraping machine to dislodge hog without notifying operators of machine—ignorance of change of signals); Roskoyek v. St. P. & D. Ry., 76-28, 78+872 (sectionman run over by passing train while he was unnecessarily in place of danger with knowledge of frequently passing trains); Guthrie v. G. N. Ry., 76-277, 79+107 (brakeman after giving engineer signal to back ran near track); Winczewski v. Winona & W. Ry., 80-245, 83+159 (collision between train and handcar—train ahead of time—sectionman working handcar with back to approaching train—attempt to get handcar off of track); Jaroszeski v. Osgood, 80-393, 83+389 (operator of unguarded revolving cylinder with knives); Hitchcock v. Ry. Trans. Co., 81-352, 84+42 (switchman mounting ladder on freight car struck by object near track); Merritt v. G. N. Ry., 81-496, 84+321 (engineer of extra train running into station without having train under control—collision with train standing at station—violation of rules); Bischoff v. St. Paul B. Assn., 82-105, 84+731 (engineer of stationary engine taking off a pipe and allowing steam to escape by which he was burned); Perras v. Booth, 82-191, 84+739 (removing goods from car to freight elevator—elevator shifted without notice to workman); Sours v. G. N. Ry., 84-230, 87+766; Id., 88-504, 93+517 (yardman in railway gravity yard standing near track hit by passing train—duty to look); Parker v. Pine Tree L. Co., 85-13, 88+261; Id., 89-500, 95+323 (working on trimmer in sawmill); Attix v. Minn. S. Co., 85-142, 88+436 (raising stone by derrick in quarry); Torske v. Com. L. Co., 86-276, 90+532 (boy fifteen years old working about a molder); Kerrigan v. Chi. etc. Ry., 86-407, 90+976 (fireman using step on locomotive); Roe v. Winston, 86-77, 90+122 (brakeman going between moving train and stationary cars to climb upon his train); Walker v. Grand Forks L. Co., 86-328, 90+573 (oiler in sawmill—leg caught in wheel in logchain gearing); Murran v. Chi. etc. Ry., 86-470, 90+1056 (sectionman clearing tracks in switching yards of snow while switching was going on—failure to keep watch—stooping with back to approaching car); Klages v. Gillette, 86-458, 90+1116 (pushing loose part of a derrick cable, charged with electricity, from the open street into the gutter); Dieters v. St. Paul G. Co., 86-474, 91+15 (opening trap doors in sidewalk); Lyons v. Dee, 88-490, 93+899 (falling down elevator shaft—elevator shifted without notice to elevator boy); Stauning v. G. N. Ry., 88-480, 93+518 (engine wiper removing cinders from engine); Ready v. Peavy El. Co., 89-154, 94+442 (carpenter working in grain elevator caught in revolving line shaft); Setterstrom v. Brainerd etc. Ry., 89-262, 94+882 (car scrubber scrubbing during switching operations); Krumdick v. Chi. etc. Ry., 90-260, 95+1122 (brakeman thrown from freight car by violent collision between two parts of train); Braaflat v. Mpls. etc. Co., 90-367, 96+920 (going into grain elevator pit to clear clogging—clothes caught in revolving shaft); Bredeson v. Smith, 91-317, 97+977 (boy eighteen years old working about saw in sawmill); Swenson v. Osgood, 91-509, 98+645 (operator of planer and matcher stooping over machine to adjust it without stopping it); Bernier v. St. Paul G. Co., 92-214, 99+788 (painter of electric light poles receiving shock from wires); Le Duc v. N. P. Ry., 92-287, 100+108 (switchman falling from engine because of defective footboard); Hendricks v. Lesure L. Co., 92-318, 99+1125 (tail sawyer in sawmill); Jensen v. Regan, 92-323, 99+1126 (removing tablecloth from rolls of laundry mangle); Ellington v. G. N. Ry., 92-470, 100+218 (fireman falling from engine because of defective running board); Swartz v. G. N. Ry., 93-339, 101+504 (sectionman hit by stone thrown by fireman from moving engine); Haidt v. Swift, 94-146, 102+388 (standing on ladder while cleaning vat); Merrill v. Pike, 94-186, 102+393 (handling joist); Hebert v. Interstate Iron Co., 94-257, 102+451 (falling into ditch); Pope v. G. N. Ry., 94-429, 103+331 (switchman crossing track in front of moving cars to adjust switch beyond); Graham v. Mpls. etc. Ry., 95-49, 103+714 (yardmaster struck by passing engine while walking on platform to switch shanty near track); Campbell v. Ry. Trans. Co., 95-375, 104+547 (brakeman descending from freight car hit by board projecting from top of car on parallel track); Barrett v. Reardon, 95-425, 104+309 (tearing down building—throwing boards over side—floor giving way); Hagerty v. St. Paul B. Co., 98-502, 108+278 (boy sixteen years old operating a brick pressing machine); Johnson v. St. Paul G. Co., 98-512, 108+816 (working in trench for gas mains without proper guards about trench); Hendrickson v. Ash, 99-417, 109+830 (working about rollers in sawmill); Caron v. Powers, 100-341, 111+152 (fall of logs from skids); Hahn v. Plymouth E. Co., 101-58, 111+841 (attempting to throw by hand a moving belt); Strand v. G. N. Ry., 101-85, 111+958 (using a defective locomotive); Floan v. Chi. etc. Ry., 101-113, 111+957 (working about railway tracks—failure to look and listen for trains); Dobsloff v. Nichols, 101-267, 112+218 (moving lath stock from a conveyor);

CASES CLASSIFIED

6017. Injuries to railway employees—Injuries received in coupling or uncoupling cars; [12] injuries to sectionmen; [13] brakemen hit by obstacle near track

Johnson v. Atwood, 101-325, 112+262 (operating an edger in a sawmill); Elmgren v. Chi. etc. Ry., 102-41, 112+1067 (fireman disregarding signals and not informing engineer); Lee v. Wild Rice L. Co., 102-74, 112+887 (stepping on brace over machinery); Kundar v. Shenango F. Co., 102-162, 112+1012 (descending mine in a bucket); Goss v. Goss, 102-346, 113+690 (foot caught in corduroy road); Anderson v. G. N. Ry., 102-355, 113+913 (repairing car on "rip" track—failure to post signal flag); Kjosnes v. Gray, 102-410, 113+1009 (using defective dump car in stone quarry); Balder v. Zenith F. Co., 103-345, 114+948 (breaking crust of coal in a bin); Larson v. Haglin, 103-257, 114+958 (plastering in elevator shaft); Mastey v. Villaume, 104-186, 116+207 (cleaning out sawdust basin under ripsaw); Fitzgerald v. International F. T. Co., 104-138, 116+475 (operating flax machine); Jelinek v. St. Paul C. Ry., 104-249, 116+480 (greasing a street car from a pit underneath it); Seely v. Tennant, 104-354, 116+648 (throwing belt over pulley); Clay v. Chi. etc. Ry., 104-1, 115+949 (brakeman riding on side of freight car past station platform); Rudquist v. Empire L. Co., 104-505, 116+1019 (going between a car loaded with logs and holding a pole against the end of a log so that it might be pushed into place by backing an engine against the pole); Sundvall v. Interstate T. Co., 104-499, 116+1118 (standing on track of tram railway in mine for the purpose of mounting an approaching car by stepping on its running board); Engler v. La Crosse D. Co., 105-74, 117+242 (taking unnecessary position of danger under buckets in repairing a ditching machine); Nustrom v. Shenango F. Co., 105-140, 117+480 (blasting—going back to place of blasting too soon after explosion); Wilkinson v. Mpls. etc. Ry., 105-300, 117+611 (cleaning out ash pan under locomotive); Borchardt v. People's Ice Co., 106-134, 118+359 (taking ice from car with knowledge of a hole in the floor of the car); Haidukovich v. Shenango F. Co., 106-230, 118+1017 (picking at wall of drift in iron mine); Dwyer v. N. P. Ry., 106-281, 118+1020 (engineer obeying lantern signal of head switchman to advance toward a switch on a main outgoing track without waiting for the switch light to be turned); Patterson v. Melchior, 106-437, 119+402 (pulling sideways with team on a ditching cable); Miller v. Mpls. etc. Ry., 106-499, 119+218 (running a velocipede on railway tracks); Waligora v. St. Paul F. Co., 107-554, 119+395 (operating air hoist); Jacobson v. Merrill, 107-74, 119+510 (operating lath machine—sitting on cradle attachment); Bailey v. Grand Forks L. Co., 107-192, 119+786 (operator of jump saw in sawmill going on platform); Arko v. Shenango F. Co., 107-220, 119+789 (attempting to stop loaded ore car in iron mine with a pinch bar); Bean v. Keller, 107-162, 119+801 (attempting to oil machine from wrong position); Hawkins v. G. N. Ry., 107-245, 119+1070 (car repairer passing between cars on repair tracks); Spencer v. Albert Lea B. & T. Co., 107-403, 120+370 (taking unsafe place to grease a revolving belt); McDonald v. Mpls. etc. Ry., 108-4, 120+1023 (engineer failing to take his train off the main track at a station in time for passing train); Martinson v. N. P. Ry., 107-495, 120+1086 (laborer riding on pilot of engine—jumping off and upon a parallel track); Magliani v. Minn. T. Ry., 108-148, 121+635 (sectionman off duty walking through switching yards without watching for moving cars); Glines v. Oliver I. M. Co., 108-278, 122+161 (conductor stepping on adjoining track to see whether there were lights on his train).

[12] Le Clair v. First Div. etc. Ry., 20-9 (1) (coupling engine and car—car too low to make adjustment); Hughes v. Winona etc. Ry., 27-137, 6+553 (slipping on wet ashes from fire box of locomotive); Fay v. Mpls. etc. Ry., 30-231, 15+241 (defective car from another road); Fraker v. St. Paul etc. Ry., 32-54, 19+349 (unsafe couplers); Russell v. Mpls. etc. Ry., 32-230, 20+147 (id.); Tierney v. Mpls. etc. Ry., 33-311, 23+229 (couplers of different heights and patterns—assumption of risk—drawbar of box car in defective condition—drawbar of flat car overriding drawbar of box car); Sherman v. Chi. etc. Ry., 34-259, 25+593 (foot caught in frog); Wilson v. Winona etc. Ry., 37-326, 33+908 (foot caught in or under frog—attempting to uncouple cars in motion); Franklin v. Winona etc. Ry., 37-409, 34+898 (stepping into uncovered culvert); Anderson v. Sowle, 37-539, 35+382 (servant of elevator company—instructed to couple with stick—hand caught between bumpers); Woods v. St. P. & D. Ry., 39-435, 40+510 (coupling cars on a trestle—cars kicked down an incline and weighed while in motion); Hungerford v. Chi. etc. Ry., 41-444, 43+324 (tender with goose-neck draft iron); Doyle v. St. P. etc. Ry., 42-79, 43+787 (foot caught under rail—claim that rail was worn out and splintered); Rahman v.

Minn. etc. Ry., 43–42, 44+522 (wiper without experience or instructions—standing with back to approaching locomotive—engineer backing without signal); Stewart v. St. P. etc. Ry., 43–268, 45+431 (engineer acting without signal); McKnight v. Chi. etc. Ry., 44–141, 46+294 (defect in draught-iron or draw-head—driving engine against car with sudden impulse); McLaren v. Williston, 48–299, 51+373 (cars of unequal height making adjustment of couplers difficult—assumption of risk); Ellison v. Truesdale, 49–240, 51+918 (uncoupling moving cars in nighttime—theory that accident was caused by stepping into a shallow hole held mere conjecture); Bohan v. St. P. & D. Ry., 49–488, 52+133 (foot caught in frog); Delude v. St. P. C. Ry., 55–63, 56+461 (coupling street cars—couplers defective—lateral springs holding drawbar in place missing or broken); Leonard v. Mpls. etc. Ry., 63–489, 65+1084 (pilot coupling—engine not properly handled—signals—grade); Corbin v. Winona etc. Ry., 64–185, 66+271 (flat car loaded with rails projecting beyond end of car—contributory negligence); Puffer v. Chi. etc. Ry., 65–350, 68+39 (brakeman standing on footboard of engine—hand caught between bumper of Janney coupler and nigger head of engine—sudden jerking movement of engine threw brakeman forward on coupler); Wood v. Chi. etc. Ry., 66–49, 68+462 (attempting to uncouple engine and car while train in motion—pin sticking—collision between two parts of broken train—negligence of swingman in not watching for signals from rear of train); Fay v. Chi. etc. Ry., 72–192, 75+15 (cutting off car from moving train—slipping on snow and ice); Rifley v. Mpls. etc. Ry., 72–469, 75+704 (walking ahead of moving car to couple it to stationary car—slipping on ice and snow); Munch v. G. N. Ry., 75–61, 77+541 (standard coupler—going between moving cars—defective coupler); Barrett v. G. N. Ry., 75–113, 77+540 (side track—trousers caught on splintered rail); Guthrie v. G. N. Ry., 76–277, 79+107 (brakeman signalling engineer to back and then running beside track—suddenly stopped too near track and was run over); Hooper v. G. N. Ry., 80–400, 83+440 (standing in front of bumper—failure of engineer to give signal); Crandall v. G. N. Ry., 83–190, 86+10 (train broken in two—collision between two cars while brakeman was uncoupling engine and first car); Dadore v. G. N. Ry., 84–115, 86+888 (foot caught in frog—block in frog defective); Schus v. Powers, 85–447, 89+68 (cars loaded with logs projecting beyond end of cars—failure of engineer to observe custom of stopping train at the time of coupling—contributory negligence); Chittick v. Mpls. etc. Ry., 88–11, 92+462 (adjusting Washburn and Trogan couplers—adjusting coupler on moving car instead of stationary car—failure to use lever); Manwaring v. Drake, 93–497, 101+1134 (uncoupling two engines—engineer starting without signals); Griffin v. Minn. Trans. Ry., 94–191, 102+391 (brakeman riding on gondola car—making double cut—practice of opening knuckles of automatic coupler with stick); Turrittin v. Chi. etc. Ry., 95–408, 104+225 (attempting to uncouple moving cars—lever out of order—going between cars—defective split switch—foot caught between rails); Rogers v. Mpls. etc. Ry., 99–34, 108+868 (uncoupling mail car and engine—engine started and then improperly backed); Hartman v. Mpls. etc. Ry., 100–43, 110+102 (between cars coupling air hose—failure of head brakeman to give signals); Ross v. G. N. Ry., 101–122, 111+951 (foot caught in culvert); Sprague v. Wis. C. Ry., 104–58, 116+104 (defective coupler—impossible to work lever—stepping between cars to discover trouble with coupler—slipping and falling over track); McManus v. Nichols, 105–144, 117+223 (logging cars—hand and arm caught between coupling bar and the coupler and framework of car); Dolge v. N. P. Ry., 107–242, 119+1066 (foot caught in split switch).

[13] Foster v. Minn. C. Ry., 14–360(277) (hit by wood thrown from tender); Brown v. Winona etc. Ry., 27–162, 6+484 (raising wrecked cars—negligence of boss); Collins v. St. P. etc. Ry., 30–31, 14+60 (collision between train and handcar—headlight of engine not lighted); Olson v. St. P. etc. Ry., 38–117, 35+866 (collision between engine with snow plow and handcar during snow storm—running special trains without notice); Connelly v. Mpls. E. Ry., 38–80, 35+582 (working on track in switching yards—stooping with back to cars standing on track—other cars switched into standing cars—no warning); Anderson v. Minn. etc. Ry., 39–523, 41+104 (defective handle of handcar); Larson v. St. P. etc. Ry., 43–423, 45+722 (collision between engine with snow plow and handcar during snow storm—running special trains without notice); Smith v. St. P. & D. Ry., 44–17, 46+149; Id., 51–86, 52+1068 (removing handcar from track—collision with train); Steffenson v. Chi. etc. Ry., 45–355, 47+1068; Id., 48–285, 51+610; Id., 51–531, 53+800 (pushed from handcar); Sliney v. Duluth etc. Ry., 46–384, 49+187 (collision at night between handcar and cars standing on track at station—returning from neighboring town on pleasure trip); Bengtson v. Chi. etc. Ry., 47–486, 50+531 (working on track in station yards—stumbled and fell over logs near track while attempting to get out of way of engine and tender—evidence as to ringing of bell—excessive speed of engine); Britton

while descending or mounting car;[14] laborer on wood train—derailment—rail taken from track and not replaced—no danger signals out;[15] laborer in freight house—handling heavy stone—insufficient help;[16] brakeman struck by awning on roof projecting over cars;[17] derailment—washout—piles loaded on flat cars

v. N. P. Ry., 47–340, 50+231 (removing handcar from track—struck by passing locomotive—measure of care required of engineers and sectionmen—failure of engineer to signal approach); Njus v. Chi. etc. Ry., 47–92, 49+527 (unloading iron bars from flat car—bar negligently dropped); Pearson v. Chi. etc. Ry., 47–9, 49+302 (loading rails upon flat car—rail negligently dropped); Slette v. G. N. Ry., 53–341, 55+137 (collision between handcar and freight train—excessive speed of train—obeying negligent boss); Rutherford v. Chi. etc. Ry., 57–237, 59+302 (clearing out trench near track—unnecessarily stepping on track—run over by passing train); Schulz v. Chi. etc. Ry., 57–271, 59+192 (cleaning weeds from track—back to approaching train—train passing on parallel track—absence of signals); Blomquist v. G. N. Ry., 65–69, 67+804 (repairing track by putting in new rails—work done hastily to avoid trains—rail negligently dropped); Christianson v. Chi. etc. Ry., 67–94, 69+640 (falling from handcar and run over by following handcar—cars run at excessive speed—men on rear car drunk and forcing forward car to run at dangerous speed); Anderson v. G. N. Ry., 74–432, 77+240 (repairing track after washout—track jack released without warning—foot caught between tie and timber used to support track); Benson v. Chi. etc. Ry., 75–163, 77+798 (collision between two handcars—application of Wisconsin fellow-servant act); Roskoyek v. St. P. & D. Ry., 76–28, 78+872 (run over by cars—taking unnecessary position of danger on track); Benson v. Chi. etc. Ry., 78–303, 80+1050 (collision between two handcars—men going to dinner); Kletschka v. Mpls. etc. Ry., 80–238, 83+133 (repairing track after washout—hit by earth caving in); Winczewski v. Winona etc. Ry., 80–245, 83+159 (collision between train and handcar—attempting to remove handcar from track—hit by flying piece of handcar—knowledge of approaching train—working handcar with back to approaching train—contributory negligence); Wallin v. Eastern Ry., 83–149, 86+76 (collision of handcars—defective handle); Kreuzer v. G. N. Ry., 83–385, 86+413; Id., 87–33, 91+27 (clearing wreck—roof of car falling); Koralewski v. G. N. Ry., 85–140, 88+410 (derailment of handcar due to stick lying on track—duty of boss to keep lookout ahead); Murran v. Chi. etc. Ry., 86–470, 90+1056 (cleaning snow from tracks in station yards during snow storm—run over); Swartz v. G. N. Ry., 93–339, 101+504 (hit by stone thrown by fireman from passing engine); Anderson v. G. N. Ry., 95–212, 103+1021 (thrown from overcrowded handcar); Tay v. Willmar etc. Ry., 100–131, 110+433 (repairing track by putting in new rail—negligence of fellow servant in allowing rail to drop); Joyce v. G. N. Ry., 100–225, 110+975 (repairing track—struck by switch engine—failure to ring bell—running at excessive speed); Masteller v. G. N. Ry., 100–236, 110+869 (head on collision between handcars—negligence of boss); Floan v. Chi. etc. Ry., 101–113, 111+957 (repairing yard tracks—run over by switching engine—failure of engineer to give customary signals); Galland v. G. N. Ry., 101–540, 111+1133 (loading rails on a flat car); Soderlund v. Chi. etc. Ry., 102–240, 113+449 (falling from handcar—car run at excessive speed "just for fun" against protest of plaintiff who was an old man); Dizonno v. G. N. Ry., 103–120, 114+736 (crew removing steel plates from overturned car—plaintiff ordered to work at point requiring him to pass over plates—injured by movement of plate); Hostetter v. Illinois C. Ry., 104–25, 115+748 (crew picking up rails along track—injury from fall of rail); Christiansen v. Chi. etc. Ry., 107–341, 120+300 (thrown on crowbar by having tie on which he was standing kicked from under him); Hanson v. N. P. Ry., 108–94, 121+607 (removing merchandise from wrecked car—struck in leg by roll of carpet); Magliani v. Minn. Tr. Ry., 108–148, 121+635 (struck by engine while passing through switching yards to boarding car—failure to look); Jacobson v. G. N. Ry., 108–517, 120+1089 (unloading rails from flat car—rails rolled down and crushed foot).

[14] Robel v. Chi. etc. Ry., 35–84, 27+305; Smith v. Winona etc. Ry., 42–87, 43+968; Johnson v. St. P. etc. Ry., 43–53, 44+884; Flanders v. Chi. etc. Ry., 51–193, 53+544; Lawson v. Truesdale, 60–410, 62+546; Hitchcock v. Ry. Trans. Co., 81–352, 84+42; Mayberry v. N. P. Ry., 100–79, 110+356; Koepsel v. Mpls. etc. Ry., 100–202, 110+974; Clay v. Chi. etc. Ry., 104–1, 115+949; Baxter v. Mpls. etc. Ry., 104–230, 116+474. See Olson v. Mpls. etc. Ry., 76–149, 78+975; Campbell v. Ry. Trans. Co., 95–375, 104+547.

[15] Drymala v. Thompson, 26–40, 1+255.

[16] Walsh v. St. P. & D. Ry., 27–367, 8+145.

[17] Clark v. St. P. etc. Ry., 28–128, 9+581.

thrown upon fireman; [18] derailment—broken rail and defective switch—engines bucking snow—engineer killed; [19] collision between passenger trains and box cars standing at station—engineer injured; [20] collision—defective chafing irons caused engine to override tender—engineer caught between engine and tender; [21] collision between two parts of broken freight train—conductor in caboose killed—letting off of defective brake; [22] derailment of gravel train connected with repairing of track—brakeman injured; [23] derailment—open switch—baggage-master killed; [24] laborer shoveling ashes on second floor of depot—fall of floor; [25] yard brakeman standing on track in front of approaching car—mounting car by stepping on brake-beam and seizing brake-staff—brake-staff was defective and gave way; [26] helper in roundhouse adjusting spring of locomotive with a spring-puller instead of a jack; [27] derailment—broken rail and defective switch—engineer killed; [28] laborer about pile-driver—hand caught between wire cable and drum—engine started while laborer was adjusting cable; [29] car-repairer working under car—car struck by another car—partner working with him under car instead of being on guard; [30] derailment—employee riding on construction train injured; [31] brakeman injured using defective ladder on freight car; [32] operator of roller in shops—hand caught between rollers; [33] boiler-maker's helper killed by smoke-stack of locomotive, which was being removed, falling upon him; [34] turning engine on turntable with assistance of engine on adjoining track—stick between engines breaking—laborer injured by collision of the two engines; [35] switchman unnecessarily running upon track in station yards overtaken and injured by locomotive moved without customary signal; [36] fireman on gravel train—thrown from engine while sweeping sand from pilot of engine—engine started without warning; [37] workman repairing drawbridge injured by draw being blown shut; [38] laborer on a ditching-machine built on flat car—hand caught in cogs; [39] derailment of switch-engine—broken rail—switchman riding on the front footboard injured; [40] brakeman thrown from car in attempting to set a defective brake; [41] car-repairer sent out to repair wrecked caboose—injury from exposure to weather—proper transportation back not furnished; [42] injury to car-repairer from defective chain to jack-screw; [43] fireman injured by flames and gas coming through furnace door—gas formed by negligent management of engine by engineer; [44] laborer falling

[18] Gates v. Southern Minn. Ry., 28–110, 9+579.

[19] Morse v. Mpls. etc. Ry., 30–465, 16+358.

[20] Brown v. Mpls. etc. Ry., 31–553, 18+834.

[21] Greene v. Mpls. etc. Ry., 31–248, 17+378.

[22] Ransier v. Mpls. etc. Ry., 32–331, 20+332.

[23] Madden v. Mpls. etc. Ry., 32–303, 20+317.

[24] Roberts v. Chi. etc. Ry., 33–218, 22+389.

[25] Cook v. St. P. etc. Ry., 34–45, 24+311.

[26] Kelley v. Chi. etc. Ry., 35–490, 29+173.

[27] Gonsior v. Mpls. etc. Ry., 36–385, 31+515.

[28] Clapp v. Mpls. etc. Ry., 36–6, 29+340.

[29] Steen v. St. P. & D. Ry., 37–310, 34+113.

[30] Oleson v. Chi. etc. Ry., 38–412, 38+353.

[31] Rosenbaum v. St. P. & D. Ry., 38–173, 36+447.

[32] Sawyer v. Mpls. etc. Ry., 38–103, 35+671.

[33] Berger v. St. P. etc. Ry., 39–78, 38+814.

[34] Lavallee v. St. P. etc. Ry., 40–249, 41+974.

[35] McDonald v. Chi. etc. Ry., 41–439, 43+380.

[36] Sobieski v. St. P. etc. Ry., 41–169, 42+863.

[37] Schneider v. Chi. etc. Ry., 42–68, 43+783.

[38] Johnson v. St. P. & D. Ry., 43–222, 45+156.

[39] Larson v. St. P. & D. Ry., 43–488, 45+1096.

[40] James v. N. P. Ry., 46–168, 48+783.

[41] Moon v. N. P. Ry., 46–106, 48+679.

[42] Schumaker v. St. P. & D. Ry., 46–39, 48+559.

[43] Krogstad v. N. P. Ry., 46–18, 48+409.

[44] Orth v. St. P. etc. Ry., 47–384, 50+363.

while attempting to mount gravel train—train started without ringing bell;[45] brakeman thrown from car while attempting to set a defective brake—loose eyebolt to brake;[46] engineer thrown to floor of cab by defective foot-board or platform;[47] laborer repairing bridge—defective jack-screw;[48] switchman struck by engine backing at unusual speed without ringing bell—look and listen rule not applicable to switchman;[49] laborer in crew of stone masons injured by fall of derrick;[50] switchman attempting to mount car in motion—slipping on snow and ice;[51] wiper in roundhouse injured by wire cable used on gravel train—cable attached to engine;[52] laborer icing refrigerator car injured by defective ice tongs;[53] laborer in stock yards—stepping from high platform to top of moving cars—thrown to ground;[54] wiper in roundhouse injured by engine, which he was cooling, being negligently moved;[55] engineer falling from engine—defective railing;[56] switchman in yards run over while unnecessarily on track;[57] laborer in yards injured while pushing a transfer table;[58] laborer at coal sheds injured while coaling an engine at night—freight cars driven against tender;[59] laborer shoveling coal from box car falling from car—defective door;[60] car-repairer working under car hit by bolt driven through floor of car;[61] night-watchman about steam shovel—machinery negligently started;[62] collision of engines—engine stopped without putting out signals—fireman injured;[63] laborer tearing down wall—injured by fall of wall;[64] machinist's helper in repair shops injured by defective scaffold;[65] bridge-builder—caving in of earth;[66] laborer putting hose on tender—fall of coal from tender;[67] switchman falling on icy steps of platform;[68] derailment—double header—failure of one engineer to shut off steam in response to signal from other engineer;[69] baggageman thrown from car—defective handhold;[70] laborer tearing down bridge—caught by bolt in timber;[71] brakeman thrown from top of car—stopping train with jerk;[72] yard-agent in gravity yards run over while taking dangerous position to hand lantern to conductor of a passing train;[73] brakeman on logging train riding on rear footboard of engine—stepping from footboard as train slowed down—killed by fall of binding log;[74] bridge-builder—turning jackscrew with defective crowbar;[75] fireman falling from pilot of engine—defective step on pilot;[76] bridge carpenter unloading logs from flat car;[77] engine-wiper cleaning cinders from engine;[78] laborer about steam

[45] Moran v. Eastern Ry., 48–46, 50+930.
[46] Sheedy v. Chi. etc. Ry., 55–357, 57+60.
[47] Gibson v. Mpls. etc. Ry., 55–177, 56+686.
[48] Kennedy v. Chi. etc. Ry., 57–227, 58+878.
[49] Jordan v. Chi. etc. Ry., 58–8, 59+633.
[50] Blomquist v. Chi. etc. Ry., 60–426, 62+818.
[51] Lawson v. Truesdale, 60–410, 62+546.
[52] Nichols v. Chi. etc. Ry., 60–319, 62+386.
[53] Neubauer v. N. P. Ry., 60–130, 61+912.
[54] Leier v. Minn. etc. Co., 63–203, 65+269.
[55] Mikkelson v. Truesdale, 63–137, 65+260.
[56] Rogers v. Chi. etc. Ry., 65–308, 67+1003.
[57] Moore v. G. N. Ry., 67–394, 69+1103.
[58] Murphy v. G. N. Ry., 68–526, 71+662.
[59] Olson v. G. N. Ry., 68–155, 71+5.
[60] Closson v. Oakes, 69–67, 71+915.
[61] Holtz v. G. N. Ry., 69–524, 72+805.
[62] Birmingham v. Duluth etc. Ry., 70–474, 73+409.
[63] Smithson v. Chi. etc. Ry., 71–216, 73+853.
[64] Wolf v. G. N. Ry., 72–435, 75+702.
[65] Oelschlegel v. Chi. etc. Ry., 73–327, 76+56.
[66] Nicholas v. Burlington etc. Ry., 78–43, 80+776.
[67] Weisel v. Eastern Ry., 79–245, 82+576.
[68] Harding v. Ry. Trans. Co., 80–504, 83+395.
[69] McGrath v. G. N. Ry., 80–450, 83+413.
[70] Wagen v. Mpls. etc. Ry., 80–92, 82+1107.
[71] O'Niel v. G. N. Ry., 80–27, 82+1086.
[72] Crane v. Chi. etc. Ry., 83–278, 86+328.
[73] Sours v. G. N. Ry., 81–337, 84+114; Id., 84–230, 87+766; Id., 88–504, 93+517.
[74] Green v. Brainerd etc. Ry., 85–318, 88+974.
[75] Miller v. G. N. Ry., 85–272, 88+758.
[76] Kerrigan v. Chi. etc. Ry., 86–407, 90+976.
[77] Boyer v. Eastern Ry., 87–367, 92+326.

shovel—sudden fall of dipper;[79] derailment—air brakes failing to work—train running down mountain side at high speed—engineer injured;[80] car-cleaner cleaning car during switching operations—collision;[81] collision between two sections of broken train—brakeman thrown from top of car, run over, and killed;[82] conductor boarding car in motion thrown under wheels—defective step;[83] fireman falling from engine—defective running-board;[84] switchman falling from engine—defective footboard and tool box on tender;[85] brakeman thrown from top of car—violent jerk of train;[86] brakeman hit by board on car of train on parallel track;[87] switchman boarding moving engine thrown by sudden lurch or jerk forward by engine;[88] collision—freight train stalled—failure to send back flagman—engineer killed;[89] pitman of steam-shovel crew—negligent swinging of bucket into pit;[90] rear end collision between two freights following each other—first train stopped by hot box—failure to send back flagman or give signals—foggy weather—engineer jumped from train and was injured;[91] collision of cars in switching yards—gravity track—leaving cars without setting brakes or blocking—car upset and switchman killed;[92] brakeman riding on step of engine knocked off by truck on station platform;[93] switchman falling from engine—defective toe-guard to footboard;[94] engineer killed by bursting of engine cylinders—defective piston rod;[95] fireman injured by explosion of engine boiler;[96] laborer in gravel pit—caving in of gravel;[97] boy seventeen years old injured by defective flogging-hammer used in connection with a side-set in repair shops;[98] bridge-builder hit by ax let fall by workman above;[99] boiler-maker's helper in repair shops injured in raising flue sheets to engine;[1] bridge-builder knocked from bridge by planks swinging from pulley;[2] yardmaster injured by defective car;[3] collision of passenger train and freight cars operated by switching crew contrary to rules—injury to engineer;[4] lineman following blasting crew to repair telegraph line when injured by blasting—hit by stone negligently rolled down embankment;[5] freight conductor mounting car on side ladder—round of ladder giving way;[6] brakeman riding in engine—eye struck by stone thrown by engine—track springy and gravelly;[7] brakeman knocked from car by car on another track—run over by cars negligenty backed upon him—failure of engineer to obey signal to go ahead;[8] brakeman thrown down —breaking of stick in side of flat car

[78] Stauning v. G. N. Ry., 88-480, 93+518.
[79] Bender v. G. N. Ry., 89-163, 94+546.
[80] Nordquist v. G. N. Ry., 89-485, 95+322.
[81] Setterstrom v. Brainerd etc. Ry., 89-262, 94+882.
[82] Krumdick v. Chi. etc. Ry., 90-260, 95+1122.
[83] Scott v. Eastern Ry., 90-135, 95+892.
[84] Ellington v. G. N. Ry., 92-470, 100+218.
[85] Le Duc v. N. P. Ry., 92-287, 100+108.
[86] Phillips v. G. N. Ry., 94-110, 102+378.
[87] Campbell v. Ry. Trans. Co., 95-375, 104+547.
[88] Martyn v. Minn. etc. Ry., 95-333, 104+133.
[89] Burris v. Mpls. etc. Ry., 95-30, 103+717.
[90] Jemming v. G. N. Ry., 96-302, 104+1079.
[91] Maehren v. G. N. Ry., 98-375, 107+951.
[92] Quinn v. Mpls. etc. Ry., 100-244, 110+872.
[93] Koepsel v. Mpls. etc. Ry., 100-202, 110+974.
[94] Wolfe v. Mpls. etc. Ry., 100-306, 111+5.
[95] Cederberg v. Mpls. etc. Ry., 101-100, 111+953.
[96] Strand v. G. N. Ry., 101-85, 111+958.
[97] O'Neil v. G. N. Ry., 101-467, 112+625.
[98] Hefferen v. N. P. Ry., 45-471, 48+1; Morris v. Eastern Ry., 88-112, 92+535; Vant Hul v. G. N. Ry., 90-329, 96+789.
[99] Jenson v. G. N. Ry., 72-175, 75+3.
[1] Ling v. St. P. etc. Ry., 50-160, 52+378.
[2] McKenna v. Chi. etc. Ry., 92-508, 100+373.
[3] Macy v. St. P. & D. Ry., 35-200, 28+249.
[4] Hall v. Chi. etc. Ry., 46-439, 49+239.
[5] Neal v. N. P. Ry., 57-365, 59+312.
[6] Thompson v. G. N. Ry., 79-291, 82+637.
[7] Baker v. G. N. Ry., 83-184, 86+82.
[8] Mayberry v. N. P. Ry., 100-79, 110+356.

loaded with cordwood—brakeman seized stick in descending to car floor to set brake;[9] engine derailed and upset while bucking snow—fireman killed;[10] derailment due to snow on track—double header—negligence in management of second engine—engineer killed;[11] derailment—washout—engineer injured;[12] helper to blacksmith in shops struck in eye by metal thrown from anvil;[13] brakeman jumping from moving caboose in switchyards—not acting in line of duty;[14] engineer jumping from engine in anticipation of a collision;[15] drunken brakeman falling from top of freight car;[16] brakeman injured in boarding train—train negligently started without signal from plaintiff;[17] engineer under engine repairing it—collision—open switch;[18] switchman attempting to cross track in front of moving cars—obstacles on track—foot caught between ties—defective air brakes—failure of fellow servant to inspect air brakes and to use hand brakes after seeing switchman lying on track;[19] yardmaster struck by passing engine while walking on platform to switch shanty adjoining track;[20] fireman falling in consequence of a defective step between his seat and the deck of the cab;[21] brakeman crossing track run over by backing engine;[22] derailment—defective switch—switchman riding on engine;[23] common laborer cleaning out combustion chamber of stationary engine—explosion;[24] derailment—disregard of signals—injury to fireman;[25] laborer repairing car on a "rip" track—switching crew pushing other cars against car being repaired;[26] brakeman falling from cars in the nighttime when in the act of going forward to reach air brake;[27] brakeman struck by low overhead bridge and knocked from car—defective tell-tale;[28] derailment due to obstructed switch—death of fireman;[29] laborer engaged in moving materials in yards by means of a small push-car—plaintiff fell from car either because he lost his balance or because his foot was caught in the track;[30] pump repairer injured while on platform of windmill to oil machinery—loss of balance due to defective platform—hand caught in machinery;[31] brakeman hanging to outside of car and attempting to raise platform of vestibule struck by baggage truck on station platform;[32] brakeman thrown from top of car by violent jerk of train in switching operations;[33] brakeman falling from ladder of freight car—claim that there was no stirrup on car;[34] switchman mounting engine by aid of handhold and stirrup—speed of engine suddenly increased with a jerk—thrown down and run over;[35] car-inspector injured while inspecting car in switching yards—collision—duty of inspectors to place lights at ends of cars or trains being inspected—duty of

[9] Jones v. Chi. etc. Ry., 80–488, 83+446.
[10] Sieber v. G. N. Ry., 76–269, 79+95.
[11] McGrath v. G. N. Ry., 76–146, 78+972.
[12] Sweeney v. Mpls. etc. Ry., 33–153, 22+289.
[13] Lyberg v. N. P. Ry., 39–15, 38+632.
[14] Olson v. Mpls. etc. Ry., 76–149, 78+975.
[15] Merritt v. G. N. Ry., 81–496, 84+321.
[16] Parker v. Winona etc. Ry., 83–212, 86+2.
[17] Roe v. Winston, 86–77, 90+122; Id., 89–160, 94+433.
[18] Kline v. Minn. Iron Co., 93–63, 100+681.
[19] Pope v. G. N. Ry., 94–429, 103+331.
[20] Graham v. Mpls. etc. Ry., 95–49, 103+714.
[21] Fry v. G. N. Ry., 95–87, 103+733.
[22] McGillis v. Duluth etc. Ry., 95–363, 104+231.
[23] Floody v. G. N. Ry., 102–81, 112+875.
[24] Kremkoski v. G. N. Ry., 101–501, 112+1025.
[25] Elmgren v. Chi. etc. Ry., 102–41, 112+1067.
[26] Anderson v. G. N. Ry., 102–355, 113+913.
[27] Shaw v. Chi. etc. Ry., 103–8, 114+85.
[28] Whitehead v. Wis. C. Ry., 103–13, 114+254, 467.
[29] Neitge v. Chi. etc. Ry., 103–75, 114+467.
[30] Mattson v. Chi. etc. Ry., 103–239, 114+759.
[31] Miller v. Chi. etc. Ry., 103–443, 115+269.
[32] Baxter v. Mpls. etc. Ry., 104–230, 116+474.
[33] Holland v. G. N. Ry., 93–373, 101+608.
[34] Carleton v. G. N. Ry., 93–378, 101+501.
[35] Martyn v. Minn. etc. Ry., 92–302, 99+1133.

switchmen to warn inspectors of switching operations;[36] car-repairer working in front of an engine in a roundhouse run over by engine which was insufficiently blocked;[37] derailment due to negligent failure of servants of a union depot company to operate a switch—switchman riding on engine of derailed train injured;[38] laborer guiding derrick used in transferring timber from a barge in a river to a caisson struck by falling boom;[39] bridge carpenter working on trestle struck by lead of pile driver;[40] brakeman ordered to go between engine and car loaded with logs and place a pole against the end of a log extending over the car, so that it might be pushed into proper place by backing the engine against the pole—defective engine—failure of engineer to stop engine in response to signals;[41] fireman cleaning out an ash pan under an engine struck by piston rod;[42] coal shoveler riding a velocipede on track to place of work run over by train;[43] carpenter repairing bumper post struck by car moved without signal—failure to put out signal flag;[44] engineer of switch engine injured in collision between his engine and rear of a freight train in switching yards—failure of freight train to put out proper signal lights;[45] checking clerk of freight at transfer platform struck in leg by sharp ring in nose of dressed hog—hog rolling from truck—platform insufficiently lighted;[46] car-repairer caught between drawbars while passing between cars—failure to give customary signals;[47] coal shoveler at elevator operating gasoline engine slipped and fell while about to oil engine—struck revolving belt;[48] pump-repairer using motor tricycle on tracks—derailment in fog—defective frog—improper alignment;[49] engineer of freight train—collision between freight and passenger trains at station—failure to clear main track for passenger train within prescribed time;[50] laborer riding on pilot of engine from place of work jumped off when engine came to a stop in yards and was struck by an engine passing on an adjoining track;[51] brakeman walking back of his train to place torpedoes on rails injured by explosion of torpedo;[52] sectionman off duty walking through switching yards heedless of moving cars;[53] brakeman ordered to repair a hot box—train started without warning him;[54] foreman in charge of coal house—finger struck by revolving crank of hoisting apparatus;[55] laborer working on a roadway injured by explosion of boiler of independent contractor sinking a well nearby;[56] collision between trains going in opposite directions—engineer killed—construction of orders as to movement of trains;[57] arm of engineer broken by

[36] Goess v. Chi. etc. Ry., 104–495, 116+ 1115.
[37] Halvorson v. N. P. Ry., 104–525, 116+ 1134.
[38] Floody v. G. N. Ry., 102–81, 112+875, 1081; Floody v. Chi. etc. Ry., 109–228, 123+815.
[39] King v. Chi. etc. Ry., 104–397, 116+ 918.
[40] Johnson v. G. N. Ry., 104–444, 116+936.
[41] Rudquist v. Empire L. Co., 104–505, 116+1019.
[42] Wilkinson v. Mpls. etc. Ry., 105–300, 117+611.
[43] Miller v. Mpls. etc. Ry., 106–499, 119+ 218.
[44] Vaillancour v. Mpls. etc. Ry., 106–348, 119+53.
[45] Dwyer v. N. P. Ry., 106–281, 118+ 1020.
[46] Carlson v. G. N. Ry., 106–254, 118+ 832.
[47] Hawkins v. G. N. Ry., 107–245, 119+ 1070.
[48] Rase v. Mpls. etc. Ry., 107–260, 120+ 360.
[49] Twitchell v. Mpls. etc. Ry., 107–383, 120+531.
[50] McDonald v. Mpls. etc. Ry., 108–4, 120+1023.
[51] Martinson v. N. P. Ry., 107–495, 120+ 1086.
[52] Brown v. Mpls. etc. Ry., 108–1, 121+ 123.
[53] Magliani v. Minn. T. Ry., 108–148, 121+635.
[54] Moores v. N. P. Ry., 108–100, 121+ 392.
[55] Englund v. Mpls. etc. Ry., 108–380, 122+454.
[56] Thomas v. Wis. C. Ry., 108–485, 122+ 456.
[57] Willard v. Iowa C. Ry., 108–304, 122+ 169.

lever thrown back by breaking of left eccentric strap;[58] derailment caused by collision with cow on track—injury to fireman riding on engine while off duty but at the invitation and request of defendant;[59] laborer in iron mine injured while unloading ore car in motion—train moved too rapidly to permit unloading with safety—unloading done by placing one end of iron bar against cross-tie and other end against corner of approaching car;[60] laborer injured in unloading rails from a flat car;[61] switchman in attempting to mount a switching engine in motion slipped and fell on account of a defective footboard;[62] hoisting engineer injured as a result of an unsafe method of removing caps from bents in piling;[63] laborer repairing floor of shop under a car being repaired killed by fall of sills of car;[64] laborer riding on engine fell on account of a defective footboard;[65] derailment—collision between train and handcar—train being pushed by engine without trainman on leading car—no signals—conductor in caboose killed;[66] switchman run over—evidence not disclosing cause of accident;[67] engine inspector injured in removing a tender from a roundhouse—arm caught between pilot beam and door jamb—engine started with a jerk and too fast.[68]

6018. Injuries to street railway employees—Conductor's foot caught in couplings—motorman backed when signaled to go ahead—failure to provide resistance coil;[69] conductor injured in setting defective brake;[70] car bucking—motorman thrown to ground, run over, and killed—worn-out electric fields;[71] conductor injured in coupling cars;[72] plasterer in conduit of cable killed;[73] derailment—broken rail—motorman injured;[74] laborer repairing tracks—struck by car—failure of motorman to give signals—excessive speed;[75] collision between electric and cable cars—conductor killed;[76] laborer employed to replace trolley poles—injured by fall of rotten pole;[77] servant of contractor painting iron caps on poles of overhead trolley system—caps charged with electricity;[78] greaser in pit under car injured by movement of car—track so greasy and slippery that car could not be stopped properly.[79]

6019. Injuries to workmen in factories, mills, and workshops—Injuries to workmen in sawmills;[80] operator of circular rip saw—fingers cut off;[81]

[58] Koreis v. Mpls. etc. Ry., 108–449, 122+668.

[59] Burgett v. Wis. C. Ry., 109–216, 123+411.

[60] Pakovich v. Oliver, 109–294, 123+824.

[61] Janssen v. G. N. Ry., 109–285, 123+664.

[62] Berglund v. Illinois C. Ry., 109–317, 123+928.

[63] Johnson v. Oakes, 124+633.

[64] Wickham v. Chi. etc. Ry., 124+639.

[65] Anderson v. Foley, 124+987.

[66] Steele v. G. N. Ry., 124+978.

[67] Bruckman v. Chi. etc. Ry., 125+263.

[68] Hoveland v. Chi. etc. Ry., 125+266.

[69] Lorimer v. St. P. C. Ry., 48–391, 51+125.

[70] Newhart v. St. P. C. Ry., 51–42, 52+983.

[71] Beardsley v. Mpls. St. Ry., 54–504, 56+176.

[72] Delude v. St. P. C. Ry., 55–63, 56+461.

[73] Funk v. St. P. C. Ry., 61–435, 63+1099.

[74] Harris v. Hewitt, 64–54, 65+1085.

[75] Lundquist v. Duluth St. Ry., 65–387, 67+1006.

[76] Morrow v. St. P. C. Ry., 65–382, 67+1002; Id., 71–326, 73+973; Id., 74–480, 77+303.

[77] Broderick v. St. P. C. Ry., 74–163, 77+28.

[78] Smith v. Twin City R. T. Co., 102–4, 112+1001.

[79] Jelinek v. St. P. C. Ry., 104–249, 116+480.

[80] Barbo v. Bassett, 35–485, 29+198 (assistant to edger—hand caught in cogs); Wuotilla v. Duluth L. Co., 37–153, 33+551 (off-bearer—in straightening slab on rollers clothes caught in gearing); Carroll v. Williston, 44–287, 46+352 (laborer employed to clear away rubbish under saw—hand caught by saw); Fraser v. Red River L. Co., 45–235, 47+785 (defective steps in lumber pile); Anderson v. Akeley, 47–128, 49+664 (operator of planing machine—belt driving machine broke); Mullin v. Northern Mill Co., 53–29, 55+1115 (replacing chain on sprocket wheel); Smith v. Backus, 64–447, 67+358 (sawyer struck in eye by piece of saw—saw struck iron imbedded in log); Olmscheid v. Nelson, 66–61, 68+605 (operator of bolting or cut-

operator of straw-cutter—hand caught in rolls;[82] boy seventeen years old operating side-set—piece of steel striking eye;[83] stepping into uncovered space over conveyor in flour mill;[84] boy fourteen years old feeding a wool-machine or picker in a mattress factory—hand drawn into machine;[85] plow fitter in

off saw—fingers cut off by saw); Koslowski v. Thayer, 66–150, 68+973 (feeder of lath machine struck by piece of lath—defective dust board); Anderson v. Nelson, 67–79, 69+630 (knot sawyer or shingle grader—cleaning out elevator—hand struck saw); Lundberg v. Shevlin, 68–135, 70+1078 (laborer injured by fall of pile of lumber); Peterson v. Johnson, 70–538, 73+510 (laborer cleaning rollway—knee caught in gearing); Bennett v. Backus, 77–198, 79+682 (steadying log on rollers); Lally v. Crookston L. Co., 82–407, 85+157 (operator of circular saw clipping shingles—hit by shingles thrown by saw—hand struck by saw); Parker v. Pine Tree L. Co., 85–13, 88+261; Id., 89–500, 95+323 (operator of trimmer—stepping on table to remove block—trousers caught in saw); Gray v. Red Lake Falls L. Co., 85–24, 88+24 (log decker—skidding logs—foot crushed by log—chain carelessly adjusted to log); Namyst v. Batz, 85–366, 88+991 (laborer oiling sawdust carrier boxes—thrown from plank against machine); Torske v. Com. L. Co., 86–276, 90+532 (boy fifteen years old assisting at a molding machine—bracing foot against machine to dislodge board—toes hit by knives); Walker v. Grand Forks L. Co., 86–328, 90+573 (oiler—foot caught in wheel of log-chain gearing); Spoonick v. Backus, 89–354, 94+1079 (sorter working on rollers—fell under bench—hand and arm caught in cogwheels); Perry v. Tozer, 90–431, 97+137 (boy fourteen years old—working as slab-conveyor—foot caught in gearing); Nelson v. Kelso, 91–77, 97+459 (working at slab-chute—clothes caught in machinery); Bredeson v. Smith, 91–317, 97+977 (boy eighteen years old taking boards from edger and placing them on trimmer—stepping into hole and falling backwards—wrist caught upon saw); Hendricks v. Lesure L. Co., 92–318, 99+1125 (tail sawyer reversing rolls by putting his hand under the table); Small v. Brainerd L. Co., 95–95, 103+726 (boy sixteen years old employed as sweeper ordered to clean gearings—unaccustomed work—caught in meshes of connecting cogwheels); Johnson v. Crookston L. Co., 95–142, 103+891 (boy sixteen years old working as knot sawyer—saw adjusted while he was temporarily absent—hand caught in saw); Scarlotta v. Ash, 95–240, 103+1025 (injury from defective machinery connected with nigger); Shalgren v. Red Cliff L. Co., 95–450, 104+531 (operator of shavings baler—hand crushed in machine); Dolson v. Dunham, 96–227, 104+964 (adjusting belt on a pulley attached to sawdust elevator); Hagglund v. St. Hilaire L. Co., 97–94, 106+91 (sorter ordered to help in piling lumber—injured by fall of pile); Antletz v. Smith, 97–217, 106+517 (operator of saw lath—defective machine—hand injured by bolt); Gomulak v. Smith, 98–149, 107+542 (working on log carriage—break of rod controlling carriage); Koschman v. Ash, 98–312, 108+514 (blacksmith injured by defective sledge hammer); Vik v. Red Cliff L. Co., 99–88, 108+469 (taking lumber from rollers in rear of gang saw—leg broken by boards on rollers striking it); Viou v. Brooks, 99–97, 108+891 (tram car fell from bridge and hit workman who was removing another car that had fallen); Johnson v. Smith, 99–343, 109+810 (workman struck by car on tramway); Hendrickson v. Ash, 99–417, 109+830 (operator of chain carrier—arm caught by spikes of chain and drawn between carrier and upper roller planks); Dobsloff v. Nichols, 101–267, 112+218 (moving lath stock from a conveyor—fingers caught beneath one of the cross-bars or links); Johnson v. Atwood, 101–325, 112+262 (operator of edger hit by timber thrown from machine); Callopy v. Atwood, 105–80, 117+238 (operator of lath bolting machine—struck on arm by piece of board thrown by saw); Poczerwinski v. Smith, 105–305, 117+486 (workman about resawing machine which recut slabs—defective box over saw—bursting of box—hit by panel of box); Jacobson v. Merrill, 107–74, 119+510 (boy working about a lath machine—in rising from a cradle connected with the machine slipped and his arm struck the saw); Bailey v. Grand Forks L. Co., 107–192, 119+786; Id., 107–207, 119+787 (operator of jump saw used for cutting logs into shingle lengths—stepped on a defective plank near machine—plank gave way—lost his balance—foot struck saw); Peek v. Ostrom, 107–488, 120+1084 (operator of splitting saw for shingles—hand thrown against saw while cleaning out chute for sawdust and spalts); Shaver v. Neils, 109–376, 123+1076 (operator of slab saw struck in eye by piece of wood thrown by saw—saw unguarded).

[81] Eicheler v. Hanggi, 40–263, 41+975.

[82] Snowberg v. Nelson, 43–532, 45+1131.

[83] Hefferen v. N. P. Ry., 45–471, 48+1.

[84] Ehmcke v. Porter, 45–338, 47+1066.

[85] Kaillen v. N. W. etc. Co., 46–187, 48+779.

plow factory—adjusting belt on pulley;[86] boy fifteen years old acting as helper on a carding machine in a woollen mill—arm caught between rollers;[87] operator of trip-hammer in plow factory—finger caught in hammer;[88] oiler of machinery in flour mill—thrown from ladder—clothes caught by set-screw;[89] laborer in paper mill slipping on floor while turning lever—falling and coming in contact with revolving pinion;[90] operator of jointer in sash and blind factory—hand struck by knives;[91] boy fifteen years old removing refuse from under a saw in tub factory—hand struck by saw;[92] boy cleaning out sand elevator in adamant plaster factory—elevator negligently started by foreman;[93] operator of circular saw in harvester factory—defective machinery for operating saw—hand struck by saw;[94] adjusting a belt without a belt-shifter—clothes caught by set-screw;[95] engineer in pork-packing plant—entering hog scraper to clear obstruction—machinery started without signals;[96] unloading barrels from car to platform of factory—falling from platform;[97] operator of double surface planer in box factory—reaching across machine to turn bolt—sleeve blown into cylinder between roller and blower—hand and arm drawn in and cut off;[98] operator of crosscut saw machine in factory—hand struck by saw;[99] operator of machine to force harrow teeth through strips of plank—hand caught in wheel;[1] operator of a paper-box creasing and embossing press—press suddenly starting after being thrown out of gear;[2] missile thrown by fellow servant in factory;[3] operator of mangle in laundry—hand caught in rollers;[4] carpenter caught in revolving shaft in grain elevator;[5] mechanic in iron works setting up an edger—edger hit by wheel being raised by a crane nearby fell on mechanic and killed him;[6] boiler tube falling on workman;[7] workman in grain elevator entering pit to clean away grain—clothes caught in revolving shaft;[8] heavy moulding-press falling on workman moving it;[9] operator of planer and matcher in lumber factory—reaching over to adjust machine without stopping it—clothes caught in cogs;[10] workman hammering metal in iron bed factory—eye struck by piece of iron;[11] laborer loading cars from flour mill—skid connecting two cars slid—leg caught;[12] operator of jointer in woodworking plant—hand caught;[13] adjusting belt to pulley in paper mill;[14] adjusting belt tightener in planing mill;[15] boy thirteen years old riding in an elevator in flour mill—sticking his head beyond line of elevator;[16] boy sixteen years old falling while

[86] Freeberg v. St. Paul P. Works, 48–99, 50+1026.
[87] Truntle v. North Star etc. Co., 57–52, 58+832.
[88] Nelson v. St. Paul P. Works, 57–43, 58+868.
[89] Groff v. Duluth etc. Co., 58–333, 59+1049.
[90] Scharenbroich v. St. Cloud etc. Co., 59–116, 60+1093.
[91] Moody v. Smith, 64–524, 67+633.
[92] Barg v. Bousfield, 65–355, 68+45.
[93] Hess v. Adamant Mfg. Co., 66–79, 68+774.
[94] Wulff v. Wood, 67–423, 70+156.
[95] Pruke v. South Park etc. Co., 68–305, 71+276.
[96] Cleary v. Dakota P. Co., 71–150, 73+717.
[97] Manley v. Mpls. P. Co., 76–169, 78+1050.
[98] Jaroszeski v. Osgood, 80–393, 83+389.
[99] Stiller v. Bohn, 80–1, 82+981.
[1] Bartley v. Howell, 82–382, 85+167.
[2] O'Hara v. Collins, 84–435, 87+1023.
[3] Reberk v. Horne, 85–326, 88+1003.
[4] Blom v. Yellowstone Park Assn., 86–237, 90+397; Jensen v. Regan, 92–323, 99+1126; Carlin v. Kennedy, 97–141, 106+340; Raasch v. Elite L. Co., 98–357, 108+477; Ludwig v. Spicer, 99–400, 109+832.
[5] Ready v. Peavy, 89–154, 94+442.
[6] Dixon v. Union Ironworks, 90–492, 97+375.
[7] Thomas v. Smith, 90–379, 97+141.
[8] Braaflat v. Mpls. etc. Co., 90–367, 96+920.
[9] Peterson v. Am. G. T. Co., 90–343, 96+913.
[10] Swenson v. Osgood, 91–509, 98+645.
[11] Wexler v. Salisbury, 91–308, 98+95.
[12] Comers v. Washburn, 91–105, 97+733.
[13] McGinty v. Waterman, 93–242, 101+300.
[14] Samuelson v. Hennepin P. Co., 101–443, 112+537.
[15] Lee v. Wild Rice L. Co., 102–74, 112+887.
[16] Ludwig v. Pillsbury, 35–256, 28+505.

washing windows;[17] laborer cleaning vat in packing house—standing on ladder and holding to brace—brace breaking;[18] boy sixteen years old operating a brick pressing machine—hand caught in machine;[19] boy fourteen years old operating picking machine in cotton mill—hand and arm caught in machine;[20] workman striking clogged hopper in flour mill to clear it—slipping—misstep—in falling hand caught in gearing;[21] laborer employed to dust machinery and sweep floors in flour mill—hand caught in unguarded cogwheels;[22] operator of circular saw in board factory—lost balance while throwing waste in box and his arm struck saw;[23] boy nineteen years old operating a machine for pressing metal bars called a drawing-machine—hand crushed between pendulum and disc;[24] boy employed in pulp mill to clean screens at the bottom of a vat—caught in detached belting;[25] oiler in flour mill injured by fall of ladder due to its slipping on an oily floor;[26] operator of jointer—improper adjustment of machine;[27] operator of centrifugal extractor or clothes-drier in laundry—machine starting unexpectedly—arm torn off—defective belt and shifter;[28] helper in grain elevator—shifting belt by hand—arm drawn between belt and pulley;[29] boy eighteen years old—fingers caught between chain and sprocket wheel of conveyor;[30] inexperienced boy eighteen years old—removing sawdust from a basin under a table to which a ripsaw was attached—hand caught;[31] girl sixteen years old injured while working on a flax-spinning machine—machine started without proper warning;[32] helper in flour mill caught on a shaft while adjusting a belt on a pulley;[33] operator of flax break in flax mill—hand caught in cylindrical picker near breaker;[34] boy seventeen years old ordered by superintendent to tighten a screw which sustained a shaft—machinery stopped for purpose and negligently started without notice;[35] mechanic ordered by his superior to repair machinery in a packing plant injured by sudden starting of the machinery;[36] workman in machine shop injured by fall of tubular casting which he was assisting in raising by means of a block and tackle—slipping of an S hook;[37] laborer in foundry injured while using an air hoist;[38] operator of a jointer machine—board passing through machine kicked back and broke, throwing his hand into the knives;[39] laborer in iron works struck by piece of bursting emery wheel operated by another;[40] engineer in waterworks injured by explosion of a glass water gauge;[41] operator of a tenoning machine equipped with revolving knives and circular saw—slipped and fell on saw while attempting to oil machine;[42] operator of bag-turning machine—slipped near machine and hand struck plunger;[43] en-

[17] Zigler v. Gotzian, 86-290, 90+387.
[18] Haidt v. Swift, 94-146, 102+388.
[19] Hagerty v. St. Paul B. Co., 98-502, 108+278.
[20] Anderson v. Morrison, 22-274.
[21] Craver v. Christian, 36-413, 31+457.
[22] Rothenberger v. N. W. etc. Co., 57-461, 59+531.
[23] Christianson v. N. W. etc. Co., 83-25, 85+826.
[24] Gray v. Commutator Co., 85-463, 89+322.
[25] Erickson v. Northwest P. Co., 95-356, 104+291.
[26] Dessecker v. Phoenix M. Co., 98-439, 108+516.
[27] Frazier v. Lloyd, 98-484, 108+819.
[28] Thiel v. Kennedy, 82-142, 84+657.
[29] Hahn v. Plymouth E. Co., 101-58, 111+841.
[30] Atlas v. Nat. B. Co., 100-30, 110+250.
[31] Mastey v. Villaume, 104-186, 116+207.
[32] Fitzgerald v. International F. T. Co., 104-138, 116+475.
[33] Seely v. Tennant, 104-354, 116+648.
[34] Parson v. Lyman, 71-34, 73+634.
[35] Taubert v. Taubert, 103-247, 114+763.
[36] Lohman v. Swift, 105-148, 117+418.
[37] Pasco v. Mpls. S. & M. Co., 105-132, 117+479.
[38] Waligora v. St. Paul F. Co., 107-554, 119+395.
[39] Bigum v. St. Paul etc. Co., 107-567, 119+481.
[40] Davidson v. Flour City O. I. Works, 107-17, 119+483.
[41] Nicolas v. Albert Lea L. & P. Co., 107-101, 119+503.
[42] Bean v. Keller, 107-162, 119+801.
[43] Abel v. Hardwood Mfg. Co., 107-214, 120+359, 121+916.

gineer in brick and tile factory injured while attempting to apply some belt dressing to a belt—protruding bolt heads caught his overalls and drew his leg between a revolving coupling and a beam;[44] laborer in stone-crushing plant injured by falling to floor from the edge of a crusher which he was attempting to clean out;[45] packer in flour mill struck in the eye by a small piece of iron thrown from a defective machine;[46] operator of machine for cutting materials for boxes injured by having his hand caught between the platen and the bed of the press;[47] feeder at printing press injured by hand being caught between cylinders;[48] operator of circular saw—loss of part of right hand—saw unguarded;[49] laborer throwing blocks of wood from second story of paper factory fell through opening in wall and was killed;[50] laborer in grain elevator caught in gearing of unguarded motor which he was oiling.[01]

6020. Injuries to servants in mines and quarries—Laborer employed in uncovering stone quarry—wheeling earth near perpendicular bank or wall of earth—struck by falling earth;[51] laborer in stone quarry killed by fall of mast of derrick—defective guy rope;[52] cage coming down upon miner working in shaft;[53] miner working in well of mine struck by earth falling from roof over well;[54] laborer in stone quarry injured while withdrawing an unexploded charge of powder;[55] stone-cutter in quarry killed by fall of derrick boom;[56] miner killed while crossing skip track, by skip car;[57] workman in quarry struck by rock broken off by workman on a higher level;[58] miner walking into uncovered ditch passing through a railway embankment;[59] workman in quarry hit by rock thrown by blast—failure to pack and cover blasting holes—failure to give signals before exploding blast;[60] miner descending shaft in bucket—bucket falling through negligent management of engine;[61] mechanic working on stairway of shaft struck by timber falling down stairway;[62] boy sixteen years old operating a derrick in a stone quarry—cable became loosened and caught upon set-screw and was wound about shaft—boy drawn into air, fell on stone pile and was killed;[63] inexperienced common laborer loading and operating ore cars on a gravity track—fall from car;[64] laborer employed in loading dump cars injured by fall of a sideboard attached to a car;[65] miner injured by use of unsafe fuse furnished to him by his shift boss;[66] laborer working about a diamond drill outfit—fall from ladder—machinery started while plaintiff in position of danger;[67] laborer employed in pushing tramcars ordered to assist in preparing an opening set of timbers to start a side-drift—removal of post—fall of ore;[68]

[44] Spencer v. Albert Lea B. & T. Co., 107-403, 120+370, 687.
[45] Altvasser v. Duluth C. S. Co., 108-206, 121+906.
[46] Brough v. Baldwin, 108-239, 121+1111.
[47] Gruenberg v. Heywood, 108-413, 122+324.
[48] Glockner v. Hardwood Mfg. Co., 109-30, 122+465.
[49] Rickers v. Mission F. Co., 124+641.
[50] Hostager v. Northwest P. Co., 125+902.
[01] Peterson v. Merchants' El. Co., 126+534.
[51] Olson v. McMullen, 34-94, 24+318.
[52] Sather v. Ness, 42-379, 44+128; Id., 44-443, 46+909.
[53] Quick v. Minn. I. Co., 47-361, 50+244.
[54] Bergquist v. Chandler, 49-511, 52+136.
[55] Corneilson v. Eastern Ry., 50-23, 52+224.
[56] Attix v. Minn. S. Co., 85-142, 88+436.
[57] Renlund v. Commodore M. Co., 89-41, 93+1057.
[58] Borgerson v. Cook, 91-91, 97+734.
[59] Hebert v. Interstate I. Co., 94-257, 102+451.
[60] Hjelm v. Western G. C. Co., 94-169, 102+384; Id., 98-222, 108+803; Id., 103-514, 114+1131.
[61] Kundar v. Shenango F. Co., 102-162, 112+1012.
[62] Jensen v. Commodore M. Co., 94-53, 101+944.
[63] Milton v. Biesanz, 99-439, 109+999.
[64] Granrus v. Croxton M. Co., 102-325, 113+693.
[65] Kjosnes v. Gray, 102-410, 113+1009.
[66] Laitinen v. Shenango F. Co., 103-88, 114+264; Nustrom v. Shenango F. Co., 105-140, 117+480.
[67] Cody v. Longyear, 103-116, 114+735.
[68] Kostrezeba v. Hobart I. Co., 103-337, 114+949.

miner injured by fall of ore due to blasting—blast set off without proper warning to plaintiff;[69] plaintiff injured by fall of ore while putting in sets of timber;[70] plaintiff injured by fall of earth while repairing timbers in a drift—assured by shift boss that place was safe;[71] injury from premature explosion of dynamite—unsafe brand of fuse;[72] switchman on tram railway run over by car—defect in back of running-board on tramcar;[73] workman blasting out room for a stable—belated explosion—fuse for use in dry places used in a wet place;[74] laborer in stone quarry injured by explosion due to drilling in hole containing an old unexploded charge of dynamite;[75] laborer in an iron mine injured by fall of dirt in a drift;[76] hoisting engineer in quarry injured by fall from derrick mast due to a defective rope;[77] pitman in iron mine struck in the leg by chunk of frozen dirt in steam shovel;[78] laborer in iron mine injured while attempting to stop a loaded ore car with a pinch bar;[79] laborer in iron mine injured by a belated explosion of dynamite due to a defective fuse;[80] laborer in iron mine killed by fall from bucket while being lifted in shaft;[81] brakeman in charge of train run in connection with an iron mine struck by train on parallel track;[82] laborer injured while unloading ore car in motion—train moved too rapidly to permit unloading with safety—unloading done by placing one end of iron bar against cross-tie and other end against corner of approaching car;[83] laborer operating a push car killed by fall of stone from car.[84]

6021. Injuries to servants in elevators—Boy thirteen years old injured while looking over top of elevator;[85] operator struck by falling weights of elevator;[86] stepping through open door of shaft supposing elevator to be at the floor—acting in reliance of call of "all right" from below;[87] passenger thrown out of elevator by its negligent management;[88] unloading freight from car to elevator—elevator shifted without notice;[89] elevator-boy falling down shaft—elevator shifted without his knowledge while he was temporarily absent;[90] freight elevator used by servants as a passenger elevator—foot caught;[91] plaintiff injured while plastering shaft—failure to notify him of movement of elevator;[92] elevator in building in course of construction—fall due to engineer leaving engine without putting the dog in place;[93] operator injured by sudden jumping of elevator.[94]

6022. Miscellaneous cases—Laborer clearing away grain from elevator after fire killed by fall of wall;[95] laborer injured from fall of trestle which he was helping construct;[96] laborer standing under open hatchway of vessel struck

[69] Jacobson v. Hobart I. Co., 103-319, 114+951.
[70] Anderson v. Pitt, 103-252, 114+953; Id., 108-261, 121+915.
[71] Tomazin v. Shenango F. Co., 103-334, 114+1128.
[72] Wiita v. Interstate I. Co., 103-303, 115+169.
[73] Sundvall v. Interstate I. Co., 104-499, 116+1118.
[74] Nustrom v. Shenango F. Co., 105-140, 117+480.
[75] Bjorklund v. Gray, 106-42, 118+59.
[76] Haidukovich v. Shenango F. Co., 106-230, 118+1017.
[77] Westin v. Anderson, 107-49, 119+486.
[78] Raitila v. Consumers O. Co., 107-91, 119+490.
[79] Arko v. Shenango F. Co., 107-220, 119+789.
[80] Pintar v. Pitt, 107-256, 119+1053.
[81] Leionen v. Oliver I. M. Co., 108-337, 121+1107.
[82] Glines v. Oliver I. M. Co., 108-278, 122+161.
[83] Papkovich v. Oliver, 109-294, 123+824.
[84] Tomczek v. Johnson, 125+268.
[85] Ludwig v. Pillsbury, 35-256, 28+505.
[86] Davidson v. Davidson, 46-117, 48+560.
[87] Mouso v. Kellogg, 58-406, 59+941.
[88] Nutzmann v. Ger. L. Ins. Co., 78-504, 81+518; Id., 82-116, 84+730.
[89] Perras v. Booth, 82-191, 84+739.
[90] Lyons v. Dee, 88-490, 93+899.
[91] McDonough v. Lanpher, 55-501, 57+152.
[92] Larson v. Haglin, 103-257, 114+958.
[93] Pfudl v. Romer, 107-353, 120+302.
[94] Dahleen v. N. Y. Life Ins. Co., 109-337, 123+926.
[95] Bennett v. Synd. Ins. Co., 39-254, 39+488.
[96] Lindvall v. Woods, 41-212, 42+1020.

by falling barrel;[97] workman engaged in putting steam plant in a brewery killed by the bursting of a pipe;[98] driver of brewery wagon injured by upsetting of wagon;[99] engineer of stationary engine blown from platform by escaping steam;[1] falling down elevator shaft;[2] laborer in ditch injured by caving in of earth;[3] laborer killed by collapse of cistern wall;[4] laborer killed in lowering large iron tank into a basement on skids;[5] laborer injured in loading heavy iron boiler on a truck;[6] laborer in trench hit by splinter from plank being driven in without an iron cap, for curbing;[7] laborer thrown down an elevator shaft by breaking of box on which he was standing;[8] laborer struck by a ferry cable—breaking of rope;[9] laborer shoveling in bin of grain elevator—killed by caving in of bran;[10] laborer injured by fall of telephone pole upon which he was working;[11] engineer scalded by steam while removing pipes from stationary engine;[12] laborer injured in loading hammer of pile-driver upon a wagon;[13] laborer injured by defective trap door in sidewalk;[14] laborer killed by electric shock in handling cable charged with electricity;[15] deckhand on dredge boat killed by fall of crane;[16] deckhand on dredge boat caught by revolving winch-head and killed;[17] painter falling from bridge—defective tackle;[18] laborer injured by tree falling upon him;[19] laborer struck by follower of pile-driver and killed;[20] laborer in sewer trench killed by caving in of trench—material for sheathing insufficient;[21] laborer falling from pile of logs on skidway;[22] teamster using a spreader rig in logging injured by breaking of rig;[23] laborer assisting in loading logs from skidways upon sleds—grab-hook broke and log rolled back upon him;[24] operator of switchboard in electric light plant—taking hold of two handles of plugs in switchboard at same time and receiving shock;[25] laborer painting electric light poles receiving electric shock—failure to insulate wires;[26] injury from shock of electricity while uncoiling wires of lamp;[27] laborer working in excavation injured by fall of earth which had been loosened by a blast;[28] teamster injured from loose tire on wheel of wagon;[29] helper to pressman injured by press being started without customary signal;[30] laborer in trench for gas main injured by horse falling into trench;[31] teamster injured in unloading hay with block and tackle—breaking of guide rope;[32] laborer tearing down building—fall of floor;[33] workman about threshing machine—

[97] McCarthy v. Lehigh Valley T. Co., 48–533, 51+480.
[98] Theisen v. Porter, 56–555, 58+265.
[99] Schlitz v. Pabst, 57–303, 59+188.
[1] McCallum v. McCallum, 58–288, 59+1019.
[2] Mouso v. Kellogg, 58–406, 59+941.
[3] Carlson v. N. W. etc. Co., 63–428, 65+914.
[4] Sneda v. Libera, 65–337, 68+36.
[5] Abel v. Butler, 66–16, 68+205.
[6] Johnson v. Mpls. etc. Co., 67–141, 69+713.
[7] Friedrich v. St. Paul, 68–402, 71+387.
[8] Soutar v. Mpls. etc. Co., 68–18, 70+796.
[9] Hughley v. Wabasha, 69–245, 72+78.
[10] Lund v. Woodworth, 75–501, 78+81.
[11] Saxton v. N. W. etc. Co., 81–314, 84+109.
[12] Bischoff v. St. Paul B. Assn., 82–105, 84+731.
[13] Bell v. Lang, 83–228, 86+95.
[14] Dieters v. St. Paul G. Co., 86–474, 91+15.
[15] Klages v. Gillette, 86–458, 90+1116.
[16] Jacobson v. Johnson, 87–185, 91+465.
[17] Hermann v. Clark, 89–132, 94+436.
[18] Anderson v. Fielding, 92–42, 99+357.
[19] Owens v. Savage, 93–468, 101+790.
[20] Swanson v. Oakes, 93–404, 101+949.
[21] Kurstelska v. Jackson, 84–415, 87+1015; Id., 89–95, 93+1054.
[22] Dell v. McGrath, 92–187, 99+629.
[23] Sandahl v. Lammers, 85–162, 88+532.
[24] Carlson v. Marston, 68–400, 71+398.
[25] Wendler v. Red Wing etc. Co., 92–122, 99+625.
[26] Bernier v. St. Paul G. Co., 92–214, 99+788.
[27] Voyer v. Dispatch P. Co., 62–393, 64+1138.
[28] Kohout v. Newman, 96–61, 104+764.
[29] Thorne v. Mpls. etc. Co., 97–329, 106+253.
[30] Doerr v. Daily News P. Co., 97–248, 106+1044.
[31] Johnson v. St. Paul G. Co., 98–512, 108+816.
[32] De Maries v. Jameson, 98–453, 108+830.
[33] Barrett v. Reardon, 95–425, 104+309.

machine negligently started while workman was adjusting turn-buckle;[34] unloading logging cars—defective platform;[35] pouring blasting powder into a hot hole;[36] explosion of dynamite in excavating ditches for watermains;[37] explosion of dynamite from overheating;[38] an assistant engineer burned by steam escaping from a defective stationary engine;[39] falling from hanging scaffold—defective rope;[40] explosion of dynamite—digging out unexploded blasting holes;[41] laborer hit by stone attached to derrick—starting machinery without signal;[42] laborer falling through hole in floor of building in process of construction;[43] laborer falling from building in process of construction—defective hoist;[44] laborer on building in process of construction hit by falling timber;[45] carpenter working on scaffold—scaffold broken by timber falling upon it—carpenter thrown to ground;[46] laborer injured by fall of telegraph pole on which he was working;[47] laborer digging earth from a bank—caving in of earth;[48] laborer working in trench for watermains—falling in of curbing;[49] rider at horse race thrown from horse known to the master to have a bolting habit;[50] laborer working in excavation struck by falling earth;[51] overturning of platform on bridge in course of construction—plaintiff hit by cable of derrick—pulley-block not moused;[52] laborer injured by circular saw used to saw cord wood;[53] laborer injured by fall of logs—working at top of rollway of logs—logs decked on two skids;[54] teamster in woods hauling logs—foot caught in hole in corduroy road;[55] teamster injured by a vicious horse;[56] laborer working about building in course of construction struck by plank falling from floor above;[57] plaintiff smothered in coal bin—attempting to break crust of coal;[58] plaintiff employed about a building in course of construction as a shoveler ordered to carry timbers from first to second story—fell to basement;[59] teamster working about a ditching machine struck by cable;[60] laborer employed in construction of telephone line—intersection of telephone line and power line—use of tape that was a conductor of electricity;[61] injury from explosion of dynamite in camp of railway construction crew;[62] landing man in logging camp—injury from fall of log;[63] plumber burned by a defective plumber's furnace;[64] injury from caving in of trench—servant not warned of latent danger;[65] injury from fall of buckets of ditching machine;[66] drayman injured by truck falling from

[34] Meyer v. Kenyon, 95–329, 104+132.
[35] Bailey v. Swallow, 98–104, 107+727.
[36] Holman v. Kempe, 70–422, 73+186.
[37] Stahl v. Duluth, 71–341, 74+143.
[38] Pinney v. King, 98–160, 107+1127.
[39] Peterson v. Van Dusen, 101–50, 111+839.
[40] Duchene v. Lefebvre, 101–473, 112+865.
[41] Carlson v. Forrestal, 101–446, 112+626.
[42] Berneche v. Hilliard, 101–366, 112+392.
[43] Merrill v. Pike, 94–186, 102+393.
[44] Gittens v. Porten, 90–512, 97+378.
[45] Vogt v. Honstain, 81–174, 83+533.
[46] Smith v. Tromanhauser, 63–98, 65+144; Myhre v. Tromanhauser, 64–541, 67+660.
[47] Kelly v. Erie etc. Co., 34–321, 25+706.
[48] Pederson v. Rushford, 41–289, 42+1063.
[49] Bergquist v. Minneapolis, 42–471, 44+530.
[50] Lane v. Minn. S. A. Soc., 62–175, 64+382.
[51] Hill v. Winston, 73–80, 75+1030.
[52] Costello v. Frankman, 97–522, 107+739.
[53] Monsen v. Crane, 99–186, 108+933.
[54] Caron v. Powers, 96–192, 104+889; Id., 100–341, 111+152.
[55] Goss v. Goss, 102–346, 113+690.
[56] Fleming v. Covington, 102–403, 113+1016.
[57] Kelly v. Tyra, 103–176, 114+750, 115+636.
[58] Balder v. Zenith F. Co., 103–345, 114+948.
[59] Binewicz v. Haglin, 103–297, 115+271.
[60] Martin v. Gould, 103–467, 115+276.
[61] Donahue v. N. W. etc. Co., 103–432, 115+279.
[62] Anderson v. Smith, 104–40, 115+743; Froeberg v. Smith, 106–72, 118+57.
[63] Brown v. Musser, 104–156, 116+218.
[64] Lehman v. Dwyer, 104–190, 116+352.
[65] McCoy v. Northern H. & E. Co., 104–234, 116+488.
[66] Engler v. La Crosse D. Co., 105–74, 117+242.

his dray—defective dray—horse reared and backed suddenly against curb;[67] laborer removing ice from a railway car—defective ice tongs slipped and he fell back into a hole in the car;[68] mason tender wheeling mortar and brick along a plank passageway in a building in the course of construction fell from the passageway and was killed;[69] teamster employed in ditching operations struck by cable;[70] laborer injured by unexpected movement of log-loader or jammer used on a railway in logging operations;[71] foreman injured in unloading timber from a flat car;[72] laborer injured by fall of staging suspended from ceiling—defective rope—use of ropes where chains should have been used;[73] laborer working near building in course of construction struck by a falling board;[74] laborer in logging crew struck in the eye by a piece of iron which he was attempting to bend on an anvil;[75] laborer loading rails on a car sprained back;[76] laborer in gas works injured while taking off a length of a steam pipe attached to a trap and putting on another—failure to open vent—discharge of hot water and steam;[77] operator of wood-sawing machine in reaching over the machine to remove a piece of wood struck his head against a shaft and was killed;[78] lineman working on electric wires suspended between poles killed by contact with heavily charged wire defectively insulated;[79] laborer working in hole of vessel discharging coal—struck by coal bucket—failure of hatch tender to give customary signal before fall of bucket;[80] lineman injured by fall of rotten telephone pole which he had mounted;[81] carpenter working in a cooling or water tower struck by board being lowered from top of tower—board slipped from noose;[82] laborer assisting in moving scaffold thrown to ground.[91]

ACTIONS

6023. Parties defendant—A joint action against a master and his servant may be maintained, when based on the negligent or other act of the servant for which the master is liable.[83]

6024. Pleading—Cases are cited below involving questions of pleading.[84] The general subject of pleading in actions for negligence is treated elsewhere.[85]

[67] De Greif v. N. W. etc. Co., 106–15, 118+558.

[68] Borchardt v. People's Ice Co., 106–134, 118+359.

[69] Johnson v. Lindahl, 106–382, 118+1009.

[70] Patterson v. Melchior, 106–437, 119+402.

[71] Vukelis v. Virginia L. Co., 107–68, 119+509.

[72] Manore v. Kilgore, 107–347, 120+340.

[73] Olson v. Pike, 107–411, 120+378.

[74] Brennan v. Butler, 107–430, 120+540.

[75] Hoover v. Nichols, 108–69, 121+416.

[76] Stenvog v. Minn. Tr. Ry., 108–199, 121+903.

[77] Putz v. St. Paul G. Co., 108–243, 121+1109.

[78] Kerling v. Van Dusen, 108–51, 121+227.

[79] Musolf v. Duluth E. E. Co., 108–369, 122+499.

[80] Anderson v. Pittsburgh C. Co., 108–455, 122+794.

[81] Holden v. Gary, 109–59, 122+1018.

[82] Kronzer v. Spencer, 109–392, 124+6.

[91] Dougherty v. Mpls. S. & M. Co., 126+136.

[83] Mayberry v. N. P. Ry., 100–79, 110+356.

[84] Fraker v. St. P. etc. Ry., 30–103, 14+366 (complaint charging negligence in not keeping couplings in safe condition held sufficiently definite); Madden v. Mpls. etc. Ry., 30–453, 16+263 (derailment—held proper to require complaint to be made more definite); Tierney v. Mpls. etc. Ry., 31–234, 17+377 (complaint charging negligence in not providing safe couplings held sufficiently definite); Jorgenson v. Smith, 32–79, 19+388 (complaint for injury to servant in moving a house held not to show any negligence on the part of the master); Olson v. St. P. etc. Ry., 34–477, 26+605 (general allegation of negligence sufficient—admits proof of negligence of master or vice-principal); Rolseth v. Smith, 38–14, 35+565 (general allegation of negligence sufficient—when complaint bad as showing contributory negligence or assumption of risk); Connelly v. Mpls. E. Ry., 38–80, 35+582 (a charge of negligence in the movement of a

6025. Evidence—Admissibility—Cases are cited below involving the admissibility of evidence.[86] The general subject of evidence in actions for negligence is treated elsewhere.[87]

train does not involve a charge of negligence in not establishing regulations for the conduct of its servants in such cases); Fraser v. Red River L. Co., 42–520, 44+878 (complaint for negligence in constructing steps in a lumber pile held sufficient); Snowberg v. Nelson, 43–532, 45+1131 (complaint for injury from machinery held indefinite but not to show assumption of risk or contributory negligence); Orth v. St. P. etc. Ry., 43–208, 45+151 (complaint for injury from defective locomotive held sufficiently definite); Schumaker v. St. P. & D. Ry., 46–39, 48+559 (complaint for exposure of servant to elements held sufficient); Rogers v. Truesdale, 57–126, 58+688 (allegation that act was "negligently" done held sufficient); Thompson v. G. N. Ry., 70–219, 72+962 (complaint need not negative contributory negligence or assumption of risk); Birmingham v. Duluth etc. Ry., 70–474, 73+409 (complaint held not to show contributory negligence or that injury was caused by fellow servant); Jenson v. G. N. Ry., 72–175, 75+3 (complaint charging carelessness and incompetency of fellow servant held sufficient); Nicholas v. Burlington etc. Ry., 78–43, 80+776 (complaint charging failure to furnish safe place in which to work held sufficient); Lindgren v. Mpls. etc. Ry., 86–152, 90+381 (complaint for injury to sectionmen from negligence of fellow servants held sufficient); Boyer v. Eastern Ry., 87–367, 92+326 (allegations as to methods of doing work construed); Morris v. Eastern Ry., 88–112, 92+535 (complaint for injury from defective flogging hammer held sufficient); Swartz v. G. N. Ry., 93–339, 101+504 (complaint for injury to sectionman hit by stone thrown from engine held sufficient); Costello v. Frankman, 97–522, 107+739 (complaint held sufficiently specific as to defects in pulleys, etc.); Pesek v. New Prague, 97–171, 106+305 (complaint charging neglect to guard machinery held sufficient); Mayberry v. N. P. Ry., 100–79, 110+356 (joinder of causes of action); Vukelis v. Virginia L. Co., 107–68, 119+509 (complaint for injuries received in logging operations sustained, though it did not directly allege that the plaintiff at the time was in the employ of the defendant); Christiansen v. Chi. etc. Ry., 107–341, 120+300 (general allegation of negligence sufficient—indefinite complaint for injuries received by sectionman through negligence of fellow servant sustained); Manks v. Moore, 108–284, 122+5 (servant ordered to work in dangerous place with assurance of protection for all injury—complaint sustained); Floody v. G. N. Ry., 108–216, 121+875 (injury due to defective switch—complaint sustained); Koreis v. Mpls. etc. Ry., 108–449, 122+668 (complaint charging a defect in the eccentric of a locomotive sustained); Burgett v. Wis. C. Ry., 109–216, 123+411 (allegations of ultimate facts sufficient—complaint by fireman riding on a locomotive by invitation of the defendant sustained).

[85] See § 7058.

[86] Ransier v. Mpls. etc. Ry., 30–215, 14+883 (charge of negligence in employing incompetent engineer in that he was old, near-sighted and unacquainted with road—evidence that after accident engineer ran train several miles without a brakeman and ran the engine off the track held inadmissible); Morse v. Mpls. etc. Ry., 30–465, 16+358 (other defects—similar accidents from same defective instrument); Macy v. St. P. & D. Ry., 35–200, 28+249 (motive for remaining in service without giving notice of injury); Clapp v. Mpls. etc. Ry., 36–6, 29+340 (similar accidents from same defective instrument); Sobieski v. St. P. & D. Ry., 41–169, 42+863 (parol evidence of rules); Doyle v. St. P. etc. Ry., 42–79, 43+787 (declarations of claim agent of railway company—customary practice—fact that similar accidents had not happened); Larson v St. P. etc. Ry., 43–423, 45+722 (customary practice—record of trains); Kaillen v. N. W. etc. Co., 46–187, 48+779 (former negligence of servant); Moran v. Eastern Ry., 48–46, 50+930 (negative evidence that bell was not rung); Bergquist v. Chandler, 49–511, 52+136 (statements of fellow servants—customary practice—testimony of boss as to conditions in mine); Steffenson v. Chi. etc. Ry., 51–531, 53+800 (fact that act was done in an unusual manner); Myhre v. Tromanhauser, 64–541, 67+660 (manner or temper in which master gave order); Barg v. Bousfield, 65–355, 68+45 (policy of insurance); Rifley v. Mpls. etc. Ry., 72–469, 75+704 (customary practice); Morrow v. St. P. C. Ry., 74–480, 77+303 (acts of servant in other part of work to show his incompetency); Manley v. Mpls. P. Co., 76–169, 78+1050 (policy of insurance); Namyst v. Batz, 85–366, 88+991 (declarations of plaintiff at time of accident—res gestae); Stauning v. G. N. Ry., 88–480, 93+518 (customary practice) Flanders v. Chi. etc. Ry., 51–193, 53+544 (id.); Anderson v. Fielding, 92–42, 99+357 (id.); Lally v. Crookston L. Co., 82–407, 85+157 (changes and repairs after accident); Cederberg v. Mpls. etc. Ry., 101–100, 111+953 (customary practice of other com-

6026. Variance and issues—Cases are cited below involving questions relating to variance and issues.[88]

6027. Burden of proof—Cases are cited below involving questions as to the burden of proof.[89]

6027a. Verdict—Naming fellow servant—In actions involving the negligence of a fellow servant the jury may be required to name the fellow servant whose negligence they find caused the injury.[90]

MASTERS OF VESSELS—See Shipping, 8762.

MAXIMS

Cross-References

See Equity, 3142.

6028. Nature and value—Legal maxims are pithy expressions of general principles. They are the proverbs of the law and have the same merits and

panies in the inspection of locomotives); Binewicz v. Haglin, 103-297, 115+271 (admissions); Wiita v. Interstate I. Co., 103-303, 115+169 (other accidents from same instrumentality); Brown v. Musser, 104-156, 116+218 (customary practice of others as to the kind of axes for knocking loose grab hooks in logging); McManus v. Nichols, 105-144, 117+223 (admissions); Poczerwinski v. Smith, 105-305, 117+486 (the question being as to whether a certain saw was properly protected evidence that another saw of similar character, but different size, situated in the same mill, was differently and more securely protected by a different kind of covering, held admissible); Pfudl v. Romer, 107-353, 120+302 (prior specific acts of negligence on the part of a servant held admissible to prove his incompetency); Anderson v. Pitt, 108-261, 121+915 (customary practice as to timbering drifts in mines); Koreis v. Mpls. etc. Ry., 108-449, 122+668 (break of appliance shortly after its inspection).

[87] See § 7049.

[88] Connelly v. Mpls. E. Ry., 38-80, 35+582; Doyle v. St. P. etc. Ry., 42-79, 43+787; Moody v. Smith 64-524, 67+633; Morrow v. St. P. C. Ry., 65-382, 67+1002; Olson v. G. N. Ry., 68-155, 71+5; Lund v. Woodworth, 75-501, 78+81; Sours v. G. N. Ry., 81-337, 84+114; Nutzmann v. Ger. L. Ins. Co., 82-116, 84+730; Pierce v. Brennan, 88-50, 92+507; Scarlotta v. Ash, 95-240, 103+1025; Jemming v. G. N. Ry., 96-302, 104+1079; Donohue v. N. W. etc. Co., 103-432, 115+279; Hostetter v. Illinois C. Ry., 104-25, 115+748; Poczerwincki v. Smith, 105-305, 117+486; Vaillancour v. Mpls. etc. Ry., 106-348, 119+53; Bigum v. St. Paul etc. Co., 107-567, 119+481; Raitila v. Consumers O. Co., 107-91, 119+490.

[89] McMahon v. Davidson, 12-357(232); (injury due in part to master and in part to fellow servant); Crandall v. McIlrath, 24-127 (unfit fellow servant); Fraker v. St. P. etc. Ry., 32-54, 19+349 (to show breach of duty of master); Olson v. St. P. etc. Ry., 38-117, 35+866 (id.); Davidson v. Davidson, 46-117, 48+560 (id.); Murphy v. G. N. Ry., 68-526, 71+662 (id.); Lorimer v. St. P. C. Ry., 48-391, 51+125 (burden of proving contributory negligence on defendant—rule not changed by railway fellow-servant statute); Nelson v. St. Paul P. Works, 57-43, 58+868 (as to defective appliances—unnecessary to prove precise nature of defect); Koslowski v. Thayer, 66-150, 68+973 (defective machinery); Orth v. St. P. etc. Ry., 47-384, 50-363 (degree of proof required); Olson v. G. N. Ry., 68-155, 71+5 (id.); Larson v. St. P. & D. Ry., 43-488, 45+1096 (id.); Kohout v. Newman, 96-61, 104+764 (id.); Thompson v. G. N. Ry., 70-219, 72+962 (assumption of risk); Kletschka v. Mpls. etc. Ry., 80-238, 83+133 (res ipsa loquitur —presumption of negligence); Carleton v. G. N. Ry., 93-378, 101+501 (degree of proof required); Ulseth v. Crookston L. Co., 97-178, 106+307 (degree of proof required—res ipsa loquitur); Gomulak v. Smith, 98-149, 107+542 (res ipsa loquitur —presumption of negligence); Cederberg v. Mpls. etc. Ry., 101-100, 111+953 (id.); Binewicz v. Haglin, 103-297, 115+271 (case not made out by proof of admissions of defendant); Lehman v. Dwyer, 104-190, 116+352 (degree of proof required); Twitchell v. Mpls. etc. Ry., 107-383, 120+531 (negligence not inferable from happening of accident); Brennan v. Butler, 107-430, 120+540 (res ipsa loquitur held inapplicable); Jacobson v. G. N. Ry., 108-517, 120+1089 (id.). See Looney v. Met. Ry., 200 U. S. 480 (burden on servant to show negligence in master—presumption that master has performed his duty).

[90] R. L. 1905 § 4179; Crane v. Chi. etc.

defects as other proverbs. They are not trustworthy guides in the practical administration of the law. They rarely explain anything and are almost always subject to implied exceptions and limitations.[91]

6029. English maxims—Where one of two innocent persons must suffer from the act of another he must bear the loss who made such act possible;[92] hard cases must not be allowed to make bad law;[93] one may not profit by his own wrong;[94] one may not pursue a lawful end by unlawful means;[95] a correct rule should not be overturned by an inconsistent exception;[96] what is necessary must be done;[97] the law does not require impossibilities;[98] the law is reasonable in all things;[99] a man's house is his castle.[1]

6030. Latin maxims—Actio personalis moritur cum persona (a personal action dies with the person);[2] actus curiae neminem gravabit (an act of the court shall prejudice no one);[3] ad questionem facti non respondent judices; ad questionem legis non respondent juratores (judges do not answer a question of fact; jurors do not answer a question of law);[4] allegans suam turpitudinem non est audiendus (one alleging his own infamy is not to be heard);[5] aqua currit et debet currere ut currere solebat (water runs and ought to run as it was wont to run);[6] bona judicis est ampliare jurisdictionem (it is the part of a good judge to enlarge his jurisdiction);[7] causa proxima non remota spectatur (the proximate and not the remote cause is to be considered);[8] caveat emptor (let the buyer beware);[9] cessante ratione legis cessat et ipsa lex (when the reason of a law ceases the law itself ceases);[10] cujus est solum ejus est usque ad coelum (he who owns the soil owns up to the sky);[11] de minimis non curat lex (the law does not concern itself with trifles);[12] expressio eorum quae tacite insunt nihil operatur (the expression of those things which are tacitly implied adds nothing);[13] expressio unius est exclusio alterius (the

Ry., 83-278, 86+328 (if evidence does not show negligence of servant named defendant is entitled to judgment notwithstanding the verdict); McManus v. Nichols, 109-355, 123+1080 (effect of failure to name—fellow servant otherwise designated—instructions disregarded); Wickham v. Chi. etc. Ry., 124+639, 994 (statute held inapplicable—negligence of fellow servant not involved).

[91] Pollock, Jurisprudence (2 ed.), 231; Salmond, Jurisprudence, 482; 9 Harv. L. Rev. 13.

[92] Palmer v. Bates, 22-532; Burgers v. Bragaw, 49-462, 52+45; Ratzer v. Burlington etc. Ry., 64-245, 249, 66+988; Robbins v. Larson, 69-436, 440, 72+456; Paulsen v. Koon, 85-240, 88+760; Scanlon v. Germania Bank, 90-478, 97+380; Wilson v. Walrath, 103-412, 115+203.

[93] Smith v. Fletcher, 75-189, 196, 77+800. See Erkens v. Nicolin, 39-461, 40+567; Heminway v. Miller, 87-123, 129, 91+428.

[94] Wellner v. Eckstein, 105-444, 463, 117+830.

[95] Chubbuck v. Cleveland, 37-466, 35+362.

[96] Capehart v. Foster, 61-132, 63+257.

[97] State v. Sommers, 60-90, 61+907.

[98] Faber v. St. P. etc. Ry., 29-465, 469, 13+902; Guiterman v. Sharvey, 46-183, 48+780; First Nat. Bank v. McConnell, 103-340, 114+1129.

[99] Guiterman v. Sharvey, 46-183, 48+780.

[1] State v. Touri, 101-370, 112+422.

[2] Boutiller v. St. Mi'waukee, 8-97(72).

[3] Lovejoy v. Stewart, 23-94, 101.

[4] Fischer v. Sperl, 94-421, 428, 103+502.

[5] Rogers v. Clark, 104-198, 226, 116+739.

[6] Pinney v. Luce, 44-367, 46+561.

[7] Brown v. Maplewood C. Assn., 85-498, 515, 89+872.

[8] Locke v. First Div. etc. Ry., 15-350 (283, 300); Ransier v. Mpls. & St. L. Ry., 32-331, 20+332.

[9] Brooks v. Hamilton, 15-26(10); First Nat. Bank v. Rogers, 22-224; McNaughton v. Carleton College, 28-285, 9+805; Coles v. Washington County, 35-124, 27+497.

[10] Chapman v. Dodd, 10-350(277, 289); Wilson v. Bell, 17-61(40); Pett-Morgan v. Kennedy, 62-348, 352, 64+912; Thorpe v. Hanscom, 64-201, 205, 66+1; Fleming v. McCutcheon, 85-152, 154, 88+433; Kelly v. Stevenson, 85-247, 251, 88+739; State v. Ronk, 91-419, 429, 98+334.

[11] Stillwater W. Co. v. Farmer, 89-58, 66, 93+907.

[12] See §§ 417, 7074, 9175.

[13] See § 8981.

expression of one thing is the exclusion of another);[14] expressum facit cessare tactium (where there are express provisions none can be implied);[15] ex turpi contractu actio non oritur (no action arises on an immoral contract);[16] falsa demonstratio non nocet (a false description does no harm);[17] id certum est quod certum reddi potest (that is certain which may be rendered certain);[18] ignorantia juris non excusat (ignorance of the law is no excuse);[19] impossibilium nulla obligatio est (there is no obligation to do impossible things);[20] in pari delicto melior est conditio possidentis (where parties are equally in the wrong the condition of the possessor is the better);[21] interest reipublicae ut sit finis litium (it is to the interest of the state that there be an end to litigation);[22] lex neminem cogit ad vana seu inutilia peragenda (the law forces no one to do vain or useless things);[23] lex neminem cogit impossibilia (the law requires no one to do impossible things);[24] mobilia sequuntur personam (movables follow the person);[25] nemo debet bis vexari pro una et eadem causa (no one ought to be twice vexed for one and the same cause);[26] nullum tempus occurrit regi (time does not run against the king);[27] nullus commodum capere potest de injuria sua propia (no one can take advantage of his own wrong);[28] omnia presumuntur legitime facta donec probetur in contrarium (all things are presumed to be done legitimately until the contrary is proved);[29] omnia rite acta presumuntur (all things are presumed to have been rightly done);[30] omnis ratihabitio retrotrahitur et mandato priori aequiparatur (every subsequent ratification has a retroactive effect, and is equivalent to a prior command);[31] prior in tempore potior in jure (he who is first in time is first in right);[32] qui approbat, non reprobat (one who approves does not reject).[33] qui facit per alium facit per se (one who acts through another acts himself);[34] qui haeret in litera haeret in cortice (one who adheres to the letter adheres to the bark);[35] quilibet potest renunciare juri pro se inducto (one may waive a right introduced for his benefit);[36] qui sentit commodum sentire debet et onus (one who derives a benefit from a thing ought to bear the incidental burdens);[37] respondeat superior (let the principal answer);[38] res inter alios acta alteri nocere non debet (a stranger to a transaction ought not to be af-

[14] See §§ 1838, 8980.
[15] See § 8982.
[16] Anheuser v. Mason, 44–318, 46+558.
[17] Lovejoy v. Gaskill, 30–137, 14+583; Adamson v. Petersen, 35–529, 29+321.
[18] St. Paul Div., S. of T. v. Brown, 9–157(144, 152); Dutcher v. Culver, 24–584, 592; Bennett v. Blatz, 44–56, 46+319; Fairchild v. St. Paul, 46–540, 545, 49+325; Lumbermen's Ins. Co. v. St. Paul, 85–234, 238, 88+749.
[19] Merritt v. St. Paul, 11–223(145, 152); State v. Armington, 25–29, 38; Houston v. N. P. Ry., 109–273, 123+922.
[20] First Nat. Bank v. McConnell, 103–340, 114+1129.
[21] Bauer v. Sawyer, 90–536, 97+428.
[22] State of Wis. v. Torinus, 28–175, 179, 9+725; Washburn v. Van Steenwyk, 32–336, 355, 20+324; Sodini v. Sodini, 96–329, 104+976.
[23] Humphrey v. Havens, 12–298(196, 214); State v. Galusha, 26–238, 2+939, 3+350; Stewart v. G. N. Ry., 65–515, 523, 68+208.
[24] Rogers v. Clark, 104–198, 213, 116+739.
[25] Swedish etc. Bank v. First Nat. Bank, 89–98, 113, 94+218; State v. W. U. Tel. Co., 96–13, 23, 104+567.
[26] State v. McGrorty, 2–224(187); State of Wis. v. Torinus, 28–175, 179, 9+725; Washburn v. Van Steenwyk, 32–336, 355, 20+324.
[27] State v. Harris, 102–340, 113+887.
[28] Wellner v. Eckstein, 105–444, 462, 117+830.
[29] St. Paul v. Kuby, 8–154(125, 135).
[30] State v. Smith, 22–218, 223.
[31] Wilson v. Hayes, 40–531, 539, 42+467.
[32] Winona & St. P. Ry. v. Randall, 29–283, 287, 13+127; Wilson v. Eigenbrodt, 30–4, 13+907; Snell v. Snell, 54–285, 55+1131.
[33] Rogers v. Clark, 104–198, 226, 116+739.
[34] St. Paul v. Seitz, 3–297(205, 217); Morier v. St. P. etc. Ry., 31–351, 17+952.
[35] Taylor v. Taylor, 10–107(81, 91).
[36] State v. Dike, 20–363(314); Whittier v. Chi. etc. Ry., 24–394, 405.
[37] State v. St. P. etc. Ry., 35–131, 28+3.
[38] St. Paul v. Seitz, 3–297(205); Morier v. St. P. etc. Ry., 31–351, 17+952.

fected by it);[39] salus populi est suprema lex (the safety of the state is the supreme law);[40] sic utere tuo ut alienum non laedas (so use your own property as not to injure that of another);[41] solutio pretii emptionis loco habetur (the payment of the price stands in the place of the sale);[42] ubi jus ibi remedium (where there is a right there is a remedy);[43] unumquodque dissolvitur eodem modo, quo ligatur (everything is dissolved by the same mode in which it is bound together);[44] ut res magis valeat quam pereat (that a thing may rather have effect than come to nothing);[45] vigilantibus et non dormientibus jura subserviunt (the laws serve the vigilant and not the careless);[46] volenti non fit injuria (one who consents suffers no injury).[47]

MAY—See Statutes, 8979.
MAYHEM—See Maiming.
MAYOR—See Municipal Corporations, 6568.
MEANDER LINES—See Boundaries, 1068, 1069.
MECHANICAL BUSINESS—See Corporations, 2080.

[39] Morin v. St. P. etc. Ry., 33-176, 180, 22+251; Pioneer S. & L. Co. v. Bartsch, 51-474, 478, 53+764; Am. B. & L. Assn. v. Stoneman, 53-212, 54+1115.

[40] McDonald v. Red Wing, 13-38(25); State v. Peterson, 50-239, 245, 52+655.

[41] See § 6983.

[42] Plainview v. Winona etc. Ry., 36-505, 515, 32+745.

[43] See § 1656.

[44] Stees v. Leonard, 20-494(448, 456).

[45] Greenleaf v. Edes, 2-264(226); Musser v. McRea, 44-343, 46+673.

[46] Bidwell v. Whitney, 4-76(45, 56); Sargeant v. Bigelow, 24-370.

[47] Lovell v. St. Paul, 10-290(229, 232); Joannin v. Ogilvie, 49-564, 52+217; Graham v. Burch, 53-17, 22, 55+64; Turner v. Fryberger, 99-236, 107+1133, 109+229; Rase v. Mpls. etc. Ry., 107-260, 120+360.

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IN GENERAL

6031. Nature—The lien is purely statutory; it had no existence at common law or in equity.[48] It is a "statutory security;" not a remedy.[49] It is not an estate or interest in realty within the statute of frauds.[50] It is of a continuing nature and binds the whole estate or interest of the debtor in the building and lot on which it stands.[51] It is not of a contractual nature.[52] It is cumulative, and does not exclude an action on the contract.[53]

6032. Application of statutes—Effect of change or repeal—Retroactive operation—Cases are cited below involving the operation and application of particular statutes relating to mechanics' liens, and the effect of repeals.[54]

6033. Construction of statutes—The statute is of a remedial nature and is to be construed liberally; at least, so far as the proceedings for the perfection and enforcement of the lien are concerned.[55] It is not to be strictly construed as to the parties entitled to a lien.[56] But it should not be extended beyond its legitimate scope to the prejudice of third parties.[57] It should be fairly and reasonably construed and applied so as to afford the security intended, upon a substantial compliance with its requirements, and at the same time afford reasonable protection to the rights of other parties who may have acquired an interest in the property.[58] It must have a reasonable and practical construction.[59]

[48] Bailey v. Mason, 4–546(430); Toledo N. Works v. Bernheimer, 8–118(92); Tuttle v. Howe, 14–145(113, 117); Freeman v. Carson, 27–516, 8+764; Rugg v. Hoover, 28–404, 10+473; Emery v. Hertig, 60–54, 58, 61+830; Jewett v. Iowa L. Co., 64–531, 535, 67+639.

[49] Atkins v. Little, 17–342(320, 331).

[50] Burns v. Carlson, 53–70, 54+1055.

[51] Colman v. Goodnow, 36–9, 29+338; Johnson v. Salter, 70–146, 72+974.

[52] Bailey v. Mason, 4–546(430); Coleman v. Ballandi, 22–144, 146.

[53] See R. L. 1905 § 3516.

[54] Bailey v. Mason, 4–546(430) (unperfected lien falls with repeal of law—under act of 1855 lien was not perfected by merely filing notice or petition for a lien); Mason v. Heyward, 5–74(55) (act of March 20, 1858, held to be retrospective as between owner and contractor and to give lien for work commenced before and finished after its passage); Willim v. Bernheimer, 5–288(229) (work done while act of 1855 was in force—lien not perfected until repeal of act of 1855 by act of March 20, 1858—application of act of August 12, 1858); Dunwell v. Bidwell, 8–34(18) (repeal of act of 1855 by act of March 20, 1858, there being no saving clause, destroyed all rights not perfected under act of 1855—saving clause in act of August 12, 1858 did not reach liens under act of 1855 destroyed by act of March 20, 1858); Toledo N. Works v. Bernheimer, 8–118(92) (repeal of act of March 20, 1858 by act of August 12, 1858); O'Neil v. St. Olaf's School, 26–329, 4+47 (legislature cannot provide for lien where none existed at time of contract with owner); Pond v. Robinson, 38–272, 37+99 (Laws 1887 c. 170, providing for liens in certain cases, was prospective in its operation—it repealed inconsistent acts, but did not expressly repeal G. S. 1878 c. 90—contracts previously made were governed by the former statute); Nelson v. Sykes, 44–68, 46+207 (Laws 1889 c. 200 was not retrospective and did not affect time for recording statements for liens accruing under prior law); Tell v. Woodruff, 45–10, 47+262 (lien statement, made according to Laws 1889 c. 200 § 8, where materials were in part furnished before act went into effect, held proper); Bardwell v. Mann, 46–285, 48+1120 (application of Laws 1889 c. 200—lien statement governed by law in force at time lien accrued); Hill v. Lovell, 47–293, 50+81 (id.); Nystrom v. London etc. Co., 47–31, 49+394 (application of Laws 1889 c. 200 as to time of bringing action to enforce lien); Wheaton v. Berg, 50–525, 52+926 (application of Laws 1889 c. 200 where materials were furnished under a contract made before but not performed until after act went into effect).

[55] Tuttle v. Howe, 14–145(113, 117); Rugg v. Hoover, 28–404, 10+473; Althen v. Tarbox, 48–18, 24, 50+1018; Tulloch v. Rogers, 52–114, 118, 53+1063; Coughlan v. Longini, 77–514, 80+695; Doyle v. Wagner, 100–380, 111+275.

[56] Emery v. Hertig, 60–54, 61+830.

[57] Farmers' Bank v. Winslow, 3–86(43).

[58] Rugg v. Hoover, 28–404, 10+473. See

6034. Constitutionality of statutes—The present statute has been held constitutional as against various objections.[60] The mechanic's lien act of 1887 was unconstitutional for various reasons,[61] but its title was sufficient.[62] The provisions of G. S. 1878 c. 90, providing a lien for subcontractors, was constitutional.[63]

6035. Basis of lien is consent of owner—The basis of the lien is the consent of the owner, expressed or implied.[64] But under the present law the lien does not necessarily rest on a contract with the owner.[65] All who have contributed to increase the value of the property by consent of the owner, or in pursuance of a contract with him for that purpose, should have an interest in it for the satisfaction of their claims.[66]

6036. Owner pledges credit of building—An owner who enters into a contract with a contractor for the erection of a building is deemed to contract with reference to the statute, which becomes a part of the contract, and in legal effect he thereby consents that the contractor may, subject to the conditions and limitations of the statute, pledge the credit of the building for the necessary labor and materials for its construction in accordance with the contract.[67]

6037. Improvements by persons not owners—Consent of owners—Notice—Statute—By statute a presumption of consent to improvements is raised against owners, and if they do not consent, they must serve a notice.[68] The statute is constitutional.[69] The presumption raised by the statute is only prima facie.[70] It establishes a rule of evidence in the nature of an equitable estoppel, where owners remain silent when improvements are being made on their property without their consent.[71] Lessors are required to give notice except as to repairs. A peaceable entry to post a notice is not a trespass.[72] Notice to an agent may be notice to the owner under the statute.[73] The burden of proving the posting of notice is on the owner.[74] The improvements mentioned in this statute are those mentioned in R. L. 1905 § 3505.[75] An exception is made in favor of bona fide incumbrancers.[76] It was held, prior to the revision of 1905, that Laws 1889 c. 200 § 5 was applicable to vendors under an executory contract to convey.[77] The posting must be in conformity to the statute.[78]

11 Harv. L. Rev. 467; Springer v. Ford, 168 U. S. 513.

[59] Howes v. Reliance etc. Co., 46–44, 48+448.

[60] Bardwell v. Mann, 46–285, 48+1120; Burns v. Sewell, 48–425, 51+224; Congdon v. Cook, 55–1, 56+253.

[61] Meyer v. Berlandi, 39–438, 40+513.

[62] State v. Brachvogel, 38–265, 36+641.

[63] Bohn v. McCarthy, 29–23, 11+127; Laird v. Moonan, 32–358, 20+354.

[64] O'Neil v. St. Olaf's School, 26–329, 4+47; Laird v. Moonan, 32–358, 20+354; Meyer v. Berlandi, 39–438, 40+513; Hill v. Gill, 40–441, 42+294; King v. Smith, 42–286, 44+65; Bardwell v. Mann, 46–285, 48+1120; Wheaton v. Berg, 50–525, 535, 52+926.

[65] Althen v. Tarbox, 48–18, 23, 50+1018.

[66] Knight v. Norris, 13–473(438); Laird v. Moonan, 32–358, 20+354; Hill v. Gill, 40–441, 42+ 294.

[67] Berger v. Turnblad, 98–163, 167, 107+543; Bardwell v. Mann, 46–285, 48+1120; Laird v. Moonan, 32–358, 20+354; Bohn v. McCarthy, 29–23, 11+127.

[68] R. L. 1905 § 3509.

[69] Congdon v. Cook, 55–1, 56+253.

[70] Wheaton v. Berg, 50–525, 52+926.

[71] Martin v. Howard, 49–404, 411, 52+34.

[72] Congdon v. Cook, 55–1, 56+253. See Ness v. Wood, 42–427, 44+313.

[73] Jefferson v. Leithauser, 60–251, 62+277; Sandberg v. Palm, 53–252, 54+1109.

[74] McCausland v. West Duluth L. Co., 51–246, 53+464.

[75] Co'vin v. Weimer, 64–37, 65+1079.

[76] Hill v. Aldrich, 48–73, 50+1020; Haupt v. Westman, 49–397, 52+33; Miller v. Stoddard, 50–272, 276, 52+895; Hewson v. Cook, 52–534, 54+751.

[77] Wheaton v. Berg, 50–525, 52+926. See Nolander v. Burns, 48–13, 17, 50+1016.

[78] Kraus v. Murphy, 38–422, 38+112.

PROPERTY SUBJECT TO LIEN

6038. Exemptions—Public property is exempt.[79] Homesteads are not now exempt,[80] but they were prior to the constitutional amendment of 1888.[81]

6039. Interests subject to lien—Who are owners—The word "owner" in the statute includes equitable owners, and those holding any estate or interest which the court may order sold.[82] One in possession will be presumed to be rightfully in possession and to have an interest in the land sufficient to sustain a lien.[83] The separate property of a married woman is chargeable,[84] and so is the interest of an executor or devisee,[85] and of a vendee under an executory contract to convey.[86]

6040. Covers land and buildings—Appurtenances—The lien attaches to the building and the land on which it is erected.[87] Though a mechanic's lien act is silent as to the land, it must be construed to include, as subject to the lien, that extent of ground, appurtenant to the building, which is reasonably necessary for its enjoyment.[88] Properties are not appurtenant to each other from the mere fact that they are used in different branches of the same business, which may be carried on separately, and derive the steam or power necessary to carry them on from a common source.[89] Proof that there is another building on the lot not connected with that for which the material is furnished, without showing the character of the former, or whether one building is or is not appurtenant to the other, is not sufficient to exclude any part of the lot from the operation of the lien.[90]

6041. Vendors—Forfeiture of executory contracts requiring improvements—It is provided by statute that whenever land is sold under an executory contract requiring the vendee to improve the same, and such contract is forfeited or surrendered after liens have attached by reason of such improvements, the title of the vendor shall be subject thereto; but he shall not be personally liable if the contract was made in good faith. When improvements are made by one person upon the land of another, all persons interested therein otherwise than as bona fide prior incumbrancers or lienors shall be deemed to have authorized such improvements, in so far as to subject their interests to liens therefor. But any person who has not authorized the same may protect his interest from such liens by serving upon the persons doing work or otherwise contributing to such improvement, within five days after knowledge thereof, written notice that the improvement is not being made at his instance, or by posting like notice, and keeping the same posted, in a conspicuous place on the premises: Provided, that as against a lessor no lien is given for repairs made by or at the instance of his lessee.[91]

[79] Jordan v. Board of Ed., 39–298, 39+801 (schoolhouse); Burlington Mfg. Co. v. Board Courthouse etc. Com'rs, 67–327, 69+1091 (courthouse). See Washington County v. Clapp, 83–512, 519, 86+775; Rowley v. Conklin, 89–172, 94+548.

[80] See § 4210.

[81] Cogel v. Mickow, 11–475(354); Englebrecht v. Rickert, 14–140(108); Coleman v. Ballandi, 22–144; Keller v. Struck, 31–446, 18+280; Meyer v. Berlandi, 39–438, 40+513; Bergsma v. Dewey, 46–357, 49+57.

[82] Atkins v. Little, 17–342(320); Benjamin v. Wilson, 34–517, 26+725; Carey v. Bierbauer, 76–434, 79+541.

[83] Colman v. Goodnow, 36–9, 29+338.

[84] Carpenter v. Leonard, 5–155(119); Tuttle v. Howe, 14–145(113); Smith v. Gill, 37–455, 35+178; Althen v. Tarbox, 48–18, 50+1018.

[85] See Cummings v. Halsted, 26–151, 1+1052; Ness v. Wood, 42–427, 44+313; Ness v. Davidson, 45–424, 48+10; Id., 49–469, 52+46.

[86] See § 6042.

[87] R. L. 1905 § 3505; King v. Smith, 42–286, 44+65.

[88] Meyer v. Berlandi, 39–438, 443, 40+513. See Carpenter v. Leonard, 5–155 (119).

[89] McDonald v. Mpls. L. Co., 28–262, 9+765. See Carpenter v. Leonard, 5–155 (119).

[90] Bergsma v. Dewey, 46–357, 49+57.

[91] R. L. 1905 § 3509; Nolander v. Burns, 48–13, 50+1016; Althen v. Tarbox, 48–18,

6042. Vendees—Interest under executory contract—The interest of a vendee, under an executory contract for the conveyance of realty, is subject to mechanics' liens.[92] The lien attaches to the entire estate of the vendee upon the completion of his contract.[93] The vendor and vendee cannot, by any stipulations between themselves alone, deprive third parties of their statutory right to a lien for labor or material subsequently furnished to the vendee for an improvement of the premises.[94] Upon default of the vendee, his interest will be treated as still outstanding for the purpose of enforcing liens established against it.[95]

6043. Follows proceeds of sale of building—Where a building was sold under a power paramount to a mechanic's lien, it was held proper to treat the lien as being transferred to the proceeds of the sale in the hands of the person who had authorized the improvement giving rise to the lien.[96]

6044. Railways, telegraph and telephone lines, etc.—Special provision is made by statute for a lien on railways, telegraph, telephone, and electric light lines, conduits, subways, etc.[97]

RIGHT TO LIEN

6045. Adaptation to improvement—The labor or material must be reasonably adapted to, or suitable for, the character of the building or improvement contracted for by the owner.[98]

6046. When materials are "furnished"—As a general rule, and at least as against bona fide purchasers or incumbrancers, materials are not "furnished" within the statute until they are actually delivered on the premises.[99] But as elsewhere pointed out, a lien may sometimes be acquired for materials that are never delivered on the premises or used in the building.[1] A materialman is entitled to a lien for all materials furnished by him up to the filing of the statement, though some of it is not actually put into the building at that time.[2] Materials may be "furnished" when originally delivered, though they are taken away from the premises temporarily for alterations. And materials may be "furnished" when they are originally delivered, though changes are made in them after delivery.[3]

6047. Product of labor not used in building—Where a laborer performed work at the shop of a contractor on certain ornamental plastering which the contractor would not allow to be placed in the building because of a dispute with the owner, it was held that he was entitled to a lien.[4]

6048. Materials furnished for particular building but not used therein—A lien may be had for materials furnished in good faith for a particular

50+1018; Hill v. Aldrich, 48–73, 77, 50+1020; Haupt v. Westman, 49–397, 402, 52+33; Wheaton v. Berg, 50–525, 52+926; McCausland v. West Duluth L. Co., 51–246, 53+464; Brown v. Jones, 52–484, 55+54; Borman v. Baker, 68–213, 215, 70+1075. See, under former statute, Hill v. Gill, 40–441, 42+294; McGlauflin v. Beeden, 41–408, 43+86; Boyd v. Blake, 42–1, 43+485; Hickey v. Collom, 47–565, 50+918.

[92] Hill v. Gill, 40–441, 443, 42+294; King v. Smith, 42–286, 44+65; Malmgren v. Phinney, 50–457, 52+915; Brown v. Jones, 52–484, 55+54.

[93] Brown v. Jones, 52–484, 55+54.

[94] Malmgren v. Phinney, 50–457, 52+915.

[95] Brown v. Jones, 52–484, 55+54.

[96] Ness v. Davidson, 49–469, 52+46.

[97] R. L. 1905 § 3507; Perry v. Duluth T. Ry., 56–306, 57+792 (one letting his teams and teamsters to a subcontractor to work on a railway held entitled to lien); Breault v. Archambault, 64–420, 424, 67+348. See, under former statute, Thompson v. St. P. C. Ry., 45–13, 47+259; Fleming v. St. P. C. Ry., 47–124, 49+661; Spafford v. Duluth etc. Ry., 48–515, 51+469; Fowlds v. Evans, 52–551, 54+743; Id., 60–513, 63+102.

[98] Laird v. Moonan, 32–358, 363, 20+354; Bardwell v. Mann, 46–285, 287, 48+1120. See Wisconsin etc. Co. v. Hood, 67–329 69+1091.

[99] Wentworth v. Tubbs, 53–388, 55+543.

[1] See §§ 6047, 6048.

[2] Milner v. Norris, 13–455(424).

[3] Johnson v. Gold, 32–535, 21+719.

[4] Berger v. Turnblad, 98–163, 107+543.

building actually constructed or in process of construction, though they are not used therein.[5]

6049. Knowledge of intended use—Sales of merchandise—Where, in the sale of materials, it is the mutual understanding that they are for the purpose of erecting or repairing a building, though no particular building is mentioned or understood, and no lien is contracted for, the materialman is entitled to a lien.[6] But a sale by a dealer on the personal credit of the purchaser, of a common article of merchandise, generally kept in the market, to one who is not the owner of the building, or a contractor or subcontractor under the owner, does not give a lien merely because the article is bought by the purchaser for the purpose of selling it again to the owner, and it is in fact bought by the owner and used in the building.[7] A mechanic has been held entitled to a lien for labor on granite columns, though he did not know for what particular building they were designed.[8]

6050. Building erected on wrong lot by mistake—Where a building was erected on a wrong lot owned by a third party, a materialman was held not entitled to a lien as against a mortgagee.[9]

6051. Delivery of materials out of state—The mere fact that materials actually used in a building are delivered to the contractor out of the state will not defeat a lien.[10]

6052. Limitations on amount of lien—If the labor is performed or material furnished under a contract with the owner and for an agreed price, the lien is limited to such price. In other cases it is limited to the reasonable value of the labor or materials.[11] It is limited to the premises improved, not exceeding one acre, in cities and villages.[12]

6053. Subcontractors—One who merely furnishes material, but takes no part in the construction of the work, is not a subcontractor.[13] The lien of a subcontractor may be enforced irrespective of the state of the accounts between the principal contractor and the owner.[14] Subcontractors of the second degree are within the statute.[15] To an extent not well defined, subcontractors must conform to the contract between the owner and the principal contractor.[16] Under the act of 1858 a subcontractor was not given a lien.[17] Under the act of 1855 a subcontractor was required first to prosecute his claim to judgment against his debtor and then proceed, by scire facias, against the owner. He could not recover judgment against his debtor and have it declared a lien upon the property in the same action.[18]

6054. Grading and excavating—Under a former statute a lien was not given for filling in and grading earth about buildings already erected, the work

[5] Hickey v. Collom, 47-565, 50+918; Burns v. Sewell, 48-425, 51+224; Combination S. & I. Co. v. St. P. C. Ry., 52-203, 208, 53+1144; Wentworth v. Tubbs, 53-388, 55+543; Paul v. Hormel, 61-303, 306, 63+718. See Howes v. Reliance etc. Co., 46-44, 48+448.

[6] Atkins v. Little, 17-342(320).

[7] Ryan v. Rowe, 66-480, 69+468; Forman v. St. Germain, 81-26, 83+438. See Pittsburg P. G. Co. v. Sisters, 83-29, 85+829.

[8] Emery v. Hertig, 60-54, 61+830.

[9] Smith v. Barnes, 38-240, 36+346. See Lingren v. Nilsen, 50-448, 52+915.

[10] Thompson v. St. P. C. Ry., 45-13, 47+259.

[11] R. L. 1905 § 3506; Laird v. Moonan, 32-358, 20+354; Bardwell v. Mann, 46-285, 289, 48+1120. See Leeds v. Little, 42-414, 44+309; Fergestad v. Gjertsen, 46-369, 49+127.

[12] R. L. 1905 § 3506; Tuttle v. Howe, 14-145(113); Egan v. Menard, 32-273, 20+197.

[13] Merriman v. Jones, 43-29, 44+526; Joannin v. Ogilvie, 49-564, 52+217.

[14] Laird v. Moonan, 32-358, 20+354.

[15] Spafford v. Duluth etc. Ry., 48-515, 51+469.

[16] Shaw v. First Baptist Church, 44-22, 46+146; Bardwell v. Mann, 46-285, 289, 48+1120; Wisconsin etc. Co. v. Hood, 67-329, 69+1091.

[17] Toledo N. Works v. Bernheimer, 8-118 (92).

[18] Emmet v. Rotary Mill Co., 2-286(248); Lewis v. Williams, 3-151(95).

being unconnected with the erection, alteration, or repair of any building or structure on the premises.[19] A hole drilled in the ground solely for the purpose of ascertaining whether there is ore underneath, is not an excavation within the meaning of the present statute.[20]

6055. Charges for transportation—A charge for the transportation of machinery to be repaired has been held a proper part of an account for repairing, and to be secured by a lien.[21]

6056. Claim assignable—Enforcement—A mechanic's lien, whether inchoate or perfected, is assignable, and the assignee may enforce it in his own name.[22] The transfer of a claim enforceable under the mechanic's lien law operates as an assignment of the right to a lien, including the right of the transferee to file the lien statement in his own name.[23] It has been said that where an assignee files a statement the facts by which he becomes subrogated to the rights of the contractor must appear.[24]

6057. Who may attack—One who has no interest in the premises cannot attack a lien claimed thereon.[25]

6058. Fraud and misconduct of contractor—One who performs labor or furnishes material at the request of a contractor has a right to a lien which cannot be defeated by the misconduct or fraud of the contractor.[26]

6059. Contracts made out of state—The fact that a contract for materials actually used in a building in this state was made out of the state is immaterial.[27]

6060. Held entitled to a lien—A laborer polishing granite columns at a quarry;[28] an architect;[29] one superintending the construction of a building;[30] one furnishing material to a subcontractor;[31] one furnishing permanent stationary machinery, in the nature of a fixture, for a shop;[32] one repairing machinery;[33] one furnishing material to a contractor for a particular building, though it was not so used;[34] a non-resident;[35] one letting his teams and teamsters to a subcontractor to do work on a railway;[36] one doing work at the shop of a contractor on certain ornamental plastering which the contractor would not allow to be placed in the building because of a dispute with the owner;[37] one preparing or manufacturing materials at his shop.[38]

6061. Held not entitled to a lien—One selling a common article of merchandise to one who is neither the owner of the building nor an agent, trustee, contractor or subcontractor of such owner;[39] one drilling in search of minerals.[40]

[19] Pratt v. Duncan, 36-545, 32+709.
[20] Colvin v. Weimer, 64-37, 65+1079.
[21] McKeen v. Haseltine, 46-426, 49+195.
[22] R. L. 1905 § 3548; Tuttle v. Howe, 14-145(113). See Sibley v. Pine County, 31-201, 17+337.
[23] Kinney v. Duluth Ore Co., 58-455, 60+23. See Davis v. Crookston etc. Co., 57-402, 59+482.
[24] Dye v. Forbes, 34-13, 17, 24+309.
[25] Cogel v. Mickow, 11-475(354).
[26] Howes v. Reliance etc. Co., 46-44, 48+448; Burns v. Sewell, 48-425, 51+224; Berger v. Turnblad, 98-163, 107+543.
[27] Atkins v. Little, 17-342(320, 331); Thompson v. St. P. C. Ry., 45-13, 15, 47+259.
[28] Emery v. Hertig, 60-54, 61+830.
[29] Knight v. Norris, 13-473(438); Gardner v. Leck, 52-522, 54+746; Wanganstein v. Jones, 61-262, 63+717.
[30] Wanganstein v. Jones, 61-262, 63+717.
[31] Pittsburg P. G. Co. v. Sisters, 83-29, 85+829.
[32] Pond v. Robinson, 38-272, 37+99.
[33] McKeen v. Haseltine, 46-426, 49+195.
[34] Burns v. Sewell, 48-425, 51+224. See Combination S. & T. Co. v. St. P. C. Ry., 52-203, 53+1144; Wentworth v. Tubbs, 53-388, 55+543; Paul v. Hormel, 61-303, 63+718.
[35] Atkins v. Little, 17-342(320, 331).
[36] Perry v. Duluth T. Ry., 56-306, 57+792.
[37] Berger v. Turnblad, 98-163, 107+543.
[38] Howes v. Reliance etc. Co., 46-44, 48+448.
[39] Ryan v. Rowe, 66-480, 69+468; Forman v. St. Germain, 81-26, 83+438. See Pittsburg P. G. Co. v. Sisters, 83-29, 85+829.
[40] Colvin v. Weimer, 64-37, 65+1079.

PRIORITIES

6062. When lien attaches—The time when liens attach, as against the owner and purchasers and incumbrancers, is prescribed by statute.[41]

6063. Delivery of materials at wrong place—A lien has been held to attach where materials were to be paid for on delivery at one place and they were delivered without payment at another place, the latter place being where the building was situated.[42]

6064. No priority as between mechanics' liens—The liens of all mechanics and materialmen attach as of the date of the performance of the first work or the delivery of the first material on the ground. There is no priority among them in connection with the same building or improvement, where the work is of a continuous nature. All are co-ordinate and share alike regardless of the time the particular work is done or materials furnished.[43]

6065. Priority between mechanics' liens and mortgages—Mortgages attaching during the course of an improvement are subordinate to the liens of all who contribute labor or materials to the completion of the improvement, whether before or after the attachment of the mortgage. Where the erection of a building is one continuous undertaking, with nothing to suggest an abandonment of the work at any time, a mortgage or other incumbrance or distinct lien, originating subsequently to the commencement of the work upon the ground, or the furnishing of materials at the same place, whether by one general contractor or by independent contractors, must be postponed and subordinated to the lien claims of all who have contributed to the completion of the structure by their labor or materials.[44] Laws 1895 c. 101 did not change this rule.[45] The law as to the priority between mortgages and mechanics' liens was radically changed by Laws 1895 c. 101 and the provision for filing notice found in R. L. 1905 § 3508. Cases are cited below involving questions as to priority between mortgages and mechanics' liens under former statutes.[46]

[41] R. L. 1905 § 3508; Glass v. Freeburg, 50-386, 52+900; Wentworth v. Tubbs, 53-388, 55+543; Miller v. Stoddard, 54-486, 56+131. See, under the act of 1855, Farmers' Bank v. Winslow, 3-86(43); Knox v. Starks, 4-20(7); Dunwell v. Bidwell, 8-34(18).

[42] Atkins v. Little, 17-342(320).

[43] Glass v. Freeburg, 50-386, 52+900; Wentworth v. Tubbs, 53-388, 55+543; Miller v. Stoddard, 54-486, 56+131.

[44] Glass v. Freeburg, 50-386, 52+900; Gardner v. Leck, 52-522, 54+746; Ortonville v. Geer, 93-501, 101+963.

[45] Ortonville v. Geer, 93-501, 101+963.

[46] Knox v. Starks, 4-20(7) (mortgage recorded before materials furnished on the ground—priority under act of 1855); Dunwell v. Bidwell, 8-34(18) (effect of repeal of act of 1855 by act of 1858 on priority of mortgage executed in 1857); Milner v. Norris, 13-455(424) (materials furnished under a continuous contract before and after execution of mortgage); Oliver v. Davy, 34-292, 25+629 (deed and purchase-money mortgage both unrecorded—mortgage preferred to mechanic's lien); Smith v. Barnes, 38-240, 36+346 (mistake as to lot); McKeen v. Haseltine, 46-426, 49+195 (acceptance of new for old mortgage in ignorance of intervening liens—reinstatement of original mortgage refused); Finlayson v. Crooks, 47-74, 49+398, 645 (mortgage intervening between liens—distribution of proceeds of sale—priorities); Reilly v. Williams, 47-590, 50+826 (purchase-money mortgage subject to lien); Hill v. Aldrich, 48-73, 50+1020 (mechanic's lien held subject to vendor's mortgage); Haupt v. Westman, 49-397, 52+33 (vendor holding purchase-money mortgage held a bona fide prior mortgagee under Laws 1889 c. 200 § 5—priority over mechanic's lien); Martin v. Howard, 49-404, 52+34 (mortgage to secure fictitious debt); Miller v. Stoddard, 50-272, 52+895 (mechanic's lien held subject to unrecorded mortgage—recording act held not to require mortgagee to record his mortgage as against mechanics' liens); Glass v. Freeburg, 50-386, 52+900 (mortgage subordinate to all mechanics' liens attaching during progress of work); Malmgren v. Phinney, 50-457, 52+915 (several mortgages—order of payment); Noerenberg v. Johnson, 51-75, 52+1069 (priority of unrecorded mortgage); McCausland v. West Duluth L. Co., 51-246, 53+464; Moody v. Tschabold, 52-51, 53+1023 (when mortgage for purchase price is superior to me-

6066. Priority between purchasers and lienors—The lien of one furnishing materials, attaches as against a person, who, in good faith and without notice, purchases the premises subsequently to the erection of the building in which the materials are used, and prior to the filing and recording of the account.[47]

LOSS, WAIVER, AND SATISFACTION

6067. Unlawful removal of buildings—The removal of a building from land on which a mechanic's lien exists is a criminal offence under certain conditions.[48]

6068. Work done by substitute—The fact that a part of the work for which a lien was claimed was not done by the claimant personally, but by a substitute employed by him, has been held not to defeat the lien, where objection was not made until after trial.[49]

6069. Arrest or abandonment of work by owner—An arrest or abandonment of an improvement by the owner will not defeat a lien for labor or materials already performed or furnished.[50]

6070. Destruction of buildings—The right to a lien is not defeated by a destruction of the building on which labor has been performed, or for which materials have been furnished. The lien may be enforced against the land on which the building stands.[51]

6071. Satisfaction of record—By statute one who wrongfully refuses to satisfy a lien of record is liable for resulting damages, and a penalty of twenty-five dollars.[52]

6072. Waiver—It is provided by statute that the taking of a note or other written obligation to pay any indebtedness for which a lien is given shall not discharge such lien unless the obligation by its terms shall so provide, or the time for payment be thereby extended beyond the date fixed by law for enforcing such lien.[53] As between the parties the question of waiver is largely one of intention.[54] A rescission by mutual consent of a partly performed building contract has been held not to constitute a waiver.[55] A formal waiver of a lien has been held ineffectual for a want of consideration.[56] A lien is waived or discharged where the parties enter into a special agreement incon-

chanics' liens); Bassett v. Menage, 52-121, 53+1064 (mortgage held subordinate to mechanics' liens); Gardner v. Leek, 52-522, 54+746 (mortgage subordinate to all mechanics' liens attaching during progress of work); Hewson v. Cook, 52-534, 54+751 (mortgage held subordinate to mechanics' liens—mortgagees excepted by Laws 1889 c. 200 § 5 must not only be bona fide, but their mortgages must be prior in point of time); Wentworth v. Tubbs, 53-388, 55+543 (mortgage subordinate to all mechanics' liens attaching during progress of work—mortgagee held not entitled to be subrogated to rights of holders of certain lienable claims); Miller v. Stoddard, 54-486, 56+131 (effect of registry law—unrecorded mortgages—mechanics' liens held superior to second mortgage—all mechanics' liens co-ordinate); Nash v. Adams, 55-46, 56+241 (priority—res judicata); Wetmore v. Royal, 55-162, 56+594 (incorrect lien statement not reformed to prejudice of subsequent mortgagee); Borman v. Baker, 68-213, 70+1075 (findings as to priority sustained).

[47] Cogel v. Mickow, 11-475(354); Atkins v. Little, 17-342(320, 333).

[48] R. L. 1905 § 5108. See Bean v. Cochran, 24-60 (proof requisite to maintain action under Laws 1869 c. 64).

[49] Egan v. Menard, 32-273, 20+197.

[50] Howes v. Reliance etc. Co., 46-44, 48+448; Knight v. Norris, 13-473(438).

[51] Freeman v. Carson, 27-516, 8+764.

[52] R. L. 1905 § 3551; Houlihan v. Keller, 34-407, 26+227 (requisites of complaint under statute).

[53] R. L. 1905 § 3550; Milwain v. Sanford, 3-147(92); Howe v. Kindred, 42-433, 44+311; McKeen v. Haseltine, 46-426, 49+195; Flenniken v. Liscoe, 64-269, 66+979; Butler v. Silvey, 70-507, 73+406, 510.

[54] Howe v. Kindred, 42-433, 44+311; McKeen v. Haseltine, 46-426, 49+195. See St. Paul L. E. Co. v. Eden, 48-5, 50+921.

[55] Bruce v. Lennon, 52-547, 54+739.

[56] Abbott v. Nash, 35-451, 29+65. See St. Paul L. E. Co. v. Eden, 48-5, 50+921.

sistent with the existence of a lien; as, for example, by the laborer or materialman extending credit to the owner beyond the statutory period for bringing an action to enforce the lien.[57] A lien may be waived by a written instrument, supported by a money consideration therein expressed, the money being paid by third parties, who have acquired property rights in the premises, though a sum less than the amount due is actually paid.[58]

6073. Transfer of title—Estoppel—The right to a lien is not lost by a mere transfer of the title to the premises. The doctrine of estoppel sometimes prevents a transferee from defeating a lien.[59]

6074. Including non-lienable items—Adjustment of account—A mechanic's lien is not defeated by including in the account filed lienable and non-lienable items furnished under the same contract, provided the lienable items, and their prices, are separable from the others. The fact that the parties have had an accounting, and adjusted the amount due on the whole account, will not destroy the lien, or prevent the court from eliminating the non-lienable items in a suit to enforce the lien.[60]

6075. Payment of account—A payment of a claim defeats a lien therefor.[61] An application, generally, upon an account, of a payment less than the amount of the lienable items therein, will not extinguish the whole lien.[62]

6076. Non-performance of contract—A contractor who has failed to perform substantially his contract with the owner cannot have a lien.[63] A substantial performance is sufficient.[64]

LIEN STATEMENT

6077. In general—The right to a lien is dependent on the filing of the statutory statement.[65] It has been said in some of our cases that the filing for record of the verified statement operates as the creation of the lien.[66] This is inaccurate. It is merely the means of preserving and perfecting it. It is the performance of the work, or the furnishing of the material, which gives the right to a lien. The provisions of the statute as to filing the statement are merely remedial in their nature.[67] The statement need not contain all the facts giving rise to the lien. It is sufficient if it conforms to the specific requirements of the statute. What the statute may specifically require in the statement should not be confounded with the conditions of fact which may be necessary to the existence of a lien.[68] Filing the statement is not a proceeding to enforce the lien, but to preserve and continue it.[69] It operates as notice to all interested parties of the existence of the lien.[70] Under a former statute it was held that the affidavit or statement must conform in matters of substance to the requirements of the statute,[71] but under the present statute the existence of a lien is unaffected by inaccuracies in the particulars of a

[57] Flenniken v. Liscoe, 64–269, 66+979; Shaw v. Fjellman, 72–465, 75+705; Westinghouse v. Kansas City etc. Ry., 137 Fed. 26, 37. See Butler v. Silvey, 70–507, 73+406, 510; Cushing v. Hurley, 127+441.

[58] Burns v. Carlson, 53–70, 54+1055.

[59] Colman v. Goodnow, 36–9, 29+338; King v. Smith, 42–286, 44+65; Wanganstein v. Jones, 61–262, 63+717. See Howes v. Reliance etc. Co., 46–44, 48+448.

[60] Dennis v. Smith, 38–494, 38+695.

[61] Jamison v. Ray, 73–249, 75+1049.

[62] Dennis v. Smith, 38–494, 38+695.

[63] Uldrickson v. Samdahl, 92–297, 100+5.

[64] Hankee v. Arundel R. Co., 98–219, 108+842.

[65] Meyer v. Berlandi, 39–438, 448, 40+513.

[66] Rugg v. Hoover, 28–404, 407, 10+473; Meyer v. Berlandi, 39–438, 448, 40+513.

[67] Bardwell v. Mann, 46–285, 48+1120.

[68] Hurlbert v. New Ulm B. Works, 47–81, 49+521.

[69] Hill v. Lovell, 47–293, 50+81.

[70] Rugg v. Hoover, 28–404, 407, 10+473; Meyer v. Berlandi, 39–438, 448, 40+513.

[71] Clark v. Schatz, 24–300; Keller v. Houlihan, 32–486, 21+729; Smith v. Headley, 33–384, 23+550; St. Paul etc. Co. v. Stout, 45–327, 47+974; Fleming v. St. P. C. Ry., 47–124, 49+661.

statement.[72] A statement is to be liberally construed. Technical objections are disfavored.[73] Surplusage does not vitiate.[74] The inclusion of non-lienable items is not fatal, if they are separable from the lienable items.[75] Several claims may be included in one statement.[76] Defects in a statement cannot be remedied by averments in the complaint.[77]

6078. Name of owner—The statute requires the statement to give the name of the owner of the premises at the time of making the statement, according to the best information then had.[78] This is not a matter of substance, but is merely directory. In other words a failure to comply with this provision exactly is not fatal.[79]

6079. Description of premises—The description need not be as full and precise as in a deed or judgment. It is sufficient if it describes the property with reasonable certainty, so as to put interested parties on inquiry and enable them to identify it.[80] This rule applies where third parties have acquired intervening rights.[81] It is proper practice to describe the premises by reference to a recorded plat or the government survey.[82] Where the tract exceeds the statutory limit, it is unnecessary for the claimant to carve out the statutory quantity in his statement.[83] The building on the land need not be described by its common name or otherwise.[84] A false particular may be disregarded.[85] A description giving the correct number of the lot, an erroneous number of the block, and properly describing the addition, with the correct number of the building on a street, has been held sufficient.[86] A description of the wrong lot has been held fatal.[87] When the building is described so as to identify it, and the tract of land upon which it stands is described, the fact that the claimant embraces in his claim for a lien other lands not included in the tract and curtilage upon which the building is situated (no fraud being suggested, and it not appearing that any person has been misled, or his rights prejudiced), will not invalidate the lien, but it will be held good to the extent it is recognized by the statute.[88]

6080. Dates of first and last items—The statement must include the dates when the first and last items of the claimant's contribution to the improvement were made.[89] This is not a matter of substance. It is immaterial that the dates are not correctly stated, if no one is prejudiced thereby and the statement is filed in due time.[90]

[72] R. L. 1905 § 3549; Finlayson v. Biebighauser, 51-202, 206, 53+362; Tulloch v. Rogers, 52-114, 119, 53+1063; Bassett v. Menage, 52-121, 127, 53+1064; Evans v. Sanford, 65-271, 272, 68+21; Doyle v. Wagner, 100-380, 111+275.

[73] See § 6033 and R. L. 1905 § 3549.

[74] Paul v. Hormel, 61-303, 63+718; Barndt v. Parks, 103-360, 115+197.

[75] Dennis v. Smith, 38-494, 38+695.

[76] Benjamin v. Wilson, 34-517, 26+725; Kinney v. Duluth Ore Co., 58-455, 60+23.

[77] Olson v. Pennington, 37-298, 33+791.

[78] R. L. 1905 § 3511(6).

[79] Hurlbert v. New Ulm B. Works, 47-81, 49+521; Finlayson v. Biebighauser, 51-202, 53+362.

[80] Russell v. Hayden, 40-88, 41+456; N. W. etc. Co. v. Norwegian etc. Seminary, 43-449, 45+868; Nystrom v. London etc. Co., 47-31, 49+394; Fleming v. St. P. C. Ry., 47-124, 49+661; Tulloch v. Rogers, 52-114, 53+1063; Bassett v. Menage, 52-121, 53+1064; Evans v. Sanford, 65-271, 68+21; Doyle v. Wagner, 100-380, 111+275.

[81] Tulloch v. Rogers, 52-114, 53+1063.

[82] N. W. etc. Co. v. Norwegian etc. Seminary, 43-449, 45+868.

[83] North Star etc. Co. v. Strong, 33-1, 21+740; Smith v. Headley, 33-384, 23+550; Boyd v. Blake, 42-1, 43+485; Evans v. Sanford, 65-271, 68+21.

[84] N. W. etc. Co. v. Norwegian etc. Seminary, 43-449, 45+868; Johnson v. Salter, 70-146, 72+974.

[85] N. W. etc. Co. v. Norwegian etc. Seminary, 43-449, 45+868; Evans v. Sanford, 65-271, 68+21.

[86] Doyle v. Wagner, 100-380, 111+275.

[87] Lingren v. Nilsen, 50-448, 52+915.

[88] North Star etc. Co. v. Strong, 33-1, 21+740.

[89] R. L. 1905 § 3511(4).

[90] Coughlan v. Longini, 77-514, 80+695; Wetmore v. Royal, 55-162, 56+594; Lundell v. Ahlman, 53-57, 54+936; Miller v. Condit, 52-455, 463, 55+47; Althen v. Tarbox, 48-18, 50+1018.

6081. Reference to law—The statutes of this state do not require the statement of a mechanic's lien to designate the law under which it is claimed. A reference in such a statement to the mechanic's lien statute of 1889 as the basis of a claim of lien under the present statute has been held immaterial.[91]

6082. One building on several lots—Separate owners—Where the several owners of two contiguous lots unite in a joint contract for the construction of one building, to be situated in part on each, both lots may, for the purposes of mechanics' liens, be treated as one tract, and a single claim for a lien for labor or material performed or furnished for the construction of the building may be filed against both lots. But the lien claimant may nevertheless, in enforcing his lien, sever his claim, and obtain judgment against each lot separately, provided he proves what part or proportion of such labor or material entered into the construction of the part of the building situated on each, and provided the rights of third parties are not thereby prejudiced.[92] Two owners in severalty of contiguous city or platted lots may by their acts connect them so as to constitute one lot, within the meaning of the lien law. They do so connect them when they treat them as one tract for the purpose of building, as where they join in the construction of a single building on both lots, and in such case those doing work on or furnishing material for the building will have a right to claim a lien on the whole building and both lots. Such will also be the case where the owner of one of the lots constructs such single building on both lots, with the knowledge and consent of the owner of the other lot. In such case, one who does work or furnishes material upon a part of the building situate on one of the lots may claim a lien on the whole building and both lots.[93]

6083. Two or more buildings—A lienor who has contributed to the erection, alteration, removal, or repair of two or more buildings or other improvements situated upon or removed to one lot, or upon or to adjoining lots, under or pursuant to the purposes of one general contract with the owner, may file one statement for his entire claim, embracing the whole area so improved; or, if he so elects, he may apportion his demand between the several improvements, and assert a lien for a proportionate part upon each, and upon the ground appurtenant to each respectively.[94]

6084. Contract with owner or agent—Under a former statute it was necessary that the statement should show that the work was performed or materials furnished under a contract with the owner or his agent—that his consent, express or implied, should be made to appear.[95] Under the present statute this is unnecessary.[96]

[91] Barndt v. Parks, 103-360, 115+197.

[92] Miller v. Shepard, 50-268, 52+894; Kinney v. Mathias, 81-64, 83+497.

[93] Menzel v. Tubbs, 51-364, 53+653.

[94] R. L. 1905 § 3512. See Lax v. Peterson, 42-214, 44+3 (meaning of "lot of land"—entire contract for row of detached buildings on two contiguous lots—lien on entire tract—effect of filing separate liens against each building); Glass v. St. Paul etc. Co., 43-228, 45+150 (several buildings on one lot—preceding case followed); Knauft v. Miller, 45-61, 47+313 (separate contracts for two houses on two lots—subcontract for labor and material for both houses); Reilly v. Williams, 47-590, 50+826 (entire contract for two houses—release of one—enforcement of lien against the other); Gardner v. Leck, 52-522, 54+746 (one lien on two houses on same city lot—unnecessary for merchant to keep separate accounts of goods furnished for each house or to file separate lien statements thereon); Johnson v. Salter, 70-146, 72+974 (three buildings on contiguous lot—one owner—unnecessary to file separate lien statements or to apportion amount of lien).

[95] Clark v. Schatz, 24-300; Rugg v. Hoover, 28-404, 10+473; Keller v. Houlihan, 32-486, 21+729; Anderson v. Knudsen, 33-172, 22+302; Smith v. Headley, 33-384, 388, 23+550; Dye v. Forbes, 34-13, 17, 24+309; Morrison v. Philippi, 35-

6085. Claim of lien—The statute requires the statement to contain a notice of intention to claim and hold a lien, and the amount thereof.[97] This, however, is not a matter of substance, and a failure to claim a lien expressly is not fatal.[98] It is unnecessary to claim a lien on buildings, in addition to a claim on the land on which they rest.[99]

6086. Verification—The statute requires the statement to be verified by the oath of some person shown by such verification to have knowledge of the facts stated.[1]

6087. Time of filing—The statement must be filed within ninety days after doing the last of the work, or furnishing the last item of skill, material, or machinery.[2] Cases are cited below involving questions as to the time of filing the statement where materials are furnished for the same job at different times as a continuous transaction;[3] where labor is performed and materials furnished under a series of contracts, relating to a single building;[4] where, after the completion of a job, repairs or additions are made to supply omissions or remedy defects;[5] where materials are changed;[6] where "extras" are furnished;[7] where work is suspended for a time, with the consent of the owner;[8] and where new material is furnished in place of the original, in pursuance of a warranty.[9] A statement which shows on its face that it was filed too late is ineffectual, even though the fact may have been otherwise.[10] A statement which is filed prematurely is ineffectual. Under Laws 1899 c. 277, a contractor was not authorized to file a statement until the expiration of the time therein fixed, within which the owner might demand of the contractor a verified statement of the amounts due from him to laborers or materialmen under him.[11]

6088. Who may file—A statement may be filed by an assignee of a claim,[12] or by one who has assigned a claim as collateral security.[13] It cannot be filed by one who has made an absolute assignment of his claim, at least for his own benefit. Possibly he may file for the benefit of his assignee.[14] Mere guarantors of a contract are not entitled to file.[15]

192, 28+239; McGlauflin v. Beeden, 41-408, 43+86; Conter v. Farrington, 46-336, 48+1134.

[96] Hurlbert v. New Ulm B. Works, 47-81, 49+521.

[97] R. L. 1905 § 3511. See, under act of 1855, McCarty v. Van Etten, 4-461(358).

[98] Smith v. Headley, 33-384, 23+550.

[99] Johnson v. Salter, 70-146, 72+974.

[1] R. L. 1905 § 3511; Colman v. Goodnow, 36-9, 29+338 (before register of deeds—jurat without seal of register—not entitled to record); Wood v. St. P. C. Ry., 42-411, 44+308 (before notary in another state); Hickey v. Collom, 47-565, 50+918 (before notary in another state—authentication of notary's authority); Nordine v. Knutson, 62-264, 64+565 (verification to effect that affiant was the person named as claimant in the foregoing claim for a lien, "that he had knowledge of the facts therein stated and that the same were true," held sufficient).

[2] R. L. 1905 § 3511.

[3] Johnson v. Gold, 32-535, 21+719; Frankoviz v. Smith, 34-403, 26+225; State S. & D. Mfg. Co. v. Norwegian etc. Seminary, 45-254, 47+796; St. Paul etc. Co. v. Stout, 45-327, 47+974; Linne v. Stout, 41-483, 43+377; Paul v. Hormel, 61-303, 63+718. See Dayton v. Mpls. R. & I. Co., 63-48, 65+133; Fitzpatrick v. Ernst, 102-195, 113+4.

[4] Fitzpatrick v. Ernst, 102-195, 113+4.

[5] Shaw v. Fjellman, 72-465, 75+705; Mpls. T. Co. v. G. N. Ry., 74-30, 76+953; Id., 81-28, 83+463. See Dayton v. Mpls. R. & I. Co., 63-48, 65+133.

[6] Scheible v. Schickler, 63-471, 65+920; Coughlan v. Longini, 77-514, 80+695. See Johnson v. Gold, 32-535, 21+719.

[7] Lundell v. Ahlman, 53-57, 54+936; Coughlan v. Longini, 77-514, 80+695.

[8] McCarthy v. Groff, 48-325, 51+218. See Knight v. Norris, 13-473(438).

[9] Scheible v. Schickler, 63-471, 65+920.

[10] Olson v. Pennington, 37-298, 33+791.

[11] Clark v. Anderson, 88-200, 92+964.

[12] See § 6056.

[13] Davis v. Crookston etc. Co., 57-402, 59+482.

[14] Id.

[15] Dye v. Forbes, 34-13, 24+309.

6089. Recording—The failure of a register to record a statement filed with him for record is not fatal.[16] Where a new county was formed out of the territory of an old county, it was held, under the circumstances of the particular case, that a lien statement should have been filed with the register of deeds in the new county.[17] A statement may be withdrawn from the register's office after it is recorded.[18]

6090. Amendment—A mechanic's lien statement cannot, as to third persons who have acquired rights and interests in the land covered thereby adverse to the lien claimant, be amended to the prejudice of the rights of such third persons after it has been filed in the office of the register of deeds, and after the expiration of the time limited by statute for filing of the same. The general statute providing for amendments to proceedings in court, has no application to a mechanic's lien statement.[19]

6091. Sufficiency under obsolete statutes—Various cases are cited below involving the sufficiency of particular statements, accounts, or affidavits of claim, under obsolete statutes.[20]

INDEMNITY BONDS AGAINST LIENS

6092. Bonds in lieu of lien under G. S. 1878 c. 90 § 3—It was provided by G. S. 1878 c. 90 § 3, that if the contractor should enter into a bond with the owner for the use of all persons who might do work or furnish materials pursuant to his contract with the owner, conditioned for the payment of all just claims for such work or materials as they became due, no lien should attach in favor of such persons, provided a notice, setting forth the existence of such bond, be kept conspicuously posted about the premises during the performance of such labor, and at the time of furnishing such material.[21]

[16] Smith v. Headley, 33–384, 23+550.

[17] Meehan v. Zeh, 77–63, 79+655. See Creamery etc. Co. v. Tagley, 91–79, 97+412.

[18] Paul v. Nample, 44–453, 47+51.

[19] Meehan v. St. P. etc. Ry., 83–187, 86+19. See Wetmore v. Royal, 55–162, 56+594.

[20] Knight v. Norris, 13–473(438) (a description of services as for "plans and specifications and superintendence of building" the time and price, and particular building being specified, held sufficient); Atkins v. Little, 17–342(320) (statement for furnishing engine and appurtenances held sufficient); Clark v. Schatz, 24–300 (must show contract with owner or agent—statutory form must be followed in substance); Keller v. Houlihan, 32–486, 21+729 (affidavit by subcontractor—statutory form must be followed in substance—affidavit omitting to state to whom materials were furnished, or that the building was erected under a contract with the owner, or with his consent, held fatally defective); Smith v. Headley, 33–384, 23+550 (description of materials—use of abbreviations); Anderson v. Knudsen, 33–172, 22+302 (must show contract with owner or his consent); Merriman v. Bartlett, 34–524, 26+728 (affidavit of subcontractor—must show that person with whom he dealt was a contractor with the owner); Dye v. Forbes, 34–13, 24+309 (affidavit showing claimants not parties to contract with owner, but were guarantors, held insufficient); Abbott v. Nash, 35–451, 29+65 (necessity of filing written contract under G. S. 1878 c. 90 § 6); McGlauflin v. Beeden, 41–408, 43+86 (contract of sale requiring purchaser to build—lien on vendor's estate—statement held not to connect claimant with owner sufficiently); Lax v. Peterson, 42–214, 44+3 (statement of subcontractor—sale by owner—statement that materials were furnished to contractor of grantee instead of grantor, held not fatal); Leeds v. Little, 42–414, 44+309 (statement of subcontractor—description in gross of labor and material, according to annexed contract between principal contractor and subcontractor, held sufficient); Johnson v. Stout, 42–514, 44+534 (id.); St. Paul etc. Co. v. Stout, 45–327, 47+974 (statutory affidavit prescribed in G. S. 1878 c. 90 § 18 must be followed in substance); Fleming v. St. P. C. Ry., 47–124, 49+661 (necessity of stating to and for whom labor or material is furnished and the contract relation of the claimant with such person).

[21] Bohn v. McCarthy, 29–23, 11+127 (bond as substitute for lien—subcontractor has right of action on bond without statutory steps to perfect his lien—time for bringing action on bond not limited by

6093. Indemnifying bonds of contractors—Independent of statute, building contractors often execute to the owner a bond to indemnify him against the claims of mechanics and materialmen. Such bonds are governed by the general principles applicable to indemnifying bonds and suretyship.[22] The subject of indemnifying bonds by public contractors is considered elsewhere.[23]

6094. Indemnifying bonds of subcontractors—Where a subcontractor executed an indemnifying bond to the principal contractor, it was held that the latter had a right of action on the bond as soon as he was compelled to pay for materials furnished to the subcontractor.[24]

6095. Indemnifying bonds of mortgagors and grantors—Cases are cited below involving indemnifying bonds, against mechanics' liens, executed by mortgagors [25] and grantors.[26]

6096. Contracts for idemnifying bonds—A lessor has been held entitled to recover for breach of a contract by his lessee to furnish an indemnifying bond against mechanics' liens arising out of certain improvements made in the premises by the lessee.[27]

period prescribed for perfecting liens); Price v. Doyle, 34-400, 26+14 (bond insufficient under statute enforceable as a common-law obligation); Kraus v. Murphy, 38-422, 38+112 (necessity of posting notice); Steffes v. Lemke, 40-27, 41+302 (immaterial what interest the nominal obligee has, or that he has or has not any interest, in the land on which the building is to be constructed, if he is the person who, as owner, has contracted to have the building constructed—rights of mechanics and materialman cannot be affected, against the sureties, by any agreement or act of the principal obligor and nominal obligee—extension of time for completing building does not affect obligation of sureties); St. Paul F. Co. v. Wegmann, 40-419, 42+288 (requisites of complaint in action on bond—unnecessary that principal contractor should have fully performed his contract—measure of damages—contract price); Burns v. Maltby, 43-161, 45+3 (admission—pleadings in former action); Jefferson v. McCarthy, 44-26, 46+140 (conclusiveness of recitals—recital that principal is corporation); Abbott v. Morrissette, 46-10, 48+416 (bond as substitute for lien—to be construed with reference to statute—effect of one contractor assigning his interest in contract to his co-contractor); Holcombe v. Mattson, 50-324, 52+857 (abandonment of work by contractor—completion of work by owner—sureties not liable for expenditures of owner in completing work).

[22] Price v. Doyle, 34-400, 26+14 (liability on bond where owner voluntarily and unnecessarily pays a debt of the contractor for materials); Simonson v. Grant, 36-439, 31+861 (discharge of surety by alteration of contract—mere existence of unpaid claims, for which no lien has been perfected, is not a breach); Robinson v. Hagenkamp, 52-101, 53+813 (sureties become principals by undertaking to complete work—not discharged by changes in work—time of payments to contractor immaterial—action by lienor no defence); Erickson v. Brandt, 53-10, 55+62 (sureties held released by change of contract in respect to plan and materials); McHenry v. Brown, 66-123, 68+847 (rules stated in Robinson v. Hagenkamp, 52-101, 53+813 applied); Graves v. Merrill, 67-463, 70+562 (sureties held not released by certain payments to the contractor by the owner); Norwegian etc. Cong. v. U. S. etc. Co., 81-32, 83+487 (changes in plans and specifications held not to release sureties—admissibility of evidence); Id., 83-269, 86+330 (increase in cost of building—release of sureties); Lakeside L. Co. v. Empire State S. Co., 105-213, 117+431 (delay in construction—failure to give notice to surety company of delay—surety not released).

[23] See § 6720.

[24] Cassan v. Maxwell, 39-391, 40+357.

[25] Am. B. & L. Assn. v. Waleen, 52-23, 53+867 (bond held to be a mere contract of indemnity—mortgagee held not to sustain damage where debt was paid by foreclosure); Am. B. & L. Assn. v. Stoneman, 53-212, 54+1115 (id.); Am. B. & L. Assn. v. Dahl, 54-355, 56+47 (terms of bond held not varied by proof of independent oral agreement); Mechanics' S. Bank v. Thompson, 58-346, 59+1054 (bond held to be a mere contract of indemnity—measure of damages—mortgagee held entitled to substantial damages though debt secured by mortgage was not yet due); Pioneer S. & L. Co. v. Freeburg, 59-230, 61+25 (first case above followed).

[26] Reed v. McGregor, 62-94, 64+88 (consideration held sufficient—sureties held not released by payment of purchase price to vendor—failure of another to sign bond as surety—judgment in action to foreclose lien binding on surety).

[27] Boston etc. Co. v. Benz, 66-99, 68+602

ACTION TO FORECLOSE

6097. Nature—An action to foreclose a mechanic's lien is not a special statutory proceeding, but an ordinary civil action, proceeding according to the usual course of the law, and governed by the same rules of procedure as other similar actions, except as otherwise expressly provided by statute.[28] It is an action in personam.[29] The statute intends that, when an action is brought by any mechanic's lien claimant, it shall be a proceeding to enforce all such liens on the same property, the holders of which choose to appear or who may be required to appear therein. When not named as plaintiffs, they appear and make their claim by filing their answers, of which all parties to the action must take notice. This being the nature of the action, the owner has notice by the service of the summons that he may be called on to meet those claims, and that he is brought into court for that purpose, for the summons must state that the action is for the foreclosure of a mechanic's lien. The action, as the owner is thus apprised, is one to marshal the liens upon the property, and, being in court for that purpose, he has notice of each lien claim by the filing of the answer.[30] The action is of an equitable nature and the flexible rules of equitable procedure are to be followed.[31]

6098. Only one action allowable—Consolidation of separate actions—Only one action is allowable. All lienors not parties to the original action must intervene therein and assert their claims. Provision is made by statute for consolidating separate actions.[32]

6099. Statement to owner as condition precedent—By statute "the owner, within fifteen days after the completion of the contract, may require any person having a lien hereunder, by written request therefor, to furnish to him an itemized and verified account of his lien claim, the amount thereof, and his name and address; and no action or other proceeding shall be commenced for the enforcement of such lien until ten days after such statement is so furnished." [33]

6100. Limitation of actions—No lien can be enforced in any case unless the holder thereof shall assert the same, either by complaint or answer, within one year after the date of the last item of his claim as set forth in the recorded lien statement.[34] The action must be commenced within one year from the time of furnishing the last item of labor or material. This means the last item of material in fact furnished, though that time is not the date stated in the affidavit for a lien.[35] An action to enforce a mechanic's lien is properly dismissed for want of prosecution on the application of the defendants other than the owner where the action is not commenced, as against the owner, within a year from the time the lien accrued, either by his appearance or by service of the summons on him, or by delivery thereof for service within that time, followed by service thereof, or by the first publication thereof, within sixty days.[36] Service of summons on the owner within the statutory period

[28] Finlayson v. Crooks, 47-74, 49+398; Bardwell v. Collins, 44-97, 101, 46+315; Jewett v. Iowa L. Co., 64-531, 535, 67+639.

[29] Bardwell v. Collins, 44-97, 101, 46+315. See Heidritter v. Elizabeth O. C. Co., 112 U. S. 294.

[30] Menzel v. Tubbs, 51-364, 367, 53+653.

[31] Bardwell v. Mann, 46-285, 290, 48+1120; Ness v. Davidson, 49-469, 52+46.

[32] R. L. 1905 § 3515; Miller v. Condit, 52-455, 55+47.

[33] R. L. 1905 § 3510. See Clark v. Anderson, 88-200, 92+964.

[34] R. L. 1905 § 3515. Note change in phraseology of statute made by revision of 1905. See, as to effect of asserting claim by answer, Reed v. Siddall, 94-216, 102+453.

[35] Doyle v. Wagner, 100-380, 111+275.

[36] Steinmetz v. St. Paul T. Co., 50-445, 52+915; Malmgren v. Phinney, 50-457, 52+915.

does not preserve the lien as against other holders of liens named as defendants, but not served within the statutory time.[37] The fact that an action is not commenced within one year after the date of the plaintiff's last item, will not defeat a recovery by a lien-claiming defendant whose answer is filed within one year after the date of his last item.[38] On the other hand, the fact that an action is brought in time as regards the plaintiff's lien will not save the lien of a defendant therein not asserted within the year.[39] An action commenced within the year may be prosecuted to judgment after the year.[40] If credit is given extending beyond the year the lien is waived.[41] Under a former statute an action might be begun within two years.[42] Any one who may defend against a lien may object that it had expired, or the remedy upon it lost, before the action was commenced against him.[43]

6101. Parties—The owner is a necessary party.[44] All other lienors of record must be made parties.[45] All incumbrancers should be made parties.[46] Necessary or proper parties may be brought in by order of court during the progress of the action.[47] Under a former statute the principal contractor was a necessary party in an action by a subcontractor.[48] An assignee in insolvency may maintain an action.[49] An assignee of a lien claim may maintain an action in his own name.[50]

6102. Summons—A special form of summons is provided by statute.[51] There is no unity of interest between the owner and a lienor such as to make either the representative of the other in an action, so as to make service of the summons on one equivalent to service on the other.[52] An act authorizing service of summons on residents by publication has been held unconstitutional.[53] In an action by a subcontractor to enforce a mechanic's lien, the two original contractors, who were jointly liable, were impleaded as defendants, but service of the summons was made on only one of them. It was held that it was not error to deny the motion of the owner of the property, on which the lien was claimed, to continue the action until service was made on the other contractor.[54] Service of summons by publication must be in strict accordance with the statute.[55]

6103. Lis pendens—The statute requires the filing of a notice of lis pendens at the beginning of the action.[56] The office of the notice is merely to charge a subsequent purchaser with notice of the pendency of the action.[57] It is not binding on one claiming an interest in the premises, unless he is a party to the action, or claims under one who was made a party within the life of

[37] Smith v. Hurd, 50–503, 52+922; Falconer v. Cochran, 68–405, 71+386.
[38] Sandberg v. Palm, 53–252, 54+1109; Burns v. Phinney, 53–431, 55+540.
[39] Burns v. Phinney, 53–431, 55+540.
[40] North Star T. W. Co. v. Strong, 33–1, 21+740.
[41] Flenniken v. Liscoe, 64–269, 66+979.
[42] Smith v. Hurd, 50–503, 52+922; Nystrom v. London etc. Co., 47–31, 49+394; Burbank v. Wright, 44–544, 47+162.
[43] Hokanson v. Gunderson, 54–499, 56+172.
[44] Burbank v. Wright, 44–544, 47+162; Steinmetz v. St. Paul T. Co., 50–445, 52+915; Hokanson v. Gunderson, 54–499, 56+172; Jewett v. Iowa L. Co., 64–531, 67+639. See Carey v. Bierbauer, 76–434, 79+541.
[45] R. L. 1905 § 3514; Menzel v. Tubbs, 51–364, 53+653.
[46] Finlayson v. Crooks, 47–74, 49+398; Bassett v. Menage, 52–121, 53+1064. See Corser v. Kindred, 40–467, 42+297; Moran v. Clarke, 59–456, 61+556; Cornish v. West, 82–107, 84+750.
[47] N. W. etc. Co. v. Norwegian etc. Seminary, 43–449, 45+868; Wheaton v. Berg, 50–525, 52+926.
[48] N. W. etc. Co. v. Norwegian etc. Seminary, 43–449, 45+868. See Julius v. Callahan, 63–154, 65+267.
[49] Miller v. Condit, 52–455, 55+47.
[50] See § 6056.
[51] R. L. 1905 § 3514; Menzel v. Tubbs, 51–364, 367, 53+653, 1017.
[52] Smith v. Hurd, 50–503, 52+922.
[53] Bardwell v. Collins, 44–97, 46+315; Smith v. Hurd, 50–503, 52+922.
[54] Julius v. Callahan, 63–154, 65+267.
[55] Gilmore v. Lampman, 86–493, 90+1113.
[56] R. L. 1905 § 3515.
[57] Jewett v. Iowa L. Co., 64–531, 67+639.

the lien.[58] Filing a notice of lis pendens is not jurisdictional, and is not a condition precedent to a right of action. Objection to a failure to file cannot be raised for the first time after trial.[59] The fact of filing need not be pleaded.[60]

6104. Complaint—A complaint must allege all the essential facts entitling the plaintiff to a lien.[61] It must allege the due filing of the lien statement within the statutory time,[62] and describe the premises with reasonable certainty.[63] It is perhaps unnecessary to allege that the work was done or materials furnished by virtue of a contract with the owner or at his instance, but the cautious pleader will make such fact appear.[64] Formerly such an allegation was essential.[65] It is unnecessary to allege the filing of a notice of lis pendens,[66] or that the land sought to be charged is within the statutory limit.[67] In pleading a claim of a subcontractor it is unnecessary to allege that the principal contractor has duly performed his contract with the owner.[68] As against a vendor in an executory contract for the sale of the premises, it is sometimes necessary to allege that the contract has been forfeited or surrendered.[69] It is proper to demand a lien on the premises.[70] An allegation that the lien statement was filed on a certain date and within ninety days after the furnishing and delivery of the last item of materials and labor, is one of fact, and sufficient as against a general demurrer, though the exact date of furnishing the last item is not alleged. The lien statement may be attached to the complaint and by apt reference made a part thereof for purposes of essential averment.[71] Cases are cited below involving the sufficiency of particular complaints.[72]

6105. Cross-complaint—One defendant cannot have a judgment against a codefendant upon a cross-complaint demanding affirmative relief upon new issues and for new objects, and not germane to the matter alleged in the original complaint, without notice to such codefendant.[73]

6106. Bill of particulars—The statute requires a bill of particulars to be attached to a complaint or answer asserting a lien.[74] None is required where the claim involves only a single item.[75] A variance, between the dates of some of the items stated in a bill of particulars and the true dates, is immaterial.[76]

6107. Answer—New matter in defence must be pleaded as in an ordinary action.[77] When a lien claimant appears and answers, setting up his claim, he makes the action his own for the purpose of enforcing his lien, and the failure of the plaintiff to recover from any cause, will not affect him.[78] One who has

[58] Hokanson v. Gunderson, 54–499, 56+172.
[59] Julius v. Callahan, 63–154, 65+267.
[60] Paul v. Hormel, 61–303, 63+718.
[61] See McCarty v. Van Etten, 4–461(358, 361).
[62] Price v. Doyle, 34–400, 26+14; Frankoviz v. Smith, 34–403, 26+225; Glass v. St. Paul Park C. & S. Co., 43–228, 45+150; Hurlbert v. New Ulm B. Works, 47–81, 49+521; Moran v. Clarke, 59–456, 61+556.
[63] Knox v. Starks, 4–20(7); McCarty v. Van Etten, 4–461(358); Boyd v. Blake, 42–1, 43+485.
[64] See Hurlbert v. New Ulm B. Works, 47–81, 49+521. Note the statement in this case that what the statute requires in the lien statement should not be confounded with the conditions of fact which may be necessary to the existence of a lien.
[65] O'Neil v. St. Olaf's School, 26–329, 4+47.
[66] Paul v. Hormel, 61–303, 63+718.
[67] Boyd v. Blake, 42–1, 43+485.
[68] See St. Paul F. Co. v. Wegmann, 40–419, 42+288.
[69] Nolander v. Burns, 48–13, 50+1016.
[70] McCarty v. Van Etten, 4–461(358).
[71] Stewart v. Simmons, 101–375, 112+282.
[72] Keller v. Struck, 31–446, 18+280; Dye v. Forbes, 34–13, 24+309; Cornish v. West, 82–107, 84+750; Stewart v. Simmons, 101–375, 112+282.
[73] Jewett v. Iowa L. Co., 64–531, 67+639.
[74] R. L. 1905 § 3516.
[75] Menzel v. Tubbs, 51–364, 53+653.
[76] Coughlan v. Longini, 77–514, 80+695.
[77] Bergsma v. Dewey, 46–357, 49+57 (matter limiting extent of lien).
[78] Burns v. Phinney, 53–431, 55+540.

no interest in the property cannot interpose a defence to a lien claim.[79] An answer has been held properly stricken out as sham.[80]

6108. Reply unnecessary—No reply is necessary. All averments of the answer are taken as denied without further pleading.[81] This applies to the answer of an intervener.[82]

6109. Variance—An immaterial variance between the pleading and proof will be disregarded.[83] The fact that the last item stated in a lien statement is not proved is not fatal to the whole claim, if the statement was filed in due time and the last item stated in it and proved.[84] Additional findings upon issues not formed by the pleadings have been held properly denied.[85]

6110. Burden of proof—The plaintiff has the burden of proving the facts alleged in his complaint, if they are denied.[86] Under the statute the owner has the burden of proving the service or posting of notice of want of consent.[87]

6111. Evidence—Admissibility—Cases are cited below involving the admissibility of evidence.[88]

6112. Evidence—Sufficiency—Cases are cited below holding evidence sufficient [89] or insufficient [90] to justify findings.

6113. Judgment—Judgment should be given for each lienor for the amount demanded and proved by him.[91] But this is not an ordinary personal judgment against the owner, so as to be a lien when docketed, on his other realty, before the sale of the premises to satisfy the lien established by the judgment.[92] If the plaintiff establishes a cause of action for the recovery of money, but fails to establish his right to a specific lien, he may have an ordinary personal judgment.[93] Under G. S. 1894 § 6238 a contractor was entitled to a judgment only for the balance due him, after deducting the amount due his subcontractor.[94] Under a former statute it was held that the judgment should declare the claim a lien on the premises from the proper date,[95] and this is no

[79] Cogel v. Mickow, 11-475(354).

[80] Hertz v. Hartmann, 74-320, 77+232.

[81] R. L. 1905 § 3514; Bruce v. Lennon, 52-547, 54+739; Davis v. Crookston etc. Co., 57-402, 59+482; Johnson v. Lau, 58-508, 60+342.

[82] Davis v. Crookston etc. Co., 57-402, 59+482.

[83] Linne v. Stout, 41-483, 43+377; Wisconsin etc. Co. v. St. Peter etc. Co., 46-231, 48+1022; Althen v. Tarbox, 48-18, 50+1018; Miller v. Condit, 52-455, 55+47; Coughlan v. Longini, 77-514, 80+695.

[84] Lundell v. Ahlman, 53-57, 54+936.

[85] Fergestad v. Gjertsen, 46-369, 49+127.

[86] Lamb v. Benson, 90-403, 97+143.

[87] Wheaton v. Berg, 50-525, 52+926; McCausland v. West Duluth L. Co., 51-246, 53+464.

[88] Smith v. Gill, 37-455, 35+178 (action to charge property of married woman—evidence of husband's agency); Woolsey v. Bohn, 41-235, 42+1022 (evidence that amount of lumber claimed to have been furnished was not "required" for the construction held inadmissible); McCarthy v. Caldwell, 43-442, 45+723 (action to charge wife on certain plumbing—authority of husband—evidence that wife saw plumbing going on and talked about it held admissible); Althen v. Tarbox, 48-18, 50+1018 (action to charge wife—her invalid contract for sale of realty without husband joining held admissible to show knowledge and consent); Justus v. Myers, 68-481, 71+667 (parol evidence inadmissible to vary contract under which materials were furnished and labor performed); Lamb v. Benson, 90-403, 97+143 (receipted tickets for lumber furnished held admissible—signatures to tickets not proved with strictness).

[89] Smith v. Headley, 33-384, 23+550; Fergestad v. Gjertsen, 46-369, 49+127; Reilly v. Williams, 47-590, 50+826; Menzel v. Tubbs, 51-364, 53+653; Combination S. & I. Co. v. St. P. C. Ry., 52-203, 53+1144; Fowlds v. Evans, 60-513, 63+102; Jamison v. Ray, 73-249, 75+1049; Mpls. T. Co. v. G. N. Ry., 81-28, 83+463; Lamb v. Benson, 90-403, 97+143; Uldrickson v. Sandahl, 92-297, 100+5; Kuethe v. Buck, 126+826.

[90] McDonald v. Ryan, 39-341, 40+158; Sandberg v. Palm, 53-252, 54+1109; Burns v. Phinney, 53-431, 55+540; Justus v. Myers, 68-481, 71+667.

[91] R. L. 1905 § 3517.

[92] Thompson v. Dale, 58-365, 59+1086.

[93] Abbott v. Nash, 35-451, 29+65; Smith v. Gill, 37-455, 35+178; Thompson v. Dale, 58-365, 371, 59+1086.

[94] Wisconsin etc. Co. v. Hood, 67-329, 69+1091.

[95] McCarty v. Van Etten, 4-461(358); Mason v. Heyward, 5-74(55).

doubt proper practice under the present statute.[96] The judgment need not reserve a right of redemption.[97] An order for judgment, directing the partition and apportionment of the property upon which liens were claimed between the plaintiff, a vendor holding the legal title, and certain lienors, defendants, according to their respective interests, as found and estimated by the court, upon equitable terms imposed by such order, has been held unauthorized.[98] In granting relief equitable principles are applicable.[99] Where there is due a contractor a certain amount for which, less the liens allowed his subcontractors, laborers, and materialmen, he is entitled to a lien, and the court allows the liens of such subcontractors, laborers, and materialmen to an aggregate less than the amount for which the contractor would otherwise be entitled to a lien, and deducts that aggregate from such amount, allowing him a lien only for the remainder, the owner is not prejudiced by error in determining the amounts due the subcontractors, laborers, and materialmen, and cannot complain.[1]

6114. Costs—Attorney's fees—Under R. L. 1905 § 3517 the court is authorized to allow reasonable costs to the lienor, and in fixing the amount thereof it may include therein, in its discretion, reasonable attorney's fees.[2]

6115. Sale—Distribution of proceeds—A sale of an equitable interest may be ordered before the extent of such interest is judicially determined.[3] The proceeds of the sale are to be distributed among the lienors equally, without any priority among them.[4]

6116. Redemption from sale—The right of redemption from a sale is in general the same as on an execution sale.[5]

MEDICAL PREPARATION—See Trademarks and Tradenames, 9669.
MEETING—See note 6.
MEMORANDA—See Evidence, 3346; Statute of Frauds; Witnesses, 10328.
MEMORANDUM OF TRIAL COURT—See Appeal and Error, 338; New Trial, 7208.
MENS REA—See Criminal Law, 2409; Negligence, 6969.
MENTAL SUFFERING—See Damages, 2526.
MERCHANTS—See Taxation, 9199.

[96] See King v. Smith, 42–286, 44+65; Carey v. Bierbauer, 76–434, 438, 79+541.
[97] Milner v. Norris, 13–455(424).
[98] Brown v. Jones, 52–484, 55+54.
[99] Ness v. Davidson, 49–469, 52+46.
[1] Menzel v. Tubbs, 51–364, 53+653.
[2] Schmoll v. Lucht, 106–188, 118+555.
[3] Carey v. Bierbauer, 76–434, 79+541.
[4] R. L. 1905 § 3518; Gardner v. Leck, 52–522, 54+746 (overruling Finlayson v. Crooks, 47–74, 49+398, 645); Ortonville v. Geer, 93–501, 101+963. See Malmgren v. Phinney, 50–457, 52+915; Miller v. Stoddard, 54–486, 56+131.
[5] R. L. 1905 § 3518. See Milner v. Norris, 13–455(424) (right of redemption is given by the statute and is not dependent on the judgment); Bovey v. Tucker, 48–223, 50+1038 (under G. S. 1878 c. 90 same right of redemption as upon foreclosure of mortgages—notice of intention to redeem—where filed); State v. Kerr, 51–417, 53+719 (court cannot enlarge time to redeem); White v. Rathbone, 73–236, 75+1046 (effect of failure of junior lienor to redeem in cutting off right to redeem from a sale made on a first lien).
[6] Burkleo v. Washington County, 38–441, 443, 38+108.

MERGER

Cross-References

See Attachment, 651; Chattel Mortgages, 1428; Contracts, 1778; Criminal Law, 2419; Judgments, 5170; Mortgages, 6256, 6272.

6117. Of estates and interests in realty—At law, where a greater and less estate coincide and meet in one and the same person, in one and the same right, without any intermediate estate, there is always a merger, the less estate being absorbed in the greater. In accordance with this rule an equitable estate always merges in the legal estate. In equity the doctrine of merger is a flexible, equitable doctrine, depending on the facts of the particular case. There is no merger if it would be contrary to the legitimate intention or interest of the owner of the greater estate or interest. It is a question of intention and in the absence of an express intention, an intention in accordance with the interests of the owner will be presumed.[7] The intention must be just and injurious to no one.[8] The legal rule of merger does not obtain in this state, being superseded by the equitable rule, which is to be applied in all cases, whether the action is legal or equitable in its nature.[9]

MERITS—See note 10.

MESNE PROFITS—See Ejectment, 2873, 2898, 2899; Tenancy in Common, 9600; Trespass, 9695.

MILITIA

6118. Governor commander-in-chief—Review of orders by courts—The governor is commander-in-chief of the militia and the courts will not review his orders as such, when they are given in the ordinary conduct of purely military affairs.[11]

6119. Not troops or standing army—The national guard or active militia of the state, organized under the Military Code, the members of which, when not engaged, at stated periods, in drilling and training for military duty, are employed in their usual civil vocations, subject to call for military service when public exigencies require, is neither "troops," within the meaning of article 1, section 10, of the federal constitution, nor a "standing army," within the meaning of section 14 of the bill of rights of the state constitution.[12]

6120. Discipline—Punishment—A captain of a company of the national guard of this state, when it is not acting as a military force, is not authorized to punish summarily by imprisonment a member of his company for a refusal to obey his orders.[13]

[7] Wilcox v. Davis, 4-197(139); Baker v. Terrell, 8-195(165); Davis v. Pierce, 10-376(302); Horton v. Maffitt, 14-289(216); First Div. etc. Ry. v. Parcher, 14-297(224, 230); McArthur v. Martin, 23-74, 80; Smith v. Lytle, 27-184, 192, 6+625; Hooper v. Henry, 31-264, 17+476; Baker v. N. W. etc. Co., 36-185, 30+464; Boyd v. Blake, 42-1, 43+485; Flanigan v. Sable, 44-417, 46+854; Nat. Invest. Co. v. Nordin, 50-336, 52+899; Lowry v. Akers, 50-508, 514, 52+922; Conn. etc. Co. v. King, 72-287, 75+376; Piper v. Sawyer, 73-332, 76+57; Bloomer v. Burke, 94-15, 18, 101+974; Bagley v. McCarthy, 95-286, 104+7. See Note, 99 Am. St. Rep. 152.

[8] Davis v. Pierce, 10-376(302); Bagley v. McCarthy, 95-286, 104+7.

[9] Flanigan v. Sable, 44-417, 46+854.

[10] Chouteau v. Parker, 2-118(95); Holmes v. Campbell, 13-66(58).

[11] State v. Harrison, 34-526, 26+729.

[12] State v. Wagener, 74-518, 77+424.

[13] Nixon v. Reeves, 65-159, 67+989.

6121. Trial by court-martial in time of peace constitutional—The rules and regulations of the Military Code are merely disciplinary in their nature, designed to secure higher efficiency in the military service, and a violation of them does not constitute a "criminal offence," within the meaning of section 7 of the bill of rights. The provisions of the Code authorizing the trial, in times of peace, of members of the national guard by a court-martial, for a violation of these rules and regulations, and their punishment, if found guilty, by a limited fine, or a limited imprisonment in case the fine is not paid, are not unconstitutional.[14]

MILK—See Food, 3776.
MILLDAMS—See Waters, 10186.
MINERALS—See Mines and Minerals.

MINES AND MINERALS

Cross-References

See Corporations, 2013; Partnership, 7411.

6122. Leases of public mineral lands—Provision is made by statute for the lease of state mineral lands to individuals.[15] The statute is constitutional.[16]

6123. Private mining leases and contracts—Cases are cited below involving the construction of private mining leases and contracts.[17]

MINOR HEIRS—See note 18.
MINORITY STOCKHOLDERS—See Corporations, 2074.
MINORS—See Infants.
MISCARRIAGE—See Damages, 2574.
MISCHIEF—See Malicious Mischief.
MISDEMEANORS—See Criminal Law, 2406.
MISJOINDER OF ACTIONS—See Pleading, 7508.
MISJOINDER OF PARTIES—See Parties, 7326.
MISNOMER—See Indictment, 4399; Judgments, 5001; Names.
MISREPRESENTATIONS—See Fraud.

[14] State v. Wagener, 74–518, 77+424.

[15] R. L. 1905 §§ 2490, 2491; Whiteman v. Severance, 46–495, 49+255 (statute construed—duty of state land commissioner to prescribe rules—several applications—rights of unsuccessful applicant—successful applicant not chargeable as trustee); Johnson v. Merritt, 50–303, 52+863 (computation of time); Baker v. Jamison, 54–17, 55+749 (statute authorizing leases applicable only to lands belonging to the state—inapplicable to lands which have been merely selected by the state—indemnity school lands—premature application—competitive bidding—successful applicant not a trustee—action to cancel lease—misconduct of state officer); State v. Iverson, 92–355, 100+91 (refusal of state auditor to grant a mineral lease of lands lying under the bed of a meandered lake, constituting public waters, not reviewable by certiorari).

[16] State v. Evans, 99–220, 108+958.

[17] Newton v. Van Dusen, 47–437, 50+820; Anderson v. Luther, 70–23, 72+820 (mining lease—specific performance—laches—change of circumstances—waiver by abandonment); Diamond I. M. Co. v. Buckeye I. M. Co., 70–500, 73+507 (mining lease—covenant to mine certain quantity of ore or pay royalty thereon—subject-matter—"merchantable shipping iron ore"—payment for ore—non-existence of ore a defence—right to terminate—failure to exercise right—effect as to defence); Landquist v. Swanson, 78–444, 81+1 (mining contract—assessment work); Hollister v. Sweeney, 88–100, 92+525 (contract for exploring and testing land for iron ore construed); Wessel v. Gigrich, 106–467, 119+242 (fraud in inducing purchase of a mining lease).

[18] Anderson v. Peterson, 36–547, 32+861.

MISTAKE

Cross-References

See Accord and Satisfaction, 45; Agency, 222; Bills and Notes, 861, 1023; Cancelation of Instruments, 1192; Compromise and Settlement, 1521; Contracts, 1743; Evidence, 3376; Payment, 7464; Reformation of Instruments; Release, 8375; Sales, 8508, 8542; Specific Performance, 8794; Statutes, 8985.

6124. Equitable relief—Mistake of law or fact—The power of equity to afford relief from the consequences of the mistakes of parties to written instruments is not strictly limited to mistakes of fact, but extends also to mistakes of law. While, for a bare mistake of law alone, without other considerations affecting the case, relief will rarely, if ever, be afforded, yet equity will interfere where it further appears that the defendant, availing himself of the opportunities afforded by the mistake, will take an unconscionable advantage of the plaintiff, without consideration; the plaintiff being blameless, and the defendant being in no position entitling him to equitable protection. But this jurisdiction will be exercised with caution, and only very clear and convincing proofs will be sufficient to overcome the presumption that the written instruments which parties have executed for the purpose of evidencing and carrying into effect their agreements are in legal effect or in terms contrary to their intention. When property has been conveyed through mistake, by deed, which the parties never intended should be conveyed, which the grantor was under no legal or moral obligation to convey, and which the grantee in good conscience has no right to retain, a court of equity will interfere, and correct the mistake, whether it arose from a misapprehension of the facts, or of the legal operation of the deed.[19] One may be ignorant or mistaken as to his own antecedent legal rights or interests, while he clearly understands the scope of the transaction into which he enters. And when a person is ignorant of facts upon which his rights depend, or erroneously assumes that he knows his rights, and deals with his property accordingly, and not on the principle of compromising doubts, a court of equity may properly interfere.[20] Relief may be granted where, under a mutual mistake, one party purchases from another property which he already owns.[21] Affirmative or defensive relief, such as is required by the circumstances, may be granted from the consequences of a mistake of any fact which is a material element of the transaction, and which is not the result of the mistaken party's own violation of some positive legal duty, if there is no adequate remedy at law.[22]

6125. Inference of mistake—Equity will grant relief on the ground of mistake, not only when it is expressly proved, but also when it may be inferred from the nature of the transaction.[23]

MITIGATION OF DAMAGES—See Damages, 2532, 2533.
MIXED ACTIONS—See Ejectment, 2865.
MONEY—See note 24.

[19] Benson v. Markoe, 37–30, 33+38; Truesdale v. Sidle, 65–315, 67+1004; Errett v. Wheeler, 109–157, 123+414. See 23 Harv. L. Rev. 608.
[20] Gerdine v. Menage, 41–417, 43+91.
[21] Houston v. N. P. Ry., 109–273, 123+922.
[22] Thwing v. Hall, 40–184, 41+815.
[23] Geib v. Reynolds, 35–331, 28+923.
[24] Nopson v. Horton, 20–268(239, 244); State v. Quackenbush, 98–515, 520, 108+953.

MONEY HAD AND RECEIVED

Cross-References

See Statute of Frauds, 8856; Mortgages, 6475; Vendor and Purchaser, 10098.

6126. Nature of action—While the action is one at law and triable by jury,[25] it is governed by equitable principles.[26] It is in the nature of indebitatus assumpsit for money had and received at common law.[27]

6127. Fiction of a contract—Our decisions, following the language of the common law, often speak of the obligation to deliver the money as an implied contract.[28] In reality, the obligation is imposed by law regardless of the intention of the parties and is not of a contractual nature.[29] The fiction of an implied promise was resorted to at common law in order that the obligation might be enforced by assumpsit.[30] There seems to be no excuse for resorting to the fiction under our practice.[31]

6128. When action lies—In general—An action for money had and received will lie whenever one person has possession of money which in equity and good conscience belongs to another and ought to be delivered to him. It is unnecessary that there should be any privity between the parties or contract to deliver the money. The law imposes an obligation to deliver the money regardless of privity or contract.[32] In is unnecessary that the defendant should have accepted the money under an agreement to hold it for the benefit of the plaintiff, or that the person from whom he received it intended it for the plaintiff's benefit,[33] or that the money received be an exact and specific amount, belonging exclusively to the plaintiff, and entirely distinct from other moneys.[34] It is immaterial that the defendant has used the money,[35] or how it came into his hands.[36] The action is in the nature of an equitable remedy to compel one unjustly enriched at the expense of another to disgorge, and it is not restricted by technical rules.[37]

6129. When action lies—Miscellaneous cases—An action for money had and received will lie to recover money paid on a consideration which has failed;[38] money received through a conversion;[39] money paid on a contract

[25] Merriam v. Johnson, 86-61, 90+116; Todd v. Bettingen, 109-493, 124+443.

[26] Brand v. Williams, 29-238, 13+42.

[27] See Taylor v. Read, 19-372(317).

[28] Brand v. Williams, 29-238, 13+42.

[29] 2 Harv. L. Rev. 63.

[30] Keener, Quasi Contracts, 14; Prof. Ames, 2 Harv. L. Rev. 63; Pomeroy, Code Remedies (4 ed.) § 406.

[31] See Keener, Quasi Contracts, 211.

[32] Van Hoesen v. Minn. etc. Con., 16-96 (86); Taylor v. Read, 19-372(317); De Graff v. Thompson, 24-452, 456; Henderson v. Sibley County, 28-515, 11+91; Brand v. Williams, 29-238, 13+42; Sibley v. Pine County, 31-201, 17+337; Valentine v. St. Paul, 34-446, 26+457; Libby v. Johnson, 37-220, 33+783; Milton v. Johnson, 79-170, 81+842; Merriam v. Johnson, 86-61, 65, 90+116; Johnson v. Ogren, 102-8, 13, 112+894; Sammons v. Pike, 105-106, 117+244; Stoakes v. Larson, 108-234, 121+1112; Fink v. Weinholzer, 109-381, 123+931; Peters v. Cannon River etc. Co., 124+826; Robert v. Ely, 113 N. Y. 128; Chapman v. Forbes, 123 N. Y. 532; 4 Wait, Actions & Defences, 469; Keener, Quasi Contracts.

[33] Brand v. Williams, 29-238, 13+42.

[34] Brand v. Williams, 29-238, 13+42. See Van Hoesen v. Minn. etc. Con., 16-96(86, 89) (holding that action will not lie in any event unless the defendant received the specific sum for plaintiff's use).

[35] See Henderson v. Sibley County, 28-515, 11+91.

[36] Stoakes v. Larson, 108-234, 121+1112.

[37] Todd v. Bettingen, 109-493, 124+443.

[38] Chamblin v. Schlichter, 12-276(181); Bennett v. Phelps, 12-326(216); Taylor v. Read, 19-372(317); Bedford v. Small, 31-1, 16+452; Valentine v. St. Paul, 34-446, 26+457; Scanlon v. Oliver, 42-538, 44+1031; Herrick v. Newell, 49-198, 51+819; Zeglin v. Carver County, 72-17, 74+901; Dennis v. Pabst, 80-15, 82+978; McCallum v. Nat. C. Ins. Co., 84-134, 86+

void under the statute of frauds;[40] money paid by mistake;[41] money obtained by fraud;[42] money received by an agent;[43] money deposited with stakeholder on a bet;[44] money received on a foreclosure of a mortgage in excess of the amount due;[45] money paid on a special assessment for a local improvement subsequently abandoned;[46] money paid on a contract which the other party to the contract refuses to perform;[47] money received by the wrong person on an award in condemnation proceedings;[48] money illegally expended by officers of municipalities;[49] money paid on a contract rescinded by mutual consent;[50] money received in an action subsequently dismissed;[51] money paid on a judgment subsequently reversed or vacated.[52]

6130. Property other than money—An action will lie though the party sought to be charged received property other than money.[53] Where one of two joint owners of a judgment caused execution to issue thereon, and bid in certain realty sold thereunder, paying no part of the purchase price, it was held that an action for money had and received would not lie by the other joint owner for one-half the purchase money.[54]

6131. Waiving tort—A person may sometimes waive a fraud, trespass, or conversion, and recover as for money had and received.[55] The subject is more fully considered elsewhere.[56]

6132. Parties plaintiff—If an agent by mistake pays to a third party money in his possession belonging to his principal, he may maintain in his own name an action for money had and received to recover it back.[57]

6133. Parties defendant—An action for money had and received will lie against a municipality.[58]

6134. Demand—Where it is not the duty of the defendant to turn the money over immediately upon its receipt, a demand is sometimes necessary before bringing an action.[59] If there is such a duty, or if, under the circumstances, it is obvious that a demand would be unavailing, a demand is unnecessary.[60] It is unnecessary where the defendant sets up a claim or defence of such a

892; Payne v. Hackney, 84–195, 87+608; Williams v. Peterson, 95–98, 103+722; Todd v. Bettingen, 109–493, 124+443. See McClure v. Bradford, 39–118, 38+753; Mackay v. Minn. S. A. Soc., 88–154, 92+539.

[39] Brady v. Brennan, 25–210; Libby v. Johnson, 37–220, 33+783.

[40] See § 8856.

[41] See § 7464.

[42] Lund v. Davies, 47–290, 50+79; Schaller v. Borger, 47–357, 50+247; Holland v. Bishop, 60–23, 61+681.

[43] Jackson v. Kansas City P. Co., 42–382, 44+126; Milton v. Johnson, 79–170, 81+842; Merriam v. Johnson, 86–61, 90+116; Schick v. Suttle, 94–135, 102+217.

[44] Wilkinson v. Tousley, 16–299(263); Pabst v. Liston, 80–473, 83+448.

[45] See § 6475.

[46] Valentine v. St. Paul, 34–446, 26+457. See § 6888.

[47] Bennett v. Phelps, 12–326(216); Reynolds v. Franklin, 41–279, 43+53; Proctor v Stevens, 94–181, 102+395. See McClure v. Bradford, 39–118, 38+753.

[48] Smith v. St. Paul, 65–295, 68+32.

[49] Chaska v. Hedman, 53–525, 55+737; Fergus Falls v. Fergus Falls H. Co., 80–165, 83+54.

[50] Williams v. Peterson, 95–98, 103+722.

[51] Sammons v. Pike, 105–106, 117+244.

[52] Berryhill v. Gasquoine, 88–281, 92+1121; Sammons v. Pike, 105–106, 117+244.

[53] Todd v. Bettingen, 109–493, 124+443.

[54] Holmes v. Campbell, 10–401(320).

[55] Brady v. Brennan, 25–210; Libby v. Johnson, 37–220, 33+783; Downs v. Finnegan, 58–112, 59+981; Pabst v. Liston, 80–473, 83+448; Schick v. Suttle, 94–135, 102+217. See Keener, Quasi Contracts, 159.

[56] See § 4308.

[57] Parks v. Fogleman, 97–157, 105+560.

[58] Henderson v. Sibley County, 28–515, 11+91; Sibley v. Pine County, 31–201, 17+337; Valentine v. St. Paul, 34–446, 26+457; Glencoe v. McLeod County, 40–44, 41+239.

[59] Ford v. Brownell, 13–184(174). See Sibley v. Pine County, 31–201, 204, 17+337.

[60] Bailey v. Merritt, 7–159(102); Huntsman v. Fish, 36–148, 30+455; Auerbach v. Gieseke, 40–258, 262, 41+946; Pabst v. Liston, 80–473, 83+448; Todd v. Bettingen, 109–493, 124+443.

nature that it is obvious that a demand would have been unavailing.[61] Where the receipt of the money was wrongful no demand is necessary.[62]

6135. Pleading—It is still unsettled whether a complaint in the form of the common count in assumpsit for money had and received to the use of the plaintiff is sufficient under our practice.[63] Various complaints, not to be commended, have been held "sufficient."[64] The general principles of pleading as to new matter,[65] amendment,[66] and the admissibility of evidence under a denial,[67] are applicable. The rule that where a general fact or result is pleaded, and also the special facts by which such result is reached, and they do not support the result, the special facts control, and the pleading is bad, applies.[68] It has been held that a party seeking to recover as for money had and received in the value of property other than money delivered by him to the party sought to be charged must allege the return or tender of specific property delivered to him by that party, or must allege excuse for his failure to do so.[69] A bill of particulars cannot be demanded.[69]

6136. Defences—It is no defence that the person from whom the defendant received the money paid it to him in his own wrong and is liable therefor to the plaintiff.[70] The fact that the money was paid to the defendant by the plaintiff as part of a conspiracy to defraud him is a good defence.[71] The fact that the defendant has paid over the money to another by mistake is no defence.[72]

6137. Interest—Interest is recoverable from the time defendant is in default.[73] Where a party has received or acquired the money of another by mistake merely, without fraud, the general rule is that interest does not run upon it until the party, in whose possession it is, is put in default by a demand by the party to whom it is justly due, in which case, if the money is not returned after demand, interest begins to run.[74]

MONEY LENT

6138. When action lies—As a general rule an action for money lent, in the nature of indebitatus assumpsit for money lent at common law, will lie where one loans or advances money at the request of another. The law implies a promise—imposes an obligation—to repay the money, in the absence of agreement.[75]

[61] Davenport v. Ladd, 38-545, 38+622; Jensen v. Weide, 42-59, 43+688.

[62] Glencoe v. McLeod County, 40-44, 41+239.

[63] See Todd v. Bettingen, 109-493, 124+443.

[64] Spottswood v. Herrick, 22-548; Whiting v. Clugston, 73-6, 75+759; Slater v. Olson, 83-35, 85+825; Conron v. Hoerr, 83-183, 85+1012; Merriam v. Johnson, 86-61, 90+116; Lovering v. Webb, 106-62, 118+61; Smith v. Brigham, 106-91, 118+150; Proctor v. Stevens, 94-181, 102+395. See First Nat. Bank v. Stadden, 103-403, 406, 115+198; Remillard v. Robinson, 108-81, 121+217; Peters v. Cannon River etc. Co., 124+826.

[65] See Hall v. Skahen, 101-460, 112+865.

[66] Hall v. Skahen, 101-460, 112+865.

[67] Jackson v. Kansas City P. Co., 42-382, 44+126; Fort Dearborn Nat. Bank v. Security Bank, 87-81, 91+257. See Hall v. Skahen, 101-460, 112+865.

[68] Carlson v. Presbyterian Board of Relief, 67-436, 70+3.

[69] Todd v. Bettingen, 109-493, 124+443. The soundness of this decision is questionable. The court might better have followed the rule laid down in Knappen v. Freeman, 47-491, 50+533.

[69] Jones v. Northern T. Co., 67-410, 69+1108.

[70] Brand v. Williams, 29-238, 13+42; Sibley v. Pine County, 31-201, 17+337.

[71] Bauer v. Sawyer, 90-536, 97+428.

[72] Landin v. Moorhead Nat. Bank, 74-222, 77+35.

[73] Auerbach v. Giesecke, 40-258, 41+946; Pabst v. Liston, 80-473, 83+448. See Perkins v. Stewart, 75-21, 77+434.

[74] Sibley v. Pine County, 31-201, 17+337; Corse v. Minn. G. Co., 94-331, 102+728.

[75] 4 Wait's Actions & Defences, 444.

6139. Pleading—The general rule, stated elsewhere,[76] as to what is admissible under a denial, is applicable here.[77]

6140. Variance—Under a complaint for money loaned a cause of action for money paid out for the defendant, under circumstances not amounting to a loan, cannot be proved.[78] An immaterial variance will be disregarded.[79]

6141. Defences—It is no defence that the plaintiff obtained the money under an illegal contract.[80] The defendant may show that the money was loaned in a representative capacity; not as a bar to the action, but for his future protection.[81]

MONEY PAID

6142. When action lies—An action, in the nature of the common-law action of indebitatus assumpsit for money paid, lies where the plaintiff has paid money to a third party, at the request, express or implied, of the defendant, and with an undertaking, express or implied, on his part, to repay it.[82] It does not lie where the payment is made by a mere volunteer. There must be a promise, express or implied, to repay the money.[83]

6143. Pleading—Cases are cited below involving questions of pleading.[84]

6144. Interest—Interest is recoverable on the money paid from the time of payment, in the absence of a contrary agreement.[85]

MONOPOLIES—See Restraint of Trade, 8435.

MONUMENTS—See Boundaries.

MORAL CONSIDERATION—See Contracts, 1757.

MORAL OBLIGATION—See Contracts, 1757; Counties, 2242; and note 88.

MORE—See note 86.

MORE OR LESS—See note 87.

MORGUES—See Counties, 2268.

MORTALITY TABLES—See Death by Wrongful Act, 2619; Evidence, 3353, 3450.

MORTGAGE REGISTRY TAX—See Taxation, 9576.

[76] See § 7574.

[77] Bond v. Corbett, 2-248(209); Dodge v. McMahan, 61-175, 63+487; Jenning v. Rohde, 99-335, 109+597.

[78] Cummings v. Long, 25-337.

[79] Fravell v. Nett, 46-31, 48+446; Dodge v. McMahan, 61-175, 63+487.

[80] Wintermute v. Stinson, 16-468(420).

[81] Bond v. Corbett, 2-248(209).

[82] Harlev v. Davis, 16-487(441); Johnson v. Krassin, 25-117; Freeman v. Etter, 21-3; Murphin v. Scovell, 41-262, 43+1; Rosemond v. N. W. etc. Co., 62-374, 64+925; Powers v. Blethen, 91-339, 97+1056; Foster v. Gordon, 96-142, 104+765. See Keener, Quasi Contracts, 388; 4 Wait, Actions & Defences, 449.

[83] Helm v. Smith, 76-328, 79+313. See Rosemond v. N. W. etc. Co., 62-374, 64+925.

[84] Dodge v. McMahan, 61-175, 63+487 (complaint for "money loaned to the defendant and paid for his use and benefit"); Foster v. Gordon, 96-142, 104+765 (informal pleading for money had and received changed by amendment to a complaint for money paid). See Spottswood v. Herrick, 22-548.

[85] Bull v. Rich, 92-481, 100+213.

[86] State v. Brown, 22-482.

[87] Austrian v. Davidson, 21-117; Austrian v. Dean, 23-62.

[88] State v. Young, 29-474, 531, 9+737.

MORTGAGES

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Cross-References

See Adverse Possession, 114; Chattel Mortgages; Pledge; Recording Act; Subrogation, 9048, 9049; Taxation, 9576.

IN GENERAL

6145. Definition and nature—A mortgage is variously defined as a "conveyance intended to be security for the payment of money or the performance of some duty, or for both;" [89] as a "conveyance of real estate, or some interest therein, defeasible upon the payment of money or the performance of some other condition;" [90] as "in form a conveyance to be void on the performance of certain conditions." [91] In equity, when the real nature of a transaction between the parties is confessedly that of a loan advanced upon the security of realty granted to the party making the loan, whatever the form of the instrument of conveyance taken as the security, it is treated as a mortgage.[92] By a mortgage of realty the mortgaged property is pledged as security for the payment of a debt, or the performance of some other obligation.[93] Though a mortgage is in form a conveyance of an estate or interest in land, in effect it is a mere lien or security.[94] It is a chattel,[95] or thing in action,[96] passing to the administrator or executor and not to the heirs.[97] Though it purports to convey the legal title it does not in reality.[98] It remains executory until foreclosure.[99] The term "mortgage" is commonly used to include the mortgage debt.[1] Mortgages are not regarded as conveyances of land within the statute of frauds so as to require a reconveyance or release to divest the title of the mortgagee.[2]

6146. Once a mortgage always a mortgage—The rule is inflexible, "once a mortgage, always a mortgage." The doctrine originated in equity to prevent contracts between the mortgagor and mortgagee cutting off the right of redemption. Where the relation of mortgagor and mortgagee is once established, any transfer to, or arrangement for the acquisition of the equity of redemption by the mortgagee without a foreclosure is regarded with jealousy and carefully scrutinized by the courts. Any additional conveyances exacted or secured by the mortgagee for his benefit will ordinarily be regarded as further security, or a new form of security, for the same mortgage debt and will not extinguish the equity of redemption.[3] The rule has no application to a future contract between the mortgagor and mortgagee for the purchase of the mortgagor's right of redemption.[4]

[89] Madigan v. Mead, 31-94, 16+539; Allison v. Armstrong, 28-276, 9+806.

[90] Buse v. Page, 32-111, 19+736, 20+95.

[91] Ozmun v. Reynolds, 11-459(341); Pace v. Chadderdon, 4-499(390).

[92] See § 6150.

[93] Sprague v. Martin, 29-226, 13+34.

[94] Hill v. Edwards, 11-22(5); Morrison v. Mendenhall, 18-232(212); Humphrey v. Buisson, 19-221(182); Niggeler v. Maurin, 34-118, 24+369; Gille v. Hunt, 35-357, 29+2; Russell v. Reed, 36-376, 31+452; Rogers v. Benton, 39-39, 38+765; Cullen v. Minn. L. & T. Co., 60-6, 61+818; Bradley v. Norris, 63-156, 65+357; Morey v. Duluth, 69-5, 71+694; Marshall & I. Bank v. Cady, 76-112, 78+978; First S. Bank v. Sibley Co. Bank, 96-456, 105+485.

[95] Johnson v. Williams, 4-260(183); Baker v. Terrell, 8-195(165); Loy v. Home Ins. Co., 24-315; Rogers v. Benton, 39-39, 38+765.

[96] Moulton v. Haskell, 50-367, 52+960.

[97] Loy v. Home Ins. Co., 24-315.

[98] Niggeler v. Maurin, 34-118, 24+369; Russell v. Reed, 36-376, 31+452; Cullen v. Minn. L. & T. Co., 60-6, 61+818; Bradley v. Norris, 63-156, 65+357; Backus v. Burke, 63-272, 65+459; Marshall & I. Bank v. Cady, 76-112, 78+978; First S. Bank v. Sibley Co. Bank, 96-456, 105+485.

[99] Russell v. Reed, 36-376, 31+452.

[1] Watson v. Smith, 60-206, 62+265; Hine v. Myrick, 60-518, 62+1125.

[2] Johnson v. Carpenter, 7-176(120); Wakefield v. Day, 41-344, 43+71.

[3] Hill v. Edwards, 11-22(5); Niggeler v. Maurin, 34-118, 24+369; Marshall v. Thompson, 39-137, 39+309.

[4] De Lancey v. Finnegan, 86-255, 90+387.

6147. Must be a mortgage as to both parties—A mortgage cannot be a mortgage on one side only; it must be mutual.[5]

6148. An incident of the debt—A mortgage is but an incident of the debt which it secures and can have no separate or independent existence as a contract.[6] If the debt is invalid for any reason the mortgage is invalid.[7] If the debt is discharged by any means the mortgage is discharged.[8] If the debt is assigned the mortgage passes to the assignee without special mention.[9]

6149. Nature at common law—At common law a mortgage instantly vested the legal title in the mortgagee, subject to be defeated by strict performance of the condition of the mortgage. Unless otherwise stipulated in the mortgage, it vested in the mortgagee the immediate right of possession. If the condition was performed, the mortgagor was in as of his old estate. If the condition was broken, the mortgagee's estate was, at law, absolute and indefeasible. But courts of equity at a very early day, under the influence of the civil law, came to regard the mortgage as only a security, and the mortgagee as holding the title as security, with a right of redemption in the mortgagor even after condition broken, on payment of principal, interest, and costs. By gradual adoption of the doctrine of equity this finally became the rule at law. But the mortgage, which in terms passed the title, was still held to be a conveyance, so far as to entitle the mortgagee to the possession after condition broken; and if he went into possession after breach of condition, the mortgagor's only remedy was by suit to redeem. Out of this grew the doctrine of a "mortgagee in possession."[10] Though a mortgage at common law vested both the legal title and right to possession in the mortgagee, still he could not recover rent from a tenant of the mortgagor, whose tenancy commenced after the making of the mortgage, his only remedy being ejectment. Taking possession under a common-law mortgage, or bringing ejectment for that purpose, was a process of foreclosure, or at least a step in that process.[11]

EQUITABLE MORTGAGES

6150. In general—In equity, when the real nature of a transaction between the parties is confessedly that of a loan, advanced upon the security of realty granted to the party making the loan, whatever the form of the instrument of conveyance taken as the security, it is treated as a mortgage. The court will look through the form to the actual character of the transaction.[12] An equitable mortgage may be in the form of an absolute deed,[13] or of an absolute deed and a bond to reconvey,[14] or of an absolute deed with accompanying writings showing it to be security;[15] or of a trust deed.[16] The rights and

[5] Bradley v. Norris, 63–156, 65+357.

[6] Johnson v. Carpenter, 7–176(120); Hill v. Edwards, 11–22(5); Humphrey v. Buisson, 19–221(182); Martin v. Fridley, 23–13; Blumenthal v. Jassoy, 29–177, 12+517; Wilson v. Eigenbrodt, 30–4, 13+907; Bausman v. Kelley, 38–197, 36+333; White v. Miller, 52–367, 54+736; McManaman v. Hinchley, 82–296, 84+1018; First Nat. Bank v. Pope, 85–433, 89+318.

[7] McManaman v. Hinchley, 82–296, 84+1018.

[8] Johnson v. Williams, 4–260(183); Johnson v. Carpenter, 7–176(120); Donnelly v. Simonton, 13–301(278).

[9] See § 6276.

[10] Pace v. Chadderdon, 4–499(390); Rice v. St. P. etc. Ry., 24–464; Rogers v. Benton, 39–39, 38+765; Taylor v. Slingerland, 39–470, 40+575; Bradley v. Norris, 63–156, 65+357; Morey v. Duluth, 69–5, 71+694.

[11] Cullen v. Minn. L. & T. Co., 60–6, 61+818.

[12] Hill v. Edwards, 11–22(5); Fisk v. Stewart, 24–97; Steele v. Bond, 28–267, 9+772; St. Paul etc. Ry. v. McDonald, 34–182, 189, 25+57; Marshall v. Thompson, 39–137, 39+309; Banning v. Sabin, 51–129, 53+1; Stitt v. Rat Portage L. Co., 96–27, 104+561.

[13] See § 6154.

[14] See § 6156.

[15] Holton v. Meighen, 15–69(50); Blakeley v. LeDuc, 25–448; Marston v. Williams,

obligations of the parties under an equitable mortgage are the same as under a legal mortgage,[17] except that an equitable mortgage can only be foreclosed by action.[18] The conveyance may proceed from a third party at the instance of the borrower.[19]

6151. Assignment of contract for purchase of land—The assignment by the vendor of an executory contract for the sale of realty as security for the payment of an indebtedness due the assignee vests in the assignee a lien upon the vendor's interest in the property to the extent of the debt secured, not exceeding the purchase money unpaid on the contract, and makes the assignee an equitable mortgagee.[20]

6152. Held to constitute an equitable mortgage or lien—Where one cotenant redeemed the whole estate from a foreclosure sale;[21] where an owner of an equity of redemption quitclaimed to another who promised to take an assignment of a sheriff's certificate on execution, advancing the money for that purpose, and to hold it as security for the loan and, if no redemption was made, to convey it as the owner of the equity might direct upon repayment of the loan; the whole transaction being designed to cut out intervening judgment liens;[22] where a power of attorney was executed by A, authorizing B to sell and convey real and personal estate and pay the proceeds to C, to be applied in payment of a debt from A to C, the power being executed by A and accepted by C as security for such debt;[23] where a corporation executed debentures with the following clause, "The company hereby charges with such payment (of the debentures) its undertaking all its property whatsoever and wheresoever both present and future;"[24] where a loan agent fraudulently took for his principal a straw mortgage and subsequently acquired title to the land;[25] where a mortgagor and a mortgagee holding several mortgages entered into an agreement, as a substitute for the mortgages, whereby the mortgagor executed to the mortgagee an absolute deed of the mortgaged premises and promised to pay a specified amount in place of the amounts secured by the several mortgages and the mortgagee executed a deed of the premises to the wife of the mortgagor and placed it in escrow to be delivered upon full payment of the amount due under the contract;[26] where a purchaser at a foreclosure sale agreed with the mortgagor to extend the time for redemption and lease the property to him with the privilege of purchasing on condition that the original mortgage should stand as security for the new contract;[27] where a mortgagor and mortgagee entered into an agreement providing for a payment of the amount due and a deed from the mortgagee to the mortgagor;[28] where A made a loan to B for the purpose of enabling B to buy a home, with the understanding that when B acquired title he should hold it as security for the loan.[29]

6153. Held not to constitute an equitable mortgage—A bond conditioned to convey realty;[30] a lease with a privilege of purchase;[31] a mortgage in form

45–116, 47+644; Darling v. Harmon, 47–166, 49+686.

[16] International T. Co. v. Ufton Grove etc. Co., 71–147, 73+716; St. Paul etc. Ry. v. McDonald, 34–182, 189, 25+57.

[17] Meighen v. King, 31–115, 16+702; Jones v. Blake, 33–362, 23+538; Wakefield v. Day, 41–344, 43+71.

[18] See § 6324.

[19] Fisk v. Stewart, 24–97.

[20] Lamm v. Armstrong, 95–434, 104+304.

[21] Buettel v. Harmount, 46–481, 49+250.

[22] Banning v. Sabin, 51–129, 53+1.

[23] American L. & T. Co. v. Billings, 58–187, 59+998.

[24] Howard v. Iron & L. Co., 62–298, 64+896.

[25] Robertson v. Rentz, 71–489, 74+133.

[26] Piper v. Sawyer, 73–332, 76+57.

[27] Steele v. Bond, 28–267, 9+772.

[28] Wenzel v. Weigand, 92–152, 99+633.

[29] Hughes v. Mullaney, 92–485, 100+217.

[30] Drew v. Smith, 7–301(231); Dahl v. Pross, 6–89(38); Yoss v. DeFreudenrich, 6–95(45).

[31] Stewart v. Murray, 13–426(393).

but a conveyance in substance and effect;[32] payment of a mortgage by a party claiming but not in fact having title;[33] an absolute deed and a bond to reconvey;[34] an absolute deed;[35] a deposit of title deeds.[36]

ABSOLUTE DEED AS MORTGAGE

6154. In general—A deed absolute in form but originally intended by the parties as security merely is regarded in equity as a mortgage.[37] The fraudulent possibilities inherent in such a transaction are the basis of the equity.[38] It is unnecessary to prove fraud, mistake, or surprise, in the execution of the deed.[39] Nor is it necessary to prove damage or threatened damage.[40] All that it is necessary to prove is the intention of the parties.[41] This intention must have been mutual.[42] It is not a fatal objection that the terms of the agreement are indefinite. To carry out the intention of the parties an enlarged view of the facts constituting the transaction will be taken by the court.[43] Such a mortgage when established has the same effect as a formal mortgage.[44] An absolute deed may be shown to be a mortgage in a legal as well as an equitable action,[45] and when the question arises collaterally.[46]

6155. Intention how proved—Parol evidence—Parol evidence is admissible not to contradict the terms of the writing, but to show the grantor's equities in the case, or, as it is sometimes said, to establish an equity superior to the terms of the deed, and because it would be a fraudulent act, which a court of equity would not permit, for the holder of the deed to use it contrary to the terms and understanding upon which he received it. As the equity upon which the court acts arises from the real character of the transaction, either parol or written evidence is admissible to establish it.[47] The intention is to be gathered from the written memorials of the transaction, from the circumstances under which the deed was made and the relations subsisting between the parties.[48] All of the instruments executed by the parties at the same

[32] St. Paul etc. Ry. v. McDonald, 34–195, 25+453.

[33] Wadsworth v. Blake, 43–509, 45+1131.

[34] See § 6156.

[35] Merchants Nat. Bank v. Stanton, 62–204, 64+390; Shultes v. Stivers, 66–517, 69+639; Philips v. Mo, 91–311, 97+969.

[36] Gardner v. McClure, 6–250(167).

[37] McClane v. White, 5–178(139); Belote v. Morrison, 8–87(62); Hill v. Edwards, 11–22(5); Phoenix v. Gardner, 13–430 (396); Holton v. Meighen, 15–69(50); Weide v. Gehl, 21–449; Archambau v. Green, 21–520; Fisk v. Stewart, 24–97; New v. Wheaton, 24–406; Blakeley v. LeDuc, 25–448; Steele v. Bond, 28–267, 9+772; Madigan v. Mead, 31–94, 16+539; Meighen v. King, 31–115, 16+702; Sloan v. Becker, 31–414, 18+143; Buse v. Page, 32–111, 19+736, 20+95; Jones v. Blake, 33–362, 23+538; Niggeler v. Maurin, 34–118, 24+369; Sloan v. Becker, 34–491, 26+730; Butman v. James, 34–547, 27+66; Livingston v. Ives, 35–55, 27+74; Marshall v. Thompson, 39–137, 39+309; Wakefield v. Day, 41–344, 43+71; Marston v. Williams, 45–116, 47+644; Darling v. Harmon, 47–166, 49+686; Nye v. Swan, 49–431, 52+39; King v. McCarthy, 50–222, 52+648; Terry v. Wilson's Estate, 50–570, 52+973; Spalti v. Blumer, 63–269, 65+454; Backus v. Burke, 63–272, 65+459; Heaton v. Darling, 66–262, 68+1087; Tilleny v. Knoblauch, 73–108, 75+1039; First Nat. Bank v. Flynn, 75–279, 77+961; Weller v. Summers, 82–307, 84+1022; Evans v. Thompson, 89–202, 94+692; Stitt v. Rat Portage L. Co., 96–27, 104+561.

[38] Belote v. Morrison, 8–87(62); Madigan v. Mead, 31–94, 16+539.

[39] Belote v. Morrison, 8–87(62) (overruling McClane v. White, 5–178, 139). See Sloan v. Becker, 34–491, 26+730.

[40] Holton v. Meighen, 15–69(50).

[41] Id.

[42] McClane v. White, 5–178(139); Belote v. Morrison, 8–87(62); Phoenix v. Gardner, 13–430(396).

[43] Madigan v. Mead, 31–94, 16+539; Stitt v. Rat Portage L. Co., 96–27, 104+561.

[44] Meighen v. King, 31–115, 16+702; Jones v. Blake, 33–362, 23+538; Wakefield v. Day, 41–344, 43+71; Marston v. Williams, 45–116, 47+644.

[45] Wakefield v. Day, 41–344, 43+71; Terry v. Wilson's Estate, 50–570, 52+973; Tilleny v. Knoblauch, 73–108, 75+1039.

[46] Id.; Backus v. Burke, 63–272, 65+459.

[47] Madigan v. Mead, 31–94, 16+539; Stitt v. Rat Portage L. Co., 96–27, 104+561.

[48] Buse v. Page, 32–111, 19+736, 20+95; Phoenix v. Gardner, 13–430(396).

time and as part of one transaction are to be construed together, as if but one instrument, in order to ascertain the real intention of the parties.[49] Letters forming a part of the res gestae are admissible. It is not allowable for one of the parties to testify what his intention was in executing the deed.[50] The existence of a debt between the grantor and grantee,[51] the retention of possession by the grantor,[52] the inadequacy of the consideration,[53] the making of substantial improvements,[54] the payment of taxes,[55] and the subsequent conduct of the parties generally [56] are all items of evidence.

6156. Deed and bond to reconvey—Conditional sales—Where A conveys land to B by absolute deed, and B at the same time executes to A a bond or agreement to reconvey to A upon payment of a certain sum of money at a specified time, the transaction between the parties, upon this simple state of facts, purports to be, and prima facie is, a conditional sale and not a mortgage.[57] But a deed and a bond to reconvey may be a mortgage on their face,[58] or they may be shown to be a mortgage by parol evidence.[59] In determining whether a transaction is a mortgage or a conditional sale, the important question is, what was the intention of the parties? Did they intend security or sale? This intention is to be ascertained by looking at the written memorials of the transaction, and its attendant facts and circumstances.[60] The absence of a personal covenant or promise to repay is a material circumstance in determining whether a mortgage or conditional sale is intended, but it is not conclusive.[61] In doubtful cases a contract will ordinarily be construed to be a mortgage, rather than a conditional sale, because in the former case the right of redemption remains, though the terms of the mortgage is not strictly complied with, while in the latter strict compliance is required to save a forfeiture.[62] The grantee in such a deed acquires only the interest of a mortgagee.[63] He has no leviable interest.[64]

6157. Degree of proof required—To prove an absolute deed a mortgage a mere preponderance of evidence is insufficient. The proof must be clear, strong, and convincing, though it need not be beyond a reasonable doubt.[65] It would seem that the mere uncorroborated testimony of the plaintiff in interest is insufficient.[66]

[49] Hill v. Edwards, 11-22(5); Holton v. Meighen, 15-69(50); Benton v. Nicoll, 24-221. See Blakeley v. LeDuc, 25-448.

[50] Phoenix v. Gardner, 13-430(396).

[51] King v. McCarthy, 50-222, 52+648; Buse v. Page, 32-111, 19+736, 20+95.

[52] Philips v. Mo, 91-311, 97+969.

[53] Hill v. Edwards, 11-22(5); Evans v. Thompson, 89-202, 94+692; King v. McCarthy, 50-222, 52+648.

[54] Philips v. Mo, 91-311, 97+969.

[55] See § 6154.

[56] King v. McCarthy, 50-222, 52+648.

[57] Buse v. Page, 32-111, 19+736, 20+95; Butman v. James, 34-547, 27+66; Marston v. Williams, 45-116, 47+644.

[58] Benton v. Nicoll, 24-221; Hill v. Edwards, 11-22(5); Archambau v. Green, 21-520; Spalti v. Blumer, 63-269, 65+454.

[59] King v. McCarthy, 50-222, 52+648.

[60] Buse v. Page, 32-111, 19+736, 20+95; King v. McCarthy, 50-222, 52+648.

[61] Niggeler v. Maurin, 34-118, 24+369; King v. McCarthy, 50-222, 52+648.

[62] Niggeler v. Maurin, 34-118, 24+369; King v. McCarthy, 50-222, 52+648.

[63] Benton v. Nicoll, 24-221.

[64] Butman v. James, 34-547, 27+66.

[65] Stitt v. Rat Portage L. Co., 96-27, 104+561; Mpls. T. M. Co. v. Jones, 95-127, 103+1017; Dwyer v. Whiteman, 92-55, 99+362; Wakefield v. Day, 41-344, 43+71; Sloan v. Becker, 31-414, 18+143; Id., 34-491, 26+730. See Staughton v. Simpson, 69-314, 72+126 (error to dismiss for insufficiency of evidence); Reider v. Walz, 93-399, 101+601 (error to set aside special verdict finding a deed a mortgage); Ness v. March, 95-301, 104+242 (error to dismiss for insufficiency of evidence). In the following cases the evidence was held insufficient: Merchants Nat. Bank v. Stanton, 62-204, 64+390; Shultes v. Stivers, 66-517, 69+639; Philips v. Mo, 91-311, 97+969; Dwyer v. Whiteman, 92-55, 99+362; Webster v. McDowell, 102-445, 113+1021.

[66] Stitt v. Rat Portage L. Co., 96-27, 104+561.

6158. A question of fact—Whether an absolute deed was intended by the parties as a security is a question of fact and is frequently submitted to a jury in an action tried by the court.[67] It is error for the court to dismiss an action if the jury might reasonably find either way.[68]

6159. Burden of proof—The presumption is that a deed absolute on its face is an absolute conveyance. The burden of proving such a deed a mortgage is on the party asserting it.[69]

6160. Recording act—Notice—A bond for the reconveyance of land made at the same time and bearing the same date as an absolute deed thereof is, if so intended, an instrument of defeasance within the statute, and, if duly recorded, protects the right of defeasance, which it is intended to secure, against all persons, without any notice to them except such as is given by the record. Whoever takes title while such a defeasance is on record takes subject to the right of the party claiming under the defeasance to show that, though the transaction is prima facie a conditional sale, it is in legal effect a mortgage.[70] Where an absolute deed and a bond to reconvey or other instrument of defeasance constitute a mortgage, the mortgagor's equity of redemption is subject to the rights of subsequent bona fide purchasers or incumbrancers, unless the defeasance is duly recorded.[71] But the record of the deed alone in such a case is sufficient to protect the rights of the mortgagee.[72] The deed is properly recorded as a deed and not as a mortgage, and the bond or other instrument of defeasance is properly recorded in the book kept for miscellaneous records.[73] Actual possession by the grantor in an absolute deed intended by the parties as a mortgage is notice to subsequent purchasers and incumbrancers of the grantor's equity of redemption.[74] The grantor of an absolute deed intended as security may be estopped by his conduct from asserting his equity against an innocent party.[75]

6161. Recovery of loan on failure of security—Where an absolute deed is given for the purpose of securing a loan to be repaid at a future time, such conveyance is to be treated as a mortgage, and upon the failure of the security, which deprives the party who receives the conveyance of its benefit, without his fault, he may recover the money loaned, in an action for that purpose.[76]

6162. Right to possession—The mortgagee under a mortgage in the form of an absolute deed cannot recover possession without foreclosure proceedings. The fact that the mortgage debt is not paid and that the statute of limitations has run against the right to foreclose and redeem is immaterial.[77]

6163. Other remedies than foreclosure—Where a grantor parts with property on the faith of the promise of the grantee to hold it as security, equity will not permit the grantee to retain the property in violation of his agreement, but will compel him to restore it or its value, or the proceeds thereof, and in proper cases enforce it if it is partly performed.[78]

[67] Niggeler v. Maurin, 34–118, 24+369; Sloan v. Becker, 34–491, 26+730.

[68] Sloan v. Becker, 31–414, 18+143; Staughton v. Simpson, 69–314, 72+126.

[69] Merchants Nat. Bank v. Stanton, 62–204, 64+390.

[70] Hill v. Edwards, 11–22(5); Butman v. James, 34–547, 27+66. Aliter if the deed and bond do not bear the same date. Weide v. Gehl, 21–449.

[71] Cogan v. Cook, 22–137; Blakeley v. Le-Duc, 25–448; Esty v. Cummings, 80–516, 83+420.

[72] Marston v. Williams, 45–116, 47+644.

[73] Benton v. Nicoll, 24–221. See Daughaday v. Paine, 6–443(304, 310).

[74] New v. Wheaton, 24–406. See Barchent v. Selleck, 89–513, 95+455 (party in possession estopped by conduct).

[75] Esty v. Cummings, 80–516, 83+420; Barchent v. Selleck, 89–513, 95+455.

[76] Evans v. Thompson, 89–202, 94+692.

[77] Meighen v. King, 31–115, 16+702.

[78] Randall v. Constans, 33–329, 23+530.

6164. Conveyance by mortgagee—Fraud—Where the grantee in a deed given to secure the payment of a debt conveys the land in fraud of the trust, and receives other land in exchange, the defrauded grantor (or mortgagor) may at his election require the grantee to account for the value of the land conveyed, the value of the land received in exchange, or the specific property thus received.[79]

6165. Principal and agent—If a principal ratifies the act of his agent in taking an absolute deed instead of a mortgage as security for a loan he will hold the deed as a mortgage and not as a deed.[80]

6166. Amount required to redeem—To secure a reconveyance the grantor can be required to pay only such debt or debts as the deed was given to secure.[81]

6167. Pleading—Cases are cited below involving questions of pleading in relation to mortgages in the form of absolute deeds.[82]

PARTIES

6168. Who may take a mortgage—A city,[83] a county,[84] a foreign bank,[85] an agent,[86] a person under an assumed name,[87] a corporation,[88] or the individuals of a partnership,[89] may take a mortgage. A mortgage to a partnership in the firm name will operate as a mortgage to the individual members named,[90] and the fact that a mortgage runs to a firm is no defence to an action to foreclose.[91] Foreclosures by advertisement of mortgages running to a firm have been legalized by curative acts.[92]

6169. Conveyance by third party—To constitute a mortgage it is not essential that the conveyance be made by the debtor or by the party claiming the right of redemption.[93]

FORM, EXECUTION, AND DELIVERY

6170. What law governs—The validity of a mortgage depends on the law in force at the time of its execution.[94]

[79] Dybdal v. Fagerberg, 102–130, 112+1018; Darling v. Harmon, 47–166, 49+686. See Dietel v. Home S. & L. Assn., 59–211, 60+1100 (burden of proof).

[80] Nye v. Swan, 49–431, 52+39.

[81] Weller v. Summers, 82–307, 84+1022.

[82] Nichols v. Randall, 5–304(240) (held a misjoinder of parties or causes of action in action to foreclose); Phoenix v. Gardner, 13–430(396) (complaint in action to foreclose sustained); Holton v. Meighen, 15–69(50) (complaint in action to have an absolute deed declared a mortgage and to redeem sustained); Sloan v. Becker, 31–414, 18+143 (prior deed held admissible without being specially pleaded); Livingston v. Ives, 35–55, 27+74 (action to have an absolute deed adjudged a mortgage and to redeem therefrom—defence that deed was in fraud of creditors must be specially pleaded); Wakefield v. Day, 41–344, 43+71 (proof that an absolute deed was intended as a mortgage held admissible under a denial); Miller v. Smith, 44–127, 46+324 (complaint in action to have a deed adjudged a mortgage and for an accounting held insufficient as showing laches); Nye v. Swan, 49–431, 52+39 (tender before suit or offer to pay in complaint unnecessary); Terry v. Wilson's Estate, 50–570, 52+973 (proof that an absolute deed was intended as a mortgage held admissible under a denial).

[83] Fergus Falls v. Fergus Falls H. Co., 80–165, 83+54.

[84] See Swift v. Hennepin County, 76–194, 78+1107.

[85] Lebanon S. Bank v. Hollenbeck, 29–322, 13+145.

[86] Menard v. Crowe, 20–448(402).

[87] Scanlan v. Grimmer, 71–351, 74+146.

[88] Cases supra and Morrison v. Mendenhall, 18–232(212).

[89] Morrison v. Mendenhall, 18–232(212).

[90] Gille v. Hunt, 35–357, 29+2; Menage v. Burke, 43–211, 45+155.

[91] Foster v. Johnson, 39–378, 40+255.

[92] See Laws 1881 c. 140.

[93] Fisk v. Stewart, 24–97; Marshall v. Thompson, 39–137, 39+309; Evans v. Thompson, 89–202, 94+692; Stitt v. Rat Portage L. Co., 96–27, 33, 104+561.

[94] Olson v. Nelson, 3–53(22).

6171. Form—A legal mortgage, as distinguished from an equitable one, must have all the formal requisites of a deed.[95] It may be in the form of a warranty deed, with a mortgage clause added.[96]

6172. Description of the parties—The description of the mortgagee as "agent" for a designated person is not improper.[97] A mortgage must run to some "person," a corporation being regarded as a person in law.[98] A mortgage to a partneship should run to the individual members "as partners under the firm name of" etc.[99] The mortgagee need not be named if he is described with sufficient definiteness and certainty, as where he is described by a title or an office and there is but one such.[1] A mortgage to a person under an assumed name has been sustained.[2]

6173. Description of the premises—A mortgage duly executed, purporting to convey a full section of land, transfers an integral fraction thereof owned by the grantor. A mortgage describing land by government subdivisions in the proper township and range is sufficient, though it is further designated as situated in the wrong county.[3] A description according to a plat long in the register of deeds' office, but not technically correct, has been upheld.[4] As between the parties, the premises need not be described specifically. "All its property, whatsoever and wheresoever, both present and future" is sufficient.[5] To charge third parties with notice from the record greater certainty is required.[6] After the description a mortgage read, "this mortgage excepts from the within description all that part already taken and graded for Dakota Avenue." At the time, condemnation proceedings were in progress, but were subsequently abandoned. It was held that a strip covered by the proceedings was within the exception.[7] Where, in a mortgage executed by a corporation, there was a mistake in the description of the premises, it was held that a director could not take advantage of the mistake.[8]

6174. Attestation—A mortgage with but one witness is binding between the parties, and as to third parties with actual notice,[9] but its record has no force as constructive notice.[10] The defect may be remedied by a curative act.[11] Mere formal defects are not fatal.[12]

6175. Acknowledgment—It requires proof beyond a reasonable doubt to overcome an acknowledgment.[13] Under Pub. Stat. (1849–1858) c. 35 § 8, a seal was not required to a certificate of acknowledgment.[14]

6176. Seal—Equity will reform and enforce an unsealed mortgage as against the maker and subsequent assignees and lienors with notice.[15]

6177. Delivery—If a mortgage is so disposed of, or treated, as to evince clearly the intention of the parties that it should take effect as such, it is a sufficient delivery.[16] The presumption that a mortgage was delivered at its date may be rebutted.[17]

[95] Morrison v. Mendenhall, 18–232(212); Gille v. Hunt, 35–357, 29+2.
[96] Swedish etc. Bank v. Germania Bank, 76–409, 79+399.
[97] Menard v. Crowe, 20–448(402).
[98] Morrison v. Mendenhall, 18–232(212).
[99] See cases under § 6168.
[1] Gille v. Hunt, 35–357, 29+2.
[2] Scanlan v. Grimmer, 71–351, 74+146.
[3] Risch v. Jensen, 92–107, 99+628.
[4] Rochat v. Emmett, 35–420, 29+147.
[5] Howard v. Iron & L. Co., 62–298, 64+896.
[6] Simmons v. Fuller, 17–485(462).
[7] Lawrence v. London etc. Co., 71–535, 74+892.
[8] Gill v. Russell, 23–362.
[9] Johnson v. Sandhoff, 30–197, 14+889.
[10] Parret v. Shaubhut, 5–323(258); Thompson v. Morgan, 6–292(199).
[11] Moreland v. Lawrence, 23–84. See Thompson v. Morgan, 6–292(199); Ross v. Worthington, 11–438(323).
[12] Upham v. Harris, 82–25, 84+496.
[13] Goulet v. Dubreuille, 84–72, 86+779.
[14] Thompson v. Morgan, 6–292(199).
[15] Lebanon S. Bank v. Hollenbeck, 29–322, 13+145. A seal is no longer necessary. See R. L. 1905 § 2652.
[16] Nazro v. Ware, 38–443, 38+359; Lee v. Fletcher, 46–49, 48+456; Smith v. Garwood, 73–311, 76+54; Thielen v. Randall,

RECORDING

6178. Necessity—An unrecorded mortgage is void as to subsequent bona fide purchasers and incumbrancers.[18] A mortgage executed before, but not recorded until after an assignment for the benefit of creditors by the mortgagor, is void as to the assignee.[19]

6179. Sufficiency—The record of a mortgage in which the mortgaged premises are not described with reasonable certainty is not notice to third parties.[20] A mortgage recorded as having but one witness is not notice to third parties,[21] but a mortgage with one witness is binding on the mortgagor and his privies and third parties with actual notice.[22] A false and impossible particular, added to the description, by mistake of the register does not vitiate the record. No more is required of a record than that it give the same information that would be furnished by an inspection of the instrument recorded.[23]

6180. Effect as notice—In general—The record of an unsatisfied mortgage is constructive notice of all the rights and equities of the mortgagee under it. Hence, though a person finds a note and mortgage in the possession of the mortgagor, he has no right to assume from that fact alone, without examination of the records, that the mortgage has been satisfied; and if he does so, the mortgage being undischarged of record, he takes subject to the equities of the mortgagee.[24] A holder of a second mortgage is charged with notice of equities arising out of a prior mortgage as the same appear of record.[25] An heir is chargeable with notice of a recorded mortgage upon property devised to him and of all equities arising thereunder of record.[26] The record of a subsequent mortgage is not constructive notice to a prior mortgagee.[27] The record is notice only of what itself discloses. If it does not disclose the rate of interest it is notice of only the legal rate of interest as to subsequent incumbrancers.[28] Whether a covenant to insure runs with the land so that the record of the mortgage is constructive notice to third parties of the equities of the mortgagee is an open question.[29]

SUBJECT-MATTER

6181. Equitable estates—The equitable estate of a vendee of land may be mortgaged.[30]

6182. Pre-emption entry—A mortgage by a pre-emptor made after final proof, but before the issuance of a patent, in pursuance of an agreement prior to proof, is valid.[31]

6183. Homestead entry—A person making an entry under the homestead laws of the United States may execute a valid mortgage on the land entered, either before or after making final proof, and before the issuance of a patent.[32]

75-332, 77+992; Dodsworth v. Sullivan, 95-39, 103+719.

[17] Banning v. Edes, 6-402(270).

[18] Simmons v. Fuller, 17-485(462). See Recording Act, 8302.

[19] Kellogg v. Kelley, 69-124, 71+924; Perkins v. Hanson, 71-487, 74+135; Robertson v. Rentz, 71-489, 74+133. See Woolson v. Kelley, 73-513, 76+258.

[20] Simmons v. Fuller, 17-485(462); Bailey v. Galpin, 40-319, 41+1054; Bank of Ada v. Gullikson, 64-91, 66+131.

[21] Parret v. Shaubhut, 5-323(258); Thompson v. Morgan, 6-292(199).

[22] Johnson v. Sandhoff, 30-197, 14+889.

[23] Thorwarth v. Armstrong, 20-464(419).

[24] Geib v. Reynolds, 35-331, 28+923.

[25] Miller v. Fasler, 42-366, 44+256. See Recording Act, 8291.

[26] Jellison v. Halloran, 44-199, 46+332.

[27] Norton v. Met. Life Ins. Co., 74-484, 77+298, 77+539. See Abbott v. Peck, 35-499, 29+194; Anderson v. Liston, 69-82, 72+52.

[28] Whittacre v. Fuller, 5-508(401).

[29] Ames v. Richardson, 29-330, 13+137.

[30] Randall v. Constans, 33-329, 23+530; Niggeler v. Maurin, 34-118, 24+369.

[31] Jones v. Tainter, 15-512(423) (overruling Woodbury v. Dorman, 15-338, 272; McCue v. Smith, 9-252, 237). See Camp v. Smith, 2-155(131); Sharon v. Wooldrick, 18-354(325).

[32] See § 7900.

6184. Interest of partner—A partner may mortgage his interest in partnership property, and in an action to foreclose the mortgagee may have an accounting.[33]

6185. Homestead—A homestead, as exempted by the laws of this state, may be the subject of mortgage, and such a mortgage creates the same rights and obligations as a mortgage of non-exempt land.[34]

6186. Fixtures—It is the general rule that fixtures pass by a mortgage of the land without special mention.[35] Fixtures annexed after the execution of a mortgage may remain personalty by agreement between the mortgagor and the party annexing them, without the concurrence of the mortgagee.[36]

6187. Undivided interest—An undivided interest in realty may be mortgaged.[37]

DEBT OR OBLIGATION SECURED

6188. Personal liability unnecessary—It is unnecessary that the mortgagor enter into a personal obligation to pay the debt secured. The mortgagee may rely solely on the security.[38]

6189. No bond or note necessary—It is unnecessary that there should be any collateral bond or security.[39] A mortgage is sufficient which refers to a note which had been made out, but not signed, and which, by mistake or fraud, never was signed, though it was agreed that it should be executed.[40]

6190. Money need not be paid to mortgagor—The money loaned may be paid to a third party to pay a debt of the mortgagor, and it is unnecessary that it should pass through the hands of the mortgagor.[41]

6191. Payment of money to loan agent—A mortgagee has been held justified in paying to a loan agent, to whom the mortgagor made application for the loan and through whom the loan was negotiated, the entire amount of the loan without satisfying a prior mortgage on the land.[42]

6192. Description—The validity of a mortgage does not depend upon the description of the debt, nor upon the form of the indebtedness; it depends rather upon the existence of the debt it was given to secure. It may be valid without a note or bond, though it purports to secure, and substantially describes, a note or bond. The true state of the indebtedness need not be disclosed by the instrument, but in cases free from fraud may be shown by parol.[43]

6193. Future advances—A mortgage may be made to secure future optional advances,[44] but a mortgagee cannot, as against a subsequent lien-claimant, have the benefit of the security for optional advances made after actual notice of

[33] Churchill v. Proctor, 31–129, 16+694.

[34] Lowell v. Doe, 44–144, 46+297. See § 4211.

[35] Beaupre v. Dwyer, 43–485, 45+1094; Woodham v. First Nat. Bank, 48–67, 50+1015; Capehart v. Foster, 61–132, 63+257; Shepard v. Blossom, 66–421, 69+221. See Merchants Nat. Bank v. Stanton, 62–204, 64+390.

[36] Merchants Nat. Bank v. Stanton, 55–211, 56+821; Id., 59–532, 61+680; Id., 62–204, 64+390; Pioneer S. & L. Co. v. Fuller, 57–60, 58+831; N. W. Mut. L. Ins. Co. v. George, 77–319, 79+1028, 1064.

[37] Darling v. Harmon, 47–166, 49+686; Russell v. Merchants' Bank, 47–286, 50+228.

[38] Fisk v. Stewart, 24–97; Niggeler v. Maurin, 34–118, 24+369; Heaton v. Darling, 66–262, 68+1087.

[39] Nazro v. Ware, 38–443, 38+359; Lee v. Fletcher, 46–49, 48+456.

[40] Volmer v. Stagerman, 25–234.

[41] Niggeler v. Maurin, 34–118, 24+369; Heaton v. Darling, 66–262, 68+1087.

[42] Murphy v. Becker, 101–329, 112+264.

[43] Nazro v. Ware, 38–443, 38+359; Lee v. Fletcher, 46–49, 48+456; Cable v. Mpls. etc. Co., 47–417, 50+528. See Merhoff v. Merhoff, 84–263, 87+781; Volmer v. Stagerman, 25–234.

[44] Madigan v. Mead, 31–94, 16+539; Stitt v. Rat Portage L. Co., 96–27, 104+561. See Berry v. O'Connor, 33–29, 21+840; Frisbee v. Poole, 32–411, 21+470 (held not to be for future advances).

such lien.[45] When a mortgage states that it was given to secure a specified amount of indebtedness, or a note for a certain amount, it may be shown by parol that no such indebtedness existed at the time of the execution of the mortgage, and that the mortgage was given to secure future advances not exceeding the amount stated. But a mortgage for a specified amount cannot be enlarged by parol evidence to secure future advances.[46]

6194. Coupon notes—Exchange—A mortgage covenanting to pay a definite sum "according to the tenor and effect" of certain notes, which provide for the payment of that sum, with interest and exchange, creates a lien for the principal sum, interest, and exchange. That coupon notes for the amount of the annual interest on a sum secured by a mortgage run in part to the mortgagee and in part to a third person, or bearer, does not destroy the lien of the mortgage for the total interest secured.[47]

6195. For smaller sum than due—A mortgage securing a note stated to be for a definite sum, when in fact the note is for a larger sum, is security only for the smaller sum stated in the mortgage.[48]

6196. Contingent liability—A mortgage may be made to secure a contingent liability.[49]

6197. For larger sum than due—A mortgage may be made to secure a larger amount than is actually due.[50]

6198. One mortgage—Several notes—A mortgage may be made to secure several notes payable at different times.[51]

6199. For maintenance—A mortgage may be made to secure the maintenance of the mortgagor during his life.[52]

6200. Attorney's fees—A mortgage may include a stipulation to pay a reasonable amount for attorney's fees on foreclosure.[53]

6201. Want or failure of consideration—It is competent, in defence of an action or proceeding to foreclose, or in an action to restrain a foreclosure and to have the apparent lien of a mortgage canceled, to show that there is nothing due on the mortgage though it is under seal, because there was no consideration for the note or obligation it purports to secure.[54] A mortgagor may enjoin the foreclosure of a mortgage by the mortgagee on the ground that it was without consideration, though it was executed for the purpose of hindering and delaying his creditors,[55] but he is estopped, as against a bona fide assignee, from interposing the defence of want of consideration.[56] In an action brought to restrain the foreclosure of a mortgage under a power, on the ground that a part of the money for which the mortgage and the note secured thereby was given had not been paid over by the mortgagee to the mortgagors, and to compel an accounting between the parties as to the amount actually due, it was held that the facts, as found by the trial court, were supported by the evidence, and that they warranted the conclusion of law based thereon.[57] A purchaser assuming a first mortgage has been held entitled to have a second mortgage

[45] Finlayson v. Crooks, 47–74, 49+398, 645.

[46] Swedish etc. Bank v. Germania Bank, 76–409, 79+399.

[47] Kingsley v Anderson, 103–510, 115+642, 116+112.

[48] Id.

[49] Madigan v. Mead, 31–94, 16+539.

[50] Nazro v. Ware, 38–443, 38+359. See Heim v. Chapel, 62–338, 64+825.

[51] Wilson v. Eigenbrodt, 30–4, 13+907.

[52] Bachmeier v. Bachmeier, 69–472, 72+710; Merhoff v. Merhoff, 84–263, 87+781. See Doescher v. Spratt, 61–326, 63+736; Childs v. Rue, 84–323, 87+918; Mpls. T. M. Co. v. Hanson, 101–260, 112+217.

[53] Griswold v. Taylor, 8–342(301).

[54] Anderson v. Lee, 73–397, 76+24. See Dart v. Minn. L. & T. Co., 74–426, 77+288; Dodsworth v. Sullivan, 95–39, 103+719; First State Bank v. Sibley Co. Bank, 96–456, 105+485.

[55] Devlin v. Quigg, 44–534, 47+258. See Dodsworth v. Sullivan, 95–39, 103+719.

[56] Moffett v. Parker, 71–139, 73+850.

[57] Gerdes v. Burnham, 78–511, 81+516.

canceled for want of consideration.[58] If a purchaser who assumes a mortgage obtains no title by his deed there is no consideration for his assumption of the mortgage and he is not liable thereon.[59] In an action to cancel a mortgage on the ground that the loan was not delivered to the mortgagor, it was held error to exclude evidence that the agents to whom the loan was paid were acting as agents for a third party in another transaction and that the mortgagor directed the money to be applied by such agents for the benefit of the third party in that transaction.[60] Upon the failure of the security, which deprives the party who receives the conveyance of its benefit, without his fault, he may recover the money loaned.[61] Where a mortgagee, without proper excuse, refuses to pay over to a mortgagor the full amount of the loan agreed upon, an action can be maintained by the latter to cancel the note evidencing the debt, and to satisfy and discharge the mortgage of record, proper terms being imposed by the court in its decree as to a repayment of the part of the loan received.[62] Certain notes and mortgages substituted for others have been held not to be without consideration, but to have been given and received to secure the original indebtedness.[63] A partial failure of the mortgagee to carry out his contract to erect and operate a steel plant, the mortgage being given as a bonus, has been held a defence to an action to foreclose.[64] A note, accompanied by a mortgage has been held to be, in effect, an accommodation note and to have a consideration from the time of its transfer, pursuant to the intention with which it was made.[65] An answer held to show a partial failure of consideration but not a counterclaim.[66] A consideration held to have been properly paid on an order of the mortgagor.[67]

COVENANTS

6202. In general—A covenant of title runs with the land and may be sued upon by the purchaser at a foreclosure sale.[68] A wife may join in the covenants of her husband's mortgage and be bound thereby.[69] Covenants against incumbrances run with the land and an action will lie thereon by a remote grantee who has discharged the incumbrances, though such covenant is one of the covenants in a mortgage through which he acquired his title by a purchase at foreclosure sale.[70] If it is recited in a mortgage that the land is conveyed subject to a specified incumbrance the recital qualifies subsequent covenants of seizin, quiet enjoyment, and of general warranty.[71] It is no defence to the foreclosure of a purchase-money mortgage that there is an outstanding incumbrance against which the mortgagee has covenanted in his deed of conveyance.[72] If a mortgage contains no covenants of title, and the title proves defective, a purchaser at a foreclosure sale has no remedy against the mortgagor.[73] A covenant for partial releases as lots are sold, runs with

[58] Welbon v. Webster, 89–177, 94+550.
[59] McLaughlin v. Betcher, 87–1, 91+14.
[60] Thielen v. Randall, 75–332, 77+992.
[61] Evans v. Thompson, 89–202, 94+692.
[62] Payne v. Loan etc. Co., 54–255, 55+1128.
[63] Egan v. Fuller, 35–515, 29+313.
[64] Ironton L. Co. v. Butchart, 73–39, 75+749.
[65] Burgess v. Bragaw, 49–462, 52+45.
[66] Lash v. McCormick, 17–403(381).
[67] Dart v. Minn. L. & T. Co., 74–426, 77+288.
[68] Security Bank v. Holmes, 65–531, 68+113; Am. B. & L. Assn. v. Waleen, 52–23, 53+867.
[69] Sandwich Mfg. Co. v. Zellmer, 48–408, 51+379; Security Bank v. Holmes, 68–538, 71+699; Von Hemert v. Taylor, 73–339, 76+42; Rooney v. Koenig, 80–483, 83+399.
[70] Security Bank v. Holmes, 65–531, 68+113; Id., 68–538, 71+699. See Randall v. Macbeth, 81–376, 84+119; Stewart v. Parcher, 91–517, 98+650.
[71] Walther v. Briggs, 69–98, 71+909.
[72] Bay View L. Co. v. Myers, 62–265, 64+816.
[73] Am. B. & L. Assn. v. Waleen, 52–23, 53+867.

the land.[74] A personal covenant to pay the debt is unnecessary and none is implied.[75] A negotiable note, due in the future, according to its terms, cannot be brought to immediate maturity through a clause in a mortgage given to secure the same, authorizing the mortgagee to declare the debt or note due upon default in any of the provisions found in the mortgage.[76] Whether a covenant to insure runs with the land is an open question.[77] A mortgage contained covenants of seizin, against incumbrances, and of warranty. The mortgagor subsequently took an assignment of a prior outstanding mortgage. It was held that if there was no merger, the prior mortgage was, by reason of the covenants in the second, postponed to and subject to, the second, so that, when the second was foreclosed, and the time to redeem expired without redemption, it cut off all rights under the first, including a right to redeem from a foreclosure thereof.[78]

PERSONAL LIABILITY TO PAY MORTGAGE DEBT

6203. None essential to mortgage—A personal obligation to pay the mortgage debt is not essential to a mortgage. The loan may be made on the real security alone.[79] A mortgage may be valid without a note or bond, though it purports to secure a note or bond.[80]

6204. None unless note or covenant—By statute there is no implied covenant to pay the mortgage debt. Hence if the mortgage contains no covenant, and there is no note or bond, there is no personal liability. A note is given to create a personal liability.[81]

6205. Liabilty on note and mortgage distinct—A note and a mortgage securing the same are separate instruments, differing in their nature and purpose. The debt evidenced by the note is the principal thing and governed by the law merchant, while the mortgage is simply an incident and not governed by the law merchant. The note is enforceable according to its terms and independently of the mortgage. A note due in the future, according to its terms, cannot be brought to immediate maturity through a clause in a mortgage given to secure the same, authorizing the mortgagee to declare the debt or note due upon default in any of the provisions found in the mortgage.[82] A mortgage may be foreclosed though an action on the debt is barred,[83] and a part payment on the debt after its maturity does not extend the mortgage.[84] A release of the personal liability of the mortgagor does not necessarily effect a release of the mortgage,[85] but a payment of the debt discharges the mortgage.[86] The person entitled to enforce the personal liability may not be the person entitled to foreclose the mortgage.[87] Where A and B jointly made a mortgage in which A alone covenanted to pay the debt thereby secured, and B alone executed the

[74] Vawter v. Crafts, 41-14, 42+483.

[75] See § 6204 and Donnelly v. Simonton, 13-301(278); Ozmun v. Reynolds, 11-459 (341).

[76] White v. Miller, 52-367, 54+736.

[77] Ames v. Richardson, 29-330, 13+137.

[78] Hooper v. Henry, 31-264, 17+476.

[79] Fisk v. Stewart, 24-97; Madigan v. Mead, 31-94, 16+539; Niggeler v. Maurin, 34-118, 24+369; Marshall v. Thompson, 39-137, 39+309; Lee v. Fletcher, 46-49, 48+456; Slingerland v. Sherer, 46-422, 49+237; King v. McCarthy, 50-222, 52+648; Heaton v. Darling, 66-262, 68+1087.

[80] Lee v. Fletcher, 46-49, 48+456.

[81] R. L. 1905 § 3342; Van Brunt v. Mismer, 8-232(202); Ozmun v. Reynolds, 11-459(341); Donnelly v. Simonton, 13-301 (278).

[82] Blumenthal v. Jassoy, 29-177, 12+517; White v. Miller, 52-367, 54+736; Lanpher v. Barnum, 57-172, 58+988; Burchard v. Hull, 71-430, 436, 74+163.

[83] Ozmun v. Reynolds, 11-459(341); Conner v. Howe, 35-518, 29+314.

[84] Laws 1903 c. 15. See § 6311.

[85] Donnelly v. Simonton, 13-301(278); Slingerland v. Sherer, 46-422, 49+237; Nicolay v. Mallery, 62-119, 64+108; Walther v. Briggs, 69-98, 71+909.

[86] Johnson v. Williams, 4-260(183).

[87] Slingerland v. Sherer, 46-422, 49+237.

note secured by the mortgage, it was held that separate actions might be maintained on the two obligations.[88] A mortgage may be released without affecting the liability on the note.[89] The personal liability on the loan is not affected by the failure of the security.[90] A mortgagee may levy on property of the mortgagor not covered by the mortgage without first exhausting the mortgaged property.[91]

6206. Exhausting security first—Under Laws 1860 c. 48 it was necessary to exhaust the mortgage security before suing on the personal liability.[92]

LIEN

6207. In general—A mortgage is a specific lien on the mortgaged premises.[93] The lien lasts as long as the debt.[94] It passes to the purchaser at the foreclosure sale,[95] and it is not extinguished until it merges in the legal estate when that passes by lapse of time.[96] It is not affected by an abortive foreclosure.[97] It follows a building removed to a new lot, as against parties with notice, but it does not attach to the new lot.[98] The lien of a second mortgage attaches to the surplus on the foreclosure of a first mortgage.[99] Where property subject to a mortgage is condemned, the lien of the mortgage attaches to the award.[1]

CONFLICT AND PRIORITY OF LIENS

6208. Purchase-money mortgages—A purchase-money mortgage is one given to secure unpaid purchase money.[2]

6209. Priority of purchase-money mortgages—A purchase-money mortgage executed at the same time as the deed of purchase, either to the vendor or to a third party who advanced the purchase money paid to the vendor, takes precedence of the lien of a prior judgment against the mortgagor or of any other claim or lien arising through the mortgagor.[3] It is unnecessary that the deed and the mortgage should be executed at the same moment, or even on the same day, provided the execution of the two instruments constitute part of one continuous transaction and was so intended.[4] The basis of the rule is not the transitory seizin of the mortgagor, but the superiority of the equity of the mortgagee over all other claims.[5] The doctrine is one of equity and not of statute, and applies to any claim to, or lien upon, the property arising through the mortgagor.[6] Thus, a purchase-money mortgage is superior to the statutory in-

[88] Macomb v. Hanley, 61-350, 63+744.
[89] Blumenthal v. Jassoy, 29-177, 12+517; Slingerland v. Sherer, 46-422, 49+237.
[90] Evans v. Thompson, 89-202, 94+692.
[91] Bean v. Heron, 65-64, 67+805.
[92] Schalck v. Harmon, 6-265(176); Sanborn v. School Dist., 12-17(1); Johnson v. Lewis, 13-364(337).
[93] Ayer v. Stewart, 14-97(68).
[94] Whittacre v. Fuller, 5-508(401); Folsom v. Lockwood, 6-186(119); Geib v. Reynolds, 35-331, 28+923.
[95] See § 6364.
[96] Buchanan v. Reid, 43-172, 45+11.
[97] Folsom v. Lockwood, 6-186(119).
[98] Hamlin v. Parsons, 12-108(59).
[99] See § 6351.
[1] Moritz v. St. Paul, 52-409, 54+370; Boutelle v. Minneapolis, 59-493, 61+554.
[2] See Banning v. Edes, 6-402(270); Barker v. Kelderhouse, 8-207(178); Bolles v. Carli, 12-113(62); Jones v. Tainter, 15-512(423); Smith v. Lackor, 23-454; Stewart v. Smith, 36-82, 30+430; Jacoby v. Crowe, 36-93, 30+441; Benson v. Markoe, 37-30, 33+38; Reilly v. Williams, 47-590, 50+826; Schoch v. Birdsall, 48-441, 51+382; McCausland v. West Duluth L. Co., 51-246, 53+464; Resser v. Carney, 52-397, 54+89; Wright v. Nichols, 55-338, 56+1118; Spalti v. Blumer, 56-523, 526, 58+156; Doescher v. Spratt, 61-326, 63+736; Bay View L. Co. v. Myers, 62-265, 64+816; Peaslee v. Hart, 71-319, 73+976; Wheadon v. Mead, 72-372, 75+598; Strickland v. Minn. T. F. Co., 77-210, 79+674.
[3] Banning v. Edes, 6-402(270); Stewart v. Smith, 36-82, 30+430; Spalti v. Blumer, 56-523, 526, 58+156; Jacoby v. Crowe, 36-93, 30+441. Rule held not affected by agreement of mortgagee whereby his lien was subordinated to that of another mortgage, Peaslee v. Hart, 71-319, 73+976.
[4] Stewart v. Smith, 36-82, 30+430.
[5] Stewart v. Smith, 36-82, 30+430. But see Banning v. Edes, 6-402(270).
[6] Stewart v. Smith, 36-82, 30+430; Schoch

terest of the other spouse;[7] to another mortgage, though it is executed and recorded first,[8] or is executed and recorded before the mortgagor acquires title in order to raise part of the purchase money;[9] and to an agreement between the mortgagor and a third party.[10] A purchase-money mortgagee is not charged with notice of prior interests of record arising through the mortgagor. It is not his duty to search the records for conveyances made by his grantee while the latter was a stranger to the title.[11] A purchaser at the foreclosure of a purchase-money mortgage takes free from any claim or lien arising through the mortgagor.[12]

6210. Priority among mortgages as affected by recording act—A junior mortgage is superior to a senior mortgage, if it is recorded first and was taken without notice.[13] Two mortgages on the same land, but each to a different mortgagee, were dated the same day, executed and recorded at the same time, and both mortgagees were represented by the same agent. It was held, that the court did not err in finding that the mortgages were co-ordinate, and in refusing to find that one mortgagee, through such agent, promised the other that the latter's mortgage should be prior.[14] Where several mortgages, executed on the same day on the same land, were recorded at the same hour, and each received document numbers in the register's office, it was held that presumptively they took priority in the order of their numbers.[15] The record of a subsequent mortgage is not constructive notice to a prior mortgagee.[16] Where the record showed the discharge of a mortgage and the certificate of discharge contained a disavowal of any other mortgage, it was held that a subsequent mortgagee was justified in relying on the disavowal.[17]

6211. Priority among mortgages irrespective of recording act—In equity mortgages are given priority so as to work out justice between all the parties by an application of the doctrine of subrogation.[18] Possession by a grantee of mortgaged premises, who has executed a second mortgage, is not notice of the second mortgage to the executors of the first mortgagee so as to affect the priority of the first mortgage by reason of an extension of the time of payment.[19] A mortgage contained covenants of seizin, against incumbrances, and of warranty. The mortgagor subsequently took an assignment of a prior outstanding mortgage. It was held that if there was no merger, the prior mortgage was, by reason of the covenants in the second, postponed and subject to the second mortgage.[20] By a contract for the construction of a house for A it was agreed that upon the completion of the house A would secure certain deferred payments of the contract price by a mortgage on the premises to B. After B had become entitled to such mortgage security A, without consideration, mortgaged the premises to C. It was held that the security of B was superior to the mortgage of C.[21] A mortgage executed to correct a mistake in a prior mortgage has been held to operate as of the date of the original mortgage, and to be superior to subsequent mortgages taken with notice.[22]

v. Birdsall, 48–441, 51+382; Spalti v. Blumer, 56–523, 58+156. See Brainard v. Hastings, 3–45(17, 20).

[7] Laws 1909 c. 465; Jones v. Tainter, 15–512(423).

[8] Schoch v. Birdsall, 48–441, 51+382.

[9] Id.

[10] Bolles v. Carli, 12–113(62).

[11] Schoch v. Birdsall, 48–441, 51+382.

[12] Jacoby v. Crowe, 36–93, 30+441.

[13] Potter v. Marvin, 4–525(410); Lindauer v. Younglove, 47–62, 49+384; Miller v. Stoddard, 54–486, 56+131.

[14] Terry v. Moran, 75–249, 77+777.

[15] Conn. etc. Co. v. King, 72–287, 75+376.

[16] Norton v. Met. Life Ins. Co., 74–484, 77+298, 539. See Anderson v. Liston, 69–82, 72+52; Abbott v. Peck, 35–499, 29+194.

[17] Lindauer v. Younglove, 47–62, 49+384.

[18] See cases under § 6209.

[19] Norton v. Met. Life Ins. Co., 74–484, 77+298, 539.

[20] Hooper v. Henry, 31–264, 17+476.

[21] Dye v. Forbes, 34–13, 24+309.

[22] Brown v. Morrill, 45–483, 48+328.

6212. Conflict between mortgage and judgment liens—A judgment creditor without actual notice is in the same position as a bona fide purchaser and the lien of his docketed judgment takes precedence of the equity of a mortgagee to have his mortgage reformed. If the land is not described with reasonable certainty in a recorded mortgage, the record is not notice to a subsequent judgment creditor.[23] An unrecorded mortgage may be cut out by a subsequent docketed judgment determining title.[24] The equities of a judgment creditor have been held to be superior to the equities of a mortgagee.[25] In an action to reform and foreclose a mortgage, notice of lis pendens duly filed prior to the record of a deed from the mortgagor to a grantee against whom a judgment had been recovered will save the prior mortgage lien against such judgment, because such judgment, by the terms of the recording act, only takes precedence when the judgment debtor's title is of record.[26] A judgment takes precedence of an unrecorded mortgage, under Pub. Stat. (1849–1858) c. 35 § 54 and G. S. 1866 c. 40 § 21, only as to such titles as appear of record.[27] A judgment may be a lien on the equity of redemption of a grantor of a deed absolute in form, but designed as a mortgage.[28] The recording act is not applicable to resulting trusts.[29]

6213. Liens for taxes and assessments—The lien of a mortgage is subordinate to a lien for taxes or special assessments.[30]

6214. Conflict between mortgage and mechanics' liens—The subject of conflict between mortgages and mechanics' liens is considered elsewhere.[31]

RIGHTS AND LIABILITIES OF MORTGAGOR

6215. Nature of estate—Though a mortgage purports to be a conveyance [32] it does not pass the title. Until foreclosure the mortgagor retains the full legal title.[33]

6216. Right of possession—The mortgagor has the right to possession both before and after condition broken and until foreclosure.[34] This right, however, is limited by the doctrine of "a mortgagee in possession." [35] He may let into possession a senior mortgagee as against a junior mortgagee.[36] Under Laws 1858 c. 61 the mortgagor, to retain possession after foreclosure sale and during the period of redemption, was required to pay in advance the interest on the purchase money.[37]

6217. Right to sell—The mortgagor may sell and convey the land subject to the mortgage, and he may sell and convey anything which, though part of the realty, is capable of being made personalty by severance, subject to the right of the mortgagee to keep his security good.[38] He may sell his equity of redemption.[39]

[23] Bank of Ada v. Gullikson, 64–91, 66+131.
[24] See Berryhill v. Smith, 59–285, 61+144; Hall v. Sauntry, 72–420, 75+720.
[25] Whittaere v. Fuller, 5–508(401).
[26] Lebanon S. Bank v. Hollenbeck, 29–322, 13+145.
[27] Golcher v. Brisbin, 20–453(407).
[28] Marston v. Williams, 45–116, 47+644.
[29] School Dist. v. Peterson, 74–122, 76+1126.
[30] Morey v. Duluth, 75–221, 77+829; State v. Camp, 79–343, 82+645.
[31] See § 6065.
[32] See § 6145.
[33] Adams v. Corriston, 7–456(365); Hill v. Edwards, 11–22(5); Berthold v. Holman, 12–335(221); Niggeler v. Maurin, 34–118, 24+369; Rogers v. Benton, 39–39, 38+765; Jones v. Rigby, 41–530, 43+390; Marshall & I. Bank v. Cady, 76–112, 78+978.
[34] Rogers v. Benton, 39–39, 38+765; Pioneer S. & L. Co. v. Farnham, 50–315, 52+897; Marshall & I. Bank v. Cady, 76–112, 78+978.
[35] See § 6237.
[36] Jones v. Rigby, 41–530, 43+390.
[37] Stone v. Bassett, 4–298(215).
[38] Berthold v. Holman, 12–335(221).
[39] See § 6396.

6218. Right to lease—The mortgagor may lease the land [40] and the mortgagee cannot collect the rent from the tenant to pay the mortgage debt.[41] The tenant is entitled to crops sown and harvested by him as against a purchaser at a foreclosure sale, even though they are not harvested until after the expiration of the period of redemption.[42]

6219. Right to rents and profits—The mortgagor is entitled to the rents and profits until foreclosure.[43] In consideration of an extension of the time of payment the mortgagor may assign the rents to the mortgagee, with an incidental right of possession for their collection.[44] The right of the mortgagor to the rents and profits is limited by the doctrine of "a mortgagee in possession." [45]

6220. Right to crops—Where a mortgagor or his tenant remains in possession after the expiration of the redemption period and harvests a crop sown prior to the expiration of such period he is entitled to the crop, at least, if the purchaser at the foreclosure sale remains inactive.[46] A purchaser at a foreclosure sale has been held not entitled to an injunction to restrain a tenant of the mortgagor from removing crops sown during the year of redemption, but not matured until after such period.[47] A mortgagor has been held entitled, by agreement with the purchaser at a foreclosure sale, to remain in possession after the expiration of the redemption period for the purpose of harvesting a crop sown during the year of redemption.[48]

6221. Right to purchase mortgage—When a mortgagor sells the land, and the mortgage is excepted from the covenants, he may purchase and take an assignment of the mortgage, and upon payment of a prior incumbrance to the holder thereof he is entitled to be subrogated to his rights.[49] When land is conveyed by warranty deed "subject" to a mortgage, or the grantee assumes the mortgage as a part of the purchase price, the grantor may purchase and enforce the mortgage against the land.[50] But where the only reference in the deed to the mortgage is to except it from the covenant against incumbrances, the exception does not extend to or modify the covenant of warranty and any title thereafter acquired by the grantor under the mortgage inures to the benefit of the grantee.[51]

6222. Lien of judgment—The interest of a mortgagor is subject to the lien of a judgment docketed against him, and this is true even when the mortgage is in the form of an absolute deed.[52]

RIGHTS AND LIABILITIES OF MORTGAGEE

6223. In general—What passes by mortgage—Every right and interest of the mortgagor, together with all subsequently acquired rights, easements, and privileges which are necessary and essential to the full enjoyment thereof, pass with the mortgage, though not specially mentioned in the description therein.[53]

[40] Pioneer S. & L. Co. v. Fuller, 57–60, 58+831.

[41] Cullen v. Minn. L. & T. Co., 60–6, 61+818.

[42] Aultman v. O'Dowd, 73–58, 75+756.

[43] Pioneer S. & L. Co. v. Farnham, 50–315, 52+897; McDowell v. Hillman, 50–319, 52+897; Pioneer S. & L. Co. v. Fuller, 57–60, 58+831; Marshall & I. Bank v. Cady, 76–112, 78+978. See Cullen v. Minn. L. & T. Co., 60–6, 61+818.

[44] Farmers T. Co. v. Prudden, 84–126, 86+887.

[45] Anderson v. Minn. L. & T. Co., 68–491, 71+819.

[46] Aultman v. O'Dowd, 73–58, 75+756.

[47] Marks v. Jones, 71–136, 73+719.

[48] Mitchell v. Tschida, 71–133, 73+625.

[49] Gerdine v. Menage, 41–417, 43+91.

[50] Merritt v. Byers, 46–74, 48+417; Walther v. Briggs, 69–98, 71+909; Rooney v. Koenig, 80–483, 83+399.

[51] Rooney v. Koenig, 80–483, 83+399.

[52] Marston v. Williams, 45–116, 47+644.

[53] Swedish etc. Bank v. Conn. etc. Co., 83–377, 86+420.

Improvements owned by a firm on land of a partner mortgaged for a partnership debt have been held to pass.[54]

6224. Interest dependent upon title in mortgagor—The interest of a mortgagee may be defeated by the subsequent reversal or vacation of a judgment which vests title in the mortgagor; [55] or by the breach of a condition subsequent in the deed vesting title in the mortgagor.[56]

6225. Nature of interest before foreclosure—Prior to foreclosure the mortgagee has no estate or interest in the land, but only a lien thereon by way of security.[57] This lien is personal property.[58] It is not subject to levy.[59] The mortgagee has no greater interest in the land than to make his debt out of it.[60]

6226. No conveyable interest before foreclosure—A mortgagee has no conveyable interest before foreclosure, or at least until entry after condition broken, and a deed by him is inoperative unless intended as an assignment of the mortgage and debt and such intention must be made to appear.[61]

6227. Right to possession—It is provided by statute that "a mortgage of real property is not to be deemed a conveyance, so as to enable the owner of the mortgage to recover possession of the real property without a foreclosure." [62] At common law a mortgage conveyed the legal title and unless otherwise expressly agreed the mortgagee was entitled to the immediate possession and could maintain ejectment against the mortgagor.[63] And when the right of possession was reserved to the mortgagor it passed to the mortgagee upon condition broken and he could maintain ejectment without foreclosure.[64] The object of the statute was to abrogate the common-law rule which regarded a mortgage as a conveyance of the title, to make it a mere chattel or lien, and to reserve to the mortgagor the right of possession, both before and after condition broken and until after foreclosure.[65] The statute is applicable to an equitable mortgage created by an absolute deed.[66] All contracts inconsistent with the statute are void,[67] but the mortgagor may give the mortgagee a right of possession before foreclosure by agreement subsequent to the mortgage.[68] The statute does not impair the power of a court of equity to appoint a receiver of the property.[69] It has been held inapplicable to railway mortgages under special acts.[70] Parol evi-

[54] Chittenden v. German-Am. Bank, 27-143, 6+773.

[55] White v. Gurney, 92-271, 99+889.

[56] Mpls. T. M. Co. v. Hanson, 101-260, 112+217.

[57] Donnelly v. Simonton, 7-167(110); Adams v. Corriston, 7-456(365); Horton v. Maffitt, 14-289(216); Loy v. Home Ins. Co., 24-315; Turrell v. Warren, 25-9; Niggeler v. Maurin, 34-118, 24+369; Rogers v. Benton, 39-39, 38+765; Marshall & I. Bank v. Cady, 76-112, 78+978.

[58] Loy v. Home Ins. Co., 24-315; Johnson v. Williams, 4-260(183).

[59] Butman v. James, 34-547, 27+66.

[60] Johnson v. Williams, 4-260(183).

[61] Hill v. Edwards, 11-22(5); Gale v. Battin, 12-287(188); Johnson v. Lewis, 13-364(337); Greve v. Coffin, 14-345 (263); Everest v. Ferris, 16-26(14); Gessner v. Burdell, 18-497(444); Martin v. Fridley, 23-13; Benton v. Nicoll, 24-221; Jones v. Blake, 33-362, 23+538; Gille v. Hunt, 35-357, 29+2; Backus v. Burke, 63-272, 65+459; Tuttle v. Boshart, 88-284, 92+1117.

[62] R. L. 1905 § 4441.

[63] Adams v. Corriston, 7-456(365); Rice v. St. P. etc. Ry., 24-464, 475.

[64] Rogers v. Benton, 39-39, 38+765; Rice v. St. P. etc. Ry., 24-464, 475.

[65] Id.; Adams v. Corriston, 7-456(365); Lowell v. Doe, 44-144, 46+297; Cullen v. Minn. L. & T. Co., 60-6, 61+818; Donnelly v. Simonton, 7-167(110); Berthold v. Fox, 13-501(462); Loy v. Home Ins. Co., 24-315.

[66] Meighen v. King, 31-115, 16+702.

[67] Cullen v. Minn. L. & T. Co., 60-6, 61+818.

[68] Cullen v. Minn. L. & T. Co., 60-6, 61+818; Ferman v. Lombard I. Co., 56-166, 57+309; Farmers T. Co. v. Prudden, 84-126, 86+887.

[69] Lowell v. Doe, 44-144, 46+297; Marshall & I. Bank v. Cady, 75-241, 77+831; Id., 76-112, 78+978.

[70] Rice v. St. P. etc. Ry., 24-464; Seibert v. Mpls. etc. Ry., 52-246, 53+1151.

dence is inadmissible to prove a contemporaneous agreement that the mortgagee should have possession.[71]

6228. Right to purchase equity of redemption—The mortgagee may purchase the equity of redemption for a fair consideration, if no unconscionable advantage is taken of the necessities of the mortgagor.[72]

6229. Right to purchase paramount title—One who has innocently and in good faith taken a mortgage from a person holding the legal title under a conveyance which is fraudulent and void as to the creditors of the grantor may, upon learning of the fraud, buy a paramount title for his own benefit.[73]

6230. No right to rents and profits before foreclosure—Prior to foreclosure the mortgagee has no right to the rents and profits.[74] Where a mortgage provided that on default in the payment of interest, taxes, or insurance, the mortgagee might collect rents and apply them in payment, and the mortgagor subsequently leased the premises, it was held that the mortgagee could not collect the rents to pay the mortgage debt, but that he might do so to pay taxes and insurance.[75] Subsequent to the execution of a mortgage the mortgagor may assign rents to the mortgagee to be applied on the mortgage debt, and incidentally authorize the mortgagee to take possession for the purpose of leasing the property and collecting the rents.[76]

6231. Right to prevent waste—Waste by a mortgagor in possession will not be enjoined unless the acts complained of may so impair the value of the property as to render it insufficient, or of doubtful sufficiency, as security for the debt. But the value of the property should remain largely in excess of the debt secured by it.[77]

6232. Right to protect lien by paying charges—The estate of a tenant in common is chargeable in favor of his cotenant for his share of the expense necessarily incurred by the latter for the repair and preservation of the property. A mortgagee of an undivided interest, whose mortgage lien is subject to such a charge, may protect his security by paying the claim of his mortgagor's cotenant, and hold the mortgaged estate for his reimbursement and he may do so notwithstanding pending litigation between the cotenants.[78]

6233. A trustee of the mortgagor—The mortgagee is regarded in many respects as the trustee of the mortgagor, and must exercise the utmost good faith in the enforcement of his security.[79]

6234. General duty to other interests—The mortgagee has no greater interest in the land than to make his debt out if it, and in enforcing his rights he is bound to do as little damage as possible to others who are interested in it.[80]

6235. No right to timber cut before foreclosure—A mortgagee is not entitled to timber cut from the mortgaged premises before foreclosure.[81]

RIGHTS AND LIABILITIES OF SUCCESSIVE MORTGAGEES

6236. In general—A prior mortgagee cannot be compelled to foreclose at the instance of a subsequent mortgagee.[82] He may acquire the rights of "a

[71] Berthold v. Fox, 13-501(462).
[72] See § 6396.
[73] Gjerness v. Mathews, 27-320, 7+355.
[74] Spencer v. Levering, 8-461(410).
[75] Cullen v. Minn. L. & T. Co., 60-6, 61+818. See Pioneer S. & L. Co. v. Powers, 47-269, 50+227.
[76] Farmers T. Co. v. Prudden, 84-126, 86+887.
[77] Moriarty v. Ashworth, 43-1, 44+531. See Berthold v. Holman, 12-335(221); Russell v. Merchants' Bank, 47-286, 50+228; Cullen v. Minn. L. & T. Co., 60-6, 61+818.
[78] Darling v. Harmon, 47-166, 49+686.
[79] Johnson v. Williams, 4-260(183); Baldwin v. Allison, 4-25(11); Wilson v. Bell, 17-61(40); Darling v. Harmon, 47-166, 49+686.
[80] Johnson v. Williams, 4-260(183).
[81] Adams v. Corriston, 7-456(365); Berthold v. Holman, 12-335(221); Berthold v. Fox, 13-501(462).
[82] Seibert v. Mpls. etc. Ry., 52-246, 53+1151.

mortgagee in possession" as against a subsequent mortgagee.[83] A subsequent mortgagee is charged with notice of the equities of a prior mortgagee, as disclosed by his own recorded title.[84] A second mortgagee, though he has foreclosed under the power of sale, he having become the purchaser, may, notwithstanding the time to redeem has not expired, bring an action to have a prior mortgage adjudged paid.[85] A senior mortgagee having neglected to record his mortgage and a complication of rights resulting so that the property could not be sold subject to the senior mortgage without interfering with the rights of others, it was held that he was precluded from resisting a foreclosure sale of the entire property to satisfy all the liens in their proper order, though his mortgage was not yet mature.[86] The holder of a second mortgage is not bound to redeem from a first for the benefit of a grantee who has assumed both mortgages.[87] A subsequent bona fide mortgagee cannot be prejudiced by an agreement between a prior mortgagee and the mortgagor.[88]

MORTGAGEE IN POSSESSION

6237. Origin of doctrine—The modern doctrine of a "mortgagee in possession" is a survival of the common-law conception of a mortgage as a conveyance with an immediate right of possession upon condition broken.[89] It is logically inconsistent with the modern conception of a mortgage as a mere lien, but it has been retained because it works justice.[90]

6238. Who is a mortgagee in possession—A purchaser at an abortive forecoslure sale or his assignee, who in good faith takes possession under the sale after the right to redeem has expired, is entitled to the rights of a mortgagee in possession, whether he enters with the consent of the mortgagor or not.[91] An entry by the mortgagee after the right to foreclose has expired does not give him the rights of a mortgagee in possession.[92] The mortgagor may give the mortgagee the rights of "a mortgagee in possession" by special contract and may limit the duration of the possession.[93] A senior mortgagee, acquiring possession by consent of the mortgagor after a foreclosure sale under a junior mortgage, but before the title and right of possession of the mortgagor have been extinguished by the expiration of the year for redemption, has the rights of a mortgagee in possession.[94] When a mortgagor surrenders possession to a mortgagee on account of a default in the conditions of the mortgage, the latter is "a mortgagee in possession." [95] The mere payment of taxes on wild, vacant land by a mortgagee will not entitle him to the rights of a mortgagee in possession.[96] A person in possession under the foreclosure of a senior mortgage is "a mortgagee in possession" as against a purchaser at the foreclosure of a junior mortgage.[97]

6239. Consent of mortgagor necessary—It has been held that "the assent, express or implied, of the mortgagor, that the mortgagee may take possession under or because of his mortgage, is of the essence of a mortgagee in possession." [98] But this doctrine has been repudiated as to a purchaser at an

[83] Jones v. Rigby, 41–530, 43+390; Longfellow v. Fisher, 69–307, 72+118.
[84] Miller v. Fasler, 42–366, 44+256.
[85] Redin v. Branhan, 43–283, 45+445.
[86] Miller v. Stoddard, 54–486, 56+131.
[87] Pinch v. McCulloch, 72–71, 74+897.
[88] See Whittacre v. Fuller, 5–508(401).
[89] See Taylor v. Slingerland, 39–470, 40+575.
[90] Bradley v. Norris, 63–156, 65+357.
[91] Johnson v. Sandhoff, 30–197, 14+889; Holton v. Bowman, 32–191, 19+734; Jellison v. Halloran, 44–199, 46+332; Russell v. Akeley, 45–376, 48+3; Bitzer v. Campbell, 47–221, 49+691; Lane v. Holmes, 55–379, 57+132; Backus v. Burke, 63–272, 65+459.
[92] Banning v. Sabin, 45–431, 48+8.
[93] Ferman v. Lombard I. Co., 56–166, 57+309. See Farmers T. Co. v. Prudden, 84–126, 86+887; Anderson v. Minn. L. & T. Co., 68–491, 71+665, 819.
[94] Jones v. Rigby, 41–530, 43+390.
[95] Longfellow v. Fisher, 69–307, 72+118.
[96] Bradley v. Norris, 63–156, 65+357.
[97] Martin v. Fridley, 23–13.
[98] Rogers v. Benton, 39–39, 38+765; Taylor v. Slingerland, 39–470, 40+575; Jelli-

abortive foreclosure sale who in good faith takes possession under the sale after the right to redeem has expired.[99]

6240. Nature of interest—Possession under the mortgage by the mortgagee does not give him an estate in the land. It does not abridge or enlarge his interest or convert what was previously a security into a seizin of the freehold. It does not change the relation of creditor and debtor, or impair the estate of the mortgagor, but leaves the rights and interests of the parties exactly as they existed previously. The fact that the possession is added as a further security does not change the lien of the mortgage into an estate.[1] All there is to it is that possession once rightfully acquired may be retained until the debt is paid; and this the mortgagee may do though the statute of limitations has run against his debt.[2] The mortgagee has a possessory interest which he may defend by an action for an injury to the freehold, an action of trespass, or an action of ejectment against third parties.[3] He has a possessory interest which may ripen into a perfect title.[4] His possession is a distinct and additional security for the mortgage debt.[5] His interest is terminated by a payment of the debt without any other act or ceremony.[6]

6241. Possession as notice—The possession of a mortgagee is notice to the world of his rights, if it is visible.[7]

6242. Rights and liabilities—A mortgagee lawfully in possession after condition broken cannot be dispossessed by the mortgagor or persons in privity with him until his mortgage is satisfied.[8] If he remains in possession until the right of action to redeem is barred, and the mortgage is not paid, he becomes vested with an absolute legal title.[9] The statute of limitations begins to run in his favor from the time he takes possession.[10] He is not ordinarily entitled to compensation for improvements, but if he makes them in good faith and with the knowledge of the mortgagor, the latter cannot redeem without paying for them.[11] He is entitled to the crops which he plants in good faith.[12] He is not liable on covenants running with the land.[13] He may be liable as the continuer of a nuisance on the premises created by the mortgagor.[14] He is entitled to compensation for all necessary repairs on the tenement.[15] He must account upon the mortgage debt for the net receipts arising from the possession.[16] If he forecloses his mortgage while in possession, and the property sells for less than the amount due, he is entitled, as against a subsequent mortgagee, to remain in possession during such part of the year of redemption as may be necessary to satisfy the unpaid balance of his debt.[17] He is entitled to the rents and profits.[18]

son v. Halloran, 44–199, 46+332; Russell v. Akeley, 45–376, 48+3; Ferman v. Lombard I. Co., 56–166, 57+309; Cargill v. Thompson, 57–534, 59+638; Marshall & I. Bank v. Cady, 76–112, 78+978.

[99] Backus v. Burke, 63–272, 65+459.

[1] Cargill v. Thompson, 57–534, 59+638.

[2] Bradley v. Norris, 63–156, 65+357.

[3] Law v. Citizens' Bank, 85–411, 89+320. See Bradley v. Norris, 63–156, 65+357.

[4] See § 6242.

[5] Longfellow v. Fisher, 69–307, 72+118.

[6] Cargill v. Thompson, 57–534, 59+638.

[7] Jellison v. Halloran, 44–199, 46+332.

[8] Pace v. Chadderdon, 4–499(390); Martin v. Fridley, 23–13; Johnson v. Sandhoff, 30–197, 14+889; Jones v. Rigby, 41–530, 43+390; Lane v. Holmes, 55–379, 57+132; Cargill v. Thompson, 57–534, 550, 59+638; Backus v. Burke, 63–272, 65+459; Longfellow v. Fisher, 69–307, 72+118. See Greve v. Coffin, 14–345(263).

[9] Rogers v. Benton, 39–39, 38+765; Jellison v. Halloran, 44–199, 46+332; Russell v. Akeley, 45–376, 48+3; Bradley v. Norris, 63–156, 65+357; Backus v. Burke, 63–272, 65+459; Law v. Citizens' Bank, 85–411, 89+320.

[10] Bradley v. Norris, 63–156, 65+357; Backus v. Burke, 63–272, 65+459.

[11] Bacon v. Cottrell, 13–194(183).

[12] Holton v. Bowman, 32–191, 19+734.

[13] Cargill v. Thompson, 57–534, 59+638.

[14] Ferman v. Lombard I. Co., 56–166, 57+309.

[15] Lash v. Lambert, 15–416(336).

[16] Cargill v. Thompson, 57–534, 59+638.

[17] Longfellow v. Fisher, 69–307, 72+118. See Anderson v. Minn. L. & T. Co., 68–491, 71+665, 819.

[18] Anderson v. Minn. L. & T. Co., 68–491, 71+665, 819.

PAYMENT AND PERFORMANCE

6243. In general—A mortgage secures a debt and not the evidence of it. Hence no change in the form of the evidence of the debt, or in the mode or time of payment will operate to discharge the mortgage. The lien lasts as long as the debt. Nothing but performance of the condition or an express release will operate as a discharge, in the absence of facts constituting an estoppel. This is true as to subsequent purchasers as well as to the parties.[19] When the debt is paid, the mortgage is discharged, and the mortgagee has no further interest in the land.[20] When property is mortgaged by an owner to answer for the debt of another, such property occupies the position of a surety, and anything which would discharge an individual surety personally liable will, under similar circumstances, discharge the property.[21] Where a mortgage was apportioned so as to be a specific lien on several lots for specified sums, it was held that the mortgagor and his assigns might pay any one of such sums and secure a discharge of the corresponding specific lien.[22] Where a mortgage of indemnity is given to secure payment of another mortgage which is subsequently satisfied by a foreclosure sale, the holder of the indemnifying mortgage is entitled to have it discharged.[23] Where an indemnifying mortgage in the form of a deed and bond is given to secure the payment of another mortgage which subsequently becomes barred by the statute of limitations, the holder of the indemnifying mortgage is entitled to a reconveyance as provided in the bond.[24] A note is given or required for the purpose of binding the mortgagor personally for the payment of the debt, and the mere act of surrendering it does not necessarily release the maker from any liability except that which is created by its execution.[25] A deed from the owner of the equity of redemption to the agent of the mortgagee, has been held to have been taken in further security of the mortgage deed and not in payment.[26] A payment upon one of a series of notes secured by a single mortgage is not a payment on the others.[27] Payment of a negotiable note secured by mortgage to the payee by the maker before maturity, and the formal satisfaction of the mortgage by the payee, will not defeat a right of recovery against the maker upon the note by an indorsee bona fide and before maturity.[28] A purchase of the mortgaged premises by the mortgagee from a grantee of the mortgagor "subject" to the mortgage operates as a payment.[29] A mortgage is not discharged by a mere extension of the time of payment.[30] A mortgage has been held not discharged by a settlement between the parties.[31] Cases are cited below involving the sufficiency of evidence as to payment.[32]

6244. By volunteer—A person loaning money on mortgage security, with the understanding that it is to be used to pay off prior mortgages, is not a volunteer.[33]

6245. By purchase of certificate of sale—A purchase of a certificate of sale on foreclosure by a party who has assumed to pay the mortgage will

[19] Whittacre v. Fuller, 5-508(401); Folsom v. Lockwood, 6-186(119); Allison v. Armstrong, 28-276, 9+806; Geib v. Reynolds, 35-331, 28+923; Evans v. Thompson, 89-202, 94+692.

[20] Johnson v. Williams, 4-260(183); Johnson v. Carpenter, 7-176(120); Wakefield v. Day, 41-344, 43+71.

[21] Finnegan v. Janeway, 85-384, 89+4.

[22] Barge v. Klausman, 42-281, 44+69.

[23] Sergeant v. Ruble, 33-354, 23+535.

[24] Archambau v. Green, 21-520.

[25] Donnelly v. Simonton, 13-301(278).

[26] Leonard v. Swanson, 58-231, 59+1009.

[27] McManaman v. Hinchley, 82-296, 84+1018.

[28] Blumenthal v. Jassoy, 29-177, 12+517.

[29] Nat. Invest. Co. v. Nordin, 50-336, 52+899.

[30] Whittacre v. Fuller, 5-508(401).

[31] Beeson v. Day, 78-88, 80+864.

[32] McCaffery v. Burkhardt, 97-1, 105+971; Edmonston v. Wilbur, 99-495, 110+3.

[33] Emmert v. Thompson, 49-386, 52+31. See Heisler v. Aultman, 56-454, 57+1053.

operate as a payment as to the party to whom the promise of assumption was made.[34]

6246. By release—In general—To operate against third parties a release must be recorded and possession of the mortgagor is not constructive notice of a release as against a purchaser at a foreclosure sale.[35] When property is mortgaged by the owner to answer for the debt of another, it occupies the position of a surety, and anything that would discharge a surety will release the property.[36] A release has been held to be only partial, though it stated that the mortgage was fully paid.[37] Evidence of the execution of a formal release has been held insufficient.[38] A release of the personal liability of the mortgagor does not necessarily effect a release of the mortgage.[39] A mortgage may be released without affecting the personal liability of the mortgagor.[40] Mortgages are not regarded as conveyances of land within the statute of frauds so as to require a reconveyance or release to divest the title of the mortgagee; any act, even forgiving the debt by parol, will discharge the mortgage.[41]

6247. By partial release—It is competent for the parties to release either the personal liability or the real security, and the release of the one cannot affect the validity of the other.[42] If the mortgagor conveys a portion of the premises, and the mortgagee subsequently releases the remainder, the latter's security is canceled to the extent of the value of the lands so released, and he can collect only the balance of the debt out of the portion conveyed, and if the land released would have been sufficient to pay the entire debt his security is entirely gone.[43] A covenant for partial releases, as lots are sold out of the tract mortgaged, runs with the land and the right to a release is not terminated by a default in the payment of the debt secured, but continues in force until the mortgagee has fully executed the power of sale.[44] Where the holder of a mortgage releases to a grantee of the mortgagor that part of the mortgaged premises which, as between the mortgagor and his grantee, has become primarily liable for the payment of the debt, and another person, on the faith of such release, purchases the premises and pays a valuable consideration therefor, the fact that such release may have affected injuriously the lien of the mortgage on the remaining security, in a way not known or anticipated at the time by the holder of the mortgage, furnishes no ground for avoiding the release to the prejudice of the purchaser of the premises released. Where the mortgagor conveys to another a part of the mortgaged premises, the deed containing a provision that the grantee shall, as part of the purchase price, pay the entire mortgage, the part thus conveyed becomes, as between the mortgagor and his grantee, primarily liable for the payment of the debt; and if a holder of the mortgage, chargeable with actual notice of that fact, releases to the grantee of the mortgagor that part of the premises thus conveyed, which in value exceeds the amount of the mortgage, such release operates as a discharge of the mortgage upon the remainder of the premises retained by the mortgagor. The fact that the holder of the mortgage executes a release to one who is therein described as grantee of the mortgagor, conclusively charges him with

[34] Probstfield v. Czizek, 37-420, 34+896.
[35] Palmer v. Bates, 22-532; Merchant v Woods, 27-396, 7+826; Bausman v. Eads, 46-148, 48+769.
[36] Finnegan v. Janeway, 85-384, 89+4.
[37] Scott v. Hay, 90-304, 97+106.
[38] Hendrickson v. Tracy, 53-404, 55+622.
[39] Donnelly v. Simonton, 13-301(278); Slingerland v. Sherer, 46-422, 49+237; Nicolay v. Mallery, 62-119, 64+108.
[40] Slingerland v. Sherer, 46-422, 49+237; Blumenthal v. Jassoy, 29-177, 12+517.
[41] Johnson v. Carpenter, 7-176(120).
[42] Donnelly v. Simonton, 13-301(278); Nicolay v. Mallery, 62-119, 64+108.
[43] Johnson v. Williams, 4-260(183); Benton v. Nicoll, 24-221; Howard v. Burns, 73-356, 76+202.
[44] Vawter v. Crafts, 41-14, 42+483.

notice of the fact that a conveyance has been made by the mortgagor to such releasee, and he is bound at his peril, before he executes a release, to ascertain the terms of the deed, either by examination of it or by inquiry of the mortgagor.[45] The holder of a mortgage, knowing that a third party has acquired an interest subsequent to the mortgage in a portion of the premises, is put upon inquiry as to the equities of such third party before gratuitously releasing the other portion. If he fails to make such inquiry before he so releases, and the portion so released is sufficient in value to pay the whole mortgage debt, and such third party was entitled to have that portion applied first to the payment of the debt, the mortgage is, in equity, satisfied as to his portion. But where, for several years, portions of the mortgaged premises, sufficient to pay the whole debt, were from time to time released on payment of pro rata shares of the mortgage, and the third party having such equity failed to assert it, though he had dealings with the holder of the mortgage, it was held that the latter was not negligent in failing to make inquiry and that the mortgage was not satisfied.[46] Where a mortgage provided for partial releases upon payment of specified amounts, it was held that a payment without application should be first applied to the payment of interest due and that the mortgagor was consequently not entitled to a partial release.[47]

6248. Release of guarantor—A release of a guarantor of a note secured by a mortgage held to be without consideration.[48]

6249. Release of equity of redemption—A release by the mortgagor to the mortgagee of the equity of redemption, after condition broken, is tantamount to foreclosure and operates as payment of the mortgage debt to the extent of the value of the property.[49]

6250. By quitclaim deed—A quitclaim deed from the mortgagee to the mortgagor operates to release the mortgage.[50]

6251. By assignment—An assignment of a mortgage to the mortgagor will not be held to operate as a satisfaction contrary to the intention of the parties.[51] An assignment to a surety of the mortgagor does not operate as a satisfaction.[52]

6252. By filing claim in insolvency—When a mortgagee proves his claim in insolvency, without disclosing the existence of his mortgage security, accepts a dividend, and gives a release, and a judgment is entered discharging the insolvent from all debts and liabilities, the mortgage is extinguished.[53] But a mortgage securing a claim not filed is not released.[54]

6253. By tender—Where it is sought by tender to discharge a mortgage of record, the tender must be of the exact amount due.[55] A tender has been held insufficient because it was coupled with a demand for a surrender of the note from a bank having no authority to receive payment except from the terms of the note itself, the note being payable at the bank but at the time of payment in the possession of the payee,[56] and because it did not include the amount of attorney's and printer's fees.[57] The maxim de minimis non curat

[45] Groesbeck v. Mattison, 43-547, 46+135.
[46] Howard v. Burns, 73-356, 76+202.
[47] Bay View L. Co. v. Myers, 62-265, 64+816.
[48] Hale v. Dressen, 76-183, 78+1045.
[49] Sprague v. Martin, 29-226, 13+34.
[50] Gille v. Hunt, 35-357, 29+2; Benson v. Markoe, 37-30, 33+38; Id., 41-112, 42+787. See Lankton v. Stewart, 27-346, 7+360; Elmquist v. Markoe, 45-305, 47+970; Leonard v. Swanson, 58-231, 59+1009.
[51] Hall v. Southwick, 27-234, 6+799; Baker v. N. W. etc. Co., 36-185, 30+464.
[52] Felton v. Bissel, 25-15.
[53] First Nat. Bank v. Pope, 85-433, 89+318.
[54] Nicolay v. Mallery, 62-119, 64+108.
[55] Kingsley v. Anderson, 103-510, 115+642, 116+112.
[56] Balme v. Wambaugh, 16-116(106).
[57] Mjones v. Yellow Medicine Co. Bank, 45-335, 47+1072.

lex has been applied to a tender in court.[58] A tender to one of two joint mortgagees is sufficient.[59]

6254. By new mortgage—A mortgage may be satisfied by the acceptance of a new mortgage.[60]

6255. By new note—A note may be accepted as an absolute payment of a prior note secured by mortgage, but it requires strong evidence to overcome the presumption that it is accepted only as conditional payment.[61]

6256. By merger—A mortgage may be extinguished by merger.[62]

6257. By judgment—A judgment has been held to reinstate the lien of a mortgage and not to discharge the mortgage debt, or to merge it in the judgment.[63]

6258. By foreclosure sale—A foreclosure sale extinguishes the mortgage debt to the amount for which the property is sold, whether the purchaser is the mortgagee or a stranger.[64] But it may not have this effect as between the mortgagor and a second mortgagee.[65]

6259. Application of payments—Where a mortgage and the record of it disclosed that the mortgagor had stipulated to pay after maturity a greater than the legal rate of interest, subsequent incumbrancers are not entitled to have payments voluntarily made by the mortgagor as interest after maturity, at the stipulated rate, applied in any other way than as the parties applied them.[66] When a payment is not applied by the debtor the law applies it; and when the indebtedness consists of a principal and the interest thereon the law applies the payment first to satisfy the interest. When an indebtedness is in part secured and in part unsecured, the law applies a payment first to satisfy the unsecured part.[67] The proper application of payments may depend on the contract between the parties.[68]

6260. Agreement of third party to pay—An agreement between a purchaser of mortgaged premises, and the holder of the mortgage, for payment of a less sum than stipulated in the mortgage, in instalments "from time to time" has been specifically enforced.[69]

6261. Payment to foreign executor—A foreign executor has implied authority to receive a payment voluntarily made.[70]

6262. Payment to agent—A loan agent employed to make loans and accept notes and mortgages has no implied authority to collect or receive payments which become due thereon. An agent to whom interest coupons are sent for collection has no implied authority to receive payment of the principal, if he does not have the note and mortgage in his possession. An agent authorized to collect or receive payment of a debt in money cannot bind his principal by collecting or receiving in payment the note, mortgage, or property of the debtor.[71] An agent may receive payment of the principal though

[58] Mannheim v. Carleton College, 68–531. 71+705.

[59] Donnelly v. Simonton, 7–167(110).

[60] See Geib v. Reynolds, 35–331, 28+923; McKeen v. Haseltine, 46–426, 49+195; Welbon v. Webster, 89–177, 94+550; Diamond v. Dennison, 102–302, 113+696.

[61] Wiley v. Dean, 67–62, 69+629; Geib v. Reynolds, 35–331, 28+923; Goenen v. Schroeder, 18–66(51).

[62] See cases under § 6272.

[63] Elmquist v. Markoe, 45–305, 47+970.

[64] See § 6313.

[65] See Farmers' Nat. Bank v. Backus, 67–43, 69+638.

[66] Mills v. Kellogg, 7–469(377). See Whittacre v. Fuller, 5–508(401).

[67] Lash v. Edgerton, 13–210(197); Bay View L. Co. v. Myers, 62–265, 64+816. See Abbott v. Peck, 35–499, 29+194.

[68] See Milnor v. Home S. & L. Assn., 64–500, 67+346.

[69] Lankton v. Stewart, 27–346, 7+360.

[70] Dexter v. Berge, 76–216, 78+1111.

[71] Trull v. Hammond, 71–172, 73+642; Schenk v. Dexter, 77–15, 79+526. See General Convention v. Torkelson, 73–401, 76+215; Thomas v. Swanke, 75–326, 77+981; Budd v. Broen, 75–316, 77+979; Dwight v. Lenz, 75–78, 77+546.

he has not at the time the note or mortgage or a release in his possession, if he has actual authority, partly express and partly implied.[72] A long course of dealing between the parties may invest an agent with implied authority to receive payment.[73] Where a loan agent had the money of two principals deposited in his own name, and replaced a mortgage to one of them by a new mortgage to the other, with the understanding that the old loan should be paid out of the proceeds of the new, and accordingly made a debit and credit entry in his books, but did not remit to his principal, it was held that the transaction amounted to a payment of the old mortgage.[74] The mere fact that an agent is insolvent at the time does not deprive him of authority to receive payment.[75] The burden rests on a party asserting payment to an agent to prove the agency.[76] An unauthorized acceptance of payment by an agent may be ratified by the inaction of the principal.[77] The mere fact that a note is made payable at a certain place does not of itself confer any agency upon the owner or occupant of that place to receive payment in behalf of the payee. In order to make such owner or occupant the payee's agent to receive the money the paper must be indorsed to or lodged with him for collection. A debtor is authorized to infer that a third party, having possession of his note and mortgage at maturity, is, as the creditor's agent, authorized to receive both principal and interest, there being no suspicious circumstances surrounding such possession. The authority ceases upon a withdrawal of the securities.[78] Authority in an agent to receive payment after maturity is not authority to receive payment before maturity, though he has possession of the note and mortgage.[79] But such authority may be implied from a long course of practice acquiesced in by the principal.[80] A principal sent to his agent money to pay a mortgage. The agent, who was also the agent of the mortgagee without the knowledge of the party making the payment, converted the money to his own use. It was held not a payment of the mortgage.[81] Cases are cited below holding agents to have authority to receive payment,[82] or the reverse.[83] A finding of payment to an agent held justified by the evidence.[84]

6263. Who entitled to benefit of payments—A second mortgagee may be entitled to the benefit of payments made on the first mortgage.[85]

6264. Fraud, accident, or mistake in payment or discharge—Equity will grant relief where a holder of a mortgage takes a new mortgage as a substitute for a former one and releases the latter in ignorance of the existence of an

[72] General Convention v. Torkelson, 73-401, 76+215; Hare v. Bailey, 73-409, 76+213; Dexter v. Berge, 76-216, 78+1111. See Thomas v. Swanke, 75-326, 77+981; Budd v. Broen, 75-316, 77+979.

[73] Hare v. Bailey, 73-409, 76+213; Springfield S. Bank v. Kjaer, 82-180, 84+752. See Dexter v. Berge, 76-216, 78+1111.

[74] General Convention v. Torkelson, 73-401, 76+215; Hare v. Bailey, 73-409, 76+213; Lynn v. Hanson, 75-346, 77+976; Randall v. Eichhorn, 80-344, 83+154; Bailey v. Anderson, 75-49, 77+414.

[75] Hare v. Bailey, 73-409, 76+213.

[76] Rand v. Perkins, 74-16, 76+950; Budd v. Broen, 75-316, 77+979.

[77] Smith v. Fletcher, 75-189, 77+800.

[78] Dwight v. Lenz, 75-78, 77+546.

[79] Park v. Cross, 76-187, 78+1107; Schenk v. Dexter, 77-15, 79+526.

[80] Springfield S. Bank v. Kjaer, 82-180, 84+752.

[81] Herrick v. Mosher, 71-270, 73+964. See Hanson v. White, 75-523, 78+111.

[82] Bristol v. Schultz, 68-106, 70+872; Mannheim v. Carleton College, 68-531, 71+705; General Convention v. Torkelson, 73-401, 76+215; Hare v. Bailey, 73-409, 76+213; Dart v. Minn. L. & T. Co., 74-426, 77+288; Bailey v. Anderson, 75-49, 77+414; Lynn v. Hanson, 75-346, 77+976; Dexter v. Berge, 76-216, 78+1111; Randall v. Eichhorn, 80-344, 83+154; Springfield S. Bank v. Kjaer, 82-180, 84+752.

[83] Trull v. Hammond, 71-172, 73+642; Rand v. Perkins, 74-16, 76+950; Dwight v. Lenz, 75-78, 77+546; Smith v. Fletcher, 75-189, 77+800; Budd v. Broen, 75-316, 77+979; Thomas v. Swanke, 75-326, 77+981; Park v. Cross, 76-187, 78+1107; Schenk v. Dexter, 77-15, 79+526.

[84] Bristol v. Schultz, 68-106, 70+872.

[85] Johnson v. Carpenter, 7-176(120).

intervening lien;[86] where a quitclaim deed is given to perfect a title and operates to release a mortgage contrary to the intention of the parties;[87] where the holder of a mortgage files his claim in bankruptcy and through mistake or inadvertence fails to disclose his mortgage and thereby releases it;[88] where a satisfaction which was never delivered is duly recorded;[89] where a new mortgage is taken in ignorance of a second mortgage, with the understanding that the proceeds of the loan are to be used in satisfying an old first mortgage so that the new mortgage would be a first lien;[90] where a release is delivered to a mortgagor by an agent of the mortgagee through fraud or mistake;[91] where property is included in a satisfaction by mistake and contrary to an agreement of the parties.[92] Parol evidence is admissible to contradict a satisfaction.[93] It is a common thing for courts of equity to relieve parties who have by mistake discharged mortgages upon the record, and to fully protect them from the consequences of their acts, when such relief will not result prejudicially to third or innocent parties.[94]

6265. Satisfaction of record—When a mortgage has been paid it is the duty of the owner of the equity of redemption, as between him and third parties having no notice thereof, to procure evidence thereof to be put on record; and if he fails to do so, and the mortgage is apparently regularly foreclosed under the power, an innocent purchaser under such foreclosure, if his evidence of title is first recorded, will be protected.[95] The assignee of a paid mortgage takes it subject to the defence of payment though it has not been satisfied of record.[96] Where a paid mortgage has been assigned, the mortgagor can recover damages for a refusal to acknowledge satisfaction only from the assignee, who alone has the power to satisfy it of record.[97] A written satisfaction authorizing the register to satisfy the mortgage of record may be contradicted by parol.[98] A satisfaction of record has been held properly canceled for mistake, after the owner of the equity of redemption had made an assignment for the benefit of creditors.[99]

6266. Extension of time for payment—Release of surety—Where a mortgagor conveys land subject to the mortgage the land becomes, as between the mortgagor and his grantee, the primary fund for the payment of the mortgage, and the relation of principal and surety is created between the land and the mortgagor. Hence, if the mortgagee, with knowledge of the conveyance, grants an extension to the grantee without the consent of the mortgagor, the latter is released to the extent of the value of the land.[1] The burden rests upon the surety to prove that the extension was without his consent.[2] A mortgage made by A as surety for B to C is discharged by an extension granted to B by C without A's consent. The discharge is available in favor of a judgment creditor of A whose judgment is a lien on the mortgaged premises, and after the lien has attached it is not affected by A's waiver of the dis-

[86] Geib v. Reynolds, 35–331, 28+923. See Ligget v. Himle, 38–421, 38+201; McKeen v. Haseltine, 46–426, 49+195.
[87] Benson v. Markoe, 37–30, 33+38.
[88] First Nat. Bank v. Pope, 85–433, 89+318.
[89] Woolson v. Kelley, 73–513, 76+258.
[90] Elliott v. Tainter, 88–377, 93+124.
[91] See Bailey v. Anderson, 75–49, 77+414.
[92] See Morrison v. Morse, 75–126, 77+561.
[93] Thompson v. Layman, 41–295, 42+1061.
[94] Emmert v. Thompson, 49–386, 52+31; London etc. Co. v. Tracy, 58–201, 59+1001. See Elmquist v. Markoe, 45–305, 47+970; Errett v. Wheeler, 109–157, 123+414.
[95] Merchant v. Woods, 27–396, 7+826; Bausman v. Eads, 46–148, 48+769.
[96] Redin v. Branhan, 43–283, 45+445.
[97] Galloway v. Litchfield, 8–188(160).
[98] Thompson v. Layman, 41–295, 42+1061.
[99] Woolson v. Kelley, 73–513, 76+258.
[1] Travers v. Dorr, 60–173, 62+269; Marshall & I. Bank v. Child, 76–173, 78+1048.
[2] Washington S. Co. v. Burdick, 60–270, 62+285; Guderian v. Leland, 61–67, 63+175; Norton v. Met. Life Ins. Co., 74–484, 77+298, 539.

charge.[3] The relation of principal and surety must appear on the face of the contract or notice of it to the creditor must be proved. Notice will not be presumed. The execution by the principal debtor, and the acceptance by the creditor, of a note payable at a future day for and on account of the debt would seem to be prima facie a contract to extend the time of payment. A wife mortgaging her separate property for the debt of her husband is entitled to all the rights and remedies of a personal surety.[4] An agreement between a mortgagor and mortgagee extending the time for payment does not discharge the lien of the mortgage as to subsequent incumbrancers or purchasers though without notice.[5] After the execution of a mortgage a portion of the premises was conveyed with a warranty against incumbrances and the grantee executed a second mortgage on such portion. The holder of the first mortgage died, having knowledge of such conveyance, and thereafter his executors extended the time of payment without having any actual knowledge of said conveyance or of the second mortgage. It was held that such portion was not released from the lien of the first mortgage; that knowledge of the testator was not imputable to the executors; that the record of the subsequent deeds and mortgage was not notice to the first mortgagee; and that possession by a subsequent grantee was not notice to such executors of the existence of the second mortgage.[6] A consideration for an extension has been held sufficient.[7] A written contract for an extension is unnecessary. Parties may be estopped from denying an extension.[8] An extension has been held a sufficient consideration for a note;[9] and for an assignment of rents.[10] Where the title of record is solely in the husband, but in fact the wife is the equitable owner of an undivided interest therein, and both execute a mortgage to secure a debt of the husband, she is not entitled to assert, as against the mortgagee, the rights of a surety to the extent of her interest, unless the mortgagee had notice of such interest when he extended the time of payment of the debt. The mere fact that she joined in the covenant of seizin in the mortgage does not charge the mortgagee with notice.[11] Cases are cited below holding that evidence was insufficient to show an extension;[12] that an agent had authority to grant an extension;[13] that a sale imposed by the creditor as a condition of an extension was a usurious loan;[14] and that a certain contract did not constitute an extension.[15]

ESTOPPEL

6267. Mortgagor held estopped—From denying the validity of a foreclosure sale confirmed at his instance;[16] from asserting the invalidity of a foreclosure on account of the death of the mortgagee, as against a bona fide purchaser under the foreclosure;[17] from denying his own title in an action to foreclose;[18] from asserting a title superior to his own mortgage;[19] from as-

[3] Campion v. Whitney, 30-177, 14+806.
[4] Agnew v. Merritt, 10-308(242).
[5] Whittacre v. Fuller, 5-508(401).
[6] Norton v. Met. Life Ins. Co., 74-484, 77+298, 539.
[7] McKinnon v. Palen, 62-188, 64+387.
[8] Hubbard v. Fletcher, 61-148, 63+612.
[9] Id.
[10] Farmers T. Co. v. Prudden, 84-126, 86+887.
[11] Von Hemert v. Taylor, 73-339, 76+42.
[12] Marshall & I. Bank v. Child, 76-173, 78+1048; Leonard v. Swanson, 58-231, 59+1009.
[13] Wheeler v. Benton, 71-456, 74+154; Id., 67-293, 69+927.
[14] Kommer v. Harrington, 83-114, 85+939.
[15] Phelps v. Western R. Co., 89-319, 94+1085; Id., 89-319, 94+1135.
[16] Blake v. McKusick, 10-251(195).
[17] Bausman v. Faue, 45-412, 48+13; Bausman v. Eads, 46-148, 48+769. See Welsh v. Cooley, 44-446, 46+908.
[18] Carson v. Cochran, 52-67, 53+1130.
[19] Swedish etc. Bank v. Conn. etc. Co., 83-377, 86+420. See Preiner v. Meyer, 67-197, 69+887; Hooper v. Henry, 31-264, 17+476; Hurlbert v. Weaver, 24-30.

serting the invalidity of a foreclosure on account of a mistake of the register of deeds in recording the names of assignees of the mortgage;[20] from asserting the invalidity of the mortgage on the ground of usury, as against a bona fide purchaser at a foreclosure sale;[21] from asserting the invalidity of a foreclosure on the ground that the mortgage was paid, as against a bona fide purchaser, by neglecting to place a satisfaction on record.[22]

6268. Mortgagor held not estopped—From denying the validity of a mortgage without his wife's signature;[23] from asserting the invalidity of a foreclosure on the ground of the death of the mortgagee;[24] from showing the actual time of sale on foreclosure by statement in certificate of sale;[25] from asserting want of consideration for a mortgage, in an action to foreclose;[26] from asserting the invalidity of a mortgage on the ground that her husband did not join;[27] from asserting the invalidity of a mortgage on the ground of a material alteration;[28] from asserting the invalidity of a mortgage on the ground of usury, as against a purchaser at a foreclosure sale;[29] from maintaining an action for breach of a covenant of seizin in a deed to him by the mortgagee;[30] from maintaining an action for a surplus on foreclosure, by requesting the mortgagee to assign the certificate of sale to another.[31]

6269. Mortgagee held estopped—From denying the extinguishment of his lien when he induced by his silence a purchase at a receiver's sale.[32]

6270. Mortgagee held not estopped—From attacking a fraudulent conveyance by his mortgagor, by accepting payment of his mortgage from the grantee of such conveyance;[33] from applying for a modification of a judgment in an action to foreclose;[34] from denying authority of an agent to receive payment of the mortgage;[35] from asserting his rights by a decree of distribution;[36] from purchasing a paramount outstanding title, on discovering that his mortgage was fraudulent as to the creditors of the mortgagor;[37] from asserting the invalidity of a prior mortgage on the ground of usury.[38]

6271. Miscellaneous cases—Cases are cited below involving various questions of estoppel.[39]

[20] Dimond v. Manheim, 61–178, 63+495.
[21] Jordan v. Humphrey, 31–495, 18+450.
[22] Bausman v. Eads, 46–148, 48+769; Merchant v. Woods, 27–396, 7+826.
[23] Alt v. Banholzer, 39–511, 40+830.
[24] Welsh v. Cooley, 44–446, 46+908. See Bausman v. Faue, 45–412, 48+13.
[25] Richards v. Finnegan, 45–208, 47+788.
[26] Anderson v. Lee, 73–397, 76+24.
[27] Blew v. Ritz, 82–530, 85+548.
[28] Coles v. Yorks, 28–464, 10+775.
[29] Jordan v. Humphrey, 31–495, 18+450.
[30] Resser v. Carney, 52–397, 54+89.
[31] Johnson v. Stewart, 75–20, 77+435.
[32] Brown v. Union etc. Co., 65–508, 68+107.
[33] Arnold v. Hoschildt, 69–101, 71+829.
[34] Louisville B. Co. v. Blake, 70–252, 73+155.
[35] Dwight v. Lenz, 75–78, 77+546.
[36] Hershey v. Meeker Co. Bank, 71–255, 73+967.
[37] Gjerness v. Mathews, 27–320, 7+355.
[38] Widell v. Nat. Citizens Bank, 104–510, 116+919.
[39] Hurlbert v. Weaver, 24–30 (a husband and wife mortgaged their equitable interest—subsequently the legal title was acquired by the wife—held that she could not assert the legal title against her mortgage); O'Mulcahy v. Holley, 28–31, 8+906 (a senior assignee of a note and mortgage whose assignment was not recorded held not estopped from questioning the validity of a subsequent assignment); Banning v. Sabin, 45–431, 48+8 (a party as to whom an action of foreclosure was dismissed held not estopped from claiming a right of redemption); Casey v. McIntyre, 45–526, 48+402 (owner held not estopped by an occupant's waiver of notice or attempted redemption); Merritt v. Byers, 46–74, 48+417 (a remote covenantor in a deed held not estopped from purchasing a mortgage and enforcing it); Sandwich Mfg. Co. v. Zellmer, 48–408, 51+379 (a wife held estopped from claiming her statutory interest by joining in a covenant of seizin); Resser v. Carney, 52–397, 54+89 (a grantee in a deed with a covenant of seizin from a grantor who had no title held not estopped by a like covenant in a mortgage given by him to his grantor for a part of the purchase price from maintaining an action for breach of the covenant in the deed); Knight v. Schwandt, 67–71, 69+626 (a married woman with an equity of redemption, the holder of a quitclaim from

MERGER

6272. Facts held to cause a merger—Where a mortgagee, a corporation, acquired from a grantee of the mortgagor the legal title to the mortgaged premises "subject" to its own mortgage, the title being taken in the name of its president to avoid a merger, it was held that the equitable title merged in the legal title.[40] A mortgage contained covenants of seizin, against incumbrances, and of warranty. The mortgagor subsequently took an assignment of a prior outstanding mortgage. It was held that if there was no merger, the prior mortgage was, by reason of the covenants in the second, postponed to and subject to the second.[41] A contract has been held to constitute an equitable mortgage into which prior legal mortgages were merged.[42] A merger has been held to take place where a party seeking to redeem had two judgment liens.[43]

6273. Facts held not to cause a merger—A merger has been held not to take place where a legal owner of premises took an assignment of a mortgage thereon with the intention of keeping the mortgage alive;[44] where a mortgagor after making an assignment for the benefit of creditors, purchased his mortgage through a third party and in the latter's name and subsequently sold it to another party;[45] where a party acquired a certificate issued on a foreclosure sale and subsequently acquired an undivided interest in the fee;[46] where the holder of a certificate of sale on the foreclosure of a second mortgage took an assignment of the first mortgage;[47] where a lien creditor, with a right of redemption, took a conveyance from the holder of a certificate of sale on foreclosure two days after the year to redeem from such sale expired;[48] where a deed and mortgage were executed contemporaneously;[49] where the state foreclosed a mortgage.[50]

FRAUD

6274. In general—Cases are cited below involving questions of fraud in connection with mortgages.[51]

her, and a purchaser at a foreclosure sale, held estopped from asserting that a redemption by a party who had taken a sole deed from the woman did not constitute an equitable assignment of the interest of the purchaser at the foreclosure sale); Preiner v. Meyer, 67–197, 69+887 (a grantee of a mortgagor held not estopped from asserting a paramount title against the mortgagee); Beede v. Pabody, 70–174, 72+970 (a party held not estopped by his deed from showing that he was in fact a mortgagee); Von Hemert v. Taylor, 73–339, 76+42 (a wife held estopped from claiming her statutory interest by joining in a covenant of seizin); Esty v. Cummings, 80–516, 83+420 (an owner who had clothed another with the indicia of ownership held estopped from questioning the authority of such person to mortgage the property); Blew v. Ritz, 82–530, 85+548 (a married woman held not estopped from asserting the invalidity of a mortgage executed by her without her husband joining).

[40] Nat. Invest. Co. v. Nordin, 50–336, 52+899. See Leonard v. Swanson, 58–231, 59+1009.

[41] Hooper v. Henry, 31–264, 17+476.

[42] Piper v. Sawyer, 73–332, 76+57.

[43] Bagley v. McCarthy, 95–286, 104+7.

[44] Wilcox v. Davis, 4–197(139); Davis v. Pierce, 10–376(302); Baker v. N. W. etc. Co., 36–185, 30+464.

[45] Baker v. Terrell, 8–195(165).

[46] Horton v. Maffitt, 14–289(216).

[47] Flanigan v. Sable, 44–417, 46+854.

[48] Conn. etc. Co. v. King, 72–287, 75+376.

[49] Bloomer v. Burke, 94–15, 101+974.

[50] First Div. etc. Ry. v. Parcher, 14–297 (224).

[51] Conkey v. Dike, 17–457(434) (C, D. and G were partners, G having personal charge of a bank in which the firm kept its funds—C requested G to pay a mortgage on the land of C, obtain a discharge and charge the amount on the firm books—G paid the mortgage and charged the amount on the firm books, but, instead of procuring a discharge, secretly took an assignment of the mortgage to himself and D and afterward assigned his interest to D—held a fraud for which the mortgage might be canceled and the foreclosure enjoined); Semrow v. Semrow, 23–214 (mortgage obtained by duress in satisfaction of judgment for alimony); Coles v. Yorks, 28–464,

INSURANCE

6275. In general—In the absence of an agreement by a mortgagor to insure for the benefit of his mortgagee the latter has no right to any advantage whatever from an insurance upon the mortgaged property effected by the former for his own benefit. But an agreement by the mortgagor to insure for the benefit of his mortgagee gives the latter an equitable lien upon the proceeds of a policy taken out by the former and embraced in the agreement. And when the agreement is that the mortgagor shall procure insurance payable in case of loss to the mortgagee, and the mortgagor, or some one for him, procures insurance in the mortgagor's or a third party's name, without making it payable to the mortgagee, though this is done without the mortgagee's knowledge, or without any intent to perform the agreement, equity will treat the insurance as effected under the agreement unless the agreement has been otherwise fulfilled, and will give the mortgagee his equitable lien accordingly, regarding that as done which ought to have been done. Where the agreement is "to keep" the premises insured it may be held to embrace prior as well as subsequent insurance. The assignment of the mortgagor's interest in a certificate after a loss is subject to the equities of the mortgagee. Whether a covenant to insure runs with the land, so that a record of the mortgage is constructive notice of the mortgagee's equities, is an open question.[52] When a policy taken out by a mortgagor is made payable to his mortgagee the latter can sue thereon in his own name, without joining the former, and may recover the full amount of insurance, in case of loss, if such insurance does not exceed the amount due upon and secured by the mortgage. But the insured may intervene or be interpleaded.[53] In an action by a mortgagor on a policy made payable to his mortgagee, where the latter is joined as a defendant, the court may adjust the rights of the mortgagor and the mortgagee and the action is properly triable by jury.[54] When a policy is made payable to a mortgagee "as his interest may appear," the burden of proof is upon him to show his right, title, or interest, in case of loss and a controversy with the insurance company. He must show that personal property destroyed was a part of the real property covered by the policy.[55] The clause in the standard Minnesota policy, "if this policy shall be made payable to a mortgagee of the insured real estate, no act or default of any person other than such mortgagee, or his agents, or those claiming under

10+775 (mortgage by husband and wife—material alteration without wife's consent); Russell v. Reed, 36-376, 31+452 (alteration of mortgage); Pineo v. Heffelfinger, 29-183, 12+522 (fraud of husband on wife in obtaining her signature); Carlton v. Hulett, 49-308, 51+1053 (findings of fraud sustained); Riggs v. Thorpe, 67-217, 69+891 (misrepresentations as to existence of dwelling house on land); Whiting v. Clugston, 73-6, 75+759 (complaint against loan agent and a codefendant who had conspired with him to defraud the mortgagee by means of a straw mortgage sustained); Whitcomb v. Hardy, 73-285, 76+29 (laches—ratification); Nolan v. Dyer, 75-231, 77+786 (prevention of redemption by fraud); First Nat. Bank v. Flynn, 75-279, 77+961 (fraud of husband in securing signature of wife—knowledge of agent of mortgagee); Clifford v. Minor, 76-12, 78+861 (fraudulent insertion of assumption clause); Westphal v. Westphal, 81-242, 83+988 (fraud of husband in securing signature of wife): Paulsen v. Koon, 85-240, 88+760 (fraud of mortgagee in securing signature of wife—assignee of mortgage held to take subject to right of wife to have it set aside); Gray v. Security T. Co., 89-166, 94+552, 95+588 (A, an officer of a corporation, sold land to B, and B deeded back to A, who fraudulently mortgaged it to C—finding that C took with notice of fraud sustained).

52 Ames v. Richardson, 29-330, 13+137. See Hebert v. Turgeon, 84-34, 86+757.

53 Maxcy v. N. H. Fire Ins. Co., 54-272, 55+1130; Ermentrout v. Am. etc. Co., 60-418, 62+543. See as to the right of a mortgagor of a chattel to sue upon a policy made payable to his mortgagee, Graves v. Am. etc. Co., 46-130, 48+684.

54 Crich v. Williamsburg etc. Co., 45-441, 48+198.

55 Wilcox v. Mut. Fire Ins. Co., 81-478, 84+334.

him, shall affect such mortgagee's right to recover in case of loss on such real estate," gives to the mortgagee independent insurance which cannot be destroyed by any act or default of the mortgagor, or of any person other than the mortgagee or his agents.[56] When, by reason of a sale and conveyance of the insured premises, without the consent of the insurer, a fire insurance policy has become void as to a mortgagor owner and his successor in interest, but, by the terms of the instrument, is still in force as to the mortgagee, and in it the company has been expressly authorized, in case of a loss, to pay the whole amount of the debt to the mortgagee, and take a transfer and assignment thereof, and of all securities held for its payment, the mortgagor or his successor has no beneficial interest in the policy, and cannot compel an application on the debt of the amount due upon a loss. The amount due is not a fund for the debt, but becomes a fund for the reimbursement of the insurance company.[57] A mortgagee holding a fire policy providing that the loss, if any, should be payable to the mortgagee as his interest might appear, which was procured and paid for by the mortgagor, foreclosed his mortgage, and bid in the premises at the sale for the full amount of his debt. Afterwards, but before the expiration of the time for redemption, the dwelling house covered by the mortgage and policy was injured by fire, and the insurance company paid the loss to the mortgagee. No redemption was made from the sale. It was held that the mortgagor could not recover of the mortgagee the amount so paid, but, if he had redeemed, he would have been entitled to have had the amount applied pro tanto on the redemption.[58] Where property was insured for the benefit of the mortgagee, as his interest might appear, and the mortgage had been duly foreclosed prior to the time of such insurance, and the premium paid by the mortgagee, but the time for redemption did not expire until after the insurance, it was held that the non-redemption by the owner did not work an alienation so as to defeat the policy, but that an action might be maintained, in case of loss, without notice to the insurance company of such non-redemption and a notation thereof made on the policy, notwithstanding the policy provided that the mortgagee should notify the company of any change of ownership in the property insured and that it be so noted on the policy.[59] The mortgagor may by contract authorize the mortgagee to collect the rents of the mortgaged premises to pay for insurance before foreclosure.[60] A condition in a policy against other insurance has been held not to have been violated by insurance taken out by the mortgagee of the holder and covering the holder's interest, but without the authority or knowledge of the holder.[61] Where, in a policy of insurance, the amount recoverable in case of loss is made payable to a mortgagee as his interest may appear, the same must to that extent be deemed already appropriated for the payment or security of the mortgagee, and not subject to garnishment by the creditors of the mortgagor.[62] A title insurance company has been held entitled to subrogation to the rights of the mortgagee, upon payment of certain claims for labor and material.[63]

[56] Magoun v. Fireman's etc. Co., 86-486, 91+5.

[57] Sterling etc. Co. v. Beffrey, 48-9, 50+922.

[58] Carlson v. Presbyterian B. of R., 67-436, 70+3.

[59] Washburn v. Fire Assn., 60-68, 61+828.

[60] Cullen v. Minn. L. & T. Co., 60-6, 61+818.

[61] Church of St. George v. Sun etc. Co., 54-162, 55+909.

[62] Mansfield v. Stevens, 31-40, 16+455.

[63] St. Paul etc. Co. v. Johnson, 64-492, 67+543.

ASSIGNMENT OF DEBT

6276. What passes—A mortgage is a mere incident of the debt secured, and in the absence of express agreement, passes with an assignment of the debt.[64] Where a note, secured by a mortgage, is indorsed and transferred to a purchaser without a formal assignment of the mortgage, the security follows the note as an incident thereof, in the absence of express agreement to the contrary. The purchaser of the note becomes the equitable owner of the mortgage, acquiring an interest which enables him to deal with it for all purposes,[65] except that he cannot foreclose by advertisement in his own name.[66] An assignment of the debt carries a bond by the mortgagor to rebuild a house on the premises destroyed by fire.[67] A transfer of a portion of the debt will not carry with it a corresponding portion of the power.[68] An assignment of the debt carries a contract of guaranty.[69]

6277. Equitable assignment—A purchaser at an abortive foreclosure sale is regarded as an equitable assignee of the mortgage.[70] An assignment of a void judgment and decree of foreclosure has been held to operate as an assignment of the mortgage and debt secured thereby, and of the rents and profits to which the assignor was entitled as a mortgagee in possession.[71]

6278. Assignee takes free from equities—If the note is negotiable a bona fide assignee before maturity takes free from equities, though he takes the accompanying mortgage subject to them.[72]

ASSIGNMENT OF MORTGAGE

6279. When mortgage debt barred—The fact that the debt secured by a mortgage is barred by the statute of limitations does not affect the assignability of the mortgage.[73]

6280. Essentials of a legal assignment—A formal legal assignment must have all the essentials of a deed. It must be in writing, attested by two witnesses, and acknowledged. Prior to Laws 1899 c. 86 it was necessary that it should be under seal. An assignment of a mortgage belonging to a firm, describing the partners by their individual names and by their firm name, signed with their individual names and sealed with their individual seals, is sufficient.[74] An instrument purporting to be an assignment of a mortgage, in which no assignee is named, but a blank space left for his name, is, until the blank is legally filled, a nullity. If, however, the name of the assignee is afterwards inserted in the instrument by the authority of the mortgagee, express or implied from circumstances, and then recorded, it is a valid assignment, and the assignee may foreclose the mortgage by advertisement.[75] The statutes of this state place assignments of mortgages on the same footing as conveyances of realty.[76]

[64] Johnson v. Carpenter, 7–176(120); Johnson v. Lewis, 13–364(337); Humphrey v. Buisson, 19–221(182); Burke v. Backus, 51–174, 53+458.

[65] First Nat. Bank v. Pope, 85–433, 89+318; Meeker Co. Bank v. Young, 51–254, 53+630; Bloomer v. Burke, 94–15, 101+974.

[66] See § 6320.

[67] Longfellow v. McGregor, 61–494, 63+1032.

[68] Solberg v. Wright, 33–224, 22+381. See Brown v. Delaney, 22–349; Wilson v. Eigenbrodt, 30–4, 13+907.

[69] Wood v. Bragg, 75–527, 78+93.

[70] Johnson v. Sandhoff, 30–197, 14+889; Jellison v. Halloran, 44–199, 46+332. See Berg v. Olson, 88–392, 93+309.

[71] Anderson v. Minn. L. & T. Co., 68–491, 71+665, 819.

[72] Watkins v. Goessler, 65–118, 67+796; White v. Miller, 52–367, 54+736.

[73] Conner v. Howe, 35–518, 29+314.

[74] Morrison v. Mendenhall, 18–232(212). See Carli v. Taylor, 15–171(131); Brown v. Delaney, 22–349.

[75] Casserly v. Morrow, 101–16, 111+654.

[76] Johnson v. Carpenter, 7–176(120).

6281. Authority to make—The authority of an agent to execute an assignment need not be recorded. Prior to Laws 1899 c. 86, it was necessary that it should be under seal. Articles of partnership under seal were held sufficient for such purpose. A firm will be bound by an assignment made by one of the partners who had parol authority or whose act was ratified by parol, express or implied.[77] A guardian may assign a mortgage of his ward without a special order of court.[78]

6282. Deed by mortgagee—A deed by the mortgagee before foreclosure, or at least before entry for condition broken, does not operate as an assignment of the mortgage and debt unless it was the intention of the parties that it should, and such intention must be made to appear.[79]

6283. What passes by assignment—A power of sale passes without express mention.[80] A promise of a third party to the mortgagor to pay the mortgage passes.[81]

6284. Assignee takes subject to equities—A mortgage is not a negotiable instrument, though it secures a negotiable note, and upon assignment passes to the assignee as an ordinary thing in action, subject to all equities of the original parties,[82] but not as to equities of third parties of which the assignee was without notice.[83] While, so far as the personal liability of the mortgagor on the note is concerned, the assignee may, if a bona fide purchaser before maturity, take it free from the equities, the mortgage in his hands is subject to them.[84] The assignee of a paid mortgage takes it subject to the defence that it has been paid though it is not satisfied of record.[85] The recording act does not render a mortgage negotiable.[86]

6285. Recording assignment—Notice—An assignment of a mortgage is a conveyance, within the meaning of the statutes requiring instruments affecting title to realty to be recorded, and void as to third persons without notice, if not recorded.[87] Where an assignment was indorsed on a mortgage, describing it as "the within-described mortgage," it was held sufficient to record it on a subsequent page of the same book as the mortgage.[88] The record of an assignment of a mortgage is constructive notice to all persons of the rights of the assignee, as against any subsequent acts of the mortgagee, save only as excepted by the statute. It is sufficient notice to require payment of the mortgage to be made to the assignee, except as to the mortgagor, his heirs, or personal representatives.[89] Where a party takes an assignment of a note and mortgage, the fact that they are not in the possession of his assignor is sufficient to put him upon inquiry as to his assignor's title to them, so that, if he makes no such inquiry, he is not a purchaser in good faith, within the meaning of the registry laws, and his assignment, though recorded, is subject to a prior unrecorded assignment of the note and mortgage. A covenant in the assign-

[77] Morrison v. Mendenhall, 18–232(212).
[78] Humphrey v. Buisson, 19–221(182).
[79] Hill v. Edwards, 11–22(5); Gale v. Battin, 12–287(188); Johnson v. Lewis, 13–364(337); Greve v. Coffin, 14–345 (263); Everest v. Ferris, 16–26(14).
[80] Brown v. Delaney, 22–349; Folsom v. Lockwood, 6–186(119); Dunning v. McDonald, 54–1, 55+864.
[81] Lahmers v. Schmidt, 35–434, 29+169.
[82] Johnson v. Carpenter, 7–176(120); Hostetter v. Alexander, 22–559; Blumenthal v. Jassoy, 29–177, 12+517; Oster v. Mickley, 35–245, 28+710; Scott v. Austin, 36–460, 32+89, 864; Redin v. Branhan, 43–283, 45+445; White v. Miller, 52–367, 54+736; Smith v. Parsons, 55–520, 57+311; Watkins v. Goessler, 65–118, 67+796; Olson v. N. W. etc. Co., 65–475, 68+100; Klatt v. Dummert, 70–467, 73+404; Com. Title etc. Co. v. Dokko, 72–229, 75+106; Ironton L. Co. v. Butchart, 73–39, 75+749; Paulsen v. Koon, 85–240, 88+760; Welbon v. Webster, 89–177, 94+550.
[83] Moffett v. Parker, 71–139, 73+850. See Burgess v. Bragaw, 49–462, 52+45.
[84] Watkins v. Goessler, 65–118, 67+796.
[85] Redin v. Branhan, 43–283, 45+445.
[86] Klatt v. Dummert, 70–467, 73+404.
[87] Huitink v. Thompson, 95–392, 104+237; Foss v. Dullam, 126+820.
[88] Carli v. Taylor, 15–171(131).
[89] Robbins v. Larson, 69–436, 72+456.

ment, by the assignor, that he has good right and lawful authority to sell and assign the note and mortgage, does not establish the fact that the assignee made inquiries into the assignor's title, or that, if he did, he was not fully informed of any defect in it.[90] Where a mortgage securing several notes is assigned to a person, together with one of the notes, he cannot secure priority over the holders of the other notes by recording his assignment, because the mortgage itself gives him notice of the other notes.[91] As between several assignees the record of an assignment is notice to subsequent purchasers and assignees.[92]

6286. Effect of assigning notes and mortgage to different persons—Where several notes maturing at different dates secured by one mortgage are assigned to different parties at different times and the proceeds of the property will not pay all in full, such proceeds should, in the absence of a contract to the contrary, be applied pro rata towards the payment of all the notes without regard to the time they matured or were assigned.[93] But a mortgagee holding several notes secured by mortgage may assign the security to an assignee of one of the notes so as to give him a preference in the application of the proceeds realized therefrom.[94] When a mortgage securing several notes is assigned to the holder of a part only of the notes he may foreclose under the power.[95] Where an interest coupon was not held by the holder of the mortgage and was not included in the amount for which the mortgage was foreclosed, it was held that the holder of the coupon had no claim on the property covered by the mortgage.[96]

6287. Payment before notice of assignment—A mortgagor may extinguish a mortgage, which has been assigned, by payment to the mortgagee any time before he has actual notice of the assignment.[97] By statute the record of an assignment of a mortgage is not notice to a mortgagor, his heirs or personal representatives, so as to impair this right of payment.[98] The statute, however, applies only to the persons named. It does not apply as between an assignee of a first mortgage and an assignee of a second mortgage.[99] A payment before maturity of a note secured by a mortgage and a formal satisfaction of the mortgage by the payee will not defeat a right of recovery against the maker by a bona fide indorsee before maturity.[1]

6288. Admissions of assignor—The admissions of the assignor, made while he was the owner of the mortgage, bind his assignee.[2]

ASSUMPTION OF MORTGAGE

6289. What constitutes—The assumption of a mortgage by a purchaser from the mortgagor is solely a matter of contract. A purchase "subject" to a mortgage is not alone an assumption of the mortgage and creates no personal obligation against the vendee.[3] But where a grantee receives a deed of lands incumbered by a mortgage which is expressly excepted from the covenants, the presumption is, in the absence of evidence to the contrary, that the land is taken subject to the lien of the mortgage, if valid; and, as respects the lien

[90] O'Mulcahy v. Holley, 28–31, 8+906.
[91] Wilson v. Eigenbrodt, 30–4, 13+907.
[92] Solberg v. Wright, 33–224, 22+381.
[93] Wilson v. Eigenbrodt, 30–4, 13+907; Hall v. McCormick, 31–280, 17+620.
[94] Solberg v. Wright, 33–224, 22+381. See State F. Co. v. Com. etc. Co., 69–219, 72+68.
[95] Brown v. Delaney, 22–349.
[96] State F. Co. v. Com. etc. Co., 69–219, 72+68.
[97] Johnson v. Carpenter, 7–176(120); Olson v. N. W. etc. Co., 65–475, 68+100.
[98] Id.
[99] Robbins v. Larson, 69–436, 72+456.
[1] Blumenthal v. Jassoy, 29–177, 12+517.
[2] Anderson v. Lee, 73–397, 76+24.
[3] Brown v. Stillman, 43–126, 45+2; Manning v. Cullen, 50–568, 52+973; Clifford v. Minor, 76–12, 78+861.

thereof on the land, it is the duty of the purchaser, and not the seller, to discharge the same.[4] A covenant to pay a "mortgage" is a covenant to pay the debt secured by it.[5] Taking a deed with a covenant against incumbrances "except" a specified mortgage is not an assumption of such mortgage.[6]

6290. Parol evidence—Parol evidence is admissible to prove an assumption,[7] unless it would have the effect of modifying an express covenant in the deed.[8] It is admissible to resolve a patent ambiguity in a covenant of assumption.[9]

6291. Not within statute of frauds—An agreement to pay a mortgage debt, not due for more than a year, is not within the statute of frauds.[10]

6292. Consideration—A deed purporting to convey realty, even when without covenants of warranty, at least when no mistake or imposition appears in the transaction, is a sufficient consideration.[11] But a want of title in the grantor, and consequent want of consideration for the assumption, is a defence which the grantee may assert against the mortgagee.[12]

6293. Grantor must be personally liable—If the grantor is not personally liable to the mortgagee the grantee is not.[13]

6294. Nature of obligation—The obligation is collateral to the original mortgage indebtedness.[14] A provision in a deed whereby the grantee assumes and agrees to pay an existing mortgage does not create a covenant which runs with the land, though inserted in connection with the covenants of seizin and against incumbrances.[15] It is purely personal and may be enforced without a foreclosure of the mortgage.[16] It does not require the grantee to protect the lien of the mortgage.[17] An assumption clause in a deed is presumed to be inserted primarily for the protection of the grantor.[18] The right of the mortgagee to sue on the contract is sometimes placed on the broad ground that a third party for whose benefit a contract is made may sue thereon,[19] and sometimes on the ground of equitable subrogation.[20] It is agreed, however, that the mortgagee acquires no greater rights than the mortgagor and takes the covenant, if at all, subject to all defences, legal and equitable, which the grantee might assert against the mortgagor.[21] The obligation of the grantee to the mortgagee cannot be greater than to the mortgagor, and if the mortgagor is under no personal obligation to the mortgagee, the grantee is not.[22] The mortgagee is a mere gratuitous beneficiary of a promise made to a stranger.[23] The contract is essentially one to indemnify the mortgagor and the

[4] Baker v. N. W. etc. Co., 36–185, 30+464; Gerdine v. Menage, 41–417, 43+91; Merritt v. Byers, 46–74, 48+417.

[5] Hine v. Myrick, 60–518, 62+1125.

[6] Calkins v. Copley, 29–471, 13+904; Gerdine v. Menage, 41–417, 43+91; Merritt v. Byers, 46–74, 48+417; Rooney v. Koenig, 80–483, 83+399.

[7] Langan v. Iverson, 78–299, 80+1051. See Nelson v. Rogers, 47–103, 49+526.

[8] Rooney v. Koenig, 80–483, 83+399.

[9] Board of Trustees v. Brown, 66–179, 68+837.

[10] Langan v. Iverson, 78–299, 80+1051.

[11] Alt v. Banholzer, 36–57, 29+674; Washington etc. Co. v. Marshall, 56–250, 57+658.

[12] McLaughlin v. Betcher, 87–1, 91+14. See Washington etc. Co. v. Marshall, 56–250, 57+658.

[13] Brown v. Stillman, 43–126, 45+2; Nelson v. Rogers, 47–103, 49+526; Kramer v. Gardner, 104–370, 116+925; Clement v. Willett, 105–267, 117+491.

[14] Washington etc. Co. v. Marshall, 56–250, 57+658.

[15] Clement v. Willett, 105–267, 117+491.

[16] Follansbee v. Johnson, 28–311, 9+882; Scanlan v. Grimmer, 71–351, 74+146; McLaughlin v. Betcher, 87–1, 91+14.

[17] McLaughlin v. Betcher, 87–1, 91+14.

[18] Nelson v. Rogers, 47–103, 49+526.

[19] Follansbee v. Johnson, 28–311, 9+882. See Brown v. Stillman, 43–126, 45+2.

[20] Gold v. Ogden, 61–88, 63+266.

[21] Gold v. Ogden, 61–88, 63+266; Rogers v. Castle, 51–428, 53+651; Clifford v. Minor, 76–12, 78+861.

[22] Brown v. Stillman, 43–126, 45+2; Nelson v. Rogers, 47–103, 49+526; Rogers v. Castle, 51–428, 53+651; Kramer v. Gardner, 104–370, 116+925; Clement v. Willett, 105–267, 117+491.

[23] Rogers v. Castle, 51–428, 53+651; Gold v. Ogden, 61–88, 63+266.

mortgagee is given a right of action simply to avoid circuity of action.[24] The liability of a party assuming a mortgage has been held not qualified or limited by an independent agreement executed by the grantor in the deed, by which he undertook to make provision for the payment of the note. An indorser on the secured note who pays it is entitled to be subrogated to the rights and remedies of the holder of the note against the party assuming the mortgage.[25]

6295. Land becomes primary fund—Grantor a surety—An assumption makes the land the primary fund for the payment of the debt and the grantor a surety therefor.[26] If the grantor pays the mortgage he is entitled to be subrogated to the rights of the mortgagee, and to enforce the mortgage for his indemnity.[27] Subsequent mortgagees are charged with notice of the equities of the grantor appearing on their title.[28] If the mortgagee, with notice of the conveyance, gives an extension of time to the grantee, without the consent of the mortgagor, the later is released to the extent of the value of the land.[29] The mortgagor is not released by a mere passive failure to enforce payment from a solvent grantee who subsequently becomes insolvent.[30] Where the mortgagor conveys to another a part of the mortgaged premises, the deed containing a provision that the grantee shall, as part of the purchase price, pay the entire mortgage, the part thus conveyed becomes, as between the mortgagor and his grantee, primarily liable for the payment of the debt; and if a holder of the mortgage, chargeable with actual notice of that fact, releases to the grantee of the mortgagor that part of the premises thus conveyed, which in value exceeds the amount of the mortgage, such a release operates as a discharge of the mortgage on the remainder of the premises retained by the mortgagor.[31]

6296. Assumption of part of debt—In an action by a mortgagee on a covenant assuming a part of the mortgage debt, it was held that an answer praying that the mortgagee be compelled to exhaust his mortgage security first did not state a defence or counterclaim.[32]

6297. Adoption of contract by mortgagee—What effect the adoption of the contract by the mortgagee has on the lien of the mortgage is undetermined.[33]

6298. Effect of foreclosure—The obligation is not necessarily merged in a judgment of foreclosure, though the grantee is a party to the action.[34]

6299. Estoppel of purchaser and his privies—A grantee who takes "subject" to a mortgage which he does not expressly assume is not estopped from questioning its validity.[35] Nor is a grantee who takes a deed with a covenant against incumbrances except a specified mortgage.[36] A grantee who assumes a first mortgage is not estopped from attacking a second mortgage which he has not assumed.[37] A grantee who has assumed a mortgage cannot assert its

[24] Gold v. Ogden, 61–88, 63+266.

[25] Nettleton v. Ramsey County etc. Co., 54–395, 56+128.

[26] Alt v. Banholzer, 36–57, 29+674; Baker v. N. W. etc. Co., 36–185, 30+464; Miller v. Fasler, 42–366, 44+256; Groesbeck v. Mattison, 43–547, 46+135; Brown v. Stillman, 43–126, 45+2; Merritt v. Byers, 46–74, 48+417; Nat. Invest. Co. v. Nordin, 50–336, 52+899; Travers v. Dorr, 60–173, 62+269; Wheeler v. Benton, 67–293, 69+927; Rogers v. Hedemark, 70–441, 73+252.

[27] Baker v. Terrell, 8–195(165); Baker v. N. W. etc. Co., 36–185, 30+464; Knoblauch v. Foglesong, 37–320, 33+865; Rogers v. Hedemark, 70–441, 73+252.

[28] Miller v. Fasler, 42–366, 44+256.

[29] Travers v. Dorr, 60–173, 62+269.

[30] Pinch v. McCulloch, 72–71, 74+897.

[31] Groesbeck v. Mattison, 43–547, 46+135.

[32] Conn. etc. Co. v. Knapp, 62–405, 64+1137.

[33] Id.

[34] Washington etc. Co. v. Marshall, 56–250, 57+658; McRae v. Sullivan, 56–266, 57+659.

[35] Thompson v. Morgan, 6–292(199). See Brown v. Stillman, 43–126, 45+2.

[36] Calkins v. Copley, 29–471, 13+904; Gerdine v. Menage, 41–417, 43+91. See Rooney v. Koenig, 80–483, 83+399.

[37] Welbon v. Webster, 89–177, 94+550.

invalidity.[38] But he may assert against the mortgagee the invalidity of his own promise to pay the mortgage. He may show that he acquired no title by his deed and that his promise was consequently without consideration.[39] A person who has assumed two mortgages cannot acquire title under one of them so as to cut out the lien of the other.[40] A grantee who has assumed a mortgage cannot, as against his grantor, assert a title acquired under such mortgage.[41] If a grantee assuming a mortgage subsequently mortgages the land, his mortgagee will take subject to the equities appearing upon his record title, and cannot assert against the original grantor a title acquired under a foreclosure of the mortgage assumed by his grantor.[42]

6300. Action by mortgagee on covenant—Defences—The mortgagee or his assignee, may maintain an action on the covenant.[43] The grantee may assert in such action any defence which he might have asserted against the grantor.[44] A mortgagee is not required to exhaust his mortgage security before suing on the covenant.[45] Whether a recovery on the covenant releases the lien of the mortgage is an open question.[46]

6301. Unauthorized insertion of assumption clause—Fraud—If an assumption clause is inserted by mistake, or fraud, or without authority, the grantee may repudiate it without repudiating the deed in toto and reconveying.[47] Cases are cited below holding evidence sufficient,[48] or insufficient.[49] to establish fraud.

FORECLOSURE—IN GENERAL

6302. Definition—The term foreclosure is sometimes used to denote the sale and attendant proceedings;[50] and sometimes, the entire process of barring the equity of redemption, including the expiration of the redemption period.[51]

6303. General nature of proceeding—Foreclosure proceedings, in whatever manner conducted, have for their object and end the enforcement of the security—the application of the property to the satisfaction of the debt or obligation secured.[52] The right to foreclose is not affected by possession.[53]

6304. Two methods—There are only two methods by which a mortgage may be foreclosed—by action and by advertisement.[54] The common-law method by entry and possession does not obtain in this state.[55] There is this difference between a foreclosure by advertisement and a foreclosure by action. In the former the title passes by virtue of the mortgage and the mortgage must be sufficient to operate as a conveyance as soon as the equity of redemption is barred by the sale; but in the latter the title passes by virtue of the decree

[38] Ross v. Worthington, 11–438(323); Calkins v. Copley, 29–471, 13+904; Alt v. Banholzer, 36–57, 29+674; Moulton v. Haskell, 50–367, 52+960; Scanlan v. Grimmer, 71–351, 74+146.

[39] McLaughlin v. Betcher, 87–1, 91+14.

[40] Conner v. Howe, 35–518, 29+314.

[41] Probstfield v. Czizek, 37–420, 34+896. See Miller v. Fasler, 42–366, 44+256.

[42] Miller v. Fasler, 42–366, 44+256.

[43] Follansbee v. Johnson, 28–311, 9+882; Scanlan v. Grimmer, 71–351, 74+146; Clement v. Willett, 105–267, 117+491. See Clifford v. Minor, 67–512, 70+798 (action by assignee of mortgagee—complaint held insufficient); Pinch v. McCulloch, 72–71, 74+897 (when statute of limitations begins to run).

[44] Gold v. Ogden, 61–88, 63+266; Rogers v. Castle, 51–428, 53+651; Clifford v. Minor, 76–12, 78+861. See Follansbee v. Johnson, 28–311, 9+882.

[45] Conn. etc. Co. v. Knapp, 62–405, 64+1137.

[46] Id.

[47] Rogers v. Castle, 51–428, 53+651; Gold v. Ogden, 61–88, 63+266; Clifford v. Minor, 76–12, 78+861.

[48] Martini v. Christensen, 65–489, 67+1019; Clifford v. Minor, 76–12, 78+861; Demaris v. Rodgers, 124+457.

[49] Follansbee v Johnson, 28–311, 9+882.

[50] Beal v. White, 28–6, 8+829; Duncan v. Cobb, 32–460, 21+714; Larocque v. Chapel, 63–517, 65+941.

[51] Standish v. Vosberg, 27–175, 6+489.

[52] Sprague v. Martin, 29–226, 13+34.

[53] Parsons v. Noggle, 23–328.

[54] Archambau v. Green, 21–520.

[55] See Sprague v. Martin, 29–226, 13+34.

and sale under it. There is no going behind the decree to ascertain if the mortgage was sufficient to operate as a conveyance.[56] If the mortgage contains no power it can only be foreclosed by action.[57] A release by the mortgagor to the mortgagee of the equity of redemption, after condition broken, is tantamount to foreclosure, and operates as payment of the mortgage debt to the extent of the value of the property.[58]

FORECLOSURE BY ADVERTISEMENT

6305. General nature of proceeding—A foreclosure by advertisement is a proceeding in pais, ex parte, and in rem.[59] While the power to foreclose is derived from the convention of the parties, yet the proceedings in the exercise of the power, so far as regulated by statute, are purely statutory.[60] For the purpose of accomplishing a foreclosure, the proceeding by advertisement takes the place of an action; and the service of notice by publication, and upon the party in possession, takes the place of service of process by which an action to foreclose is commenced.[61] The advantages of foreclosure by advertisement over foreclosure by action are, that it avoids the necessity of bringing in as parties all persons in interest; that it avoids the danger of a failure to secure a perfect title by reason of a defect of parties defendant;[62] that it is simple and inexpensive;[63] and that it is expeditious.[64] The proceeding is analogous to a judicial proceeding.[65] It is controlled by the statute irrespective of the terms of the mortgage.[66] It is in derogation of common law.[67] It is not a special proceeding within the meaning of G. S. 1878 c. 88 § 9.[68]

6306. Statute constitutional—Laws 1878 c. 53 is entitled "An act providing for the foreclosure of mortgages." The subject of section 24 thereof is germane to the subject mentioned in the title of the act and the act is not unconstitutional on account of section 24, because embracing more than one subject or embracing a subject not expressed in the title.[69]

6307. The power—Powers of sale in mortgages are not the creatures of statute, but of the convention of the parties. Statutes merely regulate the manner of their execution. A party may grant a valid power of this kind in the absence of any statute either authorizing its creation or regulating its exercise.[70] But the statute is superior to the power. Where a mortgagee, foreclosing under the power, complies with the requirements of the statute, it is sufficient, though there may be additional requirements contained in the mortgage.[71] And the statute may have requirements in addition to those in the mortgage.[72] The power of sale is a part of the mortgage and passes by an assignment of the latter without special mention.[73] The transfer of a portion of the mortgage debt will not carry with it a corresponding portion of the power.[74] The authority conferred upon a mortgagee to foreclose a mortgage by advertisement is that found in the power of sale, as that power appears in

[56] Foster v. Johnson, 39-378, 40+255.
[57] King v. Meighen, 20-264(237).
[58] Sprague v. Martin, 29-226, 13+34.
[59] Heath v. Hall, 7-315(243); Morrison v. Mendenhall, 18-232(212); Loy v. Home Ins. Co., 24-315; Jordan v. Humphrey, 31-495, 18+450; Kirkpatrick v. Lewis, 46-164, 47+970, 48+783; In re Grundysen, 53-346, 55+557; Lundberg v. Davidson, 72-49, 74+1018; Swain v. Lynd, 74-72, 76+958.
[60] Swain v. Lynd, 74-72, 76+958; Cutting v. Patterson, 82-375, 85+172.
[61] Fowler v. Woodward, 26-347, 4+231.
[62] Lundberg v. Davidson, 72-49, 74+1018
[63] Clifford v. Tomlinson, 62-195, 64+381.
[64] Morrison v. Mendenhall, 18-232(212).
[65] Webb v. Lewis, 45-285, 47+803.
[66] Butterfield v. Farnham, 19-85(58): Webb v. Lewis, 45-285, 47+803.
[67] Clifford v. Tomlinson, 62-195, 64+381.
[68] In re Grundysen, 53-346, 55+557.
[69] Lynott v. Dickerman, 65-471, 67+1143.
[70] Webb v. Lewis, 45-285, 47+803.
[71] Butterfield v. Farnham, 19-85(58).
[72] Webb v. Lewis, 45-285, 47+803.
[73] Brown v. Delaney, 22-349; Dunning v. McDonald, 54-1, 55+864.
[74] Solberg v. Wright, 33-224, 22+381.

the instrument itself.[75] The power of sale cannot be severed from the legal ownership of the mortgage.[76] Payment of the mortgage extinguishes the power.[77] If there is no power the only way that the mortgage can be foreclosed is by action.[78] The power is not exhausted by an abortive sale.[79]

6308. Strict compliance with statutory requirements necessary—While the power to foreclose is derived from the convention of the parties, the proceedings in the exercise of that power, so far as regulated by statute, are wholly statutory, and in order to constitute a valid foreclosure every statutory requirement must be strictly, or at least substantially, complied with.[80] It is unnecessary for the party seeking relief to show actual prejudice,[81] but he cannot have relief for non-compliance with a requirement not designed for his protection.[82] Mere irregularities are not fatal, unless they operate to prejudice some party interested.[83]

6309. Compliance with statute sufficient—If a foreclosure complies with the requirements of the statute it is sufficient, though there may be additional requirements contained in the mortgage.[84]

6310. What law governs—Impairment of contract—The remedial rights of the parties relating to the mode of exercising the power, except in so far as such mode may be essential to the beneficial character of the mortgage, are governed by the law in force at the time of the foreclosure. Their substantive rights, arising from an exercise of the power, are governed by the law in force at the time of the execution of the mortgage.[85] Thus the statute of limitations,[86] the statute regulating the recording of the certificate of sale,[87] the statute regulating the publication of the notice of sale,[88] the statute defining who shall conduct the sale,[89] and the statute defining the force of the certificate as evidence,[90] in force at the time of the foreclosure, govern. On the other hand, the right to foreclose,[91] the right to redeem,[92] the time within which to redeem,[93] the amount required to redeem,[94] and the rights of the parties in the property arising from the sale,[95] are governed by the law in force at the time of the execution of the mortgage.

[75] Backus v. Burke, 48–260, 51+284.

[76] Dunning v. McDonald, 54–1, 55+864; Merrick v. Putnam, 73–240, 75+1047.

[77] Misener v. Gould, 11–166(105).

[78] King v. Meighen, 20–264(237).

[79] Bottineau v. Aetna Life Ins. Co., 31–125, 16+849; Cobb v. Bord, 40–479, 42+396.

[80] Dana v. Farrington, 4–433(335); Spencer v. Annan, 4–542(426); Heath v. Hall, 7–315(243); Holmes v. Crummett, 30–23, 13+924; Martin v. Baldwin, 30–537, 16+449; Mason v. Goodnow, 41–9, 42+482; Richards v. Finnegan, 45–208, 47+788; Backus v. Burke, 48–260, 51+284; Clifford v. Tomlinson, 62–195, 64+381; Hamel v. Corbin, 69–223, 72+106; Swain v. Lynd, 74–72, 76+958; Peaslee v. Ridgway, 82–288, 84+1024; Cutting v. Patterson, 82–375, 85+172.

[81] Peaslee v. Ridgway, 82–288, 84+1024; Heath v. Hall, 7–315(243).

[82] Holmes v. Crummett, 30–23, 13+924. See Swain v. Lynd, 74–72, 76+958; Bottineau v. Aetna Life Ins. Co., 31–125, 16+849.

[83] Bottineau v. Aetna Life Ins. Co., 31–125, 16+849.

[84] Butterfield v. Farnham, 19–85(58).

[85] Stahl v. Mitchell, 41–325, 43+385; Webb v. Lewis, 45–285, 47+803. See Smith v. Green, 41 Fed. 455.

[86] Archambau v. Green, 21–520; Duncan v. Cobb, 32–460, 21+714.

[87] Ryder v. Hulett, 44–353, 46+559.

[88] Atkinson v. Duffy, 16–45(30).

[89] Webb v. Lewis, 45–285, 47+803.

[90] Burke v. Lacock, 41–250, 42+1016.

[91] O'Brien v. Krenz, 36–136, 30+458.

[92] Willis v. Jelineck, 27–18, 6+373; O'Brien v. Krenz, 36–136, 30+458; Lowry v. Mayo, 41–388, 43+78.

[93] Goenen v. Schroeder, 8–387(344); Carroll v. Rossiter, 10–174(141); Hillebert v. Porter, 28–496, 11+84.

[94] Hillebert v. Porter, 28–496, 11+84.

[95] Heyward v. Judd, 4–483(375); Hillebert v. Porter, 28–496, 11+84. The last case overrules, in part, Stone v. Bassett, 4–298(215); Heyward v. Judd, 4–483(375); Freeborn v. Pettibone, 5–277(219); Turrell v. Morgan, 7–368(290); Berthold v. Holman, 12–335(221); Berthold v. Fox, 13–501(462).

6311. Within what time—Under the present statute a mortgage may be foreclosed within fifteen years after the maturity of the mortgage or debt secured.[96] Under Laws 1871 c. 52 the limitation was ten years.[97] It is enough to commence the proceedings within the time limited; they may be completed thereafter.[98] Entering into possession after a mortgage has become barred does not revive it.[99] Prior to Laws 1903 c. 15, it was an open question whether a partial payment on the debt would extend the time in which to redeem.[1] Laws 1870 c. 60, limiting the time to commence an action to foreclose, has been held inapplicable to a foreclosure by advertisement.[2]

6312. Death, insanity, or disability of mortgagor—The right to foreclose is not affected by the death,[3] insanity, or disability [4] of the mortgagor.

6313. Effect of sale in extinguishing debt—A foreclosure sale has the effect of extinguishing the mortgage debt, to the amount for which the property is sold, whether the sale is to the mortgagee or a stranger.[5] Foreclosure proceedings, in whatever manner conducted, have for their object and end the enforcement of the security; the application of the property to the satisfaction of the debt or obligation secured.[6]

6314. Effect of sale in exhausting lien—Where a mortgage is given on a single tract to secure a debt due and payable as an entirety, and on default in payment a foreclosure is had under a power, a sale for less than the amount due exhausts the lien of the mortgage.[7] It is the general rule that a single valid sale exhausts the lien of the mortgage, or, in other words, that there can be but one valid sale of the same land under the same power.[8] The remedy on the mortgage as a security is exhausted by the foreclosure. The mortgage becomes, as a security, functus officio, and its only future office is as a muniment of title in case the mortgagor fails to redeem. After the foreclosure, the rights of the parties are to be measured, not by anything in the mortgage—except as a muniment of title—but by the statute.[9] The rule is otherwise if the sale is invalid or incomplete.[10]

6315. Foreclosure for instalments of principal or interest—Under Pub. St. (1849–1858), c. 75 § 3, only instalments subsequent to the first could be foreclosed separately.[11] Under the present statute [12] a sale of the entire tract mortgaged for a single instalment exhausts the lien of the mortgage. The same land can be sold but once under the same mortgage. There can be a second sale to satisfy a subsequent instalment only when there remains land not sold at the first sale.[13] But if the owner, or his assigns, annuls the sale for a first in-

[96] R. L. 1905 § 4457; Laws 1909 c. 181.

[97] Archambau v. Green, 21–520; Benton v. Nicoll, 24–221; Fisk v. Stewart, 26–365, 4+611; Duncan v. Cobb, 32–460, 21+714; Cobb v. Bord, 40–479, 42+396; Banning v. Sabin, 45–431, 48+8.

[98] Laws 1909 c. 181. See, prior to statute, Duncan v. Cobb, 32–460, 21+714.

[99] Benton v. Nicoll, 24–221; Banning v. Sabin, 45–431, 48+8.

[1] Kenaston v. Lorig, 81–454, 84+323.

[2] Golcher v. Brisbin, 20–453(407).

[3] Jones v. Tainter, 15–512(423); Fleming v. McCutcheon, 85–152, 88+433.

[4] Lundberg v. Davidson, 72–49, 74+1018; Id., 68–328, 71+395, 72+71.

[5] Berthold v. Holman, 12–335(221); Tinkcom v. Lewis, 21–132; Martin v. Fridley, 23–13; Sprague v. Martin, 29–226, 13+34; Sergeant v. Ruble, 33–354, 23+535; Pioneer S. & L. Co. v. Farnham, 50–315, 52+897; Am. B. & L. Assn. v. Waleen, 52–23, 53+867; Boutelle v. Minneapolis, 59–493, 61+554; Evans v. Rhode Island etc. Co., 67–160, 69+715; Veazie v. Morse, 67–100, 69+637. Otherwise if the foreclosure is set aside, Folsom v. Lockwood, 6–186(119).

[6] Sprague v. Martin, 29–226, 13+34.

[7] Loomis v. Clambey, 69–469, 72+707.

[8] Paquin v. Braley, 10–379(304); Dick v. Moon, 26–309, 4+39; Hanson v. Dunton, 35–189, 28+221; Loomis v. Clambey, 69–469, 72+707.

[9] Pioneer S. & L. Co. v. Farnham, 50–315, 52+897.

[10] Standish v. Vosberg, 27–175, 6+489; Lindgren v. Lindgren, 73–90, 75+1034. See Morey v. Duluth, 69–5, 71+694.

[11] Shorts v. Cheadle, 8–67(44).

[12] R. L. 1905 § 4465.

[13] Fowler v. Johnson, 26–338, 3+986, 6+486; Dick v. Moon, 26–309, 4+39; Martin

stalment by redeeming, a second sale may be had for another instalment.[14] The holder of overdue coupon interest notes, secured by mortgage, may maintain an action to foreclose the mortgage, though the principal debt is not yet mature, and is held by another person, who is made a party to the action.[15] The notice of sale need not state that the amount claimed to be due is for an instalment.[16]

6316. Mortgage specific lien on separate tracts—Where a mortgage is made a specific lien on separate tracts, it is optional with the mortgagee to foreclose on each separate lien, or to include all the liens in one foreclosure. If he adopts the latter course he is entitled to costs and disbursements for but one foreclosure.[17]

6317. Authority of agent—Under the present law the authority of an agent to foreclose a mortgage must be in writing and recorded.[18] A power of attorney which substantially complies with the statute, and describes the mortgage with reasonable certainty, is sufficient.[19] A loan agent to whom his principal sends coupon interest notes for collection does not have implied authority from that fact alone to foreclose the mortgage securing the notes.[20] A mortgagee has been held to have ratified an unauthorized foreclosure by an agent by taking possession under the sale.[21] An agent authorized to foreclose does not have implied authority to receive redemption money.[22] Cases are cited below holding an agent to have authority to foreclose,[23] or the reverse.[24]

PREREQUISITES

6318. Default—There is no right to foreclose under a power until it has become operative by reason of some default.[25] Where a mortgage provides that on default in the payment of interest, the mortgagee may declare the whole sum due, the election may be exercised by advertising a sale, without other notice of the election.[26]

6319. No action or proceeding—Where judgment has been recovered for the mortgage debt, the mortgage may be foreclosed by advertisement, if the execution is returned unsatisfied, in whole or in part. A mortgage was given to secure, in part, the mortgagee against his indorsement of a note. The holder of the note recovered judgment on it against the makers, the mortgagors. The mortgagee paid the note and took it up. It was held that a return of an execution unsatisfied was unnecessary to the mortgagee's right to foreclose.[27] Where part of the interest on a mortgage is paid by a note, the recovery of judgment on the note is no objection to a foreclosure under the power for the remainder of the mortgage debt.[28] An action or proceeding instituted at law to recover

v. Sprague, 29–53, 11+143; Loomis v. Clambey, 69–469, 72+707; Darelius v. Davis, 74–345, 77+214. See Koppang v. Steenerson, 100–239, 111+153. Under G. S. 1866 c. 81 § 3 the rule was otherwise, Watkins v. Hackett, 20–106(92); Taylor v. Burgess, 26–547, 6+350.

[14] Standish v. Vosberg, 27–175, 6+489; Daniels v. Smith, 4–172(117); Herber v. Christopherson, 30–395, 15+676.

[15] Cleveland v. Booth, 43–16, 44+670.

[16] Trafton v. Cornell, 62–442, 64+1148.

[17] Farnsworth v. Com. etc. Co., 87–179, 91+469.

[18] R. L. 1905 § 4461. See Laws 1899 c. 22; Laws 1907 c. 437.

[19] Peaslee v. Ridgway, 82–288, 84+1024.

[20] Burchard v. Hull, 71–430, 74+163; Dexter v. Morrow, 76–413, 79+394; White v. Madigan, 78–286, 80+1125.

[21] Blake v. McKusick, 8–338(298).

[22] In re Grundysen, 53–346, 55+557.

[23] Darelius v. Davis, 74–345, 77+214.

[24] White v. Madigan, 78–286, 80+1125; Dexter v. Morrow, 76–413, 79+394.

[25] Jones v. Ewing, 22–157. As to what constitutes a default see Pratt v. Tinkcom, 21–142; Felton v. Bissel, 25–15; Abbott v. Peck, 35–499, 29+194; O'Brien v. Oswald, 45–59, 47+316; Mjones v. Yellow Medicine Co. Bank, 45–335, 47+1072; Chase v. Whitten, 51–485, 53+767; Hebert v. Turgeon, 84–34, 86+757.

[26] Fowler v. Woodward, 26–347, 4+231.

[27] Ross v. Worthington, 11–438(323).

[28] Goenen v. Schroeder, 18–66(51).

the mortgage debt has the effect of suspending, for the time, the exercise of the right of foreclosure by advertisement, but its non-existence does not create such right.[29]

WHO MAY EXERCISE POWER

6320. Only the record owner—Only the legal and record owner of the mortgage and power can give the notice and foreclose by advertisement.[30] It is the design of the statute authorizing this method of foreclosure that there shall be of record a legal mortgage and that the record shall be so complete as to show the right of the mortgagee or his assigns to invoke its aid.[31] It is obviously a matter of importance, not only to the parties to the mortgage and their assigns, but also to subsequent incumbrancers, creditors, and contemplating purchasers, that there should be some permanent and accessible record of the mortgage and of the title thereto. This, the statute is designed to afford.[32] The debt and consequently the real ownership of the mortgage may be in one person, while what may be termed the "legal title" of the mortgage is in another. In such a case the power of sale must be exercised in the name of the party who has the legal title to the instrument.[33] The power of sale cannot be severed from the legal ownership of the mortgage. It is indivisible, and no matter how many owners of the mortgage there may be, there is but one power. If there are two or more legal owners, whether as original mortgagees or as assignees, or both, the power is in them jointly and all must join in the foreclosure proceedings.[34] If the record owner loses his interest in the mortgage during the course of the publication of the notice, he cannot complete the foreclosure.[35] Whether, the publication being regular, a change in the record ownership of the mortgage between the last publication and the day of sale, will affect the regularity of the sale, is an open question.[36] A mortgagee who has sold, assigned, and conveyed "all his right, title, and interest in and to" the mortgage guaranteeing the notes secured thereby, cannot foreclose without the consent of the assignee, though the assignment is not recorded.[37]

6321. Sufficiency of the record—If an assignment has not been properly acknowledged so as to entitle it to record a foreclosure by the assignee is void.[38] A mortgage with only one witness will not authorize a foreclosure, though recorded.[39] A mortgage with but one witness, which has been legalized by a curative act, but the registration of which has not been legalized, cannot be foreclosed by advertisement. Otherwise, when the registration has been legalized.[40] A mortgage on lands in two counties, but recorded in only one, may be

[29] Jones v. Ewing, 22–157.

[30] Bolles v. Carli, 12–113(62); Brown v. Delaney, 22–349; Felton v. Bissel, 25–15; Dick v. Moon, 26–309, 4+39; Bottineau v. Aetna L. Ins. Co., 31–125, 16+849; Solberg v. Wright, 33–224, 22+381; Benson v. Markoe, 41–112, 42+787; Lowry v. Mayo, 41–388, 43+78; Carpenter v. Artisans' S. Bank, 44–521, 47+150; Backus v. Burke, 48–260, 51+284; Burke v. Backus, 51–174, 53+458; Dunning v. McDonald, 54–1, 55+864; Hathorn v. Butler, 73–15, 75+743; Merrick v. Putnam, 73–240, 75+1047; Clark v. Mitchell, 81–438, 84+327; Northern C. Co. v. Munro, 83–37, 85+919; Simonton v. Conn. etc. Co., 90–24, 95+451.

[31] Benson v. Markoe, 41–112, 42+787; Backus v. Burke, 48–260, 51+284.

[32] Morrison v. Mendenhall, 18–232(212); Thorwarth v. Armstrong, 20–464(419); Thorp v. Merrill, 21–336; Backus v. Burke, 48–260, 51+284.

[33] Brown v. Delaney, 22–349; Bottineau v. Aetna L. Ins. Co., 31–125, 16+849; Solberg v. Wright, 33–224, 22+381; Burke v. Backus, 51–174, 53+458; Northern C. Co. v. Munro, 83–37, 85+919.

[34] Dunning v. McDonald, 54–1, 55+864.

[35] Dunning v. McDonald, 54–1, 55+864; Merrick v. Putnam, 73–240, 75+1047.

[36] Dunning v. McDonald, 54–1, 55+864. See Baldwin v. Allison, 4–25(11).

[37] Cutler v. Clementson, 67 Fed. 409.

[38] Lowry v. Mayo, 41–388, 43+78.

[39] Johnson v. Sandhoff, 30–197, 14+889.

[40] Ross v. Worthington, 11–438(323).

foreclosed as to the lands in the county where it is recorded.[41] A false and impossible particular added to the description of the premises, by mistake of the register, will not prevent a valid foreclosure.[42] But a false and misleading description will invalidate a foreclosure.[43] Where an assignment was indorsed on a mortgage, describing it as, "the within described mortgage," and was afterwards recorded on a subsequent page of the same book as the mortgage, it was held a sufficient record to authorize a foreclosure.[44] A mortgage covered lands situated in part in the county of M and in part in the county of R. The mortgage was duly recorded in full in R, but in recording it in M the description of the land situated in R was omitted from the record. It was held that while the record in M was good as to the land therein situated, yet it was not sufficient to draw to it the right to proceed under a power to advertise and sell in M the lands situated in R. In order to foreclose in one county premises situated in two counties the mortgage must be recorded in both.[45] All assignments must be recorded.[46]

6322. Stranger to mortgagee—Only the mortgagee, his agent, attorney, executor, administrator, or assignee, can exercise the power of sale.[47] The attempt of a stranger to the mortgagee to foreclose is a nullity.[48]

6323. Executor or administrator—A domestic executor or administrator may foreclose a mortgage without recording his appointment.[49] It is provided by statute that a foreign executor or administrator may foreclose a mortgage in this state, upon recording with the register of deeds an authenticated copy of his appointment.[50] This statute is a regulation and not a grant of power.[51] An assignee of a foreign executor may foreclose without recording the appointment of his assignor.[52] An administrator has been held authorized to foreclose a mortgage which he himself held against the mortgagor of whose estate he was administrator.[53]

6324. Equitable owner—Foreclosure proceedings by advertisement are based wholly upon record ownership and mere equitable interests cannot be recognized or given effect therein.[54] There is no such a thing as a foreclosure by advertisement of an equitable mortgage.[55] The fact that others have equitable interests in a mortgage does not affect the right of the legal owner thereof to foreclose by advertisement, but a court of equity will control the exercise of the right and the disposition of the proceeds of sale so as to protect equitable interests.[56] While an equitable owner cannot foreclose in his own name, he may foreclose in the name of the record owner, and if the record owner allows such use of his name, he is bound by the foreclosure.[57] Where the record owner holds

[41] Balme v. Wambaugh, 16–116(106); Van Meter v. Knight, 32–205, 20+142.
[42] Thorwarth v. Armstrong, 20–464(419).
[43] Thorp v. Merrill, 21–336.
[44] Carli v. Taylor, 15–171(131). See Russell v. Akeley, 45–376, 48+3.
[45] Van Meter v. Knight, 32–205, 20+142.
[46] Hathorn v. Butler, 73–15, 75+743.
[47] Simonton v. Conn. etc. Co., 90–24, 95+451.
[48] Bausman v. Kelley, 38–197, 36+333.
[49] Baldwin v. Allison, 4–25(11); Holcombe v. Richards, 38–38, 35+714.
[50] R. L. 1905 § 3711.
[51] Holcombe v. Richards, 38–38, 35+714; Cone v. Nimocks, 78–249, 80+1056.
[52] Cone v. Nimocks, 78–249, 80+1056.
[53] Fleming v. McCutcheon, 85–152, 88+433.
[54] Benson v. Markoe, 41–112, 42+787; Backus v. Burke, 48–260, 51+284; Burke v. Backus, 51–174, 53+458; Dunning v. McDonald, 54–1, 55+864; Clark v. Mitchell, 81–438, 84+327.
[55] Benson v. Markoe, 41–112, 42+787.
[56] Brown v. Delaney, 22–349; Dick v. Moon, 26–309, 4+39; Bottineau v. Aetna Life Ins. Co., 31–125, 16+849; Solberg v. Wright, 33–224, 22+381; Burke v. Backus, 51–174, 178, 53+458; Clark v. Mitchell, 81–438, 84+327; Northern C. Co. v. Munro, 83–37, 85+919. See Wilson v. Eigenbrodt, 30–4, 13+907; Carpenter v. Artisans' S. Bank, 44–521, 47+150; State Finance Co. v. Com. etc. Co., 69–219, 72+68.
[57] Bausman v. Faue, 45–412, 48+13. See Carpenter v. Artisans' S. Bank, 44–521, 47+150 (a chattel mortgage).

a mortgage in trust for others, they may compel him, through a court of equity, to foreclose and account for the proceeds.[58]

6325. Assignee of mortgage—The power of sale cannot be severed from the legal ownership of the mortgage, and passes to the assignee of the mortgage without special mention.[59] An assignee, however, cannot exercise the power unless all assignments are recorded.[60] But assignments by operation of law need not be recorded. Thus an executor or administrator may foreclose a mortgage without recording his appointment.[61] Where an assignment is made by an agent his authority need not be recorded.[62] If the assignment of a mortgage by the mortgagee has been executed and recorded, the only way in which he can recover authority to exercise the power of sale in his own name is to procure a written re-assignment of the mortgage, and place it on record.[63] Where a mortgagee bid in the property at a void sale under the power, and then conveyed the property to A, who conveyed portions of it to others, and afterwards the mortgagee assigned the mortgage to A, it was held that these conveyances furnished no reason for the mortgagor objecting to A foreclosing under the power.[64] An instrument purporting to be an assignment of a mortgage, in which no assignee is named, but a blank space left for his name, is, until the blank is legally filled, a nullity. If, however, the name of the assignee is afterwards inserted in the instrument by the authority of the mortgagee, express or implied from circumstances, and then recorded, it is a valid assignment, and the assignee may foreclose the mortgage by advertisement.[65]

NOTICE OF SALE

6326. By whom signed—Names of the parties—The notice must be the act of the person in whom the power to foreclose is vested and it must show that it is. The name of each assignee must be given.[66] It must appear to be given by competent authority.[67] It must be signed by all the record owners of the mortgage.[68] It must disclose the true state of the record.[69] A notice which, upon its face, is declared to be the act of a designated person, and which, as such, would be void, cannot be made effectual by proof that it was really the act of another and undisclosed person, not even standing in a relation of privity with the person in whose name the notice was given. A notice by a mere stranger can effect nothing.[70] The notice must be signed by the legal, record owner of the mortgage.[71] A notice signed by a mere equitable owner is void.[72] A notice signed by an attorney of the legal owner of the mortgage is sufficient.[73] A notice in the name of a deceased person is void.[74] A notice describing a mort-

[58] Bottineau v. Aetna Life Ins. Co., 31–125, 16+849; Bausman v. Faue, 45–412, 48+13.

[59] Dunning v. McDonald, 54–1, 55+864; Brown v. Delaney, 22–349.

[60] Bolles v. Carli, 12–113(62); Morrison v. Mendenhall, 18–232(212); Lowry v. Mayo, 41–388, 43+78; Burke v. Backus, 51–174, 53+458; Dunning v. McDonald, 54–1, 55+864; Hathorn v. Butler, 73–15, 75+743; Merrick v. Putnam, 73–240, 75+1047; Peaslee v. Ridgway, 82–288, 84+1024; Casserly v. Morrow, 101–16, 111+654.

[61] Baldwin v. Allison, 4–25(11); Holcombe v. Richards, 38–38, 35+714. See, as to what constitutes an assignment by operation of law, Burke v. Backus, 51–174, 53+458.

[62] Morrison v. Mendenhall, 18–232(212).

[63] Burke v. Backus, 51–174, 53+458.

[64] Bottineau v. Aetna Life Ins. Co., 31–125, 16+849.

[65] Casserly v. Morrow, 101–16, 111+654.

[66] Hathorn v. Butler, 73–15, 75+743.

[67] Bausman v. Kelley, 38–197, 36+333; Backus v. Burke, 48–260, 51+284; Dunning v. McDonald, 54–1, 55+864; Hathorn v. Butler, 73–15, 75+743.

[68] Dunning v. McDonald, 54–1, 55+864.

[69] Backus v. Burke, 48–260, 51+284.

[70] Bausman v. Kelley, 38–197, 36+333.

[71] See cases under § 6320.

[72] See cases under § 6324.

[73] Martin v. Baldwin, 30–537, 16+449.

[74] Bausman v. Kelley, 38–197, 36+333; Welsh v. Cooley, 44–446, 46+908; Bausman

gage as having been executed to "Isaac Crowe, agent of Abraham Becker" and signed "Isaac Crowe, agent for Abraham Becker. Abraham Becker, mortgagee in fact," has been held sufficient.[75] A mortgage was executed to a partnership consisting of Farnham & Lovejoy. The notice of sale, describing the mortgage as given to Farnham & Lovejoy, contained, in parenthesis, the full names of such partners immediately after the firm name and was subscribed "Farnham & Lovejoy, mortgagees." This was held sufficient.[76] A mistake in using "mortgagee" for "mortgagor" has been held fatal.[77] A notice signed "Silas H. Baldwin, administrator of the estate of Rachel A. Baldwin, the said mortgagee, deceased," has been held sufficient. It is unnecessary to state the death or appointment as administrator.[78]

6327. Date of the mortgage and notice—The notice must state the date of the mortgage.[79] The notice itself need not be dated. If it is dated the amount claimed must correspond with such date, but when it is not dated the time of its first publication is its date.[80]

6328. When and where mortgage recorded—The notice must state the date upon which the mortgage was recorded,[81] and the page of the record where it was recorded.[82] It need not refer to the recording of assignments.[83]

6329. Amount claimed to be due—The object of requiring the amount claimed to be due to be stated in the notice is to inform interested parties how much is claimed against their property, so that they may act accordingly. It is not enough that the notice refers to the record from which such information might be ascertained. The notice itself must give the information.[84] It is the amount claimed to be due at the date of the notice, and not the total amount secured by the mortgage and not then due, which must be stated.[85] When the notice is dated, the amount claimed must correspond with such date; when it is not dated, the date of the first publication controls.[86] When a foreclosure is made for an instalment due, it is unnecessary to state that it is for an instalment.[87] Where the mortgagee may elect to declare the whole amount due upon default in payment of an instalment, it is unnecessary to state that he so elects.[88] If a mortgage covers several tracts and is made a specific and separate lien on each tract for a specified amount, the notice must specify the amount claimed to be due on each separately.[89] When the amount claimed to be due is within the literal terms of the contract, the notice is sufficient though less is legally due, at least, in the absence of a showing of fraud or prejudice.[90] Claiming more than is legally due or stipulated in the mortgage does not affect the validity of the sale, in the absence of a showing of fraud or prejudice.[91]

v. Faue, 45–412, 48+13; Bausman v. Eads, 46–148, 48+769.

[75] Menard v. Crowe, 20–448(402).

[76] Menage v. Burke, 43–211, 45+155.

[77] See Clifford v. Tomlinson, 62–195, 64+381.

[78] Baldwin v. Allison, 4–25(11).

[79] Clifford v. Tomlinson, 62–195, 64+381.

[80] Ramsey v. Merriam, 6–168(104). See Coles v. Yorks, 28–464, 10+775.

[81] Martin v. Baldwin, 30–537, 16+449.

[82] Peaslee v. Ridgway, 82–288, 84+1024.

[83] Carli v. Taylor, 15–171(131). But see cases under § 6321.

[84] Mason v. Goodnow, 41–9, 42+482; Hamel v. Corbin, 69–223, 72+106.

[85] Gorham v. Nat. Life Ins. Co., 62–327, 64+906; Trafton v. Cornell, 62–442, 64+1148. See Bowers v. Hechtman, 45–238, 47+792.

[86] Ramsey v. Merriam, 6–168(104).

[87] Trafton v. Cornell, 62–442, 64+1148.

[88] Trafton v. Cornell, 62–442, 64+1148; Fowler v. Woodward, 26–347, 4+231.

[89] Mason v. Goodnow, 41–9, 42+482; Bitzer v. Campbell, 47–221, 49+691; Child v. Morgan, 51–116, 52+1127. See Hull v. King, 38–349, 37+792; Vawter v. Crafts, 41–14, 42+483; Barge v. Klausman, 42–281, 44+69; Saxe v. Rice, 64–190, 66+268; Farnsworth v. Com. etc. Co., 87–179, 91+469.

[90] Menard v. Crowe, 20–448(402).

[91] Spencer v. Annan, 4–542(426); Ramsey v. Merriam, 6–168(104); Bennett v. Healey, 6–240(158); Butterfield v. Farnham, 19–85(58); Menard v. Crowe, 20–

If the mortgage is given to secure several notes which pass into different hands the party owning the mortgage and foreclosing should claim the amount due on all the notes.[92]

6330. Taxes paid—The notice should state the amount claimed for taxes paid prior to the notice.[93] As to taxes paid subsequent to the date of the notice and prior to the sale it is sufficient if the notice states that the premises will be sold to pay the debt "and the taxes, if any, on said premises."[94] Where there is a blanket mortgage constituting a specific lien on several tracts the notice should specify taxes paid on each tract separately.[95] The notice need not specify the years for which the taxes were paid.[96]

6331. Description of premises—A description of the premises in the notice, conforming substantially to the description in the mortgage, is sufficient.[97]

6332. Time of sale—The notice must state the time of sale,[98] and good practice requires that it should state the hour of sale, though that is not imperative.[99] The omission of the letters "a. m." after the hour in a notice has been held immaterial.[1]

6333. Place of sale—The following have been held a sufficient designation of the place of sale: "in front of the office of the register of deeds, in the county of Fillmore," the county being referred to in the notice as in the state of Minnesota;[2] "at the courthouse in the city of St. Paul;"[3] "at the front door of the courthouse in the city of St. Paul;"[4] "at the front door of the courthouse in the city of Minneapolis, corner of 2nd Ave. S and 3d. St.," the sale being had in a building at such corner used temporarily as a courthouse.[5] A notice designating a place which does not exist is void. Calling a city a village is not fatal.[6]

6334. No action or proceeding—It is probably unnecessary to state in the notice that no action or proceeding has been instituted to recover the mortgage debt.[7]

6335. Manner of sale—It is sufficient to state that the mortgage will be foreclosed by a sale of the premises pursuant to the statute. It is unnecessary to state in what order the sale will be conducted or that it will be in particular parcels.[8]

6336. Alteration—A material alteration of the notice during the course of publication is fatal.[9]

6337. Service of notice—*a. Publication*—Where a mortgage covers several separate tracts lying in different counties it is unnecessary to publish the notice in more than one of them.[10] A publication may be discontinued and a new publication substituted, provided no one is misled.[11] The day set for sale in the notice may be a considerable time beyond the last day of publication.[12]

92 Dick v. Moon, 26-309, 4+39. See State Finance Co. v. Com. etc. Co., 69-219, 72+68.

93 Hamel v. Corbin, 69-223, 72+106.

94 Kirkpatrick v. Lewis, 46-164, 47+970. See Gorham v. Nat. Life Ins. Co., 62-327, 64+906; Wyatt v. Quinby, 65-537, 68+109.

95 Bitzer v. Campbell, 47-221, 49+691.

96 Jones v. Cooper, 8-334(294).

97 Schoch v. Birdsall, 48-441, 51+382; Johnson v. Cocks, 37-530, 35+436; Baumann v. Granite etc. Co., 66-227, 68+1074.

98 Richards v. Finnegan, 45-208, 47+788.

99 Menard v. Crowe, 20-448(402); Thorwarth v. Armstrong, 20-464(419).

1 Slater v. Taylor, 109-492, 124+3.

2 Merrill v. Nelson, 18-366(335).

3 Golcher v. Brisbin, 20-453(407).

4 Thorwarth v. Armstrong, 20-464(419).

5 Johnson v. Cocks, 37-530, 35+436.

6 Bottineau v. Aetna Life Ins. Co., 31-125, 16+849.

7 See Jones v. Ewing, 22-157.

8 Abbott v. Peck, 35-499, 29+194.

9 Dana v. Farrington, 4-433(335).

10 Paulle v. Wallis, 58-192, 59+999.

11 Dana v. Farrington, 4-433(335); Banning v. Armstrong, 7-46(31).

12 Goenen v. Schroeder, 18-66(51); Atkinson v. Duffy, 16-45(30).

or it may be on that day. In computing the time of publication the statutory rule of excluding the first day and including the last applies.[13] It is no objection that the notice is published for more than six successive weeks.[14] Publication must not begin before a default in the conditions of the mortgage, for the power does not become operative until then. A newspaper is published when it issues from the hands of the publisher. A publication in only one-sixth of the whole number of copies of an edition is insufficient. A notice not published for the prescribed time is not cured by a postponement of the sale.[15] A religious newspaper, publishing general as well as religious news, is a newspaper within the meaning of G. S. 1878 c. 81 § 5.[16] A failure to publish in a newspaper in the proper county renders the sale void.[17] An affidavit of publication may properly be made by the publisher of the newspaper, as he is presumptively its printer.[18]

b. On occupant—Service of notice on the occupant is required, not solely for his benefit, but as a means of communicating notice through him to all who may be interested in the land. Consequently any person deriving title or interest through the mortgagor may attack a sale for want of such service, and the occupant cannot waive the service so as to affect interested parties.[19] To require notice to be served upon a party, his occupancy must be open and visible, but it is unnecessary that he should be living on the land.[20] Service may be made by leaving a copy of the notice at the house of usual abode of the occupant, with some person of suitable age and discretion then resident therein,[21] and it is unnecessary that such person should be a member of the family or household of the occupant.[22] It is immaterial that the person making the substituted service thought at the time that the person to whom he delivered it was the one in actual occupancy. It is unnecessary that the notice should be addressed to any one or that the person with whom it is left should be advised as to the party for whom it is intended.[23] A girl fourteen years old is presumptively a person of suitable age and discretion. It is unnecessary that the person should be familiar with business transactions and legal proceedings.[24] If the mortgagor is in the actual occupation of part of the land and a tenant of his of the rest, notice on the mortgagor alone is sufficient, at least so far as he is concerned.[25] Where husband and wife are residing upon land owned by him, he is the proper person on whom to serve the notice.[26] Where the mortgaged premises consist of two separate farms, each of which is occupied by a different party, a notice of foreclosure by advertisement must be served on each.[27] The mortgagee himself may serve the notice.[28] An occupant must be served though he is insane.[29] Failure to make the required service renders the sale void.[30] Pub. St. (1849–1858), c. 63 § 33, requiring the service of

[13] Worley v. Naylor, 6–192(123).
[14] Atkinson v. Duffy, 16–45(40).
[15] Pratt v. Tinkcom, 21–142.
[16] Hull v. King, 38–349, 37+792.
[17] Lowell v. North, 4–32(15).
[18] Menard v. Crowe, 20–448(402); Kipp v. Cook, 46–535, 49+257.
[19] Casey v. McIntyre, 45–526, 48+402; Swain v. Lynd, 74–72, 76+958; Casserly v. Morrow, 101–16, 111+654.
[20] Cutting v. Patterson, 82–375, 85+172. See Thompson v. Berlin, 87–7, 91+25; Moulton v. Sidle, 52 Fed. 616.
[21] Groff v. Nat. Bank of Com., 50–348, 52+934; Temple v. Norris, 53–286, 55+133; Brigham v. Conn. etc. Co., 74–33, 76+952; Id., 79–350, 82+668.
[22] Brigham v. Conn. etc. Co., 74–33, 76+952; Id., 79–350, 82+668.
[23] Groff v. Nat. Bank of Com., 50–348, 52+934.
[24] Temple v. Norris, 53–286, 55+133.
[25] Holmes v. Crummett, 30–23, 13+924.
[26] Coles v. Yorks, 28–464, 10+775.
[27] Casserly v. Morrow, 101–16, 111+654.
[28] Kirkpatrick v. Lewis, 46–164, 47+970, 48+783.
[29] Lundberg v. Davidson, 72–49, 74+1018.
[30] Heath v. Hall, 7–315(243); Morey v. Duluth, 69–5, 71+694; Hebert v. Turgeon, 84–34, 86+757 and cases supra.

notice on the occupant, was not in conflict with Pub. St. (1849–1858), c. 75.[31]

c. None on mortgagor—No provision is now made for service of notice on the mortgagor as such.[32] It was formerly otherwise.[33]

SALE

6338. Not judicial—A foreclosure sale under a power is not a judicial sale, but one in pais.[34]

6339. By whom conducted—The sheriff of a county attached to another for "judicial purposes" is the proper officer to conduct a foreclosure in his county.[35] A deputy sheriff may conduct a sale either in his own name, or in the name of his principal.[36] Prior to 1866 either the sheriff or the person named in the mortgage for that purpose might conduct the sale, and the person so named was frequently the mortgagee.[37]

6340. Duties of sheriff ministerial—The duties of the sheriff in connection with the sale are purely ministerial.[38]

6341. Presumptively regular—The sheriff is presumed to have discharged his duty in connection with the sale.[39]

6342. At whose instance—A valid sale can only be had at the instance of the mortgagee, his agent, attorney, executor, administrator, or assignee. The sheriff is not authorized to sell on his own motion, or at the instance of the mortgagor. He cannot act until requested by the mortgagee, or his privy. The mere fact that the mortgagee publishes and serves a notice of foreclosure is not such a request or direction.[40]

6343. Must be at time advertised—A sale cannot be legally made before the hour named in the notice, and ordinarily it cannot be made after the expiration of the hour, unless actually commenced within the hour. Whether a sale commenced within the hour, and held open until after the hour, is invalid, depends on the facts of the particular case.[41] Where the notice stated that the sale would take place at eleven o'clock, a sale at fifteen minutes before eleven was held void.[42]

6344. In inverse order of alienation—Purchasers of portions of mortgaged premises, if they did not take cum onere, are entitled in equity to have them applied to the satisfaction of the mortgage in the inverse order of alienation.[43] If the mortgagee respects this rule in foreclosure by advertisement and sells only the remaining land, the mortgagor and his vendees cannot complain.[44]

6345. Interest sold—That a mortgagee threatens to make an absolute sale without a right of redemption is not a ground for an injunction.[45]

6346. Resale—If the first sale is abortive a second sale may be had under the same power.[46]

6347 For inadequate price—A sale for a grossly inadequate price, coupled with irregularity or fraud, may be set aside.[47] But where there is no ir-

[31] Heath v. Hall, 7–315(243).
[32] Cutting v. Patterson, 82–375, 85+172. Neither is any provision made for personal service on subsequent incumbrancers. Bennett v. Healey, 6–240(158).
[33] Id.; Jones v. Tainter, 15–512(423); Atkinson v. Duffy, 16–45(30).
[34] Merrill v. Nelson, 18–366(335); Willard v. Finnegan, 42–476, 44+985.
[35] Berthold v. Holman, 12–335(221).
[36] Burke v. Lacock, 41–250, 42+1016; Clark v. Mitchell, 81–438, 84+327.
[37] Simonton v. Conn. etc. Co., 90–24, 95+451.
[38] Paquin v. Braley, 10–379(304).
[39] Merrill v. Nelson, 18–366(335).
[40] Simonton v. Conn. etc. Co., 90–24, 95+451.
[41] Id.
[42] Richards v. Finnegan, 45–208, 47+788.
[43] See § 6466.
[44] Clark v. Kraker, 51–444, 53+706.
[45] Armstrong v. Sanford, 7–49(34).
[46] Bottineau v. Aetna etc. Co., 31–125, 16+849.
[47] Lalor v. McCarthy, 24–417. See Lundberg v. Davidson, 68–328, 71+395, 72+71.

regularity in the sale, or fraud on the part of the mortgagee, and especially where there is a right of redemption from the sale, mere inadequacy of price is not of itself ground for setting aside a sale.[48]

6348. Notice of postponement of sale—It is unnecessary to wait until the day originally set for the sale to make a postponement.[49] A notice not published for the prescribed time is not cured by a postponement of the sale.[50] The mortgagee cannot charge the expense of a postponement, made at his instance, to the mortgagor.[51] The date of the sale cannot be changed during the course of publication by a mere alteration of the notice; the remedy is either a discontinuance, or a postponement under the statute.[52] A publication of a notice of postponement, which is not in itself a sufficient notice of sale, unaccompanied by the original notice of sale, is insufficient.[53]

6349. Separate tracts must be sold separately—Separate tracts may be sold as a whole, if they constitute one farm.[54] If the premises consist of one tract the whole may be sold though less than the whole would satisfy the debt, but equity may restrict the sale when justice requires it.[55] A sale or division of the premises by the mortgagor subsequent to the mortgage does not defeat the legal right of the mortgagee to sell them as a whole, but a court of equity, upon timely application, may require a sale in parcels, if justice requires it.[56] The mortgagee is not bound, at his peril, to ascertain whether any of the mortgaged lands have been alienated or subsequently incumbered. In order to impose upon him the duty to regard equities arising subsequent to the mortgage, he must have knowledge of the facts, or notice sufficient to put him upon inquiry.[57] A sale of separate tracts in one parcel is not void, but merely voidable on a showing of fraud or prejudice,[58] and this rule is not affected by the fact that part of the tracts constitute a homestead.[59] Where a single instrument constitutes, in effect, several separate mortgages on several separate lots, to secure several separate sums of money, a sale of all the lots together as one tract, for a gross sum, is void.[60] Government subdivisions are not decisive in determining whether premises consist of one tract.[61] The fact that tracts are described separately in the mortgage is not decisive as to whether they should be sold as a whole or separately.[62] A sale of land as one tract and for a gross sum is not void simply because it includes a tract not covered by the mortgage.[63] If the certificate does not show that separate tracts were not one farm the sale will be presumed regular.[64]

6350. Who may purchase—By statute the mortgagee, his assignees, or his or their legal representatives, may purchase at the sale.[65] In the absence of statutory authority the mortgagee is regarded as a trustee for sale, who cannot, except by express authority of his cestui que trust, purchase the mortgaged

[48] Johnson v. Cocks, 37–530, 35+436.
[49] Bennett v. Brundage, 8–432(385).
[50] Pratt v. Tinkcom, 21–142.
[51] Hobe v. Swift, 58–84, 59+831.
[52] Dana v. Farrington, 4–433(335).
[53] Sanborn v. Petter, 35–449, 29+64.
[54] Merrill v. Nelson, 18–366(335).
[55] Johnson v. Williams, 4–260(183).
[56] Johnson v. Williams, 4–260(183); Paquin v. Braley, 10–379(304); Abbott v. Peck, 35–499, 29+194; Willard v. Finnegan, 42–476, 44+985; Clark v. Kraker, 51–444, 53+706; Bay View L. Co. v. Myers, 62–265, 64+816.
[57] Abbott v. Peck, 35–499, 29+194.
[58] Willard v. Finnegan, 42–476, 44+985; Ryder v. Hulett, 44–353, 46+559; Clark v. Kraker, 51–444, 53+706; Phelps v. Western R. Co., 89–319, 94+1085; Id., 89–319, 94+1135. See Webb v. Downes, 93–457, 101+966.
[59] Phelps v. Western R. Co., 89–319, 94+1085; Id., 89–319, 94+1135.
[60] Hull v. King, 38–349, 37+792.
[61] Worley v. Naylor, 6–192(123). See Farnham v. Jones, 32–7, 19+83.
[62] Worley v. Naylor, 6–192(123); Merrill v. Nelson, 18–366(335); Lalor v. McCarthy, 24–417.
[63] Bottineau v. Aetna etc. Co., 31–125, 16+849; Lowry v. Tilleny, 31–500, 18+452.
[64] Merrill v. Nelson, 18–366(335).
[65] R. L. 1905 § 4467.

property.[66] Under Pub. St. (1849–1858), c. 75 § 9, it was held that the mortgagee could not purchase unless the sale was conducted by the sheriff or his duputy.[67] Executors may purchase,[68] but a sale cannot be made to the estate of a deceased person.[69] The mere fact that the mortgagee is the administrator of the estate of the mortgagor does not prevent him from purchasing.[70] The mortgagee must purchase "fairly and in good faith." [71] A mortgagee who purchases stands in the same position as any other purchaser.[72] When a trustee purchases the trust property in his own name, the purchase is not void, but voidable at the election of the cestui que trust. The mortgagor cannot object.[73]

6351. Disposal of proceeds of sale by sheriff—Surplus—A junior mortgagee is entitled, in preference to the mortgagor, to receive the surplus, or at least sufficient to satisfy his mortgage,[74] and this is so though his claim is not yet due.[75] The surplus belongs to the same persons and is subject to the same liens as the land at the time of the sale. A mortgagor has been held entitled to the surplus as against a judgment docketed against him subsequent to the sale.[76] The defendant was the owner of a mortgage, which was a first lien on the mortgaged premises, and the plaintiff of a judgment, which was a second lien thereon. The defendant foreclosed his mortgage and purchased the premises at the sale for an amount which, after paying the mortgage and expenses of foreclosure, left a surplus in his hands. Afterwards the plaintiff issued execution on his judgment and purchased the premises at the execution sale for the full amount of his judgment and costs, and the execution was returned satisfied in full. He never redeemed from the foreclosure sale. It was held that he was not entitled to recover the surplus from the defendant.[77] Taxes paid subsequent to the sale cannot be deducted as against the mortgagor.[78] It is the duty of the sheriff, if he has no notice of the equities of third parties, to turn the proceeds of the sale over to the mortgagee to the extent of satisfying the whole mortgage.[79] The right to recover a surplus is a thing in action, independent of the equity of redemption.[80] The statute is intended for the benefit of the mortgagor and the mortgagee, and a failure to apply the proceeds as directed thereby does not invalidate the foreclosure. It has been held not to operate so as to cancel a first note, where the amount received at the sale was insufficient to pay the entire debt.[81] A surplus on a foreclosure for an instalment has been held applicable to instalments not yet due.[82] If there are no subsequent liens the mortgagor is entitled to the surplus. It is the duty of the mortgagee to pay over any surplus to the persons entitled to the same and if he fails to do so he is chargeable with interest.[83]

[66] Wilson v. Bell, 17–61(40); Baldwin v. Allison, 4–25(11); Lowell v. North, 4–32(15).

[67] Ramsey v. Merriam, 6–168(104); Allen v. Chatfield, 8–435(386).

[68] Wilson v. Bell, 17–61(40); Baldwin v. Allison, 4–25(11).

[69] Kenaston v. Lorig, 81–454, 84+323.

[70] Fleming v. McCutcheon, 85–152, 88+433.

[71] Lalor v. McCarthy, 24–417.

[72] Tinkcom v. Lewis, 21–132.

[73] Baldwin v. Allison, 4–25(11). See Shadewald v. White, 74–208, 77+42; Mareck v. Mpls. T. Co., 74–538, 77+428; Fleming v. McCutcheon, 85–152, 88+433.

[74] Brown v. Crookston Agr. Assn., 34–545, 26+907; Fuller v. Langum, 37–74, 33+122. See Ness v. Davidson, 49–469, 52+46; Gray v. Blabon, 74–344, 77+234; Ayer v. Stewart, 14–97(68).

[75] Fagan v. People's etc. Assn., 55–437, 57+142.

[76] Perkins v. Stewart, 75–21, 77+434. See Gorman v. Lamb, 89–136, 94+435.

[77] McCaffery v. Burkhardt, 104–340, 116+645.

[78] Wyatt v. Quinby, 65–537, 68+109; Hamel v. Corbin, 69–223, 72+106.

[79] Northern C. Co. v. Munro, 83–37, 85+919.

[80] Perkins v. Stewart, 75–21, 77+434.

[81] Endreson v. Larson, 101–417, 112+628.

[82] Fowler v. Johnson, 26–338, 3+986; Taylor v. Burgess, 26–547, 6+350.

[83] Perkins v. Stewart, 75–21, 77+434. Taylor v. Burgess, 26–547, 6+350.

6352. Affidavits to perpetuate evidence of sale—The affidavits authorized by statute are prima facie evidence of the facts stated therein, at least, of the facts authorized to be stated.[84] They are not evidence of the mortgage and power.[85] They are not essential to the validity of the sale.[86] An affidavit of publication should state all the statutory requirements of publication.[87] The affidavit of a publisher of a newspaper is sufficient.[88] If defective affidavits are filed correct ones may be subsequently filed.[89] Pub. St. (1849–1858), c. 84 § 61, requiring an affidavit of publication to state that the notice attached was "taken from the newspaper" in which it is alleged to have been published, has been held inapplicable.[90]

6353. Affidavit of costs and disbursements—The statute requiring a party foreclosing to file an affidavit of costs and disbursements is constitutional,[91] and mandatory.[92] Failure to file the affidavit does not invalidate the sale.[93] The ten days within which the affidavit may be filed begin to run, not from the day of the sale, but from the time the sale is completed by the execution and recording of the certificate of sale.[94] Hence a party has thirty days from the sale in which to file the affidavit.[95] A party cannot extend the time by failing to procure and record his certificate of sale within twenty days after the sale.[96] Whether the affidavit is evidence of the facts required to be stated therein is an open question. It is not evidence of facts not required to be stated.[97] An action will lie for failure to file the affidavit.[98] Failure to file affidavits was cured by Laws 1895 c. 308.[99]

6354. Formal defects disregarded—Mere irregularities in the sale do not affect its validity unless the statute so prescribes, or, unless they may operate to prejudice some interested party.[1]

6355. Waiver of irregularities by mortgagor—The mortgagor does not waive compliance with an essential requirement of foreclosure by failing to object at or before the sale. It is for the party foreclosing to see to it, at his peril, that he has authority to foreclose and that every essential statutory requirement is complied with.[2] But the mortgagor may be estopped to assert the invalidity of the foreclosure as against a bona fide purchaser.[3] The mortgagor may waive mere irregularity in a sale by failing to enjoin it,[4] or by neglecting to raise objection promptly after the sale. Thus, objection that several tracts are improperly sold in gross must be taken promptly or it is waived.[5] If the mortgagor allows a purchaser at a defective sale to go into possession and re-

[84] Griswold v. Taylor, 8-342(301); Golcher v. Brisbin, 20-453(407); Sanborn v. Petter, 35-449, 29+64.

[85] See Anderson v. Schultz, 37-76, 33+440.

[86] Golcher v. Brisbin, 20-453(407); Burke v. Lacock, 41-250, 42+1016.

[87] Sanborn v. Petter, 35-449, 29+64; Golcher v. Brisbin, 20-453(407).

[88] Menard v. Crowe, 20-448(402); Kipp v. Cook, 46-535, 49+257.

[89] Golcher v. Brisbin, 20-453(407).

[90] Goenen v. Schroeder, 18-66(51); Merrill v. Nelson, 18-366(335).

[91] Perkins v. Stewart, 75-21, 77+434.

[92] Johnson v. N. W. etc. Assn., 60-393, 62+381; Brown v. Scandia etc. Assn., 61-527, 63+1040; Larocque v. Chapel, 63-517, 65+941; Brown v. Baker, 65-133, 67+793; Itasca I. Co. v. Dean, 84-388, 87+1020.

[93] Johnson v. Cocks, 37-530, 35+436; Johnson v. N. W. etc. Assn., 60-393, 62+381; Larocque v. Chapel, 63-517, 65+941; Farnsworth v. Com. etc. Co., 84-62, 86+877.

[94] Larocque v. Chapel, 63-517, 65+941.

[95] Farnsworth v. Com. etc. Co., 84-62, 86+877.

[96] Larocque v. Chapel, 63-517, 65+941.

[97] Wyatt v. Quinby, 65-537, 68+109.

[98] See § 6489.

[99] Farnsworth v. Com. etc. Co., 84-62, 86+877.

[1] Bottineau v. Aetna etc. Co., 31-125, 16+849.

[2] Misener v. Gould, 11-166(105); Hull v. King, 38-349, 37+792; Lowry v. Mayo, 41-388, 43+78; Casey v. McIntyre, 45-526, 48+402.

[3] See § 6267.

[4] See § 6469.

[5] Abbott v. Peck, 35-499, 29+194; Hull v. King, 38-349, 37+792; Clark v. Kraker, 51-444, 53+706.

main until the redemption period expires, he waives his legal remedies and the purchaser acquires a perfect title.[6] The mortgagor may waive irregularity in a sale and tender the mortgagee a deed or release, and if he does so the mortgagee cannot repudiate the sale and sue on the mortgage note.[7]

6356. Remedies of mortgagor for void or irregular sale—The mortgagor has several remedies against a void or irregular sale. He may bring an action to set it aside,[8] or for the recovery of damages.[9] He may attack it in an action of ejectment brought against him by the purchaser;[10] or in an action to determine adverse claims;[11] or in an action against him to restrain waste during the redemption period;[12] or in unlawful detainer proceedings;[13] or in an action to remove a cloud.[14] He may remain in possession until the purchaser takes affirmative action and no statute can run against him.[15] He cannot maintain ejectment against a mortgagee in possession.[16]

6357. Curative acts—Irregularities in foreclosure sales are often remedied by curative acts.[17]

CERTIFICATE OF SALE

6358. Necessity—The execution of the certificate is an essential part of the sale. While rights and liabilities may attach at the date of the auction, yet the sale is not consummated until the proper certificate is executed, acknowledged, and recorded.[18] Nothing but a certificate can pass the title. A sale in fact without a certificate does not pass it, though it may give the purchaser a right to one. To a recorded certificate a party entitled to redeem must look to ascertain when to redeem, and how much he must pay for the purpose.[19] An action may be maintained to compel the sheriff to execute a certificate.[20]

6359. When executed—The provision that the certificate shall be executed and recorded within twenty days after the sale may be merely directory as to time, yet, as the provision for filing the affidavit of costs and disbursements is mandatory, a party cannot extend the time for filing such affidavit by failing to procure and record his certificate within twenty days after the sale.[21] A sheriff who conducts a sale is authorized by statute to execute a certificate within three months after his term of office has expired.[22] A delay of the sheriff in executing the certificate does not impair the rights of the purchaser.[23]

6360. Recording—Failure to record the certificate within twenty days does not render the sale void.[24] Recording a certificate ten months after the sale was held sufficient under Laws 1876 c. 39.[25] An unrecorded assignment of a certificate has been held subordinate to a judgment lien.[26] A certificate executed and delivered, but not recorded, does not pass the title.[27]

[6] See § 6238.
[7] Blake v. McKusick, 8-338(298); Saxe v. Rice, 64-190, 66+268.
[8] See § 6487.
[9] See § 6476.
[10] Lowry v. Mayo, 41-388, 43+78; Dana v. Farrington, 4-433(335); Armstrong v. Sanford, 7-49(34).
[11] Merchant v. Woods, 27-396, 7+826; Casey v. McIntyre, 45-526, 48+402.
[12] Jordan v. Humphrey, 31-495, 18+450.
[13] Daniels v. Smith, 4-172(117); Spencer v. Annan, 4-542(426).
[14] Bausman v. Kelley, 38-197, 36+333; Sanborn v. Eads, 38-211, 36+338.
[15] Sanborn v. Petter, 35-449, 29+64.
[16] Pace v. Chadderdon, 4-499(390).
[17] See Risch v. Jensen, 92-107, 99+628.
[18] Johnson v. Cocks, 37-530, 35+436; Laroeque v. Chapel, 63-517, 65+941; Lindgren v. Lindgren, 73-90, 75+1034.
[19] Smith v. Buse, 35-234, 28+220.
[20] Hokanson v. Gunderson, 54-499, 56+172.
[21] Laroeque v. Chapel, 63-517, 65+941. See Ryder v. Hulett, 44-353, 46+559; Crombie v. Little, 47-581, 50+823.
[22] R. L. 1905 § 4471. See Crombie v. Little, 47-581, 50+823.
[23] Hokanson v. Gunderson, 54-499, 56+172.
[24] Crombie v. Little, 47-581, 50+823. See Laroeque v. Chapel, 63-517, 65+941.
[25] Ryder v. Hulett, 44-353, 46+559.
[26] Berryhill v. Smith, 59-285, 61+144.
[27] Lindgren v. Lindgren, 73-90, 75+1034.

6361. Form and sufficiency—The certificate must describe the mortgage [28] and the property sold.[29] When a deputy sheriff conducts the sale he may execute the certificate either in his own name or in the name of his principal.[30] It is unnecessary that it should be stated in the body of the certificate that the sale was made by the sheriff as such.[31] A statement in a certificate, that "the above described premises are subject to redemption within the time and according to the statute in such case made and provided," is sufficient.[32] An instrument in the form of a deed, but containing all the essentials of a certificate, has been held sufficient, though it did not state that the land was subject to redemption.[33] A certificate issued to the "estate of A. H. deceased" conveys no title.[34] An error as to the amount of a secured note and the date of its execution, in a certificate issued under Laws 1862 c. 19 § 3, has been held not fatal.[35]

6362. As evidence of regularity and title—A certificate is prima facie evidence of regularity in the sale and of title.[36] It has no force as evidence unless it conforms substantially to the requirements of the statute.[37] It is only prima facie and not conclusive evidence of regularity and title.[38] It is not even prima facie evidence of the mortgage or power, and before it is admissible in proof of title preliminary proof is necessary that the sale was made under a power to sell "contained in a mortgage." [39] It is prima facie evidence that the notice of sale was properly published,[40] and of the amount for which the land was sold.[41] Whatever facts are necessary to make the certificate intelligible with respect to the matters which it is required to set forth are necessarily contained in it and evidence.[42] A certificate executed by a deputy sheriff in his own name has the same force as evidence as a certificate in the name of the sheriff.[43] A certificate is prima facie evidence that a postponement of a sale was duly made, if the record does not disclose the contrary.[44] It seems that a certificate has no force as evidence, even of regularity, until after the period of redemption has expired.[45] If the power of sale is exercised by one without authority the certificate is a nullity.[46] The statute giving the certificate prima facie force as evidence is constitutional.[47] It is prima facie evidence that the sale was regular as regards selling in parcels.[48]

6363. Assignment—An assignment of a certificate of sale may operate as a redemption.[49]

RIGHTS AND LIABILITIES OF PURCHASER

6364. Nature of interest during redemption period—The fee does not pass from the mortgagor to the purchaser until the expiration of the redemption

[28] Golcher v. Brisbin, 20-453(407); Cable v. Mpls. etc. Co., 47-417, 50+528.
[29] Smith v. Buse, 35-234, 28+220; Lowry v. Tilleny, 31-500, 18+452; Law v. Citizens' Bank, 85-411, 89+320. See Schoch v. Birdsall, 48-441, 51+382.
[30] Burke v. Lacock, 41-250, 42+1016; Clark v. Mitchell, 81-438, 84+327.
[31] Merrill v. Nelson, 18-366(335).
[32] Wells v. Atkinson, 24-161. See Cable v. Mpls. etc. Co., 47-417, 50+528.
[33] Crombie v. Little, 47-581, 50+823.
[34] Kenaston v. Lorig, 81-454, 84+323.
[35] Cable v. Mpls. etc. Co., 47-417, 50+528.
[36] R. L. 1905 § 4476; Mosness v. Lacy, 73-283, 76+34; Schlag v. Gooding, 98-261, 108+11.
[37] Nelson v. Central L. Co., 35-408, 29+121.
[38] Burke v. Lacock, 41-250, 42+1016; Casey v. McIntyre, 45-526, 48+402; Sanborn v. Petter, 35-449, 29+64; Richards v. Finnegan, 45-208, 47+788.
[39] Anderson v. Schultz, 37-76, 33+440.
[40] Burke v. Lacock, 41-250, 42+1016.
[41] Whitney v. Huntington, 37-197, 33+561.
[42] Goenen v. Schroeder, 18-66(51).
[43] Burke v. Lacock, 41-250, 42+1016.
[44] Mosness v. Lacy, 73-283, 76+34.
[45] Hebert v. Turgeon, 84-34, 86+757.
[46] See Bausman v. Kelley, 38-197, 36+333
[47] Burke v. Lacock, 41-250, 42+1016.
[48] Merrill v. Nelson, 18-366(335).
[49] See § 6382.

period.[50] There is no technical term to define the interest of the purchaser during the redemption period.[51] It is anomalous [52]—a purely statutory interest.[53] It is not an estate.[54] It is not an interest in realty, within the meaning of the statute authorizing actions to determine adverse claims,[55] and yet it is an interest in realty to the extent that it passes by deed,[56] and by statute it is made subject to levy as realty.[57] It is personal property [58]—a lien on real property.[59] In many respects the interest of the purchaser is the same as that of the mortgagee before sale,[60] but not in all respects.[61] He has a lien on the premises to the amount of the purchase price,[62] but he has something more than a mere right to receive back his purchase money and interest. He has a right to acquire absolute title to the land, unless it is redeemed within the time allowed by law by one who has a right under the statute to redeem; and he cannot be deprived of this right by one who is not a lawful redemptioner.[63] He is not an assignee of the mortgagee, or a creditor of the mortgagor.[64] His interest is the same as that of a purchaser at an execution sale during the period of redemption.[65]

6365. Charged with notice of title—A purchaser is bound to know the condition of the title which he purchases; and if the mortgage contains no covenants of title, and the title proves defective, he has no claim on the mortgagor to make it good. What he buys is the title which the mortgagor had at the time of the execution of the mortgage—nothing more and nothing less—and the amount of his bid is presumed to be determined with reference to that fact. When the mortgage contains covenants of title which run with the land different considerations apply.[66] He is charged with notice of what property the mortgage covers and what property may be properly sold.[67] He is charged with notice of the rights of any person other than the mortgagor in possession.[68] If the mortgage was void the purchaser acquires no title,[69] in the absence of an estoppel.[70] The mortgagee cannot make that good and effectual by a sale which was unlawful and void in its inception.[71]

[50] Daniels v. Smith, 4–172(117); Donnelly v. Simonton, 7–167(110); Horton v. Maffitt, 14–289(216); Loy v. Home Ins. Co., 24–315; Standish v. Vosberg, 27–175, 6+489; Lindley v. Crombie, 31–232, 17+372; Buchanan v. Reid, 43–172, 45+11; Gates v. Ege, 57–465, 59+495; Carlson v. Presbyterian Bd. of Relief, 67–436, 70+3; Lindgren v. Lindgren, 73–90, 75+1034; Fleming v. McCutcheon, 85–152, 88+433.

[51] Buchanan v. Reid, 43–172, 45+11. See Whitney v. Huntington, 34–458, 26+631.

[52] Hokanson v. Gunderson, 54–499, 56+172.

[53] Pioneer S. & L. Co. v. Farnham, 50–315, 52+897.

[54] Daniels v. Smith, 4–172(117); Donnelly v. Simonton, 7–167(110); Turrell v. Warren, 25–9.

[55] Turrell v. Warren, 25–9.

[56] Cooper v. Finke, 38–2, 35+469; Holmes v. State Bank, 53–350, 55+555; Tuttle v. Boshart, 88–284, 92+1117. See Lindley v. Crombie, 31–232, 17+372.

[57] R. L. 1905 § 4479; Donnelly v. Simonton, 7–167(110); Lindley v. Crombie, 31–232, 17+372.

[58] Daniels v. Smith, 4–172(117); Donnelly v. Simonton, 7–167(110); Loy v. Home Ins. Co., 24–315. See Cooper v. Finke, 38–2, 35+469.

[59] Donnelly v. Simonton, 7–167(110); Evans v. Rhode Island H. T. Co., 67–160, 69+715, 1069.

[60] Horton v. Maffitt, 14–289(216); Loy v. Home Ins. Co., 24–315.

[61] Buchanan v. Reid, 43–172, 45+11; Carlson v. Presbyterian Bd. of Relief, 67–436, 70+3; Evans v. Rhode Island H. T. Co., 67–160, 69+715, 1069.

[62] Tinkcom v. Lewis, 21–132; Schroeder v. Lahrman, 28–75, 9+173; Buchanan v. Reid, 43–172, 45+11; Bovey v. Tucker, 48–223, 50+1038; Carlson v. Presbyterian Bd. of Relief, 67–436, 70+3.

[63] Hughes v. Olson, 74–237, 77+42; Buchanan v. Reid, 43–172, 45+11; Brady v. Gilman, 96–234, 104+897.

[64] Tinkcom v. Lewis, 21–132.

[65] Tuttle v. Boshart, 88–284, 92+1117.

[66] Am. B. & L. Assn. v. Waleen, 52–23, 53+867.

[67] Bottineau v. Aetna etc. Co., 31–125, 16+849.

[68] Carleton College v. McNaughton, 26–194, 2+688.

[69] Coles v. Yorks, 28–464, 10+775.

[70] See § 6267.

[71] Jordan v. Humphrey, 31–495, 18+450.

6366. Protected by recording act—Foreclosure by advertisement is a proceeding based on the records, and a bona fide purchaser has a right to rely on the title as disclosed by the records.[72] A bona fide purchaser who has recorded his certificate is not affected by the fact that the mortgage was in fact paid at the time of the foreclosure, if there was no release or satisfaction on record.[73] Possession of the mortgagor is not notice of an unrecorded release.[74] The purchaser is charged with notice of equities appearing on the face of the record.[75]

6367. Title rests on mortgage—The title of the purchaser relates back to and takes effect by virtue of the mortgage, which is, in fact, the efficient instrument by which the title is transferred from the mortgagor to the purchaser.[76] The purchaser acquires just what the mortgagee has the right under the power to sell—no more and no less.[77] If the mortgage is void the purchaser acquires no title in the absence of an estoppel.[78] The mortgage must be sufficient to operate as a conveyance as soon as the equity of redemption is barred by the sale.[79] The mortgage ripens into a perfect title through the process of foreclosure.[80] The sale transfers all the interest of the mortgagor in the premises as described in the mortgage.[81]

6368. Succeeds to rights of mortgagee—The purchaser succeeds to the equitable interest of the mortgagee, and when no redemption is made this interest draws to it the subordinate legal title of the mortgagor, and his title then stands under the mortgagee precisely as if the mortgage had been an absolute conveyance at its date; or, in other words, the mortgage ripens into a perfect title through the process of foreclosure.[82] Even though the sale is void as against the mortgagor and his privies, it passes to the purchaser the rights of the mortgagee as such. He is regarded as an equitable assignee of the mortgage.[83] He does not succeed to other securities held by the mortgagee.[84]

6369. Effect of mortgagee bidding in—If the mortgagee is the purchaser his debt, as between him and the mortgagor, is paid; but it is not true that either his mortgage, as a muniment of title, or his interest in the mortgaged premises, is discharged or extinguished. He simply receives a conditional conveyance of the premises for the payment of his debt, and continues to have a lien on the premises for the amount of the purchase price, which was applied in payment of his debt. His interest in the premises is practically the same after the sale as before, except the purchase price must be repaid to him by the mortgagor, with interest, within the year, or his title under his mortgage becomes absolute.[85] He becomes a purchaser instead of a contract creditor, and holds the property by virtue of his bid and upon conditions fixed by law for

[72] See Brown v. Union etc. Co., 65–508, 68+107; Solberg v. Wright, 33–224, 22+381.

[73] Palmer v. Bates, 22–532; Merchant v. Woods, 27–396, 7+826; Bausman v. Eads, 46–148, 48+769.

[74] Palmer v. Bates, 22–532.

[75] Wilson v. Eigenbrodt, 30–4, 13+907.

[76] Burke v. Lacock, 41–250, 42+1016; Security Bank v. Holmes, 65–531, 68+113.

[77] Hillebert v. Porter, 28–496, 11+84.

[78] See §§ 6267, 6268.

[79] Foster v. Johnson, 39–378, 40+255.

[80] Hokanson v. Gunderson, 54–499, 56+172.

[81] Lowry v. Tilleny, 31–500, 18+452.

[82] Hokanson v. Gunderson, 54–499, 56+172.

[83] Johnson v. Sandhoff, 30–197, 14+889; Holton v. Bowman, 32–191, 19+734; Coles v. Washington County, 35–124, 27+497; Rogers v. Benton, 39–39, 38+765; Buchanan v. Reid, 43–172, 45+11; Jellison v. Halloran, 44–199, 46+332; Bitzer v. Campbell, 47–221, 49+691; Brame v. Towne, 56–126, 57+454; Backus v. Burke, 63–272, 65+459; Law v. Citizens' Bank, 85–411, 89+320. See Berg v. Olson, 88–392, 93+309.

[84] Lawton v. St. Paul etc. Co., 56–353, 57+1061.

[85] Carlson v. Presbyterian Bd. of Relief, 67–436, 70+3; Donnelly v. Simonton, 7–

its redemption.[86] He stands in no different or better position than a stranger who purchases.[87]

6370. Sale of separate tracts to different persons—The rights of purchasers of different tracts are distinct.[88]

6371. Right to crops—Rents and profits—If the purchaser is in possession with the rights of a "mortgagee in possession" he is entitled to the crops raised by himself, but he is accountable for the rents and profits.[89] If he is out of possession he is not entitled, during the year of redemption, to crops or timber, but he may restrain waste.[90] When he obtains possession after the expiration of the redemption period he is entitled to all the crops then growing thereon and thereafter he may maintain an action in the nature of replevin or trover therefor, if they are severed and carried away by another.[91] Crops sown by the mortgagor or his tenant during the year of redemption, and harvested after the expiration of the year, but before the purchaser takes possession, belong to the mortgagor or tenant,[92] and an injunction will not issue to restrain him from removing them.[93] An agreement has been held to give the mortgagor the right to crops maturing after the expiration of the redemption period.[94] During the year of redemption the purchaser is not entitled to the rents and profits,[95] and if he is in possession he must account for them.[96]

6372. Right to chattels—After the expiration of the redemption period chattels on the premises belong to the purchaser, as against a stranger.[97]

6373. As a mortgagee in possession—Title by adverse possession—The lien of the mortgage is not extinguished until it merges in the legal estate when that passes, by lapse of time. It passes to the purchaser to the extent of the purchase price so that if he goes into possession in good faith under the foreclosure, even though it is invalid, he is regarded as a mortgagee in possession, whether he took possession with or without the consent, either express or implied, of the mortgagor.[98] A vendee of the purchaser at the sale has the same rights as the purchaser in this regard.[99] Such a "mortgagee in possession" is entitled to the crops raised by himself, but he is accountable for the rents and profits.[1] If he remains in possession until the right of redemption by the mortgagor is barred, he becomes invested with the legal title,[2] and may redeem from the foreclosure of a senior lien.[3]

6374. Right to sue on covenants in mortgage—A covenant against incumbrances runs with the land and a purchaser at a foreclosure sale may maintain an action thereon.[4] The purchaser buys the title as warranted and guarded by the covenants in the mortgage.[5]

167(110); Horton v. Maffitt, 14–289(216); Fleming v. McCutcheon, 85–152, 88+433.

[86] Evans v. Rhode Island H. T. Co., 67–160, 69+715, 1069; Lawton v. St. Paul etc. Co., 56–353, 57+1061.

[87] Lawton v. St. Paul etc. Co., 56–353, 57+1061.

[88] Tinkcom v. Lewis, 21–132.

[89] Holton v. Bowman, 32–191, 19+734.

[90] Berthold v. Holman, 12–335(221); Nat. Fire Ins. Co. v. Broadbent, 77–175, 79+676.

[91] Marks v. Jones, 71–136, 73+719.

[92] Aultman v. O'Dowd, 73–58, 75+756. See Lake v. Lund, 92–280, 99+884.

[93] Marks v. Jones, 71–136, 73+719.

[94] Mitchell v. Tschida, 71–133, 73+625.

[95] Pioneer S. & L. Co. v. Farnham, 50–315, 52+897; McDowell v. Hillman, 50–319, 52+897.

[96] Holton v. Bowman, 32–191, 19+734.

[97] O'Donnell v. Burroughs, 55–91, 56+579.

[98] See cases under § 6238.

[99] Johnson v. Sandhoff, 30–197, 14+889; Holton v. Bowman, 32–191, 19+734.

[1] Holton v. Bowman, 32–191, 19+734.

[2] Rogers v. Benton, 39–39, 38+765; Jellison v. Halloran, 44–199, 46+332; Russell v. Akeley, 45–376, 48+3; Law v. Citizens' Bank, 85–411, 89+320.

[3] Law v. Citizens' Bank, 85–411, 89+320.

[4] Security Bank v. Holmes, 65–531, 68+113; Id., 68–538, 71+699.

[5] Id.; Am. B. & L. Assn. v. Waleen, 52–23, 53+867; Lawton v. St. Paul P. L. Co., 56–353, 57+1061. See Am. B. & L. Assn.

6375. Purchase-money mortgages—The purchaser at the foreclosure of a purchase-money mortgage takes free from all claims or liens arising through the mortgagor.[6]

6376. Interest subject to levy—The interest acquired by the purchaser is subject to the lien of any attachment or judgment duly made or docketed, as in case of real property, and may be attached or sold on execution in the same manner.[7]

6377. Easements—The purchaser acquires all rights, privileges, and easements appurtenant and necessary to the enjoyment of the premises, though they were acquired by the mortgagor subsequent to the mortgage.[8]

6378. Possession of mortgagor not adverse—If the mortgagor or his grantee remains in possession after the period of redemption has expired, the presumption is that the possession is in accordance with, and in subordination to the title of the purchaser.[9]

6379. Right to fixtures—Fixtures pass to the purchaser as a part of the realty.[10] After his title becomes absolute the purchaser can maintain replevin for fixtures severed from the land by the mortgagor during the redemption period.[11]

6380. Liability for purchase price—An action will lie against the purchaser to recover the amount of his bid.[12]

6381. Nature of title after redemption period—At the expiration of the redemption period, if no redemption is made, the purchaser succeeds to the title of the mortgagor as it was at the date of the mortgage and as conveyed by the mortgage.[13] He acquires every right or interest held by the mortgagor in and to the mortgaged property, together with all subsequently acquired rights, easements and privileges, which are essential to the full enjoyment of the property.[14] He is the owner and entitled to all the rights of ownership.[15]

REDEMPTION—IN GENERAL

6382. What constitutes—Assignment of certificate of sale—An assignment of a certificate of sale does not ordinarily operate as a redemption,[16] but an assignment to a cotenant,[17] and to a receiver,[18] has been held to have that effect.

6383. What law governs—The law of the date of the execution of the mortgage governs.[19]

6384. Right favored—The right of redemption is favored in the law,[20] and the statute regulating the right is construed liberally in favor of redemptioners.[21]

v. Stoneman, 53–212, 54+1115; Pioneer S. & L. Co. v. Freeburg, 59–230, 61+25.

[6] Jacoby v. Crowe, 36–93, 30+441.

[7] R. L. 1905 § 4479; Donnelly v. Simonton, 7–167(110); Lindley v. Crombie, 31–232, 17+372.

[8] Swedish etc. Bank v. Conn. etc. Co., 83–377, 86+420. See Stanton v. Sauk Rapids Co., 74–286, 77+1.

[9] Lowry v. Tilleny, 31–500, 18+452.

[10] See § 6223.

[11] Whitney v. Huntington, 34–458, 26+631.

[12] Hokanson v. Gunderson, 54–499, 56+172.

[13] Watkins v. Hackett, 20–106(92); Tinkcom v. Lewis, 21–132; Martin v. Fridley, 23–13; Gates v. Ege, 57–465, 59+495.

[14] Swedish etc. Bank v. Conn. etc. Co., 83–377, 86+420.

[15] See Moritz v. St. Paul, 52–409, 54+370.

[16] Martin v. Sprague, 29–53, 11+143; Sprague v. Martin, 29–226, 13+34. See Pamperin v. Scanlan, 28–345, 9+868; Johnson v. Stewart, 75–20, 77+435.

[17] Holterhoff v. Mead, 36–42, 29+675.

[18] Shadewald v. White, 74–208, 77+42.

[19] Heyward v. Judd, 4–483(375); Goenen v. Schroeder, 8–387(344); Carroll v. Rossiter, 10–174(141); Hillebert v. Porter, 28–496, 11+84; Willis v. Jelineck, 27–18, 6+373; O'Brien v. Krenz, 36–136, 30+458.

[20] Law v. Citizens' Bank, 85–411, 89+320; Paige v. Smith, 5 Fed. 340.

[21] See § 6387.

6385. An incident of every mortgage—A right or equity of redemption is an inseparable incident of every mortgage.[22] It is not affected by a default.[23] It exists in spite of express terms in the mortgage to the contrary.[24] It is not dependent upon possession.[25] A mortgage must be deemed to have been made with reference to the statutory right of redemption by creditors.[26]

6386. General object of statute—The statute providing for redemption is calculated to save the property of debtors from being sacrificed, and to enable debtors to retain their property; or, if they fail to do so, then to secure its application, so far as may be, to the payment of the demands of creditors.[27]

6387. Construction of statute—The statute is remedial and to be construed liberally in favor of redemptioners.[28] It is to be construed with reference to its general purpose,[29] and former equity practice.[30]

6388. Under statute a proceeding in pais—A redemption under the statute by act of the parties is not a judicial proceeding, but a proceeding in pais.[31]

6389. Compliance with statute—After a foreclosure by advertisement the only right of redemption, by mere act of the parties, is that given by statute, and it can be exercised only as the statute prescribes.[32] There must be a substantial compliance with the statute.[33] Mere formal or trivial deviations or irregularities are not fatal.[34]

6390. From what redemption made—The redemption is a redemption of the land sold from the sale, and not a redemption of the land mortgaged from the mortgage. The redemption is made from the purchaser as purchaser, not as assignee of the mortgage.[35]

6391. Right to redeem and right to foreclose how far reciprocal—In some of our earlier cases it was held that the right to redeem and the right to foreclose are reciprocal and commensurable or mutual.[36] Later it was held that this is true only in the sense that a mortgage cannot be a mortgage on one side only. It is not true in the sense that there can be no right of redemption after the right to foreclose has become barred.[37]

6392. Extension of time to redeem—A court has no discretionary power to extend the period of redemption.[38] The time cannot be extended to await the determination of a suit in equity for an accounting.[39] It may be extended by agreement of the parties,[40] but a creditor's right to redeem cannot be prejudiced by an agreement between the mortgagor and the purchaser at the sale.[41]

[22] Hill v. Edwards, 11-22(5).
[23] Id.
[24] Holton v. Meighen, 15-69(50). See Armstrong v. Sanford, 7-49(34).
[25] Parsons v. Noggle, 23-328.
[26] Martin v. Sprague, 29-53, 11+143.
[27] Id.
[28] Williams v. Lash, 8-496(441); Tinkcom v. Lewis, 21-132; Willis v. Jelineck, 27-18, 6+373; Martin v. Sprague, 29-53, 11+143; Lightbody v. Lammers, 98-203, 108+846. But in Pamperin v. Scanlan, 28-345, 9+868 it is said that a redemptioner "must follow the statute strictly and bring himself fully within its provisions."
[29] Pamperin v. Scanlan, 28-345, 9+868.
[30] Pamperin v. Scanlan, 28-345, 9+868; Nelson v. Rogers, 65-246, 68+18.
[31] State v. Kerr, 51-417, 53+719.
[32] Dickerson v. Hayes, 26-100, 1+834; Cuilerier v. Brunelle, 37-71, 33+123.
[33] Tinkcom v. Lewis, 21-132; Cuilerier v. Brunelle, 37-71, 33+123; Hoover v. Johnson, 47-434, 50+475; State v. Kerr, 51-417, 53+719. Some cases hold that a strict compliance with the statute is necessary. Pamperin v. Scanlan, 28-345, 348, 9+868; Swanson v. Realization etc. Corp., 70-380, 73+165.
[34] Tinkcom v. Lewis, 21-132.
[35] Id.
[36] Holton v. Meighen, 15-69(50); King v. Meighen, 20-264(237); Parsons v. Noggle, 23-328; Fisk v. Stewart, 26-365, 4+611; Rogers v. Benton, 39-39, 38+765.
[37] Bradley v. Norris, 63-156, 65+357.
[38] State v. Kerr, 51-417, 53+719.
[39] Hoover v. Johnson, 47-434, 50+475.
[40] Hoover v. Johnson, 47-434, 50+475; Tice v. Russell, 43-66, 44+886; Reynolds v. Curtiss, 53-257, 55+543; Phelps v. Western R. Co., 89-319, 94+1085; Id., 89-319, 94+1135 (agreement held not to constitute an extension). See Williams v. Stewart, 25-516.
[41] Swanson v. Realization etc. Corp., 70-380, 73+165.

6393. Sheriff acts as officer of law—In redemption proceedings under the statute the sheriff acts as the officer of the law and not as the agent of either of the parties.[42]

6394. Authority of attorney to receive redemption money—An attorney employed to foreclose a mortgage has no implied authority to receive redemption money from the sheriff.[43]

6395. Waiver—Under Laws 1860 c. 57 § 3, it was held that the mortgagor might waive his right of redemption as against his creditors having liens accruing subsequently.[44] It is not lost by a surrender of the note and an advancement of an additional sum by the tender, equal, with the previous loan, to the agreed value of the land mortgaged.[45]

6396. Release or sale to mortgagee—The mortgagor may sell or release his equity of redemption to the mortgagee for a fair consideration. But such a transaction is disfavored by the courts and will be set aside if it appears that the mortgagee has taken unconscionable advantage of the necessities of the mortgagor. The regular way for a mortgagor to acquire title is through foreclosure proceedings.[46] A release after condition broken is tantamount to a foreclosure and operates as payment of the mortgage debt to the extent of the value of the property.[47]

6397. Waiver of irregularities—Though a purchaser cannot, so far as concerns the passing of the legal title by redemption, waive by parol the existence of a lien giving a right to redeem, or a proper certificate of redemption, he may waive any irregularity in the intermediate steps to effect redemption. Thus he may waive any defect in the filed notice of intention to redeem, or the failure of the creditor to file an affidavit of the amount due on his lien, and he does so by accepting the redemption money.[48] The objection that a redemption was prematurely made may be waived.[49] The sheriff cannot waive defects as against the purchaser.[50]

REDEMPTION BY MORTGAGOR OR ASSIGNS

6398. By mortgagor—An owner of an undivided half of a tract sold as a whole can only redeem the whole and the effect of his redemption is to annul the sale as to the whole.[51] A redemption by one of two joint owners will inure to the benefit of both.[52] A owned certain land, but the title appeared of record to be in him and B, and the two executed a mortgage to C who foreclosed under the power. Before the time to redeem expired, B executed a quitclaim deed of the land to D who knew the state of the title, but recorded his deed. It was held that D had no right to redeem.[53]

6399. By assign—A junior mortgagee is not an "assign" within the meaning of the statute,[54] nor is the purchaser at the foreclosure of a junior mort-

[42] Davis v. Seymour, 16-210(184); Horton v. Maffitt, 14-289(216); Nopson v. Horton, 20-268(239); Tinkcom v. Lewis, 21-132; Schroeder v. Lahrman, 28-75, 9+173; Hall v. Swensen, 65-391, 67+1024; McElligott v. Millard, 82-251, 84+786.

[43] In re Grundysen, 53-346, 55+557.

[44] Armstrong v. Sanford, 7-49(34).

[45] Jones v. Blake, 33-362, 23+538.

[46] Niggeler v. Maurin, 34-118, 24+369; Marshall v. Thompson, 39-137, 39+309; De Lancey v. Finnegan, 86-255, 90+387; Aretz v. Kloos, 89-432, 95+216, 769; Webster v. McDowell, 102-445, 113+1021.

[47] Sprague v. Martin, 29-226, 13+34.

[48] Todd v. Johnson, 50-310, 52+864; Clark v. Butts, 73-361, 76+199; Tinkcom v. Lewis, 21-132.

[49] Finnegan v. Effertz, 90-114, 95+762; Sprandel v. Houde, 54-308, 56+34. See Conn. etc. Co. v. King, 72-287, 75+376; Id., 80-76, 82+1103.

[50] Tinkcom v. Lewis, 21-132.

[51] Buettel v. Harmount, 46-481, 49+250.

[52] Holterhoff v. Mead, 36-42, 29+675. See Oliver v. Hedderly, 32-455, 21+478.

[53] Gesner v. Burdell, 18-497(444).

[54] Cuilerier v. Brunelle, 37-71, 33+123; Darelius v. Davis, 74-345, 77+214. See Finnegan v. Effertz, 90-114, 95+762.

gage.[55] The term "assigns" has been defined to include "grantees of the mortgagor, and those acquiring his title otherwise than by descent," [56] and "those to whom the property, or the interest of the mortgagor therein is transferred." [57] A purchaser at an abortive foreclosure sale, who has gone into possession and remained until after the redemption period has expired, may redeem as an "assign" from the foreclosure of a senior lien. Any person having either the mortgagor's title, or a subsisting interest under it, as, for example, a tenant for years, a person beneficially interested, a tenant by curtesy, or one who has the statutory interest superseding dower and curtesy, may redeem as an "assign." [58] A wife has such interest in her husband's realty that she may redeem.[59]

6400. Time in which to redeem—Extension—The right to redeem expires absolutely at the expiration of the twelve months and cannot be revived.[60] The time to redeem stated in the certificate of sale does not control in case of conflict with the statute.[61] If the last day of the twelve months falls on Sunday redemption may be made on Monday.[62] A court cannot extend the period of redemption,[63] but the parties may do so by agreement.[64] Under Laws 1860 c. 87 § 1, redemption might be made not only within three years from the day of sale, but within three years after notice thereof filed in the office of the register of deeds.[65] A payment to the sheriff through a third party has been held sufficient, though the sheriff did not receive the money until after the redemption period.[66]

6401. Amount required to redeem—Tender—A mortgagor has a right to redeem from a mortgage by paying the mortgage debt and interest and he cannot be required, as a condition of such redemption, to pay any other debt due from him to the mortgagee.[67] A redemption cannot be made by a tender of less than the amount for which the property was sold, with interest, even where the foreclosure was for more than was actually due on the mortgage.[68]

6402. Interest—Prior to Laws 1899 c. 37, it was held that the mortgagor was required to pay the sum for which the property was sold, with interest thereon at seven per cent., though the mortgage provided for interest at a lower rate.[69]

6403. Effect of redemption—A redemption by the mortgagor, his heirs, executors, administrators, or assigns, annuls the sale, leaving the property in the same condition as if the mortgage had never been made.[70] A redemption by a part owner annuls the sale as to the whole tract.[71] A sale from which a redemption is made does not affect the lien of the mortgage for other instalments of the mortgage debt.[72] Where the owner assumes to redeem as a creditor under a

[55] Buchanan v. Reid, 43-172, 45+11.
[56] Cuilerier v. Brunelle, 37-71, 33+123.
[57] Gesner v. Burdell, 18-497(444).
[58] Law v. Citizens' Bank, 85-411, 89+320.
[59] Williams v. Stewart, 25-516; Martin v. Sprague, 29-53, 11+143; Spalti v. Blumer, 56-523, 58+156; Roberts v. Meighen, 74-273, 77+139; Kopp v. The'e, 104-267, 116+472.
[60] Gates v. Ege, 57-465, 59+495.
[61] Carroll v. Rossiter, 10-174(141).
[62] Bovey v. Tucker, 48-223, 50+1038.
[63] State v. Kerr, 51-417, 53+719.
[64] Williams v. Stewart, 25-516(transaction held not an extension); Reynolds v. St. Paul L. & T. Co., 46-84, 48+458 (evidence held insufficient to prove an extension); Steele v. Bond, 28-267, 9+772 (an extension held to operate as a mortgage). See Steele v. Bond, 32-14, 18+830.
[65] Thompson v. Foster, 21-319.
[66] McElligott v. Millard, 82-251, 84+786.
[67] Bacon v. Cottrell, 13-194(183); Weller v Summers, 82-307, 84+1022.
[68] Dickerson v. Hayes, 26-100, 1+834.
[69] Evans v. Rhode Island H. T. Co., 67-160, 69+715, 1069.
[70] R. L. 1905 § 4484; Gesner v. Burdell, 18-497(444); McArthur v. Martin, 23-74; Williams v. Stewart, 25-516; Martin v. Sprague, 29-53, 11+143; Cuilerier v. Brunelle, 37-71, 33+123; Kopp v. Thele, 104-267, 116+472.
[71] Buettel v. Harmount, 46-481, 49+250.
[72] Daniels v. Smith, 4-172(117); Standish v. Vosberg, 27-175, 6+489; Herber v. Christopherson, 30-395, 15+676.

judgment against a former owner, in law the redemption will be one by an owner and not by a creditor, and its legal effect will be to annul the sale.[73] A redemption by the wife of the mortgagor annuls the sale.[74] Where a mortgagor conveyed subject to the mortgage and took back a second mortgage which he assigned, it was held that a redemption made by the assignee under the second mortgage from a foreclosure sale of the first mortgage was made by him not as owner but as a creditor and did not annul the sale.[75]

6404. Effect of non-redemption—Non-redemption within the statutory time extinguishes all the estate and interest of the mortgagor and consequently of all persons claiming under him.[76]

REDEMPTION BY CREDITORS

6405. Nature of right—The right of a creditor to redeem is purely statutory.[77] It is a right to buy the purchaser's interest, at the price paid by him, with interest from the date of the sale.[78] When vested it is a property right which cannot be divested or impaired without due process of law.[79]

6406. Cannot be defeated by others—The right of a creditor to redeem cannot be defeated by any agreement to which he is not a party.[80]

6407. When right accrues—The right of a creditor to redeem does not accrue until the mortgagor's right of redemption has terminated and the title of the holder of the certificate of sale has become, as against the mortgagor, perfect and absolute.[81] But the purchaser may waive a premature redemption by a creditor.[82]

6408. Creditor redeeming a purchaser for value—A creditor redeeming under the statute is a purchaser for a valuable consideration,[83] and as such is protected from a resulting trust of which he had no notice.[84]

6409. Separate tracts—Where, upon foreclosure by advertisement of a mortgage embracing two parcels of land, such parcels have been separately sold to the mortgagee, at a separate price for each, a junior mortgagee of one of the parcels can redeem from the sale that parcel only which is embraced in his mortgage. The rule is the same when such mortgagee has foreclosed his mortgage by advertisement, and has purchased, at the foreclosure sale, the parcel embraced in his mortgage.[85]

6410. Who may redeem as creditor—The following may redeem as a creditor: a junior mortgagee;[86] an assignee of a junior mortgagee;[87] a purchaser at a foreclosure sale of a junior mortgage;[88] a creditor of a grantee of the mort-

[73] Clark v. Butts, 78–373, 81+11.
[74] Kopp v. Thele, 104–267, 116+472.
[75] Darelius v. Davis, 74–345, 77+214.
[76] Jacoby v. Crowe, 36–93, 30+441; Martin v. Sprague, 29–53, 11+143.
[77] Tinkcom v. Lewis, 21–132; Pamperin v. Scanlan, 28–345, 9+868; Cuilerier v. Brunelle, 37–71, 33+123; State v. Kerr, 51–417, 53+719; Bartleson v. Munson, 105–348, 354, 117+512.
[78] Tinkcom v. Lewis, 21–132.
[79] Willis v. Jelineck, 27–18, 6+373; O'Brien v. Krenz, 36–136, 30+458; Lowry v. Mayo, 41–388, 43+78.
[80] Swanson v. Realization etc. Corp., 70–380, 73+165.
[81] Pamperin v. Scanlan, 28–345, 9+868; Sprague v. Martin, 29–226, 13+34; Gates v. Ege, 57–465, 59+495.
[82] Finnegan v. Effertz, 90–114, 95+762; Sprandel v. Houde, 54–308, 56+34. See Conn. etc. Co. v. King, 72–287, 75+376.
[83] Martin v. Baldwin, 30–537, 16+449; Ahern v. Freeman, 46–156, 48+677; White v. Leeds I. Co., 72–352, 75+595, 761. See Merchant v. Woods, 27–396, 7+826.
[84] Martin v. Baldwin, 30–537, 16+449.
[85] Tinkcom v. Lewis, 21–132.
[86] Nopson v. Horton, 20–268(239); Tinkcom v. Lewis, 21–132; Cuilerier v. Brunelle, 37–71, 33+123; Hoover v. Johnson, 47–434, 50+475; Bovey v. Tucker, 48–223, 50+1038; Finnegan v. Effertz, 90–114, 95+762.
[87] Bovey v. Tucker, 48–223, 50+1038; Darelius v. Davis, 74–345, 77+214.
[88] Buchanan v. Reid, 43–172, 45+11; Tinkcom v. Lewis, 21–132.

gagor;[89] an attaching creditor on a contract express or implied;[90] a judgment creditor;[91] an assignee of a judgment against the mortgagor, though the assignment is not filed under G. S. 1894 § 5431;[92] a creditor acquiring a lien pending the time of redemption;[93] and a creditor having a lien on a part of the land sold.[94] To entitle a creditor to redeem he must have something more than the general right common to all creditors to have the general property of the debtor applied to the payment of his debts; he must have a right either in law or equity, to have the specific property appropriated to the satisfaction of his claim in exclusion of other claims subsequent in date to his.[95] It is unnecessary that he should have a personal claim against the debtor; it is sufficient if he has a special claim on the specific land sold. The statute has in view the party's relation and interest in respect to the land, and not in respect to any particular person.[96] A general creditor of a decedent, though his claim has been allowed against the estate by the probate court, has no lien within the statute and cannot redeem. A redemption for the estate must be made by the executor or administrator.[97] A party having an equitable mortgage in the form of an absolute deed may redeem without first having obtained a judicial determination that the deed is a mortgage.[98] A creditor cannot redeem on a judgment which has already been satisfied by a redemption thereon.[99] Redemption may be made on a confessed judgment.[1] A judgment creditor who has levied on sufficient personal property to satisfy his judgment cannot redeem.[2]

6411. Attacking creditor's lien—One holding the certificate of sale, and claiming title thereunder, is in no position to resist redemption by a creditor upon the ground that the sale was irregular.[3] The purchaser at a foreclosure sale cannot question the bona fides of a subsequent mortgage executed by the owner which does not extend the period of redemption.[4] But where the owner, for the purpose of extending his time of redemption, transferred his equity and took back one hundred separate mortgages and filed an intention to redeem on each, it was held that the purchaser might have relief.[5] The purchaser may question the right of a judgment creditor to redeem by attacking the validity of the judgment.[6] A subsequent lienor cannot be deprived of his right to collect his debt by redemption, to the extent of the value of the property over the amount paid to redeem, by the interposition of the liens of fraudulent and simulated securities. But, if thereby prevented from redeeming, his damages would not exceed the amount of his debt. In a case where a lien creditor re-

[89] Hospes v. Sanborn, 28–48, 8+905.

[90] Atwater v. Manchester S. Bank, 45–341, 48+187. See Kling v. Childs, 30–366, 15+673.

[91] Willis v. Jelineck, 27–18, 6+373; Pamperin v. Scanlan, 28–345, 9+868; Martin v. Sprague, 29–53, 11+143; Sprague v. Martin, 29–226, 13+34; Bartleson v. Thompson, 30–161, 14+795; O'Brien v. Krenz, 36–136, 30+458; Willard v. Finnegan, 42–476, 44+985; Atwater v. Manchester S. Bank, 45–341, 48+187; Lowry v. Akers, 50–508, 52+922; Parker v. St. Martin, 53–1, 55+113; Todd v. Johnson, 56–60, 57+320; Swanson v. Realization etc. Corp., 70–380, 73+165; Hughes v. Olson, 74–237, 77+42; Clark v. Butts, 78–373, 81+11.

[92] Swanson v. Realization etc. Corp., 70–380, 73+165.

[93] Watkins v. Hackett, 20–106(92).

[94] Tinkcom v. Lewis, 21–132; Willis v. Jelineck, 27–18, 6+373; Martin v. Sprague, 29–53, 11+143; O'Brien v. Krenz, 36–136, 30+458.

[95] Whitney v. Burd, 29–203, 12+530; Nelson v. Rogers, 65–246, 68+18.

[96] Hospes v. Sanborn, 28–48, 8+905; Buchanan v. Reid, 43–172, 45+11.

[97] Whitney v. Burd, 29–203, 12+530; Nelson v. Rogers, 65–246, 68+18.

[98] Scheibel v. Anderson, 77–54, 79+594.

[99] Sprague v. Martin, 29–226, 13+34.

[1] Atwater v. Manchester S. Bank, 45–341, 48+187.

[2] First Nat. Bank v. Rogers, 13–407(376).

[3] Martin v. Sprague, 29–53, 11+143.

[4] Bovey v. Tucker, 48–223, 50+1038.

[5] New England etc. Co. v. Capehart, 63–120, 65+258.

[6] Hughes v. Olson, 74–237, 77+42. See Willard v. Finnegan, 42–476, 44+985; Atwater v. Manchester S. Bank, 45–341, 48+187; Todd v. Johnson, 56–60, 57+320; Roberts v. Meighen, 74–273, 77+139.

deems from a prior lienor and redemptioner, and the property is ample security for all the liens, the court will not, at the instance of such subsequent lienor, undertake to inquire into the validity of, or the amount due on, prior liens, in order to enhance the value of the property in the hands of the last redemptioner.[7] Where a second or junior redemptioner, having a lien, seasonably redeems from a senior creditor who had previously made redemption from the purchaser at a mortgage sale on a lien valid on its face and had received a certificate of redemption, and the purchaser had accepted the redemption money, it was held that such second redemption must be deemed valid, though it turned out that such senior creditor had not in fact a valid lien. And the fact that such purchaser was ignorant at the time of certain irregularities in the proceedings will not avail against the superior rights of the second redemptioner.[8] A creditor's right to redeem cannot be nullified by any agreement between third parties.[9] A redemption on a judgment against a husband has been held properly set aside on the ground that the judgment had been satisfied by a tender made by the wife of the judgment debtor.[10] A stranger cannot attack the validity of a redemptioner's lien.[11]

6412. General plan of procedure—The general object of the statute providing for redemption by creditors is to make the land bring its utmost value, by means of what might be termed an auction sale among creditors, preserving to each his right according to the seniority of his lien. The aim is to conduct this sale for the benefit of both creditors and debtors, the creditors being interested in realizing out of the property as much as possible towards payment of their claims, and the debtor being interested in having as much as possible of his debts paid out of it. The statute provides that this competitive sale among creditors, under the form of successive redemptions, shall be conducted as follows: First, all bidders or proposed redemptioners must register by filing notices of their intention to redeem within one year after the sale; second, they must present to the party from whom they redeem evidence of their right to do so, and an affidavit showing the amount claimed as due on the lien under which they claim the right of redemption; third, a certificate of redemption must be made and recorded within ten days, which shall, among other things, state the amount paid by the redemptioner, upon what claim the redemption was made, and, if a lien, the amount claimed to be due thereon. These provisions are designed not merely for the information of the party from whom the redemption is made, but also, and perhaps mainly, for the information and security of every creditor having a lien, and who may desire to redeem. The object is to inform them who their competitors will be, when their time for redemption will begin and end, and how much they will be called on to pay in order to redeem.[12]

6413. Notice of intention—The statute requires a notice of intention to redeem to be filed for record with the register of deeds where the mortgage is recorded.[13] If a notice is recorded it is immaterial that it is not filed.[14] An assignee of a lien may redeem under a notice filed by his assignor.[15] Defects in a notice are waived if the purchaser accepts the redemption money.[16] A notice filed before the creditor actually acquires his lien is ineffectual though he subse-

[7] Parker v. St. Martin, 53–1, 55+113.
[8] Todd v. Johnson, 56–60, 57+320.
[9] Swanson v. Realization etc. Corp., 70–380, 73+165.
[10] Roberts v. Meighen, 74–273, 77+139.
[11] Willard v. Finnegan, 42–476, 44+985.
[12] Pamperin v. Scanlan, 28–345, 9+868. See also Sprague v. Martin, 29–226, 13+34; Martin v. Sprague, 29–53, 11+143; Todd v. Johnson, 56–60, 57+320; Bartleson v. Munson, 105–348, 354, 117+512.
[13] R. L. 1905 § 4481; Laws 1909 c. 243.
[14] Willis v. Jelineck, 27–18, 6+373.
[15] Bovey v. Tucker, 48–223, 50+1038.
[16] Todd v. Johnson, 50–310, 52+864; Clark v. Butts, 73–361, 76+199.

quently and during the year acquires the lien described.[17] Where foreclosure is by action the notice must be filed with the clerk of court.[18] The notice is not a part of the redemptioner's muniments of title.[19] Fraudulent notices may constitute a cloud on title removable by action.[20] The purchaser cannot tack subsequent liens unless he files notice of intention to redeem from the sale.[21] A notice of intention to redeem as "a judgment debtor" does not authorize a redemption by an owner.[22] The general rule that the law does not take notice of fractions of a day is inapplicable in this connection.[23]

6414. Five-day period—Waiver—The provision for a five-day period for each creditor is for the benefit of the creditors and not the purchaser; and a creditor may redeem sooner than necessary, if no one is prejudiced.[24]

6415. Order among successive lien creditors—Creditors redeem according to the priority of their liens. There is no provision in the statute to determine the rights of respective creditors in regard to redemption, except by the priority of their respective liens.[25] The purchaser at the sale cannot object that a creditor redeems out of the statutory order or prematurely.[26] The "senior creditor" mentioned in the statute [27] means the senior creditor who redeems.[28] The priority of liens for purposes of redemption is determined by the time of record, without reference to the nature of the estates in the land, or any part thereof, owned by the mortgagors.[29]

6416. Tacking subsequent liens—The purchaser at a foreclosure or execution sale cannot tack subsequent liens held by him so as to compel the holder of a lien subsequent to his to pay them in redeeming from the sale unless such purchaser puts himself in the line of redemptioners, by filing notice of redemption to redeem from his own sale under his subsequent liens and files at the proper time affidavits of the amount due on his subsequent liens.[30] But it is unnecessary for him to pay to himself the amount necessary to redeem from himself, or to issue to himself any certificate of redemption, and he need not redeem from himself through the sheriff.[31]

6417. Proof of right to redeem—The object of the statute [32] is to furnish evidence to the officer or purchaser that the party proposing to redeem has the right to do so under the statute and to provide the evidence whereby a second or other redemptioner may know the amount to be paid to a previous one. The statute is to be liberally construed in favor of redemptioners.[33] The production of the original instrument evidencing the lien, with the certificate of record indorsed thereon, is a sufficient compliance with the statute which requires the production of a certified copy of such instrument.[34] The redemptioner need not produce all the deeds constituting his chain of title from the mortgagor.[35] When the redemption is made by the mortgagor or owner, it is

[17] Maurin v. Carnes, 71-308, 74+139; Brady v. Gilman, 96-234, 104+897.
[18] Bovey v. Tucker, 48-223, 50+1038.
[19] Todd v. Johnson, 50-310, 52+864.
[20] New England etc. Co. v. Capehart, 63-120, 65+258.
[21] See § 6416.
[22] Bagley v. McCarthy, 95-286, 104+7.
[23] Brady v. Gilman, 96-234, 104+897.
[24] Conn. etc. Co. v. King, 72-287, 75+376; Id., 80-76, 82+1103.
[25] Whitney v. Burd, 29-203, 12+530; Bartleson v. Munson, 105-348, 354, 117+512.
[26] Conn. etc. Co. v. King, 72-287, 75+376; Id., 80-76, 82+1103.
[27] R. L. 1905 § 4481.
[28] Pamperin v. Scanlan, 28-345, 9+868.
[29] Bartleson v. Munson, 105-348, 117+512.
[30] Pamperin v. Scanlan, 28-345, 9+868; Park v. Hush, 29-434, 13+668; Buchanan v. Reid, 43-172, 45+11; Ritchie v. Ege, 58-291, 59+1020; Bagley v. McCarthy, 95-286, 104+7.
[31] Ritchie v. Ege, 58-291, 59+1020.
[32] R. L. 1905 § 4482.
[33] Williams v. Lash, 8-496(441); Tinkcom v. Lewis, 21-132; Pamperin v. Scanlan, 28-345, 9+868; Lightbody v. Lammers, 98-203, 108+846; Bartleson v. Munson, 105-348, 355, 117+512.
[34] Tinkcom v. Lewis, 21-132; Sardeson v. Menage, 41-314, 43+66; Hunter v. Mauscau, 91-124, 97+651.
[35] Nopson v. Horton, 20-268(239).

unnecessary to produce and file certified copies of the documents showing his title and right to redeem. The production of the original records to the officer is sufficient.[36] Proof of heirship of a person entitled to redeem is sufficient proof of the right to redeem without the production of any document or record, where it does not appear that any probate proceedings have been completed.[37] When a transcript of a judgment in a municipal court contains the name of the judgment debtor and creditor, the date of docketing, as well as the amount of the judgment, it is sufficient, if duly certified by the clerk of that court, to entitle the same to filing in the office of the clerk of the district court, as a basis of the right to redeem.[38] The holder of a subsequent judgment lien may redeem the premises from an execution sale by paying the proper amount into the hands of the clerk of the proper court, and in such case it is unnecessary to produce to the clerk certified copies of the judgment docket, files, and records upon which redemption is based, but it is sufficient if the clerk has the knowledge thereof, and the original records, files, and papers are called to his attention.[39] An affidavit of the amount due on a lien is indispensable.[40] Where a mortgagee sells the note, but executes no assignment of the mortgage securing the same, and subsequently repurchases the note, the equitable transfers of the beneficial interest in the mortgage effected by the sale and repurchase of the debt, are not assignments which need to be produced.[41] Failure to produce the papers required by the statute is waived by accepting the redemption money.[42] The redemption papers are not a part of the redemptioner's muniments of title and need not be recorded.[43] The purchaser at the foreclosure sale cannot tack subsequent liens unless he files an affidavit of the amount due thereon.[44] Failure to file the affidavit of the amount due is waived by accepting the redemption money.[45] No provision is made for a formal notice of redemption.[46] The refusal of the clerk to recognize a party's right to redeem will not be allowed to prejudice him.[47] The sheriff is not required to hunt up the mortgagor and notify him that the redemption money is in his hands.[48] Only subsequent redemptioners can complain that redemption papers are not filed as required by the statute.[49]

6418. Amount necessary to redeem—The sheriff, in receiving money paid on redemption, acts as the officer of the law, not as the agent of the party. If he receives too much or too little, or from one not entitled to redeem, that cannot prejudice the party holding the certificate of sale. It is the business of the party redeeming to see that he deposits with the sheriff the proper amount and if the amount is not correct he must bear the consequences.[50] Where the redemptioner pays to the sheriff a gross sum for the redemption and sheriff's fees, and it is accepted by the sheriff as sufficient, and the sum is sufficient to satisfy the purchaser's claim, it is a good redemption; the shortage if any must be deducted from the sheriff's fees.[51] The senior creditor redeeming is required to pay only the amount for which the property was sold, with interest. But subsequent redemptioners must pay in addition prior liens held

[36] Sardeson v. Menage, 41–314, 43+66.
[37] Lightbody v. Lammers, 98–203, 108+846.
[38] Schmahl v. Thompson, 82–78, 84+649.
[39] Hunter v. Mauseau, 91–124, 97+651.
[40] Tinkcom v. Lewis, 21–132.
[41] Wilson v. Hayes, 40–531, 42+467.
[42] Clark v. Butts, 73–361, 76+199.
[43] Todd v. Johnson, 50–310, 52+864; Lightbody v. Lammers, 98–203, 108+846.
[44] See § 6416.
[45] Clark v. Butts, 73–361, 76+199.
[46] Warren v. Fish, 7–432(347).
[47] Abraham v. Holloway, 41–156, 42+867.
[48] Hall v. Swensen, 65–391, 67+1024.
[49] Wilson v. Hayes, 40–531, 42+467.
[50] Horton v. Maffitt, 14–289(216); Davis v. Seymour, 16–210(184); Gesner v. Burdell, 18–497(444); Tinkcom v. Lewis, 21–132; Schroeder v. Lahrman, 28–75, 9+173; In re Grundysen, 53–346, 55+557; Hall v. Swensen, 65–391, 67+1024.
[51] Bovey v. Tucker, 48–223, 50+1038.

by prior redemptioners.[52] Where a mortgagee foreclosed for more than the amount due and a second mortgagee was required to pay such amount in order to redeem, it was held that the latter might recover from the former the excess.[53] Where there were execution sales under successive judgments, it was held that creditors might redeem from the first and from the second sale by paying only the amount for which the particular sale was made, with interest.[54] A junior creditor, in order to redeem, must pay the amount shown by the record to be due. The statute provides no method by which he may determine the validity of prior liens or the proper amount thereof. He must pay according to the record, and if the lien is fraudulent, or the amount thereof padded, he must resort to other appropriate proceedings to recover any damages sustained by him thereby.[55]

6419. Medium of payment—If the sheriff accepts without objection treasury and national bank notes,[56] or a check on a bank,[57] the payment is good.

6420. Tender of amount necessary to redeem—A mere tender to the sheriff by a redemptioner of the amount necessary to redeem, and a refusal of the sheriff to receive it, will not discharge the lien of the holder of the certificate of sale. The sheriff in such case, is not the agent of either party, but the officer of the law, and the rights of the holder of the certificate of sale can be neither waived or prejudiced by his acts. The only office and effect of such tender and refusal is to preserve and protect the right of the redemptioner, if seasonably and properly asserted, to have the redemption perfected by application to the holder of the certificate, or by proceedings against the sheriff to compel him to perform his official duty.[58] A tender to a deputy sheriff, in charge of the office at the time, is equivalent to a tender to the sheriff himself.[59] A tender of the amount required to redeem must be kept good in order to be effectual as the basis of a subsequent action to compel a redemption, brought after the time for redemption has expired.[60] A redemption cannot be made by a tender of less than the amount for which the property was sold, with interest, even where the foreclosure was for more than was actually due on the mortgage.[61] A tender to the sheriff held proper under Laws 1860 c. 87 § 1.[62]

6421. Filing redemption papers—Prior to Laws 1881 (Extra Session), c. 3 there was no provision for recording or filing the redemption papers.[63] The present statute [64] requiring their filing is intended for the protection of junior redemptioners and they alone, if any one, can take advantage of a non-compliance with its provisions.[65]

6422. Effect of non-redemption—Failure to redeem from a sale made on a second lien by the holder of a subsequent and subordinate lien cuts off his right to redeem from a sale made on the first lien. The sale on a second lien, whether made before or after that on a first lien, has the effect, unless it is itself cut off by the first sale, or unless it is redeemed from, to cut off all liens and interests subject to it.[66]

[52] Pamperin v. Scanlan, 28–345, 9+868.
[53] Bennett v. Healey, 6–240(158).
[54] Abraham v. Holloway, 41–156, 42+867.
[55] Bartleson v. Munson, 105–348, 117+512.
[56] Nopson v. Horton, 20–268(239).
[57] Sardeson v. Menage, 41–314, 43+66.
[58] Schroeder v. Lahrman, 28–75, 9+173. See Abraham v. Holloway, 41–156, 42+867.
[59] Williams v. Lash, 8–496(441). See Willis v. Jelineck, 27–18, 6+373.
[60] Dunn v. Hunt, 63–484, 65+948. See Schroeder v. Lahrman, 28–75, 9+173; Abraham v. Holloway, 41–156, 42+867; Dunn v. Hunt, 76–196, 78+1110.
[61] Dickerson v. Hayes, 26–100, 1+834.
[62] Thompson v. Foster, 21–319.
[63] Tinkcom v. Lewis, 21–132, 141; Todd v. Johnson, 50–310, 52+864.
[64] R. L. 1905 § 4482; Hall v. Swensen, 65–391, 67+1024.
[65] Wilson v. Hayes, 40–531, 42+467; Todd v. Johnson, 50–310, 52+864.
[66] Bartleson v. Thompson, 30–161, 14+795;

6423. Effect—Interest acquired—Satisfaction of debt—Redemption by a creditor does not annul the sale, but appropriates the benefit of it to the redemptioner, so far as there may be any excess of value in the property beyond what it costs him to make redemption.[67] It operates as an assignment of the rights of the purchaser.[68] In other words the redemptioner is subrogated to the rights of the purchaser.[69] It does not extinguish the lien on which it is made, but the first redemptioner is subrogated to the right of the purchaser, the second to the right of the purchaser with the lien of the first redemptioner added, and so on, as each successive redemption is made. The last redemptioner acquires all intervening redemption liens and may enforce them against the land for his protection and reimbursement. The lien on which a redemption is made is not extinguished by the fact that the value of the property is equal to the amount of the lien with the amount paid for redemption added.[70] But a redemption by a creditor satisfies his debt to the extent of the value of the property, less the amount paid to effect redemption. Thus a redemption by a judgment creditor of property exceeding in value the amount of the judgment and the amount paid to effect redemption satisfies the judgment and extinguishes the right to make further redemptions by virtue of the same judgment.[71] A redemptioner is charged with notice of the rights of persons in actual possession, at the time of the redemption.[72]

CERTIFICATE OF REDEMPTION

6424. In general—A certificate of redemption, in substance such as the statute directs, is essential to the passing of the legal title though the redemptioner may, perhaps, acquire equitable rights without it. That a certificate of redemption upon a lien does not state the amount claimed to be due on the lien will not, as between the purchaser and a subsequent redemptioner, affect a redemption on a subsequent lien, made on the assumption that the prior redemption was regular.[73] A certificate of redemption, issued by the holder of the sheriff's certificate of mortgage foreclosure to the owner of the property on redemption from the sale, which is not filed for record within four days after the expiration of the redemption year, as required by R. L. 1905 § 4483, is void as to a second redemption duly made through the sheriff, in good faith, by a junior lienor. This is so, even though the second redemption be made and the certificate thereof filed for record within the time limited for recording the first certificate.[74] The sheriff may execute the certificate though the payment is made to the party from whom redemption is made.[75] A certificate is prima facie evidence of the fact of a redemption and of the truth of its recitals so far as they relate to matters required to be stated.[76] In an

Hooper v. Henry, 31–264, 17+476; Lowry v. Akers, 50–508, 52+922; Sprandel v. Houde, 54–308, 56+34; Conn. etc. Co. v. King, 72–287, 75+376; White v. Rathbone, 73–236, 75+1046. See Bagley v. McCarthy, 95–286, 104+7.

[67] Cuilerier v. Brunelle, 37–71, 33+123; Gates v. Ege, 57–465, 59+495; Darelius v. Davis, 74–345, 77+214.

[68] Watkins v. Hackett, 20–106(92); Pamperin v. Scanlan, 28–345, 9+868; Abraham v. Holloway, 41–156, 42+867; Miller v. Fasler, 42–366, 44+256.

[69] McArthur v. Martin, 23–74; Willis v. Jelineck, 27–18, 6+373; Martin v. Sprague, 29–53, 11+143; O'Brien v. Krenz, 36–136, 30+458; Swanson v. Realization etc. Corp., 70–380, 73+165; Kopp v. Thele, 104–267, 116+472.

[70] Lowry v. Akers, 50–508, 52+922; Tinkcom v. Lewis, 21–132.

[71] Sprague v. Martin, 29–226, 13+34; White v. Leeds Importing Co., 72–352, 75+595, 761.

[72] Niles v. Cooper, 98–39, 107+744.

[73] Todd v. Johnson, 50–310, 52+864.

[74] Coffman v. Christenson, 102–460, 113+1064.

[75] Sprandel v. Houde, 54–308, 56+34.

[76] Willis v. Jelineck, 27–18, 6+373. See Paige v. Smith, 5 Fed. 340 (certificate not conclusive as to amount paid).

action to set aside a certificate of redemption executed by a sheriff, its recitals may be impeached by parol evidence showing that no redemption was in fact made, and no money paid to the sheriff.[77] A certificate issued to one not entitled to redeem is a nullity.[78] The purchaser at the foreclosure sale may tack subsequent liens without issuing a certificate to himself.[79]

ATTORNEY'S FEES

6425. In general—The subject of attorney's fees on foreclosure is regulated by statute.[80] A stipulation in a mortgage for an attorney's fee on foreclosure is valid, if inserted in good faith to indemnify the mortgagee for the expense of foreclosure and not as a cover for illegal interest.[81] The legislature may regulate the amount of the fees as to subsequent mortgages.[82] The fees are no part of the debt secured and the mortgagee has no right to any part of them, except to indemnify himself for such reasonable sum, not exceeding the amount limited by statute, and named in the mortgage, as he actually pays or absolutely and unconditionally incurs.[83] The statute makes the mortgage, and the lien created by it, security for such fees, as well as for the mortgage debt.[84] No fees can be retained, if no affidavit of costs and disbursements is filed.[85] The county is entitled to fees where the county attorney forecloses a mortgage held by the county.[86] A corporation employing a salaried attorney to foreclose has been held entitled to fees.[87] An attorney employed by an assignee for the benefit of creditors in connection with the foreclosure of a mortgage owned by the assignor, has been held entitled to prove his claim against the estate as a general creditor, but not entitled to be paid in full out of the trust estate.[88] Where an attorney employed to foreclose a mortgage drew the notice of sale and had it set in type by the printer, it was held that the claim for fees had accrued so that a tender not including them was ineffectual.[89] The burden of proving fees excessive and unreasonable is on the party claiming them to be so.[90] When unauthorized fees are included an action as for money had and received will lie.[91] When a single mortgage is made a specific lien on several separate tracts the mortgagee may foreclose on each tract separately or on all together in one proceeding. If he adopts the former course he is entitled to fees for each foreclosure;[92] if the latter, but one set of fees.[93] The fraudulent insertion of a covenant to pay fees has been held to invalidate a mortgage.[94] A judgment including fees has been held not invalidated by the absence of a finding that they were reasonable.[95] An application for a modification of a judgment including fees has been held properly denied on the ground that the form of judgment had been consented to.[96] G. S. 1878 c. 81 § 44, regulating the amount of fees, is not applicable to railway mortgages.[97]

[77] Cooper v. Finke, 38–2, 35+469.
[78] Gesner v. Burdell, 18–497(444).
[79] See § 6416.
[80] R. L. 1905 § 4499.
[81] Griswold v. Taylor, 8–342(301).
[82] Perkins v. Stewart, 75–21, 77+434.
[83] Morse v. Home etc. Assn., 60–316, 62+112.
[84] Coles v. Yorks, 28–464, 10+775.
[85] Johnson v. N. W. etc. Assn., 60–393, 62+381.
[86] Swift v. Hennepin County, 76–194, 78+1107.
[87] Morse v. Home etc. Assn., 60–316, 62+112.
[88] Merrick v. Putnam, 73–240, 75+1047.
[89] Mjones v. Yellow Medicine Co. Bank, 45–335, 47+1072.
[90] Hobe v. Swift, 58–84, 59+831; Morse v. Home etc. Assn., 60–316, 62+112.
[91] Truesdale v. Sidle, 65–315, 67+1004; Eliason v. Sidle, 61–285, 63+730.
[92] Farnsworth etc. Co. v. Com. etc. Co., 87–179, 91+469.
[93] Eliason v. Sidle, 61–285, 63+730; Truesdale v. Sidle, 65–315, 67+1004.
[94] Coles v. Yorks, 28–464, 10+775.
[95] Thorpe v. Hanscom, 64–201, 66+1.
[96] Murray v. Chamberlain, 67–12, 69+474; Kingsley v. Anderson, 103–510, 116+112.
[97] Seibert v. Mpls. etc. Ry., 58–65, 59+826.

In an action to foreclose no formal proof of the value of the services of counsel need be made if the court is informed by the course of the trial of their value.[98]

FORECLOSURE BY ACTION

6426. Nature and object of action—The action is strictly judicial in its nature, proceeding according to the due course of common law, like any other ordinary action cognizable in courts of equity or common law.[99] It is in personam.[1] The object of the action is the enforcement of the security—the application of the property to the satisfaction of the debt or obligation secured.[2]

6427. Separate mortgages—Separate mortgages may be foreclosed in separate actions, though held by the same party.[3]

6428. Default—Evidence held to show a default authorizing a foreclosure.[4]

6429. For instalment—Coupon interest note—The holder of overdue coupon interest notes, secured by mortgage, may maintain an action to foreclose the mortgage, though the principal debt is not yet mature, and is held by another person who is made a party.[5]

6430. Notice of election—It is unnecessary, before commencing the action, to give notice of an election to treat the whole amount of the mortgage debt due upon default in payment of a part. If the facts alleged in the complaint entitle the plaintiff to such an election on several grounds, the election to treat the whole debt as due will be deemed to be made on all such grounds unless a contrary intention clearly appears.[6]

6431. Limitation of actions—Under the present statute the limitation is fifteen years.[7] Under former statutes it was ten [8] and twenty years.[9] The statute is inapplicable to foreclosure by advertisement.[10] It is inapplicable to the mortgage debt. An action to foreclose is governed by the six-year limitation so far as it is an action for the recovery of a personal judgment.[11] An action to foreclose will lie though an action on the mortgage debt is barred.[12] A recent statute defines the time when the period of limitation shall begin to run.[13] Prior to Laws 1901 c. 11, it was held that a partial payment which prevented the running of the statute against the mortgage debt would also prevent its running against an action to foreclose the mortgage.[14] When a mortgage is given to secure several separate notes the payment of one of them as it falls due does not toll the statute as to the others or the mortgage.[15] At

[98] Kingsley v. Anderson, 103–510, 116+112.

[99] Bardwell v. Collins, 44–97, 46+315; Stone v. Bassett, 4–298(215).

[1] Whalley v. Eldridge, 24–358; Bardwell v. Collins, 44–97, 46+315; Carson v. Cochran, 52–67, 53+1130.

[2] Sprague v. Martin, 29–226, 13+34; Banning v. Bradford, 21–308.

[3] Koppang v. Steenerson, 100–239, 111+153.

[4] Farwell v. Bale, 49–13, 51+621.

[5] Cleveland v. Booth, 43–16, 44+670.

[6] N. W. etc. Co. v. Allis, 23–337. See Fowler v. Woodward, 26–347, 4+231.

[7] R. L. 1905 § 4074; Laws 1907 c. 197; Laws 1909 c. 181.

[8] Laws 1870 c. 60; King v. Meighen, 20–264(237); Archambau v. Green, 21–520; Fisk v. Stewart, 26–365, 4+611; Bradley v. Norris, 63–156, 65+357.

[9] G. S. 1866 c. 66 § 11; Holton v. Meighen, 15–69(50); Bradley v. Norris, 63–156, 65+357.

[10] Golcher v. Brisbin, 20–453(407).

[11] Slingerland v. Sherer, 46–422, 49+237; Evans v. Staalle, 88–253, 92+951.

[12] Ozmun v. Reynolds, 11–459(341); Conner v. Howe, 35–518, 29+314; Evans v. Staalle, 88–253, 92+951. See Jones v. Tainter, 15–512(423); Bradley v. Norris, 63–156, 65+357.

[13] Laws 1907 c. 197; Laws 1909 c. 181. See, under former statute, Trudeau v. Germann, 101–387, 112+281.

[14] McManaman v. Hinchley, 82–296, 84+1018; Kenaston v. Lorig, 81–454, 84+323; Austin v. Barnum, 52–136, 53+1132; Carson v. Cochran, 52–67, 53+1130; Fisk v. Stewart, 24–97.

[15] McManaman v. Hinchley, 82–296, 84+1018.

present the running of the statute is not affected by the non-residence of any of the defendants.[16] Prior to Laws 1887 c. 69 the rule was otherwise.[17]

6432. Joinder of causes of action—Cases are cited below involving the joinder of causes of action.[18]

6433. Publication of summons—Jurisdiction cannot be acquired by publication of summons against resident defendants who are personally within the state and can be found therein.[19] An action to foreclose comes within the meaning of Laws 1864 c. 42 § 1, providing for the publication of summons.[20] G. S. 1878 c. 81 § 28 is void both as to resident and non-resident defendants.[21]

6434. Parties—The heirs of a deceased mortgagor are necessary parties and the administrator or executor is a proper party; but no deficiency judgment can be rendered against such parties. The personal claim for the mortgage debt must be presented for allowance to the probate court.[22] Strictly, a prior mortgagee is not a proper party, because the proper object of the action is to bar the equities of the mortgagor and rights accruing subsequent to the mortgage. But prior lienors may consent to become parties, or may be made such, where the object is to ascertain the extent of their claims, or to have the premises sold subject thereto or absolutely to create a fund out of which the several incumbrances shall be paid in their order, but such object must clearly appear from the complaint.[23] It is the general rule that the only proper parties are the mortgagor and the mortgagee, and those who have acquired rights under them in the mortgagor's estate; for these are the only persons having any rights or obligations growing out of the mortgage, or interested in any manner in the subject-matter of the action. A stranger claiming a title adverse and paramount to that of the mortgagor is not a proper party.[24] The principal debtor may be made a defendant in an action by his creditor to foreclose a mortgage held as collateral security for the principal debt.[25] In foreclosing a mortgage on a homestead the wife must be made a party in order to cut out her interest.[26] A mortgagee who is trustee. holding title to the security for all the bondholders as beneficiaries, is the proper party to institute foreclosure proceedings, but in case of unreasonable neglect, or a refusal to discharge his duty, any bondholder may bring an action to enforce the security for the common benefit.[27] All joint owners of the mortgage should be joined as plaintiffs.[28] When a second action is brought to foreclose as to parties not included in the first, the parties included in the first need not be made parties in the second.[29] Any person who has, or claims to have an interest in the property through the mortgagor may be made a defendant, and the mere fact that the relief asked against him is different from that asked against the mortgagor or other defendants is im-

[16] R. L. 1905 § 4074; Hill v. Townley, 45–167, 47+653.

[17] Whalley v. Eldridge, 24–358; Rogers v. Benton, 39–39, 38+765; Foster v. Johnson, 44–290, 46+350; Carson v. Cochran, 52–67, 53+1130.

[18] Nichols v. Randall, 5–304(240); Whiting v. Clugston, 73–6, 75+759; Bailey v. Anderson, 75–49, 77+414.

[19] Bardwell v. Collins, 44–97, 46+315.

[20] Crombie v. Little, 47–581, 50+823.

[21] Smith v. Hurd, 50–503, 52+922.

[22] Hill v. Townley, 45–167, 47+653.

[23] Foster v. Johnson, 44–290, 46+350. See Seibert v. Mpls. etc. Ry., 58–39, 59+822.

[24] Banning v. Bradford, 21–308. See Churchill v. Proctor, 31–129, 16+694; Walton v. Perkins, 33–357, 23+527; Cheever v. Converse, 35–179, 28+217; Wilson v. Jamison, 36–59, 29+887; Finlayson v. Crooks, 47–74, 49+398, 645.

[25] First Nat. Bank v. Lambert, 63–263, 65+451.

[26] Spalti v. Blumer, 56–523, 58+156.

[27] Seibert v. Mpls. etc. Ry., 52–148, 53+1134.

[28] Hawke v. Banning, 3–67(30).

[29] Morey v. Duluth, 69–5, 71+694.

material.[30] All persons bound by the lien of the mortgage must be made parties, to obtain an effective judgment.[31] A city may maintain an action.[32]

6435. Pleading—As to subsequent lienors it is sufficient to allege that they claim to have some interest in or lien on the premises, but that such interest or lien, if any, is subject and junior to the lien of the plaintiff's mortgage. It is for them to disclose the nature of their interests by answer.[33] It is probably unnecessary in the complaint to allege that no action or proceeding has been instituted at law to recover the debt secured by the mortgage.[34] An allegation of ownership of a note and mortgage by assignment held sufficient.[35] An allegation that one of the plaintiffs, the mortgagee, "holds the said mortgage and obligation in his name, for the joint use and benefit of the said plaintiffs" held sufficient to show a joint interest.[36] A complaint charging the defendants with a conspiracy against the plaintiff in negotiating the mortgage loan, one of the defendants being a loan agent of the plaintiff, held sufficient.[37] An answer denying any knowledge or information sufficient to form a belief as to an assignment of a mortgage, held properly stricken out as sham.[38] The intention with which a mortgage was purchased may be alleged directly and an answer to be good as a denial must deny the intention.[39] Under R. S. 1851 c. 70 § 30, it was necessary for husband and wife to answer jointly.[40] A complaint where a mortgage was given in consideration of the satisfaction of a judgment against the mortgagor held sufficient, the mortgagor having failed to execute a note to accompany the mortgage.[41] Failure to allege a default in the mortgage specifically held waived by failure to object in season. Granting foreclosure has been held not a departure from the complaint.[42] A complaint and findings held to entitle the plaintiff to a foreclosure of an equitable mortgage.[43]

6436. Counterclaims—In an action to foreclose a purchase-money mortgage the mortgagor may plead as a counterclaim damages from breach of the covenants in the deed to him.[44] A counterclaim for services held sufficiently pleaded and proved.[45] Certain facts alleged held to show a partial failure of consideration, but not to constitute a counterclaim.[46]

6437. Defences—An abortive foreclosure by advertisement is not a bar to a subsequent action to foreclose.[47] The mortgagor and his privies cannot set up as a defence that he had no title to the mortgaged premises.[48] It is no defence to the foreclosure of a purchase-money mortgage that there is an outstanding incumbrance against which the mortgagee has covenanted in his deed of conveyance.[49] It is a good defence that there is nothing due on the mortgage because there was no consideration for the note or obligation secured.[50] It is no defence as to a mortgagor, though he is in possession, that the lien of the mortgage was extinguished and the equity of redemption foreclosed by former

[30] Nichols v. Randall, 5-304(240).
[31] Whalley v. Eldridge, 24-358.
[32] Fergus Falls v. Fergus Falls H. Co., 80-165, 83+54.
[33] Howard v. Iron & L. Co., 62-298, 64+896. See Seager v. Burns, 4-141(93).
[34] See Jones v. Ewing, 22-157.
[35] Foster v. Johnson, 39-378, 40+255.
[36] Hawke v. Banning, 3-67(30).
[37] Whiting v. Clugston, 73-6, 75+759.
[38] Wheaton v. Briggs, 35-470, 29+170.
[39] Wilcox v. Davis, 4-197(139).
[40] Wolf v. Banning, 3-202(133).
[41] Volmer v. Stagerman, 25-234.
[42] Seibert v. Mpls. etc. Ry., 58-39, 59+822.
[43] Piper v. Sawyer, 73-332, 76+57.
[44] Lowry v. Hurd, 7-356(282).
[45] Phelps v. Compton, 72-109, 75+19.
[46] Lash v. McCormick, 17-403(381).
[47] Folsom v. Lockwood, 6-186(119); Lash v. McCormick, 17-403(381); Rogers v. Benton, 39-39, 38+765; Lindgren v. Lindgren, 73-90, 75+1034.
[48] Carson v. Cochran, 52-67, 53+1130.
[49] Bay View L. Co. v. Myers, 62-265, 64+816.
[50] Anderson v. Lee, 73-397, 76+24.

foreclosure proceedings.[51] It is no defence to an action by a city, at least as to purchasers with notice, that the loan by the city was ultra vires.[52] The pendency of another action for possession is not a bar.[53] It is no defence that the mortgage runs to a firm.[54] In an action to foreclose a mortgage given to secure money advanced to develop a mine, it has been held that a defence that the mortgagor had been prevented from complying with the terms of his contract by the conduct of the mortgagee was not supported by the evidence.[55]

6438. Issues which may be litigated—An adverse title, paramount to that of the mortgagor if valid, cannot be litigated.[56] The question of a fraudulent termination and forfeiture of a leasehold estate covered by the mortgage may be litigated.[57] So may the validity of a tax title which, if valid, would cut out the lien of the mortgage.[58] The validity of prior liens may be litigated where the object is to ascertain the extent of the claims and to have the premises sold subject thereto, or absolutely to create a fund out of which the several incumbrances shall be paid in their order.[59] If the mortgage is held as collateral security, the respective rights of all the parties to the transaction may be determined.[60] The rights and equities of all parties interested in the mortgaged premises are to be adjusted in the action, which proceeds, not against the property, but against the persons.[61]

6439. Jury trial—If a defendant is entitled to a jury trial of his personal liability he must demand it seasonably.[62]

6440. Burden of proof—The plaintiff has the burden of proving the debt and must produce the note on the trial or excuse its absence.[63]

6441. Findings—Amendment—Where, in findings directing a foreclosure, the amount is not stated, but the court afterwards makes an order fixing the amount, and directing that it be inserted in the findings, the order is to be deemed a part of the findings, though the amount be not actually inserted therein.[64] A motion to amend findings so as to order that the premises be sold in the inverse order of alienation, has been held properly denied, no such issue having been formed.[65]

6442. Judgment—*a. In general*—The judgment prescribed by R. L. 1905 § 4488, "adjudging the amount due" is not a personal judgment which may be docketed and become a lien, before sale of the mortgaged premises and the application of the proceeds upon the debt, as prescribed by R. L. 1905 § 4494.[66] If the plaintiff fails to establish his lien and right to foreclosure, but establishes a cause of action for the recovery of money, he may have an ordinary personal judgment, with all its incidents.[67] In all cases of foreclosure it is necessary to have a judgment adjudging the amount due on the mortgage in order to determine the sum to be realized out of the security; and, in cases where the plaintiff is not entitled to a personal judgment for the debt, this is its only

[51] Herber v. Christopherson, 30–395, 15+676.

[52] Fergus Falls v. Fergus Falls H. Co., 80–165, 83+54.

[53] Coles v. Yorks, 31–213, 17+341.

[54] Foster v. Johnson, 39–378, 40+255.

[55] Farwell v. Bale, 49–13, 51+621.

[56] Banning v. Bradford, 21–308.

[57] Churchill v. Proctor, 31–129, 16+694.

[58] Wilson v. Jamison, 36–59, 29+887; Norton v Met. Life Ins. Co., 74–484, 77+298, 539.

[59] Foster v. Johnson, 44–290, 46+350. See Buettel v. Harmount, 46–481, 49+250.

[60] First Nat. Bank v. Lambert, 63–263, 65+451.

[61] Bardwell v. Collins, 44–97, 46+315. See Lahiff v. Hennepin County etc. Assn., 61–226, 63+493.

[62] Herber v. Christopherson, 30–395, 15+676; Spalti v. Blumer, 63–269, 65+454.

[63] Gray v. Blabon, 74–344, 77+234.

[64] Baker v. Byerly, 40–489, 42+395.

[65] Norton v. Met. Life Ins. Co., 74–484, 77+298, 539.

[66] Thompson v. Dale, 58–365, 59+1086. See Thompson v. Bickford, 19–17(1).

[67] Thompson v. Dale, 58–365, 59+1086; Louisville B. Co. v. Blake, 70–252, 73+155.

purpose and effect.[68] The judgment prescribed by R. L. 1905 § 4488 determines all the issues in the action, and provides just the relief to which the plaintiff is entitled. When it is entered, all controversy as to the respective rights between the plaintiff and the several defendants with respect to the mortgage and the right to enforce it is determined. All that follows it—the sale, report of sale, confirmation, etc.—are merely to carry into effect and enforce the determination of the rights of the parties which the judgment makes.[69] The judgment should not attempt to bar interests prior to the mortgage.[70] An entry of a judgment in a "Decree Book" has been held not fatal.[71] The judgment is protected by the same presumptions of regularity and jurisdiction as an ordinary judgment. It is a final judgment, and is not subject to collateral attack for irregularity.[72] It binds the parties and their privies by estoppel as an ordinary judgment, and is conclusive as to the right to foreclose, including the validity of the mortgage.[73] It should direct the sale of only so much of the land as may be necessary to satisfy the judgment.[74] The title sold rests on the judgment. There is no going behind the judgment to ascertain if the mortgage was sufficient to operate as a conveyance.[75]

b. Relief which may be awarded—A homestead may be set off.[76] A second mortgagee cannot have a decree of foreclosure conditional on the mortgagor redeeming from a sale under the first mortgage.[77]

6443. Modification of judgment—A judgment cannot be modified so as to affect subsequent purchasers except on notice to them.[78] An order for judgment on default has been held properly modified before entry of judgment, without notice to the defendant.[79] A motion to modify a judgment by striking out a provision for attorney's fees has been held properly denied.[80]

6444. Opening default judgment—The court may open a default judgment and allow a defendant to answer, as in an ordinary case, and its action will not be reversed on appeal except for a clear abuse of discretion.[81]

6445. Subsequent action against omitted parties—A mortgagee, or his assignee, may maintain a second action against parties omitted in the first, and the parties included in the first may be omitted in the second.[82] A purchaser at the forecosure sale in the first action may also maintain such an action.[83]

6446. Who bound by judgment—The judgment binds the parties and their privies the same as a judgment in an ordinary action.[84] Persons not made parties, and not in privity with parties, are unaffected, the action being in personam.[85] Parties as to whom the action is dismissed are not bound.[86] A mortgagee pendente lite has been held bound.[87]

[68] Slingerland v. Sherer, 46–422, 49+237.
[69] Dodge v. Allis, 27–376, 7+732.
[70] McLaughlin v. Nicholson, 70–71, 72+827, 73+1; McLaughlin v. Betcher, 87–1, 91+14. See Banning v. Bradford, 21–308; Seibert v. Mpls. etc. Ry., 58–39, 59+822; International T. Co. v. Ufton Grove L. & I. Co., 71–147, 73+716; Koppang v. Steenerson, 100–239, 111+153.
[71] Thompson v. Bickford, 19–17(1).
[72] Smith v. Valentine, 19–452(393); Hotchkiss v. Cutting, 14–537(408).
[73] Northern T. Co. v. Crystal Lake C. Assn., 67–131, 69+708.
[74] See R. L. 1905 § 4488; Johnson v. Williams, 4–260(183).
[75] Foster v. Johnson, 39–378, 40+255.
[76] Coles v. Yorks, 31–213, 17+341.
[77] Potter v. Marvin, 4–525(410).
[78] Aldrich v. Chase, 70–243, 73+161.
[79] Louisville B. Co. v. Blake, 70–252, 73+155.
[80] Murray v. Chamberlain, 67–12, 69+474.
[81] Russell v. Blakeman, 40–463, 42+391; Northern T. Co. v. Crystal Lake C. Assn., 67–131, 69+708. See, as to effect of reversal of judgment on title of purchaser at sale, Smith v. Valentine, 19–452(393).
[82] Foster v. Johnson, 44–290, 46+350; Morey v. Duluth, 69–5, 71+694; Rogers v. Holyoke, 14–220(158); Beeson v. Day, 78–88, 80+864.
[83] Rogers v. Holyoke, 14–220(158).
[84] Northern T. Co. v. Crystal Lake C. Assn., 67–131, 69+708.
[85] Rogers v. Holyoke, 14–220(158); Martin v. Fridley, 23–13; Whalley v. Eldridge, 24–358; Whitney v. Huntington, 37–197,

6447. Sale—The sale is conducted according to the provisions of law relating to sales of realty on execution.[88] Where a mortgage covers an exempt homestead, and additional lands, the mortgagor is entitled to have the non-exempt property first sold and applied to the satisfaction of the mortgage debt.[89] An order for the sale of the premises as one tract has been sustained, it not appearing by the record that the premises consisted of several tracts.[90] It is a judicial sale.[91] It should be for no more than necessary to satisfy the mortgage.[92] Where a judgment directs a sale to be made by the sheriff, it may be made by his deputy.[93] Purchasers of portions of the mortgaged premises are entitled to have them sold in the inverse order of alienation.[94]

6448. Purchase by trustee—If a trustee bids in the property in his own name for the use and benefit of the cestuis que trust, he is not liable for the amount of the bid.[95]

6449. Distribution of proceeds of sale—Surplus—If a mortgage secures several notes held by different parties, the proceeds, if insufficient to pay all the notes in full, should, in the absence of an agreement to the contrary, be applied pro rata towards the payment of all the notes without regard to the time of their transfer or maturity.[96] If the sheriff distributes the proceeds as directed by the judgment, he is not liable.[97] A prior mortgagee has been held not entitled to have his lien and taxes paid out of the proceeds.[98]

6450. Confirmation of sale—The confirmation of a report of sale has the effect of a judgment and cannot be attacked collaterally.[99] Until confirmation the proceedings are not complete and a sale may be set aside for cause.[1]

6451. Setting aside sale and ordering resale—A sale cannot be set aside or a resale ordered until the coming in of the report of the original sale. It may be done any time between the coming in of the report and the confirmation of the sale.[2] The fact that no report of sale has been made is no ground for issuing an injunction restraining a party from moving to set aside the sale. A junior mortgagee may move to set aside a sale, at least if he is a party to the action.[3] After a final decree a sale cannot be set aside for irregularities to which objection might have been made on the application to confirm the sale, at least without a showing excusing the failure to make such objection.[4]

6452. Final decree—Prior to Laws 1897 c. 253, provision was made for a final decree.[5] It was held that an appeal would lie from the decree; that the court might decree the title in any person named by the purchaser or his assigns;[6] that one redeeming from the purchaser was entitled to a decree;[7]

33+561; Harper v. East Side Synd., 40-381, 42+86; Bardwell v. Collins, 44-97, 46+315; Spalti v. Blumer, 56-523, 58+156; Nolan v. Dyer, 75-231, 77+786; Beeson v. Day, 78-88, 80+864. See Talbot v. Barager, 37-208, 34+23; Banning v. Sabin, 41-477, 43+329.

[86] Banning v. Sabin, 41-477, 43+329; Id., 45-431, 48+8.

[87] Banning v. Sabin, 51-129, 53+1.

[88] R. L. 1905 § 4488. See §§ 3530-3539. See, for practice under G. S. 1851 c. 94 § 58, Smith v. Valentine, 19-452(393).

[89] Horton v. Kelly, 40-193, 41+1031.

[90] Von Hemert v. Taylor, 76-386, 79+319.

[91] Stone v. Bassett, 4-298(215).

[92] Johnson v. Williams, 4-260(183).

[93] Hotchkiss v. Cutting, 14-537(408).

[94] See § 6466.

[95] Mareck v. Mpls. T. Co., 74-538, 77+428.

[96] Wilson v. Eigenbrodt, 30-4, 13+907; Hall v. McCormick, 31-280, 17+620. See Borup v. Nininger, 5-523(417); Solberg v. Wright, 33-224, 22+381.

[97] Hill v. Rasicot, 34-270, 25+604.

[98] International T. Co. v. Ufton Grove L. & I. Co., 71-147, 73+716.

[99] Hotchkiss v. Cutting, 14-537(408); Smith v. Valentine, 19-452(393); Coles v. Yorks, 36-388, 31+353.

[1] Rogers v. Holyoke, 14-220(158); Gilman v. Holyoke, 14-138(104). See, as to confirmation under former statute, Smith v. Valentine, 19-452(393).

[2] Rogers v. Holyoke, 14-220(158); Gilman v. Holyoke, 14-138(104).

[3] Rogers v. Holyoke, 14-220(158).

[4] Coles v. Yorks, 36-388, 31+353.

[5] G. S. 1894 § 6066.

[6] Dodge v. Allis, 27-376, 7+732.

[7] Bovey v. Tucker, 48-223, 50+1038.

that the decree might contain a provision for the recovery of the possession;[8] that the decree was conclusive as to the regularity of the prior proceedings and not open to collateral attack; that the decree could not be set aside for irregularities to which objection might have been made on application to confirm the sale, at least, without a showing excusing the failure to make such objection;[9] that a party was entitled to a decree upon the expiration of the redemption period, and that the court could not extend the period.[10]

6453. Recovery of possession—When possession of lands is wrongfully withheld after expiration of the time of redemption, the court may compel delivery of possession to the party entitled thereto by order directing the sheriff to effect such delivery.[11] It has been held improper to include an order in a final decree.[12] An order in which the premises are not properly described should not issue.[13]

6454. Redemption—The right of redemption is regulated by statute.[14] The period of redemption cannot be shortened or extended by the court.[15] A junior mortgagee, not a party to the action to foreclose, cannot redeem from the sale, but must, if he redeems at all, redeem from the entire mortgage, by paying the whole of it.[16]

6455. Strict foreclosure—In appropriate cases the court may award a strict foreclosure, but no final decree can be entered until one year after the judgment adjudging the amount due. The remedy is very rarely "just and appropriate."[17] By a strict foreclosure the conditional title acquired by the mortgage is made absolute in the mortgagee, the property being thus applied directly to the satisfaction of the debt.[18]

RECEIVER

6456. Effect of statute—The statute declaring that "a mortgage of real property is not to be deemed a conveyance, so as to enable the owner of the mortgage to recover possession of the real property without a foreclosure"[19] restricts, but does not abrogate, the power of a court to appoint a receiver in an action to foreclose. A receiver may still be appointed to protect such equitable rights of the mortgagee as do not rest on the common-law principle of a legal estate transferred by the mortgagor.[20]

6457. At instance of purchaser at foreclosure sale—A purchaser at a foreclosure sale may have a receiver appointed during the redemption period to collect the rents and profits for the preservation of the premises, but not for the payment of the mortgage debt.[21]

[8] Belknap v. Van Riper, 76-268, 79+103.
[9] Coles v. Yorks, 36-338, 31+353.
[10] State v. Kerr, 51-417, 53+719.
[11] R. L. 1905 § 4497; Coles v. Yorks, 36-388, 31+353; Cullen v. Minn. L. & T. Co., 60-6, 61+818; Marshall & I. Bank v. Cady, 75-241, 77+831.
[12] Belknap v. Van Riper, 76-268, 79+103.
[13] Coles v. Yorks, 36-388, 31+353.
[14] R. L. 1905 § 4496. See Stone v. Bassett, 4-298(215) (effect of act of March 5, 1853, abolishing the court of chancery); Nash v. Adams, 55-46, 56+241 (mortgagee's right to redeem from prior liens held not foreclosed).
[15] Hollingsworth v. Campbell, 28-18, 8+873; Whittacre v. Fuller, 5-508(401).
[16] Martin v. Fridley, 23-13. See Banning v. Sabin, 45-431, 48+8.
[17] R. L. 1905 § 4498; Morey v. Duluth, 69-5, 71+694; Hollingsworth v. Campbell, 28-18, 8+873; Wilder v. Haughey, 21-101. Prior to Laws 1870 c. 58 the power was less restricted, Stone v. Bassett, 4-298 (215); Heyward v. Judd, 4-483(375); Pace v. Chadderdon, 4-499(390); Drew v. Smith, 7-301(231); Bacon v. Cottrell, 13-194(183).
[18] Sprague v. Martin, 29-226, 13+34.
[19] R. L. 1905 § 4441.
[20] Lowell v. Doe, 44-144, 46+297; Marshall & I. Bank v. Cady, 76-112, 78+978.
[21] Nat. Fire Ins. Co. v. Broadbent, 77-175, 79+676.

6458. At instance of junior mortgagee—In an action to foreclose a junior mortgage, the insolvency of the mortgagor, the inadequacy of the security, and the failure of the mortgagor to apply the rents in preserving the security by paying delinquent taxes and interest on a senior mortgage, justify the appointment of a receiver.[22]

6459. Grounds for appointment—The only ground on which a receiver can be appointed is that it is necessary to prevent waste and protect and preserve the premises. A receiver cannot be appointed on the theory that the rents and profits are a part of the security. They can be used through a receiver only for the purpose of protecting and preserving the premises and not for the purpose of paying the mortgage debt. The fact that the premises are inadequate security, or that the mortgagor is insolvent, or both combined, is, of itself alone, no ground for the appointment of a receiver, though it may be a very material consideration in passing on the propriety of appointing a receiver for the purpose of preserving the premises.[23] Leaving the property vacant to its detriment, failing to pay taxes and insurance, neglecting to make necessary repairs, closing a hotel and neglecting to pay the interest on prior mortgages, have been held grounds for appointing a receiver.[24]

6460. A matter of discretion—The appointment of a receiver is largely a matter of discretion—a discretion to be cautiously and sparingly exercised.[25] The action of the court will not be reversed on appeal except for a clear abuse of discretion.[26]

6461. Purpose—Property affected—A receivership in an action to foreclose is only for the purposes of the foreclosure, and, however general the language of the appointment, affects only the property covered by the mortgage. Its purpose is to preserve the premises for the benefit of the mortgagee.[27]

6462. Bars collateral action for rents and profits—When a receiver of the rents and profits has been appointed, the right to them cannot be determined in a collateral action where all the parties interested are not before the court and there has been no accounting or settlement with the receiver.[28]

6463. Continuation of receivership—The same facts that would justify a court in appointing a receiver during the pendency of the action would justify it in providing in the final judgment that the receivership should be continued.[29]

6464. Of homestead—A receiver may be apppointed of a mortgaged homestead, but a court should require a somewhat stronger showing than in an ordinary case.[30]

6465. Receiver on assignment of rents—On a written assignment of the rents by the mortgagor to the mortgagee, it has been held that the mortgagee

[22] Haugan v. Netland, 51–552, 53+873; Farmers' Nat. Bank v. Backus, 64–43, 66+5; Id., 67–43, 69+638. See Lowell v. Doe, 44–144, 46+297; Seibert v. Mpls. etc. Ry., 52–246, 53+1151; Marshall & I. Bank v. Cady, 76–112, 78+978.

[23] Pioneer S. & L. Co. v. Farnham, 50–315, 52+897; Marshall & I. Bank v. Cady, 76–112, 78+978; Nat. Fire Ins. Co. v. Broadbent, 77–175, 79+676.

[24] Id.; Lowell v. Doe, 44–144, 46+297; Haugan v. Netland, 51–552, 53+873; Farmers' Nat. Bank v. Backus, 64–43, 66+5; Id., 67–43, 69+638; Marshall & I. Bank v. Cady, 75–241, 77+831. See also Schmidt v. Gayner, 59–303, 61+333, 62+265; Whiting v. Clugston, 73–6, 75+759; Shadewald v. White, 74–208, 77+42.

[25] Lowell v. Doe, 44–144, 46+297; Nat. Fire Ins. Co. v. Broadbent, 77–175, 79+676.

[26] Marshall & I. Bank v. Cady, 75–241, 77+831.

[27] Lowell v. Doe, 44–144, 46+297; St. Louis C. Co. v. Stillwater St. Ry., 53–129, 54+1064.

[28] Esch v. White, 82–462, 85+238, 718.

[29] Marshall & I. Bank v. Cady, 75–241, 77+831.

[30] Lowell v. Doe, 44–144, 46+297; Marshall & I. Bank v. Cady, 75–241, 77+831.

was entitled to foreclose the lien and have a receiver appointed to collect the rents.[31]

MARSHALING SECURITIES

6466. In general—Purchasers of portions of mortgaged premises, if they did not take cum onere, are entitled to have them applied to the satisfaction of the mortgage in the inverse order of alienation.[32] The holder of a mortgage, knowing that a third party has acquired an interest subsequent to the mortgage in a portion of the mortgaged premises, is put upon inquiry as to the equities of such third party before gratuitously releasing the other portion. If he fails to make such inquiry before he so releases, and the portion so released is sufficient in value to pay the whole mortgage debt, and such third party was entitled to have that portion applied first to the payment of the debt, the mortgage is, in equity, satisfied as to his portion.[33] A married man and his wife executed a mortgage on their homestead and other lands, and subsequently united in a conveyance with covenants of warranty of the other lands. It was held that the land remaining in the mortgagors, though their homestead, became the primary fund for the payment of the mortgage.[34] Where A held a mortgage on two tracts of land, one of which was the homestead of the mortgagor, and B held a judgment against him which was a lien only on the other tract, it was held that A would not be compelled to resort to the homestead first in order to leave the other tract as far as possible to B.[35] Where a mortgage covers an exempt homestead and additional lands, the mortgagor is entitled, upon the foreclosure, to have the non-exempt property first sold and applied to the satisfaction of the mortgage debt.[36] Where A and B have mortgages on the land of C, and A's mortgage covers more land than B's, B may compel A to satisfy his debt so far as possible, out of the land not covered by B's mortgage.[37] Where a creditor has security for his debt on the property of the principal debtor, and other security on the property of the surety, a court will not require him to first exhaust the security against the property of the principal debtor, if it appears that such property is of no value as security.[38]

6467. The land as the primary fund for payment of debt—As between a mortgagor and one who has assumed the payment of the mortgage the land is the primary fund for the payment of the debt.[39] If the owner of mortgaged premises sells portions of them to third parties, retaining part of them himself, the portion so remaining in the mortgagor is primarily liable for the debt secured by the mortgage, and the portions sold are liable in the inverse order of their alienation.[40]

ACCOUNTING

6468. In general—In an action to foreclose a mortgage on the interest of a partner the plaintiff may have an accounting before sale.[41] An accounting

[31] Farmers T. Co. v. Prudden, 84–126, 86+887.

[32] Johnson v. Williams, 4–260(183); Clark v. Kraker, 51–444, 53+706; Merchants' Nat. Bank v. Stanton, 55–211, 56+821; Howard v. Burns, 73–356, 76+202.

[33] Howard v. Burns, 73–356, 76+202.

[34] Merchants' Nat. Bank v. Stanton, 55–211, 56+821.

[35] McArthur v. Martin, 23–74.

[36] Horton v. Kelly, 40–193, 41+1031; Blake v. Boisjoli, 51–296, 53+637.

[37] See Whittacre v. Fuller, 5–508(401); London etc. Co. v. Tracy, 58–201, 59+1001.

[38] N. W. Mut. Life Ins. Co. v. Allis, 23–337.

[39] See § 6295.

[40] Johnson v. Williams, 4–260(183); Clark v. Kraker, 51–444, 53+706; Howard v. Burns, 73–356, 76+202.

[41] Churchill v. Proctor, 31–129, 16+694.

is an ordinary incident of an action to redeem from a mortgagee in possession.[42] In an action to enjoin foreclosure and for an accounting, it has been held that the court properly refused to allow any deduction to be made on account of the interest of the mortgagor in the estate of the mortgagee, where no settlement of the estate had been made.[43] In an action for an accounting against a mortgagee by absolute deed, where the mortgagee had exchanged the premises for other land which was conveyed to him and which he afterwards sold, it has been held that the mortgagee was chargeable with the value of the land received in exchange for the mortgaged premises, even though he did not realize its full value on selling it.[44] The statutory time of redemption cannot be extended to await the determination of an action for an accounting.[45] An assignee of the mortgagor's interest in the rents and profits, having no interest in the mortgaged premises, has been held not entitled to object to the terms of an accounting for the rents and profits.[46] In an action to redeem and for an accounting against a mortgagee by absolute deed, it has been held that the court erred in dismissing the action for insufficiency of the evidence.[47] In an action to restrain a foreclosure and for an accounting on the ground that a part of the money loaned had not been delivered to the mortgagor, it has been held that the findings were justified by the evidence and that they warranted the conclusions of law.[48] In an action for an accounting and for a reconveyance of the mortgaged premises, it has been held that the findings were justified by the evidence.[49]

INJUNCTION

6469. Duty to enjoin sale—A mortgagor may bar himself from subsequent relief by failing to enjoin an illegal sale.[50]

6470. Injunction granted to restrain sale—An injunction has been granted to restrain a sale until the existence of a default might be judicially determined;[51] where the mortgage was usurious;[52] where the mortgage was fraudulent;[53] where the mortgage was without consideration;[54] where the mortgage had never been delivered;[55] where separate tracts were threatened to be sold in gross;[56] where the mortgage was void because the husband did not join;[57] where the mortgage had been paid;[58] and where the sale would be a cloud on the title.[59]

6471. Injunction to restrain sale denied—An injunction has been denied to restrain a sale, pending an action by the mortgagor to have the mortgage adjudged satisfied;[60] and where the mortgagor threatened to foreclose without reserving a right of redemption.[61]

[42] Hoover v. Johnson, 47–434, 50+475; Madigan v. Mead, 31–94, 16+539.
[43] La Crosse Nat. Bank v. Thompson, 37–126, 33+907.
[44] Darling v. Harmon, 47–166, 49+686.
[45] Hoover v. Johnson, 47–434, 50+475.
[46] Anderson v. Minn. L. & T. Co., 68–491, 71+665, 819.
[47] Staughton v. Simpson, 69–314, 72+126.
[48] Gerdes v. Burnham, 78–511, 81+516.
[49] Floberg v. Joslin, 79–431, 82+681.
[50] Bidwell v. Whitney, 4–76(45); Dickerson v. Hayes, 26–100, 1+834; Johnson v. Williams, 4–260(183).
[51] O'Brien v. Oswald, 45–59, 47+316.
[52] Robinson v. Blaker, 85–242, 88+845.
[53] Conkey v. Dike, 17–457(434). See Pineo v. Heffelfinger, 29–183, 12+522.
[54] Devlin v. Quigg, 44–534, 47+258; Thielen v. Randall, 75–332, 77+992; Gerdes v. Burnham, 78–511, 81+516. See Dart v. Minn. L. & T. Co., 74–426, 77+288.
[55] Thielen v. Randall, 75–332, 77+992.
[56] Bay View L. Co. v. Myers, 62–265, 64+816.
[57] Yager v. Merkle, 26–429, 4+819.
[58] See Rand v. Perkins, 74–16, 76+950; Park v. Cross, 76–187, 78+1107; Montgomery v. McEwen, 9–103(93).
[59] Yager v. Merkle, 26–429, 4+819. See Hamilton v. Wood, 55–482, 57+208; Nolan v. Dyer, 75–231, 77+786.
[60] Montgomery v. McEwen, 9–103(93).
[61] Armstrong v. Sanford, 7–49(34).

6472. Miscellaneous cases—A purchaser at a foreclosure sale has been held entitled to enjoin a judgment creditor from redeeming on the ground that the judgment was void.[62] Where a cotenant redeemed from a foreclosure sale, it was held that he could not enjoin the foreclosure of a second mortgage made by his cotenant, as his lien for reimbursement was adequately protected by the recording act.[63] An injunction will issue to prevent waste by a mortgagor in possession.[64] A purchaser at a foreclosure sale not in possession, has been held not entitled to an injunction to restrain a tenant of the mortgagor from removing crops after the expiration of the redemption.[65] A person who could not be prejudiced by a redemption has been held not entitled to an injunction restraining the sheriff from paying to purchasers at the foreclosure sale money received on redemption.[66]

6473. Sale in disregard of injunction—A sale in disregard of an injunction is void.[67]

ACTIONS

6474. Action by purchaser for recovery of possession under unlawful detainer act—The action will not lie before foreclosure.[68] It will lie against a tenant of a party who has assumed the mortgage. It has been questioned whether it will lie against a stranger to the mortgage.[69] Damages for the detention are not recoverable.[70] A grantee of the mortgagor cannot defeat recovery by simply proving that the mortgagor had no title when he executed the mortgage, but he may do so by proving a paramount title and connecting himself with it.[71] The defendant cannot interpose an equitable defence requiring affirmative relief.[72] Where, on the evidence introduced, the title to the land becomes necessarily involved, the case must be certified to the district court.[73] A complaint has been held insufficient for failure to allege foreclosure. Proof of foreclosure cannot be made without preliminary proof of the mortgage and power.[74] A judgment for the plaintiff in an action in which the foreclosure proceedings were not put in issue, has been held not a bar to a subsequent action to redeem on the ground that the foreclosure was void.[75]

6475. Action for recovery of excess at foreclosure—Where a mortgagee forecloses under a power of sale and in his notice claims as due an amount greater than is allowed by the terms of the mortgage, after deducting payments, and bids in the property at that amount, he is liable to the mortgagor for the excess, in an action as for money had and received.[76] The only way that the mortgagee can escape liability is to show some ground for a court of equity to set aside the sale and order a new sale.[77] Where a mortgagor stands

[62] Hughes v. Olson, 74–237, 77+42.
[63] Buettel v. Harmount, 46–481, 49+250.
[64] See § 6231.
[65] Marks v. Jones, 71–136, 73+719.
[66] Chamblin v. Schlichter, 12–276(181).
[67] Lash v. McCormick, 14–482(359).
[68] Pioneer S. & L. Co. v. Powers, 47–269, 50+227; Cullen v. Minn. L. & T. Co., 60–6, 61+818; Heaton v. Darling, 66–262, 68+1087.
[69] Daniels v. Smith, 4–172(117).
[70] Aultman v. O'Dowd, 73–58, 75+756.
[71] Preiner v. Meyer, 67–197, 69+887.
[72] Petsch v. Biggs, 31–392, 18+101; Steele v. Bond, 32–14, 18+830; Norton v. Beckman, 53–456, 55+603; Lundberg v. Davidson, 68–328, 71+395, 72+71; Tilleny v. Knoblauch, 73–108, 75+1039.
[73] Spencer v. Annan, 4–542(426); Goenen v. Schroeder, 8–387(344).
[74] Anderson v. Schultz, 37–76, 33+440.
[75] Goenen v. Schroeder, 18–66(51).
[76] Bennett v. Healey, 6–240(158); Bailey v. Merritt, 7–159(102); Spottswood v. Herrick, 22–548; Seiler v. Wilber, 29–307, 13+136; Fagan v. People's etc. Assn., 55–437, 57+142; Eliason v. Sidle, 61–285, 63+730; Trafton v. Cornell, 62–442, 64+1148; Maudlin v. Am. etc. Assn., 63–358, 65+645; Truesdale v. Sidle, 65–315, 67+1004; Wyatt v. Quinby, 65–537, 68+109; Babcock v. Am. etc. Assn., 67–151, 69+718.
[77] Lane v. Holmes, 55–379, 57+132; Fagan v. People's etc. Assn., 55–437, 57+142; Truesdale v. Sidle, 65–315, 67+1004; Babcock v. Am. etc. Assn., 67–151, 69+718.

by and without objection permits the mortgagee to foreclose under a power for an amount authorized by the express terms of the mortgage, but for more than the legal effect of the mortgage requires, he is estopped from claiming the excess. The basis of this rule is that if a man expressly agrees to pay more than the law will enforce against him, he may abide by the terms of his contract if he chooses; and he does abide by them if he remains silent while the other party is proceeding to enforce the contract according to its terms.[78] No demand is necessary before bringing suit.[79] The sheriff is not a necessary party. Possession of the land is immaterial. It is unnecessary for the mortgagor to tender the amount due on the mortgage.[80] A second mortgagee redeeming from a first mortgagee has been held entitled to recover.[81] The burden of proving the payment of taxes claimed due in the notice of sale has been held on the defendant.[82] Interest is recoverable on the amount due.[83] Cases are cited below involving questions of pleading.[84]

6476. Action for damages from illegal sale—The mortgagor may maintain an action against the mortgagee for damages arising from an illegal foreclosure.[85]

6477. Action for rent collected by mortgagee—In an action by a grantee of the mortgagor against the mortgagee, for rent collected by the latter before the expiration of the redemption period, it has been held that a deficiency of the mortgage debt on foreclosure cannot be set up as a counterclaim.[86]

6478. Action for removal of buildings—In a statutory action under Laws 1869 c. 64, for the removal of a mortgaged building, it has been held that the existence of the mortgage lien must be established.[87]

6479. Action by second mortgagee for recovery of surplus—In an action by an assignee of a second mortgage to recover a surplus arising from a foreclosure sale on the first mortgage, it has been held necessary for the plaintiff to prove the debt secured by his mortgage.[88] A right of action in a second mortgagee against the mortgagor for a surplus received by the latter on a foreclosure of a first mortgage, has been held barred by lapse of time.[89]

6480. Action to have mortgage adjudged satisfied—Where a mortgage which has been satisfied has been assigned, an action will lie to have it adjudged satisfied against both mortgagee and assignee.[90] A mortgagee may foreclose under a power pending an action by the mortgagor to have it adjudged satisfied.[91] The assignor of a mortgage, who covenants that it is unpaid, is not a necessary party to an action against the assignee to have the mortgage adjudged to have been paid prior to the assignment.[92] A finding that a specific amount is still unpaid and that the action should therefore be dismissed, will not conclude the parties in a subsequent litigation involving an issue as to the amount unpaid.[93]

[78] Bidwell v. Whitney, 4-76(45); Potter v. Marvin, 4-525(410); Culbertson v. Lennon, 4-51(26); Dickerson v. Hayes, 26-100, 1+834; Taylor v. Burgess, 26-547, 6+350; Seiler v. Wilber, 29-307, 13+136; Fagan v. People's etc. Assn., 55-437, 57+142; Lane v. Holmes, 55-379, 57+132.

[79] Bailey v. Merritt, 7-159(102); Perkins v. Stewart, 75-21, 77+434.

[80] Bailey v. Merritt, 7-159(102).

[81] Bennett v. Healey, 6-240(158).

[82] Simmer v. Blabon, 74-341, 77+233.

[83] See Perkins v. Stewart, 75-21, 77+434; Taylor v. Burgess, 26-547, 6+350.

[84] Bailey v. Merritt, 7-159(102) (complaint sustained—facts creating an estoppel should be set up by answer); Spottswood v. Herrick, 22-548 (complaint sustained though flagrantly indefinite—demurrer held not frivolous).

[85] Lowell v. North, 4-32(15); Folsom v. Lockwood, 6-186(119).

[86] Spencer v. Levering, 8-461(410).

[87] Bean v. Cochran, 24-60.

[88] Gray v. Blabon, 74-344, 77+234.

[89] Ayer v. Stewart, 14-97(68).

[90] Galloway v. Litchfield, 8-188(160).

[91] Montgomery v. McEwen, 9-103(93).

[92] Redin v. Branhan, 43-283, 45+445.

[93] Woolsey v. Bohn, 41-235, 42+1022.

6481. Action to cancel mortgage—The action must be brought in the county where the land lies.[94] A party has been held to have lost his right to cancelation of a mortgage on the ground that he was of unsound mind when he executed it, by laches and ratification.[95] A complaint in an action against a mutual building and loan association for the cancelation of a mortgage on the ground of usury has been sustained.[96] Where a mortgagee, without proper excuse, refuses to pay over to a mortgagor the full amount of the loan agreed upon, an action to cancel the mortgage will lie, proper terms being imposed for the repayment of the portion of the loan received.[97] In an action to cancel a mortgage on the ground that the agent of the mortgagee had not delivered the money to the mortgagor, it was held error to exclude evidence that the mortgagee had directed the agent to apply the money for the benefit of another person for whom he was also acting as agent.[98] An action may be maintained on the ground that the plaintiff did not execute the mortgage.[99] It has been held that an action will not lie against the mortgagee by one whose only estate or interest in the land is founded on a title adverse, and, if valid, paramount to that of the mortgagor.[1]

6482. Action to reform and foreclose—In an action to reform a mortgage, it has been held that the answer stated a counterclaim to foreclose the same mortgage.[2] Equity will help a defectively executed mortgage given upon a valuable consideration and reform and enforce the same as against the maker and subsequent assignees and lienors having notice.[3] An alteration by a stranger has been held not to prevent the reformation and foreclosure of a mortgage.[4] In an action to reform and foreclose a mortgage of a corporation in which the premises were described incorrectly by mistake, it has been held that a director of the corporation could not take advantage of the mistake.[5]

6483. Action for fraudulent prevention of redemption—A party who has been deprived of the right to redeem through the fraud of another may be restored to his right in an action against such wrongdoer. The complaint need not allege a tender or contain an offer to pay the amount due.[6]

6484. Action for deficiency—It is a good defence to an action for a deficiency that the sale was had on an illegal notice resulting in a sale for less than the value of the property, if the property was of sufficient value to have satisfied the debt on a proper sale. It is no answer to such a defence that the mortgagor had a right to redeem.[7] The mortgagee cannot recover for a deficiency arising from a claim of excessive interest.[8] After a sale has been confirmed at the instance of the mortgagor, he cannot assert its invalidity in an action for a deficiency.[9]

6485. Action to redeem from foreclosure sale—*a. When lies*—After a foreclosure by advertisement for more than is actually due the court may, upon a proper showing, allow the mortgagor to redeem by paying what was justly due on the mortgage. But the mortgagor must show an excuse for not applying to the court before the foreclosure to prevent a sale for more than was due.[10]

[94] Kommer v. Harrington, 83–114, 85+939.
[95] Whitcomb v. Hardy, 73–285, 76+29.
[96] Birch v. Security S. & L. Assn., 71–112, 73+513.
[97] Payne v. Loan & G. Co., 54–255, 55+1128.
[98] Thielen v. Randall, 75–332, 77+992.
[99] Chamblin v. Schlichter, 12–276(181).
[1] Banning v. Bradford, 21–308.
[2] Lahiff v. Hennepin Co. etc. Assn., 61–226, 63+493.
[3] Lebanon S. Bank v. Hollenbeck, 29–322, 13+145.
[4] Ames v. Brown, 22–257.
[5] Gill v. Russell, 23–362.
[6] Kling v. Childs, 30–366, 15+673. See Nolan v. Dyer, 75–231, 77+786.
[7] Lowell v. North, 4–32(15).
[8] Culbertson v. Lennon, 4–51(26). See Bidwell v. Whitney, 4–76(45); Banker v. Brent, 4–521(408).
[9] Blake v. McKusick, 10–251(195).
[10] Dickerson v. Hayes, 26–100, 1+834.

b. Parties—A person who, without authority, assumed to act as the agent of the second lien creditor in filing a notice of intention to redeem from the foreclosure of the first lien, is not a proper party to an action brought by the third lien creditor to compel a redemption under his lien without paying the amount of the second lien. Another person who, after said notice of intention to redeem was filed, purchased the second lien, procured an assignment of it in the name of the holder of the first lien, and under it redeemed in his name from the first lien, all without his authority, is a proper party defendant to such action.[11]

c. Pleading—Allegations in a complaint as to title and tender have been held sufficient.[12] Where the plaintiff had been unlawfully deprived of the privilege of redeeming by the defendant, it was held that the complaint need not allege a tender or contain an offer to pay the amount due.[13] A complaint has been held insufficient because the plaintiff did not allege that, in his offer or attempt to redeem, he produced to the sheriff a certified copy of his mortgage, or an affidavit showing the amount actually due thereon.[14]

d. Tender—A tender of the amount required to redeem must be kept good, in order to be effectual as the basis of a subsequent action to compel a redemption, brought after the time for redemption has expired.[15]

6486. Action to redeem from mortgage—*a. Limitation of actions*—The limitation on actions to redeem, adopted by analogy, is the time within which an action to foreclose may be brought.[16] The time begins to run from the time the mortgagee goes into possession. Hence there may be a right to redeem after the right to foreclose is barred.[17] The time is not extended by the fact that, owing to the mortgagor being out of the state, the mortgagee may bring his action to foreclose after the ten years.[18]

b. Tender unnecessary—A tender before suit, or even a formal offer to pay in the complaint, is unnecessary.[19]

c. Defences—The fact that in addition to securing an indebtedness, one of the motives of a grantor in executing a deed absolute in terms, but in intention and legal effect a mortgage, was to hinder and delay his creditors, is not a defence.[20] A judgment in unlawful detainer proceedings for possession after foreclosure by advertisement is not a defence.[21] Where a release or settlement is set up as a bar, it must appear to have been fairly made, to be free from fraud, actual or constructive, and not unconscionable.[22] Possession or want of possession by either the mortgagor or mortgagee is not a defence.[23]

d. Pleading—If a claim is made for rents and profits there should be a foundation therefor laid in the complaint.[24]

e. Judgment—The judgment must fix the time within which the plaintiff may redeem. It has a double aspect: first, as establishing the right to redeem and fixing the conditions thereof; second, as a strict foreclosure of the mortgage, if the plaintiff fails to comply with such conditions. The judgment must

[11] Dunn v. Dewey, 75–153, 77+793.
[12] Thompson v. Foster, 21–319; Dunn v. Dewey, 75–153, 77+793.
[13] Kling v. Childs, 30–366, 15+673.
[14] Dunn v. Dewey, 75–153, 77+793.
[15] Dunn v. Hunt, 63–484, 65+948. See Dunn v. Dewey, 75–153, 77+793.
[16] Holton v. Meighen, 15–69(50); King v. Meighen, 20–264(237); Parsons v. Noggle, 23–328; Fisk v. Stewart, 26–365, 4+611; Livingston v. Ives, 35–55, 27+74; Rogers v. Benton, 39–39, 38+765; Marshall v. Thompson, 39–137, 39+309; Miller v. Smith, 44–127, 46+324; Bradley v. Norris, 63–156, 65+357; Backus v. Burke, 63–272, 65+459.
[17] Bradley v. Norris, 63–156, 65+357.
[18] Parsons v. Noggle, 23–328.
[19] Nye v. Swan, 49–431, 52+39.
[20] Livingston v. Ives, 35–55, 27+74.
[21] Goenen v. Schroeder, 18–66(51).
[22] Niggeler v. Maurin, 34–118, 24+369.
[23] Parsons v. Noggle, 23–328.
[24] Hollingsworth v. Campbell, 28–18, 8+873.

allow the plaintiff at least one year in which to redeem. The judgment need not mention rents and profits, if no foundation is made in the complaint.[25]

6487. Action to set aside foreclosure sale—*a. Statute—Limitation of actions*—The statute [26] is inapplicable to an action of ejectment against a mortgagor who has remained in actual possession since the sale.[27] It is valid, as a statute of limitations, if the purchaser goes into possession.[28] The statute is only applicable to certain specified "defects." It is inapplicable where there is an entire want of authority to exercise the power of sale, as where a stranger assumes to foreclose [29] or an assignment is not recorded.[30] It presupposes the existence of the conditions authorizing the exercise of the power and deals only with certain specified irregularities in its exercise.[31] If construed literally, it covers any defect in the notice.[32] It has been held applicable where the notice of sale did not state the amount due on each lot where the mortgage constituted a specfic lien on each of several lots; [33] where the notice of sale was not published the requisite time; [34] and where the notice of sale contained an inaccuracy as to the date when the mortgage was recorded.[35] A party must move promptly as soon as he has notice of a foreclosure, for the statute provides that the action must be commenced in all cases "with reasonable diligence." [36] The statute operates to validate defective sales.[37]

b. Laches—If the defect in the sale is one of those included in the statute,[38] the mortgagor must move with great promptness. Knowledge of the foreclosure puts him on inquiry as to the regularity of the proceedings.[39] If the defect is one of substance the same promptitude is not required,[40] but even in such cases the mortgagor may lose his title by laches, as against bona fide purchasers of the record title. The adverse possession of such purchasers charges him with notice and imposes on him the duty to act promptly.[41] The mortgagor may enforce his legal remedies until barred by the statute of limitations.[42]

c. Parties plaintiff—A party cannot complain of the infraction of a statutory requirement not designed for his protection; at least, if he has not been prejudiced.[43] A mere stranger cannot object.[44] A judgment creditor with a lien on the land may maintain an action to have a sale set aside,[45] and he may do so without showing the insolvency of the judgment debtor, or that the mortgaged property is of greater value than the mortgage debt.[46] When a trustee purchases the trust property in his own name, the purchase is not void, but voidable at the election of the cestui que trust. No one else can question it.[47] A mortgagee who discovers an error in his own sale, may have a resale ordered, or the mortgagor required to waive the error on the record.[48]

[25] Hollingsworth v. Campbell, 28-18, 8+875.
[26] R. L. 1905 § 4477.
[27] Sanborn v. Petter, 35-449, 29+64.
[28] Russell v. Akeley, 45-376, 48+3.
[29] Bausman v. Kelley, 38-197, 36+333.
[30] Burke v. Backus, 51-174, 53+458; Burke v. Baldwin, 51-181, 53+460.
[31] Burke v. Backus, 51-174, 53+458.
[32] Bitzer v. Campbell, 47-221, 49+691. See Saxe v. Rice, 64-190, 66+268.
[33] Id.
[34] Russell v. Akeley, 45-376, 48+3; Mogan v. Carter, 54-141, 55+1117.
[35] Russell v. Akeley, 45-376, 48+3.
[36] Marcotte v. Hartman, 46-202, 48+767. See Saxe v. Rice, 64-190, 66+268.
[37] Johnson v. Peterson, 90-503, 97+384.
[38] R. L. 1905 § 4477.
[39] Marcotte v. Hartman, 46-202, 48+767; Abbott v. Peck, 35-499, 29+194; Clark v. Kraker, 51-444, 53+706.
[40] Hull v. King, 38-349, 37+792; Burke v. Backus, 51-174, 53+458.
[41] Bausman v. Kelley, 38-197, 36+333. See Sanborn v. Eads, 38-211, 36+338; Dimond v. Manheim, 61-178, 63+495.
[42] Welsh v. Cooley, 44-446, 46+908.
[43] Holmes v. Crummett, 30-23, 13+924.
[44] Baldwin v. Allison, 4-25(11); Blake v. McKusick, 8-338(298); Saxe v. Rice, 64-190, 66+268.
[45] Swain v. Lynd, 74-72, 76+958; Spooner v. Travelers Ins. Co., 76-311, 79+305.
[46] Peaslee v. Ridgway, 82-288, 84+1024.
[47] Baldwin v. Allison, 4-25(11).
[48] Blake v. McKusick, 8-338(298).

A mortgagor cannot object to a foreclosure by the party holding the legal title to the power, on the ground that third parties have an interest in the mortgage.[49]

d. Pleading and practice—An action to set aside a sale is an equitable one and must proceed on equitable principles. The complaint should disclose facts explaining delays which would, unexplained, appear to be unreasonable.[50] An averment that the sale did not take place at the time specified in the notice, and that no postponement of the sale was ever given, alleges no fact on which issue can be taken. The facts constituting the irregularity must be alleged.[51] A complaint in an action to set aside a sale on the ground that separate tracts were sold in gross has been held insufficient.[52] An allegation that the person on whom notice was served "was not a person of suitable age and discretion" has been held a mere conclusion of law.[53] A complaint in an action to set aside a sale because the notice of sale did not state the amount due on each tract separately has been held sufficient.[54] A complaint in an action by a judgment creditor to set aside a sale because of failure to serve notice of sale on an occupant has been sustained.[55] A mortgagee may have his own sale set aside, but an action for that purpose is properly dismissed on the filing of a release by the mortgagor.[56] Under G. S. 1878 c. 75 § 25, requiring a deposit in court of the amount for which the property was sold, it was held that the deposit need not be made before bringing the action.[57] In an action to set aside a sale for failure to serve notice on the occupant, it has been held error for the court to refuse to make a finding as to the fact of residence.[58] The judgment binds only parties and their privies.[59]

e. Reimbursement for improvements—In an action against a mortgagee in possession to set aside a foreclosure and recover possession, it has been held that the mortgagee was entitled to reimbursement for improvements made in good faith.[60]

6488. Action for treble costs under R. L. 1905 § 4475—The action may be brought immediately after the sale, without waiting for the expiration of the redemption period.[61] Good faith is no defence. The burden of proof is on the plaintiff.[62] The remedy afforded by this statute is not exclusive,[63] and the one-year limitation is inapplicable to an ordinary action for the surplus.[64] One of the objects of requiring an affidavit of costs and disbursements is to enable the mortgagor to determine whether he has a cause of action under this section.[65] Whether a cause of action under the statute is assignable, is an open question.[66] A mortgagee is liable for treble the cost of postponement of sale charged to the mortgagor.[67] The statute is inapplicable to excessive charges actually paid or incurred.[68]

6489. Action for costs on failure to file affidavit of costs—On a failure to file an affidavit of costs and disbursements as required by statute [69] an action

[49] Bottineau v. Aetna etc. Co., 31–125, 16+849.
[50] Marcotte v. Hartman, 46–202, 48+767; Abbott v. Peck, 35–499, 29+194. See Sanborn v. Eads, 38–211, 36+338; Johnson v. Williams, 4–260(183).
[51] Ramsey v. Merriam, 6–168(104).
[52] Abbott v. Peck, 35–499, 29+194. See Clark v. Kraker, 51–444, 53+706.
[53] Temple v. Norris, 53–286, 55+133.
[54] Mason v. Goodnow, 41–9, 42+482.
[55] Swain v. Lynd, 74–72, 76+958.
[56] Blake v. McKusick, 8–338(298).
[57] Van Meter v. Knight, 32–205, 20+142.
[58] Brigham v. Conn. etc. Co., 74–33, 76+952.
[59] Maloney v. Finnegan, 40–281, 41+979.
[60] Bacon v. Cottrell, 13–194(183).
[61] Beal v. White, 28–6, 8+829.
[62] Hobe v. Swift, 58–84, 59+831.
[63] Eliason v. Sidle, 61–285, 63+730.
[64] Brown v. Baker, 65–133, 67+793.
[65] Johnson v. N. W. etc. Assn., 60–393, 62+381.
[66] Lynott v. Dickerman, 65–471, 67+1143.
[67] Hobe v. Swift, 58–84, 59+831.
[68] Johnson v. N. W. etc. Assn., 60–393, 62+381; Hobe v. Swift, 58–84, 59+831.
[69] R. L. 1905 § 4474.

will lie for the recovery of all costs and disbursements of the sale.[70] It is not a defence to such an action that a subsequent mortgagee is entitled to the surplus.[71] The one-year limitation of R. L. 1905 § 4475 is inapplicable.[72] A complaint has been held sufficient.[73] A mortgagor has been held not estopped by requesting the mortgagee to assign his certificate of sale to a third party.[74] No demand is necessary before bringing suit. A defendant has been held chargeable with interest.[75]

OFFENCES

6490. Removing mortgaged property—The removal by a mortgagor of a building from the mortgaged premises, not with intent to impair the value of the mortgage, but in performance of his duty to the public to remove a nuisance, does not make him liable to a criminal prosecution under the statute.[76]

6491. Selling mortgaged property—Indictment—It is necessary to allege that the defendant mortgaged the property,[77] but not that he was the owner thereof.[78] It is necessary to allege an intent to defraud the mortgagee.[79] An indictment alleging a sale to one A. B., and divers other persons, has been held not double. Attaching the mortgage to the indictment as an exhibit instead of incorporating it in the indictment is objectionable, but not fatal on demurrer. The expression "having conveyed by mortgage," as used in the statute, simply means "having executed a mortgage." A growing crop of grain is personal property within the meaning of the statute.[80]

MOTIONS AND ORDERS

Cross-References

See Appeal and Error; Judgments, 5031; Pleading.

MOTIONS

6492. Definition—A motion is defined by statute as an application for an order.[81]

6493. Scope of remedy—It is impossible to define with precision the scope of the remedy by motion in our practice. It is far more extensive and various than at common law.[82] A motion is not a proper remedy for the determination of the substantive rights of parties. Such rights can only be determined upon a regular trial in which the parties have an opportunity to submit oral testimony and to insist upon a strict application of the rules of evidence.[83]

[70] Johnson v. N. W. etc. Assn., 60-393, 62+381 and cases under § 6353.
[71] Truesdale v. Sidle, 65-315, 67+1004; Itasca I. Co. v. Dean, 84-388, 87+1020.
[72] Brown v. Baker, 65-133, 67+793.
[73] Itasca I. Co. v. Dean, 84-388, 87+1020.
[74] Johnson v. Stewart, 75-20, 77+435.
[75] Perkins v. Stewart, 75-21, 77+434.
[76] R. L. 1905 § 5108; Chute v. State, 19-271(230).
[77] Collins v. Brackett, 34-339, 25+708.
[78] State v. Williams, 32-537, 21+746.
[79] State v. Ruhnke, 27-309, 7+264.
[80] State v. Williams, 32-537, 21+746.
[81] R. L. 1905 § 4123. See Tillman v. Jackson, 1-183(157).
[82] See Steele v. Taylor, 1-274(210); Temple v. Scott, 3-419(306); Davidson v. Lamprey, 16-445(402); Hall v. Southwick, 27-234, 6+799; State v. Macdonald, 30-98, 14+459; Willoughby v. St. Paul etc. Co., 80-432, 83+377.
[83] Forbush v. Leonard, 8-303(267); Semrow v. Semrow, 23-214; Barker v. Foster, 29-166, 12+460; Woodford v. Reynolds, 36-155, 30+757; Mueller v. Reimer, 46-314, 48+1120; Reilly v. Bader, 50-199, 52+522; Gerdtzen v. Cockrell, 50-546, 52+930; Mc-

6494. Refusal to entertain motion or exercise discretion—A party is entitled to have a motion heard and determined on the merits, if it is made in proper form.[84] While the supreme court cannot compel the district court to exercise its discretion in a particular way, yet it may compel it to exercise its discretion upon a proper motion.[85] No appeal lies from a refusal of the district court to entertain a motion,[86] unless the refusal is in effect a denial of the motion on the merits.[87]

6495. Strangers to record cannot move—In this state there is no such practice as permitting a stranger to an action to take any part, or make any application or motion in it, except on application for leave to become a party, and have his rights in the matter involved adjudicated. Nor can he become a party, not for the purpose of joining in the litigation, but of arresting it. There is no way in which a stranger to an action may stop the progress of it, but through an adverse action.[88] Parties seeking the protection and aid of a court, through the exercise of its power and jurisdiction over the subject-matter, and over the persons of other parties, must conform to all the prerequisites necessary to acquire the right, and thus enable themselves to appear as parties, before they can present their cases and ask for such protection and aid.[89]

6496. Time of hearing—Motions may be noticed for hearing and made at any time either in term or vacation. The court is always open for such purposes.[90]

6497. Notice of motion—*a. Necessity*—We have no general statute or rule of court providing in what cases notice of motion is necessary except that "a defendant appears in an action when he answers, demurs, or gives the plaintiff written notice of his appearance, after which he shall be entitled to notice of all subsequent proceedings therein. Until such appearance, notice of ordinary proceedings in the action need not be given."[91] Of course no notice is necessary in the case of motions made in the course of the trial. Where, upon the call of the calendar at the first day of the term, the court sets a day for hearing a motion, no notice is necessary though the clerk has previously set the case down for trial on a day certain.[92] An order made on a motion without notice, where notice is required, is not void but merely irregular.[93] An error in making an order without notice is cured by subsequently making the same order upon notice.[94] Where an order is improperly made without notice, but a party is given an opportunity to question the propriety of the order at a subsequent hearing, he is not prejudiced.[95]

b. Length—When notice of a motion is required, it must be served eight days before the time appointed for the hearing; but the judge, by an order to show cause, may prescribe a shorter time.[96]

c. Form and contents—Notices of motion must be accompanied with copies of the affidavits and other papers on which the motions are made, provided

Murran v. Bourne, 81-515, 84+338; Joslyn v. Schwend, 89-71, 93+705; Day v. Mountin, 89-297, 94+887; Berman v. Cosgrove, 95-353, 355, 104+534.

[84] Colvill v. Langdon, 22-565; Johnson v. Howard, 25-558; Cornish v. Coates, 91-108, 97+579.

[85] State v. Otis, 58-275, 59+1015.

[86] Mayall v. Burke, 10-285(224).

[87] Ashton v. Thompson, 28-330, 9+876; McCord v. Knowlton, 76-391, 79+397.

[88] Mann v. Flower, 26-479, 5+365; Hunter v. Cleveland etc. Co., 31-505, 18+645; Hunt v. O'Leary, 78-281, 80+1120; Id., 84-200, 87+611.

[89] Steele v. Taylor, 1-274(210).

[90] See Rollins v. Nolting, 53-232, 54+1118; Fallgatter v. Lammers, 71-238, 73+860; Johnson v. Velve, 86-46, 90+126.

[91] R. L. 1905 § 4116. See § 486.

[92] Grimes v. Fall, 81-225, 83+835.

[93] Danner v. Capehart, 41-294, 42+1062.

[94] Markell v. Ray, 75-138, 77+788.

[95] American Surety Co. v. Nelson, 77-402, 80+300.

[96] R. L. 1905 § 4123.

that papers in the action of which copies have theretofore been served and papers other than such affidavits which have theretofore been filed, may be referred to in such notice and read upon the hearing without attaching copies thereof. When the notice is for irregularity, the notice must set forth particularly the irregularity complained of; in other cases it is unnecessary to make a specification of points, but it is sufficient if the notice states generally the grounds of the motion.[97] Any party applying to any judge or court commissioner for any order to be granted without notice, except an order to show cause, must state in his affidavit whether he has made any previous application for such order, and if such previous application has been made upon the same state of facts every subsequent application will be refused. When an application made to any judge for the approval of any bond or undertaking, or for an order to show cause, or any ex parte order, is refused, the application must not be renewed before another judge without leave.[98] If a party has not been actually misled to his prejudice by defects in a notice they will be disregarded. Appearing at the hearing without objection waives all objections to the notice.[99] If a notice is defective the proper practice is to return it within twenty-four hours, with objections stated.[1]

6498. Where and by whom heard—The statute provides that "demurrers and motions for judgment on the pleadings may be heard and determined at the regular or special term of the court held in any county of the district, or at any time and place within the district, which a judge thereof shall fix. All motions of which notice is required to be given shall be made within the judicial district, or at some place in an adjoining district which is nearer, by railway, to the county seat of the county in which the action is pending than is the residence of the nearest qualified judge of the district of which such county is a part. Orders so made by the judge of another district shall be filed in the county of the venue, with like effect as though made by a judge of the local district. Provided, that in any county having two special terms of court each month, all motions in actions pending therein shall be made in such county." [2] Motions of which notice is not required to be given may be heard and granted by a judge of the district at any place within the state.[3] By consent of the parties any judge of a district court may hear a motion in an action pending in another district.[4] But a motion for a new trial must be heard by the judge before whom the cause was tried, if he is still in office and not disabled.[5] Under a former statute it was held that where the judge of the district in which an action is pending is disqualified to act in the cause, a motion in it may be made before the judge of an adjoining district, without regard to the distance from the residence of the judge of the district in which the action was pending.[6] An issue of law arising upon a demurrer may be noticed for hearing before the court in the county wherein the action is pending at any time, whether it be at a term of the court or not.[7] Objection that the court did not fix the time for argument on a demurrer as provided in the statute cannot be raised for the first time on appeal.[8] If a motion is made in an adjoining county it is unnecessary that the moving papers or the record on appeal show that it is proper to make it there, for the presumption is in favor of the jurisdiction.[9] If the

[97] Rule 8, District Court.
[98] Rule 14, District Court.
[99] Marty v. Ahl, 5-27(14); Yale v. Edgerton, 11-271(184); Blake v. Sherman, 12-420(305).
[1] See § 8733.
[2] R. L. 1905 § 4124; Laws 1909 c. 433.
[3] R. L. 1905 § 4125.
[4] R. L. 1905 § 94.
[5] R. L. 1905 § 98.
[6] Mower County v. Smith, 22-97.
[7] Johnson v. Velve, 86-46, 90+126.
[8] Fallgatter v. Lammers, 71-238, 73+860.
[9] Johnston v. Higgins, 15-486(400);

judge of the district court in the district where an injunction of the court has been disobeyed is disqualified from acting, proceedings for such contempt may be had in an adjoining district.[10] Where an action was brought in Le Sueur county and the venue was changed to Hennepin county, it was held irregular for the plaintiff to notice a demurrer of the defendant for argument in Sibley county after the change of venue. But it was an irregularity not going to the jurisdiction of the court.[11]

6499. Practice at hearing—Order of argument—Affidavits—Oral evidence—It is provided by rule of court that "upon motion or order to show cause, the moving party shall have the opening and closing of the argument. Before the argument shall commence, the moving party shall introduce his evidence to support the application; the adverse party shall then introduce his evidence in opposition; and the moving party may then introduce evidence in rebuttal or avoidance of the new matter offered by the adverse party. On hearing such motion or order to show cause, no oral testimony shall be received unless the court shall so direct."[12] Ordinarily no oral testimony should be received on the hearing of a motion, but the trial court, in the exercise of a sound discretion, may permit the trial of an issue of fact, involved in a motion, on oral testimony, as if the issue had been raised by the pleadings, or it may on its own motion direct a reference to ascertain and report the facts. This discretion of the court should be exercised only in exceptional cases; for if parties were permitted, as a matter of course, to have every issue of fact in every action tried on oral testimony, and to require the formalities of a final trial of an action on its merits to be observed, it would result in vexatious and burdensome delays, and in many cases in a miscarriage of justice. On the other hand, the power of the court, in its discretion, in exceptional cases, to receive oral testimony on the hearing of a motion, and to require a party who has made an affidavit in the proceeding to appear for cross-examination, is not only wholesome, but in some cases absolutely essential to prevent the circumvention of justice.[13] The rule against the reception of oral evidence on a motion has no application to a proceeding for the appointment of a receiver under the insolvency laws of this state.[14] Affidavits are the usual mode of proof on motions.[15] A stipulation that a motion shall be heard on certain papers is binding.[16] Affidavits made out of the state before a notary public may be used without further authentication than the seal of the notary.[17] A duly verified pleading may be used as an affidavit if its allegations are positive.[18] As a general rule affidavits must be positive and not on information and belief.[19] After a motion has been made and submitted the moving party has no right, without leave of court or notice to the adverse party to submit to the court additional affidavits in support of his motion.[20] When a motion is made the opposing party has the right to know what affidavits, and other papers and evidence, will be used in support of it, that he may prepare to meet them by counter proof; and he also has the right to be heard in argument upon the evidence submitted. To allow supplemental affidavits to be introduced without notice would deprive him of both these privileges. The proper way to adduce

Drake v. Sigafoos, 39-367, 40+257. See Ingram v. Conway, 36-129, 30+447.

[10] State v. Dist. Ct., 52-283, 53+1157.

[11] Flowers v. Bartlett, 66-213, 68+976.

[12] Rule 10, District Court.

[13] Strom v. Montana C. Ry., 81-346, 84+46; State v. King, 88-175, 92+965; Miller v. Natwick, 125+1022. See also, State v. Egan, 62-280, 64+813.

[14] Prouty v. Hallowell, 53-488, 55+623.

[15] Sherrerd v. Frazer, 6-572(406).

[16] Shaw v. Henderson, 7-480(386).

[17] R. L. 1905 § 4684. See Wood v. St. P. C. Ry., 42-411, 44+308; Hickey v. Collom, 47-565, 50+918.

[18] Stees v. Kranz, 32-313, 20+241.

[19] See McRoberts v. Washburne, 10-23(8).

[20] Dunwell v. Warden, 6-287(194).

additional evidence after the submission of a motion to the court, is to apply for leave, which being granted, the additional papers should be served upon the opposite party, with notice that they will be presented to the court at a time and place mentioned; or otherwise, by regular notice and service of papers, as on an original motion. The adverse party will then be allowed the same opportunity to oppose them, that he enjoyed upon the first hearing in regard to the proof then introduced.[21] Whether affidavits presented out of time shall be received is discretionary with the court.[22] Where the affidavits offered in opposition to a motion show that the moving party is entitled to the relief sought, though upon a ground not stated in the moving papers, he may take advantage of the ground thus shown.[23] What affidavits may be read, and in what order, and whether a continuance shall be granted to give a party opportunity to procure further proof, are matters of practice in the discretion of the trial court and the supreme court will not reverse its action unless it is evident that the appellant was not allowed a reasonable opportunity to be heard.[24]

6500. Relief which may be awarded—If there is an appearance and a contest on the merits the court may probably grant any relief warranted by the facts presented, regardless of the prayer. It has been held that where the notice of motion asks for specific relief, and also for "such further or other relief in the premises, as to the court shall seem meet and proper" the court may, there being an appearance and contest by the adverse party, grant any relief compatible with the facts presented, taking care, however, that the adverse party be not taken by surprise as to such further relief.[25]

6501. Default—Relief—It is provided by rule of court that "whenever notice of a motion shall be given or an order to show cause served, and no one shall appear to oppose the motion or application the moving party shall be entitled, on filing proof or admission of service, to the relief or order sought, unless the court shall otherwise direct. If the moving party shall not appear or shall decline to proceed, the opposite party, upon filing like proof of service, shall be entitled to an order of dismissal."[26] The supreme court will not review an order of the district court under this rule. The proper practice is for the aggrieved party to move the district court to open the default.[27]

6502. Renewal of motion—When a motion is once denied, whether on the merits or on technical grounds, the defeated party cannot renew it upon the same state of facts without leave of court,[28] unless the order denying it is by its terms "without prejudice."[29] A motion to vacate an order denying a motion is tantamount to a renewal of the original motion and cannot be made without leave.[30] Granting a party leave to renew a motion on the same state of facts is a matter lying almost wholly in the discretion of the trial court.[31] An order to show cause why an application should not be granted is sufficient leave to renew the application.[32] An order denying a motion to dismiss the second motion is equivalent to leave.[33] A decision of the supreme court reversing an

[21] Dunwell v. Warden, 6-287(194).
[22] Farmers' Nat. Bank v. Backus, 64-43, 66+5.
[23] Richards v. White, 7-345(271).
[24] Carson v. Getchell, 23-571.
[25] Landis v. Olds, 9-90(79); Gerdtzen v. Cockrell, 52-501, 55+58.
[26] Rule 9, District Court; Jefferson v. Brundage, 108-7, 120+1092. See Farrington v. Wright, 1-241(191); Steele v. Taylor, 1-274(210).
[27] Dols v. Baumhoefer, 28-387, 10+420; Thompson v. Haselton, 34-12, 24+199.
[28] Irvine v. Myers, 6-558(394); Griffin v. Jorgenson, 22-92; Swanstrom v. Marvin, 38-359, 37+455; Weller v. Hammer, 43-195, 45+427; Carlson v. Carlson, 49-555, 52+214; Stacy v. Stephen, 78-480, 81+391. See Rule 14, District Court.
[29] In re Mpls. Ry. Term. Co., 38-157, 36+105.
[30] See Little v. Leighton, 46-201, 48+778.
[31] Irvine v. Myers, 6-558(394); Little v. Leighton, 46-201, 48+778.
[32] Goodrich v. Hopkins, 10-162(130).
[33] O'Hara v. Collins, 84-435, 87+1023.

order of the district court, on the ground that the form of relief granted was not warranted, does not preclude a renewal of the application, upon the same facts and record, for the appropriate relief. The decision in the supreme court is not necessarily final in respect to other relief. It may expressly provide for a renewal of the motion, or the authority to do so may be implied from the nature of the case and the grounds of the decision, where the appeal does not finally dispose of the whole matter on the merits; and in such cases the fact that, pending the proceedings upon the appeal, more than one year has elapsed, will not bar the second motion. The original motion, the appeal, and renewal should, as respects the application of the statute, be regarded as one proceeding. And where the relief sought on the renewal of the motion might have been given upon the original application, under the general prayer for relief, it may be granted on the second or renewed application.[34]

ORDERS

6503. Definition—An order is a direction of a court or judge, made or entered in writing, not included in a judgment.[35] There is a distinction between an order and a mere direction for an order.[36]

6504. Distinction between chamber and court orders—At common law, and in the practice of most of the states, there is an important distinction between chamber orders and orders of the court. While the distinction exists in our practice, it is of trifling practical importance because all orders may be made as well in vacation as in term and as well at chambers as in open court, and because the court may sit at chambers as well as the judge.[37] The district judge in a sense constitutes the district court, and he may entertain all motions at chambers or elsewhere in his district,[38] and probably anywhere within the state.[39] The distinction between chamber orders and court orders is therefore immaterial. An order made at chambers will be sustained regardless of its form or the opinion entertained by the judge as to its character.[40] It is a common practice in some districts of this state for the court in signing court orders to employ the phrase, "By the court." The employment of this phrase is objectionable because it is utterly useless. It matters not how the court characterizes an order. The court cannot change the nature of an order. The classification of orders must always be made upon their subject-matter, and not upon the name by which a judge, attorney, or other officers may have designated them.[41] While the application for a court order should properly be addressed to the "court at chambers" instead of to the "judge at chambers" it has been held that a mistake in this regard is immaterial.[42]

6505. Filing—All orders, together with the affidavits and other papers upon which the same are based, which orders are not required to be served, must, within one day after the making thereof, be filed in the office of the clerk, by the party applying for such orders. Orders required to be served must be so filed within five days after the service thereof.[43] If the party in whose favor

[34] Gerdtzen v. Cockrell, 52–501, 55+58.
[35] R. L. 1905 § 4123.
[36] Aetna Ins. Co. v. Swift, 12–437(326).
[37] R. L. 1905 § 4187; Yale v. Edgerton, 11–271(184); Rollins v. Nolting, 53–232, 54+1118; Fallgatter v. Lammers, 71–238, 73+860; Johnson v. Velve, 86–46, 90+126.
[38] Marty v. Ahl, 5–27(14); Yale v. Edgerton, 11–271(184).
[39] See State v. Dist. Ct., 52–283, 53+1157; Flowers v. Bartlett, 66–213, 68+976.
[40] Marty v. Ahl, 5–27(14); Yale v. Edgerton, 11–271(184); Rogers v. Greenwood, 14–333(256); Johnston v. Higgins, 15–486 (400); Ives v. Phelps, 16–451(407); State v. Macdonald, 26–445, 4+1107.
[41] Marty v. Ahl, 5–27(14).
[42] Yale v Edgerton, 11–271(184); Rogers v. Greenwood, 14–333(256); Johnston v. Higgins, 15–486(400).
[43] Rule 13, District Court.

an order is made fails to file it, the adverse party may compel him to do so upon application to the court.[44]

6506. Signing and entry—When a direction for an order is filed the order directed must be entered in full in the register.[45] While there is no statute specifically requiring the clerk to enter an order except upon a direction, it is his clear duty to do so under the general statute directing him to enter in his register "a minute of each paper filed in the cause and all proceedings therein." [46] An appeal cannot be taken until the order is entered.[47] An order made in open court and entered in the minutes need not be signed by the judge.[48] A second order to the same effect as a prior order, entered by the clerk without application to the court, has been held unauthorized and not to affect the right to appeal.[49]

6507. Service of orders and proof thereof—The mode of serving orders, and the proof of service, are regulated by rules of court.[50] These rules have no application to proof of the service of summons.[51]

6508. Pro forma orders—Regarding the effect of a pro forma order upon the rights of the party against whom it is made, if it appears affirmatively, or by any fair presumption, that he consented to a disposition of the motion upon which it was made, without any examination or consideration of the merits or questions involved, no good reason exists why he ought not to be concluded by it. The order in such a case should be treated as a finality and affirmed, because the party has voluntarily consented to a decision which is not reviewable. If he never agreed to the making and entry of an order of that kind, and that fact appears of record, the pro forma order would probably be reversed on appeal, as unauthorized, with a direction to the court below to proceed and dispose of the matter on the merits. If the fact of non-consent does not appear, the party prejudiced would undoubtedly be entitled, upon application and motion in the court below, to have the order vacated, and for a decision upon the merits—a remedy clearly within the supervisory and appellate jurisdiction of the supreme court to enforce, in case it should be refused.[52]

6509. Imposing terms or conditions—When an order is granted as a matter of favor or discretion the court may impose reasonable terms or conditions.[53]

6510. Res judicata—An order affecting a substantial right, and appealable, made in determining a motion after a full hearing has been had on a controverted question of fact, and deciding a point actually litigated, is an adjudication binding upon the parties in a subsequent action and conclusive upon the point passed upon.[54] The rule is otherwise when the order is not appealable.[55] The estoppel applies in any event only to the facts actually litigated and not to such as might have been litigated.[56] It must affirmatively appear that the

[44] Aetna Ins. Co. v. Swift, 12–437(326).
[45] Id.
[46] R. L. 1905 § 110. See Leyde v. Martin, 16–38(24).
[47] See Macauley v. Ryan, 55–507, 57+151.
[48] Leyde v. Martin, 16–38(24).
[49] Carli v. Jackman, 9–249(235).
[50] Rules 18, 19, District Court.
[51] Cunningham v. Water-Power S. Co., 74–282, 77+137.
[52] Johnson v. Howard, 25–558. See also. Colvill v. Langdon, 22–565; State v. Dist. Ct., 52–283, 53+1157.
[53] Deering v. McCarthy, 36–302, 30+813; Flaherty v. Mpls. etc. Ry., 39–328, 40+160.
[54] Bennett v. Denny, 33–530, 24+193; Truesdale v. Farmers' L. & T. Co., 67–454, 70+568; Fitterling v. Welch, 76–441, 79+500; Thomas v. Hale, 82–423, 85+156; Halvorsen v. Orinoco M. Co., 89–470, 95+320. See O'Farrell v. Heard, 22–189; Volmer v. Stagerman, 25–234; Baker v. Wyman, 47–177, 49+649.
[55] Kanne v. Mpls. etc. Ry., 33–419, 23+854.
[56] Heidel v. Benedict, 61–170, 63+490.

merits of the controversy were necessarily involved and determined.[57] There is no estoppel where the parties are different in the subsequent action.[58]

6511. Collateral attack—An order has been held not subject to collateral attack on the ground that the appearance of counsel on the motion for the order was not authorized, the parties having acquiesced and taken no steps to set it aside.[59]

6512. Vacation and amendment—Orders may be vacated or amended on motion.[60]

ORDERS TO SHOW CAUSE

6513. As a short notice—An order to show cause is authorized by statute as a short notice of motion.[61] The order is granted ex parte,[62] in the discretion of the judge.[63] An order relating to a matter cognizable by the court in vacation, but not by a judge at chambers, should be made returnable before the court, but a failure to do so is not fatal.[64] Any discrepancy between the time of the hearing designated in the order and in the copy served is waived by appearing at the hearing without objection.[65] When an application for an order is denied, it cannot be renewed before another judge without leave.[66] The granting of relief on default is regulated by a rule of court,[67] and so is the practice on a hearing.[68]

6514. As original process—An order to show cause is frequently employed in our practice as original process for the institution of special proceedings, as, for example, for constructive contempt of court;[69] for the removal of an assignee;[70] or for non-payment of taxes.[71]

6515. Litigation of issues—Parties may fully submit and litigate matters in dispute upon an order to show cause without the medium of an ordinary action.[72]

MOTIVE—See Criminal Law, 2467; Evidence, 3231, 3236.
MOTORMEN—See Constitutional Law, 1610; Street Railways.
MULTIFARIOUSNESS—See Pleading, 7505.
MUNICIPAL BONDS—See Municipal Corporations, 6722.

[57] Hawkins v. Horton, 91-285, 97+1053.
[58] Richards v. White, 7-345(271).
[59] State v. Dist. Ct., 88-95, 92+518.
[60] R. L. 1905 § 4160; Allis v. White, 70-186, 72+1070; Mpls. etc. Ry. v. Olson, 81-265, 83+1086; Weiser v. St. Paul, 86-26, 90+8; Northwestern L. & S. Co. v. Gippe, 92-36, 99+364; State v. Krahmer, 98-507, 108+1119; Floody v. G. N. Ry., 104-517, 116+107, 932.
[61] R. L. 1905 § 4123; Marty v. Ahl, 5-27 (14). See, as to rule of court in Hennepin County, Gillette v. Ashton, 55-75, 56+576.
[62] Gere v. Weed, 3-352(249); Pulver v. Grooves, 3-359(252); Marty v. Ahl, 5-27 (14).
[63] Goodrich v. Hopkins, 10-162(130).
[64] Yale v. Edgerton, 11-271(184).
[65] Marty v. Ahl, 5-27(14).
[66] Rule 14, District Court.
[67] Rule 9, District Court. See In re Kittson, 45-197, 48+419.
[68] Rule 10, District Court.
[69] State v. Ives, 60-478, 62+831; State v. Willis, 61-120, 63+169.
[70] In re Nicolin, 55-130, 56+587.
[71] State v. Northern T. Co., 73-70, 75+754.
[72] Truesdale v. Farmers etc. Co., 67-454, 70+568; Thomas v. Hale, 82-423, 85+156.

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Cross-References

See Counties; Eminent Domain, 3022; Limitation of Actions, 5601; Municipal Courts; Schools and School Districts; Towns.

IN GENERAL

6516. Definition—The term "municipal corporations" is here used in its strict sense, as applying to incorporated cities, villages, and boroughs. The

term sometimes includes such quasi municipal corporations as counties,[73] towns,[74] and school districts.[75]

6517. Nature—A municipal corporation has a twofold character—public and private.[76] In its public character it is a mere auxiliary to the state government in the business of municipal rule;[77] a governmental agency[78]—one of the governmental subdivisions or units of the state.[79] A municipal corporation, on coming into existence, assumes a double character. As respects its business or proprietary functions, its local affairs, it is an independent corporation in no way subject to the control or supervision of the state, and may manage its internal affairs free from legislative interference. It may, within the limitations of its charter, contract and be contracted with, and is solely responsible for its obligations. It may install various public utilities, and provide generally for the comfort and convenience of its inhabitants. For default in any of its obligations in this respect the state does not concern itself; but in so far as the general laws of the state operate and have force and effect within the municipality, and the officers thereof are charged with their enforcement, the municipality and its officers are the agents, and subject to the command and control, of the state government at all times.[80] The theory of municipal local government implies the necessity for special regulations within a certain locality due to the congestion of population and the peculiar conditions resulting therefrom.[81]

6518. Villages—In law the term "village" is generally used with reference to an incorporated village. But it is sometimes used with reference to any small unincorporated assemblage of houses for dwelling or business, or both.[82] It has been defined as "an assemblage of houses, less than a town or city; but nevertheless urban or semi-urban in its character."[83]

6519. Boroughs—A borough is a small incorporated municipality resembling an incorporated village. We have several boroughs created by special charter in the early history of the territory and state.[84]

6520. Cities not a part of town—Cities do not remain a part of the town in which they are situated for any purposes.[85]

6521. Boundaries—Detachment of agricultural lands—Provision is made by statute for the separation of unplatted agricultural lands from the corporate limits of certain municipalities.[86]

6522. Definition of charter—The word "charter" as used in Sp. Laws 1891 c. 6 § 1, may be defined "as the enabling acts under which a municipal corporation exercises its privileges and powers and performs its duties and obligations, including all matters in which the municipality has a direct interest, and the right to regulate and control." These acts must necessarily include all laws relating to the material affairs and direct interests of the municipality.[87]

[73] See § 2241.
[74] See § 9645.
[75] See § 8662.
[76] State v. Robinson, 101-277, 283, 112+269.
[77] State v. Simons, 32-540, 542, 21+750; Schigley v. Waseca, 106-94, 118+259; State v. Olson, 107-136, 119+799.
[78] Pine City v. Munch, 42-342, 344, 44+197.
[79] Odegaard v. Albert Lea, 33-351, 353, 23+526; St. Paul etc. Ry. v. Robinson, 40-360, 367, 42+79; Tucker v. Lincoln County, 90-406, 408, 97+103.
[80] State v. Robinson, 101-277, 283, 112+269.
[81] Evans v. Redwood Falls, 103-314, 115+200.
[82] State v. Mpls. etc. Ry., 76-469, 473, 79+510.
[83] State v. Gilbert, 107-364, 120+528.
[84] Bannon v. Bowler, 34-416, 26+237; State v. Mpls. etc. Ry., 76-469, 473, 79+510. See R. L. 1905 §§ 698, 768, 776.
[85] Wellcome v. Monticello, 41-136, 138, 42+930.
[86] Laws 1907 c. 221; Hunter v. Tracy, 104-378, 116+922; Brenke v. Belle Plaine, 105-84, 117+157.
[87] State v. Ehrmantraut, 63-104, 65+251.

6523. Merger—Under Sp. Laws 1872 c. 10 Minneapolis and St. Anthony were merged into one municipality, each losing its former identity. After the merger the new city of Minneapolis was held liable for a cause of action for negligence against the old city of Minneapolis.[88]

6524. St. Paul courthouse committee—Cases are cited below involving the construction of the provisions of Sp. Laws 1889 c. 46, relating to the powers and duties of the committee in charge of the courthouse and city hall of St. Paul.[89] Under Sp. Laws 1891 c. 6 § 1, the president of the assembly of St. Paul was authorized to appoint the city members of such committee.[90]

6525. Building permits—Fees—A schedule of fees for building permits under the St. Paul charter has been sustained.[91]

INCORPORATION OF VILLAGES

6526. General laws—The general law of 1883 for the incorporation of villages was unconstitutional,[92] but the incorporation of villages thereunder was validated by Laws 1885 c. 231.[93] The general village law of 1885 was applicable to all villages theretofore organized under general laws,[94] and was constitutional.[95] Laws 1885 c. 145 provided for the reincorporation of villages.[96]

6527. Territory—The statute defines what territory may be incorporated in a village. Unplatted lands must adjoin platted lands, and be so conditioned as properly to be subject to village government. The statute does not authorize incorporation of large tracts of rural territory having no natural connection with any village and no adaptability to village purposes.[97]

6528. Village de facto—Public policy requires that the state should be precluded from questioning the franchise of a village which has been permitted to exercise the functions of a village de facto for a long time and has been recognized as an existing village by legislative enactment.[98]

6529. Villages as part of town—It was formerly held that villages remained a part of the town in which they were situated for all town purposes, except so far as otherwise provided for in the general village law, or the statute constituting the village charter.[99] They are now excepted from the general laws relating to towns.[1]

INCORPORATION OF CITIES

6530. Validating act—Laws 1897, c. 81, legalizing the incorporation of cities of the class therein designated, is a general law and constitutional. By virtue thereof the city of Thief River Falls is a legal municipal corporation.[2]

6531. Collateral attack—Where a municipality is acting under color of law, and exercising all of the functions and powers of a corporation de jure, and the legality of its incorporation has not been questioned by the state, but,

[88] Adams v. Minneapolis, 20–484(438).
[89] Egan v. St. Paul, 57–1, 58+267; State v. McCardy, 62–509, 64+1133.
[90] State v. Ehrmantraut, 63–104, 65+251.
[91] St. Paul v. Dow, 37–20, 32+860.
[92] State v. Simons, 32–540, 21+750.
[93] State v. Spaude, 37–322, 34+164.
[94] State v. Spaude, 37–322, 34+164; State v. Cornwall, 35–176, 28+144.
[95] St. Paul G. Co. v. Sandstone, 73–225, 75+1050.
[96] Bradish v. Lucken, 38–186, 36+454.
[97] R. L. 1905 § 700; State v. Minnetonka, 57–526, 59+972; State v. Fridley Park, 61–146, 63+613; State v. Mpls. etc. Ry., 76–469, 79+510; State v. Holloway, 90–271, 96+40; State v. Harris, 102–340, 113+887; State v. Gilbert, 107–364, 120+528.
[98] St. Paul G. Co. v. Sandstone, 73–225, 75+1050; State v. Harris, 102–340, 113+887; State v. Bailey, 106–138, 118+676.
[99] Moriarty v. Gullickson, 22–39; Bannon v. Bowler, 34–416, 26+237; State v. Fitzgerald, 37–26, 32+788; State v. Spaude, 37–322, 34+164; Bradish v. Lucken, 38–186, 36+454; Wellcome v. Monticello, 41–136, 42+930.
[1] R. L. 1905 § 692.
[2] State v. Thief River Falls, 76–15, 78+867.

on the contrary, it has been recognized as such for some years by the state, neither the municipality or any private party can question the validity of its existence in a collateral action or proceeding.[3] In mandamus proceedings to compel a city to pay a judgment against a village under Laws 1897 c. 81, the legality of the reincorporation of the city out of the village cannot be questioned.[4]

6532. Acceptance of charters—The acceptance of a charter may be shown by a subsequent legislative act recognizing it as in force.[5]

6533. Repeal of charter—The express repeal of the then existing charter of the village of Reads (Sp. Laws 1891 c. 51) by Laws 1895 c. 390, did not revive the village charter originally enacted by Sp. Laws 1868 c. 34. The act of 1895 took effect Feb. 6, 1896, and on that day the village of Reads ceased to exist.[6]

6534. Reorganization—Liabilities—The obligations relating to a city hall, imposed on the then existing city of Duluth by Sp. Laws 1887 c. 162, did not rest on that city as organized under a subsequent act.[7]

HOME RULE CHARTERS

6535. Constitutional provision—The constitutional amendment of 1896, authorizing cities to frame and adopt their own charters, was designed to obviate the effects of the constitutional amendment of 1881 against special legislation, and to enable cities to frame their charters with reference to local conditions, rather than under a general and uniform law enacted by the legislature.[8] It is not subversive of a republican form of government, within the meaning of the federal constitution.[9] It is not self-executing.[10] It applies to incorporated cities in existence at the time of its adoption, and not to cities to be thereafter created.[11]

6536. Enabling act—General legislation—The constitutional provision is not self-executing.[12] The legislature is required to "prescribe by law the general limits" within which home rule charters shall be framed. It is not required to prescribe a general framework for charters, or to enumerate the subjects they may embrace. It is sufficient if it prescribes general limitations and restrictions. The enabling act of 1899 was sufficient.[13]

6537. Nature—A home rule charter is an organic act of the municipality and is to be construed accordingly. A city incorporated thereunder is an "imperium in imperio," whose powers are self-appointing.[14] Home rule charters have all the force and effect of legislative enactments.[15]

6538. Scope and contents—Home rule charters may embrace any subject relating to the orderly conduct of municipal affairs. They may be as full, complete, and effective as a charter granted by a direct act of the legislature.[16]

[3] State v. Honerud, 66–32, 68+323; State v. Crow Wing County, 66–519, 68+767, 69+925, 73+631; St. Paul G. Co. v. Sandstone, 73–225, 75+1050.
[4] Lee v. Thief River Falls, 82–88, 84+654.
[5] State v. Tosney, 26–262, 3+345.
[6] State v. Reads 76–69, 78+883.
[7] Carey v. St. Louis County, 38–218, 36+459.
[8] State v. Dist. Ct., 87–146, 91+300; State v. O'Connor, 81–79, 83+498.
[9] Hopkins v. Duluth, 81–189, 83+536.
[10] State v. Kiewel, 86–136, 90+160.
[11] State v. O'Connor, 81–79, 83+498.
[12] State v. Kiewel, 86–136, 90+160.
[13] State v. O'Connor, 81–79, 83+498.
[14] State v. Dist. Ct., 87–146, 151, 91+300.
[15] State v. Zimmerman, 86–353, 90+783; State v. Board, W. & L. Comrs., 105–472, 117+827; Schigley v. Waseca, 106–94, 118+259.
[16] State v. O'Connor, 81–79, 83+498; State v. Dist. Ct., 87–146, 91+300; State v. Dist. Ct., 90–457, 97+132; Grant v. Berrisford, 94–45, 101+940; Id., 94–45, 101+1113; Townsend v. Underwood's Second Addition, 91–242, 97+977.

They may embrace such subjects as the right of eminent domain in laying out, opening, and improving streets;[17] the presentation and allowance of claims;[18] the terms of contractors' bonds;[19] reassessments for local improvements;[20] the vacation of streets, etc.;[21] and liability for defective streets and sidewalks.[22]

6539. Harmony with state laws—Home rule charters must be in harmony with and subject to the laws of the state.[23] This simply means that they must not contravene the public policy of the state as declared in its general laws. They may differ in details from state laws. The provisions of home rule charters upon all subjects proper for municipal regulation prevail over the general statutes relating to the same subject-matter, except in those cases where the charter contravenes the public policy of the state, as declared by the general laws, and in those instances where the legislature expressly declares that a general law shall prevail, or a purpose that it shall so prevail appears by fair implication, taking into consideration the subject and the general nature of the charter and general statutory provisions.[24] The constitution provides that no home rule charter, or ordinance enacted thereunder, shall supersede any general law defining or punishing crimes or misdemeanors.[25]

6540. Legislative body—The constitutional requirement that a legislative body shall be a feature of all home rule charters is not violated by the provisions of the St. Paul charter relating to reassessments by the board of public works.[26]

6541. Board of freeholders—Counsel—The board cannot employ and pay one of its members as counsel.[27]

6542. Debt limit—Laws 1899 c. 351 § 10 places a debt limit on cities framing their own charters.[28] Debt limitations prescribed by home rule charters supersede the general statutes.[29]

6543. Submission—Ballots—An immaterial variation from the statutory form of submission is not fatal. Fraudulent ballots and those with unintelligible marks, or no markings, are to be excluded in determining whether the requisite four-sevenths vote has been cast for ratification.[30] The provision for submission at a general or special election is constitutional.[31]

6544. When take effect—Charters go into effect at the end of thirty days from the election in which they are ratified, though such ratification is not judicially determined on appeal from the decision of the canvassing board, until after the thirty-day period has expired.[32]

6545. Validity of adoption—The charters of St. Paul (1900),[33] and of Duluth (1900),[34] were legally adopted.

6546. Amendment—A publication of a proposed amendment has been held sufficient.[35] An amendment requires for its adoption three-fifths of the total

[17] State v. Dist. Ct., 87–146, 152, 91+300.
[18] State v. Dist. Ct., 90–457, 97+132.
[19] Grant v. Berrisford, 94–45, 101+940; Id., 94–45, 101+1113.
[20] State v. Dist. Ct., 95–183, 103+881.
[21] Townsend v. Underwood's Second Addition, 91–242, 97+977.
[22] Schigley v. Waseca, 106–94, 118+259.
[23] Const. art. 4 § 36; State v. Board, W. & L. Comrs., 105–472, 117+827.
[24] Grant v. Berrisford, 94–45, 101+940; Id., 94–45, 101+1113; Peterson v. Red Wing, 101–62, 111+840; Turner v. Snyder, 101–481, 112+868; Am. E. Co. v. Waseca, 102–329, 113+899; Schigley v. Waseca, 106–94, 118+259.
[25] Const. art. 4 § 36; State v. Collins, 107–500, 120+1081.
[26] State v. Dist. Ct., 97–147, 106+306.
[27] Young v. Mankato, 97–4, 105+969.
[28] Beck v. St. Paul, 87–381, 92+328. See R. L. 1905 § 752.
[29] Am. E. Co. v. Waseca, 102–329, 113+899.
[30] Hopkins v. Duluth, 81–189, 83+536.
[31] State v. Kiewel, 86–136, 90+160.
[32] Davis v. Hugo, 81–220, 83+984.
[33] State v. O'Connor, 81–79, 83+498.
[34] Hopkins v. Duluth, 81–189, 83+536.
[35] Wolfe v. Moorhead, 98–113, 107+728.

vote cast for any purpose at the election at which it is submitted. A majority of three-fifths of the vote cast upon the proposition of the amendment is insufficient.[36]

6547. Continuance of ordinances—Ordinances in force at the time of the adoption of a home rule charter, and not inconsistent with it, continue in force until repealed or altered.[37]

LEGISLATIVE CONTROL

6548. In general—The governmental powers, duties, and liabilities of municipal corporations are subject to the absolute control of the legislature. They may be altered or repealed by the legislature at pleasure.[38] The state, when creating a municipal subdivision for local self-government, retains a general supervising control over the affairs thereof.[39]

6549. Imposing duties on municipal officers—The legislature may impose upon municipal officers specific duties in the matter of the enforcement of the general laws of the state and prescribe penalties for the non-performance thereof.[40]

6550. Payment of imperfect obligations—The legislature may compel a municipality to pay a moral obligation which is not enforceable at law.[41]

6551. Private use of public funds—The legislature cannot authorize a municipality to expend public funds for private purposes.[42]

6552. Private use of public easements—The legislature cannot authorize a municipality to divert a public easement to an inconsistent and private use.[43]

6553. Liabilty for negligence—The legislature may impose on municipalities a liability for injuries from defective streets, or not, and it may prescribe the conditions of such liability.[44]

6554. Revenues—The power which the legislature may exercise over the revenues of the state it may exercise over the revenues of a municipality, for any purposes connected with its past or present condition.[45]

6555. Change—Apportionment of debts, etc.—Within constitutional limitations the legislature may create, alter, divide, or abolish, municipalities; and divide and apportion their debts and property in case of a division of territory and the creation of a new corporation.[46]

6556. Imposing liability for non-performance of duty—The legislature may impose on a municipality a liability for the non-performance of a governmental duty.[47]

[36] State v. Hugo, 84–81, 86+784.
[37] St. Paul v. Haugbro, 93–59, 100+470. See R. L. 1905 § 758.
[38] State v. Swanson, 85–112, 88+416; Schigley v. Waseca, 106–94, 118+259.
[39] State v. Robinson, 101–277, 112+269.
[40] Id.
[41] Merchants Nat. Bank v. East Grand Forks, 94–246, 102+703. See Bowen v. Minneapolis, 47–115, 49+683.
[42] Castner v. Minneapolis, 92–84, 99+361.
[43] Fairchild v. St. Paul, 46–540, 49+325; Sanborn v. Van Duyne, 90–215, 96+41.
[44] Nichols v. Minneapolis, 30–545, 547, 16+410; Schigley v. Waseca, 106–94, 118+259. See Eisenmenger v. Board Water Comrs., 44–457, 47+156.
[45] Merchants Nat. Bank v. East Grand Forks, 94–246, 250, 102+703.
[46] Rumsey v. Sauk Centre, 59–316, 61+330. See State v. Lake City, 25–404; Winona v. School Dist., 40–13, 41+539; Wellcome v. Monticello, 41–136, 139, 42+930; State v. Browne, 56–269, 57+659; First Nat. Bank v. Beltrami County, 77–43, 45, 79+591; Humboldt v. Barnesville, 83–219, 86+87; Canosia v. Grand Lake, 80–357, 83+346; State v. Demann, 83–331, 334, 86+352; Barnard v. Polk County, 98–289, 108+294; Kettle River v. Bruno 106–58, 118+63; Brewis v. Duluth, 9 Fed. 747; Pepin v. Sage, 129 Fed. 657.
[47] Black v. Polk County, 97–487, 107+560.

OFFICERS

6557. Appointment by legislature—The legislature may appoint officers to perform duties in a municipality and make the municipality liable for their acts.[48]

6558. Election and appointment—The time of the annual meeting for the election of village officers is the second Tuesday of March.[49] A provision fixing the date for the election of city officers has been held to prohibit an election on an earlier date.[50] A charter provision that a council shall "be the judges of the election and qualifications of their own numbers" has been held not to exclude the jurisdiction of the courts to determine a contested election.[51] Where a council did not elect an officer at the prescribed time, it was held its duty to elect at the earliest opportunity thereafter.[52]

6559. Confirmation—A council has been held not authorized to reconsider its confirmation of an officer.[54] An informal consent by a council to the appointment of an officer has been held sufficient.[55]

6560. Eligibility—The constitutional provision that every person entitled to vote at any election shall be eligible to any elective office applies to municipal officers. A charter provision making the eligibility of aldermen at large depend on the location of their residence in the city has been held unconstitutional.[56]

6561. Term—An appointive municipal committee cannot appoint employees for a term extending beyond the time for which the committee is itself appointed.[57] The provisions of the charter of St. Paul (Sp. Laws 1887 c. 343), as to the term of the building inspector of that city, have been construed.[58]

6562. Duty to qualify—A city assessor of Duluth who had duly qualified under the state law has been held not required to qualify under the city charter.[59] An officer cannot recover his salary if he fails to qualify by taking the oath of office.[60]

6563. Resignation—By acquiescing in his illegal removal an officer may resign "by implication."[61]

6564. Removal—Under the provisions of G. S. 1894 c. 10 a village council may appoint and discharge a village marshal by the mere vote of a majority on motion, and without the adoption of a regular ordinance, by-law, or resolution.[62] Provision is made by statute for the removal of certain municipal officers for a failure to enforce the liquor laws of the state.[63] By acquiescing in his illegal removal an officer may resign by implication.[64] Cases are cited below involving the construction of provisions of the charters of Duluth,[65] Minneapolis,[66] St. Paul,[67] Sauk Center,[68] East Grand Forks,[69] and St. Cloud,[70] relating to the removal of officers.

[48] Daley v. St. Paul, 7-390(311).
[49] R. L. 1905 § 711; State v. Cornwall, 35-176, 28+144.
[50] State v. Murray, 41-123, 42+858.
[51] State v. Gates, 35-385, 28+927.
[52] State v. Smith, 22-218.
[54] State v. Wadhams, 64-318, 67+64.
[55] Larsen v. St. Paul, 83-473, 86+459. See Harrington v. Minneapolis, 108-209, 121+908.
[56] State v. Holman, 58-219, 59+1006.
[57] Egan v. St. Paul, 57-1, 58+267.
[58] State v. Starkey, 49-503, 52+24.
[59] State v. Wadhams, 64-318, 67+64.
[60] State v. Schram, 82-420, 85+155.
[61] Byrnes v. St. Paul, 78-205, 80+959; Larsen v. St. Paul, 83-473, 86+459.
[62] State v. Schram, 82-420, 85+155.
[63] State v. Robinson, 101-277, 112+269.
[64] See § 6563.
[65] State v. Duluth, 53-238, 55+118. See State v. Wadhams, 64-318, 67+64.
[66] State v. Kiichli, 53-147, 54+1069; Rees v. Minneapolis, 105-246, 117+432.
[67] Galvin v. St. Paul, 58-475, 59+1102;

6565. Municipal officers as state officers—Legislative control—Officers of municipalities organized under legislative authority are, in respect to all general laws having force and operating within their municipality, agents of the state, and may be charged with the performance of such duties in the enforcement of the same as the legislature may from time to time impose.[71]

6566. Failure to enforce liquor laws—Forfeiture of office—Duty of attorney general—The forfeiture of office and pecuniary penalty prescribed by R. L. 1905 §§ 1561, 1562, for the failure of the mayor, or other officer named therein, to make complaint of known violations of the statutes regulating the sale of intoxicating liquor, may be enforced by the attorney general through appropriate proceedings brought for that purpose. The power conferred by the charter of St. Cloud upon the city council thereof, upon the subject of the removal of municipal officers for misconduct in office, does not exclude the power of the state, through the attorney general, to effect a removal for a violation of the statute above referred to. The power and authority of each is concurrent. Nor is the authority of the attorney general taken away or superseded by the provisions of section 1561, by which the county attorney of each county is required to prosecute violations of the statute.[72]

6567. Notice to officers notice to corporation—A municipality is bound by the acts and conduct of its officers only when they are engaged in the duties of their office, and notice to them to bind the municipality must come to them in their official capacity and while acting within the scope of their authority.[73]

6568. Mayor—Veto power—The power of veto is not inherent in the office of mayor or chief executive officer of a municipality. It exists only where expressly conferred by law.[74] A mayor has no implied power to cancel or rescind contracts made by other departments of the municipal government.[75]

6569. Recorder—Unless otherwise provided the duties of a recorder, in issuing an order on the city treasurer for the payment of claims which have been allowed, are merely ministerial or clerical. He has no power to pass on the validity of claims, or to refuse to issue an order on the ground that the debt limit of the city has been exceeded.[76]

6570. Building inspector—The provisions of the St. Paul charter (Sp. Laws 1887 c. 343), as to the qualifications and term of office of the building inspector of that city, have been construed.[77]

6571. Capacity to sue—The board of directors of the St. Paul workhouse cannot sue or be sued as such. Suit must be brought in the name of the city.[78]

COUNCIL

6572. Nature—A council is a legislative and administrative body.[79]

6573. President—The office of president of the common council of St. Paul was abolished by Sp. Laws 1891 c. 6.[80]

6574. Compensation of aldermen—Sp. Laws 1883 c. 3 § 8, amending the charter of Minneapolis in regard to the salary of aldermen, was not retroactive.[81]

State v. St. Paul, 81-391, 84+127; Id., 81-391, 84+1116; Parish v. St. Paul, 84-426, 87+1124; State v. O'Connor, 81-79, 83+498.

[68] State v. Ward, 70-58, 72+825; Townsend v. Sauk Centre, 71-379, 74+150.

[69] State v. Thompson, 91-279, 97+887.

[70] State v. Robinson, 101-277, 112+269.

[71] Id.

[72] Id.

[73] Board of Ed. v. Robinson, 81-305, 84+105.

[74] State v. Ames, 31-440, 18+277; Am. E. Co. v. Waseca, 102-329, 113+899.

[75] Am. E. Co. v. Waseca, 102-329, 113+899.

[76] State v. Hodapp, 104-309, 116+589.

[77] State v. Starkey, 49-503, 52+24.

[78] Monfort v. Wheelock, 78-169, 80+955.

[79] State v. Duluth, 53-238, 243, 55+118.

[80] State v. Johnstone, 61-56, 63+176.

[81] State v. Hill, 32-275, 20+196.

6575. Powers—A village council is the governing body of the municipality, charged with the management of its affairs, legislative and administrative, and alone authorized to contract in its behalf.[82] Any unassigned residuum of power falls to the council as representing the municipality.[83] Sp. Laws 1877 c. 7 clothed the council of Carver with the entire control of the village finances.[84] A council has been held not to have authority to reconsider a confirmation of the appointment of a municipal officer.[85] Under Sp. Laws 1881 c. 76 the power of making appropriations was vested exclusively in the common council of Minneapolis, and the mayor had no veto power in that regard.[86]

6576. Delegation of powers—A council cannot delegate its legislative power, or its administrative power calling for judgment or discretion, to a committee or otherwise;[87] but it may delegate mere ministerial duties.[88]

6577. Committee report—Adoption—The word "adopted" has been held to express the will of a council that the recommendation of one of its committees should be pursued.[89]

6578. Meetings—Notice—A legal notice of all meetings, whether general or special, is essential, except where all the members are present.[90] Where the charter does not prescribe the time of meetings the council may fix the time and it may do so simply by motion.[91] The regularity of a meeting will be presumed.[92] Cases are cited below involving the construction of various charter provisions as to time and notice of meetings.[93]

FISCAL AFFAIRS

6579. Limit of indebtedness—A city of the first class cannot incur an indebtedness in excess of five per cent. of the assessed value of its taxable property.[94] Other cities and villages are restricted to ten per cent. of the assessed value of their taxable property.[95] Limitations in home rule charters supersede the general statute.[96] The general limitation of G. S. 1894 § 1639 was inapplicable to village bonds issued under Laws 1893 c. 200.[97] Certificates of indebtedness issued for the purpose of a permanent improvement revolving fund are not within the general limitation.[98] The amount of the bonds and money in the sinking fund of a city is to be deducted from the total amount of the outstanding bonds of the city for the purpose of determining its actual indebtedness. Certain certificates calling for the payment of money, issued by the park board of Minneapolis, have been held not an indebtedness within the general limitation.[99] The provisions of the charter of Minneapolis, pro-

[82] Jewell v. Bertha, 91–9, 11, 97+424; Penner v. Ulvestad, 124+371.
[83] State v. St. Paul, 25–106, 109.
[84] State v. Goetz, 24–114.
[85] State v. Wadhams, 64–318, 67+64.
[86] State v. Ames, 31–440, 18+277.
[87] Mpls. G. Co. v. Minneapolis, 36–159, 30+450; Jewell v. Bertha, 91–9, 97+424; In re Wilson, 32–145, 19+723; State v. St. Paul, 34–250, 25+449. See Kreatz v. St. Cloud School Dist., 82–516, 522, 85+518.
[88] Jewell v. Bertha, 91–9, 97+424; Edison v. Bloomquist, 124+969.
[89] State v. Mpls. etc. Ry., 39–219, 39+153.
[90] State v. Smith, 22–218.
[91] State v. Kantler, 33–69, 21+856.
[92] State v. Smith, 22–218.
[93] State v. Smith, 22–218; State v. Kantler, 33–69, 21+856; Lord v. Anoka, 36–176, 30+550.
[94] R. L. 1905 § 780. See Beck v. St. Paul, 87–381, 92+328; Christie v. Duluth, 82–202, 84+754; Kelly v. Minneapolis, 63–125, 65+115.
[95] R. L. 1905 § 780. See Hamilton v. Detroit, 83–119, 85+933; Purcell v. East Grand Forks, 91–486, 98+351; Kettle River Q. Co. v. East Grand Forks, 96–290, 104+1077.
[96] Am. E. Co. v. Waseca, 102–329, 113+899.
[97] Hamilton v. Detroit, 83–119, 85+933.
[98] Christie v. Duluth, 82–202, 84+754. See R. L. 1905 § 752.
[99] Kelly v. Minneapolis, 63–125, 65+115.

hibiting the city from incurring liability in excess of the revenue actually levied, have been construed.[1]

6580. Sinking fund—The commissioners of the sinking fund of Minneapolis have been held to have no authority to purchase from the city its bonds, for the fund, at the time they are offered for sale by it.[2] The provisions of Sp. Laws 1873 c. 173, relating to the sinking fund of Duluth, have been construed.[3]

6581. Contingent fund of mayor—The provisions of the charter of Minneapolis, relating to the appropriation of a contingent fund for the mayor, have been construed.[4]

6582. Appropriations—Veto power—Under Sp. Laws 1881 c. 76, the exclusive power of making appropriations was vested in the council of Minneapolis and the mayor was without a veto power.[5]

6583. Mortgage security—A municipality loaning its money to a private person in violation of law, has been held entitled to foreclose a mortgage taken as security for the loan.[6]

6584. Liability for debts of predecessor—Under Sp. Laws 1889 c. 4 the city of Sauk Center became liable for all the indebtedness of the former village.[7] A village reincorporated under Laws 1885 c. 145 remained liable for its proportion of the general township indebtedness previously incurred and also for its proportion of certain town charges for general township purposes, but it was not liable, either before or after its separation from the township, to be taxed for indebtedness incurred on account of township roads and bridges.[8] Under Sp. Laws 1899 c. 3 the city of Barnesville was relieved from liability for the indebtedness of the townships out of which it was created.[9] Under Laws 1897 c. 81, cities incorporated under Laws 1895 c. 8, were liable for the prior debts of the village.[10]

6585. Apportionment of indebtedness—Sp. Laws 1885 c. 296, apportioning the bonded indebtedness of the town of Sauk Center between the town and the village of the same name, has been construed.[11]

LEGAL DEPARTMENT

6586. City attorney—Eligibility—Under the charter of Little Falls a qualified voter is eligible to the office of city attorney without being a member of the bar.[12]

6587. Special counsel—Sp. Laws 1891 c. 6 § 11, approved March 24, 1891, abrogated the authority otherwise existing, under the charter of the city of St. Paul, to compensate for legal services rendered to the city by one not a member of the regular legal department of the city.[13]

6588. Compensation—Cases are cited below involving the compensation of officers of the legal department.[14]

[1] Kiichli v. Minn. etc. Co., 58–418, 59+1088.
[2] Kelly v. Minneapolis, 63–125, 65+115.
[3] St. Louis County v. Nettleton, 22–356.
[4] State v. Minneapolis, 87–156, 91+298.
[5] State v. Ames, 31–440, 18+277.
[6] Fergus Falls v. Fergus Falls H. Co., 80–165, 83+54.
[7] Rumsey v. Sauk Centre, 59–316, 61+330.
[8] Bradish v. Lucken, 38–186, 36+454; State v. Peltier, 103–32, 114+90.
[9] Humboldt v. Barnesville, 83–219, 86+87.
[10] See Lee v. Thief River Falls, 82–88, 84+654.
[11] Rumsey v. Sauk Centre, 59–316, 61+330.
[12] State v. Nichols, 83–3, 85+717.
[13] Horn v. St. Paul, 80–369, 83+388.
[14] Bowe v. St. Paul, 70–341, 73+184 (salary of assistant city attorney of St. Paul—council held not to have authority to reduce it—acceptance of reduced salary—estoppel); State v. Nichols, 83–3, 85+717 (charter of Little Falls held not to require salary of city attorney to be fixed by ordinance); Horn v. St. Paul, 80–369, 83+388 (special counsel of St. Paul—compensation unauthorized by Sp. Laws 1891 c. 6 § 11); State v. Vasaly, 98–46, 107+818 (city at-

POLICE DEPARTMENT

6589. Policemen executive officers—A police officer of a municipality is an executive officer within the statutes against bribery.[15]

6590. Eligibility—Cases are cited below involving the construction of the St. Paul charter relating to the qualifications of police officers.[16]

6591. Appointment, term, suspension, and removal of policemen—Where the mayor of a municipality is vested by law with the power of appointment, removal, discipline, control, and supervision of its police force, he has authority to suspend a policeman from the performance of his duties, with or without pay, for the temporary purpose of investigating his conduct.[17] Under the provisions of G. S. 1894 c. 10 a village council may appoint and discharge a village marshal by the mere vote of a majority on motion and without the adoption of a regular ordinance, by-law, or resolution.[18] Cases are cited below relating to the appointment, term, suspension, and removal of policemen.[19]

6592. Bonds—In an action on the bond of a police officer it has been held, that it was a question for the jury whether the officer was acting as an officer or privately in doing the act complained of; that the sureties were liable if he was acting as an officer; and that the court erred in dismissing the action as to the sureties.[20]

6593. Compensation—Cases are cited below involving the compensation of police officers.[21]

6594. Powers of officers—A policeman of Minneapolis has been held authorized, under Laws 1885 c. 171, to conduct a chattel mortgage sale.[22]

6595. St. Paul board of police—Cases are cited below involving a construction of the provisions of the St. Paul charter relating to the power of the board of police to appoint and dismiss policemen.[23]

6596. Village marshal—A village council may appoint and discharge a village marshal by a mere vote of a majority on motion. The marshal is a public officer and must qualify by taking the prescribed oath. If he fails to do so he cannot recover his salary.[24]

torney of Little Falls—claim for extra services—fraud).

[15] State v. Gardner, 88–130, 142, 92+529.

[16] Yorks v. St. Paul, 62–250, 64+565; O'Brien v. St. Paul, 72–256, 75+375; Larsen v. St. Paul, 83–473, 86+459.

[17] Rees v. Minneapolis, 105–246, 117+432; Id., 107–23, 119+484.

[18] State v. Schram, 82–420, 85+155.

[19] Galvin v. St. Paul, 58–475, 59+1102; Yorks v. St. Paul, 62–250, 64+565; O'Brien v. St. Paul, 72–256, 75+375; State v. St. Paul, 81–391, 84+127; Id., 81–391, 84+1116; Parish v. St. Paul, 84–426, 87+1124; State v. O'Connor, 81–79, 83+498; Larsen v. St. Paul, 83–473, 86+459; State v. Grabarkiewicz, 88–16, 92+446.

[20] Seitner v. Ransom, 82–404, 85+158.

[21] Galvin v. St. Paul, 58–475, 59+1102 (effect of surrender of insignia of office—salary of policeman of St. Paul—necessity of council fixing amount); Johnson v. Stillwater, 62–60, 64+95 (action for services by police officer of Stillwater—findings in favor of officer held justified by the evidence); Yorks v. St. Paul, 62–250, 64+565 (salary of policeman of St. Paul—necessity of officer showing that he was legally elected or appointed, or that he discharged the duties of the office); O'Brien v. St. Paul, 72–256, 75+375 (policeman of St. Paul—ineligible to office—city held not liable for services rendered); Byrnes v. St. Paul, 78–205, 80+959 (policeman of St. Paul—acquiescence in unlawful discharge—city held not liable for services not actually performed); State v. Schram, 82–420, 85+155 (salary of village marshal of Green Isle—failure to qualify—right of de facto officer to recover); Larsen v. St. Paul, 83–473, 86+459 (sergeant of police of St. Paul—unlawful removal—right to recover not affected by fact that salary was paid to a de facto officer); Rees v. Minneapolis, 105–246, 117+432 (policeman of Minneapolis—right to salary during suspension).

[22] Oswald v. O'Brien, 48–333, 51+220.

[23] State v. St. Paul, 81–391, 84+127; Id., 81–391, 84+1116; Parish v. St. Paul, 84–426, 87+1124.

[24] State v. Schram, 82–420, 85+155.

6597. Wrongful arrests—Liability—A municipality is not liable for a wrongful arrest by one of its police officers.[25]

6598. Reimbursement of officers for defence—If not prohibited by charter, a municipality may reimburse a police officer for expenses incurred in the defence of an action for false imprisonment.[26]

FIRE DEPARTMENT

6599. Fire limits—An ordinance establishing fire limits has been held to forbid the moving of a wooden building into the fire limits from a point outside.[27]

6600. Appointment and compensation of firemen—Cases are cited below relating to the appointment [28] and compensation [29] of firemen.

6601. Contracts—A contract for fire apparatus, executed under Laws 1895 c. 257, has been held not ultra vires and void because the village, and the town in which it is located, constitute one district for purposes of taxation.[30]

6602. Authority to purchase supplies—Authority to purchase fire apparatus cannot be delegated to a committee of a council.[31] Laws 1895 c. 257, authorizing certain villages to incur an indebtedness in the purchase of fire extinguishing apparatus, is not void for uncertainty.[32] The provisions of Sp. Laws 1874 c. 1, regulating the mode of purchasing fire apparatus by the city of St. Paul, construed.[33]

6603. Negligence of firemen—A municipality is not liable for the negligence of its firemen, in the absence of statute.[34] A fireman in driving fire apparatus on a call to a fire may take risks which it would be negligence for a private person to take in pursuit of his private business. Ordinances sometimes give the fire department the right of way in responding to a fire call.[35]

6604. Unsafe buildings—At common law the owner or occupant of a building owes no duty to keep it in a reasonably safe condition for members of a public fire department who may, in the exercise of their duties, have occasion to enter the building.[36]

6605. Rapid driving—An ordinance limiting the speed of driving on public streets to six miles an hour has been held unreasonable and void as to members of a salvage corps.[37]

ENGINEERING DEPARTMENT

6606. City engineer—Compensation—A resolution of the council of St. Paul, reducing the salary of the city engineer, has been held invalid under Sp. Laws 1883 c. 2 § 13.[38]

6607. Records, plats, and surveys, as evidence—It is provided by statute that "records of surveys made by the engineering department of any munici-

[25] Gullikson v. McDonald, 62–278, 64+812.
[26] Moorhead v. Murphy, 94–123, 102+219.
[27] Red Lake Falls M. Co. v. Thief River Falls, 109–52, 122+872. See, as to power to establish fire limits, 29 Am. Rep. 347.
[28] Harrington v. Minneapolis, 108–209, 121+908 (appointment by chief of fire department of Minneapolis—approval of payroll by council held not to constitute appointment and confirmation of persons named thereon).
[29] Hart v. Minneapolis, 81–476, 84+342 (under charter of Minneapolis council may fix salary of assistant engineer of fire department by resolution instead of by ordinance).
[30] Du Toit v. Belview, 94–128, 102+216.
[31] Jewell v. Bertha, 91–9, 97+424.
[32] Du Toit v. Belview, 94–128, 102+216.
[33] Basshor v. St. Paul, 26–110, 1+810.
[34] Grube v. St. Paul, 34–402, 26+228. See Note, 32 Am. Rep. 618.
[35] Warren v. Mendenhall, 77–145, 79+661.
[36] Hamilton v. Mpls. etc. Co., 78–3, 80+693.
[37] State v. Sheppard, 64–287, 67+62.
[38] Rundlett v. St. Paul, 64–223, 66+967.

pality, including field notes, profiles, plats, plans, and other files and records of such department, shall be prima facie evidence in all courts of the correctness of the facts shown and statements made therein." [39]

PARKS

6608. Definitions—A municipal park is a tract of land set apart and maintained for public use, and laid out, planted, and ornamented in such a way as to afford pleasure to the eye, as well as opportunity for open-air recreation. A park is not a public street, but a parkway is. A parkway is essentially a boulevard.[40]

6609. Access—The right of the public of access to parks and parkways is subject to reasonable restriction imposed by public authority.[41]

6610. Exclusion of vehicles—An ordinance, excluding from any park or parkway of Minneapolis certain vehicles with tires less than six inches wide, has been held unreasonable.[42]

6611. Assessments—A park is a local public improvement for which special assessments may be levied on adjacent property.[43]

6612. Vacation—A determination by proper legislative authority that public interests require or justify the vacation of streets or public grounds of any description is final and conclusive upon the courts, except when reviewed in the manner prescribed by law, and will be presumed to have been based upon a consideration of public interests.[44] Abutting owners have a special interest in a park of which they cannot be deprived except by due process of law.[45]

6613. Minneapolis park board—Cases are cited below relating to the park board of Minneapolis.[46]

6614. St. Paul park board—Cases are cited below relating to the park board of St. Paul.[47]

[39] R. L. 1905 § 4703; Fish v. Chi. etc. Ry., 82–9, 84+458; Id., 84–179, 87+606.

[40] Kleopfert v. Minneapolis, 90–158, 95+908.

[41] Scranton v. Minneapolis, 58–437, 60+26. See Ewing v. Minneapolis, 86–51, 90+10.

[42] State v. Rohart, 83–257, 86+93, 333.

[43] See State v. Dist. Ct., 33–235, 22+625; State v. Board, 33–524, 24+187; State v. Brill, 58–152, 59+989; State v. Dist. Ct., 66–161, 68+860; State v. Hunt, 74–496, 77+301; State v. Dist. Ct., 75–292, 77+968; State v. West Duluth L. Co., 75–456, 78+115; State v. Dist. Ct., 83–170, 86+15.

[44] State v. Board Park Comrs., 100–150, 110+1121.

[45] Kray v. Muggli, 84–90, 99, 86+882.

[46] State v. Dist Ct., 33–235, 22+625 (act creating board constitutional—board not a municipal corporation but a department of the city government); State v. Board Park Comrs., 33–524, 24+187 (provisions of act creating board relating to the payment of damages for land taken for park purposes construed—confirmation of award—payment, tender, or deposit of damages); State v. Waddell, 49–500, 52+213 (not authorized to exclude vehicles from a street not running through land acquired for park purposes); Webber v. Board Park Comrs., 80–55, 82+1119 (board not a municipal corporation but a department of the city government—not liable for negligence); State v. Dist. Ct., 83–170, 86+15 (may contract for the conveyance of land to the city for park purposes in consideration of the exemption of other contiguous lands of the same owner from assessments for park purposes to the amount agreed upon); State v. Rohart, 83–257, 86+93, 333 (ordinance of board excluding certain vehicles from parkways held unreasonable and invalid); Ewing v. Minneapolis, 86–51, 90+10 (held authorized to remove a dock, etc. from the shores of Lake Calhoun); State v. Pratt, 90–66, 95+589 (held to have exclusive right to authorize individuals to cut trees in streets); Kleopfert v. Minneapolis, 90–158, 95+908 (city liable for negligence of board—notice of claim need not be served on board); State v. Board Park Comrs., 100–150, 110+1121 (contract requiring board to maintain parkway perpetually free from expense to abutting owner invalid); State v. Brown, 126+408 (held authorized to build a dwelling house on park property for the use of the park superintendent and his family and for office purposes).

[47] In re Lincoln Park, 44–299, 46+355 (act creating board construed—park fund—provision for compensation for lands taken for park purposes); State v. Brill, 58–152, 59+

STREETS—IN GENERAL

6615. Definition—A street is a public thoroughfare or highway in a city, village, or borough.[48] A street appearing on the recorded plat, but which has never been opened, prepared for use, or used as a street, is known as a "paper street."[49]

6616. What constitutes—Cul de sac—Where a piece of land appeared on a plat to be open and a continuation of a street, and afforded the only street access to certain lots, it was held a public street, though it was a cul de sac.[50]

6617. Boulevards—A municipality may set apart a portion of a street in a residence district for a boulevard, if it does not substantially impair the usefulness of the street for its primary purpose of public travel.[51]

6618. Municipal control—In general—The legislature may delegate to municipalities control over streets within their boundaries.[52] This delegated control carries with it the right to enforce all appropriate regulations sanc- right in the streets, levees, or other public grounds within its limits. What- tioned by the police power of the state.[53] A municipality has no proprietary ever rights it has in them it holds merely in trust for the public.[54]

6619. Privileges and immunities—A grant of powers and privileges by a city to do certain things in its streets does not carry with it any immunity from liability for private injuries which may result directly from the exercise of such powers and privileges.[55]

6620. Municipality cannot surrender control—A municipality, acting through its legislative body, has no power to enter into contracts which curtail or prohibit an exercise of its legislative or administrative authority over streets, highways, or public grounds, whenever the public interests demand that it should act.[56]

6621. Laying out—*a. Discretionary power*—The expediency of laying out a street is a legislative question not subject to review by the courts.[57]

b. Width of streets—Under Sp. Laws 1879 c. 36 the village of Sleepy Eye was authorized to lay out and open to the width of sixty-six feet only, except upon petition of all the abutting owners.[58]

c. Across railways—Under a city charter conferring a general power to lay out and extend streets, power to extend them across railways is implied.[59] Whether the verdict of the jury on an appeal in proceedings to lay out and establish a public highway, on the questions as to the propriety and necessity of the proposed highway, and whether it will essentially impair the use of a railway right of way over which it is extended, is final and conclusive, and

989 (park act of 1891 held constitutional—act held to make adequate provision for lands taken for park purposes).

[48] Carli v. Stillwater etc. Co., 28–373, 375, 10+205.

[49] Raiolo v. N. P. Ry., 108–431, 122+489.

[50] Hanson v. Eastman, 21–509.

[51] McDonald v. St. Paul, 82–308, 84+1022.

[52] Carli v. Stillwater etc. Co., 28–373, 377, 10+205; Fohl v. Sleepy Eye Lake, 80–67, 82+1097; State v. Board, Park Comrs., 100–150, 110+1121.

[53] State v. St. P. etc. Ry., 98–380, 388, 108+261; McKillop v. Duluth St. Ry., 53–532, 538, 55+739.

[54] St. Paul v. Chi. etc. Ry., 63–330, 63+267.

[55] Larson v. Ring, 43–88, 44+1078.

[56] Nash v. Lowry, 37–261, 33+787; State v. Board, Park Comrs., 100–150, 110+1121.

[57] Fohl v. Sleepy Eye Lake, 80–67, 82+1097; State v. Board, Park Comrs., 100–150, 110+1121.

[58] Fohl v. Chi. etc. Ry., 84–314, 87+919.

[59] St. Paul etc. Ry. v. Minneapolis, 35–141, 27+500; St. Paul etc. Co. v. St. Paul, 30–359, 15+684; Fohl v. Sleepy Eye Lake, 80–67, 82+1097. See State v. St. P. etc. Ry., 98–380, 387, 108+261 (proceedings held to show that a street was laid out across a right of way and that the city authorities became vested with power to open the street at grade, or by an overhead crossing as propriety, necessity, and public safety required).

not subject to judicial review, is an open question. Such questions are addressed to the sound judgment and discretion of the jury, and, though their verdict is not conclusive, the court has no power, under Laws 1895 c. 320, to direct and order judgment notwithstanding the same, except in cases where the evidence is clearly and indisputably conclusive on the question.[60] The fact that the extension of a public street across the right of way of a railway company will cause and necessitate the removal of a small coal shed belonging to the company, the change of a switch in line of the new street, and a rearrangement of some of its tracks, is not conclusive that the use of its right of way will be destroyed or essentially impaired.[61]

6622. Abandonment of proceedings—A resolution of the city council, pursuant to the charter, to abandon a proceeding for laying out a street in which damages had been awarded to the relator, has been held not qualified by a subsequent resolution, adopted at the same meeting, instituting proceedings anew for laying the same street over the same lands. The abandonment was effectual.[62]

6623. Vacation—*a. Petition*—In proceedings under the St. Paul charter to vacate a section of a street the council acquires jurisdiction upon receiving a petition therefor signed by a majority of the property owners along the line of that part of the street to be vacated.[63]

b. How far conclusive on courts—A determination by proper legislative authority that public interests require or justify the vacation of streets or public grounds of any description is final and conclusive upon the courts, except when reviewed in the manner prescribed by law, and will be presumed to have been based upon a consideration of public interests.[64]

c. Effect—Reversion to abutting owner—Where a street is lawfully vacated, the owner of abutting property holds the fee of the former street, presumably to the center line, discharged from all easements in favor of either the public or the owners of other property abutting on the street.[65] An ordinance vacating a street over land conveyed by an owner of the fee to a city for highway purposes and for no other use is not void because the right of the abutting owner to use the street vacated had not been condemned.[66]

d. Damages—An abutting owner who suffers peculiar damages from the vacation of a street is entitled under the constitution to compensation. The payment of damages is not a condition precedent to the vacation of a street. The owner is remitted to an action against the municipality.[67]

6624. Lighting—*a. Duty*—Though a municipality has the power to light its streets it is not bound to do so unless the charter so expressly provides.[68]

b. Delegation of power—The power to provide for lighting is legislative and cannot be delegated to a committee of a council.[69]

c. Contracts—Cases are cited below involving the construction and validity of contracts for the lighting of streets.[70]

[60] Milwaukee etc. Ry. v. Faribault, 23-167; Fohl v. Sleepy Eye Lake, 80-67, 82+1097.

[61] Fohl v. Sleepy Eye Lake, 80-67, 82+1097.

[62] State v. Minneapolis, 40-483, 42+355.

[63] State v. St. Paul, 98-232, 107+1129.

[64] State v. Board, Park Comrs., 100-150, 110+1121.

[65] Lamm v. Chi. etc. Ry., 45-71, 47+455; Steenerson v. Fontaine, 106-225, 119+400.

[66] Steenerson v. Fontaine, 106-225, 119+400.

[67] Vanderburgh v. Minneapolis, 98-329, 108+480. See Hielscher v. Minneapolis, 46-529, 49+287; Vanderburgh v. Minneapolis, 93-81, 100+668.

[68] Miller v. St. Paul, 38-134, 36+271; McHugh v. St. Paul, 67-441, 70+5.

[69] Minneapolis G. Co. v. Minneapolis, 36-159, 30+450.

[70] Kiichli v. Minn. etc. Co., 58-418, 59+1088 (contract by council of Minneapolis for a term of five years held presumptively invalid); St. Paul G. Co. v. St. Paul, 78-39, 80+774, 877 (St. Paul held not liable

6625. Paving—*a. Power—Discretion*—The power to pave involves the power to repave.[71] Cases are cited below involving the construction of particular charters in this connection.[72]

b. Contracts—Cases are cited below involving the construction and validity of contracts relating to paving.[73]

6626. Sprinkling—Contracts—Special assessments—A contract for the sprinkling of streets providing for payment out of special assessments at the end of the season, has been construed to give the city a reasonable time after the completion of the work to make and collect assessments, and that until the expiration of such time the contractor was not entitled to interest as damages for the non-payment of the contract price.[74]

STREETS—GRADING

6627. Definitions—The grade of a street has been held to mean the line or lines of elevation on which public travel is to pass.[75] Grading has been held to cover gutters and curbing,[76] and macadamizing.[77]

6628. Rights and liabilities—In general—In improving its streets a municipality has the same rights and power in the land upon which they are laid as a private owner and is subject to the same liabilities for damages done to others. The right to cause damage to private property, beyond that which a private owner may cause, without liability, must be acquired through the right of eminent domain.[78]

6629. Authority to grade—The power to order and contract for the grading of streets is not inherent in municipalities.[79] The common council of St. Paul has been held not authorized, under Sp. Laws 1874 c. 1, to grade a street without the action of the board of public works in the premises.[80]

to pay a gaslight company for lights not used); Schiffmann v. St. Paul, 88–43, 92+503 (contract for lighting improperly awarded—injunction by taxpayer); Broderick v. St. Paul, 90–443, 97+118 (held under charter of St. Paul that acceptance of bid for lighting can only be made by resolution, ordinance, or by-law); St. Paul G. Co. v. St. Paul, 91–521, 98+868 (contract between St. Paul and St. Paul Gaslight Co. construed—city held not liable to pay for lights not used); State v. Jones, 98–6, 106+963 (council of Minneapolis held authorized to award contract for lighting only by ordinance or resolution approved by the mayor or passed over his veto).

[71] See State v. Dist. Ct., 80–293, 83+183.

[72] State v. Dist. Ct., 32–181, 19+732 (board of public works of St. Paul held authorized to contract for the partial paving of streets); Diamond v. Mankato, 89–48, 93+911 (council of Mankato held to have discretionary power to provide for the paving of streets without a petition of property owners).

[73] State v. Dist. Ct., 32–181, 19+732 (failure of a city comptroller to countersign a contract held not fatal); Warren-Scharf etc. Co. v. St. Paul, 69–453, 72+711 (contract construed—unforeseen obstacles); State v. Dist. Ct., 80–293, 83+183 (contract to keep in repair construed); State v. McCardy, 87–88, 91+263 (claim for deductions from delay in performance waived); Merchants Nat. Bank v. East Grand Forks, 94–246, 102+703 (decision of arbitrator—curative act); Peet v. East Grand Forks, 101–518, 112+1003 (payment in instalments as work progresses—abandonment—recovery); Peet v. East Grand Forks, 101–523, 112+1005 (estimates of engineer—curative act); Thornton v. East Grand Forks, 106–233, 118+834 (estimates of engineer—limitation of actions); Peet v. East Grand Forks, 108–426, 122+327 (whether contractor was justified in stopping work, and whether work done was in accordance with the contract, held questions for jury). See Diamond v. Mankato, 89–48, 93+911; Patterson v. Barber, 94–39, 101+1064, 102+176.

[74] Keigher v. St. Paul, 69–78, 72+54.

[75] Wilkin v. St. Paul, 33–181, 22+249.

[76] State v. Dist. Ct., 29–62, 11+133.

[77] State v. Dist. Ct., 33–164, 22+295.

[78] O'Brien v. St. Paul, 25–331; Dyer v. St. Paul, 27–457, 8+272; McClure v. Red Wing, 28–186, 193, 9+767; Armstrong v. St. Paul, 30–299, 15+174; Henderson v. Minneapolis, 32–319, 322, 20+322; Peters v. Fergus Falls, 35–549, 29+586; Pye v. Mankato, 36–373, 374, 31+863; Nichols v. Duluth, 40–389, 42+84; Follmann v. Mankato, 45–457, 48+192; Munger v. St. Paul, 57–9, 58+601.

[79] Nash v. St. Paul, 8–172(143, 159).

[80] Althen v. Kelly, 32–280, 20+188; State v. Dist. Ct., 44–244, 46+349.

6630. Power continuing—The power of a municipality to grade its streets is a continuing power—it may change the grade again and again.[81]

6631. Duty to grade—Extent—A municipality is not bound to grade or improve its streets, at least so far as individuals are concerned. It is not bound to grade a street to its full width.[82]

6632. Discretion of municipal officers—It is expedient to leave the fixing of grades to the judgment and discretion of local governing boards.[83]

6633. Municipal control—Judicial interference—The courts are not inclined to restrict the powers of municipalities over their streets and public ways.[84]

6634. Considerations in fixing grade—While the convenience of the public in general should be the primary consideration in fixing a grade, the consequences to abutting property need not be disregarded.[85]

6635. Fixing grade before improvements—Regularly a grade should be fixed before improvements are made at the expense of abutting property, or contracts for the improvements entered into. The effect of irregularity in this regard depends on the time and mode in which objection is made.[86]

6636. Two grades in same street—Retaining wall—The grade of one side of a street may be different from that of the other, and a retaining-wall may be constructed along the center of the street to support the earth of the higher grade.[87]

6637. Lateral support—The liability of a municipality for injury to the lateral support of abutting land, in the improvement of its streets, is the same as that of a private owner.[88] The general subject of lateral support is considered elsewhere.[89]

6638. Slopes—In grading streets it is the duty of a municipality to make such slopes along the sides as may be necessary to render the sidewalks safe for pedestrians.[90]

6639. Approach to bridge—An approach to a bridge changing the grade of a street has been held not an additional servitude and not to render a city liable for damages to abutting property.[91]

6640. Notice of grade—Abutting owners have been held charged with notice of grades when established as provided by the St. Paul charter (Sp. Laws 1887 c. 7).[92]

6641. Removal of soil, etc.—A municipality may use the soil, stone, timber, etc., necessarily removed in the improvement of a street, for the construction or repair of its streets or bridges, whether at the point where the material is taken or elsewhere.[93] Whether it can take material above grade from a place which it is not improving, for use elsewhere in the construction or repair of its streets, is perhaps still an open question.[94] It has been said that

[81] Karst v. St. P. etc. Ry., 22–118; Rakowsky v. Duluth, 44–188, 46+338.

[82] Munger v. St. Paul, 57–9, 12, 58+601.

[83] Yanish v. St. Paul, 50–518, 521, 52+925.

[84] Rakowsky v. Duluth, 44–188, 46+338.

[85] O'Brien v. St. Paul, 25–331, 334; Yanish v. St. Paul, 50–518, 521, 52+925.

[86] State v. Dist. Ct., 44–244, 46+349; State v. Judges, 51–539, 53+800, 55+122; Fitzhugh v. Duluth, 58–427, 59+1041; Keough v. St. Paul, 66–114, 68+843.

[87] Yanish v. St. Paul, 50–518, 52+925; Parker v. Truesdale, 54–241, 245, 55+901; Munger v. St. Paul, 57–9, 12, 58+601. See Willis v. Winona, 59–27, 60+814.

[88] Dyer v. St. Paul, 27–457, 8+272; Nichols v. Duluth, 40–389, 42+84. See Armstrong v. St. Paul, 30–299, 15+174.

[89] See § 96.

[90] Nichols v. St. Paul, 44–494, 47+168. See Overmann v. St. Paul, 39–120, 39+66; Kuschke v. St. Paul, 45–225, 47+786; Munger v. St. Paul, 57–9, 58+601.

[91] Willis v. Winona, 59–27, 60+814.

[92] Kuschke v. St. Paul, 45–225, 47+786.

[93] St. Anthony etc. Co. v. King, 23–186, 190; Viliski v. Minneapolis, 40–304, 41+1050. See Glencoe v. Reed, 93–518, 101+956.

[94] See St. Anthony etc. Co. v. King, 23–186, 190.

the public easement justifies only the taking of material which the process of the construction or repair of the street requires.[95] When it is necessary to remove material, whether below the grade line or not, for the purpose of improving the locus in quo, such material may be disposed of by the municipality without regard to the abutting owner, at least when it is impracticable to allow him to remove it. There may be an exception to this general rule in the case of valuable minerals.[96] A municipality cannot remove materials below the grade line when such removal is unnecessary for the improvement of the locus in quo.[97] The agreement of a contractor to pay an abutting owner is enforceable, though the municipality might have authorized him to take it without compensation.[98] An unauthorized removal of trees from a street by municipal authorities may be restrained by the abutting owner.[99]

6642. Diversion of surface waters—The liability of a municipality for the diversion of surface waters in the improvement of its streets is the same as that of a private owner. The subject is considered elsewhere.[1]

6643. Interference with franchise—A private franchise to use a street is subject to the right of the municipality to establish or change grades or improve the street for public use, unless the express terms of the grant or the nature of the franchise forbid.[2]

6644. Contracts—Cases are cited below involving the construction and validity of contracts relating to grading.[3]

6645. Liability for acts of contractors—A municipality has been held liable for the acts of a contractor under a contract to grade its streets.[4] It has been held not liable because of failure to prove a contract.[5]

6646. Damages from establishment of grade—Since the constitutional amendment of 1896 an abutting owner may recover from a municipality for damages resulting to his property from the original establishment of a grade.[6]

6647. What constitutes change of grade—A bridge over railway tracks has been held to change the grade of a street so as to require the change to be made in accordance with charter provisions governing change of grades.[7] An approach to a bridge has been held a change of grade.[8]

6648. Authority to change grade—The power to change a grade is a governmental power.[9] Charter provisions regulating the change of grades are

[95] Rich v. Minneapolis, 37–423, 35+2. See Sanborn v. Van Duyne, 90–215, 225, 96+41.

[96] Viliski v. Minneapolis, 40–304, 41+1050.

[97] Viliski v. Minneapolis, 40–304, 41+1050; Althen v. Kelly, 32–280, 20+188; Rich v. Minneapolis, 37–423, 35+2. See Glencoe v. Reed, 93–518, 101+956; Rich v. Minneapolis, 40–82, 41+455.

[98] St. Anthony etc. Co. v. King, 23–186.

[99] West v. White Bear, 107–237, 119+1064; Gilbert v. White Bear, 107–239, 119+1063.

[1] See § 10172.

[2] Stillwater W. Co. v. Stillwater, 50–498, 52+893.

[3] O'Dea v. Winona, 41–424, 43+97 (contract for filling, grading, etc.—practical construction—performance—work to satisfaction of other party—measurements); Sang v. Duluth, 58–81, 59+878 (contract to grade a part of a street—city without title—ultra vires—contractor held not entitled to recover); Keough v. St. Paul, 66–114, 68+843 (contract for grading street in St. Paul entered into between the city and a contractor held not ultra vires simply because the council had omitted to establish gradient lines for the street prior to the passage by council of an order directing that such street be graded, or because condemnation proceedings through which the city had attempted to acquire an easement for slopes along such street had not been fully consummated prior to the passage of such order); Red Wing S. P. Co. v. Donnelly, 102–192, 113+1.

[4] Sewall v. St. Paul, 20–511(459); Rich v. Minneapolis, 37–423, 35+2.

[5] Rich v. Minneapolis, 40–82, 41+455.

[6] Sallden v. Little Falls, 102–358, 113+884; Wallenberg v. Minneapolis, 127+422. See Lee v. Minneapolis, 22–13; Alden v. Minneapolis, 24–254, 262; O'Brien v. St. Paul, 25–331, 333; Henderson v. Minneapolis, 32–319, 322, 20+322; Pye v. Mankato, 36–373, 375, 31+863; Willis v. Winona, 59–27, 60+814.

[7] Wilkin v. St. Paul, 33–181, 22+249.

[8] Willis v. Winona, 59–27, 60+814.

[9] Genois v. St. Paul, 35–330, 29+129.

exclusive.[10] Possibly a municipality cannot contract away the right to change a grade.[11] Sp. Laws 1870 c. 3 has been held to authorize the city of Stillwater to change the grade of its streets, notwithstanding an agreement with a contractor to excavate a street to a prior grade.[12] Sp. Laws 1887 c. 2 has been held to authorize the city of Duluth to change the grades of its predecessor, the village of Duluth.[13]

6649. Change of grade—Reconsideration—The provisions of the charter of Minneapolis (Sp. Laws 1885 c. 5), authorizing the reconsideration of a vote changing a grade, have been construed.[14]

6650. Damages from change of grade—Liability—It was formerly the rule that in the absence of special charter provisions a municipality was not liable for consequential damages to abutting property caused by a change in the grade of a street.[15] This rule was abrogated by the constitutional amendment of 1896.[16] The measure of damages is the difference in value of the property alleged to have been injured before and after the acts of the municipality in grading the street, except where the cost of restoring the property to its original condition with reference to the street is less than the difference in value, in which case the cost of restoration is the measure of the property owner's relief.[17]

6651. Same—Charter provisions—The charters of some cities provide for the payment of damages resulting to abutting property from change in the grade of streets.[18]

SIDEWALKS

6652. Petition for construction—To confer jurisdiction on the common council of a village, when proceedings for the construction of a sidewalk are initiated by petition, the petition, under Laws 1901 c. 167, must be duly signed by a majority of the owners of the property fronting on the street where the proposed improvement is to be made.[19] A village council has authority under Laws 1885 c. 145 to cause a sidewalk to be constructed and to purchase material therefor without a petition from abutting owners and

[10] Wilkin v. St. Paul, 33–181, 184, 22+249.

[11] Karst v. St. P. etc. Ry., 22–118.

[12] Id.

[13] Rakowsky v. Duluth, 44–188, 46+338.

[14] Kelly v. Minneapolis, 57–294, 59+304.

[15] Henderson v. Minneapolis, 32–319, 20+322; Genois v. St. Paul, 35–330, 29+129; Pye v. Mankato, 36–373, 31+863; Rakowsky v. Duluth, 44–188, 46+338; Yanish v. St. Paul, 50–518, 522, 52+925; Parker v. Truesdale, 54–241, 244, 55+901; Willis v. Winona, 59–27, 60+814; Abel v. Minneapolis, 68–89, 93, 70+851; Dudley v. Buffalo, 73–347, 76+44.

[16] Dickerman v. Duluth, 88–288, 92+1119; Vanderburgh v. Minneapolis, 98–329, 108+480; Sallden v. Little Falls, 102–358, 113+884; Wallenberg v. Minneapolis, 127+422.

[17] Sallden v. Little Falls, 102–358, 113+884; Olson v. Albert Lea, 107–127, 119+794.

[18] McCarthy v. St. Paul, 22–527 (what damages recoverable—retaining wall—when cause of action accrues); Taylor v. St. Paul, 25–129 (Sp. Laws 1877 c. 23 § 9 held inapplicable); Henderson v. Minneapolis, 32–319, 20+322 (provision of charter held not to create liability); Genois v. St. Paul, 35–330, 29+129 (appeal from assessment of damages exclusive remedy); Robinson v. St. Paul, 40–228, 41+950 (appeal to district court from assessment); Keil v. St. Paul, 47–288, 50+83 (change of grade of street crossing another street—one assessment held to cover all damages); Moritz v. St. Paul, 52–409, 54+370 (who entitled to damages—right of mortgagee—waiver of limitation as to time of payment); Munger v. St. Paul, 57–9, 58+601 (two grades in same street—change of one grade—measure of damages—evidence of damages insufficient); Abel v. Minneapolis, 68–89, 70+851 (application of Sp. Laws 1885 c. 5—authority of commissioners to assess damages—view of premises—evidence—damages); State v. Blake, 86–37, 90+5 (irregularity in the conduct of commissioners to assess damages and levy assessments therefor held not fatal).

[19] State v. Bury, 101–424, 112+534.

without a special assessment therefor.[20] A provision of the charter of St. Paul, providing that sidewalks shall not be laid out except upon a petition of the interested property owners, has been held not applicable to repairs or the relaying of a sidewalk with new material.[21]

SEWERS AND DRAINS

6653. Authority to construct—Under Laws 1901 c. 167 villages organized under the general law have no power to construct or contract for the construction of sewers until property owners have an opportunity to perform the work themselves.[22] The city of Duluth has been held authorized by its charter (Sp. Laws 1887 c. 2) to construct a sewer sufficiently large to carry off the waters of a small stream passing through the city.[23]

6654. Ministerial and legislative duties—In constructing sewers a municipality performs a ministerial act. In adopting plans for sewers it performs a legislative act.[24]

6655. Discretion—So long as municipal authorities confine themselves to the purpose of public drainage, their judgment as to the propriety or necessity of sewers and the method of their construction, is ordinarily conclusive.[25]

6656. Duty to construct—A municipality is not liable for failure to construct sewers, where a private owner would not be liable under the circumstances.[26]

6657. Ownership and control—The power of a city to construct sewers is not given for governmental purposes, but is a specific grant, to be exercised for the general welfare of the municipality. Sewers are the property of the city and may be protected and controlled as any other property of the city. An individual has no right to interfere with them.[27]

6658. Easement for sewer—Entry upon private property—A contract creating an easement for a sewer in private property has been held not to authorize an entry upon the property to connect the sewer with property elsewhere.[28]

6659. Connections—Liability for use—Where a sewer was constructed without a local assessment to pay for it, contrary to the provisions of a charter, it was held that a person connecting his property with it waived the irregularity and was liable to pay the rate fixed by a resolution of the council.[29] An owner of improved property has been held bound to connect his water gutters and spouts with a sewer to prevent the discharge of a large volume of water on adjoining premises.[30]

6660. Inflow valves—Contributory negligence—It has been held a question for the jury whether the plaintiff was guilty of contributory negligence in failing to provide his sewer connections with proper valves to prevent the inflow of water from a sewer.[31]

6661. Diverting surface waters—If a municipality collects surface waters in its sewers and throws them upon private property, its liability is governed

[20] Bradley v. West Duluth, 45–4, 47+166.
[21] State v. Dist. Ct., 89–292, 94+870.
[22] State v. Foster, 94–412, 103+14.
[23] Sherwood v. Duluth, 40–22, 41+234.
[24] Simmer v. St. Paul, 23–408; McClure v. Red Wing, 28–186, 194, 9+767; Welter v. St. Paul, 40–460, 42+392; Tate v. St. Paul, 56–527, 529, 58+158.
[25] Sherwood v. Duluth, 40–22, 41+234; Tate v. St. Paul, 56–527, 529, 58+158.
[26] Alden v. Minneapolis, 24–254, 262; McClure v. Red Wing, 28–186, 194, 9+767; Henderson v. Minneapolis, 32–319, 20+322; Pye v. Mankato, 36–373, 375, 31+863; St. Paul etc. Ry. v. Duluth, 56–494, 58+159.
[27] Fergus Falls v. Boen, 78–186, 80+961.
[28] State v. Dist. Ct., 90–540, 97+425.
[29] Fergus Falls v. Boen, 78–186, 80+961; Fergus Falls v. Edison, 94–121, 102+218.
[30] Ginter v. Rector, 95–14, 103+738.
[31] Netzer v. Crookston, 59–244, 61+21.

by the same rules as that of private persons. The subject is considered elsewhere.[32]

6662. Contracts for construction—Cases are cited below involving contracts for the construction of sewers.[33]

6663. Want of diligence in completing—A municipality may render itself liable to an abutting owner by want of diligence in completing a sewer and thereby obstructing access to his property.[34]

6664. Liability for insufficient sewers—A municipality is not an insurer of the sufficiency of its sewers. If it employs competent persons who construct sewers which they honestly and reasonably believe are sufficient, it is not liable if they prove insufficient. It is not required to anticipate extraordinary storms which would not have been expected in view of the past history of the country. If it fails to exercise reasonable care and skill, and its sewers, by reason of their insufficiency, throw large and destructive quantities of water upon private property, it is liable for the damages.[35] It is not liable if such property is the natural depository of all the water discharged thereon.[36]

6665. Defective construction—Liability—A municipality is liable for damages resulting to a person from its want of proper care, skill, or diligence, in the construction of sewers.[37] A municipality is not liable for incidental damages resulting from the defective plan of a sewer, but it may be liable for negligence in failing to remedy a defective plan. If a sewer as originally planned and constructed is found to result in direct and physical injury to private property which would not otherwise have happened, and which from its nature is liable to be repeated and continuous, but which is remediable by a change of plan or the adoption of prudent measures, the municipality is liable for such damages as may occur in consequence of its omission, after notice, to use ordinary care to remedy the evil. If a sewer, whatever its plan, is so constructed as to cause a positive and direct invasion of private property, as by collecting and throwing upon it, to its damage, water or sewage which would not otherwise have found its way there, the municipality is liable.[38]

6666. Duty to repair and keep clean—A municipality is liable for damages resulting from its failure to exercise ordinary or reasonable care to keep its sewers in repair and free from obstructions.[39] It is not an insurer of the safe condition of its sewers—it is not bound to exercise extraordinary care.[40] It is not liable unless it had notice of the defect, actual or constructive, and was negligent thereafter in failing to remedy it.[41] If a municipality assumes control of a sewer, it is immaterial who constructed it.[42] It is immaterial that the sewer is on private property and the municipality has no right to go on the premises to make repairs.[43]

[32] See §§ 10160–10174.

[33] Starkey v. Minneapolis, 19–203(166); Moran v. St. Paul, 65–300, 67+1000; Winona v. Jackson, 92–453, 100+368; Bell v. Kirkland, 102–213, 113+271.

[34] Simmer v. St. Paul, 23–408.

[35] McClure v. Red Wing, 28–186, 9+767; Pye v. Mankato, 36–373, 31+863; Taubert v. St. Paul, 68–519, 71+664. See Pearson v. Duluth, 40–438, 42+394.

[36] Dudley v. Buffalo, 73–347, 76+44. See St. Paul & D. Ry. v. Duluth, 56–494, 58+159.

[37] Simmer v. St. Paul, 23–408. See Note, 29 Am. St. Rep. 737.

[38] Tate v. St. Paul, 56–527, 58+158; McClure v. Red Wing, 28–186, 9+767. See Netzer v. Crookston, 59–244, 61+21; Pye v. Mankato, 36–373, 31+863; Stanke v. St. Paul, 71–51, 54, 73+629.

[39] Taylor v. Austin, 32–247, 20+157; Stoehr v. St. Paul, 54–549, 56+250; Netzer v. Crookston, 59–244, 61+21; Buchanan v. Duluth, 40–402, 42+204.

[40] Netzer v. Crookston, 59–244, 61+21.

[41] Taylor v. Austin, 32–247, 20+157; Pottner v. Minneapolis, 41–73, 42+784.

[42] Taylor v. Austin, 32–247, 20+157.

[43] Netzer v. Crookston, 59–244, 61+21.

6667. Damages—Measure—A verdict for damages to merchandise in a cellar resulting from the overflow of a sewer has been held justified as to the amount of damages.[44] The profits of a business have been held too speculative as a measure of damages.[45]

6668. Evidence—Admissibility—Cases are cited below involving the admissibility of evidence.[46]

6669. Pleading—Cases are cited below involving questions of pleading.[47]

WATERWORKS AND WATER SUPPLY

6670. Exclusive franchises—A statute has been held not to authorize a municipality to grant an exclusive franchise so as to disable it for a period of thirty years from establishing waterworks and a system of supply.[48]

6671. Water pipes in streets—A franchise to lay water pipes in a street has been held subject to the right of the city to establish and change the grade of the streets and to grade streets.[49] The village of Duluth has been held authorized to allow a corporation to lay water pipes in its streets for the purpose of supplying both Duluth and Superior with water.[50]

6672. Forfeiture of franchises—In an action by a city against a water company for the forfeiture of the latter's franchise on the ground that it had failed to supply pure water as agreed, it was held that the complaint stated a cause of action; that the city was not estopped by the fact that the same kind of water had been supplied for several years; that the duty to supply pure water was a continuing one; and that it was not a condition precedent to an action that the city obtain the decision of the state board of health as to the standard of water to be used.[51]

6673. Expediency of establishing water plant—The necessity or expediency of establishing a water plant by a municipality is a legislative and not a judicial question.[52]

6674. Water and light boards—Cases are cited below involving the powers of water and light boards under particular charters.[53]

6675. Rules and regulations—Rules of a water board, giving credit for water consumed through small pipes supplied with meters upon charges for unmetered connections of a building using an automatic sprinkling device with

[44] Buchanan v. Duluth, 40–402, 42+204.

[45] Simmer v. St. Paul, 23–408.

[46] Taylor v. Austin, 32–247, 20+157 (evidence that a cellar had been flooded by the overflow of a sewer on several occasions held admissible under the complaint); Pearson v. Duluth, 40–438, 42+394 (evidence of the condition of gutters at other times than during the particular storms mentioned in the complaint held admissible).

[47] Starkey v. Minneapolis, 19–203(166) (complaint held not to show contract between plaintiff and defendant for constructing sewers); Simmer v. St. Paul, 23–408 (complaint held defective in its allegations as to loss of business); Netzer v. Crookston, 59–244, 61+21 (fact that a municipality is without funds to repair its sewers, if a defence at all, must be pleaded by defendant).

[48] Long v. Duluth, 49–280, 51+913.

[49] Stillwater W. Co. v. Stillwater, 50–498, 52+893.

[50] Duluth v. Duluth etc. Co., 45–210, 47+781.

[51] St. Cloud v. Water etc. Co., 88–329, 92+1112. See Industrial T. Co. v. St. Cloud, 88–437, 93+114.

[52] Janeway v. Duluth, 65–292, 68+24.

[53] Morton v. Power, 33–521, 24+194 (board of water commissioners of St. Paul—power to contract in its own name—agent of city—not a corporation); Eisenmenger v. Board Water Comrs., 44–457, 47+156 (provisions of Sp. Laws 1885 c. 110 § 10 relating to injunctions against the water board of St. Paul construed); Am. E. Co. v. Waseca, 102–329, 113+899 (powers of water and light board of Waseca—may contract for and in behalf of city—mayor not a member—mayor cannot cancel contracts made by board—board may sue and be sued).

water mains, have been held discriminatory and void, because lacking uniformity in principle and in operation.[54]

6676. Meters—An ordinance regulating the use of water meters has been held not unreasonable.[55]

6677. Automatic sprinkling connections—A property owner, who has installed an automatic sprinkling system and connected it at his own expense with the water mains, though he may not take away water except in case of fire, enjoys a beneficial use of water not common to the public in general. The water board is entitled to make a reasonable and impartial charge for the pecuniarily valuable and special privilege conferred.[56]

6678. Defective pipes and hydrants—So far as a municipality maintains its water plant for use by its fire department in extinguishing fires, it is performing a public or governmental function, and is not liable for the negligence of its officers and servants in permitting the pipes and hydrants to become clogged and choked with sand, bark, and other refuse.[57]

6679. Reservoir—Liability for escaping water—A municipality has been held liable for damages resulting from the escape of water from a reservoir forming a part of its waterworks.[58]

6680. Cutting off water supply—Injunction—Courts will interfere by injunction or otherwise to protect the public and individuals entitled to water service against unreasonable charges or discriminations made by public service corporations or bodies. The water board will not be permitted to enforce illegal rates by severing the connection with an automatic sprinkling system.[59] While a municipality or water board may be restrained from cutting off a patron's supply of water because he will not pay excessive rates therefor, yet the issuance of a temporary injunction to effect that purpose is largely discretionary with the trial court.[60]

6681. Water rates—Water rates are not taxes, but merely the price paid for water as a commodity. Certain water rates in Duluth have been held reasonable.[61] An ordinance of Duluth, fixing a schedule of water rates, has been construed.[62]

6682. Liability of owner for water and light furnished tenant—Laws 1895 c. 8 §§ 291, 293, which make an owner of premises liable for water and light furnished by a municipality to a tenant, are not unconstitutional, in that it results in the taking of property without due process of law, or in causing one person to pay for the debts of another. The obligation assumed by an owner who connects his premises with the city system for the purpose of acquiring light or water is to maintain and pay for the same in accordance with the prescribed rules and regulations upon the theory of implied contract. Certain regulations of the city of East Grand Forks have been held reasonable and such as may be conferred by the state upon municipalities.[63]

6683. Contracts—Cases are cited below involving the construction and validity of contracts relating to waterworks and water supply.[64]

[54] Gordon v. Doran, 100-343, 111+272.
[55] Powell v. Duluth, 91-53, 97+450.
[56] Gordon v. Doran, 100-343, 111+272.
[57] Miller v. Minneapolis, 75-131, 77+788.
[58] Wiltse v. Red Wing, 99-255, 109+114.
[59] Gordon v. Doran, 100-343, 111+272.
[60] McGregor v. Case, 80-214, 83+140.
[61] Powell v. Duluth, 91-53, 97+450. See State v. Board, W. & L. Comrs., 105-472, 117+827.
[62] Allen v. Duluth etc. Co., 46-290, 48+1128.
[63] East Grand Forks v. Luck, 97-373, 107+393.
[64] Duluth v. Duluth etc. Co., 45-210, 47+781 (statute held to authorize village of Duluth to contract for a water supply with a corporation also supplying the city of Superior through the same mains); Stillwater W. Co. v. Stillwater, 50-498, 52+893 (ordinance granting company right to lay

POWERS—IN GENERAL

6684. Statutory—Municipalities have such powers only as are expressly conferred by statute or are necessarily implied in those which are expressly conferred. They have no inherent powers.[65] The library board of Minneapolis has been held to have power to become an ordinary bailee as to such property as may be proper for exhibition in its public museum, as for example, a collection of coins.[66]

6685. Common law powers—Villages are invested by statute with the powers and duties of municipal corporations at common law,[67] and city charters frequently contain a like grant of power.[68] It has been said that unless expressly prohibited a municipality possesses the general powers of municipal corporations at common law.[69]

6686. Powers of towns—By statute villages and cities are invested with the powers conferred by the general laws on towns.[70]

6687. Business enterprises—A municipality cannot engage in a private business enterprise—at least without explicit authority from the legislature.[71]

6688. Grant of franchise to street railways—Villages having less population than three thousand, incorporated under the provisions of G. S. 1894 c. 10 tit. 3, have no authority to authorize the construction and operation, for a definite term of years, of street railways in their streets.[72]

6689. Miscellaneous powers—A municipality has been held to have power to reimburse a police officer for expenses incurred in the defence of an action for false imprisonment,[73] and to employ special counsel.[74]

water pipes in streets construed); Sykes v. St. Cloud, 60–442, 62+613; First Nat. Bank v. St. Cloud, 73–219, 75+1054 (municipality held liable under a contract though plaintiff had not fully performed); State T. Co. v. Duluth, 70–257, 73+249 (stipulations for a forfeiture and suspension of water rentals upon a failure to supply good and wholesome water construed); Flynn v. Little Falls etc. Co., 74–180, 77+38, 78+106 (length of time for which municipality can contract with private company for water supply); Little Falls etc. Co. v. Little Falls, 74–197, 77+40 (contract whereby city agreed to pay all taxes on a company's waterworks assessed for city purposes held invalid); King v. Duluth, 78–155, 80+874 (contract for construction of a system of waterworks—stipulations relating to extra work construed); Chicago etc. Co. v. Olson, 80–533, 83+461 (contract for construction of a system of waterworks—stipulations relating to a forfeiture in case of delay construed); Reed v. Anoka, 85–294, 88+981 (charter of Anoka held to authorize contract with individuals for a water supply—contracts for water supply are made in the exercise of the proprietary powers of a municipality—they may be made to run for a considerable period); St. Cloud v. Water etc. Co., 88–329, 92+1112 (ordinance held to constitute a contract between a city and a water company—forfeiture for failure to furnish pure water as agreed); Industrial T. Co. v. St. Cloud, 88–437, 93+114 (action against city to recover contract price for hydrant rentals—counterclaim for damages sustained by individuals from failure of company to supply pure water held not to state a cause of action or defence).

[65] Nash v. St. Paul, 8–172(143, 159); McDonald v. Red Wing, 13–38(25); Minn. L. O. Co. v. Palmer, 20–468(424, 429); Milwaukee etc. Ry. v. Faribault, 23–167; Nichols v. Minneapolis, 30–545, 547, 16+410; Pine City v. Munch, 42–342, 343, 44+197; Long v. Duluth, 49–280, 287, 51+913; St. Paul v. Chi. etc. Ry., 63–330, 346, 63+267, 65+649, 68+458; Stillwater v. Lowry, 83–275, 86+103; Nerlien v. Brooten, 94–361, 364, 102+867. See State v. Brown, 126+408.

[66] Smith v. Library Board, Minneapolis, 58–108, 59+979.

[67] R. L. 1905 § 706.

[68] Horn v. St. Paul, 80–369, 370, 83+388.

[69] Moorhead v. Murphy, 94–123, 125, 102+219.

[70] R. L. 1905 § 692; Odegaard v. Albert Lea, 33–351, 23+526; State v. Gurley, 37–475, 35+179; Bradish v. Lucken, 38–186, 36+454; Wellcome v. Monticello, 41–136, 42+930; Tucker v. Lincoln County, 90–406, 97+103.

[71] Nerlien v. Brooten, 94–361, 102+867.

[72] Stillwater v. Lowry, 83–275, 86+103.

[73] Moorhead v. Murphy, 94–123, 102+219.

[74] Moorhead v. Murphy, 94–123, 102+219. See Horn v. St. Paul, 80–369, 83+388.

6690. Legislative powers—The legislative power of municipalities is considered in connection with the subject of ordinances.[75]

6691. Delegation of powers—The delegated governmental powers of municipalities cannot be delegated by them.[76]

6692. Delegation of legislative power to municipalities—The delegation of legislative power by the legislature to municipalities is an exception to the general rule that such power cannot be delegated.[77]

PROPERTY

6693. Power to hold and convey—Cities and villages are authorized to accept grants of land within their limits, and they may sell the same, when not restrained by the terms of the grant or some provision of law.[78]

6694. Deeds—A deed from the city of Minneapolis to the Minneapolis Industrial Exposition has been held authorized by special acts of the legislature.[79]

6695. Use for private purposes—The use of municipal buildings for private purposes is unlawful and may be enjoined at the instance of a taxpayer or person injuriously affected.[80]

CONTRACTS

6696. Distinction between governmental and proprietary powers—A distinction is made between contracts made in pursuance of the governmental powers of a municipality, and those made in pursuance of its proprietary or business powers.[81]

6697. Discretion—Where municipal authorities are authorized to contract in relation to a particular matter, they have a discretion as to methods and terms, with the honest and reasonable exercise of which a court cannot interfere, though they may not have chosen the best method, or made the most advantageous contract.[82]

6698. Impairing corporate powers—A municipality cannot impair its administrative, governmental, or legislative powers, by contract—at least, without express legislative authority.[83]

6699. Granting exclusive franchises—While the legislature may authorize a municipality to grant exclusive franchises, such grants are not favored and all doubt as to such authority or grant will be resolved against it.[84]

6700. Duration—A municipality cannot enter into a contract which will bind it for an unreasonably long period. Contracts for lighting streets, supplying water, etc., must be for a reasonable time only. Municipal authorities have a large discretion in such matters and courts will not declare such a contract unreasonable unless it is manifestly so.[85]

[75] See § 6748.

[76] State v. Kantler, 33-69, 21+856; Minneapolis G. Co. v. Minneapolis, 36-159, 30+450; Jewell v. Bertha, 91-9, 97+424.

[77] Harrington v. Plainview, 27-224, 232, 6+777; State v. Simons, 32-540, 543, 21+750; State v. Darrow, 65-419, 423, 67+1012; Wolfe v. Moorhead, 98-113, 117, 107+728.

[78] Jenkins v. Hanson, 101-298, 112+216.

[79] Minneapolis v. Janney, 86-111, 90+312.

[80] Nerlien v. Brooten, 94-361, 102+867.

[81] State Trust Co. v. Duluth, 70-257, 73+249; Reed v. Anoka, 85-294, 88+981.

[82] Flynn v. Little Falls etc. Co., 74-180, 186, 77+38, 78+106; Reed v. Anoka, 85-294, 88+981.

[83] Flynn v. Little Falls etc. Co., 74-180, 186, 77+38, 78+106; State v. St. P. C. Ry., 78-331, 81+200; State v. Minn. etc. Ry., 80-108, 116, 83+32; State v. St. P. etc. Ry., 98-380, 108+261; State v. N. P. Ry., 98-429, 108+269; Id., 208 U. S. 583; State v. Board, Park Comrs., 100-150, 110+1121. See Reed v. Anoka, 85-294, 88+981; Long v. Duluth, 49-280, 51+913; Nash v. Lowry, 37-261, 33+787.

[84] Long v. Duluth, 49-280, 51+913.

[85] Long v. Duluth, 49-280, 51+913; Flynn v. Little Falls etc. Co., 74-180, 77+38, 78+106; Reed v. Anoka, 85-294, 88+981. See State v. Minn. etc. Ry., 80-108, 83+32; State v. McCardy, 62-509, 64+1133.

6701. Debt limit—Contracts in excess of the limitation of indebtedness prescribed by statute or charter are void.[86]

6702. Presumption of validity—Contracts which are not necessarily beyond the scope of the corporate powers are presumptively valid. Municipal officers are presumed to have acted in good faith, within the limits of their authority, and in conformity to law, in making contracts.[87]

6703. Implied contracts—If an express contract to pay would be unauthorized and void, the law will not raise an implied promise.[88]

6704. Formal requisites—A provision requiring contracts to be in writing is mandatory.[89] The failure of a city comptroller to countersign a contract has been held a mere formal defect and not fatal under the St. Paul charter.[90]

6705. Preliminary estimates—Charters sometimes require preliminary estimates before the award of contracts.[91]

6706. Acceptance of bids by motion—The acceptance of a bid by motion of the council instead of by resolution, ordinance, or by-law, has been held unauthorized under the St. Paul [92] and Minneapolis [93] charters.

6707. Bids—Awarding to lowest bidder—When not required by statute or charter, a municipality need not advertise for bids, or award contracts to the lowest bidder, if it does.[94] By statute villages are prohibited from awarding certain contracts except to the lowest bidder after notice of the time and place of receiving bids.[95] Similar provisions are found in many city charters and they are mandatory. A contract in violation thereof is void.[96] Specifications upon which bids are invited must be so framed as to secure fair competition upon equal terms to all bidders. A contract with the best bidder, containing substantial provisions beneficial to him which were not included in the specifications, is void.[97] A contract must follow the advertisement for bids.[98] A publication of notice has been held sufficient.[99] The execution of a contract not awarded in conformity to the provisions of a charter as to bids has been held properly enjoined.[1]

6708. Approval by mayor—Under the Minneapolis charter the council can award a contract for lighting only by ordinance or resolution approved by the mayor, or passed over his veto.[2]

6709. Part performance—Where a contract to furnish a city with water had been partly performed, it was held that the city could not insist on a performance of the residue as a condition precedent to its liability to pay for what it had received.[3]

[86] Kiichli v. Minn. etc. Co., 58–418, 59+1088; Winona v. Jackson, 92–453, 100+368. See State v. Hodapp, 104–309, 116+589 and § 6579.

[87] Reed v. Anoka, 85–294, 88+981; Bayne v. Wright County, 90–1, 6, 95+456. See Kiichli v. Minn. etc. Co., 58–418, 59+1088.

[88] Macy v. Duluth, 68–452, 71+687. See Bradley v. West Duluth, 45–4, 47+166.

[89] Starkey v. Minneapolis, 19–203(166). See Basshor v. St. Paul, 26–110, 1+810; McKusick v. Stillwater, 44–372, 46+769.

[90] State v. Dist. Ct., 32–181, 19+732.

[91] See Nash v. St. Paul, 8–172(143); Id., 23–132; McKusick v. Stillwater, 44–372, 46+769.

[92] Broderick v. St. Paul, 90–443, 97+118.

[93] State v. Jones, 98–6, 106+963.

[94] Elliot v. Minneapolis, 59–111, 60+1081; Starkey v. Minneapolis, 19–203(166).

[95] R. L. 1905 § 731; Bradley v. West Duluth, 45–4, 8, 47+166; McLean v. North St. Paul, 73–146, 75+1042; Swenson v. Bird Island, 93–336, 337, 101+495; Pillager v. Hewett, 98–265, 107+815.

[96] Nash v. St. Paul 8–172(143); Id., 11–174(110); Swenson v. Bird Island, 93–336, 338, 101+495.

[97] Diamond v. Mankato, 89–48, 93+911; Schiffmann v. St. Paul, 88–43, 92+503; Le Tourneau v. Hugo, 90–420, 97+115; Patterson v. Barber, 94–39, 101+1064, 102+176; Id., 96–9, 104+566; State v. Dist. Ct., 102–482, 113+697, 114+654. See Mankato v. Barber, 142 Fed. 329.

[98] Nash v. St. Paul, 11–174(110); Penner v. Ulvestad, 124+371.

[99] Carpenter v. St. Paul, 23–232.

[1] Schiffmann v. St. Paul, 88–43, 92+503.

[2] State v. Jones, 98–6, 106+963.

[3] Sykes v. St. Cloud, 60–442, 62+613.

6710. Ratification—A contract, otherwise valid, entered into in good faith by a village at a time when it was not legally authorized to do so because of an error in posting notices of an election called and held for the purpose of conferring such power, becomes renewed and vitalized by the acceptance of the work done pursuant thereto at a date subsequent to another election at which such authority was conferred.[4] A contract beyond the corporate powers cannot be ratified.[5]

6711. Recovery of money paid—A municipality may recover money paid on a contract beyond its corporate powers,[6] or by mistake.[7] But it cannot recover money paid on a contract which was within its corporate power, but was void because in violation of charter or statutory provisions, if the other party has performed in good faith.[8]

6712. Interest of officer—A contract of a municipality in which one of its officers is interested and was concerned in making, is voidable, and money paid thereon may be recovered.[9] Under some charters all officers and employees are prohibited from being interested in any contract or job of the city.[10]

6713. Fraud—Cases are cited below involving fraud in connection with municipal contracts.[11]

6714. Delegation of power to contract—The governing body of a municipality, charged with the management of its affairs, legislative and administrative, and alone clothed with power and authority to enter into such contracts as are deemed necessary for the welfare of the municipality, cannot delegate to a member or committee thereof functions or powers involving the exercise of judgment and discretion. Ministerial functions, such as are absolute, fixed, and certain, involving no element of judgment or discretion, may be delegated; but discretionary powers must be exercised by the governing body itself.[12]

6715. Assignment—Section 277 of the charter of Duluth, relating to the assignment of contracts for public work, does not forbid or render void an assignment of the money due or to become due on the contract, made after the subject-matter of the contract has been completely executed by the contractor.[13]

6716. Same—Novation—Provisions against an assignment are designed to prevent a novation of parties.[14]

6717. Unauthorized or ultra vires contracts—Unauthorized or ultra vires contracts are generally void.[15] The doctrine of ultra vires is applied with greater strictness to municipal than to private corporations.[16] But it ought not to be applied so as to defeat the ends of justice, unless the public policy of keeping municipalities strictly within the limits of their powers imperative-

[4] Swenson v. Bird Island, 93-336, 101+495.

[5] Nash v. St. Paul, 8-172(143).

[6] Chaska v. Hedman, 53-525, 55+737; Griffin v. Shakopee, 53-528, 55+738; Fergus Falls v. Fergus Falls H. Co., 80-165, 83+54; Stone v. Bevans, 88-127, 92+520.

[7] Duluth v. McDonnell, 61-288, 63+727.

[8] Pillager v. Hewett, 98-265, 107+815.

[9] Stone v. Bevans, 88-127, 92+520; Young v. Mankato, 97-4, 105+969; Bjelland v. Mankato, 127+397; Martinsburg v. Butler, 127+420. See Chairman Board of Health v. Renville County, 89-402, 95+221 and R. L. 1905 §§ 731, 5032.

[10] Macy v. Duluth, 68-452, 71+687.

[11] Elliot v. Minneapolis, 59-111, 60+1081; Peet v. East Grand Forks, 101-523, 112+1005.

[12] Jewell v. Bertha, 91-9, 97+424.

[13] Lowry v. Duluth, 94-95, 101+1059.

[14] See Lowry v. Duluth, 94-95, 101+1059; Dickson v. St. Paul, 97-258, 106+1053.

[15] Nash v. St. Paul, 8-172(143); Id., 11-174(110); Basshor v. St. Paul, 26-110, 1+810; Chaska v. Hedman, 53-525, 55+737; Sang v. Duluth, 58-81, 59+878; State v. Minn. etc. Ry., 80-108, 83+32; Broderick v. St. Paul, 90-443, 97+118. See Bradley v. West Duluth, 45-4, 47+166; Keough v. St. Paul, 66-114, 68+843; Pillager v. Hewett, 98-265, 107+815.

[16] Newbery v. Fox, 37-141, 33+333; Bell v. Kirkland, 102-213, 113+271. See Bradley v. West Duluth, 45-4, 47+166.

ly requires it. A contract ultra vires in the general and primary sense that it is wholly outside the power of the corporation to make under any circumstances is ordinarily void in toto; but whether a contract strictly within the scope of the corporation's powers, but ultra vires in the restricted or secondary sense that the power has been irregularly exercised, or that it was beyond the power of the corporation "in some particular or through some undisclosed circumstances," is wholly void or not, depends upon the circumstances of the particular case. Where a contract which is ultra vires only in the secondary sense has been performed by the other party, so that the municipality has derived the benefit of it, it will generally be enforced.[17]

6718. Notice of powers—Persons contracting with a municipality are charged with notice of its powers and the powers of its officers.[18]

6719. Estoppel—In general a municipality is not estopped from denying the validity of a contract made by its officers when there was no authority for making it.[19]

BONDS OF PUBLIC CONTRACTORS

6720. General statutes—The liability of a public corporation, under R. L. 1905 §§ 4535, 4536, for the failure of its officers to require the contractor engaged in a public improvement to execute and file a bond to the corporation, conditioned to pay all obligations incurred in the prosecution of the work, extends to such losses as are suffered by those dealing with the contractor by reason of his insolvency or inability to pay the debts incurred by him. No liability attaches to the corporation where the contractor is solvent and able to discharge all obligations to laborers and materialmen.[20] A bond in which the penalty was less than the amount required by the statute has been held a good defence to an action under the statute against the municipality.[21] Cases are cited below involving bonds under Laws 1891 c. 146,[22] Laws 1895 c. 354,[23] Laws 1897 c. 307,[24] and Laws 1901 c. 321.[25]

6721. Charter provisions—Cases are cited below involving bonds executed by public contractors for the benefit of laborers and materialmen, as required by the charters of St. Paul [26] and Duluth.[27] In the absence of express author-

[17] Bell v. Kirkland, 102-213, 113+271; Moore v. Ramsey County, 104-30, 115+750.

[18] Starkey v. Minneapolis, 19-203(166); Basshor v. St. Paul, 26-110, 1+810; Newbery v. Fox, 37-141, 33+333; State v. Minn. etc. Ry., 80-108, 116, 83+32; Horn v. St. Paul, 80-369, 83+388; Jewell v. Bertha, 91-9, 97+424; Sandeen v. Ramsey County, 109-505, 124+243.

[19] Newbery v. Fox, 37-141, 33+333; Sang v. Duluth, 58-81, 59+878; State v. Minn. etc. Ry., 80-108, 83+32. See Pillager v. Hewett, 98-265, 107+815; Bell v. Kirkland, 102-213, 113+271.

[20] Wilcox v. School Dist., 103-43, 114+262; Id., 106-208, 118+794.

[21] Waterous v. Clinton, 125+269.

[22] West Duluth v. Norton, 57-72, 58+829 (in action by village on bond it is no defence that the village has in its hands more than sufficient funds withheld from contractor to pay all claims).

[23] Combs v. Jackson, 69-336, 72+565; Duby v. Jackson, 69-342, 72+568 (laborer entitled to sue on bond—party held a subcontractor within statute—sufficiency of evidence considered); Am. Surety Co. v. Waseca County, 77-92, 79+649 (municipality not entitled to withhold money from contractor on ground that he is in default with laborers or materialmen—may pay contractor without regard to claims); Swenson v. Bird Island, 93-336, 101+495 (effect of failure of village treasurer to approve bond).

[24] Union S. P. Co. v. Olson, 82-187, 84+756 (bond construed—held not void for uncertainty).

[25] Merchants Nat. Bank v. East Grand Forks, 94-246, 102+703 (not taking bond immaterial if all claims paid); Kettle River etc. Co. v. East Grand Forks, 96-290, 104+1077 (effect of not taking bond on liability of municipality on unauthorized contract); Black v. Polk County, 97-487, 107+560 (failure to take bond renders municipality liable to laborers and materialmen if contract valid); Horton v. Crowley, 108-508, 122+312 (sub-contractor entitled to benefit of bond).

[26] St. Paul v. Butler, 30-459, 16+362 (condition in bond held proper—city not a

ity a municipality has no power to take such a bond.[28] A home rule charter may make provisions for such bonds differing in details from the provisions of the general law.[29] The object of such a bond is to secure those who, by authority, direct or indirect, of the contractor, perform labor or furnish material, pursuant to and in performance of his contract.[30]

BONDS

6722. What constitutes—Certain certificates of indebtedness have been held to be "bonds." [31]

6723. Authority to issue—A county has no implied power to issue negotiable bonds.[32] To justify the issuance of bonds based on a petition, the antecedent proceedings must be in strict accordance with the statute and the authority of the municipal authorities to issue must appear from the records. The signers of the petition must have the requisite qualifications.[33] Cases are cited below involving the authority to issue various bonds.[34]

6724. Petition for issuance—In issuing bonds under Laws 1893, c. 200, a village council may act either upon its own motion or upon a petition of voters and freeholders. If it acts upon a petition, the qualifications of the signers must be in strict accordance with the statute.[35] If a petition is not signed by the requisite number of qualified signers the resulting election is void.[36] An informal petition has been sustained.[37]

6725. Necessity of popular vote—Under Laws 1899 c. 351 § 10, it was held that a city council might issue the bonds of the city to any amount less than one hundred thousand dollars for any particular authorized public purpose without the approval of the voters, though the then aggregate bonded in-

necessary party to action on bond); Morton v. Power, 33-521, 24+194 (bond to board of water commissioners—city not a necessary party to action on bond); Freeman v. Berkey, 45-438, 48+194 (sureties not discharged by dissolution of firm of contractors); Sepp v. McCann, 47-364, 50+246 (bond held good and to inure to benefit of laborers working for a subcontractor—cause of action on bond assignable—city not a necessary party to action on bond); Red Wing S. P. Co. v. Donnelly, 102-192, 113+1 (order in which contract and bond must be executed—effect of recitals in bonds—action by materialman); Bell v. Kirkland, 102-213, 113+271 (recital in bond as waiver of defence of ultra vires).

[27] State Bank v. Heney, 40-145, 41+411 (charter provision construed—exclusive right of action on bond in city); Duluth v. Heney, 43-155, 45+7 (sureties not discharged by payment in full to contractors without reference to claims); Tompkins v. Forrestal, 54-119, 55+813 (application of statutes—notice to city); Costello v. Doherty, 55-77, 56+459 (effect of execution of bond before contract); Ihk v. Duluth, 58-182, 59+960 (city not liable for failure to take bond); Pershing v. Swenson, 58-310, 59+1084 (identity of contractor and principal on bond—principal signing as "manager").

[28] Breen v. Kelly, 45-352, 47+1067; Park v. Sykes, 67-153, 69+712.

[29] Grant v. Berrisford, 94-45, 101+940; Id., 94-45, 101+1113.

[30] Sepp v. McCann, 47-364, 50+246; Pershing v. Swenson, 58-310, 59+1084.

[31] Christie v. Duluth, 82-202, 84+754.

[32] Goodnow v. Ramsey County, 11-31(12); Rogers v. Le Sueur County, 57-434, 59+488.

[33] Hamilton v. Detroit, 85-83, 88+419.

[34] Woodbridge v. Duluth, 57-256, 59+296 (water and light bonds issued by Duluth under Sp. Laws, 1891 c. 55 § 35 held valid); Janeway v. Duluth, 65-292, 68+24 (water and light bonds issued by Duluth held valid); Fulton v. Andrea, 70-445, 73+256 (bonds issued by town of Andrea under Sp. Laws 1883 c. 135 sustained against objection that the chairman of the town board was not properly appointed); Murphy v. Cook County, 74-28, 76+951 (county bonds for roads and bridges issued under Laws 1895 c. 297); Moore v. Duluth, 74-105, 76+1022 (bonds of Duluth for water plant); State v. West Duluth L. Co., 75-456, 78+115 (road and bridge bonds issued by St. Louis county under Laws 1895 c. 289).

[35] Hamilton v. Detroit, 85-83, 88+419; Id., 83-119, 124, 85+933.

[36] Hamilton v. Detroit, 83-119, 123, 85+933.

[37] Id.

debtedness of the city for all purposes equaled or exceeded that amount.[38] The provisions of Laws 1895 c. 8 § 126, regarding a submission to a popular vote, relates solely to cities of less than eight thousand population.[39] The legislature may authorize a county board to issue bonds for a county jail without submitting the question to a popular vote.[40]

6726. Election to determine issue—It has been held, in relation to elections for the issuance of bonds, that certain propositions for the issue of "water and light" bonds by the city of Duluth were not fairly submitted to the voters;[41] that a ballot was not so complex and misleading as to invalidate an election;[42] that the placing of the words "Yes" and "No" after the proposition to be voted on was legal;[43] that certain irregularities in the selection and conduct of the judges of election and in the registration of voters were not fatal;[44] that G. S. 1894 §§ 1216, 1217 did not require both the posting and publishing of a notice of election and that a village council could not modify the statutory requirements;[45] that a publication of a notice of election was sufficient;[46] that a posting of a notice of election was sufficient;[47] that a proposition was not bad in form and did not contain more than one question;[48] that certain propositions were competing and that an elector could vote against both but not in favor of both;[49] that under Sp. Laws 1875 c. 132, relating to the issue of bonds in aid of railroads, more than one election might be held;[50] that a failure to make a record of an election did not invalidate certain bonds;[51] and that a city clerk signed a notice of election as "city recorder" did not invalidate the election.[52]

6727. Execution—Certain bonds of the board of education of Minneapolis have been held properly signed by the officers of the board.[53]

6728. Form—Certain bonds have been held not to be in the form required by Laws 1891 c. 146, subc. 9 § 16.[54]

6729. Time to issue after vote—Whether certain bonds were issued within a reasonable time after they were voted for has been held a question of fact.[55]

6730. Recitals—Compliance with conditions—Where by statute authority is given to a municipality, or to its officers, to issue bonds for a proper purpose, but only on some condition precedent, and it is obvious from the statute that certain municipal officers have the power to decide whether the condition has been complied with, their recital and certificate in the bonds issued by them as to such compliance is conclusive in favor of bona fide holders.[56] A bond, in the hands of a bona fide purchaser for value, issued by a township under a statute prescribing a public record as determinative of the amount of authorized issue, which on its face exceeds the limit of the entire issue proper under such record produced, is void as to such excess notwithstanding recitals therein of compliance with all legal requirements and the payment of instalments of interest thereon.[57] A recital in a bond has been held to put

[38] Le Tourneau v. Duluth, 85-219, 88+529.
[39] Purcell v. East Grand Forks, 91-486, 98+351.
[40] Jewell v. Weed, 18-272(247).
[41] Truelsen v. Duluth, 61-48, 63+714.
[42] Janeway v. Duluth, 65-292, 68+24.
[43] Janeway v. Duluth, 65-292, 68+24; Truelsen v. Duluth, 61-48, 63+714.
[44] Janeway v. Duluth, 65-292, 68+24.
[45] Hamilton v. Detroit, 83-119, 85+933.
[46] Warsop v. Hastings, 22-437.
[47] Coe v. Caledonia etc. Ry., 27-197, 6+621.
[48] Hamilton v. Detroit, 83-119, 85+933.
[49] Baumann v. Duluth, 67-283, 69+919.
[50] Coe v. Caledonia etc. Ry., 27-197, 6+621; Hoyt v. Braden, 27-490, 8+591.
[51] Wiley v. Board of Ed., 11-371(268).
[52] Lodgord v. East Grand Forks, 105-180, 117+341.
[53] Wiley v. Board of Ed., 11-371(268).
[54] McCormick v. West Duluth, 47-272, 277, 50+128.
[55] Woodbridge v. Duluth, 57-256, 59+296.
[56] Fulton v. Riverton, 42-395, 44+257; St. Paul G. Co. v. Sandstone, 73-225, 75+1050. See Marshal v. Elgin, 8 Fed. 783; Kimball v. Lakeland, 41 Fed. 289.
[57] Corbet v. Rocksbury, 94-397, 103+11.

purchasers upon inquiry and charge them with notice of the invalidity of the bond.[58]

6731. Registration—The statute provides for the registration of municipal bonds in aid of railroads.[59]

6732. Negotiation—Broker—Par value—An agreement with a broker for the sale of bonds for a percentage of their face value has been held not to be, as a matter of law, in violation of a provision against a sale below par.[60] A county board has been held to have authority to negotiate bonds through an agent.[61] An agent for the sale of bonds has been held not liable to the purchasers for the purchase money, the bonds being void.[62]

6733. Delivery to creditor—A municipality may deliver its bonds to its creditors in payment of its debts.[63]

6734. Excessive issues—Debt limits—Municipal bonds issued in excess of the limit prescribed by statute are void, even as to a bona fide holder. But as to such a holder they are void only as to the excess.[64] In determining the debt limit the par value of the bonds to be issued is alone considered, and not the interest which may subsequently become due thereon by the terms thereof.[65]

6735. In aid of railroads—In view of the fact that it is extremely unlikely that municipal bonds will ever again be issued in this state in aid of railroads, it has been thought sufficient merely to cite the cases bearing on the subject.[66]

6736. Bona fide purchasers—If a municipal bond is negotiable in form it is regarded as a species of commercial paper and a bona fide holder is protected by recitals in it as against irregularities in its issue not going to the authority of the municipality to issue such bonds.[67] Bonds issued without authority are void even in the hands of bona fide purchasers. Purchasers of municipal bonds are chargeable with notice of the authority of the municipal officers issuing them.[68] Where negotiable bonds bearing interest payable annually have attached coupons for the payment of the interest, and are transferred with overdue coupons still attached, the purchaser takes them subject to any infirmity of title in the seller. That the coupons are by their terms

[58] Plainview v. Winona etc. Ry., 36–505, 512, 32+745.

[59] R. L. 1905 § 997. See St. Louis County v. Nettleton, 22–356.

[60] State v. West Duluth, L. Co., 75–456, 78+115.

[61] Cushman v. Carver County, 19–295 (252).

[62] Powell v. Heisler, 45–549, 48+411.

[63] Wiley v. Board of Ed., 11–371(268).

[64] Schmitz v. Zeh, 91–290, 97+1049; Corbet v. Rocksbury, 94–397, 103+11. See Woodbridge v. Duluth, 57–256, 59+296; Rogers v. Le Sueur County, 57–434, 59+488; Kelly v. Minneapolis, 63–125, 65+115; Murphy v. Cook County, 74–28, 76+951; Christie v. Duluth, 82–202, 84+754; Hamilton v. Detroit, 83–119, 85+933; Beck v. St. Paul, 87–381, 92+328; Purcell v. East Grand Forks, 91–486, 98+351; Johnson v. Norman County, 93–290, 101+180.

[65] Finlayson v. Vaughn, 54–331, 56+49.

[66] Davidson v. Ramsey County, 18–482 (432); Hodgman v. Chi. etc. Ry., 20–48 (36); St. Louis County v. Smith, 22–356; Warsop v. Hastings, 22–437; Hodgman v. St. P. etc. Ry., 23–153; State v. Clark, 23–422; State v. Lime, 23–521; State v. Hastings, 24–78; Winona v. Thompson, 24–199; State v. Highland, 25–355; State v. Lake City, 25–404; State v. Roscoe, 25–445; Coe v. Caledonia etc. Ry., 27–197, 6+621; Winona v. Minn. Ry. Const. Co., 27–415, 6+795, 8+148; Harrington v. Plainview, 27–224, 6+777; Hoyt v. Braden, 27–490, 8+591; State v. Minneapolis, 32–501, 21+722; Plainview v. Winona etc. Ry., 36–505, 32+745; Elgin v. Winona etc. Ry., 36–517, 32+749; McManus v. Duluth etc. Ry., 51–30, 52+980; Finlayson v. Vaughn, 54–331, 56+49; Hinckley v. Kettle River Ry., 70–105, 72+835; Birch Cooley v. First Nat. Bank, 86–385, 90+789; Schmitz v. Zeh, 91–290, 97+1049; Alden v. Easton, 113 Fed. 60.

[67] Harrington v. Plainview, 27–224, 6+777; Plainview v. Winona etc. Ry., 36–505, 512, 32+745; Fulton v. Riverton, 42–395, 44+257; St. Paul G. Co. v. Sandstone, 73–225, 75+1050; Hamilton v. Detroit, 85–83, 90, 88+419.

[68] Schmitz v. Zeh, 91–290, 296, 97+1049; Goodnow v. Ramsey County, 11–31(12); Corbet v. Rocksbury, 94–397, 103+11.

payable on presentation to a particular person does not affect this rule.[69] The pendency of an action relating to the validity of bonds not yet due is not constructive notice to subsequent holders thereof before maturity.[70]

6737. Estoppel—A municipality and its taxpayers may be estopped by long acquiescence from questioning a bond issue on account of irregularities therein.[71]

6738. Pleading—Cases are cited below involving questions of pleading in relation to municipal bonds.[72]

CLAIMS

6739. Notice of claim—General statute—The general statute [73] requiring notice of claim before suit is not unconstitutional as special legislation or for insufficiency of title.[74] It applies to all cities, villages, and boroughs of the state not governed by provisions in home rule charters, and compliance with its provisions is a condition precedent to an action.[75] It supersedes similar provisions in municipal charters,[76] but it does not apply where the subject is regulated by provisions in subsequently adopted home rule charters.[77] It is inapplicable to actions for death by wrongful act,[78] to actions for injury to property,[79] and to actions by servants of a municipality.[80] Its object is to give the proper municipal officers information so that they may investigate the matter promptly and determine whether it is advisable to resist or settle the claim.[81] The place of the accident must be so described that the municipal officers may, with reasonable diligence, identify it.[82] Where the claim is for money compensation it is not sufficient to state the nature of the relief demanded without stating the amount of compensation demanded. The clause "relief demanded" applies to cases where some other relief than money compensation is demanded.[83] The claimant is not concluded by the amount claimed in his notice.[84] A notice to which the claimant signed the initials of her husband's name instead of her own has been held sufficient.[85] There is no exclusive mode of serving the notice. It must be done in some practical, orderly, and effective way, and in determining the sufficiency of the method adopted in any particular case technical strictness will not be required. A substantial compliance with the statute is sufficient.[86] If the notice is to be presented to the council when it is in session, the orderly course of procedure is to deliver it to the clerk, or other officer having charge of the records of the council, for its consideration. If the council is not in session

[69] First Nat. Bank v. Scott County, 14-77(59).
[70] Fulton v. Andrea, 70-445, 73+256.
[71] Schmitz v. Zeh, 91-290, 97+1049. See Corbet v. Rocksbury, 94-397, 401, 103+11.
[72] Nininger v. Carver County, 10-133(106) (allegation as to execution held sufficient); Wiley v. Board of Ed., 11-371(268) (complaint on bond sustained); Cushman v. Carver County, 19-295(252) (variance waived).
[73] Laws 1897 c. 248; R. L. 1905 § 768.
[74] Bausher v. St. Paul, 72-539, 75+745; Winters v. Duluth, 82-127, 84+788.
[75] Id.; Doyle v. Duluth, 74-157, 76+1029; Engstrom v. Minneapolis, 78-200, 80+962.
[76] Nicol v. St. Paul, 80-415, 83+375; Neissen v. St. Paul, 80-414, 83+376; Weiser v. St. Paul, 86-26, 90+8.
[77] Peterson v. Red Wing, 101-62, 111+840.
[78] Orth v. Belgrade, 87-237, 91+843.
[79] Megins v. Duluth, 97-23, 106+89.
[80] Kelly v. Faribault, 95-293, 104+231; Pesek v. New Prague, 97-171, 106+305.
[81] Doyle v. Duluth, 74-157, 76+1029; Kelly v. Minneapolis, 77-76, 80, 79+653; Nicol v. St. Paul, 80-415, 83+375; Terryll v. Faribault, 84-341, 87+917; Kelly v. Faribault, 95-293, 104+231. See Nichols v. Minneapolis, 30-545, 16+410; Harder v. Minneapolis, 40-446, 42+350; McDevitt v. St. Paul, 66-14, 68+178; Olcott v. St. Paul, 91-207, 97+879; Kandelin v. Ely, 124+449.
[82] Lyons v. Red Wing, 76-20, 78+868. See Harder v. Minneapolis, 40-446, 42+350.
[83] Bausher v. St. Paul, 72-539, 75+745; Doyle v. Duluth, 74-157, 76+1029.
[84] Terryll v. Faribault, 84-341, 87+917.
[85] Terryll v. Faribault, 81-519, 84+458.
[86] Roberts v. St. James, 76-456, 79+519; Ljungberg v. North Mankato, 87-484, 92+401.

when the notice is served, it may be directed to the council, and left with the clerk or other officer who has charge of the records and files of the council, with a request annexed that it be laid before the council at its next meeting;[87] but such request is not essential.[88] It is sufficient if the notice reaches the council or governing body in due time, though it passes through the hands of others.[89] Service on the mayor is insufficient.[90] Service on a village recorder is sufficient, if made at his office or place of transacting his official business.[91] Service on an assistant city clerk has been sustained.[92] Service may be made by delivering to the proper officer a copy of the notice.[93] If a notice is addressed to the council and served on the proper officer the fact that it never reaches the council does not prejudice the claimant.[94] Service on the park board of Minneapolis is unnecessary.[95] If a notice conveys the necessary information to the proper person it is sufficient, though it contains inaccuracies.[96] An error in the address of a notice is immaterial if service is made on the proper person.[97] A substantial departure in the proof from the notice as to the particular defect causing the injury is fatal.[98] The title of Laws 1897 c. 248 has been held insufficient to cover certain injuries from the negligence of municipal officers.[99]

6740. Notice of claim—Charter provisions—It has been held that a charter provision requiring notice of claim before suit was constitutional and applicable to injuries to property as well as to persons;[1] that it was not retroactive;[2] that a notice need not be served on the council if it has been served on the mayor or recorder;[3] that a notice sufficiently described the place where the injury was received;[4] that the plaintiff was not "bereft of reason" so as to excuse him from giving notice;[5] that a notice served on the proper person but incorrectly addressed was sufficient;[6] that the words "any defect in the condition of any bridge, street, etc." refer to defects in such public ways or structures as such, and with regard to their usefulness and safety for the purposes of travel;[7] that a notice is to be construed liberally, but must be sufficiently definite and circumstantial to direct attention to the substantial defects and injuries for which recovery is demanded;[8] that a notice might be served on an assistant city clerk.[9]

6741. Presentation—The statute requires certain claims to be itemized and verified.[10] The provisions of the Duluth charter, requiring claims against the city to be presented to the city council for allowance and providing for an appeal to the district court, are valid and mandatory.[11] A complaint has been held to show a compliance with Sp. Laws 1885 c. 110 § 35 requiring claims to be presented to the water board of St. Paul.[12]

[87] Lyons v. Red Wing, 76-20, 78+868; Roberts v. St. James, 76-456, 79+519; Doyle v. Duluth, 74-157, 76+1029; Peterson v. Cokato, 84-205, 87+615.
[88] Roberts v. St. James, 76-456, 79+519.
[89] Lyons v. Red Wing, 76-20, 78+868.
[90] Doyle v. Duluth, 74-157, 76+1029.
[91] Peterson v. Cokato, 84-205, 87+615.
[92] Kelly v. Minneapolis, 77-76, 79+653.
[93] Kelly v. Minneapolis, 77-76, 79+653; Ljungberg v. North Mankato, 87-484, 92+401.
[94] Peterson v. Cokato, 84-205, 87+615.
[95] Kleopfert v. Minneapolis, 90-158, 95+908.
[96] See Harder v. Minneapolis, 40-446, 42+350; Kandelin v. Ely, 124+449.
[97] See Johnson v. St. Paul, 52-364, 54+735.
[98] Olcott v. St. Paul, 91-207, 97+879; Kandelin v. Ely, 124+449.
[99] Winters v. Duluth, 82-127, 84+788.
[1] Nichols v. Minneapolis, 30-545, 16+410.
[2] Powers v. St. Paul, 36-87, 30+433.
[3] Clark v. Austin, 38-487, 38+615.
[4] Harder v. Minneapolis, 40-446, 42+350.
[5] Ray v. St. Paul, 44-340, 46+675.
[6] Johnson v. St. Paul, 52-364, 54+735.
[7] Pye v. Mankato, 38-536, 38+621; Ray v. St. Paul, 44-340, 46+675; Moran v. St. Paul, 54-279, 56+80.
[8] Olcott v. St. Paul, 91-207, 97+879.
[9] Kelly v. Minneapolis, 77-76, 79+653.
[10] R. L. 1905 § 438. See §§ 2294, 9657.
[11] State v. Dist. Ct., 90-457, 97+132.
[12] Eisenmenger v. Board Water Comrs., 44-457, 47+156.

6742. Labor claims—Affidavit—An affidavit of the payment of labor claims made by an assignee of the balance due on a contract for public work has been held sufficient under the charter of Duluth.[13]

6743. Auditing—Mandamus—Where a claim against a city is a legal and valid one, and there is sufficient money in the city treasury to the credit of the appropriate fund to pay it, mandamus will lie to compel the city comptroller to audit and adjust it, and report it to the city council for payment.[14]

6744. Allowance—A city council in allowing or disallowing claims against the city acts quasi judicially.[15]

6745. Order for payment—Duty of mayor to sign—By the charter of Minneapolis (Sp. Laws 1881 c. 76) the making or authorizing of appropriations is exclusively vested in the common council, and the mayor has no veto of the action of the council in making or authorizing the same. A claim against the city, of a class for the payment of which the council is authorized to make an appropriation, having been first audited and adjusted by the comptroller, and an appropriation for its payment made and authorized by the requisite and duly-recorded vote of the council, when an order for its payment, in due form, and duly signed by the clerk, is presented to the mayor for his signature, it is his duty to sign it within such reasonable time as may be necessary for him to ascertain whether the council has kept within its jurisdiction, and whether the appropriation has been authorized by the necessary vote. Upon the refusal so to sign an order, he may be compelled to sign by mandamus.[16]

6746. Compromise—The provisions of the charter of St. Paul, prohibiting the council from compromising claims, have been construed.[17]

6747. Assignment—Section 277 of the charter of Duluth has been held not to forbid or render void an assignment of the money due or to become due on a contract, made after the subject-matter of the contract has been completely executed by the contractor.[18] Section 12 of chapter 15 of the charter of St. Paul has been held not to avoid an assignment of the amount due from the city on a contract for work.[19]

ORDINANCES

6748. Definition—The terms "ordinance," "by-law," and "municipal reglation," have substantially the same meaning. They are the laws of a municipality made by the authorized municipal body, in distinction from the general laws of the state. They are local regulations for the government of the inhabitants of the particular place. They relate solely to the purposes of municipal government.[20] They are in the nature of local statutes.[21] They are mere police regulations and not criminal statutes.[22]

6749. Resolution equivalent to ordinance—A resolution passed by a municipal council, with all the formalities required in the enactment of ordinances, is a legislative act, and equivalent to an ordinance.[23]

6750. Must be certain—An ordinance must be reasonably certain in its terms.[24]

[13] Lowry v. Duluth, 94–95, 101+1059.
[14] State v. McCardy, 62–509, 64+1133.
[15] State v. Dist. Ct., 90–457, 97+132.
[16] State v. Ames, 31–440, 18+277; State v. Vasaly, 98–46, 107+818.
[17] State v. McCardy, 87–88, 91+263.
[18] Lowry v. Duluth, 94–95, 101+1059.
[19] Dickson v. St. Paul, 97–258, 106+1053.
[20] State v. Lee, 29–445, 451, 13+913.
[21] Evison v. Chi. etc. Ry., 45–370, 375, 48+6.
[22] State v. Robitshek, 60–123, 61+1023. See State v. Cantieny, 34–1, 24+458.
[23] Steenerson v. Fontaine, 106–225, 119+400.
[24] St. Paul v. Schleh, 101–425, 112+532.

6751. Must conform to law of subject—An ordinance must conform to the general principles of law applicable to the particular subject-matter.[25]

6752. Consistency with constitution and general laws—An ordinance must be consistent with the constitution and general laws of the state.[26] The provisions of section 36 of article 4 of the constitution, to the effect that no charter thereby authorized to be formed, or ordinances enacted thereunder, shall supersede any general law defining or punishing crimes or misdemeanors, apply only to cities having home rule charters.[27]

6753. Contravention of common right—An ordinance must not contravene matter of common right.[28]

6754. Restraint of trade—Ordinances must not be in unreasonable restraint of trade.[29] A power to enact an ordinance in restraint of trade must be unequivocally conferred.[30]

6755. Must be reasonable—Ordinances must be reasonable, and if they are manifestly unreasonable the courts will declare them void.[31] But in assuming the right to do so courts will not look closely into matters of mere judgment and set up their own judgment against that of the municipal authorities when there is reasonable ground for difference of opinion.[32] To justify a court in declaring an ordinance void on this ground the unreasonableness must be so palpable and extreme as to amount to an abuse of discretion or a mere arbitrary exercise of the power granted to the council.[33] Whether an ordinance is reasonable or not is a question of law for the court.[34] An ordinance may be reasonable and valid as to one state of facts and not as to another.[35]

6756. Held reasonable—An ordinance limiting the speed of trains;[36] prohibiting the stopping of railway cars and locomotives on street crossings for the switching of cars;[37] regulating hacks at railway stations;[38] regulating the keeping of dogs;[39] regulating butcher shops and fixing a license fee therefor;[40] fixing a license fee for peddling;[41] regulating the speed of driving teams;[42] fixing a license fee for theatrical performances;[43] regulating and licensing intelligence offices;[44] fixing a license fee for bankrupt sales;[45] regulating the sale of milk in Minneapolis and requiring cows to be subjected to the "tuberculin test;"[46] fixing a license fee for peddlers;[47] prohibiting stalls and booths in saloons;[48] requiring saloons to be kept closed on Sunday;[49] fixing a license

[25] St. Paul v. Briggs, 85–290, 88+984; State v. Stone, 96–482, 105+187.

[26] St. Paul v. Laidler, 2–190(159); Judson v. Reardon, 16–431(387); State v. Ludwig, 21–202; Bott v. Pratt, 33–323, 328, 23+237; State v. Priester, 43–373, 45+712; State v. Robitshek, 60–123, 125, 61+1023; Evans v. Redwood Falls, 103–314, 115+200. See State v. Crummey, 17–72(50).

[27] State v. Collins, 107–500, 120+1081.

[28] State v. Robitshek, 60–123, 125, 61+1023; Darling v. St. Paul, 19–389(336).

[29] St. Paul v. Laidler, 2–190(159). See Rochester v. Upman, 19–108(78); St. Paul v. Colter, 12–41(16); Knobloch v. Chi. etc. Ry., 31–402, 18+106; Weyl v. Chi. etc. Ry., 40–350, 42+24; Duluth v. Bloom, 55–97, 56+580.

[30] St. Paul v. Traeger, 25–248.

[31] Evison v. Chi. etc. Ry., 45–370, 48+6; N. W. etc. Co. v. Minneapolis, 81–140, 149, 83+527, 86+69. See cases under §§ 6756, 6757.

[32] In re Wilson, 32–145, 148, 19+723; State v. Bates, 101–301, 112+67.

[33] Knobloch v. Chi. etc. Ry., 31–402, 18+106; Weyl v. Chi. etc. Ry., 40–350, 42+24; Duluth v. Mallett, 43–204, 45+154; Evison v. Chi. etc. Ry., 45–370, 48+6; State v. Barge, 82–256, 84+911.

[34] Evison v. Chi. etc. Ry., 45–370, 48+6.

[35] State v. Sheppard, 64–287, 67+62.

[36] Knobloch v. Chi. etc. Ry., 31–402, 18+106; Weyl v. Chi. etc. Ry., 40–350, 42+24.

[37] Duluth v. Mallett, 43–204, 45+154.

[38] St. Paul v. Smith, 27–364, 7+734.

[39] Faribault v. Wilson, 34–254, 25+449.

[40] St. Paul v. Colter, 12–41(16).

[41] Duluth v. Krupp, 46–435, 49+235.

[42] State v. Sheppard, 64–287, 67+62.

[43] Duluth v. Marsh, 71–248, 73+962.

[44] Moore v. St. Paul, 61–427, 63+1087.

[45] State v. Schoenig, 72–528, 75+711.

[46] State v. Nelson, 66–166, 68+1066.

[47] State v. Jensen, 93–88, 100+644.

[48] State v. Barge, 82–256, 84+911.

[49] State v. Harris, 50–128, 52+387, 531.

fee for peddlers;[50] requiring a license fee and bond from auctioneers;[51] regulating the use of water meters;[52] regulating the stopping of street cars.[53]

6757. Held unreasonable—An ordinance fixing a license fee for auctioneers;[54] fixing the speed of driving by a salvage corps;[55] regulating the sale of fresh meat;[56] limiting the speed of railway trains;[57] excluding from a parkway wagons with tires less than six inches wide;[58] fixing license fees for hackmen, etc.;[59] prohibiting the peddling of goods, etc. not manufactured or grown in the county;[60] requiring ordinary commercial railway trains to stop at street crossings and take on or discharge passengers.[61]

6758. Varying conditions—An ordinance may be reasonable and valid as to one state of facts and not as to another.[62]

6759. Concurrent with general law—An act may be punishable under both the general law and an ordinance and the punishment need not be the same.[63]

6760. Void in part—If part of an ordinance is void it does not necessarily follow that the whole ordinance is void.[64] The same rules govern as in the case of statutes under like conditions.[65]

6761. Who may question—One prosecuted under an ordinance for selling a quantity of liquor less than five gallons cannot question the validity of the ordinance so far as it may apply to sales in quantities of five gallons or more.[66]

6762. Legislative control—The legislative power of a municipality, being delegated by the legislature, is completely under the control of the legislature.[67]

6763. Authority to enact—In general—A municipality has only a limited and derivative legislative power. It has only such power as the legislature expressly confers upon it and such as is necessary for the full enjoyment and exercise of the power expressly conferred. The authority to enact ordinances must affirmatively appear in the charter. It is not to be inferred from terms of doubtful or uncertain import.[68] Where a charter contains a general grant of power, followed by an enumeration of the purposes for which such power may be exercised, the general grant is limited by the enumeration,[69] unless a contrary intention is manifest.[70] The powers of a municipality are always conferred by express legislative enactment and are not based on custom to

[50] In re White, 43–250, 45+232.
[51] Mankato v. Fowler, 32–364, 20+361.
[52] Powell v. Duluth, 91–53, 97+450.
[53] Gray v. St. P. C. Ry., 87–280, 91+1106.
[54] Mankato v. Fowler, 32–364, 20+361.
[55] State v. Sheppard, 64–287, 67+62.
[56] St. Paul v. Laidler, 2–190(159).
[57] Evison v. Chi. etc. Ry., 45–370, 48+6; Schulz v. Chi. etc. Ry., 57–271, 59+192.
[58] State v. Rohart, 83–257, 86+93, 333.
[59] State v. Finch, 78–118, 80+856.
[60] Gifford v. Wiggins, 50–401, 52+904.
[61] Excelsior v. Mpls. etc. Ry., 108–407, 122+486.
[62] State v. Sheppard, 64–287, 67+62.
[63] State v. Charles, 16–474(426); State v. Ludwig, 21–202; State v. Oleson, 26–507, 5+959; State v. Lee, 29–445, 13+913; Mankato v. Arnold, 36–62, 30+305; State v. West, 42–147, 43+845; State v. Harris, 50–128, 52+387, 531; State v. Lindquist, 77–540, 80+701; Jordan v. Nicolin, 84–367, 87+916; State v. Stone, 96–482, 105+187.
[64] State v. Kantler, 33–69, 21+856; State v. Cantieny, 34–1, 24+458; State v. Priester, 43–373, 45+712; Duluth v. Krupp, 46–435, 49+235; Wykoff v. Healey, 57–14, 58+685; Moore v. St. Paul, 61–427, 63+1087; St. Paul v. Chi. etc. Ry., 63–330, 355, 63+267, 65+649, 68+458; St. Paul v. Lytle, 69–1, 71+703; State v. Schoenig, 72–528, 75+711; State v. Stone, 96–482, 105+187.
[65] See §§ 8919, 8936.
[66] State v. Priester, 43–373, 45+712.
[67] Winona v. Whipple, 24–61, 65; St. Paul v. Byrnes, 38–176, 36+449.
[68] St. Paul v. Laidler, 2–190(159); St. Paul v. Traeger, 25–248; Mankato v. Fowler, 32–364, 20+361; State v. Municipal Court, 32–329, 20+243; St. Paul v. Stoltz, 33–233, 22+634; Farmer v. St. Paul, 65–176, 67+990; Red Wing v. Chi. etc. Ry., 72–240, 75+223.
[69] St. Paul v. Traeger, 25–248; State v. Pamperin, 42–320, 44+251; Red Wing v. Chi. etc. Ry., 72–240, 75+223; St. Paul v. Stoltz, 33–233, 22+634; State v. Hammond, 40–43, 41+243. See Fairmont v. Meyer, 83–456, 86+457.
[70] Green v. Eastern Ry., 52–79, 53+808.

any extent as in England.[71] Where a municipality is authorized to legislate in certain cases and for certain purposes its authority is limited to the cases and objects specified, all others being excluded by implication.[72] The power conferred upon municipalities by their charters to enact ordinances on specified subjects is to be construed strictly, and the exercise of the power must be confined within the general principles of the law applicable to such subjects.[73] The power to enact an ordinance requiring flagmen at railway crossings has been held not implied in a grant of the general powers possessed by municipalities at common law.[74]

6764. Power to enact a delegated power—The power of a municipality to legislate—enact ordinances—is not inherent, but delegated by the legislature. It is a general rule of constitutional law that the legislature cannot delegate its legislative powers, but this is subject to the exception that it may delegate them for local purposes to municipal corporations. Such corporations are chartered and vested with the powers of local government because the concentration of population and business in a particular locality requires special police regulations, with the power in the local jurisdiction to enforce them in a summary manner.[75]

6765. Presumption of power—An ordinance is presumptively valid and within the authority of the council enacting it.[76]

6766. Held authorized by general statutes—The general welfare clause in G. S. 1894 § 1224 has been held to authorize a village ordinance punishing open and notorious drunkenness.[77] An ordinance requiring the inspection of dairy herds has been held authorized by Laws 1895 c. 203.[78]

6767. Held not authorized by general statutes—An ordinance regulating the inspection of dairy herds.[79]

6768. Held authorized by charters—An ordinance forbidding the erection of wooden awnings, posts, and other obstructions in streets;[80] regulating hacks at railway stations;[81] prohibiting noises, riots, etc.;[82] regulating dealers in meats;[83] providing for building inspection;[84] prohibiting gambling devices;[85] regulating slaughter-houses;[86] prohibiting the obstruction of streets by railway cars;[87] regulating pawnbrokers;[88] prohibiting the emission of dense smoke;[89] regulating the keeping of dogs;[90] regulating scavengers;[91] regulating building permits;[92] regulating places of amusement;[93] regulating auctioneers;[94] regulating the course of travel on streets;[95] prohibiting vagrancy.[96]

6769. Held not authorized by charters—An ordinance establishing the House of the Good Shepherd as a workhouse for female prisoners;[97] prohibit-

[71] St. Paul v. Colter, 12-41(16).
[72] St. Paul v. Laidler, 2-190(159). See St. Paul v. Stoltz, 33-233, 22+634.
[73] St. Paul v. Briggs, 85-290, 88+984.
[74] Red Wing v. Chi. etc. Ry., 72-240, 75+223.
[75] St. Paul v. Colter, 12-41(16); Comer v. Folsom, 13-219(205, 209); Harrington v. Plainview, 27-224, 232, 6+777; State v. Lee, 29-445, 450, 13+913; State v. Darrow, 65-419, 423, 67+1012.
[76] St. Paul v. Colter, 12-41(16); Knobloch v. Chi. etc. Ry., 31-402, 18+106. See, contra, St. Paul v. Laidler, 2-190(159, 170).
[77] Fairmont v. Meyer, 83-456, 86+457.
[78] State v. Nelson, 66-166, 68+1066.
[79] St. Paul v. Peck, 78-497, 81+389; State v. Elofson, 86-103, 90+309.
[80] Fox v. Winona, 23-10.
[81] St. Paul v. Smith, 27-364, 7+734.
[82] State v. Cantieny, 34-1, 24+458.
[83] State v. McMahon, 62-110, 64+92.
[84] State v. Starkey, 49-503, 52+24.
[85] State v. Grimes, 49-443, 52+42.
[86] St. Paul v. Smith, 25-372.
[87] Duluth v. Mallett, 43-204, 45+154.
[88] St. Paul v. Lytle, 69-1, 71+703.
[89] St. Paul v. Haugbro, 93-59, 100+470; St. Paul v. Robbins, 93-138, 100+1124.
[90] Faribault v. Wilson, 34-254, 25+449.
[91] State v. McMahon, 69-265, 72+79.
[92] St. Paul v. Dow, 37-20, 32+860.
[93] State v. Scaffer, 95-311, 104+139.
[94] State v. Bates, 101-301, 112+67.
[95] State v. Larrabee, 104-37, 115+948.
[96] State v. Stone, 96-482, 105+187.
[97] Farmer v. St. Paul, 65-176, 67+990.

ing assault and battery;[98] prohibiting lewdness and indecency;[99] prohibiting the emission of dense smoke from chimneys, etc.;[1] prohibiting the herding of cattle;[2] regulating the sale of fresh meat;[3] prohibiting the sale of vegetables on streets by the producer;[4] prohibiting the sale of vegetables except by licensed vendors;[5] licensing the sale of goods by sample;[6] requiring peddlers to procure licenses;[7] providing as a penalty costs of prosecution in addition to fine and imprisonment;[8] regulating peddlers;[9] requiring flagmen at railway crossings;[10] prohibiting vagrancy.[11]

6770. Power to enact cannot be delegated—The legislative power which the legislature has delegated to a municipal council cannot be delegated by the council to the mayor or others.[12]

6771. Power to "regulate"—The power to "regulate" a business or employment includes the power to determine where and within what limits it shall be carried on.[13] It authorizes regulations in addition to licensing.[14]

6772. Penalty—Discretion of court—An ordinance is not invalid by reason of the amount of the fine or period of imprisonment being left to be determined in each case by the discretion of the court, within a prescribed limit.[15]

6773. Class legislation—An ordinance prohibiting the peddling of goods, etc., not manufactured or raised in the county, has been held invalid as class legislation.[16]

6774. Construction—Implied exceptions—Every presumption is in favor of the validity of an ordinance. A construction which will sustain it is to be preferred to one which would defeat it. To sustain it a court may cut down its language below its ordinary and natural meaning.[17] An ordinance in partial restriction of trade, and penal in its nature, ought to receive a reasonably strict construction.[18] An ordinance may be subject to implied exceptions, founded in the rules of public policy, and the maxims of natural justice. so as to avoid absurd and unjust consequences.[19] The title may be considered in aid of construction.[20] That construction is to be favored which gives effect to every part of an ordinance. The expression of one thing is the exclusion of another.[21]

6775. Motives of council—The motives of members of a council in the enactment of ordinances of a strictly legislative nature cannot be judicially investigated for the purpose of affecting the validity of such ordinance.[22]

6776. Particular ordinances construed—An ordinance regulating hackmen, draymen, etc.;[23] regulating the weighing of coal and hay;[24] regulating

[98] State v. Bruckhauser, 26-301, 3+695.
[99] State v. Hammond, 40-43, 41+243.
[1] St. Paul v. Gilfillan, 36-298, 31+49.
[2] State v. Johnson, 41-111, 42+786.
[3] St. Paul v. Laidler, 2-190(159).
[4] St. Paul v. Traeger, 25-248.
[5] State v. Municipal Court, 32-329, 20+243.
[6] Darling v. St. Paul, 19-389(336).
[7] St. Paul v. Stoltz, 33-233, 22+634.
[8] State v. Cantieny, 34-1, 24+458.
[9] State v. Briggs, 85-290, 88+984.
[10] Red Wing v. Chi. etc. Ry., 72-240, 75+223.
[11] State v. Stone, 96-482, 105+187.
[12] Darling v. St. Paul, 19-389(336); In re Wilson, 32-145, 19+723; State v. St. Paul, 34-250, 25+449; Mpls. G. Co. v. Minneapolis, 36-159, 30+450. See State v. Kantler, 33-69, 21+856; State v. Cantieny, 34-1, 24+458; In re White, 43-250, 45+232.
[13] In re Wilson, 32-145, 19+723. See State v. Rayantis, 55-126, 56+586.
[14] See State v. Pamperin, 42-320, 322, 44+251.
[15] State v. Cantieny, 34-1, 24+458.
[16] Gifford v. Wiggins, 50-401, 52+904. See Hawkers and Peddlers and Note, 123 Am. St. Rep. 36.
[17] State v. Barge, 82-256, 84+911; State v. Schoenig, 72-528, 532, 75+711.
[18] Duluth v. Bloom, 55-97, 101, 56+580.
[19] State v. Barge, 82-256, 84+911. See State v. Harris, 50-128, 52+387, 531.
[20] St. Paul v. Smith, 25-372.
[21] St. Paul v. Johnson, 69-184, 72+64.
[22] State v. Lake City, 25-404, 424.
[23] State v. Robinson, 42-107, 43+833; State v. Finch, 78-118, 80+856.

pawnbrokers and junkshops;[25] regulating dealers in second-hand goods;[26] relating to the occupation of a public levee;[27] licensing bankrupt sales;[28] regulating peddlers;[29] limiting the speed of trains;[30] regulating slaughter-houses;[31] prohibiting noise, riot, disturbance, etc.;[32] prohibiting the emission of dense smoke;[33] prohibiting the obstruction of streets;[34] prohibiting the placing of merchandise on sidewalks and streets;[35] prohibiting nuisances;[36] granting a right to lay water pipes in a street;[37] prohibiting the blowing of whistles;[38] regulating places of amusement;[39] prohibiting the location and operation of wood yards within certain limits;[40] regulating the course of travel on streets;[41] regulating street car transfers;[42] licensing dogs;[43] establishing fire limits;[44] relating to diseased animals.[45]

6777. Effect—On whom binding—An ordinance has the same force as law within the corporate limits as a statute. It is binding on all within the corporate limits, whether residents or not. All persons affected are charged with notice of its existence.[46] It need not expressly provide that it is applicable to the municipality enacting it, as that is presumed.[47]

6778. Extraterritorial effect—An ordinance can have no extraterritorial effect. An ordinance requiring applicants for a license to sell milk to consent to the inspection of their herds outside the city has been held not to violate this rule.[48]

6779. Private action on—Where the obvious intent and purpose of an ordinance is to create a legal duty for the protection or benefit of individuals, any person injured through the neglect of another to perform such duty is entitled to a remedy by action against the latter for his damages.[49]

6780. Effect on contracts—Where parties contract with reference to a subject regulated by ordinance the ordinance enters into and forms a part of the contract.[50]

6781. Retroactive—Subdivision of ward—A resolution of a city council approved by the mayor and duly published has been held to be sufficient to subdivide a ward as of the date of its passage, but not to have a retroactive effect so as to validate a prior invalid attempt to subdivide it.[51]

6782. Consolidation of cities—Sp. Laws 1872 c. 10, subc. 8, § 8, (the act consolidating the cities of St. Anthony and Minneapolis,) did not have the effect to extend the ordinances then in force of each of the two former cities over the new city, but simply preserved such ordinances with the same force

[24] Lehigh etc. Co. v. Capehart, 49–539, 52+142.
[25] Duluth v. Bloom, 55–97, 56+580.
[26] State v. Segel, 60–507, 62+1134.
[27] St. Paul v. Chi. etc. Ry., 63–330, 63+267, 65+649, 68+458.
[28] State v. Schoenig, 72–528, 75+711.
[29] State v. Jensen, 93–88, 100+644; Duluth v. Krupp, 46–435, 49+235. See Hawkers and Peddlers.
[30] Mahan v. Union etc. Co., 34–29, 24+293.
[31] St. Paul v. Smith, 25–372.
[32] State v. Cantieny, 34–1, 24+458.
[33] St. Paul v. Johnson, 69–184, 72+64.
[34] State v. Rayantis, 55–126, 56+586.
[35] State v. Messolongitis, 74–165, 77+29.
[36] St. Paul v. Clark, 84–138, 86+893.
[37] Stillwater W. Co. v. Stillwater, 50–498, 52+893.
[38] Gendreau v. Mpls. etc. Ry., 99–38, 108+814.
[39] State v. Scaffer, 95–311, 104+139.
[40] St. Paul v. Schleh, 101–425, 112+532.
[41] State v. Larrabee, 104–37, 115+948.
[42] Pine v. St. P. C. Ry., 50–144, 52+392.
[43] Smith v. St. P. C. Ry., 79–254, 82+577.
[44] Red Lake Falls M. Co. v. Thief River Falls, 109–52, 122+872.
[45] St. Paul v. Keough, 109–204, 123+476.
[46] Bott v. Pratt, 33–323, 23+237; Larkin v. Glens Falls Ins. Co., 80–527, 83+409.
[47] Moore v. St. Paul, 61–427, 63+1087.
[48] State v. Nelson, 66–166, 68+1066. See St. Paul v. Peck, 78–497, 81+389; State v. Elofson, 86–103, 90+309.
[49] Bott v. Pratt, 33–323, 23+237. See 19 Harv. L. Rev. 288 and § 6976.
[50] Larkin v. Glens Falls Ins. Co., 80–527, 531, 83+409.
[51] State v. Darrow, 65–419, 67+1012.

and effect and territorial operation as they then had, until they should be changed by the council of the new city.[52]

6783. Title—It is frequently required by charters that no ordinance shall embrace more than one subject, which shall be expressed in its title.[53] Such a requirement is governed by the same rules as the like constitutional requirement as regards statutes.[54]

6784. Submission to popular vote—A charter has been held to require an ordinance vacating a street to be submitted to a popular vote.[55] A notice of election for the purposes of ratifying an ordinance has been held sufficient.[56]

6785. Enactment—Separate votes—A council has been held not required to determine by separate votes whether a sidewalk would be a public convenience and whether the benefits would justify the expense.[57]

6786. Requisite votes—Where an ordinance was carried by a sufficient vote if the presiding officer voted for it, it was held that the fact that he assumed it as carried and joined in a formal order of the council based thereon showed his concurrence.[58] A provision that no ordinance should be passed at the same session at which it was introduced, except by the unanimous consent of all the members of the council present, has been held not to require a unanimous vote in the final passage of the ordinance, but only unanimous consent that it be put to its final passage.[59]

6787. Presumption of legal enactment—In the absence of affirmative evidence to the contrary it will be presumed that an ordinance was regularly and legally enacted.[60]

6788. Approval by mayor—Where a charter requires the mayor to sign an ordinance, if he approves it, his approval can be attested in no other way.[61] The subdivision of the wards of a city has been held a legislative act requiring the approval of the mayor.[62] The approval of the mayor of an order of a council for the construction of a sidewalk has been held unnecessary.[63]

6789. Publication—An ordinance has been held not to take effect until its first publication.[64] Where the time of publication was not prescribed, a publication in September of an ordinance passed in May was held sufficient, though several meetings of the council intervened.[65] The subdivision of the wards of a city has been held a legislative act requiring publication.[66] Orders of a city council to a board of public works have been held not to require publication.[67] An affidavit of publication has been held sufficient.[68] Informalities in a contract between an official paper and a city have been held not to invalidate a publication.[69]

6790. Repeal—Revival—If an ordinance is void in toto a prior ordinance which it repealed remains in force.[70] The re-enactment of an ordinance has been held to repeal portions of the original ordinance restricting the right of prosecution to policemen.[71] An ordinance may be repealed by a subsequent

[52] Camp v. Minneapolis, 33–461, 23+845.
[53] State v. Cantieny, 34–1, 24+458; Duluth v. Krupp, 46–435, 437, 49+235; State v. Starkey, 49–503, 507, 52+24; State v. Harris, 50–128, 52+387, 531; Moore v. St. Paul, 61–427, 63+1087; Duluth v. Abrahamson, 96–39, 104+682.
[54] See § 8906.
[55] Lamm v. Chi. etc. Ry., 45–71, 47+455.
[56] Warsop v. Hastings, 22–437.
[57] State v. Armstrong, 54–457, 56+97.
[58] Id.
[59] State v. Priester, 43–373, 45+712.
[60] Duluth v. Krupp, 46–435, 49+235.
[61] State v. Dist. Ct., 41–518, 43+389.
[62] State v. Darrow, 65–419, 67+1012.
[63] State v. Armstrong, 54–457, 56+97.
[64] Warsop v. Hastings, 22–437.
[65] St. Paul v. Colter, 12–41(16).
[66] State v. Darrow, 65–419, 67+1012.
[67] Fairchild v. St. Paul, 46–540, 49+325.
[68] Faribault v. Wilson, 34–254, 25+449.
[69] McKusick v. Stillwater, 44–372, 46+769.
[70] Moore v. St. Paul, 61–427, 63+1087.
[71] State v. Enger, 81–399, 84+218.

act of the legislature.[72] The informal repeal of an ordinance vacating a street will not operate to repeal an ordinance previously enacted with the formalities required by law, and to divest the interest of a purchaser from the owner of the fee after title has accrued to such owner upon the enactment of the ordinance.[73]

6791. Repeal by general law—An ordinance regulating employment agencies has been held not repealed by a subsequent general law.[74]

6792. Validating—An amendment to a charter which provides that all ordinances thereafter made shall remain in force, does not validate an ordinance which was void because unauthorized.[75]

6793. Pleading—In pleading an ordinance it is unnecessary to set it out in full, but it is sufficient to refer to its title and date of approval,[76] or to the section, number, or chapter.[77] The statutory provisions are not mandatory. It is sufficient to refer to an ordinance by its date and purpose, or by its title, and the number of the section violated, or by its substance, or, in any general way, with a degree of precision sufficiently direct to identify it.[78] It is not generally necessary to plead a village ordinance as the statute gives it the force of a general law within the village,[79] and city charters generally make it unnecessary to plead the local ordinances.[80] But in the absence of such provisions it is necessary to plead and prove ordinances.[81]

LICENSING EMPLOYMENTS, ETC.

6794. Nature and scope of power—The licensing of employments is an exercise of the police power which the legislature may delegate to municipalities.[82] A harmless and legitimate business cannot be unconditionally prohibited under a power to regulate by license;[83] otherwise, if the business is harmful to the public.[84] A power to license is not a power to tax, but the fact that a municipality derives revenue incidentally from a reasonable exercise of the police power in regulating a business is no objection to an ordinance. Unless a license fee is manifestly unreasonable, in view of its purpose as a regulation, a court will not adjudge it a tax.[85] The power to grant licenses implies the power to refuse to do so for good cause.[86]

6795. Incidental regulation—Where the only legislative authority conferred by the charter of a city is to license places subject to police regulation by ordinance, the power to license is to be construed as a power to regulate through the license ordinance, and the city council may thereby impose such reasonable terms and conditions as may be necessary to make the license issued in pursuance thereof efficacious as a police regulation. In the absence of further authority to regulate or control such places, the council would not be authorized, as against existing licensees, at least, to impose new or additional conditions, not required or contemplated by a previous ordinance and license issued thereunder, or to provide and enforce penalties for the violation thereof.[87]

[72] St. Paul v. Byrnes, 38–176, 36+449.
[73] Steenerson v. Fontaine, 106–225, 119+400.
[74] Moore v. Minneapolis, 43–418, 45+719.
[75] Red Wing v. Chi. etc. Ry., 72–240, 75+223.
[76] R. L. 1905 § 4147. See Faribault v. Wilson, 34–254, 25+449; Fairmont v. Meyer, 83–456, 86+457.
[77] R. L. 1905 § 724.
[78] Fairmont v. Meyer, 83–456, 86+457.
[79] R. L. 1905 § 724.
[80] See State v. Gill, 89–502, 95+449.
[81] Winona v. Burke, 23–254; State v. Oleson, 26–507, 513, 5+959.
[82] See § 6764.
[83] Darling v. St. Paul, 19–389(336).
[84] St. Paul v. Troyer, 3–291(200).
[85] St. Paul v. Traeger, 25–248; Mankato v. Fowler, 32–364, 20+361; State v. Jensen, 93–88, 100+644.
[86] State v. Schoenig, 72–528, 532, 75+711.
[87] State v. Pamperin, 42–320, 44+251.

6796. Licensing ordinances—Requisites—A licensing ordinance is not invalid because it fails to provide for the issuance of a license or the approval of the bonds of licensees, or a penalty for its violation.[88]

6797. Power to license cannot be delegated—The power to license cannot be delegated by a municipality to its administrative officers. Where a council is clothed with power to license it must determine the extent and duration of the license and the amount of the license fee. It cannot be left to the licensee to determine the duration of the license.[89]

6798. Places of amusement—Charters often provide for the licensing of places of amusement.[90]

6799. Discrimination among applicants—An ordinance has been construed as clothing a council with reasonable discretion in granting licenses. Applicants for a license cannot be discriminated against except for good cause.[91]

6800. License fees—Whenever a municipallity is authorized to regulate a subject, and to require those who do any act to obtain a license or permit, it may charge the person procuring the same a reasonable fee to cover the labor and expense of issuing such license or permit. Such a fee is not a tax.[92] The amount of license fees is largely a matter of discretion with the municipal authorities. License fees must be reasonable, but a court will not declare them unreasonable unless they are palpably so. The general rule is that a reasonable license fee should be intended to cover the expense of issuing it, the services of officers, and other expenses directly or indirectly imposed.[93] Where the business is of such a nature that its prosecution will do damage to the public, or is liable to degenerate into a public nuisance, a license fee large enough to operate as a restraint upon the number of persons who might otherwise engage in it may be imposed.[94] License fees must be uniform and equal upon all of the same class who engage in the business. They cannot be for a fixed sum regardless of the time for which they are to run,[95] but a municipality may fix a uniform, reasonable term from which all licenses shall run.[96] An arbitrary classification as a basis of fees is illegal.[97] If the legislature fixes the amount of fees the courts will be very slow to declare them unreasonable.[98] A larger fee than authorized by a charter is illegal.[99]

PROSECUTIONS UNDER ORDINANCES

6801. Violation of ordinance—A public offence—The violation of an ordinance is a criminal or public offence within the law relating to arrest,[1] but the accused is not entitled to jury trial.[2]

[88] Moore v. St. Paul, 61–427, 63+1087.

[89] Darling v. St. Paul, 19–389(336); In re White, 43–250, 45+232; State v. Schoenig, 72–528, 531, 75+711.

[90] See State v. Scaffer, 95–311, 104+139 (provision of charter of Minneapolis authorizing city council to license "shows of all kinds * * * circuses, concerts, * * * places of amusement and museums for which money is charged for entrance into the same," construed).

[91] State v. Schoenig, 72–528, 75+711. See St. Paul v. Lawton, 61–537, 63+1112; State v. McMahon, 69–265, 72+79.

[92] St. Paul v. Dow, 37–20, 32+860.

[93] St. Paul v. Colter, 12–41(16); Mankato v. Fowler, 32–364, 20+361; In re White, 43–250, 45+232; Duluth v. Krupp, 46–435, 49+235; Duluth v. Marsh, 71–248, 73+962; State v. Schoenig, 72–528, 75+711; State v. Finch, 78–118, 80+856; State v. Jensen, 93–88, 100+644.

[94] Mankato v. Fowler, 32–364, 20+361; In re White, 43–250, 45+232; Duluth v. Krupp, 46–435, 49+235; Duluth v. Marsh, 71–248, 73+962; State v. Jensen, 93–88, 100+644.

[95] Moore v. St. Paul, 48–331, 51+219; Id., 61–427, 63+1087; State v. Finch, 78–118, 80+856.

[96] State v. Schoenig, 72–528, 75+711.

[97] State v. Finch, 78–118, 80+856.

[98] St. Paul v. Colter, 12–41(16).

[99] Darling v. St. Paul, 19–389(336).

[1] State v. Cantieny, 34–1, 24+458.

[2] See § 5235.

6802. Quasi criminal—In whose name—Originally ordinances were enforced by the municipality in a civil action for the recovery of the penalty imposed. They are now enforced in a quasi criminal action, brought in the name of the state.[3] The fact that a complaint is in the name of a city instead of the state is not fatal.[4]

6803. On whose complaint—An ordinance of Minneapolis, providing that no prosecution for a violation thereof should be commenced except on the complaint of police officers, has been sustained.[5]

6804. Complaint—In charging an offence under an ordinance it is sufficient to follow the language of the ordinance, if it sets forth all the essential elements of the offence.[6] It is good form to conclude "contrary to the ordinance."[7] A complaint concluding contrary to both statute and ordinance has been held not double.[8] A complaint under an ordinance against selling goods by sample without a license has been held bad as stating two offences in the alternative.[9] In a complaint under an ordinance regulating expressmen it has been held unnecessary to allege what property the defendant carried or for whom he carried it.[10] The phrase "divers other articles," in a complaint for violating an ordinance regulating dealers in second-hand goods, has been held void for uncertainty.[11]

6805. Defences—It is generally no defence that the accused was an agent acting under the direction of another,[12] but under a smoke ordinance a mere servant has been held not liable.[13]

6806. Evidence—Sufficiency—A conviction under an ordinance relating to scavenger work by "licensed persons," has been set aside because the city failed to allege or prove that the defendant was a licensed person.[14]

6807. Punishment—The amount of fine or period of imprisonment may be left to the discretion of the court within prescribed limits. An ordinance imposing "costs of prosecution" has been held not authorized by the charter.[15] An ordinance has been held to authorize a fine or imprisonment in the discretion of the court, within prescribed limits.[16]

LIABILITY FOR TORTS

6808. In general—Distinction between corporate and public powers—The liability of a municipality for tort depends upon the distinction between corporate and public powers and duties. Corporate powers are those which relate to the local, proprietary, or business affairs of the corporation. Public powers are those which are governmental and affect the public generally—those powers which the municipality exercises as a governmental subdivision of the state.[17] Municipalities are not liable in damages for the manner in which they exercise in good faith their discretionary powers of a public, legislative, or quasi judicial character.[18]

[3] State v. Robitshek, 60–123, 61+1023. See State v. Sexton, 42–154, 43+845.
[4] State v. Graffmuller, 26–6, 46+445; Faribault v. Wilson, 34–254, 25+449.
[5] State v. Robitshek, 60–123, 61+1023.
[6] Mankato v. Arnold, 36–62, 30+305; State v. Gill, 89–502, 95+449. See State v. Swanson, 106–288, 119+45.
[7] State v. Gill, 89–502, 95+449.
[8] Jordan v. Nicolin, 84–367, 87+916.
[9] St. Paul v. Marvin, 16–102(91).
[10] State v. Finch, 78–118, 80+856.
[11] State v. Segel, 60–507, 62+1134.
[12] Duluth v. Mallett, 43–204, 45+154.
[13] St. Paul v. Johnson, 69–184, 72+64.
[14] St. Paul v. Lawton, 61–537, 63+1112.
[15] State v. Cantieny, 34–1, 24+458.
[16] State v. Grimes, 83–460, 86+449.
[17] Bryant v. St. Paul, 33–289, 23+220; Snider v. St. Paul, 51–466, 472, 53+763; Ihk v. Duluth, 58–182, 59+960; Reed v. Anoka, 85–294, 298, 88+981; Claussen v. Luverne, 103–491, 115+643.
[18] Claussen v. Luverne, 103–491, 115+643.

6809. Exercise of governmental powers—A municipality is not liable for torts committed in the exercise of its public, governmental powers. Thus a municipality has been held not liable for the negligence of its board of health;[19] for the negligence of firemen;[20] for the negligence of its servants in running an elevator in a city hall;[21] for negligence in maintaining a lockup; for the wrongful acts of a public officer in making arrests or detaining prisoners;[22] for negligence in maintaining waterworks for use of its fire department;[23] for the wrongful revocation of a permit to move a building within fire limits;[24] for failure to take a bond from a contractor for the benefit of laborers and materialmen;[25] or for the mistaken action of a city council in attempting to revoke a license to sell intoxicating liquors.[26]

6810. Exercise of corporate powers—A municipality is liable for torts committed in the exercise of its corporate or proprietary powers. Thus it has been held liable for negligence in damming waters;[27] for negligence in turning waters from a street upon adjoining lands;[28] for negligence in the construction of sewers;[29] for the escape of waters from a reservoir;[30] for condemning a burial lot for street purposes and removing dead bodies without authority.[31] In an action for negligence in connection with a public work a municipality cannot set up the plea of ultra vires, if the work was authorized by it, and was within the scope of its corporate power or authority to act with reference to it under any circumstances.[32]

6811. Exercise of discretion—A municipality is not liable for consequential injuries arising from the bona fide exercise of, or omission to exercise, those powers which are conferred on its council or legislative body, and the exercise of which as to the time, extent, and manner is left to the discretion or judgment of such body.[33]

6812. Unauthorized acts of officers—A municipality is not liable for the torts of its officers committed outside the scope of their authority. It is liable for the acts of its agents, injurious to others, when the act is in its nature lawful and authorized, but is done in an unlawful manner or in an unauthorized place, but it is not liable for injuries or tortious acts which are in their nature unlawful and prohibited.[34]

6813. Ultra vires acts—A municipality is not liable for torts committed outside the scope of its powers.[35] Thus, it is not liable for the destruction by its officers of buildings to arrest the progress of a fire.[36] But it is liable for the negligence of its officers acting within the general scope of its corporate powers, though their acts were unauthorized in the particular case.[37]

6814. Exceptional rule as to streets, etc.—A municipality is liable for its neglect to keep its streets, sidewalks, etc., in a safe condition.[38] This is an exception to the general rule that a municipality is not liable for torts committed

[19] Bryant v. St. Paul, 33-289, 23+220.
[20] Grube v. St. Paul, 34-402, 26+228.
[21] Snider v. St. Paul, 51-466, 53+763.
[22] Gullikson v. McDonald, 62-278, 64+812.
[23] Miller v. Minneapolis, 75-131, 77+788. See East Grand Forks v. Luck, 97-373, 378, 107+393.
[24] Lerch v. Duluth, 88-295, 92+1116.
[25] Ihk v. Duluth, 58-182, 59+960.
[26] Claussen v. Luverne, 103-491, 115+643.
[27] Boye v. Albert Lea, 74-230, 76+1131.
[28] Kobs v. Minneapolis, 22-159.
[29] Welter v. St. Paul, 40-460, 42+392.
[30] Wiltse v. Red Wing, 99-255, 109+114.
[31] Sacks v. Minneapolis, 75-30, 77+563.
[32] Welter v. St. Paul, 40-460, 42+392.
[33] Lee v. Minneapolis, 22-13; Alden v. Minneapolis, 24-254; Blyhl v. Waterville, 57-115, 118, 58+817.
[34] Viebahn v. Crow Wing County, 96-276, 104+1089.
[35] See Boye v. Albert Lea, 74-230, 76+1131; Sacks v. Minneapolis, 75-30, 77+563; Sandeen v. Ramsey County, 109-505, 124+243.
[36] McDonald v. Red Wing, 13-38(25).
[37] Welter v. St. Paul, 40-460, 42+392.
[38] Schigley v. Waseca, 106-94, 118+259. See § 6818.

in the exercise of its public or governmental powers. The exception rests upon special considerations of public policy, or upon the doctrine of stare decisis.[39]

6815. Respondeat superior—A municipality is subject to the rule of respondeat superior when the requisite elements of liability exist.[40]

6816. Negligence of fellow servants—A municipality has been held liable to its employees for the negligence of its officers in the construction of a sewer.[41]

6817. Ratification of unauthorized acts—A municipality may so ratify the unauthorized acts of its officers as to be liable therefor.[42] Not being liable for the ultra vires acts of its officers it cannot make itself liable therefor by ratification, except where it had power in the first instance or at the time of the ratification, to authorize the acts.[43]

LIABILITY FOR DEFECTIVE STREETS AND SIDEWALKS

6818. Liability for defective streets—In general—A municipality which is given the exclusive control of its streets is required to exercise reasonable care to keep them in a safe condition and is liable to any one who is injured as a result of the want of such care.[44] It is not an insurer of the safe condition of its streets.[45] Reasonable care means such as a person of ordinary prudence would exercise.[46] The degree of care must be commensurate with the risks involved.[47] All that is required is reasonable care under the circumstances, and, in determining whether a defect is actionable, consideration must be had, not only to the danger to be apprehended from it, but also to the practicability of remedying it.[48] It is sometimes said that the liability is statutory.[49] Villages organized under the general statutes are liable.[50] The legislature may impose the liability on a municipality or not, as it may deem expedient, and it may prescribe the conditions on which the liability shall be enforced.[51] The liability includes dangers from overhead as well as underfoot.[52] It is immaterial that the municipality did not cause the obstruction or defect,[53] or that it is not in the most usually traveled portion of the street.[54] A municipality cannot relieve itself of liability by allowing a railway company to lay out and operate tracks in a street.[55] The liability is not affected by the fact that the street commissioner is elected by the people,[56] or by the absence of an ordinance against obstruction, etc.,[57] or by a license from the municipality,[58] or by the way in which the street was acquired.[59] It has been said that the liability arises

[39] Snider v. St. Paul, 51–466, 53+763. See Blyhl v. Waterville, 57–115, 119, 58+817; Claussen v. Luverne, 103–491, 115+643.

[40] Hall v. Austin, 73–134, 75+1121; Boye v. Albert Lea, 74–230, 76+1131; Kleopfert v. Minneapolis, 93–118, 100+669.

[41] Welter v. St. Paul, 40–460, 42+392.

[42] Schussler v. Hennepin County, 67–412, 70+6; Viebahn v. Crow Wing County, 96–276, 104+1089.

[43] Viebahn v. Crow Wing County, 96–276, 279, 104+1089.

[44] St. Paul v. Seitz, 3–297(205); Shartle v. Minneapolis, 17–308(284); Cleveland v. St. Paul, 18–279(255); Moore v. Minneapolis, 19–300(258); O'Leary v. Mankato, 21–65; Bohen v. Waseca, 32–176, 19+730; Grant v. Stillwater, 35–242, 28+660; Nichols v. St. Paul, 44–494, 47+168; Blyhl v. Waterville, 57–115, 58+817; McDowell v. Preston, 104–263, 116+470. See, upon the subject generally, 20 L. R. A. (N. S.) 513; 108 Am. St. Rep. 136.

[45] Miller v. St. Paul, 38–134, 137, 36+271; Blyhl v. Waterville, 57–115, 120, 58+817.

[46] Blyhl v. Waterville, 57–115, 120, 58+817.

[47] Bieber v. St. Paul, 87–35, 91+20.

[48] Wright v. St. Cloud, 54–94, 55+819.

[49] Nichols v. Minneapolis, 30–545, 547, 16+410; Peterson v. Cokato, 84–205, 87+615. See Schigley v. Waseca, 106–94, 118+259.

[50] Peterson v. Cokato, 84–205, 87+615.

[51] Nichols v. Minneapolis, 30–545, 16+410; Schigley v. Waseca, 106–94, 118+259.

[52] Bohen v. Waseca, 32–176, 19+730; Nichols v. St. Paul, 44–494, 47+168.

[53] Cleveland v. St. Paul, 18–279(255); Estelle v. Lake Crystal, 27–243, 6+775.

[54] Estelle v. Lake Crystal, 27–243, 6+775.

[55] Campbell v. Stillwater, 32–308, 20+320.

[56] Furnell v. St. Paul, 20–117(101).

[57] Bohen v. Waseca, 32–176, 19+730.

[58] Grant v. Stillwater, 35–242, 28+660.

[59] Phelps v. Mankato, 23–276.

out of the fact that the municipality has the exclusive control of the streets, and has the power to provide the means for the proper performance of the duty of keeping them in safe condition.[60]

6819. Boulevards—When a city has rightly set apart and improved a part of a street for a boulevard, it is not bound to use due care to keep such part free from all obvious obstructions which are necessarily incident to its use as a boulevard, though they may endanger the safety of travelers thereon. But a city has no right to maintain, or permit others to do so, on its boulevards, and especially on those at the street corners, anything in the nature of a dangerous pitfall, or trap, or snare, or like obstructions, whereby the traveler may be injured.[61]

6820. Adjacent premises—A municipality is not liable for injuries from dangerous premises adjacent to its streets, if such premises do not render traveling on its streets dangerous.[62] It is not liable for an injury to a traveler while straying outside of an unfenced street, when the street is in a safe condition.[63]

6821. When liability begins—Liability does not attach as soon as the street is dedicated. It is for the municipality to determine in its discretion when it will improve and open a street for travel. If when dedicated, and in its natural condition, a street is unsafe, it is not the fault of the municipality.[64] Where a portion of a street has been graded or improved so as to invite public use the municipality is bound to keep such portion in a safe condition.[65] A municipality has a reasonable time after its incorporation to ascertain and remedy defects in streets which it has inherited from its predecessor.[66] Evidence held not to show a street opened so as to render a city liable.[67] No formal acceptance or opening is necessary to initiate the liability.[68]

6822. Defective plan of construction—A municipality is not liable for an injury resulting from a defective plan of construction in a sidewalk,[69] unless the plan adopted is palpably unreasonable.[70]

6823. Notice to municipality of defect—A municipality is not liable for a defect or obstruction not created by its own act, unless it had actual or constructive notice thereof a sufficient time before the accident to render it negligent in not removing it.[71] What is a "sufficient time" within this rule depends on the facts of the particular case. Where obvious defects had existed in a village sidewalk on a prominent street for more than twenty days before the accident, it was held a question for the jury whether sufficient time had elapsed.[72] If the defect or obstruction has existed so long that it would have been discovered had the municipal officers exercised reasonable diligence the municipality will be charged with constructive notice.[73] If it is open and notori-

[60] Schigley v. Waseca, 106–94, 118+259.
[61] McDonald v. St. Paul, 82–308, 84+1022. See Kleopfert v. Minneapolis, 90–158, 95+908; Id., 93–118, 100+669.
[62] Dehanitz v. St. Paul, 73–385, 76+48. See Nutting v. St. Paul, 73–371, 76+61; Ratte v. Dawson, 50–450, 52+965.
[63] McHugh v. St. Paul, 67–441, 70+5.
[64] St. Paul v. Seitz, 3–297(205).
[65] Lindholm v. St. Paul, 19–245(204); Treise v. St. Paul, 36–526, 32+857.
[66] Bohen v. Waseca, 32–176, 181, 19+730.
[67] Nutting v. St. Paul, 73–371, 76+61.
[68] Phelps v. Mankato, 23–276; Shartle v. Minneapolis, 17–308(284).
[69] Conlon v. St. Paul, 70–216, 72+1073.
[70] Blyhl v. Waterville, 57–115, 58+817; McDonald v. Duluth, 93–206, 100+1102.
[71] Cleveland v. St. Paul, 18–279(255); Moore v. Minneapolis, 19–300(258); Lindholm v. St. Paul, 19–245(204); Miller v. St. Paul, 38–134, 36+271.
[72] Ljungberg v. North Mankato, 87–484, 92+401.
[73] Cleveland v. St. Paul, 18–279(255); Lindholm v. St. Paul, 19–245(204); Moore v. Minneapolis, 19–300(258); O'Leary v. Mankato, 21–65, 69; Estelle v. Lake Crystal, 27–243, 6+775; Waldron v. St. Paul, 33–87, 22+4; Miller v. St. Paul, 38–134, 36+271; Wabasha v. Southworth, 54–79, 55+818; Peterson v. Cokato,

ous, notice to the municipality is presumed.[74] Notice to a mayor or other officer charged with the general control and supervision of the corporate affairs, or to an officer charged with the care of streets, is notice to the municipality.[75] If the defect or obstruction was created by the municipality itself, or by its permission, it is liable without notice,[76] at least if the defect is an open one.[77] Notice to a street commissioner is notice to the municipality.[78] The legislature may provide that ten days' written notice to the city, prior to the accident, of the existence of a defect in a street or sidewalk, shall be a condition precedent to liability for damages caused thereby to individuals.[79]

6824. Duty of inspection—It is the duty of a municipality to exercise reasonable care and diligence to know whether its streets and sidewalks are in safe condition.[80] No inflexible rule can be laid down as to the degree of care and frequency of inspection.[81] A municipality is required to exercise a reasonable, but not a constant supervision over the construction of sidewalks, though the work is being done by abutting owners. Whether it has been negligent in this regard is ordinarily a question for the jury.[82] Requests for instructions as to the duty and effect of inspection have been held properly refused.[83]

6825. Duty to maintain guards, railings, etc.—When travel along a street is dangerous because of adjacent excavations, embankments, deep water, etc., it may be the duty of the municipality to maintain guards or railings. Whether the duty exists depends on the facts of the particular case and is sometimes a question of law and sometimes a question of fact for the jury.[84] A railing need not be so constructed as to render it impossible for a child to crawl through or over it.[85]

6826. Notice of decayed wood—A municipality is bound to take notice of the certain tendency of wooden sidewalks to decay and to exercise reasonable care to repair and replace decayed portions thereof. It is charged with constructive notice of a condition of decay which has existed for a considerable time.[86] Courts will take judicial notice of the fact that the decay of wood is a gradual process.[87]

6827. Lights about obstructions, etc.—The failure to place lights about obstructions, excavations, etc., may constitute negligence.[88]

84–205, 87+615; Gasink v. New Ulm, 92–52, 99+624; Sumner v. Northfield, 96–107, 104+686; Dory v. Duluth, 103–154, 114+465; Leystrom v. Ada, 125+507.

[74] Lindholm v. St. Paul, 19–245(204). See Dory v. Duluth, 103–154, 114+465.

[75] Cunningham v. Thief River Falls, 84–21, 86+763; Miller v. St. Paul, 38–134, 36+271; O'Leary v. Mankato, 21–65, 69.

[76] Cleveland v. St. Paul, 18–279(255); O'Leary v. Mankato, 21–65, 69; Furnell v. St. Paul, 20–117(101); Kleopfert v. Minneapolis, 93–118, 100+669.

[77] McDonald v. Duluth, 93–206, 100+1102.

[78] Sumner v. Northfield, 96–107, 104+686; Dory v. Duluth, 103–154, 114+465.

[79] Schigley v. Waseca, 106–94, 118+259.

[80] Gude v. Mankato, 30–256, 15+175; Kennedy v. St. Cloud, 90–523, 97+417; Furnell v. St. Paul, 20–117(101); Ritschdorf v. St. Paul, 95–370, 104+129; Sumner v. Northfield, 96–107, 104+686; Svendsen v. Alden, 101–158, 112+10.

[81] Kellogg v. Janesville, 34–132, 24+359.

[82] Stellwagen v. Winona, 54–460, 56+51.

[83] Kennedy v. St. Cloud, 90–523, 97+417.

[84] St. Paul v. Kuby, 8–154(125); Estelle v. Lake Crystal, 27–243, 6+775; Clark v. Austin, 38–487, 38+615; Ray v. St. Paul, 40–458, 42+297; Tarras v. Winona, 71–22, 73+505; Id., 77–57, 79+649; Weiser v. St. Paul, 86–26, 90+8; Grant v. Brainerd, 86–126, 90+307. See Cleveland v. St. Paul, 18–279(255); O'Leary v. Mankato, 21–65; Collins v. Dodge, 37–503, 35+368; Johnson v. Walsh, 83–74, 85+910.

[85] Lineburg v. St. Paul, 71–245, 73+723.

[86] Furnell v. St. Paul, 20–117(101); Johnson v. St. Paul, 52–364, 54+735; Hall v. Austin, 73–134, 75+1121; Peterson v. Cokato, 84–205, 87+615; Kennedy v. St. Cloud, 90–523, 97+417; Ritschdorf v. St. Paul, 95–370, 104+129; Murphy v. South St. Paul, 101–341, 112+259.

[87] Hall v. Austin, 73–134, 75+1121.

[88] See St. Paul v. Seitz, 3–297(205); Grant v. Stillwater, 35–242, 28+660; Col-

6828. Lighting streets—Unless required by its charter a municipality is not bound to light its streets, but the fact that a street was not lighted may be material on the question whether it was in a safe condition at a particular time.[89]

6829. Ice and snow on sidewalks—A municipality is not liable for injuries resulting from the mere slipperiness of a sidewalk due to snow or ice,[90] but it is liable for dangerous accumulations of snow or ice,[91] and it may be liable for a slippery coating of ice formed by the overflow of a gutter or waterway, if it had notice and was negligent in allowing the overflow.[92]

6830. Dangers overhead—The duty of a municipality to keep its streets in a safe condition extends to dangers overhead as well as underfoot.[93]

6831. Defects and obstructions in streets—The following defects or obstructions have been held to justify a recovery: an excavation;[94] an open culvert across a street;[95] dirt and rock deposited in a street in connection with the construction of a building;[96] an uncovered ditch across a street;[97] telegraph wires imbedded in ice;[98] ditches along a railway track;[99] a platform;[1] a deposit of refuse in a river at the end of a street;[2] an excavation and embankment across a street;[3] a post;[4] an awning;[5] a rope across a boulevard;[6] a ladder with one end in the street and the other resting against a building;[7] a wire stretched along a boulevard near a street corner to support a tree;[8] a railway track;[9] an embankment near a sidewalk;[10] a defective railing on a bridge;[11] a pool of hot water connected with a steam-heating plant;[12] a building in a street.[13] The following have been held not defects or obstructions justifying a recovery: a dumping ground in a slough adjacent to a street;[14] a marsh adjacent to a street;[15] a space between an electric light pole and the curb;[16] the absence of railings along the sides of an embankment.[17]

6832. Liability for defective sidewalks—A sidewalk is a part of a street[18] and a municipality which is given exclusive control of its streets or sidewalks is required to exercise reasonable care in keeping the latter in a safe condition and is liable to any person who is injured as a result of the want of

lins v. Dodge, 37-503, 35+368; Clark v. Austin, 38-487, 38+615.

[89] Miller v. St. Paul, 38-134, 36+271; McHugh v. St. Paul, 67-441, 70+5.

[90] Henkes v. Minneapolis, 42-530, 44+1026. See Lawson v. Truesdale, 60-410, 414, 62+546; Blais v. Mpls. etc. Ry., 34-57, 24+558; Friday v. Moorhead, 84-273, 87+780.

[91] Wright v. St. Cloud, 54-94, 55+819. See Dory v. Duluth, 103-154, 114+465.

[92] Stanke v. St. Paul, 71-51, 73+629.

[93] Bohen v. Waseca, 32-176, 19+730; Nichols v. St. Paul, 44-494, 47+168.

[94] St. Paul v. Seitz, 3-297(205); Cleveland v. St. Paul, 18-279(255); Clark v. Austin, 38-487, 38+615. See Collins v. Dodge, 37-503, 35+368; Johnson v. Walsh, 83-74, 85+910.

[95] O'Gorman v. Morris, 26-267, 3+349.

[96] Grant v. Stillwater, 35-242, 28+660. See Nye v. Dibley, 88-465, 93+524.

[97] O'Leary v. Mankato, 21-65.

[98] Nichols v. Minneapolis, 33-430, 23+868.

[99] Cunningham v. Thief River Falls, 84-21, 86+763; Adams v. Thief River Falls, 84-30, 86+767.

[1] Estelle v. Lake Crystal, 27-243, 6+775.

[2] Ray v. St. Paul, 40-458, 42+297.

[3] Cleveland v. St. Paul, 18-279(255).

[4] Phelps v. Mankato, 23-276.

[5] Bohen v. Waseca, 32-176, 19+730.

[6] Kleopfert v. Minneapolis, 90-158, 95+908; Id., 93-118, 100+669.

[7] Moore v. Townsend, 76-64, 78+880.

[8] McDonald v. St. Paul, 82-308, 84+1022.

[9] Campbell v. Stillwater, 32-308, 20+320.

[10] Nicho's v. St. Paul, 44-494, 47+168.

[11] McDonald v. Duluth, 93-206, 100+1102.

[12] Svendsen v. Alden, 101-158, 112+10.

[13] McDowell v. Preston, 104-263, 116+470.

[14] Dehanitz v. St. Paul, 73-385, 76+48.

[15] McHugh v. St. Paul, 67-441, 70+5.

[16] Ryther v. Austin, 72-24, 74+1017.

[17] Tarras v. Winona, 71-22, 73+505; Id., 77-57, 79+649.

[18] Furnell v. St. Paul, 20-117(101, 103); Young v. Waterville, 39-196, 39+97; Bohen v. Waseca, 32-176, 179, 19+730; Noonan v. Stillwater, 33-198, 200, 22+444.

such care.[19] Villages organized under the general law are charged with this duty and liability.[20] The liability is statutory.[21] It is immaterial that they are not built by the municipality.[22] A municipality is not an insurer of the safe condition of its sidewalks.[23] The degree of care must be commensurate with the risks involved.[24] It is immaterial that the walk is made of earth.[25] Reasonable care involves due regard not only to the size and depth of a hole in a sidewalk, but also to its form as affecting the danger to which it exposes pedestrians.[26]

6833. Defects in sidewalks—The following have been held defects justifying a recovery: a perpendicular drop of from six to nine inches from one sidewalk to another at the intersection of streets;[27] unsteadiness due to rotten and uneven sleepers;[28] a perpendicular drop or step of seven or eight inches between old and new walks in the middle of a block;[29] loose planks resting on rotten stringers;[30] a depression of one and one-fourth inches in a hexagonal cement block in front of a store where there was much travel;[31] a defective cover to a coal hole;[32] a hole;[33] a loose plank connecting a new and old sidewalk on a bridge;[34] a small V-shape hole in a plank;[35] a space between the end of a sidewalk and a connecting bridge;[36] a small hole in a scantling wedged in between a cement and wooden sidewalk.[37] The following have been held defects not justifying a recovery: a step from a sidewalk to a street crossing;[38] a slope of three inches to the foot in an alley crossing.[39]

6834. Proximate cause—The rule as to what constitutes proximate cause is the same here as elsewhere in the law of negligence.[40]

6835. Horses taking fright—Proximate cause—Where a horse takes fright, without fault of the driver, at something for which the municipality is not responsible, and gets beyond the control of the driver, runs away, and comes in contact with some obstruction or defect in the street which is there by the negligence of the municipality, the municipality is liable for the resulting injury, if it would not have been sustained except for such negligence.[41]

6836. Respondeat superior—The doctrine of respondeat superior applies to a municipality in relation to its duty to keep its streets in a safe condition.[42]

[19] Moore v. Minneapolis, 19-300(258); Furnell v. St. Paul, 20-117(101); Noonan v. Stillwater, 33-198, 22+444; Kellogg v. Janesville, 34-132, 24+359; Young v. Waterville, 39-196, 39+97; Bieber v. St. Paul, 87-35, 91+20.

[20] Peterson v. Cokato, 84-205, 87+615.

[21] Id.

[22] Graham v. Albert Lea, 48-201, 50+1108; Furnell v. St. Paul, 20-117(101).

[23] Miller v. St. Paul, 38-134, 36+271.

[24] Bieber v. St. Paul, 87-35, 91+20.

[25] Graham v. Albert Lea, 48-201, 50+1108.

[26] Sumner v. Northfield, 96-107, 104+686.

[27] Tabor v. St. Paul, 36-188, 30+765.

[28] Burrows v. Lake Crystal, 61-357, 63+745.

[29] Blyhl v. Waterville, 57-115, 58+817.

[30] Hall v. Austin, 73-134, 75+1121. See Murphy v. South St. Paul, 101-341, 112+259.

[31] Bieber v. St. Paul, 87-35, 91+20.

[32] L'Herault v. Minneapolis, 69-261, 72+73. See Korte v. St. Paul T. Co., 54-530, 56+246.

[33] Moore v. Minneapolis, 19-300(258).

[34] Lenz v. St. Paul, 87-85, 91+256.

[35] Sumner v. Northfield, 96-107, 104+686.

[36] Dory v. Duluth, 103-154, 114+465.

[37] Leystrom v. Ada, 125+507.

[38] Miller v. St. Paul, 38-134, 36+271.

[39] Conlon v. St. Paul, 70-216, 72+1073.

[40] O'Leary v. Mankato, 21-65, 68; Campbell v. Stillwater, 32-308, 20+320; La Londe v. Peake, 82-124, 84+726; Cunningham v. Thief River Falls, 84-21, 86+763; Grant v. Brainerd, 86-126, 90+307; Kennedy v. St. Cloud, 90-523, 97+417; McDowell v. Preston, 104-263, 116+470. See § 7000.

[41] McDowell v. Preston, 104-263, 116+470.

[42] St. Paul v. Seitz, 3-297(205); Hall v. Austin, 73-134, 75+1121.

6837. Funds for repairs—Whether want of funds to make repairs will relieve a municipality of liability is apparently an open question in this state. If it is a defence at all it must be pleaded by the municipality.[43]

6838. Contributory negligence—Notice of defect—Contributory negligence on the part of the person injured will defeat a recovery.[44] While the fact that the person injured knew before the accident that the street or sidewalk was unsafe is always admissible, on the issue of his negligence, it is not conclusive. The test is whether a person of ordinary prudence, with such knowledge, would have used the street or sidewalk under the circumstances.[45] If a defect is patent and can be easily avoided, it is negligence not to avoid it.[46] The negligence of the driver of a vehicle in which the plaintiff was driving at the time of the accident has been held not imputable to him.[47] The question of contributory negligence is for the jury, unless the evidence is conclusive.[48] A person using a street or sidewalk is not bound at his peril to keep in mind a defect therein of which he has had notice.[49] Contributory negligence has been held not chargeable to a child four and a half years old from the mere fact that it was upon a sidewalk near an excavation unattended.[50] It is not negligence per se for a pedestrian to step from a sidewalk into the street elsewhere than at a crossing.[51] Cases are cited below sustaining instructions as to contributory negligence.[52]

6839. Joinder of parties—Charters sometimes provide for joining the party who creates an obstruction, etc., in an action against the municipality.[53]

6840. Pleading—In an action against a village incorporated under the general statute it is unnecessary to plead the statutes in order to show the duty to maintain its streets in a safe condition.[54] It is unnecessary to allege in a complaint that the municipality had funds to make repairs. Want of funds, if a defence at all, is to be pleaded in the answer.[55] It must be alleged that the street was a public street of the defendant.[56] Cases are cited below sustaining particular complaints.[57]

[43] Shartle v. Minneapolis, 17–308(284); Lindholm v. St. Paul, 19–245(204); Netzer v. Crookston, 59–244, 61+21.

[44] Wright v. St. Cloud, 54–94, 55+819; Hudon v. Little Falls, 68–463, 71+678; Ryther v. Austin, 72–24, 74+1017; Anderson v. St. Cloud, 79–88, 81+746; Friday v. Moorhead, 84–273, 87+780; Johnson v. Willmar, 126+397.

[45] Erd v. St. Paul, 22–443; Estelle v. Lake Crystal, 27–243, 6+775; Kelly v. Southern Minn. Ry., 28–98, 9+588; McKenzie v. Northfield, 30–456, 16+264; Nichols v. Minneapolis, 33–430, 23+868; Wright v. St. Cloud, 54–94, 98, 55+819; Maloy v. St. Paul, 54–398, 56+94; Holm v. Carver, 55–199, 56+826; Burrows v. Lake Crystal, 61–357, 63+745; Lyons v. Red Wing, 76–20, 78+868; Taylor v. Mankato, 81–276, 83+1084; Friday v. Moorhead, 84–273, 87+780; Murphy v. South St. Paul, 101–341, 112+259; Mosheuvel v. D. C., 191 U. S. 247.

[46] Wright v. St. Cloud, 54–94, 55+819; Friday v. Moorhead, 84–273, 87+780; Anderson v. St. Cloud, 79–88, 81+746.

[47] Cunningham v. Thief River Falls, 84–21, 86+763; Koplitz v. St. Paul, 86–373, 90+794.

[48] St. Paul v. Kuby, 8–154(125); Lindholm v. St. Paul, 19–245(204); Stoker v. Minneapolis, 32–478, 21+557; Weiser v. St. Paul, 86–26, 90+8; Isham v. Broderick, 89–397, 95+224; Murphy v. South St. Paul, 101–341, 112+259.

[49] Maloy v. St. Paul, 54–398, 56+94; Isham v. Broderick, 89–397, 401, 95+224.

[50] St. Paul v. Kuby, 8–154(125).

[51] Collins v. Dodge, 37–503, 35+368.

[52] Holm v. Carver, 55–199, 56+826; Kellogg v. Janesville, 34–132, 24+359.

[53] Jones v. Minneapolis, 31–230, 17+377; Clark v. Austin, 38–487, 38+615; Wabasha v. Southworth, 54–79, 55+818.

[54] Peterson v. Cokato, 84–205, 87+615.

[55] See § 6837.

[56] See Shartle v. Minneapolis, 17–308 (284); Kleopfert v. Minneapolis, 90–158, 95+908; Phelps v. Mankato, 23–276; Furnell v. St. Paul, 20–117(101); Farrant v. First Div. etc. Ry., 13–311(286).

[57] Lindholm v. St. Paul, 19–245(204) (complaint held sufficient to justify a recovery for medical attendance, loss of time, etc.); Kleopfert v. Minneapolis, 90–

6841. Variance—Place of accident—Evidence has been held to justify a verdict to the effect that the accident happened at the place stated in the notice of claim and complaint.[58]

6842. Law and fact—Whether a street or sidewalk was in an unsafe condition at the time of an accident, and whether the municipality was negligent under the circumstances, are questions for the jury, unless the evidence is conclusive.[59]

6843. Evidence—Admissibility—Cases are cited below holding evidence admissible,[60] or inadmissible.[61]

6844. Evidence—Sufficiency—Cases are cited below holding evidence sufficient,[62] or insufficient,[63] to justify a verdict for the plaintiff. A defect in the proof that a street was a "public street" has been held waived.[64]

6845. Liability of abutting owners—A provision of a charter, making abutting owners liable to others than the city for damages resulting from a failure to keep sidewalks in a safe condition, has been held unconstitutional.[65] Where a cellarway, trapdoor, scuttle, or the like is put in a public sidewalk for the convenience of the abutting property, as between the owner and the city, the duty of maintaining it in a safe condition devolves upon the former, and he cannot release himself of this duty by merely abandoning the use of the structure. He can only do so by removing it and restoring the sidewalk to its original condition. If, through the negligence of the property owner, the structure becomes unsafe, and injury results, for which the city is liable because of neglect of its duty to keep its streets in a safe condition for travel,

158, 95+908 (complaint for negligence in stretching a rope across a street sustained); Marsh v. Mpls. B. Co., 92-182, 99+630 (complaint against abutting owner sustained).

[58] Ritschdorf v. St. Paul, 95-370, 104+129.

[59] St. Paul v. Kuby, 8-154(125); Tabor v. St. Paul, 36-188, 30+765; McDonald v. St. Paul, 82-308, 84+1022; Weiser v. St. Paul, 86-26, 90+8; Sumner v. Northfield, 96-107, 104+686; Svendsen v. Alden, 101-158, 112+10.

[60] O'Leary v. Mankato, 21-65 (fact that after the accident the city covered the exposed portions of a ditch at the place of accident—see § 7055); Erd v. St. Paul, 22-443 (resolution of council directing repairs); Gude v. Mankato, 30-256, 15+175 (fact that sidewalk at and near place of accident was in bad condition for a considerable time); Kellogg v. Janesville, 34-132, 24+359 (id.); Waldron v. St. Paul, 33-87, 22+4 (the length of time a plank had been broken); Johnson v. St. Paul, 52-364, 54+735 (worn out and rotten condition of sidewalk a considerable time after the accident); Burrows v. Lake Crystal, 61-357, 63+745 (other accidents caused by the same defect—fact that plaintiff knew that the sidewalk on the opposite side of the street was at the time in a dangerous condition); Hall v. Austin, 73-134, 75+1121 (worn out and rotten condition of sidewalk a considerable time after the accident); Lyons v. Red Wing, 76-20, 78+868 (fact that sidewalk at and near place of accident was in a bad condition for a considerable time); McDonald v. Duluth, 93-206, 100+1102 (fact that the plan of constructing a railing on a bridge was changed after the accident—see § 7055).

[61] Stellwagen v. Winona, 54-460, 56+51 (fact that a grating placed in a new sidewalk had been defective for some time while in an old sidewalk); Hammargren v. St. Paul, 67-6, 69+470 (subsequent repairs—see § 7055); Johnson v. Walsh, 83-74, 85+910 (fact that another person fell into the ditch into which plaintiff fell).

[62] Moore v. Minneapolis, 19-300(258); Phelps v. Mankato, 23-276; Clark v. Austin, 38-487, 38+615; Wabasha v. Southworth, 54-79, 55+818; Burrows v. Lake Crystal, 61-357, 63+745; L'Herault v. Minneapolis, 69-261, 72+73; Hall v. Austin, 73-134, 75+1121; Cunningham v. Thief River Falls, 84-21, 86+763; Adams v. Thief River Falls, 84-30, 86+767; Peterson v. Cokato, 84-205, 87+615; Lenz v. St. Paul, 87-85, 91+256; Kennedy v. St. Cloud, 90-523, 97+417; Gasink v. New Ulm, 92-52, 99+624; Kleopfert v. Minneapolis, 93-118, 100+669; Ritschdorf v. St. Paul, 95-370, 104+129; Sumner v. Northfield, 96-107, 104+686; Svendsen v. Alden, 101-158, 112+10; Murphy v. South St. Paul, 101-341, 112+259; McDowell v. Preston, 104-263, 116+470.

[63] Tarras v. Winona, 71-22, 73+505.

[64] Furnell v. St. Paul, 20-117(101).

[65] Noonan v. Stillwater, 33-198, 22+444.

it may, upon payment of damages to the person injured, recover over from the owner by whose fault (as between him and it) the injury was occasioned.[66] Charters sometimes provide for joining the abutting owner in an action against the municipality, if he is at fault.[67] Where a municipality graded a street across private property, without acquiring the title, and the owner constructed a sidewalk connecting a building on his premises with the street, he was held liable for a defect therein.[68] An abutting owner is liable for injuries to pedestrians from snow falling from a roof so constructed that snow and ice would naturally fall to the sidewalk below.[69]

ACTIONS

6846. Limitation of actions—Sp. Laws 1885 c. 7 § 19, prescribing a limitation to certain actions against St. Paul has been held inapplicable to actions for death by wrongful act,[70] and not retroactive.[71] Sp. Laws 1881 c. 73, prescribing a limitation to actions for injuries resulting from defective streets, etc., has been held inapplicable to a case of lands overflowed by the obstruction of a watercourse by raising the grade of a street.[72] Laws 1895 c. 8 § 347, prescribing a limitation of two years, has been held applicable to an action for labor and materials under a paving contract.[73]

6847. Municipal boards—Municipal boards are sometimes expressly authorized to sue and be sued.[74]

6848. By taxpayer—If the proper municipal officers fail to act, a taxpayer may maintain an action to prevent the unlawful disposition of municipal funds;[75] or to recover funds unlawfully paid out;[76] or to enforce a claim of the municipality;[77] or to prevent an unlawful use of municipal property;[78] or to prevent the unlawful creation of municipal debts.[79]

6849. Judgment against municipality—Enforcement—The satisfaction or enforcement of judgments against municipalities is regulated by statute.[80] Mandamus will lie to compel payment, or the levy of a tax for that purpose. This secures the fruits of the judgment, and leaves the public property intact for the use to which it is devoted.[81]

SPECIAL ASSESSMENTS FOR LOCAL IMPROVEMENTS

6850. Definition of special assessment—A special assessment is a tax levied on real property for a local improvement of a public nature from which such property will, by reason of its proximity, derive special benefit.[82] A

[66] Wabasha v. Southworth, 54–79, 55+818.
[67] Wabasha v. Southworth, 54–79, 55+818; Jones v. Minneapolis, 31–230, 17+377; Clark v. Austin, 38–487, 38+615.
[68] Marsh v. Mpls. B. Co., 92–182, 99+630.
[69] Hannem v. Pence, 40–127, 41+657.
[70] Maylone v. St. Paul, 40–406, 42+88.
[71] Powers v. St. Paul, 36–87, 30+433.
[72] Pye v. Mankato, 38–536, 38+621.
[73] Thornton v. East Grand Forks, 106–233, 118+834.
[74] Am. E. Co. v. Waseca, 102–329, 113+899.
[75] Sinclair v. Winona County, 23–404; Farmer v. St. Paul, 65–176, 67+990; Smith v. St. Paul, 72–472, 75+708; Flynn v. Little Falls etc. Co., 74–180, 77+38, 78+106; Schiffmann v. St. Paul, 88–43, 92+503; Nerlien v. Brooten, 94–361, 102+867.
[76] Stone v. Bevans, 88–127, 92+520; Cone v. Wold, 85–302, 306, 88+977. See Bailey v. Strachan, 77–526, 80+694; Farmer v. St. Paul, 65–176, 67+990.
[77] Cone v. Wold, 85–302, 88+977.
[78] Nerlien v. Brooten, 94–361, 102+867.
[79] Hodgman v. Chi. etc. Ry., 20–48(36); Hamilton v. Detroit, 85–83, 88+419.
[80] R. L. 1905 §§ 769, 770.
[81] Jordan v. Board of Ed., 39–298, 39+801.
[82] See McComb v. Bell, 2–295(256); Stinson v. Smith, 8–366(326); First Div. etc. Ry. v. St. Paul, 21–526; State v. St. Paul, 36–529, 32+781; State v. Reis, 38–371, 38+97.

special assessment cannot be levied on personal property.[83] Assessments are not ordinarily included in the term "taxes."[84] The levying of special assessments is an exercise of the taxing power and not of the power of eminent domain.[85]

6851. What constitutes local improvement—In general—The term "local improvement" means, in this connection, a public improvement of a local character from which adjacent real property derives special benefit.[86] But to authorize a special assessment the improvement need not be wholly local in its benefits. The public at large share the benefits of streets and parks but if the special benefits to adjacent property equal the cost of the improvements the entire cost may be assessed on such property. On the other hand if the cost exceeds such benefits the city at large should bear at least a part of the burden. In such a case the legislative authority has a very extensive discretion in determining whether the expense of the improvement shall be defrayed by a special assessment or a general tax or by both.[87] It is impossible to enumerate the purposes for which special assessments may be levied.[88] Whether a public work is a local improvement justifying special assessment is ordinarily a question of fact for the determination of the legislature or of such local body as the legislature may designate.[89] The term as used in the constitution is to be construed in the light of common usage.[90]

6852. Works held local improvements—Paving and repaving a street and putting in culverts;[91] widening and straightening a street;[92] sprinkling a street;[93] opening a street;[94] grading a street;[95] constructing sidewalks;[96] a bridge over railway tracks;[97] a bridge over a river;[98] parks;[99] raising water of a lake;[1] draining wet land;[2] a conduit conducting water into a city;[3] taking fee for street;[4] diverting a small stream through the sewers of a city;[5] bridging a street.[6]

6853. Works held not local improvements—A rural highway;[7] establishment of section corners;[8] a retaining wall necessitated by the grading of a street;[9] approaches to bridge crossing railway tracks.[10]

[83] Washburn M. O. Asylum v. State, 73-343, 76+204.
[84] See § 9114.
[85] McComb v. Bell, 2-295(256); Stinson v. Smith, 8-366(326); Noonan v. Stillwater, 33-198, 22+444; State v. Dist. Ct., 33-235, 22+625; Duluth v. Dibblee, 62-18, 63+1117.
[86] Rogers v. St. Paul, 22-494; State v. Reis, 38-371, 38+97; Sperry v. Flygare, 80-325, 83+180.
[87] State v. Dist. Ct., 33-295, 23+222; Id., 75-292, 77+968.
[88] State v. Reis, 38-371, 38+97.
[89] State v. Dist. Ct., 75-292, 77+968.
[90] Rogers v. St. Paul, 22-494.
[91] St. Paul v. Rogers, 22-492; Rogers v. St. Paul, 22-494; State v. Dist. Ct., 80-293, 83+183.
[92] Cook v. Slocum, 27-509, 8+755; McKusick v. Stillwater, 44-372, 46+769; Fairchild v. St. Paul, 46-540, 49+325.
[93] State v. Reis, 38-371, 38+97; Keigher v. St. Paul, 69-78, 72+54; 21 Harv. L. Rev. 533.
[94] Fairchild v. St. Paul, 46-540, 49+325.
[95] Rogers v. St. Paul, 22-494; Kelly v. Minneapolis, 57-294, 59+304; Strickland v. Stillwater, 63-43, 65+131.
[96] Noonan v. Stillwater, 33-198, 22+444; Hennepin County v. Bartleson, 37-343, 34+222; Scott County v. Hinds, 50-204, 52+523.
[97] Kelly v. Minneapolis, 57-294, 59+304.
[98] Guilder v. Otsego, 20-74(59).
[99] State v. Dist. Ct., 33-235, 22+625; State v. Brill, 58-152, 59+989; State v. Dist. Ct., 66-161, 68+860; State v. Dist. Ct., 75-292, 77+968.
[1] In re Minnetonka Lake Improvement, 56-513, 58+295; McGee v. Hennepin County, 84-472, 88+6.
[2] Dowlan v. Sibley County, 36-430, 31+517; Curran v. Sibley County, 47-313, 50+237; Id., 56-432, 57+1070; Lien v. Norman County, 80-58, 82+1094; Clapp v. Minn. G. T. Co., 81-511, 84+344.
[3] State v. Lewis, 72-87, 75+108.
[4] Fairchild v. St. Paul, 46-540, 49+325.
[5] Sherwood v. Duluth, 40-22, 41+234.
[6] State v. Ensign, 54-372, 56+41.
[7] Sperry v. Flygare, 80-325, 83+180.
[8] Davis v. St. Louis County, 65-310, 67+997.
[9] Armstrong v. St. Paul, 30-299, 15+174.
[10] State v. Smith, 99-59, 108+822.

6854. Only municipal corporations can levy—Only municipal corporations can be authorized to levy assessments for local improvements.[11] Counties are municipal corporations within this rule.[12] Park boards and other administrative agencies of municipalities are within the rule.[13]

6855. Delegation of authority to levy—The authority of the legislature to apportion taxes may be delegated to municipal corporations [14] and to administrative boards.[15] The legislature may delegate to a municipality the right to make local improvements of a public nature and may authorize appropriate proceedings to ascertain the necessity and cost thereof, without notice to the property owners affected. The cost of such improvements may be levied upon property specially benefited, or fronting on the same, in such manner as the legislature may prescribe. The determination of the local authority may be made final and conclusive so long as the property owner is given an opportunity to be heard at some stage of the proceedings.[16] Whether a local improvement shall be made, and whether the cost shall be borne by the entire city, or by the property specially benefited, are political questions, and in no sense judicial, like the question whether private property shall be taken for public use. But the legislature may commit to the courts, as a quasi judicial function the power to determine what is just compensation for taking private property for public use, and, when the burden of a local improvement is imposed upon particular property, as upon property specially benefited, it may be committed to the courts to determine as a quasi judicial question whether the assessing officers have correctly determined the facts upon which the assessment is based.[17]

6856. Legislature may levy directly—The legislature may direct local improvements of a public nature to be made and the expense thereof to be levied upon the particular tax district interested without any intermediate proceedings to determine the necessity or propriety of the improvements, or the cost thereof.[18]

6857. Petition of property owners—Where under the charter proceedings are to be initiated by a petition of a majority of the property owners affected a properly signed petition is jurisdictional.[19] But in the absence of any provision to the contrary, a municipality may initiate improvement proceedings and levy an assessment therefor without any preliminary petition by property owners.[20] Objection to the want of a petition cannot be made by a general taxpayer.[21]

6858. Authority of municipalities statutory—Strict construction—The authority of municipalities to levy special assessments is purely statutory and

[11] State v. Dist. Ct., 33–235, 22+625; Davis v. St. Louis County, 65–310, 67+997.

[12] Dowlan v. Sibley County, 36–430, 31+517; In re Minnetonka Lake Improvement, 56–513, 58+295; Lien v. Norman County, 80–58, 82+1094.

[13] State v. Dist. Ct., 33–235, 22+625; State v. Ensign, 55–278, 56+1006; In re Piedmont Ave. East, 59–522, 61+678.

[14] Rogers v. St. Paul, 22–494; Carpenter v. St. Paul, 23–232; Cook v. Slocum, 27–509, 8+755; Wolfe v. Moorhead, 98–113, 117, 107+728.

[15] Maltby v. Tautges, 50–248, 52+858.

[16] Rogers v. St. Paul, 22–494; Carpenter v. St. Paul, 23–232; State v. Dist. Ct., 33–295, 23+222; Hennepin County v. Bartleson, 37–343, 34+222; Kelly v. Minneapolis, 57–294, 59+304; State v. Pillsbury, 82–359, 85+175.

[17] State v. Rapp, 39–65, 38+926; State v. Ensign, 55–278, 56+1006; Duluth v. Dibblee, 62–18, 63+1117; State v. Dist. Ct., 83–464, 86+455; McGee v. Hennepin County, 84–472, 88+6.

[18] Guilder v. Otsego, 20–74(59); Hennepin County v. Bartleson, 37–343, 34+222.

[19] Hawkins v. Horton, 91–285, 97+1053; Hause v. St. Paul, 94–115, 102+221; State v. Dist. Ct., 97–147, 106+306. See Diamond v. Mankato, 89–48, 93+911; State v. Dist. Ct., 89–292, 94+870.

[20] State v. Dist. Ct., 95–183, 103+881; Wolfe v. Moorhead, 98–113, 107+728.

[21] Merritt v. Duluth, 103–236, 114+758.

as its exercise may result in a divestiture and tranfer of property it must be clearly given and strictly pursued.[22] Still, the doctrine of de minimis applies.[23]

6859. Constitutional provisions—Prior to 1869, art. 9 § 1 of the constitution read: "All taxes to be raised in this state shall be as nearly equal as may be; and all property on which taxes are to be levied shall have a cash valuation, and be equalized and uniform throughout the state." Under this provision it was held that special assessments could not be made except on a basis of cash valuation.[24] To make it possible to levy such assessments according to benefits the following amendment was adopted in 1869: "Provided, that the legislature may, by general law or special act, authorize municipal corporations to levy assessments for local improvements upon the property fronting upon such improvements, or upon the property to be benefited by such improvements, without regard to a cash valuation, and in such manner as the legislature may prescribe." [25] This amendment does not affect the constitutional requirement of equality.[26] It was not designed either to restrict or extend the purposes for which local assessments may be made, but merely to except them from the provision requiring taxes to be levied according to the cash valuation of the property, and to authorize them to be apportioned with reference to benefits ascertained or implied, according to frontage or some other fixed standard.[27] It is not in conflict with the home rule amendment to the constitution adopted in 1898.[28] In 1881 the constitution was still further amended by adding a proviso authorizing an annual special assessment for the purpose of defraying the expenses of laying water pipes and supplying a city with water.[29]

6860. Constitutional requirement of equality—Assessment must be proportionate to benefits—Frontage plan—Special assessments are subject to the constitutional requirement of equality.[30] It necessarily follows that they must, so far as practicable, be apportioned on a basis of equality with reference to benefits. An arbitrary assessment made without reference to benefits is unconstitutional.[31] But an assessment is not unconstitutional merely because it is based on the frontage plan, that is, so much per lineal front foot.[32] Still, in this state, an assessment on the frontage plan cannot be wholly arbitrary. It must be based on equality with reference to benefits and it cannot materially exceed the benefits. This is so because otherwise unequal

[22] McComb v. Bell, 2-295(256); Minn. L. O. Co. v. Palmer, 20-468(424); Sewall v. St. Paul, 20-511(459); State v. Dist. Ct., 44-244, 46+349; Id., 72-226, 75+224; Hawkins v. Horton, 91-285, 97+1053; Stillwater v. Henningsen, 109-132, 123+289.

[23] London etc. Co. v. Gibson, 77-394, 80+205, 777.

[24] Stinson v. Smith, 8-366(326); Bidwell v. Coleman, 11-78(45); Comer v. Folsom, 13-219(205); Dowlan v. Sibley County, 36-430, 31+517; Sperry v. Flygare, 80-325, 83+180.

[25] Const. art. 9 § 1.

[26] See § 6860.

[27] State v. Reis, 38-371, 38+97; State v. Dist. Ct., 61-542, 64+190; Sperry v. Flygare, 80-325, 83+180.

[28] State v. Dist. Ct., 87-146, 91+300.

[29] Const. art. 9 § 1; State v. Lewis, 72-87, 75+108; Id., 77-317, 79+1003; Id., 82-390, 85+207, 86+611; State v. Trustees, Macalester College, 87-165, 91+484.

[30] Minn. L. O. Co. v. Palmer, 20-468 (424); Noonan v. Stillwater, 33-198, 22+444; State v. Dist. Ct., 33-235, 22+625; State v. Dist. Ct., 33-295, 23+222; State v. Pillsbury, 82-359, 85+175.

[31] State v. Dist. Ct., 33-235, 22+625; State v. Reis, 38-371, 38+97; State v. Dist. Ct., 47-406, 50+476; State v. Judges, Dist. Ct., 51-539, 53+800, 55+122; State v. Brill, 58-152, 59+989; State v. Pillsbury, 82-359, 85+175.

[32] Hennepin County v. Bartleson, 37-343, 34+222; State v. Reis, 38-371, 38+97; State v. Dist. Ct., 61-542, 64+190; State v. Lewis, 72-87, 75+108; State v. Dist. Ct., 80-293, 83+183; State v. Lewis, 82-390, 85+207, 86+611.

taxation would necessarily result and our constitutional requirement of equality be violated.[33] The law upon this subject is in an unsettled state.[34] The constitutional requirement of equality has been abolished.

6861. Cannot materially exceed cost of work—An assessment materially greater than the cost of the work is illegal,[35] but it may include incidental expenses beyond the contract price, such as expenses for abstracts, engineering, advertising and the like [36] and for levying and collecting it.[37]

6862. Cannot exceed benefit—The benefit accruing to the property from the improvement must at least equal the amount of the assessment. The theory of special assessments is that the property will be enhanced in value by the improvement to an extent at least equal to the assessment. If the assessment exceeds the special benefit it is unconstitutional because it necessarily results in unequal taxation.[38] But there is rarely any judicial redress for excessive taxation of this character because the determination of the question of benefits is primarily legislative or administrative and not judicial.[39]

6863. Benefit must be secured—To support a special assessment for a local improvement the benefit for which the land is assessed must be secured.[40]

6864. Object of assessment must pertain to district—It is a corollary of the constitutional requirment of equality that the object of the assessment must pertain specially to the taxing district. A special assessment cannot be levied on property not specially benefited because such taxation is necessarily unequal.[41]

6865. Fixing limits of taxing district—Apportionment—It is discretionary with the legislature either to fix the limits of a taxing district for special assessments itself,[42] or to delegate authority to do so to a municipal body or administrative board.[43] The legislature has a very extensive discretion in determining whether the expense of a local improvement shall be met by a general tax or a special assessment or by both. If property is in fact benefited by a local improvement, as, for example, a park, it may be taxed by special assessment up to the full limit of the special benefit although the park is a general benefit and no general tax is levied.[44] Parts of several streets may be included in a single district.[45] The extent of the district must depend on the facts of each case but where in any case it is made clearly to appear that through fraud or mistake property is improperly included or excluded the courts may set aside the assessment.[46] The fixing of the limits of a taxing

[33] State v. Dist. Ct., 33-295, 23+222; State v. Reis, 38-371, 38+97; State v. Dist. Ct., 47-406, 50+476; State v. Pillsbury, 82-359, 85+175 (the force of this case is much impaired by the fact that it was largely based on State v. Lewis, supra, before the latter case was reversed on reargument).

[34] See State v. Foley, 30-350, 15+375; State v. Lewis, 82-390, 85+207, 86+611 (on reargument).

[35] Minn. L. O. Co. v. Palmer, 20-468 (424). See § 6862.

[36] St. Paul v. Mullen, 27-78, 6+424; Burns v. Duluth, 96-104, 104+714.

[37] State v. Dist. Ct., 80-293, 83+183.

[38] Minn. L. O. Co. v. Palmer, 20-468 (424); Rogers v. St. Paul, 22-494; Cook v. Slocum, 27-509, 8+755; State v. Brill, 58-152, 59+989; Strickland v. Stillwater, 63-43, 65+131; State v. Dist. Ct., 75-292, 77+968; State v. Pillsbury, 82-359, 85+175.

[39] See §§ 6878, 6891.

[40] In re Minnetonka Lake Improvement, 56-513, 58+295. See Rogers v. St. Paul, 22-494.

[41] Minn. L. O. Co. v. Palmer, 20-468 (424); Rogers v. St. Paul, 22-494; State v. Dist. Ct., 33-295, 23+222; Id., 75-292, 77+968.

[42] Guilder v. Dayton, 22-366; Rogers v. St. Paul, 22-494; Hennepin County v. Bartleson, 37-343, 34+222.

[43] Id., Carpenter v. St. Paul, 23-232; Cook v. Slocum, 27-509, 8+755.

[44] State v. Dist. Ct., 75-292, 77+968.

[45] Strickland v. Stillwater, 63-43, 65+131.

[46] State v. Dist. Ct., 33-295, 23+222.

district is a legislative and not a judicial function. Hence the courts cannot interfere except to correct a palpable violation of the constitution or charter.[47] If the legislature itself fixes the limits its action is practically conclusive on the courts.[48] Objection to the size of a taxing district cannot be made collaterally.[49] The terms "local," "vicinity" and the like, in this connection, are not to be taken as indicating any definite limits, but as applying to the real property reported by the assessors to be actually benefited. The question does not, therefore, depend merely upon actual distances, as appearing on the map or plat, but upon the judgment of the assessors as well.[50]

6866. Apportionment within a single taxing district—The apportionment within a single taxing district must be on a basis of equality with reference to benefits. All lots or tracts need not be assessed for the same amount but they must all be assessed equally in proportion to the benefits each receives.[51] There cannot be two rules of apportionment for the same tax in the same district.[52] An unplatted tract in a city may be assessed as if platted and intersected by streets, but proper deductions must be made for the imaginary streets. It is correct practice, at least under the St. Paul charter, where a lot abuts on two streets, to assess it for water-mains only on one street.[53] Where a sidewalk is built in front of a part only of a single tract, such as a city lot owned by one person, the cost of construction is a proper charge against the entire tract. In determining, for the purposes of a special assessment, what property fronts on a sidewalk, practical frontage is not the test, but the officials must be guided by the plats and records.[54] Corner lots need not be assessed for more than inside lots for paving although the street intersections are paved. Lots on intersecting streets need not be assessed for paving on street intersected.[55] The mere fact that property on both sides of a street is not assessed for exactly the same amount does not invalidate the assessment.[56] The question of benefits is a question of opinion which cannot be regulated by any quasi mathematical rules of law.[57] The apportionment must be according to some reasonable rule, upon the basis of benefits ascertained or implied.[58] A rule prescribed by the charter must be followed strictly.[59]

6867. One assessment for several improvements—Unless specially authorized a single assessment cannot be made for several distinct improvements. It is generally provided that the several incidents of street improvement—grading, paving, bridging, culverts and gutters—may be included in a single assessment.[60]

6868. May be levied in advance of work—A special assessment may be levied in advance of the work and even in advance of the letting of the con-

[47] Guilder v. Dayton, 22-366; Rogers v. St. Paul, 22-494; Cook v. Slocum, 27-509, 8+755; State v. Dist. Ct., 33-295, 23+222; State v. Brill, 58-152, 59+989; State v. Dist. Ct. 95-70, 103+744.

[48] Guilder v. Otsego, 20-74(59); Guilder v. Dayton, 22-366; Rogers v. St. Paul, 22-494; Maltby v. Tautges, 50-248, 52+858; State v. Lewis, 72-87, 75+108.

[49] Kelly v. Minneapolis, 57-294, 59+304.

[50] State v. Dist. Ct., 33-295, 23+222.

[51] State v. Dist. Ct., 33-235, 22+625; State v. Reis, 38-371, 38+97; State v. Dist. Ct., 47-406, 50+476; State v. Judges, Dist. Ct., 51-539, 53+800, 55+122; State v. Brill, 58-152, 59+989; State v. Pillsbury, 82-359, 85+175.

[52] Maltby v. Tautges, 50-248, 52+858.

[53] State v. Lewis, 72-87, 75+108.

[54] Scott County v. Hinds, 50-204, 52+523.

[55] State v. Dist. Ct., 80-293, 83+183.

[56] State v. Dist. Ct., 68-242, 71+27.

[57] State v. Bd. Public Works, 27-442, 8+161.

[58] State v. Reis, 38-371, 38+97.

[59] State v. Dist. Ct., 29-62, 11+133.

[60] See Cook v. Slocum, 27-509, 8+755; State v. Dist. Ct., 29-62, 11+133; Mayall v. St. Paul, 30-294, 15+170; Armstrong v. St. Paul, 30-299, 15+174; State v. Dist. Ct., 33-295, 23+222; McKusick v. Stillwater, 44-372, 46+769; State v. Dist. Ct., 47-406, 50+476; Id., 80-293, 83+183.

tract. The legislature has full discretion to prescribe the mode of estimating the probable cost of the contemplated work.[61] But it is generally provided that a grade must be established before an assessment for grading can be levied.[62]

6869. Revolving fund—Laws 1901 c. 134, providing a revolving fund for local improvements in cities of fifty thousand inhabitants or more, is constitutional.[63] An assessment for certain items has been held not invalidated by the fact that the amount collected went into a special revolving fund, while the items were in fact paid for out of another fund supported exclusively by general taxation.[64]

6870. Facts to be considered in determining benefits—In determining benefits the general rule is to consider the effect of the improvement on the market value of the property.[65] The question cannot be determined with reference merely to the particular use to which the owner is devoting the property.[66]

6871. Fund for future improvements—Under the guise of paying the cost of construction a municipality cannot collect by special assessments a fund to be used in the indefinite future for repairs and maintenance.[67]

6872. Authority to levy a continuing one—Unless restrained by the charter the authority to levy special assessments is not spent when one improvement is made. It is a continuing power, and, whenever its exercise becomes again necessary by reason of the destruction or inutility of the original improvement it may be again exerted.[68]

6873. Re-assessment—Provision is made in the general laws and in most city charters for a re-assessment when the original assessment is set aside or judgment thereon denied.[69] Laws 1893 c. 206, authorizing re-assessments, is constitutional and retroactive.[70] It does not repeal like provisions in city charters.[71] When a court orders a re-assessment it ought to specify the defects in the original assessment for the future guidance of the assessing officers.[72] There is no limitation in the St. Paul charter as to the time within which a re-assessment may be had.[73] A re-assessment may be made without regard to jurisdictional defects in the original assessment, in the absence of provision to the contrary.[74]

6874. Lien—The lien created by a special assessment is paramount to all prior private liens of whatever nature. It extends over all interests in the land and is co-extensive with the entire interest benefited. But its existence and extent depend entirely on the statute.[75] It is subordinate to the lien of the state for general taxes.[76]

[61] State v. Dist. Ct., 47–406, 50+476; State v. Dist. Ct., 61–542, 64+190.

[62] State v. Dist. Ct., 44–244, 46+349; State v. Judges, Dist. Ct., 51–539, 53+800, 55+122. See Fitzhugh v. Duluth, 58–427, 59+1041.

[63] State v. Ames, 87–23, 91+18.

[64] Burns v. Duluth, 96–104, 104+714.

[65] State v. Dist. Ct., 33–295, 23+222.

[66] State v. Dist. Ct., 68–242, 71+27.

[67] State v. Dist. Ct., 80–293, 83+183.

[68] Id.

[69] G. S. 1894 §§ 1124, 1353; Carpenter v. St. Paul, 23–232; St. Paul v. Mullen, 27–78, 6+424; State v. Judges, Dist. Ct., 51–539, 53+800, 55+122; State v. Ensign, 55–278, 56+1006; In re Piedmont Ave. East, 59–522, 61+678; State v. Egan, 64–331, 67+77; State v. Dist. Ct., 77–248, 79+971; State v. Dist. Ct., 95–503, 104+553; State v. Dist. Ct., 102–482, 113+697, 114+654.

[70] In re Piedmont Ave. East, 59–522, 61+678.

[71] State v. Egan, 64–331, 67+77.

[72] State v. Ensign, 55–278, 56+1006.

[73] State v. Dist. Ct., 68–242, 71+27.

[74] St. Paul v. Mullen, 27–78, 6+424; State v. Dist. Ct., 95–183, 103+881; State v. Dist. Ct., 95–503, 104+553; State v. Dist. Ct., 97–147, 106+306; State v. Dist. Ct., 98–63, 107+726; State v. Dist. Ct., 102–482, 113+697, 114+654.

[75] Morey v. Duluth, 75–221, 77+829; State v. Dist. Ct., 102–482, 493, 113+697, 114+654.

[76] White v. Knowlton, 84–141, 86+755; White v. Thomas, 91–395, 98+101.

6875. For watermains—Assessments for watermains levied under Sp. Laws 1885 c. 110 §§ 26, 27, at a fixed rate per front foot, are constitutional.[77]

6876 Extension of time to pay—The provisions of Laws 1895 c. 236 authorizing an extension of time to pay special assessments are permissive and not mandatory.[78]

6877. Exemptions—The land of educational [79] and charitable [80] institutions is not exempt. The land of cemetery associations is exempt.[81] Whether railroad land is exempt depends on the charter of the company and the use to which the land is put.[82] Land may be condemned for a local improvement and the other land of the owner exempted in compensation.[83]

6878. Assessment how far conclusive on courts—The levying of a special assessment, like the levying of an ordinary tax, is a legislative and not a judicial function.[84] The questions, what property is benefited and how much, are questions of opinion upon the facts as they appear. They are therefore questions the decision of which cannot be regulated by any quasi mathematical rules of law. They must be left to the judgment of men.[85] If the legislature itself makes the assessment, determining what property is benefited and fixing the amount, its action can rarely if ever be set aside by the courts.[86] If the legislature delegates to a municipal body authority to levy such an assessment the force and effect of the assessment on the courts depends on the particular charter or authorizing act. Under the charter of St. Paul the determination of the board of public works as to what property is benefited, and how much, is conclusive on the courts and cannot be set aside except for fraud or demonstrable mistake of fact; [87] or for a violation of the charter,[88] or constitution; [89] or for failure to exercise judgment, that is, making the assessment in accordance with an inflexible, arbitrary rule, rather than upon deliberate and honest judgment directed to the ascertainment of benefits; [90] or for following an illegal rule or principle in making the apportionment.[91] By demonstrable mistake of fact is meant a mistake of fact as to the existence of which there is no room for doubt.[92] Every reasonable intendment of good faith and regularity is to be indulged by the courts in respect to the acts of such bodies while acting within their jurisdiction in the discharge of such duties.[93] The same conclusiveness applies to the determination of the council under the

[77] State v. Lewis, 72-87, 75+108; Id., 77-317, 79+1003; Id., 82-390, 85+207, 86+611; State v. Trustees, Macalester College, 87-165, 91+484.

[78] State v. Minneapolis, 65-298, 68+31.

[79] State v. Trustees, Macalester College, 87-165, 91+484.

[80] Washburn M. O. Asylum v. State, 73-343, 76+204.

[81] R. L. 1905 § 2946; State v. St. Paul, 36-529, 32+781.

[82] First Div. etc. Ry., v. St. Paul, 21-526; St. Paul v. St. Paul etc. Ry., 23-469; State v. Dist. Ct., 68-242, 71+27.

[83] State v. Dist. Ct., 33-235, 22+625.

[84] Guilder v. Dayton, 22-366.

[85] State v. Bd. Public Works, 27-442, 8+161.

[86] State v. Dist. Ct., 33-295, 23+222; State v. Lewis, 72-87, 75+108.

[87] Rogers v. St. Paul, 22-494; Carpenter v. St. Paul, 23-232; State v. Bd. Public Works, 27-442, 8+161; State v. Dist. Ct., 29-62, 11+133; Id., 32-181, 19+732; Id., 33-295, 23+222; Id., 68-242, 71+27; Id., 80-293, 83+183; State v. Otis, 53-318, 55+143; State v. Dist. Ct., 90-540, 97+425; State v. Dist. Ct., 95-70, 103+744.

[88] Weller v. St. Paul, 5-95(70); State v. Dist. Ct., 29-62, 11+133; Id., 33-295, 23+222; Id., 44-244, 46+349; Mayall v. St. Paul, 30-294, 15+170.

[89] See § 6860.

[90] State v. Dist. Ct., 29-62, 11+133; State v. Brill, 58-152, 59+989; State v. Dist. Ct., 95-503, 104+553; Duluth v. Davidson, 97-378, 107+151.

[91] State v. Dist. Ct., 33-295, 23+222; Id., 47-406, 50+476; Id., 68-242, 71+27; Id., 80-293, 83+183; State v. Brill, 58-152, 59+989; State v. Dist. Ct., 95-70, 103+744; State v. Dist. Ct., 98-63, 107+726..

[92] State v. Bd. Public Works, 27-442, 8+161. See State v. Dist. Ct., 80-293, 83+183.

[93] State v. Dist. Ct., 33-295, 23+222; Id., 80-293, 83+183. See State v. Dist. Ct., 33-235, 22+625.

Minneapolis charter.[94] It does not apply, however, to the determination of the assessors appointed by the park board of Minneapolis [95] or of the board of public works of Duluth,[96] on application for confirmation. The determination of municipal authorities as to the expediency of a public work and the mode of carrying it out is ordinarily conclusive on the courts.[97]

6879. Notice to owner—Where a tax is levied on property, not specifically but according to its value or according to the benefits accruing to it as in the case of special assessments, to be ascertained by some person appointed for that purpose a party has a constitutional right to notice and an opportunity to be heard. But he has no such right to be heard at all stages of the proceedings or at any particular stage. Due process of law is satisfied if the owner has an opportunity to question the amount or validity of the assessment either before the amount is determined or in subsequent proceedings for its enforcement.[98] He has no constitutional right to notice of the appointment of assessors or to contest their appointment.[99] If he is given an opportunity to object to the assessment on application for judgment under the general law that alone is sufficient.[1] If the charter provides for notice at any stage of the proceedings the provision is mandatory and must be strictly pursued.[2] The legislature has full authority to prescribe the kind of notice and the mode of serving it on the owner.[3] Constructive notice is sufficient.[4] The provisions for notice in the St. Paul [5] and Minneapolis [6] charters have been held sufficient.

6880. A proceeding in rem—Proceedings for the collection of special assessments are always in rem.[7] It is the land and not the owner who is liable. There is no authority under our constitution to levy a special assessment so as to make it a personal liability against the owner or a lien on his other property.[8]

6881. No seizure necessary—No seizure of the property is essential to the right of the state to levy special assessments. For the purposes of taxation the hand of the state is always on all property within its jurisdiction.[9]

6882. An administrative not judicial proceeding—Due process of law does not require that assessments should be collected through the courts. The assessment and collection of taxes is fundamentally an administrative function. The confirmation of the assessment and the rendition of judgment for

[94] Cook v. Slocum, 27-509, 8+755.
[95] State v. Dist. Ct., 33-235, 22+625.
[96] State v. Ensign, 55-278, 56+1006; State v. Dist. Ct., 68-147, 70+1088.
[97] Sherwood v. Duluth, 40-22, 41+234; Janeway v. Duluth, 65-292, 68+24; Diamond v. Mankato, 89-48, 93+911; State v. Dist. Ct., 89-292, 94+870.
[98] Rogers v. St. Paul, 22-494; Carpenter v. St. Paul, 23-232; State v. Dist. Ct., 33-235, 22+625; State v. Dist. Ct., 33-295, 23+222; Hennepin County v. Bartleson, 37-343, 34+222; Redwood County v. Winona etc. Co., 40-512, 41+465, 42+473; St. Paul v. Nickl, 42-262, 44+59; Duluth v. Dibblee, 62-18, 63+1117; State v. Dist. Ct., 77-248, 79+971; State v. Pillsbury, 82-359, 85+175.
[99] Kelly v. Minneapolis, 57-294, 59+304.
[1] Hennepin County v. Bartleson, 37-343, 34+222; Redwood County v. Winona etc. Co., 40-512, 41+465, 42+473; State v. Pillsbury, 82-359, 85+175.
[2] McComb v. Bell, 2-295(256); Weller v. St. Paul, 5-95(70); Prindle v. Campbell, 9-212(197); Morehouse v. Bowen, 9-314(297); Sewall v. St. Paul, 20-511 (459); Flint v. Webb, 25-93; State v. Dist. Ct., 33-235, 22+625; Overmann v. St. Paul, 39-120, 39+66; State v. Otis, 53-318, 55+143; James v. St. Paul, 58-459, 60+21; State v. Dist. Ct., 90-294, 96+737.
[3] State v. Pillsbury, 82-359, 85+175.
[4] Dousman v. St. Paul, 23-394; State v. Dist. Ct., 33-235, 22+625.
[5] Carpenter v. St. Paul, 23-232.
[6] State v. Dist. Ct., 33-235, 22+625; Hennepin County v. Bartleson, 37-343, 34+222; State v. Pillsbury, 82-359, 85+175.
[7] State v. Dist. Ct., 51-401, 53+714; Morey v. Duluth, 75-221, 77+829.
[8] Noonan v. Stillwater, 33-198, 22+444.
[9] Duluth v. Dibblee, 62-18, 63+1117.

the amount are not "judicial," in the strict sense. They are but steps in an administrative proceeding, in which judicial assistance is invoked as a matter of convenience, because with its assistance the rights of parties and the interests of the public can be best protected and conserved.[10]

6883. Application for judgment—Objections admissible—What objections may be interposed on application for judgment depends on the particular charter.[11] Under the St. Paul charter almost any objection may be raised which is sufficiently specified in the written objections required to be filed, and the owner is not concluded by the confirmation of the board of public works.[12] Where the charter provides for an intermediate judgment of court confirming the assessment the objections which may be interposed on application for final judgment are very limited.[13] Where special assessments are collected under the general law and there is no intermediate judgment of confirmation, there is no limit to the objections which may be interposed on application for judgment. The owner may interpose any legal objection affecting the validity of the prior proceedings.[14] But if the objection goes to the notice the appearance must be special for a general appearance waives all objections on that ground.[15]

6884. Judgment—Separate tracts—Upon an application to the district court for judgment against several distinct tracts of land to enforce assessments based upon one assessment roll, one general judgment only should be entered.[16]

6885. Judgment—Conclusiveness—Collateral attack—A judgment for special assessments stands on the same footing as a judgment in an ordinary civil action except as otherwise prescribed. It is conclusive as to the validity of the assessment, the amount thereof, and the regularity of all prior proceedings, if the court had jurisdiction. In other words it cannot be attacked collaterally for defects not going to the jurisdiction.[17]

6886. Opening default judgment—The opening of a default judgment is discretionary with the trial court and its action will rarely be reversed on appeal. A motion to open a default is properly denied if the applicant has been guilty of laches.[18]

6887. Formal defects not fatal—It is generally provided in charters that merely formal defects in the proceedings shall be deemed immaterial or waived unless objected to at a certain stage of the proceedings.[19]

[10] Duluth v. Dibblee, 62–18, 63+1117.

[11] See, under Stillwater charter, Stillwater v. Henningsen, 109–132, 123+289.

[12] Dousman v. St. Paul, 22–387; Id., 23–394; State v. Bd. Public Works, 27–442, 8+161; State v. Dist. Ct., 47–406, 50+476; Id., 51–401, 53+714; Albrecht v. St. Paul, 47–531, 50+608.

[13] State v. Dist. Ct., 33–235, 22+625.

[14] Hennepin County v. Bartleson, 37–343, 34+222; Kelly v. Minneapolis, 57–294, 59+304; State v. Pillsbury, 82–359, 85+175.

[15] State v. Dist. Ct., 51–401, 53+714.

[16] Stillwater v. Henningsen, 109–132, 123+289.

[17] Carpenter v. St. Paul, 23–232; Dousman v. St. Paul, 23–394; Albrecht v. St. Paul, 47–531, 50+608; State v. Judges, Dist. Ct., 51–539, 53+800, 55+122; Hennessy v. St. Paul, 54–219, 55+1123; Fitzhugh v. Duluth, 58–427, 59+1041; Duluth v. Dibblee, 62–18, 63+1117; Morey v. Duluth, 75–221, 77+829; London etc. Co. v. Gibson, 77–394, 80+205, 777; Hawkins v. Horton, 91–285, 97+1053; Hause v. St. Paul, 94–115, 102+221; Willard v. Hodapp, 98–269, 107+954; Pieper v. MacLaren, 106–30, 118+60. See Farrell v. St. Paul, 62–271, 64+809 (effect of judgment as an estoppel against owner of land); Smith v. St. Paul, 69–276, 72+104, 210 (judgment against city not binding on abutting owners).

[18] St. Paul v. Rogers, 22–492; Dousman v. St. Paul, 23–394; Duluth v. Dibblee, 62–18, 63+1117.

[19] See McComb v. Bell, 2–295(256); Weller v. St. Paul, 5–95(70); Morrison v. St. Paul, 5–108(83); Prindle v. Campbell, 9–212(197); Griggs v. St. Paul, 11–308 (214); De Rochbrune v. St. Paul, 11–313 (218); Sewall v. St. Paul, 20–511(459); State v. Dist. Ct., 33–164, 22+295; Mc-

6888. Recovery when improvement abandoned—The owner of property upon which valid assessments have been made for the purpose of a general scheme of improvement, as the laying out and grading of streets, may, in case of the failure on the part of the city to finish its work and an abandonment of the same, recover his share pro tanto of the sum so unexpended, in an action for money had and received.[20] But there can be no recovery if all the money raised for the particular improvement has been expended thereon although the party's lot received no benefit. A municipality does not guarantee that money raised by special assessment will be honestly or prudently expended, or accomplish the purpose for which it was collected, or that the cost of the improvement will come within the estimate. The complaint must negative the expenditure of all the money raised.[21] The fact that the property has been sold by the city to satisfy the assessment does not affect the right of the owner to recover.[22] The rights of the purchaser at such a sale are undetermined.[23] It is immaterial whether the payment was made before or after the abandonment if there is a regular judgment for the assessment constituting a lien on the land.[24] A municipality may refund an assessment to the person who paid it, without becoming liable to his grantee.[25]

6889. Refundments—Charters generally provide for a refundment in case the proceedings are declared invalid by judgment of a court.[26]

6890. Injunction—The validity of assessments cannot be determined in an action by a general taxpayer to restrain the authorities from making the improvement; the basis of the action being that, if the special assessments fail, the expense of the improvement will fall on the general taxpayers. A general taxpayer has no right of action until an attempt is made to defray the expense of the improvement from the general fund.[27] Assessment proceedings can rarely be enjoined at the instance of the owner of the land assessed, as he has an adequate remedy at law by answer on application for judgment.[28] A delay in making the assessment, or a failure to make the same at the time prescribed by law, caused by the pendency of injunction proceedings in which the assessment is enjoined, does not bar the right of the municipality to proceed as soon as relieved from the injunction.[29]

6891. Abuses—Remedy political not judicial—The mode of making special assessments under many city charters frequently works grave injustice to the individual citizen.[30] But the remedy is generally political not judicial.[31] These charters are self-imposed and if they do not work justly they should be amended.[32] Since the power is committed to the legislature to prescribe the procedure for raising municipal funds and since this power is absolute save

Kusick v. Stillwater, 44–372, 46+769; Hawkins v. Horton, 91–285, 97+1053; Stillwater v. Henningsen, 109–132, 123+289.

[20] Valentine v. St. Paul, 34–446, 26+457; Strickland v. Stillwater, 63–43, 65+131; McConville v. St. Paul, 75–383, 77+993; Germania Bank v. St. Paul, 79–29, 81+542.

[21] Rogers v. St. Paul, 79–5, 81+539; Germania Bank v. St. Paul, 79–29, 81+542; Rogers v. St. Paul, 86–98, 90+155; Pieper v. MacLaren, 106–30, 118+60.

[22] Rogers v. St. Paul, 79–5, 81+539.

[23] Id.; Germania Bank v. St. Paul, 79–29, 81+542.

[24] Valentine v. St. Paul, 34–446, 26+457.

[25] Smith v. Minneapolis, 95–431, 104+227.

[26] State v. Egan, 64–331, 67+77; Flanagan v. St. Paul, 65–347, 68+47; Merchants' R. Co. v. St. Paul, 77–343, 79+1040; Willius v. St. Paul, 82–273, 84+1009; Nat. B. & S. Co. v. St. Paul, 91–223, 97+878; Otis v. St. Paul, 94–57, 101+1066; Id., 102–208, 113+269; Gray v. St. Paul, 105–19, 116+1111.

[27] Merritt v. Duluth, 103–236, 114+758.

[28] See § 6883.

[29] State v. Dist. Ct., 102–482, 113+697, 114+654.

[30] State v. Reis, 38–371, 38+97; Sperry v. Flygare, 80–325, 83+180; Swenson v. Hallock, 95–161, 103+895; Pieper v. MacLaren, 106–30, 118+60.

[31] State v. Reis, 38–371, 38+97.

[32] State v. Dist. Ct., 80–293, 83+183.

as limited by the state and federal constitutions and the nature of taxation itself it is difficult for the courts to define the limits to the exercise of the power.[33]

6892. Cases under charter of St. Paul—Cases are cited below involving assessments under the charter of St. Paul.[34]

[33] State v. Dist. Ct., 33-295, 23+222.

[34] McComb v. Bell, 2-295(256) (exercise of taxing power—charter must be followed strictly and mode of collection must be uniform—certificates to contractors); Weller v. St. Paul, 5-95(70); Morrison v. St. Paul, 5-108(83) (prescribed mode of apportionment exclusive—failure to file estimate with comptroller fatal—appeal from street commissioners to council not exclusive remedy—act requiring owner to pay assessment before bringing action to have it set aside unconstitutional—force of clause respecting errors and informalities—equitable action to annul proceedings void on face); Stinson v. Smith, 8-366(326) (exercise of taxing power—must be made on cash valuation and not on basis of benefits—power of legislature over taxation); Lovell v. St. Paul, 10-290 (229) (city not liable on certificate of contractor); Griggs v. St. Paul, 11-308 (214); De Rochbrune v. St. Paul, 11-313 (218) (neglect of street commissioners to make and file estimates of expense for sidewalks does not prima facie vitiate contractor's certificate—distinction between errors of form and substance); Sewall v. St. Paul, 20-511(459) (notice of assessment and of application for confirmation jurisdictional—publication on Sunday held sufficient—city liable for damages resulting from work done under supervision of city officers—injunction against void assessment—authority to levy must be clearly given and strictly pursued—distinction between errors of form and of substance—force of deed as evidence—no appeal from order of confirmation—filing objections to confirmation—council cannot make valid contract on void assessment—confirmation essential); First Div. etc. Ry. v. St. Paul, 21-526 (railroad land held exempt—definition of "taxes," "taxation," and "assessments"); Dousman v. St. Paul, 22-387 (scope of review on certiorari—certiorari will not lie to the clerks of council and board of public works—nature of proceedings for judgment—defences admissible on application for judgment); St. Paul v. Rogers, 22-492 (new trial unauthorized—opening and vacating judgment—order denying new trial not appealable); Rogers v. St. Paul, 22-494 (definition of local improvements—determination of board of public works as to benefits how far conclusive—legislature may make determination of board final—board of public works may contract without restriction as to price—powers of board of public works defined—respective powers of council and board of public works—legislature may levy assessments, mark out tax districts and apportion assessments or delegate power to local board—description of pavement in proposition and order for improvement—plan and specifications for paving sufficient—principle of local assessments—contract to be let to lowest bidder—benefit must equal assessment—authority of legislature over taxation); Nash v. St. Paul, 23-132 (engineer's estimate not a part of plans and specifications—board of public works cannot contract that engineer's estimate shall be conclusive as to amount of work done under contract—change in improvement can only be made by resolution—certiorari will not lie to council or board of public works); Carpenter v. St. Paul, 23-232 (delegation of taxing power to council and board of public works constitutional—determination of board of public works as to benefits how far conclusive—parol evidence inadmissible to show want of benefit—re-assessment authorized by Sp. Laws 1874 c. 1—collateral attack on condemnation of land for street—sufficiency of advertisement for bids); Dousman v. St. Paul, 23-394 (force of judgment—certiorari lies to review judgment—constructive notice sufficient—when objections must be made—non-residence no excuse for laches—action to vacate judgment by non-resident); St. Paul v. St. Paul etc. Ry., 23-469 (railroad land held exempt); Flint v. Webb, 25-93 (assessment for sidewalk not a lien until confirmed—notice of confirmation mandatory—contents of judgment roll); St. Paul v. Mullen, 27-78, 6+424 (reassessment authorized—assessment may include cost of abstract, engineering, advertising, etc.); State v. Board Public Works, 27-442, 8+161 (objections admissible on application for judgment—who may appear and object—determination of board of public works as to benefits how far conclusive—what is demonstrable mistake of fact); State v. Dist. Ct., 29-62, 11+133 (when assessment required to be made on basis of benefits an assessment on frontage plan void—material departure from statute renders assessment void—determination of public works as to benefits how far conclusive—records of board of public works as evidence); Mayall v. St. Paul, 30-294, 15+170 (grading several streets in one improvement—unauthorized assessment not conclusive—in-

junction against illegal assessment); Armstrong v. St. Paul, 30-299, 15+174 (retaining wall not a local improvement—grading several streets in one improvement—injunction against illegal assessment); State v. Dist. Ct., 32-181, 19+732 (board of public works may contract for partial pavement of streets—street railway held not assessable—comptroller must countersign contracts—signature of comptroller after performance—contract price cannot be increased without change in improvement); Althen v. Kelly, 32-280, 20+188 (council cannot authorize individual to grade street without concurrence of board of public works—injunction to prevent unauthorized grading); State v. Dist. Ct., 33-164, 22+295 (report, plan, and profile of board of public works and order of council must be construed together to determine whether work done is authorized by order—assessment warrant prima facie evidence of valid assessment—burden of proof on application for judgment—what are formal defects—determination of board of public works as to benefits how far conclusive—respective powers of board of public works and council defined—order to grade, but work done macadamizing—keeping assessment papers in loose roll in office of board till after confirmation not fatal); Gaston v. Merriam, 33-271, 22+614 (sufficiency of publication of notice before issuing deed); State v. Dist. Ct., 33-295, 32+222 (city may complete improvements begun under Sp. Laws 1881 c. 224, as amended by Sp. Laws 1883 c. 57, and levy special assessments therefor—including several streets in one improvement—Seventh street fill under Sp. Laws 1881 c. 224 § 2—powers of board of public works defined—determination of board of public works as to benefits how far conclusive—fraud or mistake in fixing limits of taxing districts—meaning of "local" and "vicinity"—assessment warrant prima facie evidence of valid assessment—legislature may authorize city to acquire easement in adjoining land for embankment to support street); Valentine v. St. Paul, 34-446, 26+457 (recovery upon abandonment of improvement); State v. St. Paul, 36-529, 32+781 (cemeteries exempt); State v. Dist. Ct., 40-5, 41+235 (party voluntarily paying an assessment for change of grade cannot object to want of notice on application for judgment for assessment to pay for grading in accordance with changed grade); State v. Dist. Ct., 44-244, 46+349 (certiorari will not lie before entry of judgment—street grade must be established before levy of assessment for grading—wooden stairway not a sidewalk—power to levy must be clearly given and strictly pursued); Hennessy v. St. Paul, 44-306, 46+353 (assessment cannot be made for improvement of street not yet acquired except upon bond); Brennan v. St. Paul, 44-464, 47+55 (each lot or parcel must be assessed separately—assessment of two lots as one is void if board has notice before confirmation); Fairchild v. St. Paul, 46-540, 49+325 (taking fee for street is a public improvement); State v. Dist. Ct., 47-406, 50+476 (several improvements in one proceeding—board of public works must adopt contract price as cost—legislature may authorize assessment on estimate of cost without reference to a contract price—determination of board of public works as to benefits how far conclusive—what is demonstrable mistake of fact—objections to assessment on application for judgment must be specific but may be in alternative—illegal principle of assessment); Albrecht v. St. Paul, 47-531, 50+608 (action will not lie to set aside assessment and restrain its collection—may be maintained if city does not object—general nature of proceedings to collect—objections admissible on application for judgment); Langevin v. St. Paul, 49-189, 51+817 (recovery of money paid for redemption under a mistake of fact); State v. Dist. Ct., 51-401, 53+714 (general appearance on application for judgment waiver of defects as to notice—objections to assessment on application for judgment must be specific—assessment warrant prima facie evidence of validity of assessment and regularity of prior proceedings); State v. Otis, 53-318, 55+143 (notice of meeting of board of public works held insufficient—see James v. St. Paul, 58-459, 60+21); Hennessy v. St. Paul, 54-219, 55+1123 (force of judgment—entry of judgment without order of court—collateral attack on judgment—penalty of twelve per cent. interest valid); State v. Brill, 58-152, 59+989 (arbitrary basis of assessment); Bergen v. Anderson, 62-232, 64+561 (notice to terminate redemption period must be fully published at least three months prior to expiration of period); Farrell v. St. Paul, 62-271, 64+809 (effect of judgment as estoppel against owner); State v. Egan, 64-331, 67+77 (owners accepting refundment when assessment set aside cannot object to the proceedings for setting aside the original assessment on re-assessment—charter provisions for re-assessment not repealed by Laws 1893 c. 206); Security T. Co. v. Heyderstaedt, 64-409, 67+219 (sufficiency of order for judgment—sale for less than amount due void—description of property sufficient—power of sale must be strictly followed); Rogers v. Heyderstaedt, 65-229, 68+8 (under Sp. Laws 1891 c. 12 § 5 treasurer need not file original assessment warrants in court on application for judgment—what report of treasurer to court should state); Flanagan v. St. Paul, 65-

347, 68+47 (when original notice to foreclose right of redemption insufficient a second notice may be issued within a reasonable time and after five years from the sale—the sale satisfies the judgment and if the sale lapses there is a total forfeiture of the claim for taxes—no reimbursement unless sale set aside in action—sufficiency of complaint for reimbursement); State v. Copeland, 66–315, 69+27 (statute of 1895 providing for a commissioner of public works unconstitutional); State v. Dist. Ct., 68–242, 71+27 (railroad land not used for railroad purposes not exempt—description of property sufficient—determination of board of public works as to benefits how far conclusive—limitation of time on re-assessment—property on both sides of street not equally assessed—discrepancy between original assessment and re-assessment); Keigher v. St. Paul, 69–78, 72+54 (contract for street sprinkling—city need not levy assessments for street sprinkling until end of season—query whether monthly assessments for street sprinkling can be levied—interest on contract not allowable); State v. Lewis, 72–87, 75+108; Id., 77–317, 79+1003; Id., 82–390, 85+207, 86+611 (special assessments for watermains, under Sp. Laws 1885 c. 110 §§ 26, 27, at a fixed rate per lineal front foot are constitutional); State v. Dist. Ct., 72–226, 75+224 (assessment by commissioner of public works under Laws 1895 c. 228 void—distinction between officers de jure and de facto); State v. Dist. Ct., 75–292, 77+968 (assessment for public park—discretion of legislature in apportioning tax for park—statute of 1891 relating to parks constitutional—provision for confirmation mandatory—statute does not contemplate double taxation); State v. Dist. Ct., 77–248, 79+971 (board of public works may condemn city property and levy assessments therefor—charter provisions for re-assessment constitutional—re-assessment of whole when original assessment set aside only as to one lot—objections which may be urged on re-assessment); Merchants' Realty Co. v. St. Paul, 77–343, 79+1040 (action for reimbursement on void tax deed—new notice of expiration of redemption—deed before service of notice void—deed void certificate not necessarily void—when reimbursement allowed—in execution of deed officers act for all parties—description of property sufficient—delivery of certificate on execution of void deed does not cancel certificate); London etc. Co. v. Gibson, 77–394, 80+205, 777 (limitation of action to test validity of sale in Sp. Laws 1889 c. 32 § 50 applies to action to set aside sale—limitation applies to particular remedy not to land—waiver of statute by pleading counterclaim—sale for seventy-five cents less than amount due not fatal—doctrine of de minimis applicable to tax sales—notice of tax sale may include several lots—force of judgment—collateral attack on judgment—construction of tax laws); State v. Dist. Ct., 80–293, 83+183 (determination of board of public works as to benefits how far conclusive—mistake of fact must be shown affirmatively—presumption of regularity and good faith—part of street intersections not included in contract—corner lots need not be assessed for more than inside lots though street intersections paved—lots on intersecting streets need not be assessed—street railway not assessed—fund for repair cannot be raised by assessments—contract for repair not fatal to assessment—power to assess for paving a continuing one—express authority for repaving not necessary—that assessment is made for equal amount per front foot on each lot does not make assessment arbitrary or without regard to benefits—cost of levy and collection may be included—one assessment may cover paving and repairs—inequality cannot be shown merely by plan or plat—remedy for evils of special assessments political); Willius v. St. Paul, 82–273, 84+1009 (action for reimbursement on void deed—force of judgment setting aside deed); White v. Knowlton, 84–141, 86+755 (lien for special assessment subordinate to lien of state for general taxes); Ek v. St. Paul P. L. Co., 84–245, 87+844 (statute of 1891 amending charter as to duties of board of public works constitutional); State v. Dist. Ct., 87–146, 91+300 (citizen's charter of 1900 carries right to levy special assessments); State v. Trustees, Macalester College, 87–165, 91+484 (land of Macalester College not exempt from assessments for watermains); State v. Dist. Ct., 89–292, 94+870 (requirement of a petition of owners for new sidewalk applies only to original improvements not to repairs); State v. Dist. Ct., 90–294, 96+737 (before board of public works can determine and designate the district within which property will be specially benefited notice provided by section 25 of the 1900 charter must be given); State v. Dist. Ct., 90–540, 97+425 (where sewer is constructed in part across private property, so that it is inaccessible to owner of a lot assessed for benefits without the commission of a trespass upon such property, such assessment for benefits must have been made through fraud or demonstrable mistake of fact, and cannot be sustained); Nat. B. & S. Co. v. St. Paul, 91–223, 97+878 (certificate-holder cannot have judgment opened and vacated on the ground that it is void—refundment—necessity of judgment being declared void in action between purchaser of certificate and owner of land); Otis v. St. Paul, 94–57, 101+1066 (refundment—limitation of actions—municipality bound by judgment

6893. Cases under charter of Minneapolis—Cases are cited below involving assessments under the charter of Minneapolis.[35]

6894. Cases under charter of Duluth—Cases are cited below involving assessments under the charter of Duluth.[36]

declaring proceedings void); Hause v. St. Paul, 94-115, 102+221 (judgment—collateral attack); State v. Dist. Ct., 95-70, 103+744 (determination of board of public works how far conclusive—fixing assessment district—spread of assessment—reassessment—notice); State v. Dist. Ct., 95-183, 103+881 (re-assessment—order of council unnecessary—defects of original proceedings immaterial); State v. Dist. Ct., 95-503, 104+553 (re-assessment—notice of meeting of board of public works—separate meetings—new assessment district—arbitrary assessment); State v. Dist. Ct., 97-147, 106+306 (re-assessment—defects in original proceedings immaterial—power of board of public works unaffected by home rule amendment); State v. Dist. Ct., 98-63, 107+726 (re-assessment—defects in original proceedings immaterial—assessments held not unequal, or unfair, or based on an erroneous principle of law); Otis v. Weide, 98-227, 107+540 (judgment and sale held void because of prior judgment for same assessment); Otis v. St. Paul, 102-208, 113+269 (refundment—two judgments for same assessment—obligation of city arising out of sale of certificate); Gray v. St. Paul, 105-19, 116+1111 (refundment—limitation of actions—Laws 1907 c. 183 held unconstitutional); Pieper v. MacLaren, 106-30, 118+60 (judgment—collateral attack—certificate—statement of amount of judgment).

[35] Minn. L. O. Co. v. Palmer, 20-468 (424); Ankeny v. Palmer, 20-477(431) (equity will grant relief against a void assessment when the proceedings are valid on their face and constitute a lien on realty—assessment cannot exceed cost of work—authority to levy limited by charter—assessment on particular block or portion of division of city to pay for improvement to which all property of such division should contribute is unconstitutional—if charter provides no mode of ascertaining cost of improvement the cost may be shown by evidence dehors the record); Cook v. Slocum, 27-509, 8+755 (widening and straightening street local improvement—legislature may delegate to city authority to levy special assessments and authorize council to appoint commission to assess benefits whose determination shall be final in absence of fraud or mistake of fact—report of commission how far conclusive); State v. Dist. Ct., 33-235, 22+625 (park board may levy assessments—act creating park board constitutional—publication of notice of meeting of assessors—confirmation of assessment by court conclusive on application for judgment—determination of assessors how far conclusive—practice on application for confirmation—certiorari will lie to review confirmation—what is equality of taxation); Hennepin County v. Bartleson, 37-343, 34+222 (provision of charter Sp. Laws 1881 pp. 462, 482, authorizing assessments for sidewalks constitutional—provision as to notice sufficient—frontage plan of assessment constitutional—objections which may be raised on application for judgment—legislature may levy assessments directly or delegate authority to municipality); Kelly v. Minneapolis, 57-294, 59+304 (injunction will not lie to restrain proceedings—owner has no constitutional right to be heard on appointment of assessors—objection to size of taxing district may be made on application for judgment—title of Sp. Laws 1885 c. 5 sufficient); Washburn etc. Asylum v. State, 73-343, 76+204 (land of charitable institutions not exempt—personal property not subject to special assessments); State v. Hunt, 74-496, 77+301 (statement of amount of assessment in report of assessors sufficient on application for judgment); State v. Pillsbury, 82-359, 85+175 (provision for notice sufficient—assessment under "second plan," Sp. Laws 1883 c. 3 §§ 18, 19, unconstitutional—assessments must be equal—assessments cannot materially exceed benefits—assessments cannot be fixed arbitrarily but must be proportioned to benefits—refundment of excess—offer of owner on application for judgment to pay amount of cost and benefits); State v. Dist. Ct., 83-170, 86+15 (park board may contract for conveyance to city of land for park purposes in consideration of exemption of other contiguous land of owner from assessments for park purposes—scope of exemption); State v. Blake, 86-37, 90+5 (informality in report of commissioners not fatal to assessment); State v. Ames, 87-23, 91+18 (act providing revolving fund for local improvements constitutional); Smith v. Minneapolis, 95-431, 104+227 (proceedings canceled—recovery of assessments paid); State v. Smith, 99-59, 108+822 (assessments not leviable for approaches to bridge crossing railway tracks).

[36] Sherwood v. Duluth, 40-22, 41+234 (certiorari will lie to review judgment confirming assessment—assessment may be made for diverting small stream through city sewers—property specially benefited by such diversion may be assessed more than property merely benefited by sewer—burden of proving invalidity of assessment—determination of municipal officers as to

6895. Cases under charter of Stillwater—Cases are cited below involving assessments under the charter of Stillwater.[37]

6896. Cases under charter of Waseca—Cases are cited below involving assessments under the charter of Waseca.[38]

necessity of improvement how far conclusive); State v. Judges, Dist. Ct., 51-539, 53+800, 55+122 (certiorari will lie to review judgment confirming assessment—grade must be established before assessment for grading—assessment for grading on an arbitrary basis of proximity and without regard to benefits invalid—determination of assessors as to benefits, how far conclusive—effect of Sp. Laws 1891 c. 55 § 17 amending charter of 1887—reassessment); State v. Ensign, 54-372, 56+41 (provision requiring assessment roll and order of confirmation to be filed in office of public works constitutional—city may levy assessments for bridging street regardless of authority to compel railroad to do so—burden of proving invalidity of assessment—plan of assessment held not arbitrary—change of sewer plans—force of findings of fact on appeal); State v. Ensign, 55-278, 56+1006 (legislature may delegate to courts authority to determine as a quasi judicial question whether the assessing officers have correctly determined the facts upon which the assessment is made—powers of court on application for confirmation—order for re-assessment should specify defects in original assessment—evidence of experts as to value of benefits); Fitzhugh v. Duluth, 58-427, 59+1041 (judgment not subject to collateral attack because grade not established prior to assessments for grading); In re Piedmont Ave. East, 59-522, 61+678 (re-assessment under Laws 1893 c. 206—act held constitutional—act remedial and retroactive—query whether act special legislation—where report of assessors is attached to assessment roll sufficient if they sign report and not roll); Duluth v. Dibblee, 62-18, 63+1117 (motion to open judgment denied on account of laches—judgment may be vacated for jurisdictional defects—what are jurisdictional defects—seizure of property not essential to jurisdiction—proceedings administrative not judicial); State v. Dist. Ct., 66-161, 68+860 (Sp. Laws 1891 c. 54 unconstitutional in so far as section 8 provides for assessing "adjacent" property for the same benefits which, under section 7, are to be deducted from the value of land taken—see State v. Dist. Ct., 75-292, 77+968); State v. Dist. Ct., 68-147, 70+1088 (powers of court on application for judgment—sufficiency of objections to assessment); Duluth v. Miles, 73-509, 76+259 (failure of comptroller to file certified statement as to delinquents on application for judgment not a jurisdictional defect and ground for vacating judgment on motion—form of judgment); Morey v. Duluth, 75-221, 77+829 (lien of assessment superior to all private liens—when lien attaches—proceedings for collection in rem—mortgagee may appear and oppose confirmation and judgment—judgment conclusive as to all objections not jurisdictional); Hawkins v. Horton, 91-285, 97+1053 (where proceedings are based on a petition of property owners a sufficient petition is jurisdictional); Le Tourneau v. Hugo, 90-420, 97+115 (where a contract is let to the lowest bidder it must conform to the specifications); Burns v. Duluth, 96-104, 104+714 (expenses of making survey, plans, specifications, and superintendence—special revolving fund); Holmes v. Loughren, 97-83, 105+558 (defective publication of list—presumptions—limitation of actions); Duluth v. Davidson, 97-378, 107+151 (arbitrary assessment); Merritt v. Duluth, 103-236, 114+758 (right of general taxpayer to test validity of assessment by injunction).

[37] McKusick v. Stillwater, 44-372, 46+769 (legislature may authorize proceedings for widening, opening, and grading a street to be conducted together as one improvement and the same commissioners who assess benefits from such improvement may be authorized to assess damages for property taken—provision in charter for deducting assessments for benefits from compensation awarded held unconstitutional); Strickland v. Stillwater, 63-43, 65+131 (recovery on abandonment of improvement—parts of several streets may be included in one plan for grading); Henningsen v. Stillwater, 81-215, 83+983 (action to set aside sale must be brought within three years from sale—complaint in such action demurrable when it appears on the face thereof that three years have run though it states that the judgment was void—limitation in charter unaffected by G. S. 1894 § 5821 as amended by Laws 1897 c. 266); Stillwater v. Henningsen, 109-132, 123+289 (assessment roll and warrant held to raise presumption that the preliminary steps were taken which were necessary to give the council jurisdiction to make an assessment—on application for judgment against several districts tracts to enforce assessments based upon one assessment roll one general judgment only should be entered).

[38] State v. Armstrong, 54-457, 56+97 (approval of mayor of order of council for sidewalk unnecessary—council not required to determine separately that sidewalk would be a public convenience and that the

6897. Cases under charter of Mankato—Cases are cited below involving assessments under the charter of Mankato.[39]

6898. Cases under charters of Shakopee, Moorhead, Crookston, and Wabasha—Cases are cited below involving assessments under the charters of Shakopee,[40] Moorhead,[41] Crookston,[42] and Wabasha.[43]

6899. Cases under general law for villages—Cases are cited below involving assessments under the general law for villages.[44]

MUNICIPAL COURTS

ORGANIZED UNDER GENERAL LAWS

6900. Courts of record—Municipal courts organized under the general statute are courts of record, possessing all the powers usually exercised by courts of record at common law, except as otherwise provided.[45]

6901. Change of venue—Transfer to district court—Provision is made by statute for change of venue, substantially in accordance with the practice in the district court.[46] Special provision is made for a change on appeal from a justice court.[47]

6902. Preparation of jury list—Elisor—Municipal courts, organized under the provisions of Laws 1895 c. 229, are authorized to appoint an elisor to make a list of names of persons from which to select a jury, where no officer qualified to make such list is present. The character and form of the evidence to show such disqualification rests in the discretion of the trial court.[48]

6903. Equitable defences—Certifying cases to district court—Provision is made by statute for certifying cases to the district court when equitable defences are interposed not triable by the municipal court.[49] A defendant cannot oust the court of jurisdiction, and secure a transfer of the cause to the district court, by simply demanding equitable relief in his answer. To effect

benefits would justify the expense); Kerr v. Waseca, 88–191, 92+932 (injunction will not lie to restrain assessment for sidewalk).

[39] Diamond v. Mankato, 89–48, 93+911 (determination of council as to necessity of paving how far conclusive—contract to be let to lowest bidder—contract must follow specifications); Willard v. Hodapp, 98–269, 107+954 (limitation of actions—judgment—collateral attack); First Nat. Bank v. Hodapp, 98–534, 107+957 (id.); State v. Dist. Ct., 102–482, 113+697, 114+654 (re-assessment—effect of stipulation as to benefits—delay caused by injunction).

[40] Scott County v. Hinds, 50–204, 52+523 (provision of charter as to special assessments for sidewalks considered and applied).

[41] Wolfe v. Moorhead, 98–113, 107+728 (petition of property owners unnecessary).

[42] Turner v. Snyder, 101–481, 112+868 (charter adopted July 31, 1906, superseded Laws 1895 c. 235 and Laws 1899 c. 128 as to special assessments for street improvements).

[43] Prindle v. Campbell, 9–212(197) (notice of sale—publication).

[44] State v. Dist. Ct., 61–542, 64+190 (law not unconstitutional because it authorizes assessment on frontage plan—owners not objecting to partial assessment under the statute cannot object to final assessment on the grounds available against first assessment—legislature may authorize assessment before completion of work); State v. Norton, 63–497, 65+935 (objections to assessment must be made at the time prescribed by the statute and cannot be made for the first time on application for judgment under the general law—penalties may be added as on non-payment of taxes under the general law).

[45] Wellcome v. Berkner, 108–189, 121+882.

[46] R. L. 1905 § 4099; Clark v. Baxter, 98–256, 108+838. See, prior to present statute, Janney v. Sleeper, 30–473, 16+365.

[47] R. L. 1905 § 4100; Antonsky v. City Dye House, 109–96, 123+56.

[48] Wellcome v. Berkner, 108–189, 121+882.

[49] R. L. 1905 § 130; Huntley v. Hutchinson, 91–244, 97+971.

such result, the answer must allege facts which, if true, would entitle the defendant to some equitable relief.[50]

6904. Judgments—Liens—Filing transcripts—The law providing for the filing of transcripts of judgments rendered in the municipal courts of this state is distinct from, and not controlled by, the statute relating to the returning or filing transcripts of justice court judgments, and the former are sufficient if they contain the docket entries of the same.[51]

6905. Appeal to district court—Where the return on an appeal on questions of law alone from the judgment of a municipal court to the district court does not purport to contain all of the evidence, no question as to the sufficiency of the evidence to support the verdict can be raised in the district court.[52] Where, in garnishment proceedings in a municipal court, the plaintiff appealed from a judgment rendered against him in favor of an intervening claimant, but neither the garnishee or the defendant in the action took any part therein, it was held that they were not necessary or material parties to the appeal to the district court.[53] An appeal from a conviction for the violation of a municipal ordinance must be taken in accordance with the procedure for appeals from justice courts in criminal cases.[54]

ORGANIZED UNDER SPECIAL LAWS

6906. Of Minneapolis—Cases are cited below relating to the municipal court of Minneapolis.[55]

[50] Iltis v. Greengard Bros., 109–209, 123+406.

[51] Schmahl v. Thompson, 82–78, 84+649.

[52] Wellcome v. Berkner, 108–189, 121+882.

[53] Peterson v. Knuutila, 94–114, 102+368.

[54] Madison v. Martin, 109–292, 123+809.

[55] Benton v. Snyder, 22–247 (provisions of Sp. Laws 1874 c. 141 § 1, prohibiting the court from entertaining equitable jurisdiction, inapplicable to garnishment proceedings); Brackett v. Rich, 23–485 (upon the trial of a question of fact the decision must be in writing and the facts found and the conclusions of law separately stated); State v. Wagner, 23–544 (general law giving defendant the concluding argument to the jury on the trial of an indictment inapplicable); Gray v. Hurley, 28–388, 10+417 (in unlawful detainer proceedings an appeal can be taken only from the final judgment); State v. Cotton, 29–187, 12+529; Judd v. Arnold, 31–430, 18+151 (when it appears upon the evidence that the title to realty is involved the cause must be certified to the district court); Stevens v. Minneapolis, 29–219, 12+533 (Sp. Laws 1881 c. 76, fixing the salary of the clerk, repealed pro tanto Sp. Laws 1874 c. 141 § 7); Janney v. Sleeper, 30–473, 16+365 (change of venue—see R. L. 1905 § 4099); Clark v. Baxter, 98–256, 108+838 (provisions of the general statute relating to change of venue inapplicable); State v. Green, 32–433, 21+547 (findings of fact subsequent to a conviction held unauthorized and not to affect the conviction); Cain v. Libby, 32–491, 21+739 (decision filed by a judge after expiration of his term of office invalid); Shatto v. Latham, 33–36, 21+838 (under Sp. Laws 1883 c. 46 § 6 summons in civil actions for the recovery of money only must be served in Hennepin county); West v. Bottineau, 34–239, 25+405 (form of writ of replevin adopted by rule of court held sufficient); Burke v. St. P. etc. Ry., 35–172, 28+190; Higgins v. Beveridge, 35–285, 28+506 (Sp. Laws 1885 c. 74 § 1, giving court jurisdiction to the exclusion of justices of the peace, constitutional); Flanigan v. Minneapolis, 36–406, 31+359 (power of clerk to receive amount of forfeited recognizance); Jordan v. Bailey, 37–174, 33+778 (Sp. Laws 1885 c. 74 § 3, relating to the election of judges of court, constitutional); Boston B. Co. v. Buffington, 39–385, 40+361 (unlawful detainer—appeal to supreme court); Keyes v. Clare, 40–84, 41+453 (service of pleadings—time—opening default); Universalist G. Con. v. Bottineau, 42–35, 43+687 (defendant, in unlawful detainer proceedings, must answer, if at all, at the opening of court upon the day in which the summons is returnable, or at such other time as may be designated by the court—a court of special and limited jurisdiction, possessing only those powers bestowed upon it by statute); State v. Maben, 45–56, 47+306 (mode of selecting jurors in criminal cases—special venire); Hanson v. Bean, 51–546, 53+871 (filing transcript of judgment in district court—unnecessary that execution first issue out of municipal court); Suchaneck v. Smith, 53–96, 54+932 (court has authority to set

6907. Of St. Paul—Cases are cited below relating to the municipal court of St. Paul.[56]

aside a sheriff's return of execution and to enforce its judgment by issuing an alias writ of restitution); McGeagh v. Nordberg, 53-235, 55+117 (prepayment of jury fee); White v. Flamme, 64-5, 65+959 (replevin may be begun by the service of an ordinary summons without a writ of replevin); Tilleny v. Knoblauch, 73-108, 75+1039 (facts requiring equitable relief not a defence to unlawful detainer proceedings); State v. Messolongitis, 74-165, 77+29 (Sp. Laws 1889 c. 34 § 17, providing that a statement of an offence charged shall stand as a complaint, constitutional); State v. Grimes, 83-460, 86+449 (minutes of a conviction and sentence held sufficient); State v. Marciniak, 97-355, 105+965 (court has jurisdiction of all criminal cases arising in or triable in the city, where the punishment cannot exceed a fine of one hundred dollars or ninety days' imprisonment—Sp. Laws 1889 c. 34 § 7, authorizing the trial by the court without a jury, constitutional); State v. Dreger, 97-221, 106+904 (court has jurisdiction to try and determine all offences committed within the county of Hennepin which, under the general laws of the state, are within the jurisdiction of a justice of the peace); Bunker v. Hanson, 99-426, 109+827 (court has no jurisdiction in forcible entry and unlawful detainer proceedings based upon breach of the contract of a lease to lands, part of which were within Hennepin county and part of which were without that county); State v. Nugent, 108-267, 121+898 (jurisdiction—intoxicating liquors—violation of ordinance—right to jury trial).

[56] Marsh v. Smith, 22-46 (Sp. Laws 1875 c. 2 gave the court jurisdiction of unlawful detainer proceedings to the exclusion of justices of the peace in certain cases); Gould v. Johnston, 24-188 (in action for recovery of money only, if the amount claimed in the complaint is more than one hundred dollars and not more than two hundred dollars, the summons may be served in any county of the state—summons held valid though it fixed two different times for answering complaint); McClung v. Manson, 25-374 (no appeal lies to court from justice of the peace elected under Sp. Laws 1876 c. 211 § 10); McMath v. Parsons, 26-246, 2+703 (want of verification to a complaint is not a ground for dismissal); Hoffman v. Parsons, 27-236, 6+797 (unlawful detainer—title of Laws 1874 c. 67 sustained); Steele v. Bond, 28-267, 9+772 (in unlawful detainer proceedings case must be certified to district court when it appears upon the evidence that title to realty is involved); Webb v. O'Donnell, 28-369, 10+140 (answer need not be replied to unless it contains a counterclaim); Hennessey v. Pederson, 28-461, 11+63 (in unlawful detainer proceedings the plaintiff is not entitled to judgment without proof on default of defendant); Conger v. Nesbitt, 30-436, 15+875 (interest from the time of the finding or verdict until judgment is entered not to be taken into account in determining jurisdiction); Petsch v. Biggs, 31-392, 18+101 (in unlawful detainer proceedings the cause is not to be certified to the district court because the answer sets up an equitable defence); Wagner v. Neal, 33-348, 23+308 (if the amount claimed does not exceed the jurisdiction of the court the fact that the complaint states a cause of action for a greater amount does not oust court of jurisdiction); St. Paul v. Umstetter, 37-15, 33+115 (G. S. 1878 c. 64 § 98, giving the clerk of the court power to receive complaints and issue warrants in criminal cases, constitutional); Crosby v. Farmer, 39-305, 40+71; Buffham v. Perkins, 43-158, 44+1150 (court may vacate its judgments after transcripts thereof have been filed in and executions issued out of the district court); Simonsen v. Curtis, 43-539, 45+1135 (held that replevin for a deed involved the title to realty so as to oust the court of jurisdiction); Marcotte v. Fitzgerald, 45-51, 47+316 (notice of trial by the appellant necessary before an appeal from a justice of the peace can be placed on the calendar under Sp. Laws 1889 c. 351 § 28—notice of trial held fatally defective); Barth v. Horejs, 45-184, 47+717 (on appeal from a justice court other or further pleadings than those filed with the justice unnecessary unless ordered by the court); Granse v. Frings, 46-352, 49+60 (court has discretionary power to set aside a judgment taken by the defendant's mistake, inadvertence, or excusable neglect); Hause v. Newel, 60-481, 62+817 (court has jurisdiction of an action by a receiver of a corporation to recover from a stockholder the amount due on his stock subscription); Clark v. Butts, 73-361, 76+199 (filing transcript of judgment in district court before entry of judgment in municipal court); Coleman v. Akers, 87-492, 92+408 (vacating judgment not seasonably entered); Selover v. Williams, 98-155, 107+960 (to require the court to certify a cause to the district court upon the ground that an equitable defence is interposed, under Sp. Laws 1889 c. 351 § 22, the answer must set forth facts sufficient to constitute a defence); Kenny v. Seu Si Lun, 101-253, 112+220 (summons in forcible entry and unlawful detainer proceedings is returnable on the first day of a regular weekly term, being not less than three nor more than ten days from the

6908. Of Duluth—Cases are cited below relating to the municipal court of Duluth.[57]

6909. Of Mankato—Cases are cited below relating to the municipal court of Mankato.[58]

6910. Of Stillwater—Cases are cited below relating to the municipal court of Stillwater.[59]

6911. Of Winona—On appeal from the municipal court of Winona the district court has power, not only to reverse the judgment, but in a proper case to award judgment absolute for the appellant.[60]

MURDER—See Homicide.
MUST—See Statutes, 8954, 8979.

date of its issuance); Treat v. Court Minn., 109–110, 123+62 (costs on dismissal of appeal from justice court); Holmes v. Igo, 124+974 (appeal from justice court—affirmance—relief from default in bringing appeal on for trial); Wentworth v. Nat. etc. Co., 124+977 (appeal from justice court—relief from default in bringing appeal on for trial).

[57] Rossiter v. Minn. etc. Co., 37–296, 33+855 (court can vacate an attachment only upon statutory bond); State v. Bannock, 53–419, 55+558 (waiver of jury in criminal case); Norton v. Beckman, 53–456, 55+603 (in unlawful detainer proceedings the cause is not to be certified to the district court because the answer sets up an equitable defence); Crawford v. Hurd, 57–187, 58+985 (court has no jurisdiction where the amount claimed in the complaint, including interest, exceeds five hundred dollars, though the principal sum is less than that amount); Benson v. Silvey, 59–73, 60+847 (court has jurisdiction of an action by a creditor of a foreign corporation against stockholders to enforce their statutory liability); Carlson v. Segog, 60–498, 62+1132 (court has jurisdiction of an action for a false and fraudulent warranty); Lynch v. Free, 64–277, 66+973 (an indebtedness exceeding five hundred dollars set up as a defence held not to oust court of jurisdiction); Lundberg v. Davidson, 68–328, 71+395, 72+71 (in unlawful detainer proceedings defendant cannot set up an equitable defence); Nornborg v. Larson, 69–344, 72+564 (opening default—garnishment); Rustad v. Bishop, 80–497, 83+449 (vacation of judgment on motion); State v. Bates, 96–150, 104+890 (court held not to acquire jurisdiction of a person charged with drunkenness and disorderly conduct because the statement of the offence entered by the clerk in the records of the court, in place of a formal complaint, was insufficient); Dahlsten v. Anderson, 99–340, 109+697 (no appeal lies from the court to the supreme court, but only to the district court); Dion v. Bassett, 102–512, 113+1133 (opening default); State v. Bates, 105–440, 117+844 (jurisdiction in criminal cases); State v. Bates, 108–55, 121+225 (intoxicating liquors—ordinance—authority to impose fine and in default of payment to commit to county jail for a period not exceeding ninety days); Frederickson v. Iron Range B. Assn., 108–155, 121+632 (action for conversion of hay—judgment for defendant notwithstanding the verdict—appeal to district court—order reversed with directions to entertain motion for new trial—appeal to supreme court—action of district court sustained).

[58] Burt v. Winona etc. Ry., 31–472, 18+285, 289 (held a de facto court); Funk v. Lamb, 87–348, 92+8 (held that transcript of a judgment showing the name of the judgment debtor and creditor, the fact that judgment was rendered, and the date and amount thereof, and certified to be a transcript of the judgment instead of the docket entries thereof, was a compliance with Sp. Laws 1885 c. 119 § 16); Clark v. Baxter, 98–256, 108+838 (change of venue governed by general law).

[59] Bassett v. Fortin, 30–27, 14+56 (in an action for unlawful detainer the title to realty held involved so as to require the case to be certified to district court); Fox v. Ellison, 43–41, 44+671 (action for value of certain logs held within its jurisdiction); McCluer v. Crotty, 69–426, 72+701 (opening default—limitation of six months); Watier v. Buth, 87–205, 91+756, 92+331 (appeals in unlawful detainer proceedings must conform to the provisions of G. S. 1894 c. 86 relating to appeals to the supreme court—provisions of G. S. 1894 § 1377, requiring a summons in unlawful detainer proceedings to be returnable at a regular term of court, mandatory—summons returnable at a special term is void and confers no jurisdiction upon the court to proceed); Jourdain v. Luchsinger, 91–111, 97+740 (court has authority to determine the sufficiency of a counterclaim, as an incident of its authority to certify causes to the district court in certain cases); State v. Jack, 98–278, 108+10 (election of judge—qualifying—filing oath of office).

[60] Hardenburg v. Roesner, 83–7, 85+719.

MUTUAL ACCOUNTS—See Limitation of Actions, 5649.
MUTUAL BENEFIT INSURANCE—See Insurance, 4818.
MUTUAL BENEFIT SOCIETIES—See Insurance, 4818.
MUTUAL HAIL INSURANCE—See Insurance, 4863.
MUTUAL INSURANCE—See Insurance, 4742.
MUTUALITY—See Contracts, 1758; Master and Servant, 5802.
MUTUATUS—See note 61.

NAMES

Cross-References

See Acknowledgment, 72; Contracts, 1732; Corporations, 1971; Execution, 3505; Indictment, 4399; Judgments, 5062, 5104; Justices of the Peace, 5296; Process, 7830; Public Lands, 7971; Taxation, 9289, 9428.

6912. Middle name—As a general rule neither a middle name nor its initial is a necessary part of a person's legal name.[62] But this rule is inapplicable where the Christian name is given only by its initial. Forgery may be committed in changing the initial of a person's middle name.[63]

6913. Initials—In judicial proceedings the Christian name of a person should be given in full and not merely by its initial letter. The failure to do so, however, is not a ground for demurrer or dismissal.[64] The initial of a person's middle name is not a necessary part of a person's legal name.[65]

6914. Junior—The suffix "Jr." is not a necessary part of a person's legal name.[66]

6915. Assumed name—A person may contract,[67] or sue,[68] under an assumed or fictitious name, at least if he does so without a fraudulent or criminal purpose. If a person places on record a deed in which his name is incorrectly spelled, he cannot object if he is sued in relation to the land by that name.[69]

6916. Foreign names—In a foreign name a variance of a letter which, according to the pronunciation of that language, does not vary the sound, is not a misnomer.[70] A court will not take judicial notice of the proper orthography or pronunciation of names in a foreign language.[71]

6917. Identity—Identity of names is prima facie evidence of identity of persons.[72]

6918. Father and son of same name—Presumption—Where father and son have the same name as the grantee in a conveyance of land, and neither is otherwise designated therein as the grantee, the father will be presumed to be the grantee, if other things are equal and there is no evidence to the contrary.[73]

[61] Marshall v. Hart, 4-450(352).
[62] Stewart v. Colter, 31-385, 18+98; State v. Tall, 43-273, 45+449. See Ambs v. Chi. etc. Ry., 44-266, 46+321; Blomberg v. Montgomery, 69-149, 72+56; Massillon etc. Co. v. Holdridge, 68-393, 71+399; D'Autremont v. Anderson, 104-165, 116+357.
[63] State v. Higgins, 60-1, 61+816.
[64] Knox v. Starks, 4-20(7); Gardner v. McClure, 6-250(167); Kenyon v. Semon, 43-180, 45+10; Pinney v. Russell, 52-443, 54+484; Piper v. Sawyer, 82-474, 85+206.
[65] See § 6912.
[66] Bidwell v. Coleman, 11-78(45).
[67] McNair v. Toler, 21-175. See § 1732.
[68] Scanlan v. Grimmer, 71-351, 74+146.
[69] Blinn v. Chessman, 49-140, 51+666.
[70] State v. Timmens, 4-325(241).
[71] State v. Johnson, 26-316, 3+982; State v. Blakeley, 83-432, 86+419.
[72] Morris v. McClary, 43-346, 46+238; State v. Bates, 101-303, 306, 112+260. See, as to effect of similarity of names, Newton v. Newell, 26-529, 541, 6+346; Ambs v. Chi. etc. Ry., 44-266, 46+321; Pinney v. Russell, 52-443, 54+484; Truelsen v. Hugo, 81-73, 83+500.
[73] Hess v. Stockard, 99-504, 109+1113.

6919. Mistakes not generally fatal—Amendment—Mistakes in names are not generally fatal.[74] Provision is made by statute for the amendment of mistakes in the names of parties in judicial proceedings.[75]

6920. Mistakes held fatal—"Landers" for "Landis," in a summons;[76] "Fred Vongard" for "William Bungard," in an indictment;[77] "John O. Shea" for "John O'Shea," in a published summons;[78] "Andrew Rome" for "Abram Rauma," in unlawful detainer proceedings;[79] "George H. Leslie" for "George W. Leslie," in a published summons.[80]

6921. Mistakes held not fatal—"Sumner W. Farnham" for "Samuel W. Farnham," in a judgment;[81] "Kurkwiski" for "Kurkowski," in an indictment;[82] "Railroad" for "Railway," in an indictment;[83] "Neilson" for "Nelson," in a judgment;[84] "Jacob Barrows" for "Chauncey W. Barrows," in an attachment;[85] "Bert Samrud" for "Bernt Sannerud," in an indictment;[86] "Farmness" for "Framness," in a verdict;[87] "Berlah" for "Beulah," in a published summons;[88] "Le Claine" for "Le Claire," in a patent of land;[89] "Cheesemen" for "Chessman," in a deed and published summons;[90] "Charles Casper" for "Christian Casper," in a summons and default judgment;[91] "Oscar Farrar" for "Arthur Farrar," in a summons;[92] "Wm. Strieber" for "Wm. Schrieber," in an acknowledgment;[93] "S. G. Terryll" for "Cora V. Terryll," in a notice of claim;[94] "Tony Barrom" for "Tony Baron" or "Antonio Barone," in the name of a witness on an indictment;[95] "Johnson" for "Johnston," in a notice of appeal;[96] "Forrest" for "Fourai," in an indictment;[97] "Joseph W. Earl" for "Jasper W. Earl," in a return of service of summons;[98] "Adam Sture" for "Andrew Sture," in a verdict.[99]

6922. Held idem sonans—Forrest and Fourai;[1] Bernt Sannerud and Bert Samrud;[2] Johnson and Johnston;[3] Hanson and Hansen;[4] Eidem and Eidam.[5]

6923. Held not idem sonans—Landis and Landers;[6] Fred Vongard and William Bungard;[7] S. Holdridge and C. S. Holdridge.[8]

6924. Pleading misnomer—A plea of misnomer must be so full as to wholly exclude plaintiff's right to sue defendant by the name used.[9]

NATIONAL BANKS—See Banks and Banking, 812.
NATIONAL GUARD—See Militia.
NATURALIZATION—See Aliens, 253.

[74] D'Autremont v. Anderson, 104–165, 116+357 and cases under § 6921.
[75] See § 5104.
[76] Atwood v. Landis, 22–558 (overruled in Casper v. Klippen, 61–353, 63+737).
[77] State v. Quinlan, 40–55, 41+299.
[78] Clary v. O'Shea, 72–105, 75+115.
[79] Rauma v. Bailey, 80–336, 83+191.
[80] D'Autremont v. Anderson, 104–165, 116+357.
[81] Thompson v. Bickford, 19–17(1).
[82] State v. Johnson, 26–316, 3+982.
[83] State v. Brin, 30–522, 16+406.
[84] Fuller v. Nelson, 35–213, 28+511.
[85] Morse v. Barrows, 37–239, 33+706.
[86] State v. Sannerud, 38–229, 36+447.
[87] State v. Framness, 43–490, 45+1098.
[88] Lane v. Innes, 43–137, 45+4.
[89] Dawson v. Mayall, 45–408, 48+12.
[90] Blinn v. Chessman, 49–140, 51+666.
[91] Casper v. Klippen, 61–353, 63+737.
[92] Bradley v. Sandilands, 66–40, 68+321.
[93] Rodes v. St. Anthony etc. Co., 49–370, 52+27.
[94] Terryll v. Faribault, 81–519, 84+458.
[95] State v. Blakeley, 83–432, 86+419.
[96] State v. Jones, 55–329, 56+1068.
[97] State v. Timmens, 4–325(241).
[98] Sandwich Mfg. Co. v. Earl, 56–390, 57+938.
[99] Red River etc. Ry. v. Sture, 32–95, 20+229.
[1] State v. Timmens, 4–325(241). See, on the general subject of idem sonans, Note, 100 Am. St. Rep. 322.
[2] State v. Sannerud, 38–229, 36+447.
[3] State v. Jones, 55–329, 56+1068.
[4] Stein v. Hanson, 99–387, 109+821.
[5] Eidam v. Finnegan, 48–53, 50+933.
[6] Atwood v. Landis, 22–558.
[7] State v. Quinlan, 40–55, 41+299.
[8] Massillon etc. Co. v. Holdridge, 68–393, 71+399.
[9] Lyons v. Rafferty, 30–526, 16+420.

NAVIGABLE WATERS

Cross-References

See Boundaries; Nuisance, 7253; Waters.

IN GENERAL

6925. What constitutes—The division of waters into navigable and non-navigable is but a way of dividing them into public and private waters. The ebb and flow of the tide is not the test of navigability. Waters are navigable in law, if they are navigable in fact. They need not be navigable all the year, or against the current. The existence of rapids in a stream does not necessarily destroy its navigability. The capability of use by the public for purposes of transportation and commerce affords the true criterion of the navigability of a river, rather than the extent and manner of that use. If it is capable, in its natural state, of being used for purposes of commerce, no matter in what mode the commerce may be conducted, it is navigable in fact, and becomes, in law, a public river or highway. Waters may be navigable though they are intercepted by falls, if the waters above and below the falls are navigable for long distances for purposes of commerce.[10] Riparian rights in

[10] Castner v. St. Dr. Franklin, 1-73(51); Schurmeier v. St. P. etc. Ry., 10-82(59); Lamprey v. State, 52-181, 53+1139; Minn. C. & P. C. v. Koochiching Co., 97-429, 107+405.

inland navigable waters are the same as in tidal waters.[11] Where the title to the bed of a lake was not in the state, it was held that the waters did not become public from the fact that the height of the lake was raised by a dam and the lake was used incidentally by the public and a city during the time the right to maintain the dam and overflow the adjoining lands continued.[12]

6926. Public and private waters—Lakes—It has been said, perhaps too broadly, that if our inland lakes are capable of being put to any beneficial public use, they are to be deemed public waters—that the test of navigability to be applied to them must be sufficiently broad and liberal to include all public uses, including boating for pleasures, for which such waters are adapted.[13]

6927. International comity—The use and control of waters lying within the geographical boundaries of the United States is not restrained by international comity.[14]

6928. Public highways—Navigable waters are public highways.[15] Certain of the navigable waters of the state are declared public highways by the constitution and organic act, and preserved as such forever free, as well to the inhabitants of the state as to other citizens of the United States, without any tax, duty, impost, or toll.[16]

6929. Definition of river bed and river front—A river is composed of bed, banks, and water or stream. It is generally understood that the river bed terminates where the bank begins, that is, at low-water mark. The term "river front" is sometimes used to denote the shore above low-water mark.[17]

FEDERAL AND STATE CONTROL

6930. Concurrent control—Federal consent—The act of Congress of March 3, 1899, requiring the consent of the Secretary of War on the approval of the chief of engineers to the construction of public works in any navigable waterway within the United States, does not transfer exclusive control over navigable waters entirely within the limits of a state to the federal authorities; but the right of private persons to erect structures in such waters is dependent upon the concurrent or joint consent of both the state and federal governments. Under such act a public service corporation should not be permitted to exercise the power of eminent domain in furtherance of an enterprise involving an interference with navigable waters within the state without having first procured the approval of its plan by the officers of the federal government.[18]

6931. Federal control—Navigable waters entirely within the limits of a state are subject to the same control by the federal government as those extending through or reaching beyond the limits of the state.[19]

[11] Morrill v. St. Anthony Falls etc. Co., 26-222, 2+842.

[12] Albert Lea v. Nielsen, 80-101, 82+1104.

[13] Lamprey v. State, 52-181, 53+1139.

[14] Minn. C & P. Co. v. Pratt, 101-197, 112+395.

[15] Schurmeier v. St. P. etc. Ry., 10-82 (59, 77); Cotton v. Miss. etc. Co., 22-372, 374; Hayward v. Knapp, 23-430; Weaver v. Miss. etc. Co., 28-534, 538, 11+114; Osborne v. Knife Falls B. Corp., 32-412, 21+704; Page v. Mille Lacs L. Co., 53-492, 499, 55+608; Crookston etc. Co. v. Sprague, 91-461, 98+347; State v. Tower L. Co., 100-38, 42, 110+254.

[16] Const. art. 2 § 2; Castner v. St. Dr. Franklin, 1-73(51); Schurmeier v. St. P. etc. Ry., 10-82(59); Osborne v. Knife Falls B. Corp., 32-412, 21+704.

[17] Eastman v. St. Anthony Falls etc. Co., 43-60, 44+882.

[18] Minn. C. & P. Co. v. Pratt, 101-197, 112+395. See Crookston etc. Co. v. Sprague, 91-461, 468, 98+347, 99+420.

[19] Minn. C. & P. Co. v. Pratt, 101-197, 112+395.

6932. Navigable waters of United States—Lakes—Lakes lying within the limits of the state are not navigable waters of the United States.[20]

6933. State control—In the absence of the exercise of power conferred by the federal government over navigable streams within the states, incident to its power to regulate commerce, the states have full power over such waters within their jurisdiction.[21]

6934. Legislative discretion—Within constitutional limits the legislature has practically unlimited discretion in regulating the use of public waters. It may enact laws prescribing the manner in which the common right of floatage shall be enjoyed. It may determine what means shall be adopted, and by what agency, to secure results which, in its judgment, are the best and fairest practical compromises of conflicting interests—the best attainable good of all concerned. It may authorize suitable means and instrumentalities to secure this end to be provided and employed by a private person or by a corporation, and it may prescribe what these means and instrumentalities may be—as booms, dams, piers, sluiceways—and what use may be made of them, and, in general, in what manner the business shall be conducted.[22] The legislature may grant the right to do what could not otherwise be lawfully done.[23] The state is authorized to regulate the exercise of riparian rights in the interests of the public, and may make concessions to private owners of possessory rights in the soil of navigable waters, the effect of which will be to give them private and exclusive rights equivalent to a grant.[24]

NAVIGATION

6935. General nature of public right—Reasonable use—All persons have a common and equal right to use public waters for navigation in a reasonable manner. No general rule can be laid down as to what constitutes a reasonable use. Reasonable use is a relative matter, depending upon the facts of the particular case.[25] The right of passage on a navigable stream is a common and paramount one, but must be exercised with due regard to the rights of riparian owners, and with ordinary care and skill.[26]

6936. Occupation of shore—Moorings—The right of navigation includes, as incidental to its beneficial enjoyment, the right, in a reasonable manner, to occupy, to the exclusion of others, particular places in public waters. Thus, vessels have not merely the right of passage, but the right to land and remain at the shore such times, and in such places, as may be reasonably necessary for loading or unloading passengers and freight, and waiting for the same.[27]

PUBLIC USES OTHER THAN NAVIGATION

6937. In general—All persons have the common right, subject to reasonable restrictions, to use public waters for the ordinary purposes of life, such as boating, fishing, fowling, skating, taking water for domestic or agricultural

[20] Stapp v. St. Clyde, 43–192, 45+430. See Griswold v. St. Otter, 12–465(364).

[21] Minn. C. & P. Co. v. Pratt, 101–197, 112+395.

[22] Osborne v. Knife Falls B. Corp., 32–412, 21+704.

[23] Mpls. M. Co. v. Bd. Water Comrs., 56–485, 58+33; Sanborn v. People's Ice Co., 82–43, 51, 84+641.

[24] Miller v. Mendenhall, 43–95, 101, 44+1141.

[25] Hayward v. Knapp, 23–430; Page v. Mille Lacs L. Co., 53–492, 55+608. See Red River R. Mills v. Wright, 30–249, 15+167; Crookston etc. Co. v. Sprague, 91–461, 98+347; State v. Tower L. Co., 100–38, 110+254.

[26] Coyne v. Miss. etc. Co., 72–533, 75+748.

[27] Castner v. St. Dr. Franklin, 1–73(51); Hayward v. Knapp, 23–430.

purposes, and cutting ice. The public, and riparian owners, enjoy this right in common.[28]

6938. A public right—The right to use navigable waters is a public and not a private right.[29]

6939. Compensation to riparian owners unnecessary—The public may apply the waters of a navigable stream to public uses without making compensation to riparian owners.[30]

6940. Public rights superior to riparian rights—The right of the public to apply navigable waters to public uses is superior to riparian rights.[31]

6941. Taking water for municipal uses—Taking water from navigable streams or lakes for the ordinary use of cities in their vicinity is a public use, and this is so though consumers are charged for water used, as a means of paying the cost of maintaining the plant. In thus taking water the state is not controlled by the rules which apply between riparian owners as to the diversion from, and return of water to, its natural channels.[32]

6942. Removal of ice—All persons have a common right to cut and remove ice from public waters for ordinary domestic or individual uses. They have no right, however, to cut, for commercial purposes, such large quantities as to materially reduce the level of the waters. Cutting and removing ice from White Bear lake, for shipment and sale in distant markets, has been held forbidden by Sp. Laws 1881 c. 410.[33]

6943. Floating logs—*a. In general*—Every one has a right to use public or navigable waters for the purpose of floating logs in a reasonable manner, and with due regard for the rights of others. The right of navigation includes rafts of logs as well as vessels.[34]

b. Mooring rafts of logs—Persons floating rafts of logs on the Mississippi river may moor them to the shore, for periods, in places, and in a manner reasonable with respect to the right of passage in other persons, to enable the owner to make sales of the logs. The custom of lumbermen and pilots, with reference to tying up rafts along the shore of the Mississippi river, is material evidence upon the question whether a particular raft is negligently moored to the shore. It is competent to ask the opinion of experts whether the place where a raft is moored is a safe place.[35]

c. Injuries to dams—Under the authority given to a water-power company by act of Congress to construct a dam across the Mississippi river at St. Cloud, it is for the company to do what is necessary to protect its dam from the consequences of jams of logs floating down the river, caused by the slack-water which the dam creates. If, to prevent such jams, and protect the dam against the consequences of them, it is necessary to employ men to get the logs past the slack-water, it is for the company to employ them.[36] An owner of logs, who permitted the same to pass over a dam without guiding them through the sluiceways by means of sheer booms, and without taking out the sluice boards,

[28] Sanborn v. People's Ice Co., 82–43, 84+641; Lamprey v. State, 52–181, 200, 53+1139.

[29] Swanson v. Miss. etc. Co., 42–532, 44+986.

[30] Mnls. M. Co. v. Bd. Water Comrs., 56–485, 58+33.

[31] Id.

[32] Id.

[33] Sanborn v. People's Ice Co., 82–43, 84+641. See 15 Harv. L. Rev. 68.

[34] Castner v. St. Dr. Franklin, 1–73(51); Hayward v. Knapp, 23–430; Weaver v. Miss. etc. Co., 28–534, 538, 11+114; Swanson v. Miss. etc. Co., 42–532, 536, 44+986; Page v. Mille Lacs L. Co., 53–492, 500, 55+608; Coyne v. Miss. etc. Co., 72–533, 535, 75+748; Reeves v. Backus, 83–339, 342, 86+337; Crookston etc. Co. v. Sprague, 91–461, 470, 98+347, 99+420.

[35] Hayward v. Knapp, 23–430.

[36] St. Cloud etc. Co. v. Miss. etc. Co., 43–380, 45+714.

has been held not liable for damage to the dam occasioned thereby.[37] A complaint in an action for damages to a dam caused by floating logs has been held sufficient.[38]

d. Obstructing navigation—The obstruction of navigation, in driving, floating, rafting, or booming logs, is a nuisance and actionable as such.[39]

e. Duty to exercise care—Liability for negligence—A person using public waters for floating logs must exercise ordinary or reasonable care to avoid injuring other navigators or riparian owners—such care as persons of ordinary prudence usually exercise under similar circumstances.[40] It is negligent for one to propel a raft of logs in the channel of the Mississippi by means which impart to the raft a motion beyond his power to control.[41] One driving logs must exercise ordinary or reasonable care to prevent them from lodging and creating jams and obstructions in the stream, thereby diverting waters from their natural course to the injury of riparian property.[42] One driving logs is not an insurer. If he exercises due care he is not liable for resulting injury to riparian property.[43]

OBSTRUCTION AND INTERFERENCE

6944. Bridges—Nuisance—A bridge across a navigable stream may constitute a nuisance which may be abated in a private action by a navigator specially injured thereby.[44] A bridge cannot be constructed across a navigable stream of the United States without first obtaining leave from the federal authorities.[45]

6945. Public service corporations—A public service corporation, though authorized to condemn private property for the construction of canals and reservoirs for the generation of electric power, cannot exercise such power when the particular enterprise contemplates an interference with the navigable capacity or navigation of any of the navigable waters of the state, unless such interference is expressly authorized by statute.[46]

6946. Injunction—For an unlawful interference with the right of a riparian owner to use water flowing past his land injunction is a proper remedy.[47]

6947. When private action lies—A private action will lie for an unlawful obstruction of navigable waters by a person who suffers a special and particular injury therefrom, distinct from the general public. When the injury is not special a private action will not lie. No general rule can be laid down as to what constitutes a special injury. Each case necessarily depends largely upon its own facts. In border cases the line must be drawn somewhat arbitrarily.[48] A common nuisance in a navigable stream of water, which obstructs, interrupts, or prevents the continuance of a lawful business occupation existing and being conducted at the time of and before the creation of the nuisance, may

[37] Crookston etc. Co. v. Sprague, 91-461, 98+347, 99+420.

[38] Kretzschmar v. Meehan, 74-211, 77+41.

[39] Page v. Mille Lacs L. Co., 53-492, 55+608. See Swanson v. Miss. etc. Co., 42-532, 44+986; Miller v. Chatterton, 46-338, 48+1109.

[40] Miller v. Chatterton, 46-338, 48+1109; Doucette v. Little Falls I. & N. Co., 71-206, 73+847; Coyne v. Miss. etc. Co., 72-533, 75+748; Mandery v. Miss. etc. Co., 105-3, 116+1027. See § 5691.

[41] Hayward v. Knapp, 23-430.

[42] Mandery v. Miss. etc. Co., 105-3, 116+1027.

[43] Coyne v. Miss. etc. Co., 72-533, 75+748.

[44] Viebahn v. Crow Wing County, 96-276, 104+1089.

[45] Minn. C. & P. Co. v. Pratt, 101-197, 112+395.

[46] Id.

[47] Morrill v. St. Anthony Falls etc. Co., 26-222, 2+842.

[48] St. Anthony etc. Co. v. Morrison, 12-249(162); Swanson v. Miss. etc. Co., 42-532, 44+986; Lammers v. Brennan, 46-209, 48+766; Page v. Mille Lacs L. Co., 53-492, 55+608; Viebahn v. Crow Wing County, 96-276, 104+1089.

be proceeded against by private action by the person who is thus interfered with in his vested rights.[49]

6948. Criminal offence—The obstruction of navigable waters is a criminal offence.[50]

RIPARIAN RIGHTS

6949. In general—Riparian owners possess special rights in navigable waters not enjoyed by the general public.[51] The owner of land bordering on a navigable river has a right to free communication between his land and the navigable channel of the river, to build and maintain, for his own and the public use, suitable landing-places, wharves, and piers, on and in front of his land, and to extend the same therefrom into the river, to the point of navigability, even though beyond low-water mark, and to this extent exclusively to occupy, for such and like purposes, the bed of the stream, subordinate and subject only to the navigable rights of the public, and such needful rules and regulations for their protection as may be prescribed by competent legislative authority. The rights which thus belonged to him, as riparian owner of the abutting premises, are valuable property rights, of which he cannot be divested without consent, except by due process of law, and, if for public purposes, upon just compensation.[52] The fundamental right, upon which all the others depend, is the right of access to the water.[53] All persons having lands on the margin of a flowing stream have, by nature, certain riparian rights in the water of the stream, whether they exercise those rights or not, and they may begin to use them when they choose. It matters not how much the owner of land upon a stream has actually used the water, or whether he has used it at all, his right to it remains unaffected for any period of time.[54] Riparian rights depend on title to the bank or shore, and not upon title to the soil under the water.[55] Riparian owners have a right to enjoy, for the purposes of gain or pleasure, all the facilities which the location of their land with reference to the water affords. These rights exist jure naturae, because the land has, by nature the advantage of being washed by the stream.[56]

6950. Subordinate to public uses—Riparian owners on navigable waters hold their land subordinate to the public use of such waters, if such use is reasonably exercised, precisely as do the owners of land abutting on any other public highway.[57]

[49] Viebahn v. Crow Wing County, 96-276, 104+1089.

[50] R. L. 1905 § 4987; Minn. C. & P. Co. v. Koochiching Co., 97-429, 442, 107+405; Minn. C. & P. Co. v. Pratt, 101-197, 220, 112+395.

[51] Morrill v. St. Anthony Falls etc. Co., 26-222, 2+842; Lake Superior L. Co. v. Emerson, 38-406, 38+200.

[52] Rippe v. Chi. etc. Ry., 23-18; Brisbine v. St. P. etc. Ry., 23-114; Morrill v. St. Anthony Falls etc. Co., 26-222, 2+842; Weaver v. Miss. etc. Co., 28-534, 538, 11+114; Carli v. Stillwater etc. Co., 28-373, 380, 10+205; Union Depot etc. Co. v. Brunswick, 31-297, 17+626; Miller v. Mendenhall, 43-95, 44+1141; Hanford v. St. P. etc. Ry., 43-104, 42+596, 44+1144; Lamprey v. State, 52-181, 53+1139; Sanborn v. People's Ice Co., 82-43, 84+641; Reeves v. Backus, 83-339, 86+337; Webber v. Axtell, 94-375, 102+915; St. Anthony etc. Co. v. Bd. Water Comrs., 168 U. S. 349; Weems S. Co. v. People's S. Co., 214 U. S. 345.

[53] Lamprey v. State, 52-181, 197, 53+1139.

[54] Reeves v. Backus, 83-339, 86+337.

[55] Lake Superior L. Co. v. Emerson, 38-406, 38+200; Lamprey v. State, 52-181, 198, 53+1139.

[56] Lake Superior L. Co. v. Emerson, 38-406, 38+200.

[57] Morrill v. St. Anthony Falls etc. Co., 26-222, 2+842; Red River R. Mills v. Wright, 30-249, 254, 15+167; Mpls. M. Co. v. Bd. Water Comrs., 56-485, 58+33; Doucette v. Little Falls I. & N. Co., 71-206, 73+847; Coyne v. Miss. etc. Co., 72-533, 75+748.

6951. Infringement by other riparian owners—Riparian owners are bound to exercise their rights with due regard to the corresponding rights of adjacent owners.[58]

6952. Use of water—In general—Riparian owners may use the water flowing past their land for any purpose, so long as it does not impede navigation, in the absence of any counter claim by the state or United States. The limit to the private right is imposed by the public right, and the private right exists up to the point beyond which it would be inconsistent with the public right.[59]

6953. Right to accretions—Riparian owners are entitled to accretions to their lands made by the water contiguous thereto. The reasons usually given for this rule are either that it falls within the maxim de minimis non curat lex, or that because the riparian owner is liable to lose soil by the action or encroachment of the water, he should also have the benefit of any land gained by the same action. In truth the rule rests upon a much broader principle, and has a much more important purpose in view, that is, to preserve the fundamental riparian right of access to the water.[60] Land bordering on the Mississippi river having been submerged for some distance above the low-water mark by means of dams erected in the river, the owner conveyed in fee all such submerged land. It was held that the conveyance also included the riparian rights which were naturally incident thereto, among which was the right to accretions formed by gradual alluvial deposits beyond the line of low water, notwithstanding the fact that the deed also in terms granted certain easements and rights upon the shore, which may be regarded as applicable to the remaining lands of the grantor bordered by the submerged land conveyed.[61] It has been held that where a plat was made of upland and of land beneath the water, and land was sold with reference to the plat, the fact that the water gradually encroached upon one of the shore lots so as to entirely submerge it, did not vest the title thereto in the owner of the adjacent inland block.[62] A patentee from the government has been held entitled to an island connected with his shore lots by a sand bar, as against a second patentee from the government.[63]

6954. Right to relictions—Riparian owners are entitled to relictions made by the recession of water from their lands.[64]

6955. Reclamation and improvement of submerged land—A considerable extent of the shores, not only along tide-waters of the ocean coasts, but on our great inland waters, are of such a nature, out to and even beyond low-water mark, as to be in general unavailable by the public for the purposes of navigation, and must remain forever waste and useless lands, unless reclaimed by artificial means from the shallow water covering them, or unless otherwise improved. It is established beyond question in this state, and in other states as well, that the proprietor of the riparian lands may make such improvements. Subject only to the limitation that he shall not interfere with the

[58] Morrill v. St. Anthony Falls etc. Co., 26–222, 2+842 (act incorporating the St. Anthony Falls Water Power Co. did not authorize it to appropriate the water power opposite the lands of any other riparian owner).

[59] Morrill v. St. Anthony Falls etc. Co., 26–222, 2+842; State v. Mpls. M. Co., 26–229, 2+839; Hanford v. St. P. etc. Ry., 43–104, 42+596, 44+1144.

[60] Lamprey v. State, 52–181, 197, 53+1139; Webber v. Axtell, 94–375, 102+915.

[61] Mpls. T. Co. v. Eastman, 47–301, 50+82.

[62] Gilbert v. Eldridge, 47–210, 49+679. See 29 Cyc. 352.

[63] Webber v. Axtell, 94–375, 102+915 (appeal dismissed for want of jurisdiction, 203 U. S. 578).

[64] Lamprey v. State, 52–181, 53+1139; Webber v. Axtell, 94–375, 102+915; Sherwin v. Bitzer, 97–252, 106+1046.

public right of navigation, he has the unquestionable and exclusive right to construct and maintain suitable landings, piers, and wharves into the water, and up to the point of navigability, for his own private use and benefit. He is entitled to fill in and make improvements in the shallow waters in front of his land to the line of navigability, and such improvements in aid of navigation are recognized as a public as well as private benefit. These rights pertain to the use and occupancy of the soil below low-water mark, and are valuable property rights, and the exercise thereof, though subject to state regulation, can only be interfered with by the state for public purposes. The establishment of a dock or harbor line, in pursuance of legislative authority, is to be considered as giving to the owners of the upland the privilege of filling in and building out to such line.[65] The right to reclaim and improve submerged land may be separated from the riparian estate and be transferred to and enjoyed by persons having no interest in the original riparian estate.[66] A condemnation by a railway company, of the upland abutting upon water, has been held to embrace the right to reclaim, though no specific mention thereof was made.[67] Where the owner of shore-land platted it, together with the shallows beyond the shore, into town blocks and streets, and thereafter conveyed an inland block with reference to the platting, and the water having gradually encroached upon the land until the shore-line reached that block, it was held that the riparian right to reclaim and use the platted blocks and streets in the water did not attach to the block thus conveyed as incident thereto.[68]

6956. In lakes—The riparian rights of owners on lakes or other still waters are the same as those of owners on streams.[69]

6957. Estoppel—Mere delay of a riparian owner to assert his riparian rights against encroachment does not work an estoppel.[70]

6958. Intrusion of riparian owner beyond point of navigability—If a riparian owner unlawfully intrudes into the stream beyond "the point of navigability," and there fills up the bed of the stream, for the sole purpose of extending his possessions, and so as to obstruct the public right of navigation, this would constitute a purpresture which the public would have a right to abate as a public nuisance. While it would not forfeit his riparian rights as they previously existed, yet he could claim no additional rights on account of it, and when his property is taken for public use he would not be entitled to any additional or greater compensation because of it.[71]

6959. Point of navigability—Definition—The term "point of navigability," as used in this connection, is one whose meaning and application must vary with and depend upon circumstances, such as the nature of the stream and the kind and size of vessels used upon it. It is not to be limited to that point where the stream may be navigable for some purposes at certain stages of water, but must be understood as extending out into the stream sufficiently far to enable a riparian owner to make his abutting property available and

[65] Miller v. Mendenhall, 43-95, 44+1141; Union Depot etc. Co. v. Brunswick, 31-297, 17+626; Hanford v. St. P. etc. Ry., 43-104, 42+596, 44+1144; Bradshaw v. Duluth I. M. Co., 52-59, 53+1066.

[66] Hanford v. St. P. etc. Ry., 43-104, 42+596, 44+1144 (overruling Lake Superior L. Co. v. Emerson, 38-406, 38+200); Miller v. Mendenhall, 43-95, 44+1141; Gilbert v. Eldridge, 47-210, 49+679; Duluth v. St. P. etc. Ry., 49-201, 51+1163; Bradshaw v. Duluth I. M. Co., 52-59, 53+1066. See Mpls. T. Co. v. Eastman, 47-301, 50+82, 930.

[67] Hanford v. St. P. etc. Ry., 43-104, 42+596, 44+1144.

[68] Gilbert v. Eldridge, 47-210, 49+679.

[69] Lamprey v. State, 52-181, 53+1139; Webber v. Axtell, 94-375, 102+915.

[70] Morrill v. St. Anthony Falls etc. Co., 26-222, 2+842.

[71] Union Depot etc. Co. v. Brunswick, 31-297, 17+626. See, as to what constitutes a purpresture, Note, 69 Am. St. Rep. 271.

useful at any ordinary stage of water, for any kind of navigation for which the stream is used or adapted, provided, of course, he does not obstruct the paramount rights of the public. It is not material whether this is done by building out piers or docks of wood or other material, or by reclaiming the land by filling up with earth out to the requisite depth of water.[72]

6960. Who are riparian owners—One may be a riparian owner though he has not the fee of the shore. One who is entitled to the exclusive right to possess and use land abutting on navigable waters, is entitled to enjoy the riparian rights incident to the land, though he does not own the fee.[73] An owner of the fee of half of a street bordering on the Mississippi river has been held a riparian owner.[74]

LANDS UNDER NAVIGABLE WATERS

6961. Title held by state in trust—At common law, the king, as representative of the nation, held in trust for them all navigable waters, and the title to the soil under them. This was a sovereign or prerogative, and not a proprietary right. At the revolution the people of each state became sovereign, and in that capacity held all these navigable waters and the soil under them for their common use, subject only to the rights since surrendered to the general government. New states, since admitted, have the same rights in these navigable waters as the original states. Upon the admission of a new state, this right of eminent domain in them, which was temporarily held by the United States, passes to the state. The patent from the United States of land on a navigable stream conveys to the patentee no title to the bed of the stream. This vests in the state as a sovereign right. The state holds the title in a sovereign and not a proprietary capacity, and in trust for the benefit of the people. It cannot alienate its title.[75] Riparian owners are permitted to enjoy the remaining rights and privileges in the soil under water beyond their strict boundary lines, after conceding to the state all the public rights.[76] It is wholly for the state to determine the extent of its rights and the federal courts follow the decisions of the state courts.[77]

6962. Between high and low-water mark—While the title of a riparian owner in navigable or public waters extends to ordinary low-water mark, his title is not absolute except to ordinary high-water mark. As to the intervening space his title is limited or qualified by the public right. The state may use this space for the purpose of navigation, and within the well-defined banks and below ordinary high-water mark the public right is supreme.[78]

6963. Definition of high-water mark—"High-water mark," as a line between the public and riparian owners on navigable waters, where there is no ebb and flow of the tide, is to be determined by examining the bed and banks, and ascertaining where the presence and action of the water are so common and usual as to mark upon the soil of the bed a character distinct from that of the banks in respect to vegetation as well as the nature of the soil. It is co-

[72] Union Depot etc. Co. v. Brunswick, 31-297, 17+626.

[73] Hanford v. St. P. etc. Ry., 43-104, 42+596.

[74] Brisbine v. St. P. etc. Ry., 23-114.

[75] Union Depot etc. Co. v. Brunswick, 31-297, 17+626; Lake Superior L. Co. v. Emerson, 38-406, 38+200; Miller v. Mendenhall, 43-95, 44+1141; Hanford v. St. P. etc. Ry., 43-104, 42+596, 44+1144; Bradshaw v. Duluth I. M. Co., 52-59, 53+1066; Lamprey v. State, 52-181, 198, 53+1139; Witty v. Nicollet County, 76-286, 79+112; Minn. C. & P. Co. v. Koochiching Co., 97-429, 107+405.

[76] Miller v. Mendenhall, 43-95, 44+1141.

[77] Union Depot etc. Co. v. Brunswick, 31-297, 301, 17+626.

[78] In re Minnetonka Lake Improvement, 56-513, 58+295; Gniadek v. N. W. etc. Co., 73-87, 75+894.

ordinate with the limit of the bed of the water, and that only is to be considered the bed which the water occupies so long and continuously as to wrest it from vegetation and destroy its value for agricultural purposes. The bed does not include low lands which, though subject to frequent overflow, are valuable as meadows and pastures; and the state has no right, even in aid of navigation, to raise the water by artificial means, so as to injure or destroy such lands, without making compensation.[79]

CONVEYANCES AND CONTRACTS

6964. Public grants—A patent from the United States of land on navigable waters in a state passes no title to the land under the waters.[80] When the United States has disposed of the lands bordering on a meandered lake, by patent, without reservation or restriction, it has nothing left to convey, and any patent thereafter issued for land forming the bed, or former bed of the lake, is void and inoperative. Where the United States has made grants, without reservation or restriction, of public lands bounded on streams or other waters, the question whether the lands forming the beds of the waters belong to the state, or to the owners of the riparian lands, is to be determined entirely by the law of the state in which the lands lie.[81]

6965. Private grants—A grant of land bordering on navigable waters passes the riparian rights of the grantor unless expressly reserved or excepted.[82] Where a party conveys a tract of land bounded by water, it will never be presumed that he reserves to himself proprietary rights in front of the land conveyed. The intention to do so must clearly appear from the conveyance; and the mere fact that the boundary of the lot conveyed is indicated by a line on the plat will not limit the grant to the lines on the plat, or operate to reserve to the grantor proprietary rights in front of the lot.[83] Some riparian rights may be severed from the ownership of the upland and transferred separately.[84] A deed by an owner of land bordering on navigable waters, purporting to convey the soil under the waters below low-water mark, conveys nothing.[85] A grantee of land bordering on navigable waters ordinarily takes to low-water mark.[86] Cases are cited below involving the construction of particular deeds.[87]

[79] In re Minnetonka Lake Improvement, 56–513, 58+295.

[80] Union Depot etc. Co. v. Brunswick, 31–297, 300, 17+626.

[81] Lamprey v. State, 52–181, 53+1139.

[82] Mpls. T. Co. v. Eastman, 47–301, 50+82; Wayzata v. G. N. Ry., 50–438, 52+913; Gilbert v. Emerson, 55–254, 56+818; Castle v. Elder, 57–289, 59+197.

[83] Gilbert v. Emerson, 55–254, 56+818; Castle v. Elder, 57–289, 59+197.

[84] Hanford v. St. P. etc. Ry., 43–104, 42+596, 44+1144 (overruling Lake Superior L. Co. v. Emerson, 38–406, 38+200); Gilbert v. Eldridge, 47–210, 49+679; Duluth v. St. P. etc. Ry., 49–201, 51+1163; Bradshaw v. Duluth I. M. Co., 52–59, 53+1066; Gilbert v. Emerson, 55–254, 56+818; N. P. Ry. v. Scott, 73–25, 75+737. See also, Miller v. Mendenhall, 43–95, 44+1141.

[85] Lake Superior L. Co. v. Emerson, 38–406, 38+200.

[86] See § 1067.

[87] Gilbert v. Eldridge, 47–210, 49+679 (severance of riparian rights from upland—platting of shore and submerged land—conveyance of inland platted block—effect of encroachment of water to such block); Mpls. T. Co. v. Eastman, 47–301, 50+82 (conveyance of submerged land—right of grantee to accretions—estoppel); Wait v. May, 48–453, 51+471 (deed construed to include riparian rights across a street); Bradshaw v. Duluth I. M. Co., 52–59, 53+1066 (conveyance of submerged land—effect of establishment or change of dock line); Gilbert v. Emerson, 55–254, 56+818 (conveyance of submerged land—effect of plat—outermost lots on plat held to take riparian rights); Castle v. Elder, 57–289, 59+197 (deed held to convey all riparian rights—reference to a former deed held sufficient to identify it); Rasicot v. Little Falls I. & N. Co., 65–543, 68+212 (grant of boomage rights—setting

6966. Contracts—Cases are cited below involving the construction of contracts relating to riparian rights.[88]

6967. Leases—Riparian rights may be leased separate from the upland.[89]

NAVIGATION—See Navigable Waters.
NECESSARIES—See Husband and Wife, 4276; Infants, 4437.

NE EXEAT

6968. In general—A writ of ne exeat is a writ forbidding a person to leave the state until the further order of the court issuing it.[90] District courts are authorized to issue it.[91] Provision is made by rule of court for a bond by the party at whose instance it is issued.[92]

NEGATIVE EVIDENCE—See Evidence, 3238, 3319.
NEGATIVE PREGNANT—See Pleading, 7571.

back water); N. P. Ry. v. Scott, 73-25, 75+737 (plat of shore and submerged land—alley—railway right of way in trust—conveyance—shore rights appurtenant to right of way—inclusion of riparian rights); Gravel v. Little Falls I. & N. Co., 74-416, 77+217 (conveyance of right to erect certain piers, booms, and assorting works); Gridley v. Lenroot, 126+897 (deed to railway company of land along navigable river — land partly submerged).

[88] Miller v. Mendenhall, 43-95, 44+1141 (contract between riparian owners relating to plan for improvement of shore—dock line).

[89] Miller v. Mendenhall, 43-95, 44+1141.

[90] See, upon the general subject, Note, 118 Am. St. Rep. 988.

[91] R. L. 1905 § 92. See R. L. 1905 §§ 4321, 4625.

[92] Rule 22, District Court. See, as to an action on a foreign bond, Midland Co. v. Broat, 50-562, 52+972.

NEGLIGENCE

IN GENERAL

DANGEROUS PREMISES

MISCELLANEOUS FORMS OF NEGLIGENCE

PROXIMATE CAUSE

CONTRIBUTORY NEGLIGENCE

IMPUTED CONTRIBUTORY NEGLIGENCE

PRESUMPTIONS AND BURDEN OF PROOF

LAW AND FACT

Cross-References

See Agency; Animals; Bailment; Carriers; Damages; Death by Wrongful Act; Electricity; Evidence, 3331; Explosives; Fires; Gas; Highways; Landlord and Tenant; Limitation of Actions, 5654; Master and Servant; Municipal Corporations; Physicians and Surgeons; Railroads; Street Railways; Towns; Warehousemen; and other specific heads.

IN GENERAL

6969. Definition—Negligence is a failure to exercise the care required by the law under the circumstances [93]—in short, the want of due care.[94] It is often defined by the courts as the want of ordinary or reasonable care.[95] Various definitions that have met with judicial approval are cited below.[96] In charging juries the use of abstract definitions should be studiously avoided.[97] In ordinary cases, the best definition of negligence for a jury is, "the failure to exercise such care as persons of ordinary prudence usually exercise under

[93] See Clerk & Lindsell, Torts (4 ed.) 457 (negligence is the omission to take such care as under the circumstances it is the legal duty of a person to take); Williams v. Northern L. Co., 113 Fed. 382; Willes, J., Grill v. General Iron etc. Co., L. R. I. C. P. 612 (the absence of such care as it was the duty of the defendant to use); Hyman v. Nye, L. S. 6 Q. B. D. 685.

[94] Gould v. Winona G. Co., 100–258, 269, 111+254; Rase v. Mpls. etc. Ry., 107–260, 120+360; Campbell v. Duluth etc. Ry., 107–358, 120+375; Matulys v. Phil. etc. Co., 201 Pa. 70; Weir v. Herbert, 6 Kans. App. 596; Carter v. Columbia etc. Ry., 19 S. C. 20. See 5 Words & Phrases 4743.

[95] Rosenfield v. Arrol, 44–395, 46+768; Howe v. Mpls. etc. Ry., 62–71, 79, 64+102.

[96] "Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do." Provided, of course, that the party whose conduct is in question is already in a situation that brings him under the duty of taking care. Lauritsen v. Am. B. Co., 87–518, 92+475; N. P. Ry. v. Adams, 192 U. S. 440. This definition has been justly criticised. 1 Beven Neg. (3 ed.) 2; 1 Thompson, Neg. § 1; Beach, Cont. Neg. (3 ed.) § 5. "The omission to take the care which under the special circumstances of the case a reasonable and prudent man would take." Davidson v. U. S., 205 U. S. 187. "Actionable negligence consists in the neglect of the use of ordinary care or skill towards a person to whom the defendant owes the duty of observing ordinary care and skill, by which neglect the plaintiff, without contributory negligence on his part, has suffered injury to his person or property.' Brett, M. R., in Heaven v. Pender, 11 Q. B. D. 503. "Actionable negligence is the inadvertent failure of a legally responsible person to use ordinary care under the circumstances in observing or performing a non-contractual duty implied by law, which failure is the proximate cause of injury to a person to whom the duty is due." 7 A. & E. Ency. of Law (2 ed.) 370. "Negligence consists in conduct which common experience, or the special knowledge of the actor, shows to be so likely to produce the result complained of, under the circumstances known to the actor, that he is held answerable for that result, although it was not certain, intended, or foreseen." Holmes, J., Schlemmer v. Buffalo etc. Ry., 205 U. S. 1. See, for a criticism of various definitions, 1 Beven, Neg. (3 ed.) 1.

[97] Lauritsen v. Am. B. Co., 87–518, 522, 92+475; Ready v. Peavy, 89–154, 159, 94+442. See, for an approved general type of charge, Hall v. Chi. etc. Ry., 46–439, 449, 49+239.

similar circumstances." [98] The expression "ordinary care" should be avoided in charging a jury.[99] Negligence is sometimes regarded as a state of mind or form of mens rea,[1] but this is contrary to the prevailing and better view.[2] Inadvertence is sometimes regarded as an essential characteristic of negligence,[3] but this is controverted,[4] and is hardly consistent with the doctrine of wilful or wanton negligence which prevails in this state,[5] or with the prevailing objective theory of negligence.

6970. General standard of care—Ordinary or reasonable care—The general standard of care required by the law is ordinary or reasonable care. The test of ordinary or reasonable care is the degree of care which persons of ordinary prudence usually exercise under similar circumstances.[6] Ordinary care and reasonable care are synonymous.[7] It is to be observed that the standard is objective rather than subjective.[8] It is immaterial that a person charged with negligence thought that he was acting carefully or exercised his best judgment. The legal standard of conduct is not the opinion of the individual, but the conduct of an ordinarily prudent man under the circumstances.[9] What men ordinarily do is the test of prudence.[10] The non-performance of impossible things does not constitute negligence.[11]

6971. Degrees of negligence—The doctrine that there are three degrees of negligence—slight, ordinary, and gross—does not prevail in this state.[12]

6972. Ordinary or reasonable care varies with circumstances—What constitutes ordinary or reasonable care depends upon the circumstances of the particular case.[13] It must be proportionate to the danger known or reasonably to be apprehended—commensurate with the risks of the situation.[14] The

[98] See Ready v. Peavy, 89–154, 94+442 and cases under § 6970.

[99] Gould v. Winona G. Co., 100–258, 269, 111+254.

[1] See Salmond, Jurisprudence (2 ed.) § 140; Salmond, Torts, 18; Bigelow, Torts (8 ed.) 109.

[2] Pollock, Torts (8 ed.) 438; Clerk & Lindsell, Torts (4 ed.) 457.

[3] Leighton v. Grant, 20–345(298, 307); Lauritsen v. Am. B. Co., 87–518, 522, 92+475; Anderson v. Mpls. etc. Ry., 103–224, 230, 114+1123. See § 7036.

[4] Salmond, Torts, 19; Beven, Neg. (3 ed.) 5.

[5] See § 7036.

[6] Griggs v. Fleckenstein, 14–81(62, 67); Erd v. St. Paul, 22–443, 446; Kelly v. Southern Minn. Ry., 28–98, 102, 9+588; Kelly v. St. P. etc. Ry., 29–1, 4, 11+67; Kolsti v. Mpls. etc. Ry., 32–133, 19+655; O'Malley v. St. P. etc. Ry., 43–289, 291, 45+440; Armstrong v. Chi. etc. Ry., 45–85, 87, 47+459; Hall v. Chi. etc. Ry., 46–439, 449, 49+239; Bergquist v. Chandler Iron Co., 49–511, 514, 52+136; Ryder v. Kinsey, 62–85, 64+94; Lauritsen v. Am. B. Co., 87–518, 92+475; Craig v. Benedictine etc. Assn., 88–535, 540, 93+669; Stallman v. Shea, 99–422, 426, 109+824; Lake v. Shenango F. Co., 160 Fed. 887; Chi. etc. Ry. v. Mpls. etc. Ry., 176 Fed. 237.

[7] Day v. Akeley, 54–522, 528, 56+243; Lyons v. Red Wing, 76–20, 25, 78+868; Rudquist v. Empire L. Co., 104–505, 116+1019.

[8] Holmes, Common Law, 108, et seq.; The Germanic, 196 U. S. 589.

[9] Schell v. Second Nat. Bank, 14–43(34); Krippner v. Biebl, 28–139, 9+671; Staloch v. Holm, 100–276, 280, 111+264; The Germanic, 196 U. S. 589.

[10] Hunt v. Seeger, 91–264, 98+91.

[11] Faber v. St. P. etc. Ry., 29–465, 469, 13+902.

[12] Jacobus v. St. P. & C. Ry., 20–125 (110); Fonda v. St. P. C. Ry., 71–438, 74+166; Lauritsen v. Am. Bridge Co., 87–518, 522, 92+475; Powers v. Wells, 93–143, 145, 100+735; Gould v. Winona G. Co., 100–258, 269, 111+254.

[13] Johnson v. Winona etc. Ry., 11–296 (204, 213); Erd v. St. Paul, 22–443, 446; Blais v. Mpls. etc. Ry., 34–57, 59, 24+558; Reed v. Mpls. St. Ry., 34–557, 559, 27+77; Hall v. Chi. etc. Ry., 46–439, 49+239; Britton v. N. P. Ry., 47–340, 342, 50+231; Steeg v. St. P. C. Ry., 50–149, 151, 52+393; Clarkin v. Biwabik B. Co., 65–483, 67+1020; Lauritsen v. Am. B. Co., 87–518, 92+475; Stallman v. Shea, 99–422, 426, 109+824; Hahn v. Plymouth E. Co., 101–58, 111+841.

[14] Dahlberg v. Mpls. St. Ry., 32–404, 406, 21+545; Nichols v. Chi. etc. Ry., 36–452, 454, 32+176; Iltis v. Chi. etc. Ry., 40–273, 280, 41+1040; Hoye v. Chi. etc. Ry., 46–269, 48+1117; Hall v. Chi. etc. Ry., 46–439, 49+239; Day v. Akeley, 54–522, 528, 56+243; Czech v. G. N. Ry., 68–38, 42, 70+791; Riley v. Chi. etc. Ry., 71–425, 429, 74+171; Howard v. Burns, 73–

greater the danger the greater the care required,[15] but the standard remains the same—ordinary or reasonable care.[16] Reasonable care may call for the highest degree of care.[17]

6973. Necessity of duty and breach—Actionable negligence is the failure to discharge a legal duty to the person injured. If there is no duty there is no negligence. Though a defendant owes a duty to some one else, but does not owe it to the person injured, no action will lie by the latter. In other words, to maintain an action for negligence there must be shown to have existed some duty toward the party injured which the defendant has left undischarged or unfulfilled. If the duty is not owing to all persons it must affirmatively appear that the plaintiff is one of the class to whom it is owing.[18] It is not enough that an act causes injury. If an act is not a violation of law it is not actionable.[19] The ideas of negligence and duty are strictly correlative, and there is no such thing as negligence in the abstract. Negligence is simply neglect of some care which one is bound to exercise toward somebody.[20]

6974. General duty to exercise care—Doctrine of Heaven v. Pender—Whenever a person is placed in such a position with regard to another that it is obvious that if he does not use due care in his own conduct he will cause injury to that person, the duty at once arises to exercise care commensurate with the situation in which he thus finds himself to avoid such injury.[21] There is an obligation on all persons to take the care which, under the special circumstances of the case, a reasonable and prudent man would take, and the omission of such care constitutes negligence.[22]

6975. Duty of persons working together—Where several persons are engaged in the same work, in which the negligent or unskillful performance of his part by one may cause danger to the others, and in which each must necessarily depend for his safety upon the good faith, skill, and prudence of each of the others in doing his part of the work, it is the duty of each to the others engaged on the work to exercise the care and skill ordinarily employed by prudent men in similar circumstances, and he is liable for any injury occurring to any one of the others by reason of a neglect to use such care and skill.[23]

6976. Duties created by statute or ordinance—Where a statute or ordinance imposes on a person a specific duty for the protection or benefit of

356, 360, 76+202; Warren v. Mendenhall, 77–145, 152, 79+661; Lauritsen v. Am. B. Co., 87–518, 92+475; Gilbert v. Duluth G. E. Co., 93–99, 105, 100+653; Powers v. Wells, 93–143, 145, 100+735; Mattson v. Minn. etc. Ry., 95–477, 104+443; Depue v. Flatau, 100–299, 111+1; Wiita v. Interstate I. Co., 103–303, 115+169; Anderson v. Smith, 104–40, 115+743; Campbell v. Duluth & N. Ry., 107–358, 120+375.

[15] Erd v. St. Paul, 22–443, 446.

[16] Day v. Akeley, 54–522, 528, 56+243; Campbell v. Duluth & N. Ry., 107–358, 120+375.

[17] Wiita v. Interstate I. Co., 103–303, 115+169.

[18] Akers v. Chi. etc. Ry., 58–540, 60+669; Sawyer v. Mpls. etc. Ry., 38–103, 35+671; Osborne v. McMasters, 40–103, 105, 41+543; Trask v. Shotwell, 41–66, 42+699; Larson v. St. P. & D. Ry., 43–488, 45+1096; Hamilton v. Mpls. Desk Mfg. Co., 78–3, 80+693; Wickenburg v. Mpls. etc. Ry., 94–276, 102+713; Ellington v. G. N. Ry., 96–176, 104+827; N. P. Ry. v. Adams, 192 U. S. 440. See Mathews v. G. N. Ry., 81–363, 84+101.

[19] Thompson v. Dodge, 58–555, 60+545.

[20] Bowen, L. J., Thomas v. Quartermaine, 18 Q. B. D. 694.

[21] Depue v. Flatau, 100–299, 111+1; Moon v. N. P. Ry., 46–106, 109, 48+679; O'Brien v. Am. B. Co., 125+1012. See Schubert v. Clark, 49–331, 338, 51+1103. This generalization of Brett, M. R., in Heaven v. Pender, 11 Q. B. D. 503, was a mere dictum, not concurred in by the other judges, and it is apparently not the law in England. See Pollock, Torts (8 ed.) 436; Clerk & Lindsell, Torts, (4 ed.) 465; 23 Law Quarterly Rev. 230; Bigelow, Torts, (8 ed.) 164; 1 Street, Foundations of Legal Liability, 94.

[22] Davidson v. U. S., 205 U. S. 187.

[23] Griffiths v. Wolfram, 22–185; Brower v. N. P. Ry., 109–385, 124+10.

others, and he neglects to perform such duty, he is liable to those for whose protection or benefit it was imposed, for any injuries of the character which the statute or ordinance was designed to prevent proximately caused by his neglect without contributory negligence or assumption of risk on their part. The violation of the statute in such a case constitutes negligence per se. The action is not a statutory one, nor does the statute give the right of action in any other sense except that it makes an act negligent which otherwise might not be such, or at least only evidence of negligence. All that the statute does is to establish a fixed standard by which the fact of negligence may be determined. The gist of the action is still negligence, or the non-performance of a legal duty to the person injured. The violation of an ordinance has the same effect in this regard as the violation of a statute.[24] It has been held that the violation of a statute or ordinance is merely evidence of negligence—makes out a prima facie case.[25]

6977. Duties of humanity—There is no negligence unless there is a legal duty. The law is not coextensive with good morals. Duties of humanity are not enforced by law unless the relation of the parties is such as to give rise to a legal duty.[26]

6978. Different duties to different persons—One may owe two distinct duties in respect to the same thing—one of a special character to one person, growing out of special relations to him; and another, of a general character, to those who would necessarily be exposed to risk and danger from the negligent discharge of such duty.[27]

6979. Conditions at time of accident control—The question of negligence is to be determined with reference to conditions as they existed at the time of the accident and not with reference to subsequent conditions.[28]

6980. Care toward children—Ordinary or reasonable care calls for a higher degree of care toward children than toward ordinary adults.[29] But where there is no negligence the incapacity of a child who happens to be injured does not create a liability.[30]

6981. Care toward the sick and infirm—Ordinary or reasonable care calls for a higher degree of care toward the sick and infirm than toward the well and strong.[31]

[24] Bott v. Pratt, 33-323, 23+237; Osborne v. McMasters, 40-103, 41+543; Weyl v. Chi. etc. Ry., 40-350, 42+24; Dugan v. St. P. & D. Ry., 43-414, 45+851; Willis v. Mabon, 48-140, 153, 50+1110; Akers v. Chi. etc. Ry., 58-540, 60+669; Rosse v. St. P. & D. Ry., 68-216, 71+20; Baxter v. Coughlin, 70-1, 72+797; Tvedt v. Wheeeler, 70-161, 72+1062; Hamilton v. Mpls. D. Mfg. Co., 78-3, 80+693; Perry v. Tozer, 90-431, 97+137; McGinty v. Waterman, 93-242, 101+300; Wickenburg v. Mpls. etc. Ry., 94-276, 102+713; Schutt v. Adair, 99-7, 108+811; Anderson v. Settergren, 100-294, 111+279; Everett v. G. N. Ry., 100-309, 111+281; Elmgren v. Chi. etc. Ry., 102-41, 112+1067; Callopy v. Atwood, 105-80, 117+238; Davidson v. Flour City O. I. Works, 107-17, 119+483; Meshbesher v. Channellene etc. Co., 107-104, 119+428; Evans v. Chi. etc. Ry., 109-64, 122+876. See 19 Harv. L. Rev. 288.

[25] Faber v. St. P. etc. Ry., 29-465, 13+902; Mahan v. Union Depot etc. Co., 34-29, 24+293; Palmer v. St. P. & D. Ry., 38-415, 38+100; Oddie v. Mendenhall, 84-58, 86+881; Perry v. Tozer, 90-431, 97+137; Ellington v. G. N. Ry., 96-176, 104+827; Fitzgerald v. International F. T. Co., 104-138, 116+475.

[26] Depue v. Flatau, 100-299, 303, 111+1. See Pollock, Torts (8 ed.) 434; Note, 69 L. R. A. 513; 56 Am. L. Reg. 217, 316.

[27] Moon v. N. P. Ry., 46-106, 109, 48+679; O'Brien v. Am. B. Co., 125+1012.

[28] Beard v. Clarke, 35-324, 29+142; Murphy v. G. N. Ry., 68-526, 71+662; The Germanic, 196 U. S. 589.

[29] Mattson v. Minn. etc. Ry., 95-477, 482, 104+443. See McDermott v. Severe, 202 U. S. 600.

[30] Emerson v. Peteler, 35-481, 484, 29+311.

[31] Depue v. Flatau, 100-299, 111+1. See Note, 69 L. R. A. 513.

6982. Failure to follow customary practice—A failure, without notice, to conform to customary practice by which it is known others regulate their conduct often constitutes negligence. Thus it is ordinarily negligent not to give customary signals by which others regulate their conduct.[32]

6983. Sic utere tuo ut alienum non laedas—This maxim is frequently cited,[33] but its utter worthlessness as a practical guide in the decision of cases has often been pointed out.[34] The maxim restrains a man from using his own property to the prejudice of his neighbor, but is not usually applicable to a mere omission to act, but rather to some affirmative act or course of conduct which amounts to or results in an invasion of another's rights.[35] It refers to acts the effect of which extends beyond the limits of the property, and to neighbors who do not interfere with it or enter upon it.[36]

DANGEROUS PREMISES

6984. Persons on premises by invitation—The owner or occupant of premises is bound to exercise ordinary or reasonable care to keep them in a safe condition for those who come upon them by his express or implied invitation.[37] He is not an insurer of their safe condition.[38] The duty cannot be avoided by employing an independent contractor.[39]

6985. Licensees—Intruders—Firemen—The owner or occupant of premises owes no duty to keep them in a safe condition for bare licensees or intruders,[40] and this applies to firemen.[41]

6986. Trespassers—The owner or occupant of premises owes no duty to keep them in a safe condition for trespassers.[42] An exception to this general rule is made in the turntable cases.[43]

[32] Iltis v. Chi. etc. Ry., 40–273, 41+1040; Erickson v. St. P. & D. Ry., 41–500, 43+332; Anderson v. Northern M. Co., 42–424, 44+315; Moran v. Eastern Ry., 48–46, 50+930; Westaway v. Chi. etc. Ry., 56–28, 57+222; Moore v. G. N. Ry., 67–394, 69+1103; Hooper v. G. N. Ry., 80–400, 83+440; Schus v. Powers, 85–447, 89+68; Hjelm v. Western G. C. Co., 98–222, 108+803; Floan v. Chi. etc. Ry., 101–113, 111+957; Fitzgerald v. International F. T. Co., 104–138, 116+475; Allen v. Wis. C. Ry., 107–5, 119+423. See §§ 5860, 5861.

[33] Cahill v. Eastman, 18–324(292, 306 et seq.); Dorman v. Ames, 12–451(347, 363); Mathews v. St. P. etc. Ry., 18–434 (392, 397); O'Brien v. St. Paul, 25–331, 335; Rosenfield v. Newman, 59–156, 160, 60+1085; Howard v. Burns, 73–356, 76+202; Depue v. Flatau, 100–299, 303, 111+1.

[34] See 9 Harv. L. Rev. 14, 15; 11 Id. 440; Pollock, Torts (8 ed.) 110, 129.

[35] Krueger v. Ferrant, 29–385, 13+158.

[36] Ratte v. Dawson, 50–450, 52+965.

[37] Keffe v. Mil. etc. Ry., 21–207, 210; Nash v. Mpls. M. Co., 24–501, 505; Mpls. M. Co. v. Wheeler, 31–121, 16+698; Lee v. Mpls. etc. Ry., 34–225, 25+399; Trask v. Shotwell, 41–66, 42+699; Dean v. St. Paul U. D. Co., 41–360, 43+54; Ingalls v. Adams Ex. Co., 44–128, 46+325; Johnson v. Ramberg, 49–341, 51+1043; Galloway v. Chi. etc. Ry., 56–346, 57+1058; Emery v. Mpls. I. Expo., 56–460, 57+1132; Ryder v. Kinsey, 62–85, 64+94; Clarkin v. Biwabik B. Co., 65–483, 67+1020; Corrigan v. Elsinger, 81–42, 83+492; Fredenburgh v. Baer, 89–241, 94+683; Klugherz v. Chi. etc. Ry., 90–17, 95+586; Marsh v. Mpls. B. Co., 92–182, 183, 99+630; Depue v. Flatau, 100–299, 303, 111+1; Hyatt v. Murray, 101–507, 112+881; Farnsworth v. Farwell, 102–371, 113+897; Stuelpnagel v. Paper, 126+281; Larson v. Red River T. Co., 127+185; 16 Harv. L. Rev. 516.

[38] Ryder v. Kinsey, 62–85, 64+94; Larkin v. O'Neil, 119 N. Y. 221.

[39] Corrigan v. Elsinger, 81–42, 83+492; Curtis v. Kiley, 153 Mass. 123; 18 Harv. L. Rev. 144.

[40] Keffe v. Mil. etc. Ry., 21–207, 210; Schreiner v. G. N. Ry., 86–245, 90+400; Fredenburgh v. Baer, 89–241, 94+683; Klugherz v. Chi. etc. Ry., 90–17, 95+586; Hyatt v. Murray, 101–507, 112+881; McClellan v. Dow, 104–527, 116+1134. See Ingalls v. Adams Ex. Co., 44–128, 46+325; Emery v. Mpls. I. Expo., 56–460, 57+1132; Clarkin v. Biwabik B. Co., 65–483, 487, 67+1020; Mathews v. G. N. Ry., 81–363, 84+101; Lauritsen v. Am. B. Co., 87–518, 92+475; Widing v. Penn. etc. Ins. Co., 95–279, 282, 104+239; Depue v. Flatau, 100–299, 303, 111+1; 17 Harv. L. Rev. 425.

[41] Hamilton v. Mpls. etc. Co., 78–3, 80–693; New Omaha etc. Co. v. Anderson, 102+89; 18 Harv. L. Rev. 397.

[42] Trask v. Shotwell, 41–66, 42+699;

6987. Duty of shopkeeper—A shopkeeper is bound to exercise ordinary or reasonable care to keep his shop in a safe condition for his customers.[44]

6988. Places of public entertainment—A person managing and controlling a public place of amusement, which he invites the public, on payment of an admission fee, to attend, and at which place he sells to his customers and patrons intoxicating liquors, who sells such liquors to one in attendance at such place, and thereby renders him drunk and disorderly, well knowing that when in that condition he is likely to commit assaults upon others without cause or provocation, is bound to exercise reasonable care to protect his other customers and patrons from such assults and insults, and for a failure to do so is liable for damages at the suit of one assaulted and injured.[45]

6989. Doctrine of the turntable cases—It has been held in this state that a person who has dangerous machinery in an open place upon his premises is bound to exercise ordinary or reasonable care to protect young children from injury therefrom though they are trespassers, at least if he knows or ought to know that children are accustomed to play about it.[46] This doctrine is an anomaly in the law and is not to be extended. Our supreme court has refused to extend it to an injury from cars used in grading a street;[47] an injury from railway cars on a gravity sidetrack with brakes set;[48] an injury from a pond of water in a quarry;[49] an injury from the caving in of an embankment to an excavation;[50] an injury from the fall of a retaining wall;[51] an injury from fire set on a railway right of way;[52] and an injury from railway cars in a switching yard.[53] It has, however, been applied to an injury from dynamite,[54] and from an elevator in a paper mill.[01] The doctrine of contributory negligence applies here as elsewhere in the law of negligence.[55]

6990. Traps and concealed dangers—The liability of an owner or occupant of premises for concealed dangers and traps has been referred to incidently in several of our cases but not defined.[56]

6991. Open trapdoors and coalholes in sidewalks—Cases are cited below involving liability for negligence in leaving open trapdoors and coalholes in sidewalks.[57]

6992. Negligence of third party—The owner of premises, having the possession and control thereof, may be liable for an injury caused by their unsafe

Ratte v. Dawson, 50–450, 52+965; Stendal v. Boyd, 73–53, 75+735; Fredenburgh v. Baer, 89–241, 94+683; Widing v. Penn. etc. Ins. Co., 95–279, 104+239; Sullivan v. Boston etc. Ry., 156 Mass. 378. See 11 Harv. L. Rev. 349, 434.

[43] See § 6989.

[44] Johnson v. Ramberg, 49–341, 51+1043; Birnberg v. Schwab, 55–495, 56+341; Corrigan v. Elsinger, 81–42, 83+492; McQuade v. Golden Rule, 105–326, 117+484.

[45] Mastad v. Swedish Brethren, 83–40, 85+913.

[46] Keffe v. Mil. etc. Ry., 21–207; Kolsti v. Mpls. etc. Ry., 32–133, 19+655; Ekman v. Mpls. St. Ry., 34–24, 24+291; Twist v. Winona etc. Ry., 39–164, 39+402; O'Malley v. St. P. etc. Ry., 43–289, 45+440; Haesley v. Winona etc. Ry., 46–233, 48+1023; Mattson v. Minn. etc. Ry., 95–477, 104+443; Berg v. Mpls. etc. Ry., 95–404, 104+293. See 11 Harv. L. Rev. 349, 434; 12 Id. 206; 21 Id. 57; 23 Id. 491.

[47] Emerson v. Peteler, 35–481, 29+311.

[48] Haesley v. Winona etc. Ry., 46–233, 48+1023.

[49] Stendal v. Boyd, 67–279, 69+899; Id., 73–53, 75+735.

[50] Ratte v. Dawson, 50–450, 52+965.

[51] Kayser v. Lindell, 73–123, 75+1038.

[52] Erickson v. G. N. Ry., 82–60, 84+462.

[53] Ellington v. G. N. Ry., 96–176, 104+827.

[54] Mattson v. Minn. etc. Ry., 95–477, 104+443.

[01] Decker v. Itasca Paper Co., 127+183.

[55] Twist v. Winona etc. Ry., 39–164, 39+402.

[56] Keffe v. Mil. etc. Ry., 21–207, 210, 211; Dean v. St. Paul U. D. Co., 41–360, 363, 43+54; Kayser v. Lindell, 73–123, 126, 75+1038.

[57] Waters v. Pioneer F. Co., 52–474, 55+52; Wabasha v. Southworth, 54–79, 55+818; Korte v. St. Paul T. Co., 54–530, 56+246; L'Herault v. Minneapolis, 69–261, 72+73; Ray v. Jones, 92–101, 99+782; Clarke v. Phila. etc. Co., 92–418, 100+231.

and dangerous condition, though resulting from the act or negligence of a third person. The person through whose conduct or negligence the owner is thus exposed to liability is also liable to an action by the injured party at his election. And in such case, also, the parties not being in pari delicto, the owner who has been obliged to pay such damages is entitled to indemnity from the person to whose act or negligence the injury is directly chargeable. He may also, in the first instance, upon the demand of the injured party, adjust and pay the actual damages without action, and thereupon recover the same of the person who is responsible to him.[58] Where the owner of a movable scaffold erected for his employees in a building of a third party permits the same to be used by others, such owner may not actively interfere with or change its structural conditions so as to endanger the safety of one who is thus permitted to occupy it. The duty imposed upon the owner of such structure to a person permitted and licensed to use the same is properly defined as ordinary care, and should be commensurate with the risks of the situation, or such care as persons of ordinary prudence would exercise to others under the same or similar circumstances.[59] A third party may be liable even as to trespassers.[60]

6993. Contributory negligence—The doctrine of contributory negligence applies here as elsewhere in the law of negligence.[61]

6994. Cases classified as to facts—The general principles stated above have been applied in cases involving injuries from a ditch or other excavation;[62] a pond;[63] an elevator;[64] a railway turntable;[65] a platform over a canal;[66] a receptacle for boiling water;[67] a dangerous and vicious employee;[68] a truck on a railway platform;[69] a cellar stairway in the rear part of a store;[70] a window frame in an exposition building held in position by a stick resting on the floor;[71] a falling building;[72] an explosion of dynamite;[73] a counter being moved into a store;[74] a cable of a gravel train sweeping over a railway platform;[75] a falling ladder;[76] a falling retaining wall;[77] a fire on a railway right of way;[78] a manhole in a sidewalk[79] an unguarded platform in a warehouse.[01]

[58] Mpls. Mill Co. v. Wheeler, 31-121, 16+698.

[59] Lauritsen v. Am. B. Co., 87-518, 92+475.

[60] See 18 Harv. L. Rev. 150.

[61] Twist v. Winona etc. Ry., 39-164, 39+402; Johnson v. Ramberg, 49-341, 51+1043; Swanson v. Boutell, 95-138, 103+886; Woodruff v. Bearman, 108-118, 121+426.

[62] Ratte v. Dawson, 50-450, 52+965; Shannon v. Delwer, 68-138, 71+14; La Londe v. Peake, 82-124, 84+726; Fredenburgh v. Baer, 89-241, 94+683.

[63] Stendal v. Boyd, 73-53, 75+735.

[64] Trask v. Shotwell, 41-66, 42+699; Birnberg v. Schwab, 55-495, 56+341; Hamilton v. Mpls. etc. Co., 78-3, 80+693; Swanson v. Boutell, 95-138, 103+886; Farnsworth v. Farwell, 102-371, 113+897; McClellan v. Dow, 104-527, 116+1134. See Goodsell v. Taylor, 41-207, 42+873; McDonough v. Lanpher, 55-501, 57+152; Tvedt v. Wheeler, 70-161, 72+1062; Lyons v. Dee, 88-490, 93+899; Craig v. Benedictine etc. Assn., 88-535, 93+669.

[65] See §§ 6989, 8158.

[66] Nash v. Mpls. Mill Co., 24-501; Mpls. Mill Co. v. Wheeler, 31-121, 16+698.

[67] Lee v. Mpls. etc. Ry., 34-225, 25+399.

[68] Dean v. St. Paul U. D. Co., 41-360, 43+54.

[69] Ingalls v. Adams Ex. Co., 44-128, 46+325.

[70] Johnson v. Ramberg, 49-341, 51+1043.

[71] Emery v. Mpls. I. Expo., 56-460, 57+1132.

[72] Ryder v. Kinsey, 62-85, 64+94.

[73] Clarkin v. Biwabik B. Co., 65-483, 67+1020.

[74] Corrigan v. Elsinger, 81-42, 83+492.

[75] Klugherz v. Chi. etc. Ry., 90-17, 95+586.

[76] Moore v. Townsend, 76-64, 78+880.

[77] Kayser v. Lindell, 73-123, 75+1038.

[78] Erickson v. G. N. Ry., 82-60, 84+462.

[79] Woodruff v. Bearman, 108-118, 121+426.

[01] Stuelpnagel v. Paper, 126+281.

MISCELLANEOUS FORMS OF NEGLIGENCE

6995. Negligence in manufacture of articles for sale—If one engages in the business of manufacturing goods not ordinarily of a dangerous nature, to be put upon the market for sale and for ultimate use, so negligently constructs an article that by reason of such negligence it will obviously endanger the life and limb of any one who may use it, and if the manufacturer, knowing such defects, and knowing that the same are so concealed that they are not likely to be discovered, puts the article in his stock of goods for sale, he is liable for injuries caused by such negligence to one into whose hands the dangerous implement comes for use in the usual course of business, even though there is no contract relation between the latter and the manufacturer.[80]

6995a. Breach of contract—Damage to third party—Proximate cause—When the breach of a contract has resulted in proximate and substantial damages to a stranger thereto because of the negligence of one party to the contract, such damages are recoverable if the agency, causing the harm complained of, be of a noxious or dangerous kind, and the party sought to be charged as a manufacturer or contractor had knowledge of its being in such a state as would amount to a concealed danger to persons using it in an ordinary manner and with ordinary care. It is sufficient if the agency be "potentially dangerous." Its noxious or dangerous character refers not so much to its intrinsic quality as to the extremity and imminence of the peril which its ordinary use with ordinary care involves. The effect of the original wrongful act may be traced in accordance with general principles of causation through the unconscious intermediate agents who may be parties to the contract. The mere fact that the party sought to be charged has broken his contract with the other party thereto is not of itself sufficient to render him liable for consequential damages to a stranger to that contract.[81]

6996. Falling objects—Cases are cited below involving liability for injury from a falling wall,[82] building,[83] awning,[84] bundle basket in store,[85] lumber pile,[86] ice and snow from roof,[87] brick from coping on roof.[88]

6997. Unguarded openings in ice—Evidence held to show negligence in allowing cattle unnecessarily to go at large in the vicinity of a frozen lake, where they were accustomed to drink, it being known that there might be openings in the ice dangerous to cattle.[89]

6998. Leaving horses unhitched—Whether it is negligent to leave a horse unhitched in a street depends upon the circumstances, including the disposition of the horse and whether he is left under the control or observation of some

[80] Schubert v. Clark, 49–331, 51+1103; Holmvik v. Parsons, 98–424, 108+810; Wolden v. Deering, 105–259, 117+493. See Meshbesher v. Channellene etc. Co., 107–104, 119+428; O'Brien v. Am. B. Co., 125+1012; Waters v. Deselms, 212 U. S. 159; 19 Harv. L. Rev. 372.

[81] O'Brien v. Am. B. Co., 125+1012 (defendant was responsible for the erection of a bridge under contract—five or six weeks after its acceptance it collapsed while plaintiff and others were passing over it—plaintiff was seriously injured—held that under the pleadings, proof, and charge plaintiff was entitled to recover).

[82] Schell v. Second Nat. Bank, 14–43 (34).

[83] Bast v. Leonard, 15–304(235) (liability of contractor for negligence of subcontractor); Ryder v. Kinsey, 62–85, 64+94 (duty of owner defined—latent defect—presumption of negligence—burden of proof).

[84] Waller v. Ross, 100–7, 110+252.

[85] Byard v. Palace C. H. Co., 85–363, 88+998.

[86] Holly v. Bennett, 46–386, 49+189; Isherwood v. Jenkins, 84–423, 87+931.

[87] Hannem v. Pence, 40–127, 41+657.

[88] Flack v. W. U. Tel. Co., 106–337, 118+1022.

[89] La Riviere v. Pemberton, 46–5, 48+406.

one.[90] The fact that there is an ordinance against leaving horses unhitched is not conclusive.[91] but it makes out a prima facie case.[92]

PROXIMATE CAUSE

6999. In general—In order to recover in an action for negligence it must appear that the negligent act or omission charged against the defendant was the proximate cause of the injury.[93] A person is liable only for the proximate or immediate and direct results of his acts.[94] In strict logic it may be said that he who is the cause of an injury should be answerable for all the damages which flow from his causation. But any such rule would be impracticable and unjust. The law looks only to proximate and direct results.[95] Causa proxima non remota spectatur.[96] This maxim is of no practical value. It is extremely unfortunate that the word "proximate" ever gained currency in this connection. The subject of legal cause is inherently difficult, but much of its difficulty is due to the want of apt terminology.

7000. Definition—The proximate cause of injury is that which causes it directly and immediately, or through a natural sequence of events, without the intervention of another independent and efficient cause[97]—the predominant

[90] Griggs v. Fleckenstein, 14–81(62); Courternier v. Secombe, 8–299(264).

[91] Oddie v. Mendenhall, 84–58, 86+881.

[92] Bott v. Pratt, 33–323, 23+237.

[93] Nelson v. Chi. etc. Ry., 30–74, 14+360; Truntle v. North Star etc. Co., 57–52, 58+832; La Londe v. Peake, 82–124, 84+726. In the following cases the alleged act of negligence was held not the proximate cause of the injury: Renner v. Canfield, 36–90, 30+435; Swinfin v. Lowry, 37–345, 34+22; Johanson v. Howells, 55–61, 56+460; Truntle v. North Star etc. Co., 57–52, 58+832; Wood v. Chi. etc. Ry., 66–49, 68+462; Lee v. Chi. etc. Ry., 68–49, 70+857, Weisel v. Eastern Ry., 79–245, 82+576; La Londe v. Peake, 82–124, 84+726; Fezler v. Willmar etc. Ry., 85–252, 88+746; Schreiner v. G. N. Ry., 86–245, 90+400; Kemp v. N. P. Ry., 89–139, 94+439; Strobeck v. Bren, 93–428, 101+795; Hagglund v. St. Hilaire L. Co., 97–94, 106+91; Mageau v. G. N. Ry., 102–399, 113+1016; Mehalek v. Mpls. etc. Ry., 105–128, 117+250; Mageau v. G. N. Ry., 106–375, 119+200.

[94] Renner v. Canfield, 36–90, 30+435.

[95] Nelson v. Chi. etc. Ry., 30–74, 14+360; Renner v. Canfield, 36–90, 30+435.

[96] Perry v. Tozer, 90–431, 438, 97+137; Locke v. First Div. etc. Ry., 15–350(283, 300); Ransier v. Mpls. etc. Ry., 32–331, 20+332; Russell v. German etc. Co., 100–528, 534, 111+400.

[97] See Krippner v. Biebl, 28–139, 9+671; Nelson v. Chi. etc. Ry., 30–74, 14+360; Schubert v. Clark, 49–331, 51+1103; Teal v. Am. M. Co., 84–320, 87+837; Strobeck v. Bren, 93–428, 101+795; Anderson v. Settergren, 100–294, 111+279; Russell v. German etc. Co., 100–528, 111+400; Musolf v. Duluth E. E. Co., 108–369, 122+499. The proximate cause of an injury is the procuring, efficient, and predominant cause. It is not necessarily that which is nearest in point of time and place and it need not be in activity at the consummation of the injury. Russell v. German etc. Co., 100–528, 534, 111+400. The proximate cause of an event must be understood to be that which, in a natural and continuous sequence, unbroken by any new, independent cause, produces that event, and without which that event would not have occurred. 1 Shearman & Redfield, Neg. (5 ed.) § 26; Moon v. N. P. Ry., 46–106, 48+679. If the wrong and the resulting damages are not known by common experience to be naturally and usually in sequence, and the damage does not, according to the ordinary course of events, follow from the wrong, then the wrong and the damage are not sufficiently conjoined or concatenated as cause and effect to support an action. Nelson v. Chi. etc. Ry., 30–74, 14+360; Fitzgerald v. International F. T. Co., 104–138, 116+475 Proximate cause is that from which the effect might reasonably be expected to follow, without the concurrence of any unforseen circumstances. Russell v. German F. Ins. Co., 100–528, 111+400. One's misconduct is called "the proximate cause of those results which a prudent foresight might have avoided. It is called the remote cause of other results." Locke v. First Div. etc. Ry., 15–350(283, 300). It has been said that a proximate cause is one that is "near in the order of causation," Jacobus v. St. P. & C. Ry., 20–125 (110); Union Pac. Ry. v. Callaghan, 56 Fed. 988; that it is "an immediate, direct, or efficient cause," Ready v. Peavy, 89–154, 94+442; that "negligence is a

cause.[98] It is not necessarily that which is nearest in point of time or place.[99] The question always is, was there an unbroken connection between the wrongful act and the injury—a continuous operation? Did the facts constitute a continuous succession of events so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury? There may be a succession of intermediate causes, each produced by the one preceding and producing the one following. The new, intervening cause must be one not produced by the wrongful act or omission, but independent of it, and adequate to bring about the injurious result.[1] Where, in the sequence of events between the original default and the final mischief an entirely independent and unrelated cause intervenes, and is of itself sufficient to stand as the cause of the mischief, the second cause is ordinarily regarded as the proximate cause and the other as the remote cause.[2] If the original wrong only becomes injurious through some distinct wrongful act or neglect of another, the last wrong is the proximate cause and the injury should be imputed to the last wrong, and not to that which is more remote. In order to relieve the first wrongdoer, there must intervene between him and the plaintiff an independent responsible agent, breaking the causal connection.[3] Whoever does a wrongful act is answerable for all the consequences that may ensue in the ordinary and natural course of events, though such consequences are immediately and directly brought about by intervening causes, if such intervening causes are set in motion by the original wrongdoer.[4] Where an efficient, adequate cause for an injury is found, it must be considered as the true cause, unless another, not incident to it, but independent of it, is shown to have intervened.[5] Proximate is synonymous with direct and immediate.[6] Much has been written by judges and text-writers on the subject of proximate cause, but it is of slight practical value.[7] In the administration of the law it is a practical question to be determined by the jury in the exercise of practical common sense, rather than by the application of abstract definitions.[8] It is impossible to frame a satisfactory definition or general rule. The question involves considerations of physical causation, public policy, precedent, and justice, to be determined largely with reference to the facts of the particular case. The real question is, what ought to be regarded as the legal cause of an injury, or how far ought a person to be held accountable for the consequences of his negligence? The law has no definite, general answer. It must be left to the common sense of the jury, subject to the supervisory power of the court to keep the jury

proximate cause where the injury would not have occurred but for that negligence,'' Johnson v. N. W. etc. Co., 48–433, 51+225. There can be no fixed rule upon the subject that can be applied to all cases. Much must depend upon the circumstances of each particular case. Renner v. Canfield, 36–90, 30+435. See, on the subject in general, Note, 36 Am. St. Rep. 807.

[98] Russell v. German etc. Co., 100–528, 534, 111+400; Evans v. Chi. etc. Ry., 109–64, 122+876; Aetna Ins. Co. v. Boon, 95 U. S. 117.

[99] Ransier v. Mpls. etc. Ry., 32–331, 20+332; Campbell v. Railway T. Co., 95–375, 104+547; Russell v. German F. Ins. Co., 100–528, 111+400; Union Pac. Ry. v. Callaghan, 56 Fed. 988.

[1] Purcell v. St. P. C. Ry., 48–134, 50+1034. See Campbell v. Stillwater, 32–308, 20+320; Griggs v. Fleckenstein, 14–81 (62).

[2] Atchison etc. Ry. v. Calhoun, 213 U. S. 1.

[3] Moon v. N. P. Ry., 46–106, 48+679.

[4] Nelson v. Chi. etc. Ry., 30–74, 77, 14+360; Renner v. Canfield, 36–90, 30+435.

[5] Schumaker v. St. P. & D. Ry., 46–39, 48+559; Russell v. German F. Ins. Co., 100–528, 111+400.

[6] McLean v. Burbank, 11–277(189, 199); Renner v. Canfield, 36–90, 92, 30+435; Ermentrout v. Girard etc. Co., 63–305, 308, 65+635.

[7] See Russell v. German etc. Co., 100–528, 535, 111+400.

[8] Jensen v. Commodore M. Co., 94–53, 56, 101+944; Moores v. N. P. Ry., 108–100, 121+392.

within the bounds of reason.[9] In charging a jury it is desirable to use simple, colloquial language so far as possible.[10] A failure to define proximate cause has been held not prejudicial error.[11]

7001. Existence and extent of liability distinct questions—The question of proximate cause involves two questions which it is important to distinguish: first, is the defendant liable at all; second, liability for an act being established, how far in the sequence of its effects is this liability to extend? In answering the first question, the test is, ought the defendant to have foreseen under the circumstances that injury was likely to follow to some one from his act or omission? If it could not reasonably have been foreseen under the circumstances that his act or omission was likely to result in injury to any one he is not liable. In answering the second question the doctrine of foreseeable consequences does not apply. If the defendant is liable at all, he is liable for all the injurious consequences that result from his act, in an ordinary, natural sequence, unbroken by another independent efficient cause, whether such consequences were or might reasonably have been, foreseen or not.[12] In the language of Justice Holmes, "the measure of the defendant's duty, in determining whether a wrong has been committed, is one thing; the measure of liability when a wrong has been committed is another." [13]

7002. Foreseeable consequences—A wrongdoer is liable for all consequences which might reasonably have been foreseen or anticipated as likely to result from his negligent act or omission under the circumstances.[14] And he is liable for any injury naturally and proximately resulting from his act or omission though he could not reasonably have foreseen or anticipated that an injury would result in that precise form, if he ought reasonably to have anticipated that some form of injury was likely to result.[15] A person guilty of negligence should be held responsible for all the consequences which a prudent and experi-

[9] 1 Street, Foundations of Legal Liability, 110; Sedgwick, Damages (2 ed.) 41.

[10] In the generality of cases it would no doubt be sufficient to charge as follows: "The defendant cannot be held liable though he was negligent unless his negligence was the proximate cause of the injury—in other words, unless it was the chief, controlling, predominant cause. If the defendant is liable at all he is liable for all the injurious consequences resulting from his wrongful act in an ordinary, natural course of events, whether they might reasonably have been foreseen or not."

[11] Wickham v. Chi. etc. Ry., 124+639.

[12] Krippner v. Biebel, 28–139, 143, 9+671; Christianson v. Chi. etc. Ry., 67–94, 97, 69+640; Johnson v. Oakes, 124+633; 8 Columbia L. Rev. 656; 49 Am. L. Reg. 79; 1 Beven, Neg. (3 ed.) 85; 1 Street, Foundations of Legal Liability, 109–116; Sedgwick, Damages (2 ed.) 41.

[13] Spade v. Lynn etc. Ry., 172 Mass. 488.

[14] Griggs v. Fleckenstein, 14–81(62); Nelson v. Chi. etc. Ry., 30–74, 14+360; Johnson v. Chi. etc. Ry., 31–57, 16+488; Campbell v. Stillwater, 32–308, 20+320; Ransier v. Mpls. etc. Ry., 32–331, 20+332; Mahan v. Union Depot etc. Co., 34–29, 24+293; Christianson v. Chi. etc. Ry., 67–94, 69–640; Hansen v. St. Paul G. Co., 82–84, 84+727; Grant v. Brainerd, 86–126, 90+307; Perry v. Tozer, 90–431, 97+137; Strobeck v. Bren, 93–428, 101+795; Hebert v. Interstate I. Co., 94–257, 102+451; Ramsey County v. Sullivan, 94–201, 206, 102+723; Anderson v. Smith, 104–40, 115+743; Froeberg v. Smith, 106–72, 118+57; Meshbesher v. Channellene etc. Co., 107–104, 119+428.

[15] Christianson v. Chi. etc. Ry., 67–94, 69+640; Schumaker v. St. P. & D. Ry., 46–39, 48+559; Keegan v. Mpls. etc. Ry., 76–90, 78+965; Christianson v. N. W. etc. Co., 83–25, 85+826; Wallin v. Eastern Ry., 83–149, 86+76; Butler v. Williams, 84–447, 88+3; Simonson v. Mpls. etc. Ry., 88–89, 92+459; Bredeson v. Smith, 91–317, 97+977; McGinty v. Waterman, 93–242, 101+300; Jensen v. Commodore M. Co., 94–53, 101+944; Paquin v. Wis. C. Ry., 99–170, 108+882; Anderson v. Settergren, 100–294, 111+279; Wolfe v. Mpls. etc. Ry., 100–306, 111+5; Hyatt v. Murray, 101–507, 112+881; McDowell v. Preston, 104–263, 116+470; Jacobson v. Merrill, 107–74, 119+510; Arko v. Shenango F. Co., 107–220, 119+789; Evans v. Chi. etc. Ry., 109–64, 122+876; Johnson v. Oakes, 124+633; Hill v. Winsor, 118 Mass. 251; Baltimore etc. Ry. v. Kemp, 61 Md. 74, 48 Am. St. Rep. 134; Terre Haute etc. Ry. v. Buck, 96 Ind. 346, 49 Am. St. Rep. 160; 14 Harv. L. Rev. 377.

enced person, fully acquainted with all the circumstances which in fact existed, whether they could have been ascertained by reasonable diligence or not, would at the time of the negligent act have thought reasonably possible to follow if they had occurred to his mind.[16]

7003. What are natural and proximate consequences—Consequences that follow in an unbroken sequence, without an intervening efficient cause, from the original act or omission, are natural and proximate.[17]

7004. Condition or occasion not a cause—Inducing causes—It is important in this connection to observe the distinction between the cause of an injury and the occasion or condition of it—between efficient causes and mere inducing causes. Liability for negligence depends, not on the causa sine qua non, but on the causa efficiens.[18]

7005. Intervening causes—An intervening cause, to break the causal connection and free the original wrongdoer from liability must be one not produced by his wrongful act or omission, but independent of it, and adequate to effect the injury.[19] The causal connection is broken by the intervention of an efficient cause which could not reasonably have been foreseen.[20] It has been said that it must be a "responsible" agency.[21]

7006. Concurrent negligence of several—Where an injury is caused by the concurrent negligence of several persons the negligence of each is the proximate cause of the injury and each is liable for all the resultant damages, if the injury would not have occurred without his negligence.[22]

7007. Concurring causes in general—It has been said that "if damage is caused by the concurrent force of defendant's neglect and some other cause for which he is not responsible, including an act of God, he is nevertheless liable if his negligence is one of the proximate causes of the injury complained of, even though, under the particular circumstances, he was not bound to anticipate the interference of the intervening force which concurred with his own."[23]

7008. Unforeseeable accidents—A person is not liable on the ground of negligence for an act or omission if it could not reasonably have been foreseen under the circumstances that such act or omission was likely to result in injury to any one.[24] A wrongdoer is not responsible for a consequence which is merely

[16] Wallin v. Eastern Ry., 83–149, 86+76.

[17] Christianson v. Chi. etc. Ry., 67–94, 69+640; Keegan v. Mpls. etc. Ry., 76–90, 78+965; Teal v. Am. M. Co., 84–320, 87+837; Paquin v. Wis. C. Ry., 99–170, 108+882; Russell v. German F. Ins. Co., 100–528, 111+400.

[18] See Griggs v. Fleckenstein, 14–81(62); Krippner v. Biebl, 28–139, 146, 9+671; Nelson v. Chi. etc. Ry., 30–74, 76, 14+360; Ransier v. Mpls. etc. Ry., 32–331, 20+332; Purcell v. St. P. C. Ry., 48–134, 138, 50+1034; Heron v. St. P. etc. Ry., 68–542, 550, 71+706; Berg v. G. N. Ry., 70–272, 276, 73+648; Hagglund v. St. Hilaire L. Co., 97–94, 106+91; Fitzgerald v. International F. T. Co., 104–138, 116+475; Anderson v. Smith, 104–40, 115+743.

[19] Smith v. St. P. etc. Ry., 30–169, 14+797; Purcell v. St. P. C. Ry., 48–134, 50+1034; Anderson v. Settergren, 100–294, 111+279. See § 7000.

[20] Johnson v. N. W. etc. Co., 54–37, 46, 55+829. See Johnson v. Chi. etc. Ry., 31–57, 61, 16+488; Bibb v. Atchison etc. Ry., 94–269, 102+709; Atchison etc. Ry. v. Calhoun, 213 U. S. 1; Stone v. Boston etc. Ry., 171 Mass. 536.

[21] Krippner v. Biebl, 28–139, 9+671 (fire—change of wind); Moon v. N. P. Ry., 46–106, 48+679. See Moore v. Townsend, 76–64, 78+880 (ladder blown down by unusual wind).

[22] McMahon v. Davidson, 12–357(232, 249); Griggs v. Fleckenstein, 14–81(62); Johnson v. Chi. etc. Ry., 31–57, 16+488; Martin v. North Star I. Works, 31–407, 18+109; Campbell v. Stillwater, 32–308, 20+320; Flaherty v. Mp's. etc. Ry., 39–328, 40+160; Moon v. N. P. Ry., 46–106, 48+679; Johnson v. N. W. etc. Co., 48–433, 51+225; McClellan v. St. P. etc. Ry., 58–104, 59+978; King v. Chi. etc. Ry., 77–104, 79+611; Teal v. Am. M. Co., 84–320, 87+837; Perry v. Tozer, 90–431, 97+137; Campbell v. Ry. Trans. Co., 95–375, 104+547; McDowell v. Preston, 104–263, 116+470; Union Pac. Ry. v. Callaghan, 56 Fed. 988. See Atchison etc. Ry. v. Calhoun, 213 U. S. 1.

[23] Bibb v. Atchison etc. Ry., 94–269, 102+709. See Moore v. Townsend, 76–64, 78+880.

[24] Evans v. Goodrich, 46–388, 49+188;

possible, according to occasional experience, but only for a consequence which is probable, according to ordinary and usual experience. One is bound to anticipate and provide against what usually happens and what is likely to happen; but it would impose too heavy a responsibility to hold him bound in like manner to guard against what is unusual and unlikely to happen, or what, as it is sometimes said, is only remotely and slightly probable.[25]

7009. Second breaking of leg—A second breaking of a person's leg in the the same place several weeks after the first breaking has been held not so remote from the original accident as to constitute an independent injury.[26]

7010. Results of diseased conditions—If an injury is the direct cause of a diseased condition which results in paralysis the latter may be ascribed to the injury as a proximate cause.[27]

7011. Law and fact—What constitutes the proximate cause of an injury is a question for the jury, unless the evidence is conclusive,[28] to be determined by them in the exercise of practical common sense, rather than by the application of abstract definitions.[29] Whether the natural connection of events was maintained, or was broken by a new, independent cause is a question for the jury, unless the evidence is conclusive.[30]

CONTRIBUTORY NEGLIGENCE

7012. Definition—Contributory negligence is a want of ordinary or reasonable care on the part of a person injured by the negligence of another directly contributing to the injury, as a proximate cause thereof, without which the injury would not have occurred.[31] A better definition for a jury, where the negligent conduct of the two parties is contemporaneous and the fault of each relates directly and proximately to the occurrence from which the injury arises, that is, in the generality of cases, is this: Contributory negligence is a failure on the part of a person injured by the negligence of another to exercise ordinary or reasonable care to avoid the injury, without which the injury would

Freeberg v. St. Paul P. Works, 48-99, 109, 50+1026; Johanson v. Howells, 55-61, 56+460; McCallum v. McCallum, 58-288, 59+1019; Groff v. Duluth I. M. Co., 58-333, 59+1049; Christianson v. Chi. etc. Ry., 67-94, 97, 69+640; Friedrich v. St. Paul, 68-402, 71+387; Murphy v. G. N. Ry., 68-526, 71+662; Weisel v. Eastern Ry., 79-245, 82+576; La Londe v. Peake, 82-124, 84+726; Wallin v. Eastern Ry., 83-149, 86+76; Schreiner v. G. N. Ry., 86-245, 90+400; Kremkoski v. G. N. Ry., 101-501, 112+1025. See McQuade v. Golden Rule, 105-326, 117+484; Frisk v. Cannon, 126+67 (dissenting opinion).

[25] Stone v. Boston etc. Ry., 171 Mass. 536. See Atchison etc. Ry. v. Calhoun, 213 U. S. 1.

[26] Hyvonen v. Hector I. Co., 103-331, 115+167.

[27] Bishop v. St. P. C. Ry., 48-26, 50+927.

[28] Mil. etc. Ry. v. Kellogg, 94 U. S. 469; Savage v. Chi. etc. Ry., 31-419, 18+272; Ransier v. Mpls. etc. Ry., 32-331, 20+332; Bott v. Pratt, 33-323, 324, 23+237; Mahan v. Union Depot etc. Co., 34-29, 24+293; Schumaker v. St. P. & D. Ry., 46-39, 48+559; McGrath v. G. N. Ry., 76-146, 78+972; Grant v. Brainerd, 86-126, 90+307; Crandall v. Mpls. etc. Ry., 96-434, 105+185; Vik v. Red Cliff L. Co., 99-88, 108+469; Fitzgerald v. International F. T. Co., 104-138, 116+475.

[29] Jensen v. Commodore M. Co., 94-53, 101+944; Moores v. N. P. Ry., 108-100, 121+392.

[30] Purcell v. St. P. C. Ry., 48-134, 50+1034.

[31] Corbin v. Winona etc. Ry., 64-185, 66+271; Wherry v. Duluth etc. Ry., 64-415, 67+223; Flannagan v. St. P. C. Ry., 68-300, 71+379; Fonda v. St. P. C. Ry., 71-438, 451, 74+166; Craig v. Benedictine etc. Assn., 88-535, 93+669; Ready v. Peavy, 89-154, 94+442. See Pollock, Torts (8 ed.) 458; 1 Shearman & Redfield, Neg. (5 ed.) § 61; Bishop, Non-Contract Law § 459. It has been said that "contributory negligence is no more than a case of negligence, not dependent on any different rule of law, though presupposing the limitation of the issue of negligence to an inquiry as to which of two persons its final (and wrongful) impulsion is to be attributed." Fitzgerald v. International F. T. Co., 104-138, 116+475. See, as to the correctness of this statement, 21 Harv. L. Rev. 239.

not have occurred.[32] No one can justly complain of another's negligence, which, but for his own wrongful interposition, would be harmless.[33] It has been said that if the negligence of the plaintiff contributes proximately to the injury, "in any degree," no recovery can be had,[34] but such is not the law.[35] Ordinary care in this connection means such care as persons of ordinary prudence usually exercise under similar circumstances.[36] Contributory negligence is to be distinguished from assumption of risk.[37]

7013. Basis of doctrine—In the earliest cases announcing the doctrine of contributory negligence there is nothing to indicate that the court thought that a new principle was being established. Apparently the court merely applied the old principle that a plaintiff who is at fault cannot recover.[38] The ultimate justification of the doctrine is to be found in considerations of public policy—the prevention of accidents by requiring each member of the community to act up to the standard of due care set by the law.[39] The defence of contributory negligence is not a mere application to the particular facts upon which it arises of the rules governing proximity of causation, or of the right of indemnity or contribution between wrongdoers, or the voluntary assumption of a known risk, but is itself a distinct and separate exhibition of the individualism of the common law, which exhibits itself in other fields in the doctrines of consent and voluntary assumption of risk. It debars from recovery, even from an admittedly negligent defendant, one whose own social misconduct has been a concurring proximate cause of his harm. The development in the law of negligence of this idea was necessitated by the enormous growth of protective duties incident upon the extraordinary economic and mechanical changes taking place during the early part of the nineteenth century. A civilization in which the relations between individuals were few and simple, in the course of a few years, was turned into one in which individuals were thrown into a multitude of complex and novel associations. The extent of the social duties of one citizen to another became enormously enlarged. Unless each man was to be regarded as his brother's keeper, unless he was to be unduly burdened with the duty of practically insuring the world against the results of his conduct, it was necessary that the correlative duty of self-protection should be extended as a counterpoise and corrective. It was manifestly unfair that the whole burden of protective caution should be thrown on one of the two parties, or that any man should be required to take better care for others than such persons are bound to take of themselves. The duty of care for others manifestly should be no higher than the duty of self-protection.[40]

7014. Comparative negligence—The doctrine of comparative negligence does not prevail in this state.[41]

7015. Must be proximate cause of injury—The plaintiff's negligence must be proximate. That is to say, he is not to lose his remedy merely because he

[32] Pollock, Torts (8 ed.) 459; 1 Thompson, Neg. (2 ed.) § 171; Bigelow, Torts (8 ed.) 184; 2 Cooley, Torts (2 ed.) 1445; Griggs v. Fleckenstein, 14–81(62, 67); Schell v. Second Nat. Bank, 14–43(34); Brown v. Mil. etc. Ry., 22–165, 167; Hubbard v. New York etc. Ry., 72 Conn. 24; Illinois etc. Ry. v. Jones, 95 Fed. 370; Murphy v. Deane, 101 Mass. 455.

[33] Fitzgerald v. International F. T. Co., 104–138, 116+475.

[34] Corbin v. Winona etc. Ry., 64–185, 66+271. See also, Richardson v. Davis, 94–315, 102+868; Steele v. G. N. Ry., 124+978.

[35] Craig v. Benedictine etc. Assn., 88–535, 93+669.

[36] Erd v. St. Paul, 22–443; Craig v. Benedictine etc. Assn., 88–535, 93+669.

[37] See § 5966.

[38] Butterfield v. Forrester, 11 East 60 (1809); Conden v. Fentham, 2 Esp. 685 (1798); Clay v. Wood, 5 Esp. 44 (1803).

[39] 3 Harv. L. Rev. 270; Pollock, Torts (8 ed.) 460.

[40] 21 Harv. L. Rev. 254, 258.

[41] Fonda v. St. P. C. Ry., 71–438, 74+166.

has been negligent at some stage of the occurrence, though without his negligence the subsequent events might not or would not have happened; but only if he has been negligent in the final stage and at the decisive point of the event, so that the mischief, as and when it happens, is immediately due to his own want of care and not to the defendant's.[42] There are two essential elements of contributory negligence, want of ordinary care and causal connection between the act and the injury complained of. When the act and the injury are not known, by common experience, to be actually and usually in sequence, and the injury does not, according to the ordinary course of events, follow from the act, then the act and the injury are not sufficiently connected to make the act the proximate cause of the injury. The distinction between a cause and a condition is to be made here as elsewhere in the law of negligence.[43]

7016. Simultaneous and successive acts of negligence—A distinction is to be made between cases where the negligent acts are simultaneous, or substantially so, and cases where they are successive. Where the negligent acts are simultaneous the rule is that if the plaintiff could by the exercise of ordinary or reasonable care have avoided the accident he cannot recover. Where the negligent acts are successive the rule is that he who has the last chance of avoiding the accident, by the exercise of ordinary or reasonable care, is solely responsible for it, notwithstanding the negligence of the other party.[44]

7017. Last chance doctrine—It is sometimes laid down broadly that a plaintiff may recover, notwithstanding his contributory negligence, if the defendant might, by the exercise of ordinary or reasonable care on his part, have avoided the consequences of such negligence.[45] This rule, which is commonly known as the last chance doctrine, does not prevail in this state, at least in the broad form just stated.[46] In a case in which the doctrine was invoked our court refused to recognize it and said, "any such rule, in cases of concurrent negligence proximately contributing to the injury, would practically do away with the doctrine of contributory negligence." [47] In this state the doctrine applies, if at all, only where the negligence of the plaintiff precedes that of the defendant. Where the negligence of both is contemporaneous and the fault of each operates directly to cause the injury neither can recover from the other.[48] Of course it is settled law in this state, as it is elsewhere, that a plaintiff may recover, notwithstanding his contributory negligence, if the defendant might, by the exercise of ordinary or reasonable care on his part, after discovering the plaintiff in a position of danger, have avoided the accident.[49] But this is not

[42] Pollock, Torts (8 ed.) 459.

[43] Fitzgerald v. International F. T. Co., 104–138, 116+475.

[44] Pollock, Torts (8 ed.) 468; Fonda v. St. P. C. Ry., 71–438, 451, 74+166; Murphy v. Deane, 101 Mass. 455; Boston etc. Co. v. McDuffey, 79 Fed. 734; Vizacchero v. Rhode Island Co., 69 L. R. A. 188 and cases under § 7017.

[45] Bigelow, Torts (8 ed.) 185; 21 Harv. L. Rev. 259; Notes, 55 L. R. A. 418; 63 L. R. A. 238; Grand Trunk Ry. v. Ives, 144 U. S. 408; Inland etc. Co. v. Tolson, 139 U. S. 551; Chunn v. City etc. Ry., 207 U. S. 302 (note that the language in this case is more guarded than in the earlier federal cases). Little Rock etc. Co. v. Billings, 173 Fed. 903. See Fonda v. St. P. C. Ry., 71–438, 74+166; Courtney v. Mpls. etc. Ry., 97–69, 73, 106+90; Hjelm v. Western G. C. Co., 98–222, 226, 108+803; Anderson v. Mpls. etc. Ry., 103–224, 114+1123 (dissenting opinion).

[46] Anderson v. Mpls. etc. Ry., 103–224, 114+1123; Fonda v. St. P. C. Ry., 71–438, 451, 74+166.

[47] Fonda v. St. P. C. Ry., 71–438, 451, 74+166.

[48] Fonda v St. P. C. Ry., 71–438, 451, 74+166; Murphy v. Deane, 101 Mass. 455; Boston etc. Co. v. McDuffy, 79 Fed. 734; Gilbert v. Erie Ry., 97 Fed. 747; Rider v. Syracuse R. T. Ry., 171 N. Y. 141; Dyerson v. Union Pac. Ry., 87 Pac. 680. See Note, 7 L. R. A. (N. S.) 132.

[49] Fonda v. St. P. C. Ry., 71–438, 74+166; Sloniker v. G. N. Ry., 76–306, 79+168; Rawitzer v. St. P. C. Ry., 93–84, 100+664; Hjelm v. Western etc. Co., 98–222, 108+803; Anderson v. Mpls. etc. Ry.,

the last chance doctrine.[50] There are practical objections to that doctrine[51] and the latest utterance of the federal supreme court on the subject indicates an intention to abandon it.[52] It is an archaic survival.[53]

7018. Appreciation of risk unnecessary—No one voluntarily and unnecessarily incurs a danger which he knows to exist without expecting to escape. In all cases of conscious self-exposure there is a failure to realize the extent or degree of the risk. But the act is none the less contributory negligence if the party fails to exercise ordinary or reasonable care.[54]

7019. Ignorance of danger—If the injured person had no knowledge of the danger causing the injury, and could not by the exercise of reasonable care have discovered it, he cannot be charged with contributory negligence. But if the knowledge would have been discovered by the exercise of reasonable care he may be chargeable with contributory negligence though he was ignorant of the danger.[55]

7020. Sudden emergency—Imminent peril—Distracting circumstances—Where, through the negligence of another, a person is suddenly placed in a position of great and imminent peril in which he is compelled, in a state of fear, excitement, and bewilderment, and under distracting circumstances, to act instantly in an endeavor to escape, he is not chargeable as a matter of law with contributory negligence if he puts himself into a position of still greater peril and is injured. Contributory negligence is not made out in such a case by showing that the person seeking to recover might have escaped harm by pursuing some other available course. It seems that such conduct may be regarded as not constituting contributory negligence either because it is the natural and proximate consequence of the negligence of the other party or because it does not fall below the standard of conduct required by law—the conduct of the man of ordinary prudence.[56] The principle applies only where the party charged with causing the injury committed acts which were the proximate cause of placing the injured party in the position of peril and emergency. It has no application where the injured party was negligent in putting himself in the position of peril.[57]

103-224, 114+1123; Black v. New York etc. Ry., 193 Mass. 448; Chunn v. City etc. Ry., 207 U. S. 302.

[50] See 3 Harv. L. Rev. 277.

[51] See 3 Harv. L. Rev. 263 (same article with additional citations in 26 Canada Law Journal 130); 16 Id. 365; 18 Id. 537; 6 N. Y. Bar Assn. 198; 2 Law Quarterly Rev. 507; 55 L. R. A. 418; Beach, Cont. Neg. (3 ed.) § 11; 1 Thompson, Neg. (2 ed.) § 231; Bishop, Non-Contract Law, § 463, note; Chicago etc. Ry. v. Lilley, 93+1012.

[52] Chunn v. City etc. Ry., 207 U. S. 302 (note that the language in this case is more guarded than in the earlier cases). See Little Rock etc. Co. v. Billings, 173 Fed. 903.

[53] 21 Harv. L. Rev. 259.

[54] Twist v. Winona etc. Ry., 39-164, 39+402.

[55] Russell v. Mpls. etc. Ry., 83-304, 86+346.

[56] Wilson v. N. P. Ry., 26-278, 3+333; Smith v. St. P. etc. Ry., 30-169, 14+797; Mark v. St. P. etc. Ry., 30-493, 16+367; Loucks v. Chi. etc. Ry., 31-526, 532, 18+651; Erickson v. St. P. & D. Ry., 41-500, 506, 43+332; Beanstrom v. N. P. Ry., 46-193, 196, 48+778; Purcell v. St. P. C. Ry., 48-134, 138, 50+1034; Piper v. Mpls. St. Ry., 52-269, 53+1060; Slette v. G. N. Ry., 53-341, 55+137; Delude v. St. P. C. Ry., 55-63, 67, 56+461; Corbin v. Winona etc. Ry., 64-185, 189, 66+271; Fonda v. St. P. C. Ry., 71-438, 445, 74+166; Munch v. G. N. Ry., 75-61, 66, 77+541; Winczewski v. Winona & W. Ry., 80-245, 248, 83+159; Larson v. Mpls. etc. Ry., 85-387, 88+994; Plaunt v. Ry. Trans. Co., 86-506, 91+19; Baly v. St. P. C. Ry.. 90-39, 95+757; Peterson v. Mpls. St. Ry., 90-52, 95+751; Dolson v. Dunham, 96-227, 104+964; O'Brien v. St. P. C. Ry., 98-205, 208, 108+805; Raasch v. Elite L. Co., 98-357, 365, 108+477; Farrell v. G. N. Ry., 100-361, 366, 111+388; Arko v. Shenango F. Co., 107-220, 119+789; Spencer v. Albert Lea B. & T. Co., 107-403, 120+370, 687.

[57] Winczewski v. Winona & W. Ry., 80-245, 251, 83+159; Gallagher v. N. P. Ry., 94-64, 67, 101+942.

7021. Conduct not to be judged by results—The plaintiff's conduct is to be judged with reference to conditions as they existed at the time of the accident. A person is not to be deemed guilty of contributory negligence merely because it is apparent, in the light of results and subsequent events, that he might have avoided the accident by taking another course.[58]

7022. Assumption as to conduct of others—A person may act, within reasonable limits, on the assumption that others will exercise due care.[59]

7023. Risking known danger—If a person rashly, recklessly, and unnecessarily exposes himself to a known and imminent danger, in a manner that a person of ordinary prudence would not do under the circumstances, he cannot recover. But it is not always negligent, as a matter of law, for a person to run the risk of a known danger. He may do so without being guilty of contributory negligence if a man of ordinary prudence might do so under the circumstances. Whether a person is guilty of contributory negligence in running such a risk depends upon the circumstances and is a question for the jury, unless the evidence is conclusive.[60] A greater degree of care is required in avoiding an apparently imminent and reasonably certain danger than one of a less certain or doubtful character.[61] It has been said that a failure under ordinary circumstances, to make diligent use of the available means at one's command to avoid a known and apprehended danger, where it is apparent that such danger might have been avoided if such means had been so used, is to be regarded as concurring negligence, and so declared by the court.[62] Inattention to a previously known danger does not always constitute contributory negligence as a matter of law.[63]

7024. Failure to notify others of position of peril—If a person assumes a position of danger in which he is likely to be injured by the acts of others who are unaware of his position, he will generally be charged with contributory negligence if he fails to notify them of his position.[64]

7025. Attempting to save life or property—One may incur very great risk in an attempt to save human life without being charged with contributory negligence. The degree of risk that may be incurred to save property varies with its value. Here, as elsewhere, the question of contributory negligence is for the jury, unless the evidence is conclusive.[65]

7026. Using one's own property—One cannot be driven from the use of his own property by the negligence of his neighbor. He may use it though it is in an exposed condition and the fact of its exposure does not relieve his

[58] Murphy v. G. N. Ry., 68–526, 71+662; Walker v. St. P. C. Ry., 81–404, 84+222; Oddie v. Mendenhall, 84–58, 86+881; Larson v. Mpls. etc. Ry., 85–387, 88+994; Plaunt v. Ry. Trans. Co., 86–506, 91+19.

[59] Loucks v. Chi. etc. Ry., 31–526, 18–651; Iltis v. Chi. etc. Ry., 40–273, 281, 41+1040; Svendsen v. Alden, 101–158, 162, 112+10.

[60] Schell v. Second Nat. Bank, 14–43 (34); Carroll v. Minn. Valley Ry., 14–57(42); Erd v. St. Paul, 22–443; Estelle v. Lake Crystal, 27–243, 6+775; Kelly v. Southern Minn. Ry., 28–98, 9+588; McKenzie v. Northfield, 30–456, 16+264; Martin v. North Star I. Works, 31–407, 18+109; Taylor v. Austin, 32–247, 20+157; Stoker v. Minneapolis, 32–478, 21+557; Nichols v. Minneapolis, 33–430, 23+868; La Riviere v. Pemberton, 46–5, 48+406; Wright v. St. Cloud, 54–94, 55+819; Wherry v. Duluth etc. Ry., 64–415, 67+223; Hudon v. Little Falls, 68–463, 71+678; Berg v. G. N. Ry., 70–272, 73+648; Lyons v. Red Wing, 76–20, 78+868; Anderson v. St. Cloud, 79–88, 81+746; Williams v. Mpls. St. Ry., 88–79, 92+479; Borchardt v. People's Ice Co., 106–134, 118+359.

[61] Erd v. St. Paul, 22–443.

[62] Brown v. Mil. & St. P. Ry., 22–165. See also, Griggs v. Fleckenstein, 14–81 (62); Bean v. Keller, 107–162, 119+801.

[63] Maloy v. St. Paul, 54–398, 56+94; Williams v. Mpls. St. Ry., 88–79, 92+479; Borchardt v. People's Ice Co., 106–134, 118+359.

[64] Cleary v. Dakota P. Co., 71–150, 73+717, 1099; Carroll v. Minn. Valley Ry., 14–57(42).

[65] Berg v. G. N. Ry., 70–272, 73+648; Carroll v. Minn. Valley Ry., 14–57(42).

neighbor from the exercise of due care. But one has no right to invite peril, or to run into danger recklessly, even on his own property.[66]

7027. Illegal conduct—The fact that the injured person was doing an illegal act at the time of the accident does not in itself constitute contributory negligence.[67]

7028. Drunkenness—The fact that a person when injured was drunk does not constitute contributory negligence per se, but it is a circumstance that may be considered in determining whether he was in the exercise of due care.[68]

7029. Children—A child of such tender years as to be incapable of exercising any judgment or discretion cannot be charged with contributory negligence. But where a child has attained such an age as to be capable of exercising his judgment and discretion, he is responsible for the exercise of such a degree of care and vigilance as might reasonably be expected of one of his age and mental capacity. The fact that he may not have the mature judgment of an adult will not excuse a child from exercising the degree of judgment and discretion which he possesses, or for disregarding the warnings and orders of his seniors, and heedlessly rushing into known danger.[69] A child over seven years of age must be expected to exercise some degree of care.[70]

7030. Old people—The same rules that apply to children apply to old people whose senses are blunted and mental faculties impaired by age. All that the law requires of them is a degree of care commensurate with their age and discretion.[71]

7031. Actions under statutes—The doctrine of contributory negligence applies to actions under statutes as well as at common law unless it is clear that the intention of the legislature was otherwise.[72]

7032. Burden of proof—Presumption of due care—The burden of proving contributory negligence is on the defendant.[73] But if it appears from the plaintiff's evidence it will defeat a recovery.[74] The presumption is that the plaintiff, or person injured, was in the exercise of due care at the time of the injury,[75] unless the evidence clearly shows the contrary.[01]

[66] Schell v. Second Nat. Bank, 14-43 (34); Martin v. North S. I. Works, 31-407, 18+109.

[67] Opsahl v. Judd, 30-126, 14+575; Strutzel v. St. P. C. Ry., 47-543, 50+690; Oddie v. Mendenhall, 84-58, 86+881; Mullane v. St. P. C. Ry., 104-153, 116+354. See Hocum v. Weitherick, 22-152; 18 Harv. L. Rev. 505.

[68] Lyons v. Dee, 88-490, 93+899. See McKillop v. Duluth St. Ry., 57-408, 59+481; Shannon v. Delwer, 68-138, 71+14; Parker v. Winona & St. P. Ry., 83-212, 86+2; Black v. New York etc. Ry., 193 Mass. 448; Little Rock etc. Co. v. Billings, 173 Fed. 903. See Note, 25 Am. St. Rep. 39.

[69] St. Paul v. Kuby, 8-154(125); Keffe v. Mil. & St. P. Ry., 21-207, 214; Ludwig v. Pillsbury, 35-256, 28+505; Twist v. Winona etc. Ry., 39-164, 39+402; Hepfel v. St. P. etc. Ry., 49-263, 51+1049; Henderson v. St. P. & D. Ry., 52-479, 55+53; Powers v. Chi. etc. Ry., 57-332, 59+307; Barg v. Bousfield, 65-355, 68+45; Jackson v. St. P. C. Ry., 74-48, 76+956; Fezler v. Willmar, etc. Ry., 85-252, 88+746; Benedict v. Mpls. etc. Ry., 86-224, 90+360; Mattes v. G. N. Ry., 95-386, 104+234; Mattson v. Minn. etc. Ry., 95-477, 104+443; Mastey v. Villaume, 104-186, 116+207; Jacobson v. Merrill, 107-74, 119+510; Bailey v. Grand Forks L. Co., 107-207, 119+787; Force v. Standard S. Co., 160 Fed. 992. See Decker v. Itasca Paper Co., 127+183.

[70] Hepfel v. St. P. etc. Ry., 49-263, 51+1049.

[71] Johnson v. St. P. C. Ry., 67-260, 69+900. See Peterson v. Mpls. St. Ry., 90-52, 95+751.

[72] Schutt v. Adair, 99-7, 108+811.

[73] Hocum v. Weitherick, 22-152; Whittier v. Chi. etc. Ry., 24-394; Wilson v. N. P. Ry., 26-278, 3+333; Clark v. Chi. etc. Ry., 28-69, 9+75; Shannon v. Delwer, 68-138, 71+14; Parson v. Lyman, 71-34, 73+634; Bremer v. St. P. C. Ry., 107-326, 120+382.

[74] Hocum v. Weitherick, 22-152; Greene v. Mpls. etc. Ry., 31-248, 253, 17+378; Parson v. Lyman, 71-34, 73+634.

[75] Lillstrom v. N. P. Ry., 53-464, 55+624; Searfoss v. Chi. etc. Ry., 106-490, 119+66; Hawkins v. G. N. Ry., 107-245, 119+1070; Peterson v. Merchants' El. Co., 126+534.

[01] Carlson v. Duluth St. Ry., 126+825.

7033. Law and fact—Whether a person is guilty of contributory negligence or not is a question for the jury, unless the evidence is conclusive.[76] The respective provinces of court and jury are the same here as in the case of negligence.[77]

7034. Question on appeal—The supreme court is not disposed to reverse a case on the ground that the evidence shows that the plaintiff was guilty of contributory negligence unless such negligence appears very clearly.[78]

7035. Effect—Contributory negligence defeats a recovery unless the injury was wilful or wanton.[79] One cannot recover damages for an injury to the commission of which he has directly contributed; and it matters not whether that contribution consists in his participation in the direct cause of the injury, or in his omission of duties which, if performed, would have prevented it. If his fault, whether of omission or commission, has been a proximate cause of the injury, he is without remedy against another also in the wrong.[80]

7036. Wilful or wanton negligence or injury—Contributory negligence is no defence to an action for wilful or wanton negligence or injury. Wilful or wanton negligence, in this connection, means "a reckless disregard of the safety of the person or property of another, by failing, after discovering the peril, to exercise ordinary care to prevent the impending injury." [81] While the term "wilful or wanton negligence" means something more than simply "negligence," or even "gross negligence," it does not necessarily include the element of malice, or an actual intent to injure another.[82] It is a failure, after, and not before, discovering the peril, to exercise ordinary or reasonable care to avoid the impending injury.[83] Evidence merely showing negligence—a want of ordinary or reasonable care—will not sustain a finding of wilful or wanton negligence and the court should not submit the question to the jury.[84] In many cases it has been held that the evidence failed to show wilful or wanton negligence.[85] In a few cases the evidence has been held sufficient to sustain a finding of wilful or wanton negligence; [86] or to require its submission to the jury.[87]

[76] Erd v. St. Paul, 22-443; Donaldson v. Mil. etc. Ry., 21-293; Brown v. Mil. etc. Ry., 22-165; Abbett v. Chi. etc. Ry., 30-482, 16+266; Hermeling v. Chi. etc. Ry., 105-136, 117+341; Bremer v. St. P. C. Ry., 107-326, 120+382. See § 7048.

[77] See § 7048.

[78] Schmidt v. G. N. Ry., 83-105, 85+935.

[79] Carroll v. Minn. Valley Ry., 13-30 (18); Griggs v. Fleckenstein, 14-81(62); Alger v. Duluth etc. Co., 93-314, 101+298.

[80] Elmgren v. Chi. etc. Ry., 102-41, 112+1067.

[81] Johnson v. Truesdale, 46-345, 48+1136; Studley v. St. P. & D. Ry., 48-249, 51+115; Fonda v. St. P. C. Ry., 71-438, 74+166; Sloniker v. G. N. Ry., 76-306, 79+168; Lando v. Chi. etc. Ry., 81-279, 83+1089; Rawitzer v. St. P. C. Ry., 93-84, 100+664; Id., 98-294, 108+271; Alger v. Duluth etc. Co., 93-314, 101+298; Teal v. St. P. C. Ry., 96-379, 104+945; Gibbons v. N. P. Ry., 99-142, 108+471; Anderson v. Mpls. etc. Ry., 103-224, 114+1123.

[82] Sloniker v. G. N. Ry., 76-306, 79+168; Alger v. Duluth etc. Co., 93-314, 101+298; Anderson v. Mpls. etc. Ry., 103-224, 114+1123.

[83] Anderson v. Mpls. etc. Ry., 103-224, 114+1123.

[84] Johnson v. Truesdale, 46-345, 48+1136; Lando v. Chi. etc. Ry., 81-279, 83+1089.

[85] Donaldson v. Mil. etc. Ry., 21-293; Denman v. St. P. & D. Ry., 26-357, 4+605; Scheffler v. Mpls. etc. Ry., 32-518, 21+711; Johnson v. Truesdale, 46-345, 48+1136; Pettit v. G. N. Ry., 58-120, 59+1082; Judson v. G. N. Ry., 63-248, 65+447; Thompson v. Chi. etc. Ry., 64-159, 66+265; Wherry v. Duluth etc. Ry., 64-415, 67+223; Lee v. Chi. etc. Ry., 68-49, 70+857; Fonda v. St. P. C. Ry., 71-438, 74+166; Arine v. Mpls. etc. Ry., 76-201, 78+1108; Guthrie v. G. N. Ry., 76-277, 79+107; Gagne v. Mpls. St. Ry., 77-171, 79+671; Lando v. Chi. etc. Ry., 81-279, 83+1089; Russell v. Mpls. St. Ry., 83-304, 86+346; Olson v. N. P. Ry., 84-258, 87+843; Baly v. St. P. C. Ry., 90-39, 95+757; Alger v. Duluth etc. Co., 93-314, 101+298; McGillis v. Duluth etc. Ry., 95-363, 104+231; Ellington v. G. N. Ry., 96-176, 104+827; Gibbons v. N. P. Ry., 99-142, 108+471.

[86] Evarts v. St. P. etc. Ry., 56-141, 57+459; Sloniker v. G. N. Ry., 76-306, 79+168.

[87] Rawitzer v. St. P. C. Ry., 93-84, 100+664.

If a party seeks to recover for wilful or wanton negligence he must frame his complaint accordingly.[88] It is to be regretted that our supreme court will not abandon the use of the misleading expression "wilful or wanton negligence." It is a misnomer. Negligence is usually the result of inadvertence. An act done with a consciousness of probable results and reckless indifference to them contains another element besides mere inadvertence characteristic of negligence. Wantonness is as reprehensible as intentional wrong doing and should be classed with it. What is really meant by wilful or wanton negligence is wilful or wanton injury—a distinct tort, independent of negligence. If what was meant was negligence contributory negligence would be a defence. A wilful injury is an injury inflicted intentionally, using the language in its ordinary, untechnical sense. A wanton injury is an injury resulting from conduct showing a reckless disregard of the safety of person or property known to be in a position of peril from such conduct.[89]

IMPUTED CONTRIBUTORY NEGLIGENCE

7037. In general—Negligence in the conduct of another will not be imputed to a party if he neither authorized such conduct, nor participated therein, nor had the right or power to control it. If, however, two or more persons unite in the joint prosecution of a common purpose under such circumstances that each has authority, expressed or implied, to act for all in respect to the conduct or the means or agencies employed to execute such common purpose, the negligence of any one of them in the management thereof will be imputed to all of the others.[90]

7038. Driver of vehicle and passenger—The negligence of the driver of a vehicle is not imputed to a passenger unless the passenger has control over the driver or they are engaged in a joint enterprise. The passenger is bound to exercise ordinary or reasonable care and if he is personally guilty of contributory negligence he cannot recover.[91]

7039. Master and servant—The contributory negligence of a servant is imputed to his master.[92]

7040. Carrier and passenger—The negligence of a railway company in the management of a train is not imputed to a passenger on the train.[93]

[88] Anderson v. Mpls. etc. Ry., 103–224, 114+1123.

[89] 18 Harv. L. Rev. 536; 17 Id. 428; 21 Id. 257; 7 A. & E. Ency. Law (2 ed.) 443; Beach, Cont. Neg. (3 ed.) § 62; Anderson v. Mpls. etc. Ry., 103–224, 114+1123 (dissenting opinion); Rideout v. Winnebago T. Co., 101+672. In Wyman v. N. P. Ry., 34–210, 212, 25+349 and Evarts v. St. P. etc. Ry., 56–141, 146, 57+459, the wrong is properly called a wilful or wanton injury.

[90] Koplitz v. St. Paul, 86–373, 90+794. See 18 Harv. L. Rev. 219.

[91] Follman v. Mankato, 35–522, 29+317 (plaintiff riding in private carriage driven by owner); Howe v. Mpls. etc. Ry., 62–71, 64+102 (id.); Johnson v. St. P. C. Ry., 67–260, 69+900 (id.); Finley v. Chi. etc. Ry., 71–471, 74+174 (husband and wife); Wosika v. St. P. C. Ry., 80–364, 83+386 (young woman riding with young man who had engaged vehicle for the day); Lammers v. G. N. Ry., 82–120, 84+728 (husband and wife); Cunningham v. Thief River Falls, 84–21, 86+763 (plaintiff riding by invitation in private carriage driven by another); Oddie v. Mendenhall, 84–58, 86+881 (driver leaving horse unhitched with plaintiff, a woman, in the carriage); Koplitz v. St. Paul, 86–373, 90+794 (plaintiff a young woman riding in an omnibus hired by young men of a picnic party); Teal v. St. P. C. Ry., 96–379, 104+945 (husband and wife); Cotton v. Willmar etc. Ry., 99–366, 109+835 (plaintiff hiring livery team with driver); Heidemann v. St. P. C. Ry., 105–48, 117+226 (negligence of driver imputed to passenger as a matter of law); Liabraaten v. Mpls. etc. Ry., 105–207, 117+423 (unmarried woman twenty-three years old riding with her father).

[92] La Riviere v. Pemberton, 46–5, 48+406.

[93] Flaherty v. Mpls. etc. Ry., 39–328, 40+160.

7041. Parent, guardian, or custodian of child—The negligence of a parent, guardian, or custodian of a child non sui juris, which contributes with the negligence of a third person to the injury of the child, is not a defence to an action by the child against such third person for his negligence.[94] Formerly the rule was otherwise in this state.[95]

PRESUMPTIONS AND BURDEN OF PROOF

7042. No presumption of negligence—As a general rule no presumption of negligence arises from the mere happening of an accident and resulting injury.[96] The general presumption is that a person does his duty and is not negligent.[97]

7043. Burden of proof—As a general rule the plaintiff has the burden of proving the negligence of the defendant and the causal connection between such negligence and the injury alleged.[98] He has the burden of proving that an injury was inflicted wilfully or wantonly.[99]

7044. Res ipsa loquitur—The mere fact that an accident happens has no tendency to prove negligence, but an accident may be of such a nature as to raise a presumption of negligence. It often occurs that, in proving the particulars of the accident, its cause is revealed, and thereby competent and sufficient proof of negligence furnished. Where the thing causing the accident is shown to be in the possession and under the control of the defendant, and the accident is such as in the ordinary course of things does not happen if those who have the management use due care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of such care.[1] It is sometimes applicable between master and servant.[2] The maxim at most raises a prima facie case of negligence, which is rebuttable. No presumption of negligence necessarily follows the plaintiff through the case, so as to compel the submission of the question of fact to the jury.[3]

7045. Bursting of steamboat boiler—By an early federal statute the bursting of a steamboat boiler was made prima facie evidence of negligence in certain cases.[4]

[94] Mattson v. Minn. etc. Ry., 95-477, 104+443.

[95] Fitzgerald v. St. P. etc. Ry., 29-336, 13+168. See St. Paul v. Kuby, 8-154 (125); Reed v. Mpls. St. Ry., 34-557, 27+77; O'Malley v. St. P. etc. Ry., 43-289, 45+440; Gunderson v. N. W. El. Co., 47-161, 49+694; Weissner v. St. P. C. Ry., 47-468, 50+606; Strutzel v. St. P. C. Ry., 47-543, 50+690.

[96] Murphy v. G. N. Ry., 68-526, 71+662; Johnson v. Walsh, 83-74, 85+910; Kohout v. Newman, 96-61, 104+764.

[97] St. Paul v. Kuby, 8-154(125); Locke v. First Div. etc. Ry., 15-350(283, 295); Shannon v. Delwer, 68-138, 71+14.

[98] Larson v St. P. & D. Ry., 43-488, 45+1096; Rosenfield v. Arrol, 44-395, 46+768; Orth v. St. P. etc. Ry., 47-384, 50+363; Briggs v. Mpls. St. Ry., 52-36, 53+1019; Koslowski v. Thayer, 66-150, 68+973; La Londe v. Peake, 82-124, 84+726; Johnson v. Walsh, 83-74, 85+910; Simonson v. Mpls. etc. Ry., 88-89, 92+459; Rogers v. Mpls. etc. Ry., 99-34, 108+868; Parmelee v. Tri-State T. & T. Co., 103-530, 115+1135; Bruckman v. Chi. etc. Ry., 125+263.

[99] Arine v. Mpls. etc. Ry., 76-201, 78+1108.

[1] Ryder v. Kinsey, 62-85, 64+94; Olson v. G. N. Ry., 68-155, 71+5; Johnson v. Walsh, 83-74, 85+910; Isherwood v. Jenkins, 84-423, 87+931; Ulseth v. Crookston L. Co., 97-178, 106+307; Waller v. Ross, 100-7, 110+252; Gould v. Winona G. Co., 100-258, 111+254; Cederberg v. Mpls. etc. Ry., 101-100, 111+953; Parmelee v. Tri-State T. & T. Co., 103-530, 115+1135; Lehman v. Dwyer, 104-190, 116+352; McGuire v. G. N. Ry., 106-192, 118+556. See 20 Harv. L. Rev. 228; Note, 113 Am. St. Rep. 986.

[2] Olson v. G. N. Ry., 68-155, 71+5; Jenkins v. St. P. C. Ry., 105-504, 117+928; Brennan v. Butler, 107-430, 120+540; Jacobson v. G. N. Ry., 108-517, 120+1089; Byers v. Carnegie, 159 Fed. 347; 20 Harv. L. Rev. 228.

[3] Jenkins v. St. P. C. Ry., 105-504, 117+928. See 20 Harv. L. Rev. 228.

[4] McMahon v. Davidson, 12-357(232); Fay v. Davidson, 13-523(491); Connolly v. Davidson, 15-519(428).

7046. Admissions—The mere admissions of the defendant, unsupported by other evidence, are insufficient to justify a verdict for negligence.[5]

7047. Degree of proof—Speculation and conjecture—Proof of negligence is made out by a fair preponderance of the evidence.[6] Certainty is not required. It is sufficient if the evidence affords a reasonable basis for a finding that the act complained of was the proximate and operating cause of the injury.[7] The evidence need not be direct and positive. The fact of negligence is susceptible of proof by evidence of circumstances bearing more or less directly upon the fact. The plaintiff is not bound to prove more than enough to raise a fair presumption of negligence on the part of the defendant and of resulting injury to himself. Having done this he is entitled to recover unless the defendant produces evidence sufficient to rebut this presumption.[8] It is sufficient if the evidence takes the case out of the realm of conjecture and fairly justifies the inference that the negligence charged was the proximate cause of the injury complained of.[9] Proof of causal connection must be something more than consistent with the plaintiff's theory of how the accident occurred.[10] It is not enough that the evidence leaves the matter in equilibrio as to whether the injury was produced by a cause for which the defendant was responsible, or by one for which he was not responsible; and a fortiori no recovery can be had if it is more probable that it was produced by the latter.[11] It is unnecessary to prove the precise way in which the accident occurred.[12] It is sufficient if the evidence, on the whole, agrees with and supports the hypothesis which it is adduced to prove, and it is the duty of the jury to decide according to the reasonable probability of the truth.[13] But a finding of negligence cannot be based upon mere possibility, speculation, or conjecture.[14] It is unnecessary that the evidence should negative every other possible cause of the injury,[15] or all possible circumstances that would excuse

[5] Binewicz v. Haglin, 103–297, 115+271. See McManus v. Nichols, 105–144, 117+223.

[6] Lindsley v. Chi. etc. Ry., 36–539, 33+7; Rase v. Mpls. etc. Ry., 107–260, 120+360.

[7] Orth v. St. P. etc. Ry., 47–384, 50+363; Briggs v. Mpls. St. Ry., 52–36, 53+1019; Olson v. G. N. Ry., 68–155, 71+5; Kreuzer v. G. N. Ry., 87–33, 91+27; Halvorson v. Chi. etc. Ry., 94–531, 103+1132; Kohout v. Newman, 96–61, 104+764; Neitge v. Chi. etc. Ry., 103–75, 114+467; Halvorson v. N. P. Ry., 104–525, 116+1134; Flack v. W. U. Tel. Co., 106–337, 118+1022; Vaillancour v. Mpls. etc. Ry., 106–348, 119+53; Johnson v. Lindahl, 106–382, 118+1009; Patterson v. Melchior, 106–437, 119+402; Rase v. Mpls. etc. Ry., 107–260, 120+360; Olson v. Pike, 107–411, 120+378; Brown v. Mpls. etc. Ry., 108–1, 121+123; Moores v. N. P. Ry., 108–100, 121+392. See Shannon v. Delwer, 68–138, 71+14.

[8] Rosenfield v. Arrol, 44–395, 46+768; Johnson v. Lindahl, 106–382, 118+1009; Hawkins v. G. N. Ry., 107–245, 119+1070. See Shannon v. Delwer, 68–138, 71+14.

[9] Kreuzer v. G. N. Ry., 87–33, 91+27.

[10] Rogers v. Mpls. etc. Ry., 99–34, 108+868; Bruckman v. Chi. etc. Ry., 125+263.

[11] Orth v. St. P. etc. Ry., 47–384, 50+363.

[12] Lillstrom v. N. P. Ry., 53–464, 55+624; Jungclaus v. G. N. Ry., 99–515, 108+1118; Rogers v. Mpls. etc. Ry., 99–34, 108+868. See Shannon v. Delwer, 68–138, 71+14.

[13] Lillstrom v. N. P. Ry., 53–464, 55+624; Rogers v. Mpls. etc. Ry., 99–34, 108+868; Hawkins v. G. N. Ry., 107–245, 119+1070.

[14] Larson v. St. P. & D. Ry., 43–488, 45+1096; Powell v. N. P. Ry., 46–249, 48+907; Orth v. St. P. etc. Ry., 47–384, 50+363; Ellison v. Truesdale, 49–240, 51+918; Briggs v. Mpls. St. Ry., 52–36, 53+1019; Judson v. G. N. Ry., 63–248, 65+447; Koslowski v. Thayer, 66–150, 68+973; Baxter v. G. N. Ry., 73–189, 75+1114; Young v. G. N. Ry., 80–123, 83+32; Brennan L. Co. v. G. N. Ry., 80–205, 83+137; Mpls. S. & D. Co. v. G. N. Ry., 83–370, 86+451; Swenson v. Erlandson, 86–263, 90+534; Martin v. Courtney, 87–197, 91+487; Truax v. Mpls. etc. Ry., 89–143, 94+440; Carleton v. G. N. Ry., 93–378, 101+501; Griffin v. Minn. Tr. Ry., 94–191, 102+391; Martyn v. Minn. & I. Ry., 95–333, 104+133; Ulseth v. Crookston L. Co., 97–178, 106+307; Lehman v. Dwyer, 104–190, 116+352; McGuire v. G. N. Ry., 106–192, 118+556; Mageau v. G. N. Ry., 106–375, 119+200; Miller v. Mpls. etc. Ry., 106–499, 119+218; Olson v. Pike, 107–411, 120+378; Brennan v. Butler, 107–430, 120+540; Moores v. N. P. Ry., 108–100, 121+392.

[15] Kohout v. Newman, 96–61, 104+764.

the defendant.[16] Where a cause is shown which might produce a given accident, and the fact appears that an accident of that particular character did occur, it may be a warrantable inference, in the absence of evidence of other cause, that the one known was the operative agency in bringing about such result.[17]

LAW AND FACT

7048. In general—The rule, applicable to most cases of negligence, that the law requires such care as persons of ordinary prudence would use under similar circumstances, is plainly a rule of law. In applying it to the circumstances of a particular case, two questions arise: what amount of care would persons of ordinary prudence use under such circumstances; and did the defendant use that amount of care? Both are purely questions of fact.[18] But, like other questions of fact they are sometimes questions for the jury and sometimes questions for the court. They are always for the jury when fair-minded men might reasonably draw different conclusions. They are always for the court when the evidence is conclusive, in other words, when the evidence is susceptible of only one reasonable inference and it would be the manifest duty of the court to set aside a contrary verdict.[19] This is simply a particular application of the general rule that governs in all civil cases.[20] Certain rules of conduct, such as the "look and listen rule," have been established by judicial legislation and are applied by the court as rules of law. These cases stand apart.[21] The fact that there is no conflict in the testimony does not make the case one for the court instead of the jury, if the evidence is for any reason inconclusive in its nature—as, for example, where different conclusions may reasonably be drawn from it, or where its credibility is doubtful.[22] Ordinarily it is only where there is an entire absence of evidence tending to establish negligence that a court can enter upon the province of the

[16] Olson v. G. N. Ry., 68–155, 71+5.

[17] Rase v. Mpls. etc. Ry., 107–260, 120+360.

[18] 14 Harv. L. Rev. 549; Grand Trunk Ry. v. Ives, 144 U. S. 408; Keener, Quasi Contracts, 107. The only rule of law is one which appeals to an outside standard, that of general experience; and the application of it, by whatever tribunal made, calls for a preliminary determination of something for which there is no legal test—a matter of fact, and not a matter of law—namely, the behavior in a supposed case, of the prudent man. Thayer, Ev. 228. The standard of care is that which is prescribed by law. Ordinarily the jury, under instructions from the court as to the legal standard of care, should be left to decide whether or not the defendant's conduct measures up to that standard, for it may well be assumed that the united judgment of twelve average citizens correctly gauges the conduct of the "person of ordinary prudence." Some lines of conduct of the "person of ordinary prudence" are, however, so instinctive or have been so thoroughly characterized in the common, or at least the preponderant sentiment of mankind, that a court cannot but know that it would be impossible for a jury in a case of that class to return a verdict for the plaintiff without rejecting the conduct of the person of ordinary prudence as the standard and setting up one of their own for that particular case. In such instances it is proper for the court to direct the verdict. American W. G. Co. v. Noe, 158 Fed. 777.

[19] Abbett v. Chi. etc. Ry., 30–482, 16+266; Johnson v. Winona etc. Ry., 11–296 (204, 213); Erd v. St. Paul, 22–443; Craver v. Christian, 34–397, 26+8; Id., 36–413, 418, 31+457; Bennett v. Syndicate Ins. Co., 39–254, 39+488; Oviatt v. Dakota C. Ry., 43–300, 303, 45+436; Hendrickson v. G. N. Ry., 49–245, 252, 51+1044; Tuthill v. N. P. Ry., 50–113, 52+384; Steindorff v. St. Paul G. Co., 92–496, 100+221; Wiita v. Interstate I. Co., 103–303, 115+169; Metropolitan Ry. v. Jackson, 3 App. Cas. 193; Dublin etc. Ry. v. Slattery, 3 App. Cas. 1155, 1181; Grand Trunk Ry. v. Ives, 144 U. S. 408; Davidson v. U. S., 205 U. S. 187.

[20] Emery v. Mpls. I. Expo., 56–460, 464, 57+1132. See § 9707.

[21] See § 8170 and 14 Harv. L. Rev. 549.

[22] Burud v. G. N. Ry., 62–243, 245, 64+562; Abbett v. Chi. etc. Ry., 30–482, 16+266; Oviatt v. Dakota C. Ry., 43–300, 45+436.

jury and order a nonsuit or direct a verdict for the defendant.[23] The foregoing rules apply to contributory negligence as well as to negligence.[24]

EVIDENCE

7049. Customary practice—Evidence of the customary practice of other men in the same business or occupation is admissible to prove or disprove negligence, but it is not conclusive.[25] Customary practice will not excuse an act negligent in itself.[26] What usually is done may be evidence of what ought to be done; but what ought to be done is fixed by a standard of reasonable prudence, whether it is usually complied with or not.[27] That others have attempted or performed negligent acts of a certain character will not excuse one in attempting an act of that character.[28]

7050. Unusual practice—Evidence that an act charged to have been negligently done was done in an unusual manner is admissible.[29]

7051. Careful habit—Evidence that a person is of a careful and prudent habit is inadmissible to prove that he was not negligent upon a particular occasion.[30]

7052. Other acts of negligence—Negligent habit—Evidence of other independent and disconnected acts of negligence is inadmissible. It is not permissible to prove that a person is of a negligent habit for the purpose of proving that he was negligent upon the occasion in question.[31] It is discretionary with a trial court to allow the plaintiff to give all his evidence at one time, even though such evidence tends to show negligent custom, before it is shown by some direct evidence that the negligent act complained of was committed by the defendant.[32]

7053. Other accidents from same cause—Evidence of similar accidents from the same inanimate cause is admissible to prove that the common cause was dangerous or likely to cause such accidents; that the person responsible for it was aware of its dangerous character or tendency to cause such accidents; and that it caused the accident in question.[33] It must appear that the

[23] Bennett v. Syndicate Ins. Co., 39–254, 39+488; Emery v. Mpls. I. Expo., 56–460, 57+1132.

[24] Abbett v. Chi. etc. Ry., 30–482, 16+266; Hermeling v. Chi. etc. Ry., 105–136, 117+341; Lewis v. Chi. etc. Ry., 127+180.

[25] Woodson v. Mil. etc. Ry., 21–60, 65; Hayward v. Knapp, 23–430; Kelly v. Southern Minn. Ry., 28–98, 9+588; Kolsti v. Mpls. etc. Ry., 32–133, 19+655; Doyle v. St. P. etc. Ry., 42–79, 43+787; O'Malley v. St. P. etc. Ry., 43–289, 45+440; Larson v. St. P. etc. Ry., 43–423, 45+722; Armstrong v. Chi. etc. Ry., 45–85, 47+459; Bergquist v. Chandler, 49–511, 52+136; Flanders v. Chi. etc. Ry., 51–193, 53+544; Lawson v. Truesdale, 60–410, 62+546; Hinton v. Eastern Ry., 72–339, 75+373; Anderson v. Fielding, 92–42, 99+357; Monsen v. Crane, 99–186, 108+933; Cederberg v. Mpls. etc. Ry., 101–100, 111+953; Wiita v. Interstate I. Co., 103–303, 115+169; Brown v. Musser, 104–156, 116+218; Vance v. G. N. Ry., 106–172, 118+674. See Red River R. Mills v. Wright, 30–249, 15+167.

[26] Larson v. Ring, 43–88, 44+1078; Mpls. S. & D. Co. v. Met. Bank, 76–136, 78+980; Braaflat v. Mpls. & N. El. Co., 90–367, 96+920; Kremkoski v. G. N. Ry., 101–501, 112+1025; Wiita v. Interstate I. Co., 103–303, 115+169; Fletcher v. Baltimore etc. Ry., 168 U. S. 135.

[27] Wiita v. Interstate I. Co., 103–303, 115+169.

[28] Wherry v. Duluth etc. Ry., 64–415, 67+223.

[29] Steffenson v. Chi. etc. Ry., 51–531, 53+800.

[30] Jagger v. Nat. G. A. Bank, 53–386, 55+545; Fonda v. St. P. C. Ry., 71–438, 446, 74+166.

[31] Morse v. Mpls. etc. Ry., 30–465, 471, 16+358; Kaillen v. N. W. B. Co., 46–187, 48+779; Newstrom v. St. P. & D. Ry., 61–78, 82, 63+253; Fonda v. St. P. C. Ry., 71–438, 74+166. See Shaber v. St. P. etc. Ry., 28–103, 109, 9+575; Ransier v. Mpls. etc. Ry., 30–215, 14+883; Davidson v. St. P. etc. Ry., 34–51, 24+324; Stellwagen v. Winona, 54–460, 56+51; McBride v. St. P. C. Ry., 72–291, 75+231; Fulmore v. St. P. C. Ry., 72–448, 75+589.

[32] Campbell v. Ry. Trans. Co., 95–375, 104+547.

[33] Phelps v. Mankato, 23–276; Kelly v. Southern Minn. Ry., 28–98, 9+588; Morse

conditions at the time of the other accidents were substantially the same as at the time of the accident in question.[34] Conversely, evidence that other similar accidents have never resulted from the alleged cause is admissible.[35] Evidence that a pile of stone frightened other horses is admissible.[36]

7054. Private rules of conduct—The private rules of a master for the guidance of his servants are not admissible in an action by a third party against the master for negligence, where such party did not know of such rules at the time of the accident and did not act with reference to them. Such rules do not fix the legal standard of negligence. A person cannot, by the adoption of private rules, fix the standard of his duty to others. That is fixed by law, either statutory or common.[37]

7055. Subsequent repairs and precautions—Evidence of repairs made or precautions taken subsequently to an injury is inadmissible to prove a negligent condition at the time of the injury.[38]

7056. Belief of defendant—Evidence that the defendant believed that he was acting carefully is inadmissible where only compensatory damages are claimed.[39]

ACTIONS

7057. Limitation of actions—Actions for negligence may be brought any time within six years,[40] except against municipalities.[41]

7058. Complaint—It is sufficient to allege that the act, the commission or omission of which caused the injury, was negligently or carelessly done or omitted. It is unnecessary to allege specifically all the acts or omissions constituting the negligence.[42] Under such a general allegation a party may prove any facts, not inconsistent with the facts alleged, which would tend to prove that the acts alleged were negligent. A complaint with such an allegation is not demurrable as not stating a cause of action, unless the particular acts alleged are such that they could not be negligent under any possible

v. Mpls. etc. Ry., 30–465, 16+358; Clapp v. Mpls. etc. Ry., 36–6, 29+340; Phelps v. Winona & St. P. Ry., 37–485, 35+273; Burrows v. Lake Crystal, 61–357, 63+745; Byard v. Palace C. H. Co., 85–363, 88+998; Nye v. Dibley, 88–465, 93+524; Wiita v. Interstate I. Co., 103–303, 115+169; Darling v. Westmoreland, 52 N. H. 401; Bemis v. Temple, 162 Mass. 342; Shea v. Glendale etc. Co., 162 Mass. 463; Brown v. Eastern etc. Ry., 22 Q. B. D. 391; District of Columbia v. Armes, 107 U. S. 519. See Johnson v Walsh, 83–74, 85+910.

[34] Morse v. Mpls. etc. Ry., 30–465, 16+358; Clapp v. Mpls. etc. Ry., 36–6, 29+340; Burrows v. Lake Crystal, 61–357, 63+745.

[35] Doyle v. St. P. etc. Ry., 42–79, 43+787.

[36] Nye v. Dibley, 88–465, 93+524.

[37] Hanson v. Mpls. etc. Ry., 37–355, 34+223; Fonda v. St. P. C. Ry., 71–438, 74+166; Smithson v. Chi. etc. Ry., 71–216, 73+853; Isackson v. Duluth St. Ry., 75–27, 77+433; Continental Ins. Co. v. Chi. etc. Ry., 97–467, 484, 107+548; McKernan v. Detroit etc. Ry., 101+812, 815.

[38] Morse v. Mpls. etc. Ry., 30–465, 16+358 (overruling O'Leary v. Mankato, 21–65; Phelps v. Mankato, 23–276; Kelly v. Southern Minn. Ry, 28–98, 9+588; Shaber v. St. P. etc. Ry., 28–103, 9+575); Day v. Akeley, 54–522, 56+243; Hammargren v. St. Paul, 67–6, 69+470; Fonda v. St. P. C. Ry., 71–438, 450, 74+166; Lally v. Crookston L. Co., 82–407, 85+157; Ginter v. Rector, St. M. Church, 95–14, 24, 103+738.

[39] Krippner v. Biebl, 28–139, 9+671.

[40] R. L. 1905 § 4076(5); Brown v. Heron Lake, 67–146, 69+710; Ott v. G. N. Ry., 70–50, 72+833; Ackerman v. Chi. etc. Ry., 70–35, 72+1134.

[41] R. L. 1905 § 768.

[42] Clark v. Chi. etc. Ry., 28–69, 9+75; McCauley v. Davidson, 10–418(335, 339); Keating v. Brown, 30–9, 13+909; Johnson v. St. P. & D. Ry., 31–283, 17+622; Ekman v. Mpls. St. Ry., 34–24, 24+291; Olson v. St. P. etc. Ry., 34–477, 26+605; Rolseth v. Smith, 38–14, 35+565; Rogers v. Truesdale, 57–126, 58+688; Hinton v. Eastern Ry., 72–339, 75+373; Ware v. Squyer, 81–388, 84+126; Kretzschmar v. Meehan, 81–432, 84+220; Smith v. G. N. Ry., 92–11, 99+47; Pope v. G. N. Ry., 94–429, 103+331; Casey v. Am. B. Co., 95–11, 103+623; Christiansen v. Chi. etc. Ry., 107–341, 120+300; Bjelos v. Cleveland Cliffs I. Co., 109–320, 123+922.

evidence admissible thereunder.[43] A general allegation as to the injuries suffered is sufficient.[44] It is unnecessary to negative contributory negligence.[45] It must appear that the injury was the natural and proximate result of the alleged negligent act of the defendant, but it is unnecessary that it should appear just how the injury resulted from such act.[46] It must appear that the defendant owed the plaintiff a duty to exercise due care. An allegation that it was the duty of the defendant to do a specified thing is a mere conclusion of law and a nullity.[47] A breach of duty must appear.[48] In actions against municipalities there must be an allegation of the service of notice as required by statute.[49] If recovery is sought for wilful or wanton negligence or injury a proper foundation must be laid.[50]

7059. Demurrer—Contributory negligence—A complaint showing on its face conclusively that the plaintiff was guilty of contributory negligence is demurrable.[51] But to render a complaint demurrable on this ground the contributory negligence must so clearly appear that there could be no room for different minds reasonably arriving at any different conclusion, upon any possible evidence admissible under and consistent with the allegations.[52] An allegation that the plaintiff was without fault and that he was in the due performance of his duty, are not mere legal conclusions, and are to be given due weight in construing a pleading, to repel the inference of contributory negligence.[53]

7060. General denial—Evidence of contributory negligence—Contributory negligence may be proved under a general denial.[54]

7061. Variance—Where the complaint alleges specific acts of negligence the proof must be limited to such acts. A plaintiff must recover, if at all, by proving substantially the facts alleged in the complaint.[55] In several cases a variance has been held immaterial.[56]

[43] Rolseth v. Smith, 38–14, 35+565; Rogers v. Truesdale, 57–126, 58+688; Stendal v. Boyd, 67–279, 69+899; Birmingham v. Duluth etc. Ry., 70–474, 73+409.

[44] Smith v. St. P. etc. Ry., 30–169, 14+797; Babcock v. St. P. etc. Ry., 36–147, 30+449; Casey v. Am. B. Co., 95–11, 103+623. See Willison v. N. P. Ry., 127+4.

[45] Hocum v. Weitherick, 22–152; Clark v. Chi. etc. Ry., 28–69, 9+75; Ekman v. Mpls. St. Ry., 34–24, 24+291; Rolseth v. Smith, 38–14, 35+565; Lydecker v. St. P. C. Ry., 61–414, 63+1027; Leier v. Minn. etc. Co., 63–203, 65+269; Birmingham v. Duluth etc. Ry., 70–474, 73+409; Thompson v. G. N. Ry., 70–219, 72+962.

[46] Lee v. Emery, 10–187(151); Hocum v. Weitherick, 22–152, 156; Johnson v. St. P. & D. Ry., 31–283, 17+622; Dugan v. St. P. & D. Ry., 40–544, 42+538; Berry v. Dole, 87–471, 92+334; Floody v. G. N. Ry., 104–474, 116+943.

[47] Berry v. Dole, 87–471, 92+334; Heron v. St. P. etc. Ry., 68–542, 71+706.

[48] See Johnson v. St. P. & D. Ry., 31–283, 17+622; Lydecker v. St. P. C. Ry., 61–414, 63+1027; Berry v. Dole, 87–471, 92+334.

[49] See § 6739.

[50] Anderson v. Mpls. etc. Ry., 103–224, 114+1123. See Note, 69 L. R. A. 601.

[51] Clark v. Chi. etc. Ry., 28–69, 9+75.

[52] Rolseth v. Smith, 38–14, 35+565; Lydecker v. St. P. C. Ry., 61–414, 63+1027; Leier v. Minn. etc. Co., 63–203, 65+269; Birmingham v. Duluth etc. Ry., 70–474, 73+409.

[53] Pope v. G. N. Ry., 94–429, 103+331.

[54] St. Anthony Falls etc. Co. v. Eastman, 20–277(249, 265); Hocum v. Weitherick, 22–152, 156; O'Malley v. St. P. etc. Ry., 43–289, 294, 45+440. See Blakeley v. Le-Duc, 19–187(152, 156). The intimation in Woodruff v. Bearman, 108–118, 121+426 that the question is an open one in this state is obviously due to inadvertence.

[55] Ransier v. Mpls. etc. Ry., 30–215, 14+883; Connelly v. Mpls. E. Ry., 38–80, 82, 35+582; O'Malley v. St. P. etc. Ry., 43–289, 45+440; Morrow v. St. P. C. Ry., 65–382, 67+1002; Jemming v. G. N. Ry., 96–302, 104+1079; Donahue v. N. W. etc. Co., 103–432, 115+279; Poczerwinski v. Smith, 105–305, 117+486; Vance v. G. N. Ry., 106–172, 118+674; Raitila v. Consumers O. Co., 107–91, 119+490; Bigum v. St. Paul etc. Co., 107–567, 119+481; Willison v. N. P. Ry., 127+4; Duff v. Bayne, 127+385. See, as to litigation of issues by consent, Hostetter v. Illinois C. Ry., 104–25, 115+748; Vailancour v. Mpls. etc. Ry., 106–348, 119+53.

[56] Moser v. St. P. & D. Ry., 42–480, 44+530; Olson v. G. N. Ry., 68–155, 71+5.

CRIMINAL RESPONSIBILITY

7062. Indictment—An indictment for criminal carelessness in the operation of a railway engine and train by its engineer, whereby a collision occurred and named persons were killed, held insufficient.[57]

NEGOTIABLE INSTRUMENTS—See Bills and Notes.
NEGOTIABLE PAPER—See Bills and Notes.
NEW ASSIGNMENT—See Pleading, 7629.
NEW MATTER—See Pleading, 7578.

NEWSPAPERS

7063. Definition—A newspaper is a publication, usually in sheet form, intended for general circulation, and published at short intervals, containing intelligence of current events and news of general interest.[58]

7064. Qualifications for legal publications—Statute—The qualifications of a newspaper to make it a proper medium for official and legal publications are prescribed by statute.[59] Where an affidavit has been filed with a county auditor by the publisher of a newspaper, in accordance with the provisions of the statute, the presumption is that the newspaper therein shown to be qualified continues so to be until the contrary is established. It is unnecessary, if there is a change of publishers, that another affidavit be filed.[60]

7065. Designation as official newspaper—Municipal charters often provide for the designation of a newspaper for official publications.[61]

7066. Compensation for official or legal publications—The maximum amount which a newspaper may receive for official or legal publication is prescribed by statute.[62]

7067. What constitutes publication—Those copies of a newspaper which are sent from the publication office to the post office, some to be delivered to subscribers in the same city, others to be carried by mail to subscribers elsewhere, are published when deposited in the post office.[63]

[57] State v. MacDonald, 105-251, 117+482.
[58] Beecher v. Stephens, 25-146; Hull v. King, 38-349, 37+792.
[59] Laws 1907 c. 3. See Beecher v. Stephens, 25-146 (Northwestern Reporter held not a newspaper); Hull v. King, 38-349, 37+792 (religious weekly held a newspaper); Tribune P. Co. v. Duluth, 45-27, 47+309 (a newspaper printed and published six days consecutively each week, one of which is Sunday, is a daily newspaper within Laws 1889 c. 47); Norton v. Duluth, 54-281, 56+80 (effect of general statute on charter provisions—no paid subscribers—advertising sheet for circulation on trains and boats); Wolfe v. Moorhead, 98-113, 107+728 (weekly newspaper conforming to statutory requirements).
[60] Wyman v. Baker, 83-427, 86+432.
[61] McKusick v. Stillwater, 44-372, 46+769 (publication held valid though charter not complied with); Fairchild v. St. Paul, 46-540, 49+325 (designation held sufficient); Norton v. Duluth, 54-281, 56+80 (effect of general statute on charter provisions—designation held sufficient).
[62] R. L. 1905 § 2714. See Hobe v. Swift, 58-84, 59+831 (meaning of "folio," "ems," and "solid" matter); Fergus P. & P. Co. v. Otter Tail County, 60-212, 62+272 (for publishing forfeited tax list under Laws 1893 c. 150 newspaper held entitled to recover reasonable value of services or statutory rate, in absence of express agreement).
[63] Pratt v. Tinkcom, 21-142.

NEW TRIAL

IN GENERAL

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IN GENERAL

7068. Definition and nature—A new trial is a retrial of an issue of fact in the same court.[64] While a new trial is not authorized merely for the retrial of an issue of law, it is nevertheless held that on a motion for a new trial the court may correct or modify its conclusions of law on the ground that they are not justified by the findings of fact.[65] The office of a motion for a new trial is to review errors occurring on the trial.[66]

7069. Power to grant new trials inherent—Effect of statute—The district courts have inherent power to grant new trials. The statute authorizing new trials is a regulation rather than a grant of power.[67] It has been held by a divided court that in civil actions the power of the district courts to grant new trials is limited to the grounds specified by the statute.[68] On the other hand the broad rule has been laid down that it is discretionary with the trial court to grant a new trial on the ground that on the evidence substantial justice has not been done and that an appellate court will interfere only in case of an abuse of discretion.[69] A trial court may grant a new trial on its own motion.[70]

7070. Statute applicable to both legal and equitable actions—Reargument unauthorized—Our statute regulating new trials is applicable to all actions, whether of a legal or equitable nature. The statute was designed to supersede the methods of the old practice and to provide a single mode of securing a new trial regardless of the nature of the action. The bills of review, supplemental bills in the nature of bills of review and supplemental bills of the old chancery practice are all superseded. These methods of relief in chancery cases, though well adapted to promote correct results, were cumbrous and onerous and relief after a judgment at law was obtained only by methods similarly burdensome. The policy of the code of practice is to simplify the proceedings through which the ends of justice may be reached and the remedy by motion in the original action has taken the place of all others. A reargument is unauthorized.[71]

7071. Motion for new trial matter of right—The right to move for a new trial is absolute. It is not a matter of discretion with the court whether it will entertain such a motion or not. A party has the same right to have his motion for a new trial heard and duly considered as he has to institute or defend an action.[72] It is the duty of the court to exercise a deliberate judgment on the motion and an order denying a new trial obviously made pro forma cannot be made the basis of an appeal.[73] And when a cause is remanded

[64] Dodge v. Bell, 37–382, 34+739; Fergus etc. Co. v. Otter Tail County, 60–212, 62+272.

[65] See § 9871.

[66] Taylor v. Grand Lodge, 98–36, 107+545.

[67] McNamara v. Minn. C. Ry., 12–388 (269); Bank of Willmar v. Lawler, 78–135, 80+868.

[68] Valerius v. Richard, 57–443, 59+534; Todd v. Bettingen, 102–260, 113+906. See Peterson v. Lundquist, 106–339, 119+50.

[69] State v. Shevlin, 66–217, 68+973; Gray v. Minn. T. Co., 81–333, 84+113.

[70] Bank of Willmar v. Lawler, 78–135, 80+868.

[71] Sheffield v. Mullin, 28–251, 9+756; Marvin v. Dutcher, 26–391, 4+685; Ashton v. Thompson, 28–330, 9+876; Volmer v. Stagerman, 25–234, 244.

[72] McCord v. Knowlton, 76–391, 79+397.

[73] Johnson v. Howard, 25–558.

from the supreme court without prejudice to the right to move again for a new trial the moving party is entitled to have his motion heard and determined by the trial court uninfluenced, so far as discretion is concerned, by anything said by the supreme court.[74]

7072. Legislature cannot grant—When an action or other judicial proceeding has been tried, and a decision rendered, the legislature cannot, by an act subsequently passed, grant a new trial.[75]

7073. Necessity of motion to secure review on appeal—*a. In general*—Ordinarily the primary object of a motion for a new trial is to secure a correction of errors without incurring the expense, delay, and inconvenience of appealing to the supreme court.[76]

b. Trial by jury—Where the trial is by jury it is usually necessary to move for a new trial in order to question on appeal the sufficiency of the evidence to justify the verdict.[77] This is true where a part of the issues are submitted to the jury in an action of an equitable nature.[78] But where the court rules upon the sufficiency of the evidence on a motion for a directed verdict at the close of the testimony, the sufficiency of the evidence to justify the verdict may be reviewed on appeal from the judgment though no motion for a new trial was made.[79] A motion for a new trial is necessary in order to raise the objection on appeal that the damages are excessive.[80]

c. Trial by court—When an action is tried by the court without a jury a party may move for a new trial and from the order made on his motion appeal to the supreme court.[81] This is not necessary, however, in order to secure a full review on appeal. Contrary to the rule in nearly every jurisdiction in this country, it is held in this state that when the trial is by the court without a jury, it is unnecessary to move for a new trial in order to question on appeal the sufficiency of the evidence to justify the findings.[82]

d. Trial by referee—The district court has power to grant a new trial when the action is tried by a referee.[83] It is not necessary, however, to move for a new trial in order to question on appeal the sufficiency of the evidence to justify the findings of a referee provided a case is settled containing all the evidence introduced on the trial.[84]

7074. Granted only for material error—De minimis—Nominal damages—Technical errors—It is a general principle that new trials are to be granted only for errors materially affecting the substantial rights of the aggrieved party.[85] There must always be a reasonable prospect that another trial might result differently,[86] and when the motion is made on some grounds there must be a strong probability of a different result.[87] A new trial will not be granted for a failure to assess merely nominal damages where no question of permanent

[74] Fohl v. Chi. etc. Ry., 84-314, 87+919.
[75] State v. Flint, 61-539, 63+1113.
[76] Chittenden v. German-Am. Bank, 27-143, 6+773.
[77] Kelly v. Rogers, 21-146; Spencer v. St. Paul etc. Ry., 22-29; Wampach v. St. P. etc. Ry., 22-34; Byrne v. Mpls. etc. Ry., 29-200, 12+698; Barker v. Todd, 37-370, 34+895; Barringer v. Stoltz, 39-63, 38+808; Lund v. Anderson, 42-201, 44+6.
[78] Jordan v. Humphrey, 31-495, 18+450.
[79] Hefferen v. N. P. Ry., 45-471, 48+1, 526.
[80] Spencer v. St. P. etc. Ry., 22-29; Wampach v. St. P. etc. Ry., 22-34; Severns v. Brainard, 61-265, 63+477.
[81] Chittenden v. German-Am. Bank, 27-143, 6+773; Ashton v. Thompson, 28-330, 9+876.
[82] St. Paul etc. Co. v. Allis, 24-75; Chittenden v. German-Am. Bank, 27-143, 6+773; Jordan v. Humphrey, 31-495, 18+450; Bannon v. Bowler, 34-416, 26+237; Nelson v. Central L. Co., 35-408, 29+121.
[83] Thayer v. Barney, 12-502(406); Cochrane v. Halsey, 25-52; Koktan v. Knight, 44-304, 46+354; Hughley v. Wabasha, 69-245, 72+78.
[84] Teller v. Bishop, 8-226(195); Cooper v. Breckenridge, 11-341(241).
[85] R. L. 1905 § 4198; Cole v. Maxfield, 13-235(220); Tarbox v. Gotzian, 20-139 (122).
[86] See cases under note 89.
[87] See § 7131.

right is involved.[88] A new trial will not be granted even where there is error if from the whole case it is apparent that the result will not be changed.[89] A party can secure a new trial only for error directly affecting himself, and where it is apparent that the moving party would not be benefited by it, a new trial may be denied, though there was error on the trial.[90] A new trial will not be granted simply to enable a party to litigate a question not raised by the pleadings.[91] The law does not concern itself with trifles and if the verdict is only a trifle more or less than it ought to have been a new trial will not be granted.[92] That which is merely technical and may be remedied on the trial, in the discretion of the court, ought not, as a general rule, to be regarded after verdict.[93] If the verdict of a jury can be sustained on any proper and consistent theory of the evidence it is the duty of the court to sustain it, and refuse a new trial, unless the record presents some error in law of sufficient importance to justify setting it aside.[94]

7075. Who may move—One not a party to the action, though directly interested in the result, cannot move for a new trial.[95]

7076. Waiver of right—In a civil action a party may, by express agreement, waive his right to a new trial and an attorney has implied authority to do so for his client.[96] A party waives his right to a new trial by appealing from the judgment;[97] by failing to have a case or bill of exceptions settled within the statutory time;[98] by failing to move with due diligence.[99] A party does not waive his right to move for a new trial by moving for judgment non obstante veredicto on special findings,[1] or under the statute.[2]

7077. When there are several parties—When there are several parties seeking a new trial in the same action, there should be separate motions and assignments of error unless it is clear that the errors were common to all. It is held in this state, sacrificing substance to form, that a joint motion is properly denied if the verdict was justified as respects any one of the parties.[3] This rule is purely technical [4] and the supreme court has shown a commendable disposition to break away from it. Thus, a notice by three defendants to the effect that they and each of them will move the court for a new trial is held

[88] Knowles v. Steele, 59–452, 61+557; Harris v. Kerr, 37–537, 35+379; Warner v. Lockerby, 31–421, 18+145, 821; U. S. Ex. Co. v. Koerner, 65–540, 68+181; Nickerson v. Wells, 71–230, 73+959, 74+891; Diamon v. Taylor, 99–527, 109+1133; Mpls. B. Co. v. City Bank, 74–98, 76+1024 and cases under note 92. But when the trial court grants a new trial, and it is probable that only nominal damages can be recovered, the supreme court will not reverse the order on that ground. Kramer v. Perkins, 102–455, 113+1062; Goulding v. Ferrell, 106–44, 117+1046.

[89] Dorr v. Mickley, 16–20(8); Colter v. Mann, 18–96(79); Lewis v. St. P. etc. Ry., 20–260(234); Webb v. Kennedy, 20–419 (374); Hurt v. St. P. etc. Ry., 39–485, 40+613; Perry v. Mpls. St. Ry., 69–165, 72+55.

[90] Maher v. Winona etc. Ry., 31–401, 18+105.

[91] Bullis v. Cheadle, 36+164, 30+549.

[92] Osborne v. Johnson, 35–300, 28+510; Am. Mfg. Co. v. Klarquist, 47–344, 50+243; Palmer v. Degan, 58–505, 60+342; Singer Mfg. Co. v. Potts, 59–240, 61+23; Jensen v. Chi. etc. Ry., 64–511, 67+631; Mannheim v. Carleton College, 68–531, 71+705; Maloney v. Warner, 91–364, 98+1102; Goulding v. Ferrell, 106–44, 117+1046. See cases under note 88.

[93] Steele v. Maloney, 1–347(257); Short v. McRea, 4–119(78).

[94] Nichols v. Hackney, 78–461, 81+322.

[95] Stewart v. Duncan, 40–410, 42+89.

[96] Bray v. Doheny, 39–355, 40+262.

[97] McArdle v. McArdle, 12–122(70).

[98] See § 1372.

[99] See §§ 7086–7090.

[1] Stein v. Swensen, 44–218, 46+360.

[2] Sallden v. Little Falls, 102–358, 113+884. See § 5087.

[3] Miller v. Adamson, 45–99, 47+452; McKasy v. Huber, 65–9, 67+650; Baer v. Kloos, 81–218, 83+980.

[4] See, for a very just criticism of the rule, Boehmer v. Big Rock I. Dist., 117 Cal. 19.

to be a joint and several motion and the foregoing rule does not apply.[5] A new trial may be granted as to one or more of several parties and denied as to the others. Where a verdict is justified as to one of several parties it is error to grant a new trial as to him.[6]

7078. Where there are several causes of action—Where there are two causes of action one may be retried without retrying the other.[7]

7079. Of less than all the issues—A new trial of a single independent issue may be ordered where justice does not demand a retrial of all the issues.[8] If the jury bring in a special verdict which fails to include findings upon all the issues and are discharged a new trial must be granted. The new trial may be limited to the issues not passed upon.[9] In an action of an equitable nature, specific issues having been tried before a jury by order of the court, leaving other material issues untried, the court, upon the verdict of the jury, ordered judgment for the defendant. It was held that the party prejudiced was not entitled to a new trial of all the issues but only of the untried issues.[10] In an equitable action it has been held error to refuse a new trial as to certain issues submitted to a jury, while granting a new trial as to the issues reserved for the court.[11]

7080. Renewal of motion—When a motion for a new trial has been denied absolutely the court will rarely entertain a second motion on substantially the same grounds. The matter rests in the discretion of the court.[12]

7081. Setting aside order granting—The district court has power to set aside an order granting a new trial, on the ground that such order was erroneously granted, any time before the period for appeal expires.[13]

7082. Effect of granting—Vacating judgment—The effect of an order granting a new trial is to vacate the verdict [14] and the judgment entered thereon [15] without any special order to that effect. The award of a new trial wipes out the verdict and the situation is the same as if there had been no trial.[16] The plaintiff then has the same right to dismiss or discontinue as if no trial had ever been had.[17] In granting a motion for a new trial after entry of judgment the court may also set aside the judgment to give effectiveness to its decision.[18]

7083. Imposing conditions—Within ill-defined limits a court may grant a new trial conditionally. The discretion of the court in imposing terms on the moving party is very large and will rarely be controlled by the appellate court.[19] The power to grant a new trial unless the adverse party will consent to certain conditions is much narrower.[20] The court has no authority to grant a new trial conditionally so as to determine, in effect, the issues of fact

[5] Bathke v. Krassin, 78-272, 80+950.
[6] Lee v. Fletcher, 46-49, 48+456. See also, Clark v. Austin, 38-487, 38+615; First Nat. Bank v. Lincoln, 39-473, 40+573.
[7] Schmitt v. Schmitt, 32-130, 19+649.
[8] Buerfening v. Buerfening, 23-563; Coolbaugh v. Roemer, 32-445, 21+472; Chi. etc. Ry. v. Porter, 43-527, 46+75; Sauer v. Traeger, 56-364, 57+935. See Swanson v. Andrus, 83-505, 86+465, and § 7089.
[9] Crich v. Williamsburg etc. Co., 45-441, 48+198.
[10] Cobb v. Cole, 44-278, 46+364.
[11] Fink v. United etc. Co., 109-381, 124+7.
[12] Little v. Leighton, 46-201, 48+778.
[13] Beckett v. N. W. etc. Assn., 67-298, 69+923.
[14] Phelps v. Winona etc. Ry., 37-485, 35+273; St. Anthony Falls Bank v. Graham, 67-318, 69+1077; Anderson v. Fielding, 92-42, 99+357.
[15] Minn. Valley Ry. Co. v. Doran, 15-240 (186); Conklin v. Hinds, 16-457(411).
[16] Phelps v. Winona etc. Ry., 37-485, 35+273; McKenzie v. Banks, 94-496, 103+497.
[17] Phelps v. Winona etc. Ry., 37-485, 35+273.
[18] Cochrane v. Halsey, 25-52.
[19] Chouteau v. Parker, 2-118(95); Rice v. Gashirie, 13 Cal. 53.
[20] See First Nat. Bank v. Lincoln, 39-473, 40+573.

involved in the case.[21] It is not improper for a court to refuse to require the payment of costs as a condition of granting a new trial.[22]

7084. Stating grounds in order granting new trial—When a new trial is granted on the ground that the verdict, decision, or report, is not justified by the evidence, it is the duty of the court to state specifically, in the order granting it, that it is granted on that ground, if the motion included other grounds. In the absence of such a statement, an order granting a new trial will be reversed on appeal unless it is justified on some of the other grounds specified in the notice of motion. This rule is based on the statute which provides that "unless it be so expressly stated in the order granting a new trial, it shall not be presumed, on appeal, to have been made on the ground that the verdict, decision, or report was not justified by the evidence."[23] A case may be remanded to allow an application to be made to amend an order so that it will state the ground on which it was made.[24]

7085. Who may hear motion—It is the general rule that the motion must be heard by the judge who tried the case.[25] If he is dead or removed or his term expired his successor may entertain a motion.[26] Where there are several judges of the same court and the case is tried by a single judge the latter should sit alone in passing on a motion for a new trial. In some cases in this state the judge who tried the case has called in his associates to sit with him on the motion for a new trial.[27] This ought not be done over the objection of the moving party, especially where the motion is based on the insufficiency of the evidence. It is the duty of a judge taking up the trial of an action to carry it to completion.[28]

TIME OF MOTION

7086. When made on the minutes of the court—If the motion is made on the minutes of the court, it must be made within thirty days after the coming in of the verdict or notice of the filing of the decision or report, unless the time is extended by written stipulation of the parties, or by the court for cause.[29]

[21] Miller v. Hogan, 81-312, 84+40.

[22] Park v. Electric T. Co., 75-349, 77+988.

[23] R. L. 1905 § 4198(7); Fitzer v. Guthrie, 89-330, 94+888; Halvorsen v. Moon, 87-18, 91+28; Berg v. Olson, 88-392, 93+309; Smith v. Mpls. St. Ry., 91-239, 97+881; Hillestad v. Lee, 91-335, 97+1055; Owens v. Savage, 93-468, 101+790; Briggs v. Rutherford, 94-23, 101+954; Merrill v. Pike, 94-186, 102+393; Kolander v. Dunn, 95-422, 104+371, 483; Bradley v. Bradley, 97-130, 106+338; Hoatson v. McDonald, 97-201, 106+311; Hess v. G. N. Ry., 98-198, 108+7, 803; Sather v. Sexton, 101-544, 112+1142; Law Reporting Co. v. Poehler, 106-213, 118+664; Gay v. Kelley, 109-101, 123+295; Independent B. Assn. v. Burt, 109-323, 123+932; Nat. Citizens' Bank v. Bowen, 109-473, 124+241; Bandler v. Bradley, 124+644. See Hess v. G. N. Ry., 98-198, 108+7, 803 (memorandum held to state sufficiently that the order granting a new trial was made on the ground that the verdict was not justified by the evidence). Under Laws 1901 c. 46, it was sufficient if the ground of the order was stated in the memorandum, but this was changed by the revision of 1905, and it must now be stated in the order, at least if the memorandum is not made a part of the order by apt reference therein.

[24] Powers v. Delehunt, 105-334, 117+503.

[25] McCord v. Knowlton, 76-391, 79+397.

[26] Reynolds v. Reynolds, 44-132, 46+236; Hughley v. Wabasha, 69-245, 72+78; Price v. Churchill, 84-519, 88+11; State v. Mathley, 101-536, 111+1134.

[27] Demueles v. St. P. etc. Ry., 44-436, 46+912.

[28] Voullaire v. Voullaire, 45 Mo. 602.

[29] Laws 1907 c. 450. See under former statute, Larson v. Ross, 56-74, 57+323 (motion after term—objection waived by delay); Gribble v. Livermore, 64-396, 67+213 (query as to right to move on minutes after trial by court—motion after term—waiver by appearing and opposing motion on merits); Le Tourneau v. Aitkin County, 78-82, 80+840 (motion within term—statute imperative).

7087. When made on a case or bill of exceptions—A motion for a new trial based on a case or bill of exceptions must be made at least within the time allowed to appeal from the judgment.[30] Within such period the right to make a motion for a new trial depends upon whether the party has secured a case or bill of exceptions [31] and whether he has been diligent in making the motion. A motion for a new trial, whether the trial was by a court, referee or jury, must, if the party has a reasonable opportunity, be made before judgment, but if he has no reasonable opportunity before judgment, he may make it afterwards within the time for bringing an appeal from the judgment. In such cases, however, he must use due diligence in making it, and will lose his right to make it by neglect of such diligence. The determination of the question whether he has used due diligence is within the sound discretion of the court. It therefore behooves a party desiring to move for a new trial upon a case or bill of exceptions to act promptly upon the coming in of the verdict or upon notice of the filing of the decision or report, to get his case or bill of exceptions settled and to procure a stay to prevent the entry of judgment, to enable him to make the motion, and, if judgment be entered before he can make the motion, to be equally prompt in acting afterwards.[32]

7088. When made on affidavits—A motion for a new trial based on affidavits must be made within the same time as a similar motion based on a case or bill of exceptions. That is, it must be made at least within the time allowed to appeal from the judgment and the moving party must act with due diligence.[33] A motion for a new trial on the ground of newly discovered evidence is no exception to the general rule; [34] but if new and material evidence is discovered after the right to a new trial is lapsed, relief may be had, in a clear case, within one year from notice of judgment under the statute authorizing the opening of judgments for mistakes.[35]

7089. After findings on part of issues—Where, in an equitable action, certain of the issues presented by the pleadings are submitted to a jury, and they return a verdict thereon, the defeated party may apply for a new trial of the issue or issues so submitted, without waiting for findings by the court upon the remaining issues, where the verdict is decisive of the case.[36]

7090. After appeal—Remand—The supreme court may remand a case and the record thereof to enable an appellant to renew a motion for a new trial on the ground of newly discovered evidence arising since the filing of the return in the supreme court.[37] When a case is reversed on appeal and the case remanded for further proceedings, a party seeking a new trial must proceed with reasonable diligence.[38]

NOTICE OF MOTION

7091. Specification of errors or grounds of motion—In the absence of exceptions, errors of law on the trial will not be considered on a motion for a

[30] Groh v. Bassett, 7-325(254); Conklin v. Hinds, 16-457(411); Kimball v. Palmerlee, 29-302, 13+129; Deering v. Johnson, 33-97, 22+174; Richardson v. Rogers, 37-461, 35+270.

[31] See § 1372.

[32] Kimball v. Palmerlee, 29-302, 13+129; Collins v. Bowen, 45-186, 47+719 (right lost by laches).

[33] Eaton v. Caldwell, 3-134(80); Kimball v. Palmerlee, 29-302, 13+129; Deering v. Johnson, 33-97, 22+174.

[34] Sheffield v. Mullin, 28-251, 9+756; Deering v. Johnson, 33-97, 22+174; Lathrop v. Dearing, 59-234, 61+24. See Scott v. Sharvy, 62-528, 64+1132; Kroning v. St. P. C. Ry., 96-128, 104+888.

[35] Sheffield v. Mullin, 28-251, 9+756.

[36] Buzalsky v. Buzalsky, 108-422, 122+322. See § 7079.

[37] Kroning v. St. P. C. Ry., 96-128, 104+888.

[38] See Canosia v. Grand Lake, 87-347, 92+215 (right to new trial held not waived by delay).

new trial, or on appeal, unless they are clearly specified in the notice of motion for a new trial.[39] A definite and specific assignment in a notice of motion for a new trial of a ruling or decision is equivalent to an exception under the statute. It is unnecessary to follow an assignment so made with a formal exception.[40] It is unnecessary to embody in the notice the general grounds for a new trial specified in the statute, except, perhaps, where a mere reference to the ruling complained of would not disclose the particular respects in which it is claimed to be erroneous.[41] Except as to errors of law on the trial, it is sufficient to state the grounds of the motion in the language of the statute.[42] When a motion is made and determined in the district court on special grounds stated in the notice of motion, the moving party will not be heard in the supreme court on new or additional grounds.[43] In actions in which the damages are governed by fixed rules and are wholly compensatory for pecuniary loss the objection that damages are excessive or inadequate may be raised on a notice which states that the motion will be made on the ground that the verdict is not justified by the evidence.[44] The record on appeal must contain the notice of motion, and where a notice does not specify any grounds for the motion an order denying a new trial will be affirmed.[45] On appeal from an order granting a new trial the appellant cannot assign as error that the notice of motion did not specify any grounds for it, if he did not make the objection below.[46]

7092. Amendment—The trial court has the power to permit an amendment to a motion for a new trial after decision thereon by inserting therein an additional ground of motion, where such relief will not prejudice the adverse party.[47]

7093. Waiver—A party may waive a notice of motion for a new trial.[48]

7094. On whom served—A notice of motion must be served on all parties against whom it is sought to secure a new trial.[49]

7095. Motion for new trial or judgment non obstante—If, in connection with a motion for a new trial, a party wishes to move for a judgment notwithstanding the verdict under the statute, he must state in his notice of motion that he will ask for that relief.[50]

[39] R. L. 1905 § 4200; Cappis v. Wiedemann, 86–156, 90+368; Olson v. Berg, 87–277, 91+1103; Grant v. Wagner, 87–297, 91+1125; Guthier v. Mpls. etc. Ry., 87–355, 91+1096; Parker v. Pine Tree L. Co., 89–500, 95+323; Conan v. Ely, 91–127, 97+737; Cady v. Cady, 91–137, 97+580; Baier v. Baier, 91–165, 97+671; Tillman v. International H. Co., 93–197, 101+71; Clark v. Thompson, 93–443, 101+1133; Stitt v. Rat Portage L. Co., 98–52, 107+824; Nye v. Kahlow, 98–81, 107+733; Lunney v. Cass Lake, 100–540, 110+1134; American E. Co. v. Crowley, 105–233, 117+428; Moneyweight S. Co. v. Hjerpe, 106–47, 118+62; Beardmore v. Barton, 108–28, 121+228.

[40] Prizer v. Peaslee, 99–275, 109+232.

[41] King v. Burnham, 93–288, 101+302.

[42] See First Nat. Bank v. St. Cloud, 73–219, 221, 75+1054. In Nye v. Kahlow, 98–81, 83, 107+733, it is said that an assignment that "said decision is not justified by the evidence and is contrary to law," is insufficient. This is obviously a mistake due to inadvertence. The court had in mind the rule as to assignments of error on appeal. It has always been the practice to state the grounds of a motion for a new trial in the language of the statute, and this practice is unaffected by Laws 1901 c. 113, except as to errors of law occurring on the trial.

[43] State v. Dist. Ct., 56–56, 57+319; Anchor Invest. Co. v. Kirkpatrick, 59–378, 61+29.

[44] First Nat. Bank v. St. Cloud, 73–219, 75+1054.

[45] Clark v. Nelson, 34–289, 25+628; Spencer v. Stanley, 74–35, 76+953. See Searles v. Thompson, 18–316(285).

[46] Chesley v. Miss. etc. Co., 39–83, 38+769. See Searles v. Thompson, 18–316(285).

[47] Jung v. Hamm, 95–367, 104+233.

[48] Hamm v. Kneise, 101–531, 111+577.

[49] Clark v. Austin, 38–487, 38+615; Adams v. Thief River Falls, 84–30, 86+767.

[50] Kernan v. St. P. C. Ry., 64–312, 67+71; Netzer v. Crookston, 66–355, 68+1099.

BASIS OF MOTION

7096. Affidavits—Minutes—Case or bill of exceptions—The practice as to motions based on the minutes of the court or a case or bill of exceptions has been materially changed by a recent statute.[51] When the motion is based on one or more of the grounds mentioned in subdivisions 1–4, R. L. 1905 § 4198, pertinent facts not appearing of record must be shown by affidavit.[52] After moving on the minutes a party cannot renew the motion on a settled case as of right.[53] Appearing and opposing a motion based on affidavits, and submitting counter affidavits, has been held a waiver of any irregularity in not moving on a case or bill of exceptions.[54]

IRREGULARITY

7097. Statute—Construction—The statute provides for a new trial for "irregularity in the proceedings of the court, referee, jury, or prevailing party, or any order or abuse of discretion, whereby the moving party was deprived of a fair trial." [55] The construction placed on this provision has not been clear and consistent. It has been held that a new trial may be granted thereunder for error in referring a case,[56] in dismissing an action before the introduction of evidence,[57] and in refusing to strike a case from the calendar.[58] On the other hand it has been held that an abuse of discretion before trial cannot be assigned as error on a motion for a new trial.[59] It has been held that no error in the charge can be reviewed under this provision.[60] Irregularities subsequent to the trial are not a ground for a new trial. The failure or inability of a court reporter to furnish the defeated party with a transcript of the evidence is not a ground for a new trial.[61]

7098. Improper remarks of court—Improper remarks of the court preventing a party from having a fair trial are ground for a new trial.[62] It is rare, however, that an appellate court feels justified in granting a new trial on this ground.[63] To be reviewed on appeal improper remarks of the court must be objected to at the time they are made and incorporated in a case or bill of exceptions.[64]

7099. Miscellaneous cases of misconduct in the court—After the jury have retired for consultation the judge cannot communicate with them or give them the least information except in open court and in the presence of or after due notice to the parties. Failure to observe this rule is error and ground

[51] Laws 1907 c. 450.

[52] Laws 1907 c. 450. See Hudson v. Mpls. etc. Ry., 44–52, 46+314; Valerius v. Richard, 57–443, 59+534.

[53] Case v. Huffman, 86–30, 90+5.

[54] Twaddle v. Mendenhall, 80–177, 83+135.

[55] R. L. 1905 § 4198.

[56] St. Paul etc. Ry. v. Gardner, 19–132 (99).

[57] Dunham v. Byrnes, 36–106, 30+402. See St. Paul etc. Ry. v. Gardner, 19–132 (99).

[58] Flanagan v. Borg, 64–394, 67+216.

[59] Winona v. Minn. etc. Co., 27–415, 6+795, 8+148; Schumann v. Mark, 35–379, 28+927; Mpls. etc. Ry. v. Home Ins. Co., 64–61, 66+132; Grimes v. Ericson, 94–461, 103+334; Taylor v. Grand Lodge, 98–36, 107+545. But see, St. Paul etc. Ry. v. Gardner, 19–132(99); Mead v. Billings, 43–239, 45+228.

[60] Valerius v. Richard, 57–443, 59+534.

[61] Peterson v. Lundquist, 106–339, 119+50.

[62] Horton v. Williams, 21–187; State v. English, 62–402, 64+1136; Kramer v. N. W. El. Co., 91–346, 98+96.

[63] Zimmerman v. Lamb, 7–421(336); Haug v. Haugan, 51–558, 53+874; State v. Floyd, 61–467, 63+1096; State v. Hayward, 62–474, 65+63; State v. Johnson, 74–381, 77+293; State v. Briggs, 84–357, 87+935; Isherwood v. Jenkins, 87–388, 92+230; State v. King, 88–175, 92+965; Coulter v. Goulding, 98–68, 107+823.

[64] State v. Floyd, 61–467, 63+1096; Smith v. Kingman, 70–453, 73+253.

for a new trial.[65] It has been held, however, in a civil case, that the court may grant additional instructions to the jury in open court in the absence of counsel and without notice to them.[66] It was held in an early case that if the court adjourns while the jury are out, the judge cannot, in the absence of the parties, receive the verdict until the court meets.[67]

MISCONDUCT OF COUNSEL OR PREVAILING PARTY

7100. Corrupting jurors—When a prevailing party attempts to corrupt or improperly influence a juror a new trial should be granted, as a matter of public policy, whether the attempt was successful or not.[68]

7101. Interference with jury—Where there is in fact misconduct in interfering with the jury in the performance of their duty, it is sufficient to require the granting of a new trial, if the misconduct may reasonably have had an effect unfavorable to the moving party.[69]

7102. Improper remarks or argument of counsel—The matter of granting a new trial for improper remarks or argument of counsel in the course of the trial is governed by no fixed rules, but rests almost wholly in the discretion of the trial court. The action of the trial court in this regard will be reversed on appeal only for a clear abuse of discretion.[70]

7103. Miscellaneous cases of misconduct of counsel—Counsel for the prevailing party offered prejudicial incompetent evidence and persisted in discussing the same in his argument to the jury, though his offer was ruled out and he was ordered by the court not to discuss it. A new trial was granted in the supreme court.[71] A misrecital by counsel before a jury of the testimony of a witness is no ground for a new trial if it is apparent that no prejudice could have resulted.[72] Improper comments on a decision of the supreme court upon an appeal in the same cause have been held a ground for a new trial.[73] The persistent asking by the county attorney of incompetent and improper questions with reference to matters which are of a nature to create prejudice in the minds of the jurors and prevent the defendant from having a fair trial is such improper conduct as to require the granting of a new trial.[74]

[65] Hoberg v. State, 3-262(181). See Helmbrecht v. Helmbrecht, 31-504, 18+449.

[66] Reilly v. Bader, 46-212, 48+909.

[67] Kennedy v. Raught, 6-235(155) (apparently overruled in Reilly v. Bader, 46-212, 48+909).

[68] Akin v. L. S. etc. Mines, 103-204, 114+654, 837.

[69] Id.

[70] Knowles v. Van Gorder, 23-197; Rheiner v. Stillwater etc. Co., 31-193, 17+279; Loucks v. Chi. etc. Ry., 31-526, 18+651; Johnson v. Chi. etc. Ry., 37-519, 35+438; Watson v. St. P. C. Ry., 42-46, 43+904; Olson v. Gjertsen, 42-407, 44+306; State v. Adamson, 43-196, 45+152; Mykleby v. Chi. etc. Ry., 49-457, 52+213; State v. Floyd, 61-467, 63+1096; Riley v. Chi. etc. Ry., 71-425, 74+171; Mason v. St. P. etc. Co., 82-336, 85+13; Pierce v. Brennan, 88-50, 92+507; State v. Nelson, 91-143, 97+652; Hartley v. Penn. etc. Co., 91-382, 98+198; Fisher v. Weinholzer, 92-347, 99+1132; McKenzie v. Banks, 94-496, 103+497; Jung v. Hamm, 95-367, 104+233; Graves v. Bonness, 97-278, 107+163; Carey v. Switchmen's Union, 98-28, 107+129; Pearsall v. Tabour, 98-248, 108+808; Balder v. Zenith F. Co., 103-345, 114+948; Parmelee v. Tri-State etc. Co., 103-530, 115+1135; McQuade v. Golden Rule, 105-326, 117+484; Hawkins v. G. N. Ry., 107-245, 119+1070; Christiansen v. Chi. etc. Ry., 107-341, 120+300; Nat. Citizens' Bank v. Bowen, 109-473, 124+241; Zimmerman v. Burchard, 126+282. See Note, 100 Am. St. Rep. 689. In a few cases a new trial has been granted by the supreme court. Belyea v. Mpls. etc. Ry., 61-224, 63+627; Martin v. Courtney, 81-112, 83+503; Wells v. Moses, 87-432, 92+334; Fisher v. Weinholzer, 91-22, 97+426; Bjoraker v. Chi. etc. Ry., 103-400, 115+202. See Bremer v. Mpls. etc. Ry., 96-469, 105+494 and cases under § 9799.

[71] Belyea v. Mpls. etc. Ry., 61-224, 63+627.

[72] Rheiner v. Stillwater etc. Co., 31-193, 17+279.

[73] Martin v. Courtney, 81-112, 83+503.

[74] State v. Fournier, 108-402, 122+329.

MISCONDUCT OF JURY

7104. By trial court—A matter of discretion—The matter of granting new trials on the ground of misconduct of the jury is governed by no fixed rules but rests almost wholly in the discretion of the trial court.[75] Motions for a new trial on this ground are disfavored and granted with extreme caution.[76] It is doubtful whether a case, and especially a capital case, could arise, in which some one could not be procured to make affidavit of misconduct or irregularity on the part of some member of the jury. The temptation would be great where life is involved, and the risk of detection small. Testimony, therefore, of this character, made to impeach a verdict, should be received with the utmost caution, and tried by the strictest test.[77] To authorize a new trial it is not enough that the jury have been guilty of misconduct. It is not the policy of the law to punish a successful litigant for the sins of the jury.[78] They may always be fined or imprisoned for their misconduct.[79] To justify a new trial there must not only be misconduct on the part of the jury but also prejudice to the moving party. If it does not appear that the misconduct was occasioned by the prevailing party or any one in his behalf, and if it does not indicate any improper bias upon the jurors' minds, and the court cannot see that it either had or might have had an effect unfavorable to the party moving for a new trial, the verdict ought not to be set aside.[80]

7105. By supreme court—The matter of granting new trials for misconduct of the jury rests almost wholly in the discretion of the trial court and its action will not be reversed on appeal except for a clear abuse of discretion. This is especially true when such action is based on conflicting affidavits.[81]

7106. When verdict right as matter of law—When the verdict is right as a matter of law and such as the court should have directed, no misconduct on the part of the jury is a ground for a new trial.[82]

7107. Objections on the trial—Waiver—When the misconduct is of such a nature that its effects can be obviated on the trial, it is the duty of the party affected to call the attention of the court to the matter promptly on its discovery and ask for appropriate relief. Failing to do so he will be deemed to have waived the objection. A party cannot be permitted to remain silent under such circumstances and speculate on a favorable verdict.[83] If, upon the misconduct of one or more jurors being called to the attention of the court, the trial proceeds by consent without a full panel, the misconduct is not a ground for a new trial.[84]

[75] Hewitt v. Pioneer Press Co., 23-178; State v. Salverson, 87-40, 91+1.

[76] State v. Dumphey, 4-438(340); Tarbox v. Gotzian, 20-139(122); Koehler v. Cleary, 23-325; Twaddle v. Mendenhall, 80-177, 83+135.

[77] State v. Dumphey, 4-438(340).

[78] Eich v. Taylor, 20-378(330); State v. Conway, 23-291. See also, Helmbrecht v. Helmbrecht, 31-504, 18+449.

[79] State v. Conway, 23-291.

[80] Koehler v. Cleary, 23-325. See also, Tarbox v. Gotzian, 20-139(122); State v. Conway, 23-291; Oswald v. Mpls. etc. Ry., 29-5, 11+112; Woodbury v. Anoka, 52-329, 54+187; Pettibone v. Phelps, 13 Conn. 445; Jackson v. Smith, 21 Wis. 26; Sawvel v. Bitterlee, 86 Wis. 420; Dennison v. Powers, 35 Vt. 39.

[81] Hewitt v. Pioneer Press Co., 23-178; State v. Conway, 23-291; Tierney v. Mpls. etc. Ry., 33-311, 23+229; State v. Madigan, 57-425, 59+490; State v. Floyd, 61-467, 63+1096; Hull v. Mpls. St. Ry., 64-402, 67+218; Svenson v. Chi. etc. Ry., 68-14, 70+795; State v. Salverson, 87-40, 91+1; State v. Bragg, 90-7, 95+578.

[82] Moore v. Phoenix Ins. Co., 100-393, 111+263.

[83] State v. Nichols, 29-357, 13+153; Gurney v. Mpls. etc. Ry., 41-223, 43+2; Young v. Otto, 57-307, 59+199; State v. Floyd, 61-467, 63+1096; State v. Salverson, 87-40, 91+1.

[84] Young v. Otto, 57-307, 59+199.

7108. Presumption of prejudice—Burden of proof—If the moving party shows such misconduct that prejudice may have resulted to him from it a new trial will be granted unless the successful party shows that in fact such prejudice did not result. The fact of non-prejudice must be made to appear very clearly if it is reasonable to suppose that prejudice might have resulted. Any doubt in the mind of the court should be resolved in favor of a new trial.[85]

7109. Affidavits of jurors and others—Admissibility—Affidavits of jurors as to what transpired in the jury room[86] or as to the misconduct of the officer having them in charge,[87] are inadmissible to impeach their verdict. Affidavits of jurors as to matters occurring outside the jury room during the progress of the trial are admissible to impeach their verdict.[88] Affidavits of jurors as to what transpired in the jury room, or as to occurrences outside the jury room during the course of the trial, are admissible in support of their verdict.[89] Affidavits of jurors in general terms that they were not affected by what they saw, and that their verdict was rendered wholly on the evidence given in court, are of little or no weight. They may think that this was so and still their minds have been insensibly affected by what they saw.[90] Affidavits of persons other than jurors are admissible to impeach a verdict provided they relate to acts of the jurors showing misconduct.[91] They are inadmissible. however, if they relate to statements of jurors,[92] except for purposes of impeachment.[93] An affidavit of an officer is admissible to show misconduct of jurors while in his charge.[94]

7110. Sufficiency of affidavits—An affidavit of a juror to the effect that he overheard a conversation and was influenced thereby, but which did not state the names of the parties or what was said, has been held insufficient.[95]

7111. Oral examination of jurors—It is discretionary with the trial court to allow counsel, on a motion for a new trial, to examine a juror charged with misconduct.[96]

7112. Separation of the jury—In a criminal action it is discretionary with the court to allow the jury to separate during the course of the trial and before the case is finally submitted to them.[97] After submission they cannot be permitted to separate until their discharge.[98] Any separation after final sub-

[85] Koehler v. Cleary, 23-325; Oswald v. Mpls. etc. Ry., 29-5, 11+112; Woodbury v. Anoka, 52-329, 54+187; Svenson v. Chi. etc. Ry., 68-14, 70+795; Rush v. St. P. C. Ry., 70-5, 72+733; Twaddle v. Mendenhall, 80-177, 83+135; State v. Salverson, 87-40, 91+1; Akin v. L. S. etc. Mines, 103-204, 114+654.

[86] St. Martin v. Desnoyer, 1-156(131); Knowlton v. McMahon, 13-386(358); State v. Stokely, 16-282(249); State v. Beebe, 17-241(218); State v. Mims, 26-183, 2+494, 683; Bradt v. Rommel, 26-505, 5+680; Stevens v. Montgomery, 27-108, 6+456; State v. Lentz, 45-177, 47+720; Gardner v. Minea, 47-295, 50+199; Aldrich v. Wetmore, 52-164, 53+1072; Svenson v. Chi. etc. Ry., 68-14, 70+795; Wester v. Hedberg, 68-434, 71+616; Rush v. St. P. C. Ry., 70-5, 72+733; State v. Durnam, 73-150, 75+1127.

[87] Knowlton v. McMahon, 13-386(358), Gardner v. Minea, 47-295, 50+199.

[88] Rush v. St. P. C. Ry., 70-5, 72+733; Twaddle v. Mendenhall, 80-177, 83+135; Pierce v. Brennan, 83-422, 86+417; Goss v. Goss, 102-346, 113+690.

[89] St. Martin v. Desnoyer, 1-156(131); Eich v. Taylor, 20-378(330); State v. Lentz, 45-177, 47+720; Aldrich v. Wetmore, 52-164, 53+1072; Svenson v. Chi. etc. Ry., 68-14, 70+795.

[90] Aldrich v. Wetmore, 52-164, 53+1072; Pierce v. Brennan, 83-422, 86+417.

[91] Bradt v. Rommel, 26-505, 5+680; Svenson v. Chi. etc. Ry., 68-14, 70+795.

[92] St. Martin v. Desnoyer, 1-156(131); Aldrich v. Wetmore, 52-164, 53+1072; Svenson v. Chi. etc. Ry., 68-14, 70+795.

[93] Aldrich v. Wetmore, 52-164, 53+1072.

[94] Bradt v. Rommel, 26-505, 5+680.

[95] Goss v. Goss, 102-346, 113+690.

[96] State v. King, 88-175, 92+965.

[97] Bilansky v. State, 3-427(313); State v. Ryan, 13-370(343); State v. Salverson, 87-40, 91+1; State v. Nelson, 91-143, 97+652; State v. Williams, 96-351, 105+265.

[98] Maher v. State, 3-444(329); State v.

mission is presumptively prejudicial and ground for a new trial.[99] A temporary separation of a juror from his fellows, after the withdrawal of the jury, under the charge of the court, for deliberation upon their verdict, is no ground for a new trial, when it clearly and affirmatively appears that no prejudice resulted, and that the facts and circumstances connected with the separation were such as to exclude all reasonable presumption or suspicion that the juror was tampered with, or that the verdict was or could have been in any way influenced or affected by the irregularity.[1]

7113. Drinking intoxicating liquors—The drinking of intoxicating liquors by jurors during the course of the trial and before final submission is not a ground for a new trial unless it is made to appear that the drinking was at the expense of the prevailing party [2] or that the juror was thereby rendered unfit to discharge his duties intelligently.[3] The burden rests upon the moving party to show these facts affirmatively and unequivocally, and in addition that he was unaware of the condition of the juror until after verdict and did not in any way participate in bringing it about.[4] If liquor is drunk by the jury after retiring to the jury room for deliberation a new trial will ordinarily be granted as a matter of course and it is not necessary to show intoxication.[5]

7114. Visiting locus in quo—The theory of the modern jury trial is that the evidence on which the verdict is based must all be submitted in open court where the judge can rule out inadmissible evidence and the parties can examine and cross-examine the witnesses and explain or rebut their testimony. If jurors were permitted to pursue private investigations out of court they would form opinions, often erroneous and one-sided, which the party prejudiced thereby would have no opportunity to correct.[6] If all the evidence were not submitted in open court the judge would never know whether the verdict was justified by the evidence or not.[7] Jurors cannot base their verdict on their private knowledge of the facts in issue or of facts relevant to the facts in issue.[8] If a juror has any knowledge of such facts he must be sworn as a witness.[9] Whether a visit to the locus in quo by a juror is a ground for a new trial depends upon the facts of the particular case. A new trial should be granted unless it is clear that the result was not affected by the visit.[10]

7115. Unauthorized communications with jury—An unauthorized communication made to a juror concerning the action is ground for a new trial, unless it is obvious that it did not affect the verdict.[11]

Parrant, 16–178(157) (an extreme case—contra, State v. Hendricks, 32 Kan. 559); State v. Anderson, 41–104, 42+786; State v. Durnam, 73–150, 75+1127. See Aetna Ins. Co. v. Grube, 6–82(32) (sealed verdict—jury pretending to reach agreement to secure separation).

[99] Maher v. State, 3–444(329).

[1] State v. Conway, 23–291; State v. Matakovich, 59–514, 61+677; State v. Wright, 98 Iowa, 702.

[2] State v. Madigan, 57–425, 59+490; State v. Salverson, 87–40, 91+1.

[3] State v. Parrant, 16–178(157); State v. Adamson, 43–196, 45+152; State v. Madigan, 57–425, 59+490; State v. Salverson, 87–40, 91+1; State v. King, 88–175, 924 965; Floody v. G. N. Ry., 102–81, 112+875, 1081.

[4] State v. Salverson, 87–40, 91+1.

[5] State v. Madigan, 57–425, 59+490.

[6] Aldrich v. Wetmore, 52–164, 53+1072.

[7] Chute v. State, 19–271(230).

[8] See, for the origin of this rule, Thayer, Ev. c. 3.

[9] Chute v. State, 19–271(230).

[10] Rush v. St. P. C. Ry., 70–5, 72+733. See also, Koehler v. Cleary, 23–325; Aldrich v. Wetmore, 52–164, 53+1072; Woodbury v. Anoka, 52–329, 54+187; Twaddle v. Mendenhall, 80–177, 83+135; Pierce v. Brennan, 83–422, 86+417; Lyons v. Dee, 88–490, 93+899; Floody v. G. N. Ry., 102–81, 112+875, 1081.

[11] Hayward v. Knapp, 22–5; Chalmers v. Whittemore, 22–305; Oswald v. Mpls. etc. Ry., 29–5, 11+112; State v. Lentz, 45–177, 47+720; State v. Floyd, 61–467, 63+1096; Boyle v. Virginia L. Co., 102–508, 112+1140. See Hoberg v. State, 3–262(181); Helmbrecht v. Helmbrecht, 31–504, 18+449.

7116. Miscellaneous forms of misconduct—Cases are cited below involving various forms of misconduct.[12]

ACCIDENT OR SURPRISE

7117. By trial court—A matter of discretion—The matter of granting a new trial for accident or surprise is not governed by fixed rules, but rests almost wholly in the discretion of the trial court—a discretion to be exercised with reference to the facts of the particular case and in furtherance of justice.[13] Motions for a new trial on this ground should be granted with great caution and only to remedy manifest injustice.[14] They should not be granted unless there is a strong probability that a new trial would result differently.[15] Such motions are often closely allied to a motion for a new trial on the ground of newly discovered evidence.[16]

7118. By supreme court—The matter of granting a new trial on the ground of accident or surprise rests almost wholly in the discretion of the trial court and its action will rarely be reversed on appeal. The question for an appellate court in such cases is not whether a new trial might properly have been granted or denied, but whether the court below violated a clear legal right of the appellant or abused its judicial discretion.[17] Especially is this true where the action of the trial court is based on conflicting affidavits.[18]

7119. Objection on the trial—It is a general rule that when a party is surprised on the trial he must instantly call the attention of the court to the matter and fortify his position by resorting to all available modes of present relief.[19] It is ordinarily his duty to move for a postponement or continuance,[20]

[12] Aetna Ins. Co. v. Grube, 6-82(32) (leave to bring in sealed verdict—pretending to have reached agreement in order to be allowed to separate); McNulty v. Stewart, 12-434(319) (foreman stating in open court how jury stands); Eich v. Taylor, 20-378(330) (juror sending letter to his wife by successful party to action); Stevens v. Montgomery, 27-108, 6+456 (jury rendered verdict and was discharged—two days afterwards jury came into court and claimed that verdict was not such as they intended—held that verdict could not be so impeached); Gurney v. Mpls. etc. Ry., 41-223, 43+2 (party furnishing jurors with cigars—absence of juror on view—irregularity waived); State v. Holden, 42-350, 44+123 (requesting case to be submitted without argument); Young v. Otto, 57-307, 59+199 (two jurors took boat ride at night with successful party and two of his important witnesses—they were excused and trial proceeded with ten jurors by consent—misconduct waived); Svenson v. Chi. etc. Ry., 68-14, 70+795 (personal injury action—verdict for defendant—letter from jurors requesting defendant to employ plaintiff on account of his injuries); State v. Bragg, 90-7, 95+578 (juror falsifying when answering questions as to his competency); State v. Williams, 96-351, 105+265 (juror reading newspaper comments on case).

[13] Hull v. Mpls. St. Ry., 64-402, 67+218; Wester v. Hedberg, 68-434, 71+616; Miller v. Layne, 84-221, 87+605; Wingen v. May, 92-255, 99+809; Holland v. Sheehan, 106-545, 119+217.

[14] Hull v. Mpls. St. Ry., 64-402, 67+218.

[15] Farnham v. Jones, 32-7, 19+83; Hull v. Mpls. St. Ry., 64-402, 67+218.

[16] Sheffield v. Mullin, 28-251, 9+756.

[17] Desnoyer v. McDonald, 4-515(402); Huntress v. Wyman, 55-262, 56+896; Hull v. Mpls. St. Ry., 64-402, 67+218; Otterness v. Botten, 80-430, 83+382; Miller v. Layne, 84-221, 87+605; Wingen v. May, 92-255, 99+809; Burgraf v. Byrnes, 99-517, 109+1132; Trainor v. Maturen, 100-127, 110+370; Holland v. Sheehan, 106-545, 119+217.

[18] Wintermute v. Stinson, 19-394(340); Hull v. Mpls. St. Ry., 64-402, 67+218; State v. Gallehugh, 89-212, 94+723.

[19] State v. Dist. Ct., 50-14, 52+222; Nelson v. Carlson, 54-90, 55+821; Wells v. Bowman, 59-364, 61+135; Adamant Mfg. Co. v. Pete, 61-464, 63+1027; Wester v. Hedberg, 68-434, 71+616; Otterness v. Botten, 80-430, 83+382; Pillager v. Hewett, 98-265, 107+815.

[20] Eich v. Taylor, 17-172(145); Ward v. Hackett, 30-150, 14+578; Cheney v. Dry Wood L. Co., 34-440, 26+236; Lowe v. Mpls. St. Ry., 37-283, 34+33; State v. Bagan, 41-285, 43+5; Hendrickson v. Tracy, 53-404, 55+622; Otterness v. Botten, 80-430, 83+382.

except when the surprise relates to the disqualification of a juror.[21] A party is not permitted to remain silent under such circumstances and speculate on the chances of a favorable verdict. Motions for a continuance or postponement are granted almost as a matter of course in such cases.[22] The rule requiring a party to make such a motion when surprised on the trial is not inflexible, but yields to the demands of justice.[23]

7120. Showing on motion—Affidavits—It must be made to appear affirmatively and unequivocally that the accident or surprise could not have been guarded against by the exercise of ordinary prudence,[24] and that due diligence was exercised in seeking to avert the consequences thereof.[25] The affidavit should state with particularity the circumstances of the accident or surprise and the facts showing diligence or excusing the absence of an attorney,[26] party,[27] or witness. If new evidence is sought to be introduced, affidavits of the new witnesses must be submitted as on motions for a new trial for newly discovered evidence.[28] As a general rule an affidavit of merits is necessary.[29] But when it appears from the moving papers that the party has a good cause of action or defence on the merits the court may dispense with an affidavit of merit.[30]

7121. Cases in which motion granted—A new trial for accident and surprise was granted where the question was whether plaintiff's or defendant's mortgages were filed first, and an abstract of the record made by the register of deeds for the defendant showed that the defendant's mortgages were filed first, and the defendant's attorneys, relying upon that made no preparation to prove the times of filing otherwise than by the record and the court admitted parol evidence of the times of filing;[31] where a verdict was obtained by false testimony concerning a lost letter and the applicant was unable, without any want of diligence, to rebut such testimony on the trial;[32] where a written instrument, which a party with good reason believed to be lost, was unexpectedly produced at the trial by the opposite party to the suit, who was not entitled to its possession, and on its face disclosed an erasure and apparent alteration, which it was material for the former to explain, but which he was unable to do, in the absence of the notary who witnessed its execution, but whose evidence was not discovered to be material until after an inspection of the instrument subsequent to the trial;[33] where an original record was lost, and the defeated party was misled by a certified copy used on the trial, which was subsequently discovered not to conform to the original in important particulars, but the correctness of which he had no reasonable ground for suspecting on the trial;[34] where the plaintiff had gone to Germany with his wife and was unexpectedly detained there by her illness;[35] where the original defendant died during the pendency of the action and one of the executors dying, there was uncertainty as to who should be substituted and the remaining executor was

[21] Wells v. Bowman, 59-364, 61+135.
[22] Lando v. Chi. etc. Ry., 81-279, 83+1089.
[23] Nudd v. Home etc. Co., 25-100; Farnham v. Jones, 32-7, 19+83; Russell v. Reed, 32-45, 19+86; Miller v. Layne, 84-221, 87+605.
[24] Eich v. Taylor, 17-172(145); Cheney v. Dry Wood L. Co., 34-440, 26+236; State v. Bagan, 41-285, 43+5; State v. Dist. Ct., 50-14, 52+222; Caughey v. N. P. El. Co., 51-324, 53+545; State v. Madigan, 57-425, 59+490; Scott v. Sharvy, 62-528, 64+1132.
[25] See cases under § 7119.
[26] Feltus v. Balch, 27-357, 7+688; Caughey v. N. P. El. Co., 51-324, 53+545.
[27] Desnoyer v. McDonald, 4-515(402).
[28] Eich v. Taylor, 17-172(145). See § 7127.
[29] O'Keefe v. Lenfest, 35-237, 28+260; Trainor v. Maturen, 100-127, 110+370.
[30] Trainor v. Maturen, 100-127, 110+370.
[31] Shaw v. Henderson, 7-480(386).
[32] Nudd v. Home etc. Co., 25-100.
[33] Russell v. Reed, 32-45, 19+86.
[34] Farnham v. Jones, 32-7, 19+83.
[35] Miller v. Layne, 84-221, 87+605.

a woman and ignorant;[36] and where the defendant failed to be present at the trial, being misled as to the time of trial by a letter from his attorney.[37]

7122. Cases in which motion denied—A motion for a new trial on the ground of accident or surprise was denied where a party, relying upon the statement of his counsel that the case would not be reached before a certain time, was absent when the case was called;[38] where a material witness, who was not subpœnaed, but who, at the request of the party, had promised to attend and testify, was physically unable to attend and the trial was had without him;[39] where the party was absent from the trial without excuse;[40] where counsel inadvertently overlooked a special statute of limitations;[41] where counsel was absent without excuse when the case was called;[42] where a material witness of the opposite party assured the applicant before trial that he would testify in a given way, but on the trial testified directly contrary;[43] where counsel failed to detect an omission in the sheriff's return on attachment until long after the trial, such return being an essential part of his case;[44] where counsel claimed to be surprised by a decision of the supreme court;[45] where a witness testified contrary to the expectations of the applicant and after trial made an affidavit contradicting his testimony on the trial;[46] where it was claimed that a witness did not understand or speak English perfectly and failed to express his true meaning on the stand;[47] where counsel was not present at the call of the calendar at the opening of the term and was surprised at the early date at which the case was set and in consequence was not prepared for trial;[48] where the disqualification of a juror was discovered on the trial but counsel failed to ask for the discharge of the jury;[49] where a witness testified on the trial contrary to her testimony before a committing magistrate;[50] where a witness on the trial testified contrary to his statements to the applicant before trial;[51] where a witness claimed that his testimony on the trial did not express his real meaning;[52] where a juror was disqualified by reason of non-residence in the county;[53] where a juror was disqualified by reason of alienage;[54] where the applicant claimed to have been surprised at the testimony of a witness and did not discover it until after trial;[55] where one of the jurors did not understand the English language;[56] where, on a fifth trial of the same cause, a witness was first produced who testified, to the surprise of applicant, that he had seen the accident;[57] where the applicant was surprised at the testimony of a witness;[58] where a party was surprised at not being allowed to introduce further evidence after resting;[59] where the party did not secure the attendance of a material witness who had promised to be present;[60] where counsel failed to construe a pleading properly;[61] where

[36] Huntress v. Wyman, 55-262, 56+896.
[37] Trainor v. Maturen, 100-127, 110+370.
[38] Desnoyer v. McDonald, 4-515(402). See Trainor v. Maturen, 100-127, 110+370.
[39] Eich v. Taylor, 17-172(145).
[40] Cheney v. Dry Wood L. Co., 34-440, 26+236.
[41] Barrows v. Fox, 39-61, 38+777.
[42] Caughey v. N. P. El. Co., 51-324, 53+545; Latusek v. Davies, 79-279, 82+587.
[43] Adamant Mfg. Co. v. Pete, 61-464, 63+1027. See Webb v. Barnard, 36-336, 31+214.
[44] Scott v. Sharvy, 62-528, 64+1132.
[45] Kurtz v. St. P. etc. Ry., 65-60, 67+808.
[46] Bristol v. Schultz, 68-106, 70+872.
[47] Nelson v. Carlson, 54-90, 55+821.
[48] Feltus v. Balch, 27-357, 7+688.
[49] Wells v. Bowman, 59-364, 61+135.
[50] Gardner v. Kellogg, 23-463.
[51] Webb v. Barnard, 36-336, 31+214.
[52] Sheffield v. Mullin, 28-251, 9+756.
[53] Keegan v. Mpls. etc. Ry., 76-90, 78+965.
[54] State v. Durnam, 73-150, 75+1127.
[55] Wester v. Hedberg, 68-434, 71+616.
[56] State v. Madigan, 57-425, 59+490.
[57] Hull v. Mpls. St. Ry., 64-402, 67+218.
[58] Wintermute v. Stinson, 19-394(340).
[59] Beaulieu v. Parsons, 2-37(26).
[60] Otterness v. Botten, 80-430, 83+382.
[61] First Nat. Bank v. Steele, 58-126, 59+959.

it was claimed that one of the jurors was disqualified by reason of deafness;[62] where counsel failed to put in all his evidence on account of a remark of the judge to the effect that a certain ruling put an end to his case;[63] where counsel for the defendant in a criminal case claimed to be surprised by the testimony of one of the witnesses for the state;[64] where it was discovered that one of the jurors had expressed hostile feelings toward the defendant in a criminal case;[65] where a party was surprised by the action of the court in making certain recitals in a prior order of the court the basis of findings against him;[66] where a party was surprised at the testimony of one of his own witnesses;[67] where a party was surprised by the testimony of an adverse witness and was unable to secure the attendance of a witness in rebuttal;[68] where a party was surprised by the testimony of a witness of the adverse party;[69] where counsel inadvertently overlooked a statute applicable to the case.[70]

NEWLY DISCOVERED EVIDENCE

7123. By trial court—To be granted with extreme caution—The matter of granting new trials for newly discovered evidence is not governed by inflexible rules, but rests very largely in the discretion of the trial court—a discretion to be exercised cautiously and sparingly and only in furtherance of substantial justice. Public policy demands that new trials should not be freely granted on this ground. They should be granted only to prevent manifest and grave injustice.[71]

7124. By another judge—The discretionary nature of an order granting a new trial for newly discovered evidence is not affected by the fact that it is made by a judge other than the one who tried the case.[72]

7125. By supreme court—The matter of granting a new trial on the ground of newly discovered evidence is very largely addressed to the discretion of the trial court. Having heard the case tried and seen the witnesses and heard them testify, its means of judging of the propriety of granting a new trial, and as to whether the new evidence will be likely to change the result, are superior to those afforded to the appellate court by a mere statement of the evidence in the record. The inquiry of the appellate court is not whether upon the record a new trial apparently might have been properly granted, but whether the refusal of it involved the violation of a clear legal right or a manifest abuse of judicial discretion.[73] The action of the lower court will

[62] Wilcox v. Arbuckle, 50–523, 52+926.
[63] Zimmerman v. Lamb, 7–421(336).
[64] State v. Fay, 88–269, 92+978.
[65] State v. Gallehugh, 89–212, 94+723.
[66] State v. Bongard, 89–426, 94+1093.
[67] Wingen v. May, 92–255, 99+809.
[68] Stitt v. Rat Portage L. Co., 92–365, 100+1125.
[69] Pillager v. Hewett, 98–265, 107+815; Strand v. G. N. Ry., 101–85, 111+958.
[70] Slocum v. McLaren, 109–49, 122+871.
[71] Lampsen v. Brander, 28–526, 11+94; Peck v. Small, 35–465, 29+69; Cirkel v. Croswell, 36–323, 31+513; Hoye v. Chi. etc. Ry., 46–269, 48+1117; Nelson v. Carlson, 54–90, 55+821; State v. Nelson, 91–143, 97+652; Wingen v. May, 92–255, 99+809; Kroning v. St. P. C. Ry., 96–128, 104+888; Bunker v. United Order, 97–361, 107+392; Ewing v. Stickney, 107–217, 119+802.
[72] State v. Mathley, 101–536, 111+1134.
[73] Lampsen v. Brander, 28–526, 11+94; Peterson v. Faust, 30–22, 14+64; Eldridge v. Mpls. etc. Ry., 32–253, 20+151; Peck v. Small, 35–465, 29+69; Cirkel v. Croswell, 36–323, 31+513; State v. Barrett, 40–65, 41+459; Jones v. Chi. etc. Ry., 42–183, 43+1114; Hoye v. Chi. etc. Ry., 46–269, 48+1117; Layman v. Mpls. St. Ry., 66–452, 69+329; Bradley v. Norris, 67–48, 69+624; Benton v. Mpls. etc. Co., 73–498, 76+265; Thiel v. Kennedy, 82–142, 84+657; O'Hara v. Collins, 84–435, 87+1023; State v. Blanchard, 88–82, 92+504; State v. Nelson, 91–143, 97+652; Wingen v. May, 92–255, 99+809; Bunker v. United Order, 97–361, 107+392; State v. Mathley, 101–536, 111+1134; Sprague v. Wis. C. Ry., 104–58, 116+104; Graves v. Bonness, 104–135, 116+209; Gragg v. Empey, 105–229, 117+421; Lindstrom v. Fitzpatrick, 105–331,

be sustained on appeal as a matter of course, if the record does not contain all of the evidence submitted on the trial, together with the newly discovered evidence.[74] An appellate court is especially reluctant to grant a new trial when it has been denied by the trial court on conflicting affidavits.[75]

7126. Motion for postponement condition precedent—A motion for a new trial on the ground of newly discovered evidence will ordinarily be denied if the applicant knew of the existence of such evidence at the time of the trial and failed to apply for a postponement or continuance of the case.[76]

7127. Showing on motion—A party seeking a new trial on the ground of newly discovered evidence must show affirmatively and unequivocally by his affidavits on the motion that the new evidence was not in fact discovered until after the trial and that it could not have been discovered before the trial by the exercise of reasonable diligence. It is not sufficient for him to state in his affidavit that he used due diligence or his utmost efforts in the discovery of evidence before the trial or that the new evidence could not have been discovered before the trial by the exercise of reasonable diligence. He must state with particularity what he did to discover the new evidence before the trial so that the court may determine from the affidavit alone whether he exercised reasonable diligence.[77] He should state explicitly when, where, and how the new evidence was discovered.[78] The affidavit should be made by the party personally rather than by his attorney.[79] The applicant must submit to the court affidavits of the new witnesses setting forth verbatim just what can be testified to in court.[80] If it is impossible to submit such affidavits the reasons should be fully stated in the affidavit of the applicant.[81] Counter affidavits may be submitted by the opposing party.[82]

7128. Evidence must not have been discoverable before trial—Newly discovered evidence is no ground for a new trial if it could have been discovered before the trial by the exercise of reasonable diligence.[83] It must be

117+441; Ewing v. Stickney, 107–217, 119+802. New trial ordered by supreme court, McDonald v. Smith, 101–476, 112+627.

[74] State v. Lautenschlager, 23–290; Scofield v. Walrath, 35–356, 28+926; Gardner v. Fidelity etc. Assn., 67–207, 69+895.

[75] Peterson v. Faust, 30–22, 14+64; Eldridge v. Mpls. etc. Ry., 32–253, 20+151; Jones v. Chi. etc. Ry., 42–183, 43+1114; Hull v. Mpls. St. Ry., 64–402, 67+218.

[76] Lowe v. Mpls. St. Ry., 37–283, 34+33; State v. Bagan, 41–285, 43+5; Hendrickson v. Tracy, 53–404, 55+622.

[77] Meeks v. St. Paul, 64–220, 66+966; Bradley v. Norris, 67–48, 69+624; Revor v. Bagley, 76–326, 79+171; Wellendorf v. Tesch, 77–512, 80+629; Sumner v. Northfield, 96–107, 104+686.

[78] Bradley v. Norris, 67–48, 69+624.

[79] Broat v. Moor, 44–468, 47+55.

[80] Keough v. McNitt, 6–513(357); Eddy v. Caldwell, 7–225(166). See State v. Fay, 88–269, 92+978 (affidavit defective in not stating residence of affiant); Mpls. T. Co. v. Menage, 73–441, 454, 76+195 (affidavit defective in stating mere inference of affiant).

[81] Eddy v. Caldwell, 7–225(166).

[82] Finch v. Green, 16–355(315); Peterson v. Faust, 30–22, 14+64.

[83] Baze v. Arper, 6–220(142); Shaw v. Henderson, 7–480(386); Humphrey v. Havens, 9–318(301); Knoblauch v. Kronschnabel, 18–300(272); Wintermute v. Stinson, 19–394(340); State v. Wagner, 23–544; Evans v. Christopherson, 24–330; Krassin v. Shearan, 24–355; Laurel v. State Nat. Bank, 25–48; Fenno v. Chapin, 27–519, 8+762; Sheffield v. Mullin, 28–251, 9+756; Ward v. Hackett, 30–150, 14+578; Taylor v. Mueller, 30–343, 15+413; Keith v. Briggs, 32–185, 20+91; Eldridge v. Mpls. etc. Ry., 32–253, 20+151; Austin v. N. P. Ry., 34–351, 25+798; Farnsworth v. Robbins, 36–369, 31+349; Broat v. Moor, 44–468, 47+55; Elmborg v. St. P. C. Ry., 51–70, 52+969; Hendrickson v. Tracy, 53–404, 55+622; Nelson v. Carlson, 54–90, 55+821; Lathrop v. Dearing, 59–234, 61+24; Tuman v. Pillsbury, 60–520, 63+104; Adamant Mfg. Co. v. Pete, 61–464, 63+1027; Galvin v. St. Paul, 62–145, 64+147; Meeks v. St. Paul, 64–220, 66+966; Wherry v. Duluth etc. Ry., 64–415, 67+223; Malmgren v. Phinney, 65–25, 67+649; Kurtz v. St. P. & D. Ry., 65–60, 67+808; Bradley v. Norris, 67–48, 69+624; Wellendorf v. Tesch, 77–512, 80+629; Vosbeck v. Kellogg, 78–176, 80+957; Newbury v. G. N. Ry., 109–113, 122+1117; Snyder v. Crescent M. Co., 126+822.

made to appear affirmatively and unequivocally that the new evidence was not in fact discovered until after the trial [84] and that it could not have been discovered before the trial by the exercise of reasonable diligence.[85] If the party knew of the existence of the evidence before the trial the fact that his counsel did not is not enough to justify a new trial.[86] If it be left even doubtful that the party knew of the evidence he will not succeed. A strict adherence to this rule is necessary to prevent imposition upon the court.[87] A new trial will not ordinarily be granted to enable a party to prove matter which was of public record at the time of the trial,[88] or to examine a person who was a witness on the trial and might then have been examined by the applicant.[89]

7129. Evidence must not be merely contradictory or impeaching—Newly discovered evidence which merely contradicts or impeaches a witness is no ground for a new trial, except in extraordinary cases.[90] Of course if it is made to appear that a verdict has been corruptly obtained by deliberate perjury, suborned by the successful party, it is the duty of the court to grant a new trial and a refusal to do so cannot be justified on the ground that the newly discovered evidence is merely impeaching.[91] The general rule that a new trial will not be granted for newly discovered evidence which is merely contradictory or impeaching is not inflexible, but yields to the demands of justice in exceptional cases.[92] An affidavit to the effect that the reputation of a witness for truthfulness is bad is not alone sufficient ground for a new trial.[93]

7130. Evidence must not be merely cumulative—A new trial will not ordinarily be granted for newly discovered evidence which is merely cumulative or corroborative of the evidence introduced on the trial.[94] Cumulative evi-

[84] Knoblauch v. Kronschnabel, 18–300 (272); Wintermute v. Stinson, 19–394 (340); Adamant Mfg. Co. v. Pete, 61–464, 63+1027; Galvin v. St. Paul, 62–145, 64+147.

[85] Nininger v. Knox, 8–140(110); Wintermute v. Stinson, 19–394(340); Evans v. Christopherson, 24–330; Broat v. Moor, 44–468, 47+55; Meeks v. St. Paul, 64–220, 66+966; Wherry v. Duluth etc. Ry., 64–415, 67+223; Kurtz v. St. P. etc. Ry., 65–60, 67+808; Bradley v. Norris, 67–48, 69+624; Revor v. Bagley, 76–326, 79+171; Wellendorf v. Tesch, 77–512, 80+629; Vosbeek v. Kellogg, 78–176, 80+957; Gragg v. Empey, 105–229, 117+421.

[86] Broat v. Moor, 44–468, 47+55.

[87] Nininger v. Knox, 8–140(110); Broat v. Moor, 44–468, 47+55.

[88] Laurel v. State Nat. Bank, 25–48; Galvin v. St. Paul, 62–145, 64+147.

[89] Taylor v. Mueller, 30–343, 15+413; Wherry v. Duluth etc. Ry., 64–415, 67+223. But see Humphrey v. Havens, 9–318(301).

[90] State v. Dumphey, 4–438(340); Mead v. Constans, 5–171(134); Gardner v. Kellogg, 23–463; State v. Wagner, 23–544; Peck v. Small, 35–465, 29+69; Cirkel v. Croswell, 36–323, 31+513; Gilmore v. Brost, 39–190, 39+139; State v. Barrett, 40–65, 41+459; State v. Bagan, 41–285, 43+5; Jones v. Chi. etc. Ry., 42–183, 43+1114; Brazil v. Peterson, 44–212, 46+331; Hoye v. Chi. etc. Ry., 46–269, 48+1117; Granning v. Swenson, 49–381, 52+30; Bristol v. Schultz, 68–106, 70+872; Revor v. Bagley, 76–326, 79+171; State v. Brooks, 84–276, 87+779; State v. Nelson, 91–143, 97+652; Northrup v. Hayward, 99–299, 109+241; Myrick v. Purcell, 99–457, 109+995; State v. Sheltrey, 100–107, 110+353; Strand v. G. N. Ry., 101–85, 111+958; State v. Mathley, 101–536, 111+1134.

[91] Hoye v. Chi. etc. Ry., 46–269, 48+1117.

[92] Cairns v. Keith, 50–32, 52+267; Kroning v. St. P. C. Ry., 96–128, 104+888; Hanson v. Bailey, 96–274, 104+969.

[93] State v. Brooks, 84–276, 87+779.

[94] State v. Dumphey, 4–438(340); Mead v. Constans, 5–171(134); Nininger v. Knox, 8–140(110); Johnson v. Coles, 21–108; State v. Wagner, 23–544; Laurel v. State Nat. Bank, 25–48; State v. Cantieny, 34–1, 24+458; Farnsworth v. Robbins, 36–369, 31+349; Lowe v. Mpls. St. Ry., 37–283, 34+33; Gilmore v. Brost, 39–190, 39+139; State v. Barrett, 40–65, 41+459; Schacherl v. St. P. C. Ry., 42–42, 43+837; Jones v. Chi. etc. Ry., 42–183, 43+1114; Brazil v. Peterson, 44–212, 46+331; Hoye v. Chi. etc. Ry., 46–269, 48+1117; Elmborg v. St. P. C. Ry., 51–70, 52+969; Griswold v. Eastman, 51–189, 53+542; Nelson v. Finseth, 55–417, 57+141; Kennedy v. St. P. C. Ry., 59–45, 60+810; Meeks v. St. Paul, 64–220, 66+966; State v. Durnam, 73–150, 75+1127; Revor v. Bagley, 76–326, 79+171; Vosbeek v. Kellogg, 78–176, 80+957; State v. Fay, 88–269, 92+978; State v. Nelson, 91–143, 97+652; Wingen v. May, 92–255, 99+809; Faber v. Schiwek, 93–417, 101+1133; Sumner v.

dence is additional evidence of the same kind and to the same point as that given on the first trial.[95] The term point as here used means an evidential fact. Evidence is not cumulative merely because it tends to prove the same issuable fact.[96] It is not cumulative if it relates to distinct and independent facts of a different character though tending to establish the same ground of claim or defence.[97] It is not cumulative if it is of a different kind, for example, positive and direct evidence where the evidence on the trial was wholly circumstantial;[98] written evidence where the evidence on the trial was oral;[99] unequivocal admissions of a party where the evidence on the trial was circumstantial,[1] but applications for a new trial on the ground of newly discovered oral admissions of a party against whom they are to be used are viewed with disfavor.[2] The rule against granting a new trial for newly discovered cumulative evidence is not inflexible but yields to the demands of justice in exceptional cases. If new cumulative evidence makes it clear that a grave injustice has been done a new trial should be granted.[3]

7131. Evidence must be likely to change result—A new trial will not be granted on the ground of newly discovered evidence except to remedy manifest injustice. It is not enough that the new evidence is material. It has been said that the newly discovered evidence must be such as ought to be decisive and productive, on another trial, of an opposite result on the merits, and that a new trial will not be granted unless it appears probable that injustice has been done, and that the new evidence is of such a controlling character that it will probably correct the injustice. Again, that it must be so material that it would probably produce, or would be likely to produce, a different result; or that the question is not whether a jury might be induced to give a different verdict, but whether the legitimate effect of the newly discovered evidence would be to require a different verdict. It is perhaps impossible to state an invariable rule on this point, to be applied to all cases. Much must depend upon the nature of the issue, what transpired at the trial, the nature of the evidence proposed, as well as of that submitted. But all the cases concur that it is not enough to entitle a party to a new trial that the new evidence is material, but that the court must take into account its importance, and whether, in connection with the evidence already introduced, it will be likely to affect the result.[4] The matter of granting a new trial for this cause

Northfield, 96–107, 104+686; State v. Mathley, 101–536, 111+1134; Hewitt v. Hubbard County, 103–41, 114+261; Tew v. Webster, 103–110, 114+647.

[95] Nininger v. Knox, 8–140(110); Lowe v. Mpls. St. Ry., 37–283, 34+33; Gilmore v. Brost, 39–190, 39+139; Schacherl v. St. P. C. Ry., 42–42, 43+837; Layman v. Mpls. St. Ry., 66–452, 69+329; Bradley v. Norris, 67–48, 69+624; State v. Fay, 88–269, 92+978.

[96] Parker v. Hardy, 24 Pick. (Mass.) 246; Able v. Frazier, 43 Iowa, 177; Waller v. Graves, 20 Conn. 305.

[97] Layman v. Mpls. St. Ry., 66–452, 69+329; Bradley v. Norris, 67–48, 69+624; Waller v. Graves, 20 Conn. 305; Dierolff v. Winterfield, 26 Wis. 175; Casey v. State, 20 Neb. 138.

[98] Guyot v. Butts, 4 Wend. (N. Y.) 579; Gardner v. Gardner, 2 Gray (Mass.) 434.

[99] Mercer v. Mercer, 87 Ky. 21. See McDonald v. Smith, 101–476, 112+627.

[1] Cairns v. Keith, 50–32, 52+267; Parker v. Hardy, 24 Pick. (Mass.) 246; Gardner v. Gardner, 2 Gray (Mass.) 434; Guyot v. Butts, 4 Wend. (N. Y.) 579; Preston v. Otey, 88 Va. 491.

[2] Lampsen v. Brander, 28–526, 11+94; Mueller v. Grand Grove, 72–70, 74+1025.

[3] Kroning v. St. P. C. Ry., 96–128, 104+888; Hanson v. Bailey, 96–274, 104+969. See Hosford v. Rowe, 41–245, 42+1018.

[4] Lampsen v. Brander, 28–526, 11+94; Mead v. Constans, 5–171(134); Eddy v. Caldwell, 7–225(166); Sharpe v. Traver, 8–273(239); Finch v. Green, 16–355(315); Knoblauch v. Kronschnabel, 18–300(272); Cummings v. Taylor, 24–429; Peterson v. Faust, 30–22, 14+64; Scofield v. Walrath, 35–356, 28+926; Peck v. Small, 35–465, 29+69; Smith v. Chapel, 36–180, 30+660; Cirkel v. Croswell, 36–323, 31+513; Hosford v. Rowe, 41–245, 42+1018; Schacherl v. St. P. C. Ry., 42–42, 43+837; State v. Tall, 43–273, 45+449; Brazil v. Peterson,

generally involves an exercise of judicial discretion upon a full consideration of all the evidence given on the trial, and the legitimate effect which the new evidence, taken in connection therewith, ought, upon legal principles, to have towards producing a different result.[5] It is the duty of the court to consider the credibility of the new witnesses.[6]

7131a. New defensive matter—Supplemental pleadings—Where new matter of independent defence arises after verdict, the remedy is not a motion for a new trial on the ground of newly discovered evidence, which has no relevancy to the issues litigated by the trial, but by a motion to be permitted to make a supplemental answer, with a stay of proceedings on the verdict until the issue tendered by the supplemental answer can be determined.[7]

EXCESSIVE OR INADEQUATE DAMAGES

7132. Statute—Under which subdivision motion to be made—Subdivision 5 of R. L. 1905 § 4198 provides for a new trial for "excessive or insufficient damages, appearing to have been given under the influence of passion or prejudice." Subdivision 7 provides for a new trial when "the verdict, decision, or report is not justified by the evidence, or is contrary to law." In actions to recover unliquidated damages, such as actions for personal injuries, libel, and slander, and similar actions, where the plaintiff's damages cannot be computed by mathematical calculation, and are not susceptible to proof by opinion evidence, and are within the discretion of the jury, the motion should be made under the fifth subdivision of the statute. On the other hand, in all actions, whether sounding in tort or contract, where the amount of damages depends upon opinion evidence, as the value of property converted or destroyed, the nature and extent of injuries to person or property, the motion for new trial should be made under the seventh subdivision of the statute; and in cases of doubt, or where both elements of damages are involved, under both subdivisions.[8]

7133. By trial court—A matter of discretion—The matter of granting a new trial for excessive or inadequate damages rests almost wholly in the discretion of the trial court. When the motion is made under the fifth subdivision of the statute, that is, in actions for personal tort or where exemplary damages are allowable, the court should be particularly cautious in setting aside the verdict, for in such cases the question of damages is peculiarly one for the jury.[9] The duty of the court in this regard is to keep the jury within the

44–212, 46+331; Bishop v. St. P. C. Ry., 48–26, 50+927; Elmborg v. St. P. C. Ry., 51–70, 52+969; Griswold v. Eastman, 51–189, 53+542; Smith v. Fletcher, 75–189, 77+800; Schultz v. Faribault etc. Co., 82–100, 84+631; State v. Blanchard, 88–82, 92+504; State v. Nelson, 91–143, 97+652; Kosmerl v. Mueller, 91–196, 97+660; State v. Ronk, 91–419, 98+334; Wingen v. May, 92–255, 99+809; Bunker v. United Order, 97–361, 107+392; State v. Mathley, 101–536, 111+1134; Hewitt v. Hubbard County, 103–41, 114+261; Tew v. Webster, 103–110, 114+647; Graves v. Bonness, 104–135, 116+209; Shaw v. Chi. etc. Ry., 105–393, 117+465; State v. Schreiber, 126+536.

[5] State v. Lautenschlager, 23–290; Bunker v. United Order, 97–361, 107+392.

[6] State v. Tall, 43–273, 45+449; Wherry v. Duluth etc. Ry., 64–415, 67+223; Bristol v. Schultz, 68–106, 70+872. See State v. Fay, 88–269, 92+978; Kosmerl v. Mueller, 91–196, 97+660.

[7] Bandler v. Bradley, 124+644.

[8] Mohr v. Williams, 95–261, 104+12; English v. Mpls. etc. Ry., 96–213, 104+886. There formerly existed much uncertainty as to the proper practice in this regard. Nelson v. West Duluth, 55–497, 57+149; Lane v. Dayton, 56–90, 57+328; State v. Shevlin, 66–217, 68+973; First Nat. Bank v. St. Cloud, 73–219, 75+1054; Blume v. Scheer, 83–409, 86+446; Emerson v. Pac. etc. Co., 92–523, 100+365; Alton v. Chi. etc. Ry., 107–457, 120+749.

[9] Blume v. Scheer, 83–409, 86+446; Mohr v. Williams, 95–261, 104+12; English v. Mpls. etc. Ry., 96–213, 104+886; McKnight v. Mpls. etc. Ry., 96–480, 105+673.

bounds of reason.[10] The court should only act for the relief of manifest injustice. To warrant the court in setting aside a verdict on this ground "the damages must be not merely more than the court would have awarded if it had tried the case, but they must so greatly and grossly exceed what would be adequate in the judgment of the court, that they cannot reasonably be accounted for, except upon the theory that they were awarded, not in a judicial frame of mind, but under the influence of passion,—that is to say, of excited feeling, rather than of sober judgment; or of prejudice,—that is to say, of a state of mind partial to the successful party, or unfair to the other. The damages must be so exorbitant as to shock the sense of the court, and satisfy it that, after making just allowance for difference of opinion among fair-minded men, they cannot be accounted for except upon the theory that in the particular case the fair-mindedness was wanting. It must be confessed that this expression of the principles upon which new trials should be granted for excessive damages is somewhat general and at large; but these are substantially the principles enunciated by text writers and in the adjudged cases: and the subject is one which, from its very nature, hardly admits of more specific treatment. A motion for a new trial on this ground, as on some other grounds, appeals in a measure to the discretion of the trial court. This does not mean that the motion is to be granted or denied at the mere pleasure or fancy or feeling of the court, but that, the matter being one which cannot be determined by the application of definite and precise rules, it is to be acted upon in the exercise of a sound practical judgment, in view of all the relevant facts of the particular case, or, to use a current expression, in view of the whole situation."[11] Though it is a delicate thing to set aside a verdict for excessive damages in a case where they are not susceptible of accurate measurement, a court must sometimes do it in order to prevent injustice.[12]

7134. Necessity of passion or prejudice—When the motion is made under the fifth subdivision of the statute the trial court is not authorized to grant a new trial unless it is manifest that the damages were given under the influence of passion or prejudice.[13] It is not enough that the court would have assessed them differently[14] or believes them too large.[15] Ordinarily the fact of prejudice or passion appears from the verdict being so large or small, when compared with what the evidence indicates it ought to be, that the court must conclude that the jury did not arrive at the amount upon a fair and impartial consideration of the evidence.[16] Affidavits are inadmissible to prove the existence of passion or prejudice. The court must base its decision solely on the evidence submitted on the trial.[17]

7135. When damages governed by fixed rules—When the motion is made under the seventh subdivision of the statute, that is, in cases where the dam-

[10] Slette v. G. N. Ry., 53-341, 55+137; Peterson v. W. U. Tel. Co., 65-18, 67+646.

[11] Pratt v. Pioneer Press Co., 32-217, 18+836, 20+87. See also, Woodward v. Glidden, 33-108, 22+127; Dennis v. Johnson, 42-301, 44+68; Blume v. Scheer, 83-409, 86+446.

[12] McCarthy v. Niskern, 22-90; Woodward v. Glidden, 33-108, 22+127.

[13] St. Martin v. Desnoyer, 1-156(131); Beaulieu v. Parsons, 2-37(26); St. Paul v. Kuby, 8-154(125); Chamberlain v. Porter, 9-260(244); Chapman v. Dodd, 10-350(277); Du Laurans v. First Div. etc. Ry., 15-49(29); Judson v. Reardon, 16-431(387); Shartle v. Minneapolis, 17-308(284); Pratt v. Pioneer Press Co., 32-217, 18+836, 20+87; Nelson v. West Duluth, 55-497, 57+149; Meeks v. St. Paul, 64-220, 66+966; Peterson v. W. U. Tel. Co., 65-18, 67+646; Blume v. Scheer, 83-409, 86+446; Halnes v. Anderson, 124+830.

[14] Pratt v. Pioneer Press Co., 32-217, 18+836, 20+87.

[15] Nelson v. West Duluth, 55-497, 57+149; Meeks v. St. Paul, 64-220, 66+966.

[16] Dennis v. Johnson, 42-301, 44+68; Nelson v. West Duluth, 55-497, 57+149.

[17] Moran v. Mackey, 32-266, 20+159; Blume v. Scheer, 83-409, 86+446.

ages are governed by fixed rules and are wholly compensatory for pecuniary loss the court is justified in granting a new trial more freely.[18]

7136. By supreme court—Whether the motion is made under the fifth or the seventh subdivision of the statute the action of the trial court will rarely be reversed on appeal. What is said under sections 7154, 7157, is applicable here. The duty of the trial court is to keep the jury within the bounds of reason; the duty of the appellate court is to keep the trial court within the bounds of judicial discretion. The two courts are not governed by the same rules.[19] The action of the trial court will not be reversed on appeal except for a clear abuse of discretion.[20] It is not enough to justify a reversal that the appellate court would have been better satisfied with a smaller verdict.[21] It is to be remembered that in determining an application for a new trial on the ground of an excessive verdict, as on other grounds, the trial court occupies a position of practical advantage over an appellate court. There is a certain atmosphere of the trial, well known to the profession, which cannot be put upon paper.[22] The doctrine of Hicks v. Stone applies.[23] Though it is a delicate thing for an appellate court to set aside a verdict for excessive damages when they are not susceptible of accurate measurement, it must sometimes do so to prevent injustice.[24]

7137. Record on appeal—Motion for new trial necessary—The question of excessive or inadequate damages can only be raised on appeal upon a record which purports on its face or in the certificate of the judge to contain all of the evidence submitted on the trial or at least all the evidence bearing on the question of damages.[25] Where the trial is by jury the question of damages can be raised on appeal only after a motion for a new trial on that ground has been passed upon by the trial court.[26]

7138. Remitting excess—*a. Trial court*—When the only objection to a verdict is the excessive amount of the damages awarded, it is within the sound discretion of the trial court to refuse a new trial upon condition that the prevailing party remit the excess.[27] This should be done only where the ver-

[18] Grant v. Wolf, 34–32, 24+289 (contract—items of damage erroneously included); Wyman v. Erickson, 35–202, 28+240 (action for goods sold and delivered—miscalculation); Ward v. Anderberg, 36–300, 30+890 (replevin); Whitely v. Miss. etc. Co., 38–523, 38+753 (condemnation proceedings); Hutchins v. St. P. etc. Ry., 44–5, 46+79 (death by wrongful act); Fixen v. Blake, 47–540, 50+612 (action for deceit); Becker v. Bohmert, 63–403, 65+728 (claim against estate of decedent); Hodge v. Eastern Ry., 70–193, 72+1074 (action for conversion); First Nat. Bank v. St. Cloud, 73–219, 75+1054 (water rental—contract price—deductions for incomplete performance).

[19] Pratt v. Pioneer Press Co., 32–217, 222, 18+836, 20+87.

[20] Blakeman v. Blakeman, 31–396, 18+103; Pratt v. Pioneer Press Co., 32–217, 18+836, 20+87; Hardenbergh v. St. P. etc. Ry., 41–200, 42+933; Dennis v. Johnson, 42–301, 44+68; Mohr v. Williams, 95–261, 104+12; English v. Mpls. etc. Ry., 96–213, 104+886; McKnight v. Mpls. etc. Ry., 96–480, 105+673; Ford v. Mpls. St. Ry., 98–96, 107+817; Cornell v. Hendrickson, 100–544, 110+1132.

[21] Blakeman v. Blakeman, 31–396, 18+103; Flatt v. Osborne, 33–98, 22+440; Sobieski v. St. P. etc. Ry., 41–169, 42+863; Koch v. St. P. etc. Ry., 45–407, 48+191; Fulmore v. St. P. C. Ry., 72–448, 75+589; Stauning v. G. N. Ry., 88–480, 93+518.

[22] Pratt v. Pioneer Press Co., 32–217, 18+836, 20+87; Olson v. St. P. etc. Ry., 45–536, 48+445.

[23] Mohr v. Williams, 95–261, 104+12 (overruling Nelson v. West Duluth, 55–497, 57+149; Blume v. Scheer, 83–409, 86+446); English v. Mpls. etc. Ry., 96–213, 104+886; Cornell v. Hendrickson, 100–544, 110+1132.

[24] McCarthy v. Niskern, 22–90; Woodward v. Glidden, 33–108, 22+127 and cases under § 2596.

[25] St. Paul v. Kuby, 8–154(125); Moran v. Mackey, 32–266, 20+159.

[26] Spencer v. St. P. etc. Ry., 22–29; Bank of Com. v. Smith, 57–374, 59+311; Severns v. Brainard, 61–265, 63+477; Fletcher v. German-Am. Ins. Co., 79–337, 82+647; English v. Mpls. etc. Ry., 96–213, 104+886.

[27] Craig v. Cook, 28–232, 9+712; Grant v.

dict is otherwise unimpeachable.[28] In this state the court is authorized to exercise such a power even in cases where the damages were manifestly awarded under the influence of passion or prejudice.[29] If there is a fair probability that the passion or prejudice shown by the award of excessive damages affected the jury in the determination of the other issues a new trial should be granted—at least in cases where the evidence is conflicting and the merits of the case doubtful.[30] The court may reduce the damages when the motion is based on the ground that the verdict is not justified by the evidence.[31]

b. Supreme court—Subject to the same limitations as the trial court the supreme court may grant a new trial unless the prevailing party consents to remit a specified part of the award.[32] This can only be done when the excess can be clearly ascertained from the record.[33]

7139. Setting aside successive verdicts—A court should act with great caution in setting aside a second verdict on account of excessive damages. But where the verdict is irrational, unjust and manifestly the result of passion or prejudice, it is the duty of the court to set it aside no matter how many similar verdicts have been vacated for the same cause, for justice must be administered according to reason, not passion.[34]

7140. When granted as of course—Where it is clear that the jury assessed the damages in accordance with an erroneous instruction,[35] or where they evidently made a miscalculation,[36] or included improper items of damage,[37] a new trial should be granted as a matter of course, unless the error can be corrected by a remittitur.

7141. Inadequate damages—A new trial may be granted on the ground that the damages awarded are inadequate, that is, unreasonably small.[38] Where a party is entitled to substantial damages, if any, and the jury award him only nominal damages, a new trial should be awarded as a matter of course.[39] A court may grant a new trial upon condition that the adverse party may avoid it by consenting to the entry of judgment for a specified amount.[40] A court may properly deny a motion for a new trial for inadequate

Wolf, 34–32, 24+289; Ladd v. Newell, 34–107, 24+366; Kopp v. N. P. Ry., 41–310, 43+73; Van Doren v. Wright, 54–455, 56+51; Brown v. Doyle, 69–543, 72+814; Goss v. Goss, 102–346, 113+690.

[28] Craig v. Cook, 28–232, 9+712; Miller v. Hogan, 81–312, 84+40.

[29] Craig v. Cook, 28–232, 9+712; Pratt v. Pioneer Press Co., 35–251, 28+708; Blume v. Scheer, 83–409, 86+446; Goss v. Goss, 102–346, 113+690.

[30] Goss v. Goss, 102–346, 113+690; Masteller v. G. N. Ry., 100–236, 110+869; Plaunt v. Ry. T. Co., 90–499, 97+433; Trow v. White Bear, 78–432, 80+1117; Hall v. Chi. etc. Ry., 46–439, 49+239; Ewing v. Stickney, 107–217, 119+802; Johnson v. G. N. Ry., 107–285, 119+1061.

[31] Brown v. Doyle, 69–543, 72+814; Hodge v. Eastern Ry., 70–193, 72+1074; Coxe v. Anoka etc. Co., 91–50, 97+459; Goss v. Goss, 102–346, 113+690.

[32] Stickney v. Bronson, 5–215(172); Ward v. Haws, 5–440(359); Hutchins v. St. P. etc. Ry., 44–5, 46+79; Becker v. Bohmert, 63–403, 65+728; Peterson v. W. U. Tel. Co., 75–368, 77+985. See cases under § 2596.

[33] Bond v. Corbett, 2–248(209); Smith v. Dukes, 5–373(301); Dodge v. Chandler, 13–114(105); Seeman v. Feeney, 19–79 (54).

[34] Peterson v. W. U. Tel. Co., 65–18, 67+646; Bathke v. Krassin, 78–272, 80+950. See Gray v. St. P. C. Ry., 87–280, 91+1106; Shea v. Cloquet L. Co., 97–41, 105+552; Halnes v. Anderson, 124+830.

[35] Ward v. Anderberg, 36–300, 30+890.

[36] Wyman v. Erickson, 35–202, 28+240. See Bank of Com. v. Smith, 57–374, 59+311; Fletcher v. German-Am. Ins. Co., 79–337, 82+647.

[37] Grant v. Wolf, 34–32, 24+289.

[38] Henderson v. St. P. & D. Ry., 52–479, 55+53; Marsh v. Mpls. B. Co., 92–182, 99+630; Ford v. Mpls. St. Ry., 98–96, 107+817. See Dunnell, Minn. Pr. § 1032.

[39] Conrad v. Dobmeier, 57–147, 58+870; Rawitzer v. St. P. C. Ry., 94–494, 103+499; Ford v. Mpls. St. Ry., 98–96, 107+817.

[40] Marsh v. Mpls. B. Co., 92–182, 99+630; Ford v. Mpls. St. Ry., 98–96, 107+817.

damages if the moving party is not entitled to any damages.[41] The matter of granting a new trial for inadequate damages rests largely in the discretion of the trial court and its action will not be reversed on appeal except for a clear abuse of discretion. The doctrine of Hicks v. Stone applies.[42]

INSUFFICIENCY OF EVIDENCE

7142. By trial court—In general—In considering motions for a new trial on the ground that the verdict is not justified by the evidence, trial "courts should rarely take upon themselves to decide as to the weight of evidence where it is conflicting. Where they do so, they might with truth be charged with usurping the privileges of the jury. A court ought to exercise not merely a cautious, but a strict and sure judgment before setting aside a verdict in such a case. Hence the general rule is, that a verdict will not be set aside unless clearly and palpably against the evidence."[43] The duty of the court in this regard is to keep the jury within the bounds of reason.[44] If reasonable men might have found the verdict upon a consideration of all the evidence a new trial should not be granted.[45] The test is one of reasonableness, but the question for the court is not what reasonable men ought to find but what they might find without overstepping the bounds of reason. A court is never justified in granting a new trial simply because it is dissatisfied with the verdict and would have found differently.[46] In nearly every case, where there is conflicting testimony, there is a wide latitude for honest difference of opinion within which the court has no right to impose its judgment on the jury. The best general rule for the practical guidance of trial courts is this: If different persons might reasonably draw different conclusions from the evidence the verdict should not be disturbed.[47] A new trial should be granted only in cases of manifest injustice.[48] Every doubt should be resolved in favor of the verdict. It is not enough that the evidence slightly preponderates against the verdict.[49] A new trial should not be granted upon conflicting evidence unless the verdict is so manifestly contrary to the preponderance of the evidence as to warrant the inference that the jury failed to consider all the evidence or acted under some mistake or from some improper motive, bias, feeling or caprice, instead of dispassionately and honestly exercising their judgment upon all the evidence.[50] The power of the court is not absolute or

[41] Young v. G. N. Ry., 80–123, 83+32.

[42] Peck v. Small, 35–465, 29+69; Mohr v. Williams, 95–261, 104+12; Ford v. Mpls. St. Ry., 98–96, 107+817; Pinkerton v. Wis. S. Co., 109–117, 123+60.

[43] Rheiner v. Stillwater etc. Co., 29–147, 12+449; Palmer v. Hyde, 4 Conn. 426; Laflin v. Pomeroy, 11 Conn. 440; Culver v. Avery, 7 Wend. (N. Y.) 380; Jackson v. Loomis, 12 Wend. (N. Y.) 27.

[44] Thayer, Ev. 208; Farmer v. Stillwater W. Co., 99–119, 121, 108+824.

[45] Lord Halsbury in the leading case of Metropolitan Ry. Co. v. Wright, 11 App. Cases, 152. See also, Australian Newspaper Co. v. Bennett, 6 Reports (P. C.) 484; Wright v. Southern Express Co., 80 Fed. 85.

[46] Rheiner v. Stillwater etc. Co., 29–147, 12+449; Metropolitan Ry. v. Wright, 11 App. Cases, 152; Laflin v. Pomeroy, 11 Conn. 440; Cunningham v. Magoun, 18 Pick. (Mass.) 13; Serles v. Serles, 35 Or. 289; Wright v. Southern Express Co., 80 Fed. 85.

[47] Johnson v. Winona etc. Ry., 11–296 (204); Eich v. Taylor, 17–172(145); Hinkle v. Lake Superior & M. Ry., 18–297 (270); Linn v. Rugg, 19–181(145); Ohlson v. Manderfeld, 28–390, 10+418; Kansas Pac. Ry. v. Kunkel, 17 Kans. 145.

[48] State v. Miller, 10–313(246); Johnson v. Winona etc. Ry., 11–296(204); Laflin v. Pomeroy, 11 Conn. 440; Carstairs v. Stein, 4 M. & S. 192.

[49] Laflin v. Pomeroy, 11 Conn. 440; Kansas Pac. Ry. v. Kunkel, 17 Kans. 145; Jackson v. Loomis, 12 Wend. (N. Y.) 27.

[50] Johnson v. Winona etc. Ry., 11–296 (204); Schmeltzer v. St. P. C. Ry., 80–50, 82+1092; Alsop v. Com. Ins. Co., 1 Sumner (U. S.) 451, 472; Corning v. Troy Factory, 44 N. Y. 577, 594; Baker v. Briggs, 8 Pick. (Mass.) 122; Cunningham v. Magoun, 18 Pick. (Mass.) 13; Morss v. Sherill, 63 Barb. (N. Y.) 21.

arbitrary, but must be exercised with reference to the evidence. Where the evidence wholly fails to establish a material fact its sufficiency is to be determined by an application of legal principles.[51]

7143. Probability of stronger evidence on another trial—In passing on a motion for a new trial on the ground that the verdict is not justified by the evidence the court may properly take into consideration the probability that on another trial stronger evidence might be adduced.[52]

7144. Evidence to be considered as a whole—Though there may be some evidence reasonably tending to support a verdict it should be set aside if manifestly unreasonable in view of all the evidence.[53]

7145. Duty to weigh evidence—Credibility of witnesses—Discretion of trial court—In passing on a motion for a new trial on this ground it is the duty of the court to weigh the evidence and not to adopt inconsiderately the opinion of the jury.[54] Every motion of this kind is addressed largely to the sound discretion of the trial court, and is to be determined with reference to promoting the interests of substantial justice, as disclosed upon a view of the whole case. Its right decision often involves an inquiry into the credibility of witnesses, the weight of oral testimony, and whether the verdict was influenced by any surrounding circumstances likely to affect the result.[55] It is improper to consider evidence excluded, though it was erroneously excluded.[56]

7146. By another judge—Where a motion for a new trial on the ground of the insufficiency of the evidence to justify the verdict is made before a judge other than the one who tried the cause, it is his right and duty to exercise the same discretion in determining whether the motion should be granted as if the cause had been tried by himself, with the proviso or qualification, that such discretion must be exercised entirely with reference to the evidence disclosed by the record, as he can know nothing else as to what occurred or appeared at the trial.[57]

7147. After nonsuit—A dismissal on the trial for insufficiency of evidence is a "decision" within the meaning of the statute and the motion for a new trial may be made on a settled case.[58]

7148. After trial by court—Where a cause is tried by the court without a jury a new trial may be granted on the ground that the findings of fact are not justified by the evidence.[59] In actions of an equitable nature where the main issues are first tried, leaving ancillary issues for future trial, a new trial of the main issues may be granted before a decision on the ancillary issues.[60] Erroneous findings of fact afford no ground for a new trial when it is apparent that if such findings had been different the result would necessarily have been the same.[61] A general finding that each and all allegations of the complaint

[51] Gustafson v. Gustafson, 92–139, 99+631.

[52] Emerson v. Hennessy, 47–461, 50+603.

[53] Rheiner v. Stillwater etc. Co., 29–147, 12+449; Buenemann v. St. P. etc. Co., 32–590, 20+379; Voge v. Penney, 74–525, 77+422; Martin v. Courtney, 75–255, 77+813; Messenger v. St. P. C. Ry., 77–34, 79+583; Schmeltzer v. St. P. C. Ry., 80–50, 82+1092; Hunt v. St. P. C. Ry., 89–448, 95+312; Peterson v. Chi. etc. Ry., 106–245, 118+1016.

[54] Johnson v. Howard, 25–558; McCord v. Knowlton, 76–391, 79+397; Serles v. Serles, 35 Or. 289; Kansas Pac. Ry. v. Kunkle, 17 Kans. 145; Wright v. Southern Express Co., 80 Fed. 85.

[55] Johnson v. Howard, 25–558; Ohlson v. Manderfeld, 28–390, 10+418. See Barrett v. Third Ave. Ry., 45 N. Y. 632.

[56] Sauer v. Flynt, 61–109, 63+252.

[57] Reynolds v. Reynolds, 44–132, 46+236; Koktan v. Knight, 44–304, 46+354; Hughley v. Wabasha, 69–245, 72+78; Price v. Churchill, 84–519, 88+11.

[58] Volmer v. Stagerman, 25–234; Thorp v. Lorenz, 34–350, 25+712; Dunham v. Byrnes, 36–106, 30+402.

[59] Groh v. Bassett, 7–325(254); Ashton v. Thompson, 28–330, 9+876; Knappen v. Swensen, 40–171, 41+948.

[60] Ashton v. Thompson, 28–330, 9+876. See Mealey v. Finnegan, 46–507, 49+207.

[61] Scheufler v. Grand Lodge, 45–256, 47–

are untrue is equivalent to a special finding as to each allegation that it is untrue. Hence, if the finding is justified by the evidence as to one allegation, which, alone and independently of the others, would justify the conclusions of law in favor of defendant, the fact that the finding as to some other allegation is unsupported by the evidence is error without prejudice.[62]

7149. After trial by a referee—The district court may vacate the findings of a referee on the ground that they are not justified by the evidence and grant a new trial.[63] In such a case it is the right and duty of the judge who passes on the motion to exercise the same discretion in determining whether the motion should be granted as if the cause had been tried by himself, with the proviso or qualification that such discretion must be exercised entirely with reference to the evidence disclosed by the record.[64]

7150. After denial of motion to dismiss or direct verdict—A new trial for insufficiency of the evidence may be granted, though the court refused on the trial to dismiss or direct a verdict on that ground.[65]

7151. After successive verdicts—A trial court may set aside successive verdicts based on substantially the same evidence.[66] Successive verdicts impose on the judge the duty of exercising a more cautious judgment because they tend to show that there is ground for reasonable difference of opinion.[67] No number of successive verdicts should force the judge to abdicate. Justice must be administered according to reason and not passion. It follows that any number of concurrent verdicts must be set aside if they are manifestly the result of passion or prejudice.[68]

7152. Remitting excess—When the amount of a verdict is clearly not justified by the evidence a trial court may grant a new trial unless the successful party consents to a remission of the excess.[69] In such cases the supreme court may also grant a new trial conditionally.[70]

7153. Conditionally—Where an action is for the recovery of different articles of personal property, the issues in respect to which are severable, or the several items of damages claimed are distinct and separate, and a general verdict is rendered for the defendant, which is supported by the evidence except as to particular items the amount or value of which clearly appears upon the record, the court may, in the exercise of a sound discretion, deny a motion for a new trial based on the ground that the verdict is against the evidence, upon the condition that the defendant stipulates to allow a recovery for the property or damages to which plaintiff appears to be entitled.[71] A trial court cannot, by granting or denying a motion for a new trial conditionally, substitute its judgment upon the issues of fact for the judgment of the jury as expressed in the verdict.[72]

799; Union Bank v. Shea, 57–180, 58+985; Newport v. Smith, 61–277, 63+734; Clark v. Dewey, 71–108, 73+639; Fidelity & C. Co. v. Crays, 76–450, 79+531.

[62] Fidelity & C. Co. v. Crays, 76–450, 79+531.

[63] Thayer v. Barney, 12–502(406); Cochrane v. Halsey, 25–52; Koktan v. Knight, 44–304, 46+354.

[64] Hughley v. Wabasha, 69–245, 72+78; First Nat. Bank v. St. Cloud, 73–219, 75+1054.

[65] Abbett v. Chi. etc. Ry., 30–482, 16+266.

[66] Fischer v. Sperl, 100–198, 110+853; Atwood v. Watkins, 94–464, 103+332; Wilcox v. Landberg, 30–93, 14+365; Buenemann v. St. P. etc. Ry., 32–390, 20+379; Cable v. Byrne, 38–534, 38+620; Van Doren v. Wright, 65–80, 67+668, 68+22; Netzer v. Crookston, 66–355, 68+1099; Park v. Electric T. Co., 75–349, 77+988; Bathke v. Krassin, 78–272, 80+950.

[67] Buenemann v. St. P. etc. Ry., 32–390, 20+379; Atwood v. Watkins, 94–464, 103+332; Fischer v. Sperl, 100–198, 110+853; Stuelpnagel v. Paper, 126+281.

[68] Bathke v. Krassin, 78–272, 80+950.

[69] Brown v. Doyle, 69–543, 72+814.

[70] Hodge v. Eastern Ry., 70–193, 72+1074.

[71] Ladd v. Newell, 34–107, 24+366.

[72] Miller v. Hogan, 81–312, 84+40.

7154. By supreme court—In general—Trial and appellate courts are not governed by the same rules in the matter of granting new trials on the ground that the verdict is not justified by the evidence.[73] The duty of the trial court is to keep the jury within the bounds of reason; the duty of the appellate court is to keep the trial court within the bounds of judicial discretion. The trial court is as well able to determine the preponderance of the evidence and the justice of the cause as the jury. It hears all the evidence submitted, observes the general appearance of the witnesses and their demeanor on the stand, hears the arguments of counsel, is able to judge the intelligence of the jury, knows of any circumstances of the trial calculated to influence the jury improperly, knows the things that were not done in the course of the trial as well as the things that were done and is conscious of what has been happily described as the atmosphere of the trial. All of this knowledge and experience properly influences the trial court in passing on a motion for a new trial, but only a small part of it is susceptible of being incorporated in the record on appeal.[74] The knowledge of the appellate court is derived solely from this record and is therefore very imperfect. A new trial should only be granted in furtherance of substantial justice but it is often impossible for an appellate court to learn whether injustice has been done by merely reading a transcript of the evidence. It often happens that a verdict or decision which by the settled case appears to be contrary to the great weight of the evidence is very satisfactory to every disinterested person who was present at the trial, saw the witnesses and heard them testify.[75] It is principally because of their extreme liability to err from imperfect knowledge of the trial that appellate courts are inclined to defer to the judgment of the trial court. Our supreme court has described its duty in this regard as "difficult, embarrassing, and delicate." [76]

7155. When order granting new trial reversed—Rule of Hicks v. Stone—The supreme court will rarely reverse the order of a trial court granting a new trial on the ground that the verdict was not justified by the evidence.[77] In an early case, which has ever since been followed without modification, the supreme court laid down the following rule for their government in such cases: "We should not be warranted in reversing an order of this kind simply because if the judge below had refused to grant a new trial we should have felt bound to sustain him; nor because there was evidence reasonably tending to support the verdict; nor because, if the motion for a new trial had been made before us in the first instance, we should, upon a consideration of the evidence and its preponderance, have denied the motion. But if, upon a careful perusal of the testimony, and upon mature reflection, we feel satisfied that the preponderance of the evidence is manifestly and palpably in favor of the verdict, we should then deem it our duty to reverse an order granting a new trial." [78] An appellate court will not necessarily sustain an order granting a second or third new trial because it has sustained one granting a first.[79]

[73] Rheiner v. Stillwater etc. Co., 29–147, 12+449.

[74] Farmer v. Stillwater W. Co., 99–119, 108+824; Marsh v. Webber, 13–109(99); Hicks v. Stone, 13–434(398); Johnson v. Howard, 25–558; Ohlson v. Manderfeld, 28–390, 10+418; Karsen v. Milwaukee etc. Ry., 29–12, 11+122; Rheiner v. Stillwater etc. Co., 29–147, 12+449; Hensel v. Chicago etc. Ry., 37–87, 33+329; Chesley v. Miss. etc. Co., 39–83, 38+769; Reynolds v. Reynolds, 44–132, 46+236; Hughley v. Wabasha, 69–245, 72+78; Nichols v. Gerlich, 84–483, 87+1120; Miller v. Chi. etc. Ry., 103–443, 115+269.

[75] McCord v. Knowlton, 76–391, 79+397.

[76] Hicks v. Stone, 13–434(398).

[77] Marsh v. Webber, 13–109(99).

[78] Hicks v. Stone, 13–434(398). Approved in Rheiner v. Stillwater etc. Co., 29–147, 12+449; Pratt v. Pioneer Press Co., 30–41, 14+62; Wilcox v. Landberg,

7156. When rule of Hicks v. Stone applicable—The rule of Hicks v. Stone applies when the verdict or finding was based in whole or in part on written evidence;[80] when the trial was by the court[81] or a referee;[82] when issues of fact are submitted to a jury in an action of an equitable nature;[83] when the motion was granted or denied by a judge other than the one who tried the cause;[84] when the verdict was on an issue in probate proceedings appealed to the district court[85] and in tax proceedings.[86] It does not apply when the motion for a new trial is on several grounds, unless it is expressly stated in the order granting a new trial that it was granted on the ground that the verdict, decision, or report was not justified by the evidence.[87] It applies to an order granting a new trial for excessive or inadequate damages, whether the motion is made under the fifth or seventh subdivision of the statute.[88] It does not apply to an allowance of counsel fees on undisputed facts.[89] It applies though the trial court acted with doubts.[90] Though not strictly applicable to an order denying a new trial,[91] it is often applied to the analogous rule applicable to such orders.[92]

7157. When order denying new trial reversed—Where a motion for a new trial, upon the ground that the verdict is not justified by the evidence, is denied by the trial court, the order denying a new trial will be reversed on appeal only in cases where there is no evidence reasonably tending to sustain the verdict, or where it is manifestly and palpably against the weight of the evidence.[93] The question for an appellate court in such a case is not whether a new trial might not have been properly granted, but whether the court below violated a clear legal right of the appellant or abused its judicial discretion in refusing to grant a new trial.[94] If different persons might reasonably draw different conclusions from the evidence the verdict will be sustained.[95] If, upon any reasonable theory of the evidence, the verdict of a jury can be upheld, it is the duty of an appellate court to sustain it.[96] A verdict will not be set aside on appeal where there is any evidence reasonably tending to support it[97]—unless there is a manifest preponderance of the

30–93, 14+365; Hensel v. Chi. etc. Ry., 37–87, 33+329; Chesley v. Miss. etc. Co., 39–83, 38+769; Reynolds v. Reynolds, 44–132, 46+236; Crane v. Knauf, 65–447, 68+79; Woods v. Wulf, 84–299, 87+840; Lamers v. Butler, 88–109, 92+523. The case of Hicks v. Stone has been followed in a very large number of cases which it would serve no useful purpose to collect here. They may be found in the table of cases cited.

[79] Wilcox v. Landberg, 30–93, 14+365.

[80] See § 410.

[81] See § 411.

[82] Berkey v. Judd, 22–287; Koktan v. Knight, 44–304, 46+354; First Nat. Bank v. St. Cloud, 73–219, 75+1054.

[83] Marvin v. Dutcher, 26–391, 4+685.

[84] Hughley v. Wabasha, 69–245, 72+78; Price v. Churchill, 84–519, 88+11; State v. Mathley, 101–536, 111+1134.

[85] In re Pinney, 27–280, 6+791, 7+144.

[86] State v. Union T. L. Co., 94–320, 102+721.

[87] Fitger v. Guthrie, 89–330, 94+888. See § 7084.

[88] See § 7136.

[89] Watkins v. Bigelow, 96–53, 104+683.

[90] Morrissey v. Guaranty etc. Assn., 81–426, 84+219; Olson v. Johnson, 84–366, 87+937.

[91] Kramer v. Perkins, 102–455, 113+1062.

[92] Johnson v. Johnson, 104–523, 115+1133.

[93] Dixon v. Merritt, 6–160(98); State v. Miller, 10–313(246); Morris v. St. P. etc. Ry., 21–91; Ohlson v. Manderfeld, 28–390, 10+418; Olson v. Johnson, 84–366, 87+937.

[94] Morris v. St. P. etc. Ry., 21–91; Karsen v. Mil. etc. Ry., 29–12, 11+122; Cleland v. Mpls. etc. Ry., 29–170, 12+461; Flatt v. Osborne, 33–98, 22+440; Morrissey v. Guaranty etc. Assn., 81–426, 84+219.

[95] Califf v. Hillhouse, 3–311(217); Johnson v. Winona etc. Ry., 11–296(204); State v. Herrick, 12–132(75); Eich v. Taylor, 17–172(145); Linn v. Rugg, 19–181(145).

[96] Benz v. Geissell, 24–169; Cleland v. Mpls. etc. Ry., 29–170, 12+461.

[97] Hinkle v. Lake Superior etc. Ry., 18–297(270); Egan v. Faendel, 19–231(191); St. Anthony Falls etc. Co. v. Eastman, 20–277(249); Foot v. Miss. etc. Co., 70–57, 72+732.

evidence against it.[98] It will not be set aside merely because it is not such as the supreme court would have found.[99]

7158. Theory of trial—Where a case is tried upon the theory that the only issue is as to one question of fact, and the court, without objection by the party, instructs the jury that this is the only question submitted to them, and that their verdict is to depend exclusively upon their determination of the question, the party thereby consents that the case may be tried and determined upon that one issue and cannot afterwards urge that the evidence upon some other question of fact was insufficient to justify the verdict.[1]

7159. Favorable view of evidence—Where the evidence is ambiguous it must be construed in favor of the party for whom the verdict is rendered.[2]

7160. Verdicts based on speculation or conjecture—A verdict which rests on mere possibility, speculation, or conjecture, should be set aside.[3]

VERDICT CONTRARY TO LAW

7161. In general—The phrase "contrary to law" is very comprehensive and was no doubt designed to cover a great variety of errors which could not well be specified. It has been held, in a case somewhat discredited, that the phrase means contrary to the instructions and that it is not enough to justify a new trial that a principle of law not embodied in an instruction was disregarded by the jury.[4] On the other hand it has been held that a motion for a new trial on the ground that the verdict is contrary to law is somewhat in the nature of a demurrer to the evidence; that is, conceding all that the evidence tends to prove, the verdict is not supported by the principles of law applicable to the facts.[5] No doubt a new trial may be granted on this ground because of irregularity in the verdict.[6] A decision is contrary to law when the findings are not responsive to the issues[7] or inconsistent.[8] An appellate court, when considering the question whether a verdict is contrary to law, must assume that state of facts most favorable to the verdict which, under the charge, the jury were at liberty to find.[9]

ERRORS OF LAW ON THE TRIAL

7162. What are errors on the trial—It is only errors of law occurring at the trial that may be made the basis of a motion for a new trial under the sixth subdivision of the statute. Errors of law may of course occur before and after trial but the remedy in such cases is either an appeal from the judgment[10] or a motion for a new trial under the first subdivision of the statute.[11]

[98] Lennon v. White, 61–150, 63+620; Voge v. Penney, 74–525, 77+422; Messenger v. St. P. C. Ry., 77–34, 79+583; Baxter v. Covenant M. L. Assn., 77–80, 79+596; Brennan v. G. N. Ry., 77–360, 79+1032; Gammons v. Gulbranson, 78–21, 80+779; Schmeltzer v. St. P. C. Ry., 80–50, 82+1092; Koralewski v. G. N. Ry., 85–140, 88+410; Peterson v. Chi. etc. Ry., 106–245, 118+1016; Patzke v. Mpls. & St. L. Ry., 109–97, 123+57; Hill v. Jones, 109–370, 123+927.

[99] Brown v. Kohout 61–113, 63+248.

[1] Engstad v. Syverson, 72–188, 75+125.

[2] Hillestad v. Lee, 91–335, 97+1055.

[3] Orth v. St. P. etc. Ry., 47–384, 50+363; Ellison v. Truesdale, 49–240, 51+918; Baxter v. G. N. Ry., 73–189, 75+1114; Mpls. S. & D. Co. v. G. N. Ry., 83–370, 86+451; Swenson v. Erlandson, 86–263, 90+534; Kreuzer v. G. N. Ry., 87–33, 91+27; Martin v. Courtney, 87–197, 91+487; Truax v. Mpls. etc. Ry., 89–143, 94–440; Martyn v. Minn. etc. Ry., 95–333, 104+133; Hill v. Jones 109–370, 123+927. See § 7047.

[4] Valerius v. Richard, 57–443, 59+534.

[5] First Nat. Bank v. Strait, 71–69, 73+645.

[6] See Cummings v. Taylor, 21–366; Meighen v. Strong, 6–177(111); Holden v. O'Brien, 86–297, 90+531.

[7] Wilson v. City Nat. Bank, 51 Neb. 87.

[8] Langan v. Langan, 89 Cal. 198.

[9] Alden v. Minneapolis, 24–254.

[10] Winona v. Minn. etc. Co., 27–415, 6+795, 8+148; Id., 29–68, 11+228; Schumann v. Mark, 35–379, 28+927; Mpls. etc. Ry. v. Home Ins. Co., 64–61, 66+132; Taylor v. Grand Lodge, 98–36, 107+545.

[11] St. P. etc. Ry. v. Gardner, 19–132(99); Mead v. Billings, 43–239, 45+228.

When the trial is by jury the trial continues until the jury are discharged.[12] When the trial is by a court or referee the trial terminates with the final submission of the case.[13] When a cause is called for the trial of issues of fact any erroneous and prejudicial order or ruling thereafter made by the court is ground for a new trial.[14] Thus a new trial may be awarded for an erroneous order granting or denying a motion for dismissal,[15] for judgment on the pleadings,[16] for a directed verdict,[17] or for a jury trial.[18] A submission of a case to a jury when the evidence is insufficient to sustain a verdict is an "error of law." [19]

7163. How far discretionary—It has been said that "a motion for a new trial based upon alleged errors in law occurring at the trial presents purely legal questions, in the determination of which the trial court exercises no discretion." [20] This is not true. In passing on a motion for a new trial for alleged erroneous instructions the question is not simply whether the instructions were erroneous, but it is necessary to determine whether as a matter of fact they were practically prejudicial. This is not a legal question, but a question of pure fact, and its determination is left somewhat to the discretion of the trial court.[21] And the same is true in determining whether the erroneous admission or exclusion of evidence was practically prejudicial.[22] The entire subject of new trials is left more or less to the discretion of the trial court, a larger measure of discretion being given in some cases than in others. A party is not entitled to a new trial simply because there was error on the trial. No trial is ever entirely free from error and litigants must take the law with the imperfections ordinarily incident to its practical administration. It is only for material errors affecting the substantial rights of a party that a new trial may be granted. Whether errors are "material" and affect "substantial rights" is a question that depends upon the facts of the particular case and is addressed very largely to the discretion of the trial court.[23] The law of new trials is to be administered, not upon narrow and technical grounds, but upon broad and substantial grounds.[24]

ERROR IN DRAWING OR IMPANELING THE JURY

7164. In general—An error of the court in connection with the challenging of jurors and their examination on the voir dire may be a ground for a new trial if prejudicial.[25] But inasmuch as a party is not entitled to have any particular juror selected but only to have an impartial jury and as it will be presumed that the jury were impartial in the absence of a showing to the

[12] Tarbox v. Gotzian, 20–139(122); Manny v. Griswold, 21–506; Varco v. Chi. etc. Ry., 30–18, 13+921; Nichols v. Wadsworth, 40–547, 42+541; Hudson v. Mpls. etc. Ry., 44–52, 46+314; Reilly v. Bader, 46–212, 48+909.

[13] See Volmer v. Stagerman, 25–234.

[14] Hine v. Myrick, 60–518, 62+1125; Burkleo v. Baytown, 108–224, 120+526; Kerling v. Van Dusen, 109–481, 124+235 (error in refusing additional counsel).

[15] See § 7147.

[16] McAllister v. Welker, 39–535, 41+107; Hine v. Myrick, 60–518, 62+1125. See Lueck v. St. P. & D. Ry., 57–30, 58+821.

[17] Thompson v. Pioneer Press Co., 37–285, 33+856; Floody v. G. N. Ry., 104–517, 116+107, 932; McClellan v. Dow, 104–527, 116+1134.

[18] Hasey v. McMullen, 109–332, 123+1078.

[19] Law Reporting Co. v. Poehler, 106–213, 118+664.

[20] Fitger v. Guthrie, 89–330, 94+888.

[21] Braley v. Byrnes, 21–482; Fairchild v. Rogers, 32–269, 20+191; Demueles v. St. P. etc. Ry., 44–436, 46+912.

[22] Cole v. Maxfield, 13–235(220) and cases under § 7183.

[23] See cases under § 7074.

[24] Anderson v. Burlington etc. Ry., 82–293, 84+145.

[25] Morrison v. Lovejoy, 6–319(224); State v. Bresland, 59–281, 61+450.

contrary it is rare that a new trial can be secured for such an error.[26] In the absence of fraud, or collusion, in the selection of a jury, an objection to the array, or to a single juror, is too late after verdict; unless it is shown that the party objecting was prejudiced by the irregularity.[27] If a challenge for general disqualification is erroneously disallowed and the party subsequently challenges the juror peremptorily, and a jury is obtained without the party having exhausted his peremptory challenges, the error is without prejudice.[28] The failure to comply with statutory requirements in reference to summoning and drawing a petit jury is not ground for granting a new trial, when the record shows that a fair and impartial jury was secured, and that the defendant accepted the jury at a time when he had numerous peremptory challenges unused. Under such circumstances the errors and irregularities are without prejudice to the substantial rights of the defendant.[29]

ERRONEOUS INSTRUCTIONS

7165. In general—It is the general rule that error in a charge is ground for a new trial unless it is clear, from a consideration of the charge as a whole, that the jury were not misled.[30] The charge must be construed as a whole.[31] All the exceptions or modifications of a legal proposition cannot be stated in one sentence, and need not, necessarily, be stated in the same connection. If the proper modifications and exceptions to the general rule are made, there is no ground for reversal unless there is something in the charge so obscure, absurd, or contradictory as to tend to mislead or confound the jury.[32] An instruction which, standing alone, bears upon its face a meaning legally erroneous and prejudicial to a party furnishes no ground for a new trial, if, taken in connection with the whole charge, no error appears, and it is clear that the jury cannot have been misled.[33]

7166. How far discretionary—Question on appeal—The matter of granting new trials for erroneous instructions is largely a matter of discretion.[34] Whether a charge is practically prejudicial or not is a question of fact which the trial court is in a far better position to pass upon than an appellate court.[35]

[26] State v. Brown, 12–538(448); State v. Lautenschlager, 22–514; State v. Lawlor, 28–216, 9+698; State v. Hanley, 34–430, 26+397; State v. Frelinghuysen, 43–265, 45+432; State v. Kluseman, 53–541, 55+741; State v. Smith, 56–78, 57+325; Perry v. Mpls. St. Ry., 69–165, 72+55; State v. Durnam, 73–150, 75+1127.

[27] Steele v. Maloney, 1–347(257); State v. Thomas, 19–484(418).

[28] State v. Lawlor, 28–216, 9+698.

[29] State v. Quirk, 101–334, 112+409.

[30] Coit v. Waples, 1–134(110); Woodbury v. Larned, 5–339(271); Ames v. First Div. etc. Ry., 12–412(295); State v. Gut, 13–341(315); Stearns v. Johnson, 17–142(116); Pinney v. First Div. etc. Ry., 19–251(211); Pence v. Gale, 20–257(231); Rollins v. St. P. L. Co., 21–5; Morish v. Mountain, 22–564; Beebe v. Wilkinson, 30–548, 16+450; Fairchild v. Rogers, 32–269, 20+191; Pevey v. Schulenburg, 33–45, 21+844; Hughes v. Meehan, 81–482, 84+331; State v. Newman, 93–393, 101+499; Kolander v. Dunn, 95–422, 104+371; Maehren v. G. N. Ry., 98–375, 107+951; Floody v. G. N. Ry., 102–81, 112+875.

[31] Spencer v. Tozer, 15–146(112); Merriam v. Pine City L. Co., 23–314; Laurel v. State Nat. Bank, 25–48; Brakken v. Mpls. etc. Ry., 31–45, 16+459; Johnston v. Clark, 31–165, 17+111; Barbo v. Bassett, 35–485, 29+198; Peterson v. Chi. etc. Ry., 38–511, 39+485; State v. Brown, 41–319, 43+69; Smith v. Maben, 42–516, 44+792; Deisen v. Chi. etc. Ry., 43–454, 45+864; Fruit D. Co. v. Murphy, 90–286, 96+83; State v. Newman, 93–393, 101+499.

[32] Gates v. Manny, 14–21(13); Brakken v. Mpls. etc. Ry., 31–45, 16+459.

[33] Johnson v. Wallower, 18–288(262); Colvill v. Langdon, 22–565; Simpson v. Krumdick, 28–352, 10+18; Farnham v. Thompson, 32–22, 18+833.

[34] Demueles v. St. P. etc. Ry., 44–436, 46+912.

[35] Braley v. Byrnes, 21–482.

When the trial court grants a new trial on this ground its decision is practically final. "It should require a clear case of error or abuse of discretion to warrant the reversal of an order of a trial court awarding a new trial for apprehended misconception on the part of the jury of the law of the case." [36] As a general rule the supreme court will grant a new trial for an error in a charge unless it is clear, from a consideration of the charge as a whole, that the jury were not misled.[37]

7167. Inconsistent and contradictory instructions—Where the instructions are manifestly inconsistent and contradictory on a material issue a new trial should ordinarily be granted. It is not for the jury to select from contradictory instructions, those which correctly express the law.[38]

7168. When there are several issues—Where there are several material issues tried and the verdict is a general one it cannot be upheld if the trial court gave the jury an erroneous charge upon any one of the issues.[39] Where an issue in the case has been submitted to the jury and they have made a special finding on the same, which is conclusive of the rights of the parties, if that finding must stand, it is immaterial that the court may have erred in its manner of submitting to the jury another separate and distinct issue.[40] Where some of the issues submitted to a jury constitute a good defence, and part do not, and a general verdict is returned for defendant, it cannot stand, if it does not appear upon which issue the verdict is based.[41]

7169. Charge in accord with theory of trial—Where a case has been tried by the parties, and submitted to the jury by the court without objection, upon a certain construction of the pleadings, such construction will be conclusive on the parties.[42] A party is concluded by an instruction given in accordance with the theory upon which he conducted his case.[43] Where a case is tried upon the theory that the only issue is as to one question of fact, and the court, without objection by the party, instructs the jury that this is the only question submitted to them, and that their verdict is to depend exclusively upon their determination of the question, the party thereby consents that the case may be tried and determined upon that one issue, and cannot afterwards urge that the evidence upon some other question of fact was insufficient to justify the verdict.[44] An erroneous and prejudicial statement of the law in the charge is a

[36] Braley v. Byrnes, 21-482; Nelson v. Thompson, 23-508; Fairchild v. Rogers, 32-269, 20+191; Demueles v. St. P. etc. Ry., 44-436, 46+912.

[37] Dalby v. Lauritzen, 98-75, 107+826; Maehren v. G. N. Ry., 98-375, 107+951.

[38] Cole v. Curtis, 16-182(161, 173); Eich v. Taylor, 17-172(145); McCormick v. Kelly, 28-135, 9+675; State v. Grear, 28-426, 10+472; Hughley v. Wabasha, 69-245, 72+78; Gorstz v. Pinske, 82-456, 85+215; Mailand v. Mailand, 83-453, 86+445.

[39] Peterson v. Chi. etc. Ry., 36-399, 31+515; Funk v. St. P. C. Ry., 61-435, 63+1099; First Nat. Bank v. Strait, 71-69, 73+645; Fidelity etc. Co. v. Crays, 76-450, 79+531; Moldenhauer v. Mpls. St. Ry., 80-426, 83+381; Avery Planter Co. v. Peck, 80-519, 83+455, 1083; Grover v. Bach, 82-299, 84+909; Holden v. O'Brien, 86-297, 90+531; Schmitt v. Murray, 87-250, 91+1116; Barrett v. Magner, 105-118, 117+245. See Nelson v. Thompson, 23-508.

[40] Whitacre v. Culver, 9-295(279); Peterson v. Chi. etc. Ry., 36-399, 31+515; Elwood v. Saterlie, 68-173, 71+13; Maceman v. Equitable L. A. Soc., 69-285, 72+111; Milton v. Biesanz, 99-439, 109+999.

[41] Holden v. O'Brien, 86-297, 90+531.

[42] Fritz v. McGill, 31-536, 18+753; Keyes v. Mpls. etc. Ry., 36-290, 30+888; Peteler etc. Co. v. N. W. etc. Co., 60-127, 61+1024.

[43] Papooshek v. Winona etc. Ry., 44-195, 46+329; Perine v. Grand Lodge, 48-82, 50+1022; Davis v. Jacoby, 54-144, 55+908; Peteler etc. Co. v. N. W. etc. Co., 60-127, 61+1024; Moquist v. Chapel, 62-258, 64+567; Engler v. Schneider, 66-388, 69+139; Engstad v. Syverson, 72-188, 75+125; Haslam v. First Nat. Bank, 79-1, 81+535; Hansen v. St. P. G. Co., 88-86, 92+510; Strong v. Knuteson, 91-191, 97+659.

[44] McCarvel v. Phenix Ins. Co., 64-193, 66+367; Engler v. Schneider, 66-388, 69+139; Engstad v. Syverson, 72-188, 75+125.

ground for a new trial though the court merely adopted the interpretation of the law agreed upon by counsel. It is the duty of the court to apply and administer the law according to its own understanding of it and not to abdicate in favor of counsel.[45]

7170. When the verdict is right—A new trial should not be granted in a civil action however erroneous the charge may have been if the verdict was the only one warranted by the law applicable to the case [46] or was supported by so manifest a preponderance of the evidence that it would have been the obvious duty of the court to set aside a contrary verdict as not justified by the evidence,[47] or was such as the court would have been justified in directing.[48] Where, upon the evidence, the successful party is entitled, upon a particular issue, to the verdict actually rendered, the charge as to other issues being correct, an inaccuracy in the charge as to that issue will not vitiate the verdict.[49]

7171. Erroneous instructions disregarded—Where it is obvious that the jury disregarded an erroneous instruction a new trial should not be granted.[50] Where it appears from an answer to an interrogatory that the jury found the general verdict upon a certain theory of the case, erroneous instructions relating to other theories are not a ground for a new trial.[51]

7172. Impertinent abstract instructions—An erroneous instruction on an abstract proposition of law not pertinent to the case is no ground for a new trial where it is manifest that no prejudice resulted to the party complaining.[52] But where such instruction relates to facts which, though not in themselves material, are so closely connected in time and sequence with the real issues that the jury might very well believe, from the fact of the court stating the law applicable to them, that they had a material bearing on the issues a new trial should be granted unless it is manifest that the moving party was not prejudiced.[53]

7173. Party cannot complain of favorable charge—A party cannot complain of an instruction which was more favorable to him than it ought to have been.[54]

7174. Improper submission of issues—No evidence—Conclusive evidence—It is prejudicial error for the court to submit a case to the jury upon a point upon which there is no evidence [55] or where the evidence admits of only one reasonable inference.[56]

[45] Fitzgerald v. St. P. etc. Ry., 29–336, 13+168.

[46] Colter v. Mann, 18–96(79); Lewis v. St. P. etc. Ry., 20–260(234); Ryder v. Neitge, 21–70; Strong v. Baker, 25–442; Fogarty v. Wilson, 30–289, 15+175; Petsch v. Biggs, 31–392, 18+101; Gross v. Diller, 33–424, 23+837; Hurt v. St. P. etc. Ry., 39–485, 40+613; Evison v. Chi. etc. Ry., 45–370, 48+6; Magner v. Truesdale, 53–436, 55+607; Bank of Montreal v. Richter, 55–362, 57+61; Pioneer S. & L. Co. v. Freeburg, 59–230, 61+25; Goodhue Co. v. Duluth etc. Ry., 67–213, 69+898; Smithson v. Chi. etc. Ry., 71–216, 73+853; King v. Duluth, 78–155, 80+874; Germolus v. Sausser, 83–141, 85+946; Stearns v. Kennedy, 94–439, 103+212.

[47] Woodbury v. Larned, 5–339(271); Beebe v. Wilkinson, 30–548, 16+450; Smithson v. Chi. etc. Ry., 71–216, 73+853; Arine v. Mpls. etc. Ry., 76–201, 78+1108; Heminway v. Miller, 87–123, 91+428.

[48] Moore v. Phoenix Ins. Co., 100–393, 111+263; Donahue v. N. W. etc. Co., 103–432, 115+279; Arine v. Mpls. etc. Ry., 76–201, 78+1108; Smithson v. Chi. etc. Ry., 71–216, 73+853.

[49] Strong v. Baker, 25–442.

[50] Dike v. Pool, 15–315(245); Colter v. Mann, 18–96(79); Gaslin v. Bridgman, 26–442, 4+1111; Klimple v. Boelter, 44–172, 46+306; Howe v. Cochran, 47–403, 50+368; Cannon v. Moody, 78–68, 80+842; Kurstelska v. Jackson, 93–385, 101+606.

[51] Milton v. Biesanz, 99–439, 109+999.

[52] Blackman v. Wheaton, 13–326(299); Brown v. Nagel, 21–415; Braley v. Byrnes, 21–482.

[53] Braley v. Byrnes, 21–482. See Gorstz v. Pinske, 82–456, 85+215.

[54] Spencer v. Tozer, 15–146(112); State v. Grear, 29–221, 13+140; Weber v. Winona etc. Ry., 63–66, 65+93.

[55] Rugland v. Tollefsen, 53–267, 55+123; Van Doren v. Wright, 65–80, 67+668, 68+22.

[56] Reed v. Lammel, 40–397, 42+202; Can-

7175. Improper withdrawal of issues—It is prejudicial error and ground for a new trial for the court in its charge to withdraw from the jury issues of fact properly determinable by them.[57]

7176. Improper introduction of issues—The giving of an instruction calculated to materially affect the verdict, which introduces into the case a new and substantial issue not presented by the pleadings nor litigated by consent, is a ground for a new trial.[58]

7177. Conditional instructions—Where an erroneous instruction was stated by the court to be applicable only in the event the jury found the plaintiff guilty of contributory negligence, and the jury found, in response to an interrogatory, that he was not guilty of contributory negligence, it was held that the error in the instruction was not a ground for a new trial.[59]

7178. Erroneous summary—Where a court charges the jury at length and finally summarizes the law applicable to the case, an error in the summary is ground for a new trial.[60]

7179. Failure to charge on particular points—It is the general rule that a failure to charge on a particular point is not a ground for a new trial, in the absence of a written and timely request from counsel.[61]

ERRONEOUS ADMISSION OR EXCLUSION OF EVIDENCE

7180. Erroneous admission of evidence—In general—Error in the admission of evidence is ground for a new trial or reversal unless it appears, from a consideration of the whole case, that substantial prejudice did not result.[62] Prejudice is presumed from error in the admission of evidence,[63] but this presumption is of little practical force as the court will always consider the whole case in determining whether the error resulted in substantial prejudice. It is not the law in this state that mere error in the admission of evidence entitles a party to a new trial as of right.[64] It is coming to be generally recognized that new trials have been granted too freely in this country for error in the admission and exclusion of evidence.[65] It is submitted that a new trial ought

non River etc. Assn. v. Rogers, 51–388, 53+759; Wilkinson v. Crookston, 75–184, 77+797.

[57] Wilkinson v. Crookston, 75–184, 77+797.

[58] Dolson v. Dunham, 96–227, 104+964; Hostetter v. Illinois C. Ry., 104–25, 115+748.

[59] Mullane v. St. P. C. Ry., 104–153, 116+354.

[60] Kurstelska v. Jackson, 89–95, 93+1054. See State v. Newman, 93–393, 101+499.

[61] Chamberlain v. Porter, 9–260(244); State v. Lawlor, 28–216, 9+698; Haynes v. Duluth, 47–458, 50+693; McCarvel v. Phenix Ins. Co., 64–193, 66+367; Kostuch v. St. P. C. Ry., 78–459, 81+215; Mobile F. & T. Co. v. Potter, 78–487, 81+392; Brown v. Radebaugh, 84–347, 87+937; Case v. Huffman, 86–30, 90+5; Applebee v. Perry, 87–242, 91+893; Strong v. Knuteson, 91–191, 97+659; Olson v. Aubolee, 92–312, 99+1128; Ellington v. G. N. Ry., 92–470, 100+218; Beck v. Mpls. U. Ry., 95–73, 103+746; Osborn v. Miss. etc. Co., 95–149, 103+879; Kramer v. N. W. El. Co., 97–44, 106+86; Dalby v. Lauritzen, 98–75, 80, 107+826; De Blois v. G. N. Ry., 99–18, 108+293; Johnson v. Smith, 99–343, 109+810; State v. Zempel, 103–428, 115+275; Bailey v. Grand Forks L. Co., 107–192, 119+786; Hanson v. Hellie, 107–375, 120+341; Beardmore v. Barton, 108–28, 121+228. See Greengard v. Burton, 88–252, 92+931; Robertson v. Burton, 88–151, 92+538.

[62] State v. Mpls. etc. Ry., 90–88, 95+581. See, for illustrative cases, Keyes v. Mpls. etc. Ry., 36–290, 30+888; Murphy v. Backer, 67–510, 70+799 (criticised in 1 Wigmore, Ev. § 21); Rauma v. Bailey, 80–336, 83+191; Aske v. Duluth etc. Ry., 83–197, 85+1011; Crowley v. Burns, 100–178, 110+969; Bahr v. N. P. Ry., 101–314, 112+267.

[63] Kelly v. Tyra, 103–176, 183, 114+750, 115+636. See Lowry v. Harris, 12–255 (166). Contra, Leystrom v. Ada, 125+507.

[64] State v. Crawford, 96–95, 102, 104+822, 768; Kelly v. Tyra, 103–176, 183, 114+750; Stoakes v. Larson, 108–234, 121+1112. See Evidence, 3251.

[65] State v. Nelson, 91–143, 97+652; State v. Crawford, 96–95, 102, 104+822, 768; 1

not to be granted or a judgment reversed for error in the admission of evidence if the other evidence in the case is sufficient to justify the verdict or finding, unless the error resulted in depriving a party of a fair and impartial trial.[66] When a trial court grants a new trial on the ground that evidence erroneously admitted was practically prejudicial its action will rarely be reversed on appeal.[67]

7181. Erroneous exclusion of evidence—In general—No general rule has been laid down in this state as to when a judgment will be reversed or new trial granted for error in the exclusion of evidence.[68] It is submitted that a judgment should not be reversed or a new trial granted for error in the exclusion of evidence unless such evidence is so material that it might reasonably have changed the result if it had been admitted.

7182. When the verdict is right—Error in the admission or exclusion of evidence, however material, is no ground for a new trial when, taking into consideration all the evidence in the case, including that erroneously excluded and excluding that erroneously admitted, the verdict rendered was the only one warranted by the law applicable to the case[69] or was supported by so manifest a preponderance of the evidence that it would have been the obvious duty of the court to set aside a contrary verdict as not justified by the evidence,[70] or was such as the court should have directed.[71]

7183. Immaterial evidence—Error in the admission or exclusion of evidence so immaterial that obviously it could not have affected the determination of the jury is no ground for a new trial.[72] The object of a new trial is to afford a fair trial; and if the court can see that there is no reasonable ground to apprehend that injustice was done by the reception of immaterial testimony, or to apprehend that the jury were misled by it to the substantial prejudice of the objecting party, a new trial should not be granted.[73]

7184. Evidence as to facts otherwise proved—Error in admitting or excluding evidence of a fact otherwise satisfactorily proved by admissible evidence, or inadmissible evidence unobjected to, is no ground for a new trial.[74]

Wigmore, Ev. § 21; Report, American Bar Assn., 1908 p. 542; 1909 pp. 578, 603.

[66] See State v. Crawford, 96–95, 102, 104+822, 768.

[67] Smith v. Barringer, 37–94, 33+116.

[68] See, for illustrative cases, Steele v. Thayer, 36–174, 30+758; Allen v. Fortier, 37–218, 34+21; Tunell v. Larson, 37–258, 34+29; Christian v. Klein, 77–116, 79+602; Pickler v. Caldwell, 86–133, 90+307; Berglund v. Illinois C. Ry., 109–317, 123+928.

[69] Harrington v. St. P. etc. Ry., 17–215 (188, 206); Lewis v. St. P. etc. Ry., 20–260(234); Hewitt v. Blumenkranz, 33–417, 23+858; Gammon v. Ganfield, 42–368, 44+125; Winslow v. Herzog, 46–452, 49+234; Bank of Montreal v. Richter, 55–362, 57+61; Fay v. Chi. etc. Ry., 72–192, 75+15.

[70] Duncan v. Kohler, 37–379, 34+594; Larson v. Lombard I. Co., 51–141, 53+179; Teipner v. Bank of Waterville, 59–392, 61+336; Fowlds v. Evans, 60–513, 63+102; Elwood v. Betcher, 72–103, 75+113; Fulmore v. St. P. C. Ry., 72–448, 75+589; Williams v. Griffin, 84–279, 87+773.

[71] Moore v. Phoenix Ins. Co., 100–393, 111+263; Donahue v. N. W. etc. Co., 103–432, 115+279.

[72] Bond v. Corbett, 2–248(209); Lynd v. Picket, 7–184(128); Illingworth v. Greenleaf, 11–235(154); Lowry v. Harris, 12–255(166); Ames v. First Div. etc. Ry., 12–412(295); Yale v. Edgerton, 14–194 (144); Rudsdill v. Slingerland, 18–380 (342); St. Anthony etc. Co. v. Eastman, 20–277(249); Torinus v. Matthews, 21–99; Howard v. Barton, 28–116, 9+584; Wass v. Atwater, 33–83, 22+8; Prosser v. Hartley, 35–340, 29+156; Keyes v. Mpls. etc. Ry., 36–290, 30+888; De Laittre v. Jones, 36–519, 32+709; Cedar Rapids etc. Ry. v. Ryan, 37–38, 33+6; Duncan v. Kohler, 37–379, 34+594; Schmidt v. McCarthy, 43–288, 46+239; Howe v. Cochran, 47–403, 50+368; Akers v. Thwing, 52–395, 54+194; Drews v. Ann River L. Co., 53–199, 54+1110; Aske v. Duluth etc. Ry., 83–197, 85+1011; Nichols v. Gerlich, 84–483, 87+1120; Donahue v. N. W. etc. Co., 103–432, 115+279; Hawley v. Mpls. St. Ry., 108–136, 121+627.

[73] Cole v. Maxfield, 13–235(220); Bernick v. McClure, 107–9, 119+247.

[74] Lowry v. Harris, 12–255(166); Huot

It has been held that this rule applies only when the other evidence proves the fact "conclusively," [75] but this is questionable doctrine.

7185. Error in order of proof—No irregularity in the order in which evidence is introduced is ground for a new trial.[76]

7186. Evidence likely to prejudice jury against party—Error in the admission of evidence naturally tending to excite strongly the sympathies or prejudices of the jury is a ground for a new trial, unless it is obvious that it was harmless under the circumstances.[77]

7187. Evidence of fact admitted, undisputed, or presumed—Error in admitting or excluding evidence of a fact which is admitted [78] or undisputed [79] or which in the absence of evidence would be presumed,[80] is no ground for a new trial.

7188. Evidence to impeach witness—Error in refusing to allow a witness to be impeached by evidence of contradictory statements on a material point is ground for a new trial.[81]

7189. Evidence to disprove fact not proved—Error in admitting evidence to disprove a fact which there is no evidence to establish is no ground for a new trial.[82]

7190. Where there are several causes—Where the complaint contains two causes of action and there is a general verdict for the plaintiff for damages, if there was material error in admitting evidence of one of the causes of action a new trial must be granted.[83]

v. McGovern, 27–84, 6+426; Stone v. Evans, 32–243, 20+149; Taylor v. Austin, 32–247, 20+157; Laib v. Brandenburg, 34–367, 25+803; Meyenberg v. Eldred, 37–508, 35+371; Beard v. First Nat. Bank, 41–153, 43+7; Larson v. Lombard I. Co., 51–141, 53+179; In re Yetter, 55–452, 57+147; Olson v. Nonenmacher, 63–425, 65+642; People's Bank v. Howes, 64–457, 67+355; Holman v. Kempe, 70–422, 73+186; Breault v. Merrill, 72–143, 75+122; State v. Rue, 72–296, 75+235; First Nat. Bank v. Strait, 75–396, 78+101; Selover v. First Nat. Bank, 77–140, 79+666; Fonda v. St. P. C. Ry., 77–336, 79+1043; Utley v. Clements, 79–68, 81+739; Klein v. Funk, 82–3, 84+460; Citizens' State Bank v. Bonnes, 83–1, 85+718; Hibbs v. Marpe, 84–178, 87+363; Pickler v. Caldwell, 86–133, 90+307; Massolt v. Minnetonka C. Co., 103–517, 114+1132; Anderson v. San Francisco, 104–320, 116+473.

[75] Bergenthal v. Security S. Bank, 98–414, 108+301.

[76] Beaulieu v. Parsons, 2–37(26); Cooper v. Stinson, 5–201(160); Woodbury v. Larned, 5–339(271); Baze v. Arper, 6–220(142); Lynd v. Picket, 7–184(128); Caldwell v. Bruggerman, 8–286(252); Foster v. Berkey, 8–351(310); State v. Staley, 14–105(75); Madigan v. De Graff, 17–52(34); Groff v. Ramsey, 19–44(24); Plummer v. Mold, 22–15; Griffiths v. Wolfram, 22–185; Crandall v. McIlrath, 24–127; State v. Cantieny, 34–1, 24+458; McDonald v. Peacock, 37–512, 35+370; St. Paul D. Co. v. Pratt, 45–215, 47+789; Rosquist v. Gilmore, 50–192, 52+385; Romer v. Conter, 53–171, 54+1052; Hart v. Kessler, 53–546, 55+742; Nelson v. Finseth, 55–417, 57+141; Johnson v. Stillwater, 62–60, 64+95; State v. Hayward, 62–474, 65+63; Hale v. Life I. & I. Co., 65–548, 68+182.

[77] Hoberg v. State, 3–262(181); State v. Hoyt, 13–132(125); Simmons v. Holster, 13–249(232); Rauma v. Bailey, 80–336, 83+191; State v. Pierce, 85–101, 88+417.

[78] Dodge v. Chandler, 13–114(105); Benton v. Nicoll, 24–221; Carlson v. Small, 32–492, 21+737; Miller v. Irish C. C. Assn., 36–357, 31+215; Berger v. Mpls. G. Co., 60–296, 62+336; Hahn v. Penney, 62–116, 63+843; Harding v. G. N. Ry., 77–417, 80+358; Evenson v. Keystone Mfg. Co., 83–164, 86+8; Union etc. Co. v. Prigge, 90–370, 96+917.

[79] Allis v. Lash, 23–261; Stone v. Evans, 32–243, 20+149; Laib v. Brandenburg, 34–367, 25+803.

[80] Yale v. Edgerton, 14–194(144); Horton v. Williams, 21–187; State v. Levy, 23–104; Brakken v. Mpls. etc. Ry., 32–425, 21+414; Miller v. Irish etc. Assn., 36–357, 31+215; Enneking v. Woebkenberg, 88–259, 92+932; Pitzl v. Winter, 96–499, 504, 105+673.

[81] Tunell v. Larson, 37–258, 34+29; Swift v. Withers, 63–17, 65+85; Yoki v. First State Bank, 87–295, 91+1101. See § 10351.

[82] Illingworth v. Greenleaf, 11–235(154).

[83] Simmons v. Holster, 13–249(232). See Moldenhauer v. Mpls. St. Ry., 80–426, 83+381.

7191. Where there is a special verdict—Where upon a special verdict upon one issue the party is entitled to the judgment rendered, error in the admission of evidence bearing on another issue is no ground for a new trial.[84]

7192. Exclusion of evidence subsequently admitted—The erroneous exclusion of evidence subsequently admitted is no ground for a new trial.[85] Error in admitting evidence is no ground for a new trial if the complaining party subsequently introduced substantially the same evidence.[86]

7193. Evidence called out by moving party—A new trial will not be granted to a party on account of the admission of evidence which was elicited by his own examination.[87]

7194. Secondary evidence—Error in admitting oral evidence to prove the contents of a written instrument is no ground for a new trial, if the instrument is subsequently introduced.[88]

7195. Similar evidence admitted without objection—Error in admitting evidence is no ground for a new trial if substantially the same evidence has already been introduced without objection.[89]

7196. Theory of case—Objections raised on trial—With a view to a new trial the admissibility of evidence must be considered with reference to the theory of the case adopted by the moving party on the trial.[90] When evidence is offered with a statement that it is offered for a particular purpose, its rejection is not reversible error, because it was admissible for another purpose not called to the attention of the court, especially where such other purpose is wholly inconsistent with the theory upon which the proponent is trying the action.[91] Where evidence admitted was admissible, but not on the ground on which its admission was urged by counsel, a new trial will not be granted unless it is obvious that prejudice resulted.[92]

7197. Evidence on issues litigated by consent—Where it is not apparent that the parties consented to try an issue not made by the pleadings, evidence that might be proper upon such an issue is not to be considered in respect to it.[93]

7198. When there are several issues—When there are several issues and a general verdict, the erroneous admission of evidence on any one of the issues necessitates a new trial.[94]

7199. Substantive and impeaching evidence—The erroneous admission of substantive evidence which subsequently becomes competent as impeaching evidence is ground for a new trial, unless the court instructs the jury to consider it for impeachment only; and in order to save his rights the aggrieved party is not required to request the court for such instruction.[95]

[84] Whitacre v. Culver, 9-295(279).

[85] Lynd v. Picket, 7-184(128); Finley v. Quirk, 9-194(179); Chapman v. Dodd, 10-350(277); Sanborn v. Sturtevant, 17-200 (174); Merriam v. Pine City L. Co., 23-314; Weaver v. Miss. etc. Co., 31-74, 16+494; Carlson v. Small, 32-492, 21+737; Alexander v. Chi. etc. Ry., 41-515, 43+481; Peck v. Snow, 47-398, 50+470; Minn. etc. Soc. v. Swanson, 48-231, 51+117; Young v. Otto, 57-307, 59+199; Hale v. Life etc. Co., 65-548, 68+182; Rosted v. G. N. Ry., 76-123, 78+971; Comstock v. Comstock, 76-396, 79+300; Cady v. Cady, 91-137, 97+580.

[86] Coit v. Waples, 1-134(110); Weide v. Davidson, 15-327(258); Anderson v. St. Croix L. Co., 47-24, 49+407; McLennan v. Mpls. etc. Co., 57-317, 59+628; Lloyd v. Simons, 90-237, 95+903.

[87] Shelley v. Lash, 14-498(373).

[88] Cooper v. Breckenridge, 11-341(241). See Steele v. Etheridge, 15-501(413).

[89] Shrimpton v. Philbrick, 53-366, 55+551; Lane v. Minn. etc. Soc., 67-65, 69+463; Holman v. Kempe, 70-422, 73+186.

[90] Peteler etc. Co. v. N. W. etc. Co., 60-127, 61+1024; Earl v. Thurston, 60-351, 62+439; Mareck v. Mpls. T. Co., 74-538, 77+428.

[91] Mareck v. Mpls. T. Co., 74-538, 77+428.

[92] Nininger v. Knox, 8-140(110).

[93] White v. Western Assur. Co., 52-352, 54+195.

[94] Moldenhauer v. Mpls. St. Ry., 80-426, 83+381.

[95] Rosted v. G. N. Ry., 76-123, 78+971.

7200. Proper answer to improper question—An improper question propounded a witness is no ground for a new trial if the answer, being not responsive, is proper.[96]

7201. Opinion evidence—The erroneous admission or exclusion of opinion evidence is not a ground for a new trial unless it was clearly prejudicial.[97]

7202. Evidence in rebuttal of incompetent evidence—When a party introduces incompetent evidence he cannot object that the adverse party is allowed to introduce evidence in rebuttal.[98]

7203. Evidence as to facts disproved—The exclusion of a question on cross-examination as to a fact which the jury find does not exist is harmless.[99] The exclusion of evidence as to a fact which is subsequently conclusively disproved by other evidence is harmless.[1]

7204. Evidence as to issues withdrawn—The exclusion of evidence in support of a counterclaim subsequently withdrawn is harmless.[2] If evidence is properly admitted its admission is not rendered a ground for a new trial by the fact that the issue to which it relates is subsequently withdrawn from the jury by the court in its instructions.[3]

7205. Evidence relating to damages—As a general rule a new trial should not be granted for error in the admission or exclusion of evidence relating to damages, if the damages awarded are reasonable and such as the party was entitled to recover, or if no objection is made to the amount of damages awarded.[4] But if it is probable that a party was materially prejudiced a new trial should be granted.[5] If by stipulation of the parties the verdict is reduced to the proper amount of damages, error in the admission of evidence as to damages is harmless.[6]

7206. Error cured by striking out evidence—A new trial should not ordinarily be granted for the erroneous admission of evidence subsequently stricken out. But if it is clear that the prejudicial effect of the evidence could not be thus removed, owing to the exceptional nature of the evidence and the issues, as, for example, where the evidence was likely to arouse the sympathies or prejudices of the jury, a new trial should be granted, if it is certain or highly probable that material prejudice in fact resulted.[7]

7207. Error cured by instructions—A new trial should not ordinarily be granted for the erroneous admission of evidence when the court distinctly instructs the jury to disregard it. But if it is clear that the prejudicial effect of the evidence could not be thus removed, owing to the exceptional nature of the evidence and the issues, as for example, where the evidence was likely to arouse the sympathies or prejudices of the jury, a new trial should be granted if it is certain or highly probable that material prejudice in fact resulted. The question is not to be determined by the application of any hard and fast rules, or by indulging a presumption of prejudice. Each case must necessarily be determined largely by its own facts.[8]

[96] McCormick v. Miller, 19–443(384); Chalmers v. Whittemore, 22–305; In re Pinney, 27–280, 6+791, 7+144; Bridgman v. Hallberg, 52–376, 54+752; Towle v. Sherer, 70–312, 73+180.

[97] Conan v. Ely, 91–127, 97+737.

[98] See Ofstie v. Kelly, 33–440, 23+863.

[99] Hayward v. Knapp, 23–430.

[1] Thielen v. Randall, 75–332, 77+992.

[2] Illingworth v. Greenleaf, 11–235(154).

[3] Cady v. Cady, 88–230, 92+1129; Jacobson v. Hobart, 103–319, 114+951.

[4] Anderson v. Burlington etc. Ry., 82–293, 84+145; Boosalis v. Stevenson, 62–193, 64+380; Backus v. Scanlon, 78–438, 81+216; Paterson v. Chi. etc. Ry., 95–57, 103+621; Weicherding v. Krueger, 109–461, 124+225.

[5] Larson v. Lammers, 81–239, 83+981; Conan v. Ely, 91–127, 97+737.

[6] Rutter v. Dowagiac Mfg. Co., 102–367, 113+910.

[7] Hillestad v. Hostetter, 46–393, 49+192; Olson v. Berg, 87–277, 91+1103; State v. Yates, 99–461, 109+1070; State v. Towers, 106–105, 118+361; Burch v. Bernard, 107–210, 120+33. See cases under § 7207.

[8] Hillestad v. Hostetter, 46–393, 49+192;

7208. When the trial is by the court—When a cause is tried by the court without a jury greater latitude is permissible in the admission of evidence than on a trial by a jury. When there is sufficient competent evidence to justify the findings of a court a new trial will not be granted because of the admission of incompetent evidence unless it is very clear that it affected the determination of the court.[9] The fact that the court was affected by incompetent evidence may appear from its memorandum.[10] The decision of a trial court cannot be sustained on a statement of the court that its decision was unaffected by evidence improperly admitted,[11] but a new trial will not be granted if it is obvious that such evidence was disregarded.[12] If the competent evidence is such as to require the findings made, the admission of other and incompetent evidence is error without prejudice.[13] A new trial will not be granted for the improper admission of evidence pertinent to an issue upon which the findings were in favor of the moving party.[14] The exclusion of evidence which could not reasonably have changed the result if it had been admitted is not a ground for a new trial.[15] If inadmissible evidence is received subject to a future ruling and the findings show that it was disregarded there is no error.[16]

STATUTORY NEW TRIAL AS OF RIGHT

7209. To what actions applicable—The phrase "action for the recovery of real property" was intended to refer to actions in the nature of the common-law action of ejectment.[17] In determining the right to a second trial the court will look to the substance of the action, and, whatever may be the form of the pleadings, if the action is one in which either party seeks to recover possession of real property, the right to a second trial will be conceded.[18] It is no objection that the action involves other issues.[19] It does not apply when the land is vacant. In other words it applies only to possessory actions. It is the general rule that a second trial cannot be had as of right unless the recovery of

Williams v. Wood, 55–323, 56+1066; Olson v. Berg, 87–277, 91+1103; State v. Yates, 99–461, 109+1070; Crowley v. Burns, 100–178, 110+969; State v. Whitman, 103–92, 114+363; State v. Towers, 106–105, 118+361; Dunnell, Minn. Pr. § 1855. The following cases, in so far as they lay down the rule that a new trial should be granted unless it appears that prejudice did not result, are discredited: Juergens v. Thom, 39–458, 40+559; Dugan v. St. P. & D. Ry., 43–414, 45+851.

[9] Backus v. Scanlon, 78–438, 81+216; Barber v. Robinson, 82–112, 84+732; Flour City Nat. Bank v. Bayer, 89–180, 94+557; Mankato M. Co. v. Willard, 94–160, 102+202; Humphreys v. Minn. C. Co., 94–469, 103+328; McDonald v. Campbell, 96–87, 104+760; Lloyd v. Simons, 97–315, 105+902; Kern v. Cooper, 97–509, 106+962; Bernick v. McClure, 107–9, 119+247; American B. Co. v. American D. S. Co., 107–140, 119+783; Fallon v. Fallon, 124+994. See Lowry v. Harris, 12–255(166); State v. Mpls. etc. Ry., 90–88, 95+581; Johnson v. Johnson, 92–167, 99+803.

[10] Johnson v. Johnson, 92–167, 99+803.

[11] Farmers' U. El. Co. v. Syndicate I. Co., 40–152, 41+547; Hogan v. Vinje, 88–499, 93+523.

[12] Barber v. Robinson, 82–112, 84+732 and cases under (16).

[13] Rothschild v. Burritt, 47–28, 49+393; Fowlds v. Evans, 60–513, 63+102; Elwood v. Betcher, 72–103, 75+113.

[14] Torinus v. Matthews, 21–99.

[15] Greenleaf v. Egan, 30–316, 15+254.

[16] Voak v. Nat. I. Co., 51–450, 53+708; Ryan v. Ryan, 58–91, 59+974; Cullman v. Bottcher, 58–381, 59+971; Hogan v. Vinje, 88–499, 93+523.

[17] R. L. 1905 § 4430; Doyle v. Hallam, 21–515; Ferguson v. Kumler, 25–183; Somerville v. Donaldson, 26–75, 1+808; Schmitt v. Schmitt, 32–130, 19+649; Godfrey v. Valentine, 50–284, 52+643.

[18] Eastman v. Linn, 20–433(387); Ferguson v. Kumler, 25–183; Schmitt v. Schmitt, 32–130, 19+649; St. Paul v. Chi. etc. Ry., 49–88, 51+662; Gahre v. Berry, 79–20, 81+537; Finnegan v. Brown, 81–508, 84+343; Gray etc. Co. v. Security T. Co., 93–369, 101+605; Phillips v. Mo., 96–42, 104+681; Heins v. Renville County, 96–188, 104+903.

[19] Gray etc. Co. v. Security T. Co., 93–369, 101+605.

possession of real property is sought, either by plaintiff or defendant.[20] Ordinarily in a statutory action to determine adverse claims there is no right to a new trial.[21] If in such an action the plaintiff is in possession and defendant in his answer alleges ownership in himself and possession by plaintiff and a withholding and demands possession, the action becomes in substance an action for the recovery of real property and either party has a right to a new trial under the statute.[22] A cause of action substantially in ejectment does not lose the right to a second trial because joined with a cause of action to which the statute does not apply.[23] It is immaterial that the party seeks other relief than the recovery of possession.[24] The statute is not ordinarily applicable to actions under the forcible entry and unlawful detainer act.[25] It does not apply to all actions in which the title to realty may come in question and be determined.[26] It does not apply to an action under the statute to determine a boundary line,[27] or to a statutory action against a railway company to recover realty taken without compensation.[28]

7210. Reason for statute—The reason for the statute allowing a second trial of right in actions in the nature of ejectment is to be found in the nature of the common-law action of ejectment and in the importance of title to real estate under the feudal system.[29] The statute is without justification at the present time and ought to be repealed.

7211. Statute construed liberally—Though the supreme court has questioned the expediency of the statute,[30] it nevertheless holds that it should receive a liberal construction.[31]

7212. Who may invoke statute—Under the statute as originally enacted only the defendant was entitled to a new trial.[32] The amendment of 1867 placed both parties on the same footing.[33] The right to a new trial descends to one's personal representative.[34]

7213. Estoppel—Waiver—Neither the acceptance by the prevailing party of the costs and disbursements awarded him by the judgment or delay in moving to dismiss and strike from the files the demand for a second trial, will estop him from questioning the asserted right of his adversary to a second trial under the statute.[35] An attorney has implied authority to waive the right to a

[20] Somerville v. Donaldson, 26–75, 1+808; Knight v. Valentine, 35–367, 29+3; Godfrey v. Valentine, 50–284, 52+643; Kremer v. Chi. etc. Ry., 54–157, 55+928; Schons v. Kellogg, 61–128, 63+257; McRoberts v. McArthur, 69–506, 72+796; Phillips v. Mo, 96–42, 104+681; Buffalo L. & E. Co. v. Strong, 101–27, 111+728.

[21] Knight v. Valentine, 35–367, 29+3; Godfrey v. Valentine, 50–284, 52+643; McRoberts v. McArthur, 69–506, 72+796; Heins v. Renville County, 96–188, 104+903; Buffalo L. & E. Co. v. Strong, 101–27, 111+728.

[22] Eastman v. Linn, 20–433(387); Godfrey v. Valentine, 50–284, 52+643; Gahre v. Berry, 79–20, 81+537; Finnegan v. Brown, 81–508, 84+343.

[23] Schmitt v. Schmitt, 32–130, 19+649.

[24] St. Paul v. Chi. etc. Ry., 49–88, 51+662; Kremer v. Chi. etc. Ry., 54–157, 55+928.

[25] Whitaker v. McClung, 14–170(131); Ferguson v. Kumler, 25–183.

[26] Phillips v. Mo, 96–42, 104+681; Tew v. Webster, 106–185, 118+554.

[27] Tierney v. Gondereau, 99–421, 109+821.

[28] R. L. 1905 § 2540. See, prior to Laws 1895 c. 52, Kremer v. Chi. etc. Ry., 54–157, 55+928.

[29] See Baze v. Arper, 6–220(142); Doyle v. Hallam, 21–515; Somerville v. Donaldson, 26–75, 1+808; Schmitt v. Schmitt, 32–130, 19+649; Lewis v. Hogan, 51–221, 53+367; Kremer v. Chi. etc. Ry., 54–157, 55+928; Conn. etc. Co. v. King, 80–76, 82+1103; Dunnell, Minn. Pr. § 1141.

[30] Kremer v. Chi. etc. Ry., 54–157, 55+928; Conn. etc. Co. v. King, 80–76, 82+1103.

[31] Gahre v. Berry, 79–20, 81+537; Finnegan v. Brown, 81–508, 84+343.

[32] Howes v. Gillett, 10–397(316).

[33] Davidson v. Lamprey, 16–445(402).

[34] Stocking v. Hanson, 22–542.

[35] Buffalo L. & E. Co. v. Strong, 101–27, 111+728.

second trial.[36] A waiver of the right has been made a condition of opening a default judgment.[37]

7214. In case of default—A party is not entitled to another trial under the statute where he has failed to answer and has allowed judgment to be rendered against him by default. The statute presupposes that there is some issue to be tried. But where the defendant has failed to answer, there is no issue, and nothing to try, until the default is opened, and he is permitted to answer. Applications for such relief are addressed to the discretion of the court.[38]

7215. Only one new trial of right—Only one new trial as of right is allowed in a single action. In a case where the first trial resulted in a judgment for the plaintiff the defendant availed himself of the right to a new trial under the statute. The second trial resulted in favor of the defendant. It was held that the plaintiff did not have a right to another trial under the statute.[39]

7216. Time of demand—Notice of judgment—The time within which the defeated party may demand a second trial does not begin to run until service of written notice of the entry of judgment. Actual knowledge of the entry of judgment is insufficient to set the statute in motion. Written notice, however, may be waived by the party entitled thereto, and conduct on his part which clearly indicates an intention to proceed without notice will constitute such waiver. The delivery to the judgment debtor of a satisfaction of the judgment upon payment by him of the amount thereof, the same not being intended as a notice of the entry of the judgment, is not a compliance with the statute, nor such written notice of the judgment as will set the statute in motion.[40] In case of appeal the six months within which the defeated party may pay the costs and damages and demand a second trial commence to run from the time the prevailing party serves written notice of the termination of the appeal, and such appeal is terminated upon the filing of the remittitur in the trial court. Notice of taxation of costs in the supreme court is insufficient notice of the termination of the appeal. Where no notice of the termination of the appeal is served by the prevailing party the adverse party may pay the costs and damages and serve a demand for a second trial at any time within two years from the date of filing the remittitur in the district court.[41]

7217. Demand—Proof of service—The service of a written demand as prescribed by the statute is a condition precedent.[42] The demand may be made by the party himself and a notice embodying such demand, made in his name by an agent authorized by him to make such demand is sufficient. A party may employ another attorney in place of the one who acted for him on the first trial and no formal consent and substitution of attorneys is necessary.[43] The notice of demand and proof of service thereof must be filed as provided by statute.[44] The written demand for a second trial, entitled in the proper action, addressed to the proper attorney, with admission of service indorsed thereon, on file as a part of the judgment roll, is admissible in evidence without extrinsic proof of the facts therein stated.[45]

7218. Payment of costs and damages—The payment of all costs and damages recovered by the judgment is a condition precedent, and is enforced with strictness.[46] The court has no authority to excuse a party from the perform-

[36] Bray v. Doheny, 39–355, 40+262.
[37] Henderson v. Lange, 71–468, 74+173.
[38] Hallam v. Doyle, 35–337, 29+130.
[39] Lewis v. Hogan, 51–221, 53+367.
[40] Maurin v. Carnes, 80–524, 83+415.
[41] Voight v. Woll, 124+446.
[42] Davidson v. Lamprey, 16–445(402).
[43] West v. St. P. etc. Ry., 40–189, 41+1031.
[44] R. L. 1905 § 4430. See, prior to amendment of statute, Hunt v. O'Leary, 78–281, 80+1120.
[45] Voight v. Woll, 124+446.
[46] Davidson v. Lamprey, 16–445(402);

ance of such condition. In a case where, a part only of such costs having been paid, the adverse party noticed the cause for retrial and caused it to be entered on the calendar, both parties supposing that all costs had been paid, it was held that there was no waiver of the statutory requirement and that no right to a second trial was thereby acquired. The time for performing the statutory conditions having expired the court could not relieve from the default.[47] A party does not waive the right to object that the action is not within the statute by accepting payment of costs though such payment was made with the avowed purpose of securing a second trial.[48]

7219. Amendment of pleadings on second trial—The court may allow the pleadings to be amended on the second trial.[49]

7220. Right to jury trial—Where a party secures a new trial under the statute he is entitled to a jury trial, though he may have waived a jury on the first or prior trials.[50]

7221. Effect of first trial on second trial—In a second trial upon the same state of facts the decision upon a former appeal controls upon the doctrine of stare decisis and not upon the doctrine of res judicata. The second trial should be in the full sense another trial.[51] If the first trial involved issues other than the title and right to possession a different rule applies to them.[52] A second trial extends to all questions or issues presented by the pleadings, pertinent to the title and right of possession, including damages for use and occupancy.[53]

7222. Judgment on second trial—The judgment on the second trial is final, except that it is subject to review for error as any other judgment. It is annexed to the judgment roll of the first trial.[54]

7223. Restitution—One who succeeds on a second trial, or against whom the action is dismissed by the adverse party, is entitled to a refundment of the costs and damages of the first trial paid by him to secure a second trial.[55]

7224. Improvements—Whether, on the second trial, a party may recover for improvements made by him while in possession under a judgment in his favor on the first trial is an open question.[56]

NEXT BEFORE—See note 57.
NEXT FRIEND—See Infants, 4452, 4459; Insane Persons, 4529.
NEXT OF KIN—The nearest blood relatives.[58]
NOISE—See note 59.
NOMINAL CONDITIONS—See Deeds, 2678.
NOMINAL DAMAGES—See Damages, 2522.
NOMINATION OF CANDIDATES—See Elections, 2927–2933.
NON-RESIDENT—See Attachment, 632.
NONSUIT—See Dismissal and Nonsuit; Judgments, 5180; Trial, 9750.
NOR—See Statutes, 8976.
NOSCITUR A SOCIIS—See Constitutional Law, 1576; Contracts, 1836; Insurance, 4659; Statutes, 8978.

Dawson v. Shillock, 29–189, 12+526; Western Land Assn. v. Thompson, 79–423, 82+677.

[47] Dawson v. Shillock, 29–189, 12+526.

[48] Whitaker v. McClung, 14–170(131); Buffalo L. & E. Co. v. Strong, 101–27, 111+728.

[49] Cool v. Kelly, 85–359, 88+988.

[50] Cochran v. Stewart, 66–152, 68+972.

[51] Conn. etc. Co. v. King, 80–76, 82+1103.

[52] Gray etc. Co. v. Security T. Co., 93–369, 101+605.

[53] Sammons v. Pike, 105–106, 117+244.

[54] R. L. 1905 § 4431; Baze v. Arper, 6–220(142); Lewis v. Hogan, 51–221, 53+367; Hunt v. O'Leary, 78–281, 80+1120; Cohues v. Finholt, 101–180, 112+12.

[55] Sammons v. Pike, 105–106, 117+244.

[56] Gahre v. Berry, 82–200, 84+733.

[57] Wilson v. Thompson, 26–299, 3+699.

[58] Watson v. St. P. C. Ry., 70–514, 73+400.

[59] State v. Cantieny, 34–1, 24+458.

NOTARIES PUBLIC

7225. In general—A notary public is considered not merely an officer of the country where he is admitted or appointed, but as a kind of international officer, whose official acts, performed in the state for which he is appointed, are recognized as authoritative the world over. The officer is a very ancient one.[60] A notary is a public officer.[61]

7226. Seal—A notary's seal proves itself and is alone sufficient evidence of the official character of the notary.[62] An official act of a notary is void if it is not authenticated by his seal.[63] It is not essential that the seal be impressed upon any particular part of an instrument.[64]

7227. Powers—A notary may administer an oath required by an ordinance.[65] An attorney in an action may, if a notary, take the affidavit of service of summons therein.[66]

7228. Bonds—If a notary public certifies to an acknowledgment of an instrument without personal knowledge as to the identity of the party appearing before him and without a careful investigation of such fact, he is guilty of negligence, and he and the sureties on his bond are liabile for all damages proximately resulting therefrom.[67] Sureties on a notary's bond have been held not estopped from questioning its validity on the ground that the notary had not signed it.[68]

7229. Foreign notaries—Affidavits—An affidavit, taken before a foreign notary and authenticated by his seal, is admissible without further proof.[69]

NOTE OF ISSUE—See Trial, 9701.

NOTICE

Cross-References

See Evidence, 3284 (notice to produce documents); Execution, 3528 (notice of claim by third party to property seized under process); Lis Pendens; Process, 7815 (notice of no personal claim); Recording Act; Service of Notices and Papers; and other specific heads.

7230. Actual and constructive distinguished—Actual notice is synonymous with knowledge. Constructive notice is notice which the law attributes to a person irrespective of his actual knowledge. Constructive notice generally has the same legal effect as actual notice, but not always. It has been said that constructive notice binds the title, while actual notice binds the conscience.[70]

7231. Constructive notice—In general—Whenever a person has knowledge of facts relating to a matter in which he is interested which would naturally

[60] Wood v. St. P. C. Ry., 42–411, 44+308.
[61] Slater v. Schack, 41–269, 43+7.
[62] Wood v. St. P. C. Ry., 42–411, 44+308.
[63] De Graw v. King, 28–118, 9+636; Colman v. Goodnow, 36–9, 29+338; Thompson v. Scheid, 39–102, 38+801; Grimes v. Fall, 81–225, 83+835; Holmes v. Loughren, 97–83, 105+558. See Osgood v. Sutherland, 36–243, 31+211; Rachac v. Spencer, 49–235, 51+920; Lloyd v. Simons, 97–315, 320, 105+902.
[64] Lloyd v. Simons, 97–315, 320, 105+902.
[65] State v. Scatena, 84–281, 87+764.
[66] Young v. Young, 18–90(72).
[67] Barnard v. Schuler, 100–289, 110+966. See Note, 82 Am. St. Rep. 380.
[68] Martin v. Hornsby, 55–187, 56+751.
[69] Wood v. St. P. C. Ry., 42–411, 44+308.
[70] Bailey v. Galpin, 40–319, 41+1054; Gray Cloud L. Co. v. Clay, 89–166, 170, 171, 94+552, 95+588; Robertson v. Anderson, 96–527, 531, 105+972. See Scott v. Edes, 3–377(271, 278).

lead an honest and prudent person to inquire concerning the rights of others in such matter, he is chargeable with notice of everything which such an inquiry, pursued in good faith, with reasonable diligence and ordinary intelligence, would disclose.[71] The application of this general rule depends upon the facts of the particular case.[72] If one is deliberately ignorant of matters concerning which it is is his duty as an honest man to investigate he is chargeable with notice thereof.[73] If proper inquiry is made and information concerning the adverse rights is withheld or concealed further investigation is unnecessary.[74] And if a specific claim is made, inquiry for other claims is unnecessary.[75] It has been said that the present tendency of the courts is to restrict, rather than to extend, the doctrine of constructive notice,[76] but this is questionable. It is not to be applied to protect one from a harm which he had the first opportunity to avoid.[77]

7232. From possession of property—Actual possession of property whether real or personal, is notice to all of the rights of the possessor therein.[78]

7233. By signing instrument—One who signs an instrument is chargeable with notice of its contents in the absence of fraud.[79]

7234. Addressing notices—It is more important that a notice should be served on the right person than that it should be properly addressed to him.[80]

7235. Must be given by competent authority—It is an essential quality of a notice that it appear to be given by competent authority. A notice which, upon its face, is declared to be the act of a designated person, and which, as such, would be void, cannot be made effectual by proof that it was really the act of another and undisclosed person, not even standing in relation of privity with the person in whose name the notice was given. A notice by a mere stranger can effect nothing.[81]

7236. Law and fact—The question of constructive notice, where it depends upon the facts of the particular case, is for the jury, unless the evidence is conclusive.[82]

NOTICE OF TRIAL—See Trial, 9700.
NOTICES—See Service of Notices and Papers.
NOTICE TO PRODUCE WRITINGS—See Evidence, 3284.

[71] Scott v. Edes, 3-377(271, 278); Jewell v. Truhn, 38-433, 437, 38+106; Chadbourn v. Williams, 45-294, 47+812; Mercantile Nat. Bank v. Parsons, 54-56, 63, 55+825; Howard v. Burns, 73-356, 76+202; Bartleson v. Vanderhoff, 96-184, 187, 104+820; Robertson v. Anderson, 96-527, 531, 105+972; Niles v. Cooper, 98-39, 107+744; Bergstrom v. Johnson, 126+899.

[72] Jewell v. Truhn, 38-433, 437, 38+106.

[73] Mann v. Lamb, 83-14, 18, 85+827; Bartleson v. Vanderhoff, 96-184, 187, 104+820.

[74] Niles v. Cooper, 98-39, 43, 107+744.

[75] Thompson v. Lapsley, 90-318, 96+788; Niles v. Cooper, 98-39, 43, 107+744.

[76] Jewell v. Truhn, 38-433, 438, 38+106; Kettle River Ry. v. Eastern Ry., 41-461, 476, 43+469. See Smith v. Lockwood, 100-221, 110+980.

[77] Smith v. Lockwood, 100-221, 224, 110+980.

[78] Gaertner v. Western El. Co., 104-467, 116+945. See § 10075.

[79] Dillon v. Porter, 36-341, 31+56; Donahue v. Quackenbush, 75-43, 47, 77+430.

[80] Johnson v. St. Paul, 52-364, 367, 54+735.

[81] Bausman v. Kelley, 38-197, 205, 36+333.

[82] Robertson v. Anderson, 96-527, 531, 105+972.

NOVATION

Cross-References

See Corporations, 2043.

7237. Definition—Novation is the substitution of one obligation for another. The change may be in the parties, in the agreement, or in both.[83]

7238. Requisites—It must be explicitly agreed between the three parties that the old debtor shall be discharged and the new party substituted in his place, in other words, that the debt be discharged as to the old debtor and assumed by the new party.[84] It has been held that the discharge of the old debt must be contemporaneous with and result from the agreement with the new debtor.[85] There must be a consideration for the promise of the new party.[86]

7239. Pleading—An indefinite complaint has been sustained as alleging a novation.[87]

NOXIOUS WEEDS—See Agriculture, 249.

[83] Century Dict.; 21 A. & E. Ency. Law, 660.

[84] Hanson v. Nelson, 82-220, 84+742; Johnson v. Rumsey, 28-531, 11+69; Cornwell v. Megins, 39-407, 40+610; Nelson v. Larson, 57-133, 58+687; Barnes v. Hekla etc. Co., 56-38, 57+314. See Berryhill v. Resser, 64-479, 67+542; In re People's L. S. Ins. Co., 56-180, 187, 57+468; Nat. Citizens' Bank v. Thro, 124+965; 6 Harv. L. Rev. 184.

[85] Cornwell v. Megins, 39-407, 40+610 See, contra, 21 A. & E. Ency. Law, 669.

[86] Johnson v. Rumsey, 28-531, 11+69

[87] Id.

NUISANCE

Cross-References

See Adverse Possession, 122; Highways, 4180; Landlord and Tenant, 5370; Navigable Waters.

WHAT CONSTITUTES

7240. Definition—By statute a private nuisance is defined as "anything which is injurious to health, or indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property." [88] It is otherwise defined as "anything that worketh hurt, inconvenience, or damage;" [89] "anything which renders the enjoyment of life and property uncomfortable;" [90] "an unwarrantable act which constitutes a wrong, producing such material annoyance, inconvenience, discomfort, or hurt that the law will presume a consequent damage." [91] It is

[88] R. L. 1905 § 4446; Dorman v. Ames, 12-451(347); Red Wing v. Guptil, 72-259, 75+234.
[89] Dorman v. Ames, 12-451(347).
[90] St. Paul v. Gilfillan, 36-298, 31+49.
[91] Friburk v. Standard Oil Co., 66-277, 68+1090.

to be observed that the statute is inconsistent with the view that a private nuisance is limited to "acts injuriously affecting the land, tenements, or hereditaments of an individual." [92] A public nuisance is defined by statute.[93]

7241. Sic utere tuo—The law of nuisance is an application of the maxim, sic utere tuo ut alienum non laedas.[94]

7242. Distinction between private and public nuisances—A "public" nuisance does not necessarily mean one affecting the government or the whole community of the state. It is "public" if it affects the surrounding community generally or the people of some local neighborhood.[95] A nuisance may be at the same time both public and private, public in its general effect upon the public, and private as to those who suffer a special or particular damage therefrom. The public wrong must be redressed by a prosecution in the name of the state; the private injury by private action.[96] The state is not limited to a criminal prosecution. It may maintain a civil action to abate a public nuisance.[97] What is authorized by law cannot be a public nuisance, but it may be a private nuisance as to individuals who are specially injured thereby.[98] When a "considerable" number of persons are affected by a nuisance it is public.[99]

7243. Effect of locality—Whether a thing is a nuisance depends largely on its locality and surroundings. Things that would be a nuisance in the heart of a city might not be in the suburbs or beyond the city limits.[1]

7244. Exercise of lawful business—Where a party is carrying on a lawful business on his own land without negligence, yet if it is a business which is attended with loud and disagreeable noise, or produces noisome smells or noxious vapors, whereby the property and comfort of those dwelling in the neighborhood are materially injured and disturbed, the business is a nuisance.[2] Where an obstruction in an alley consisted of a roundhouse and machine shop which emitted smoke, dirt, and soot, it was held that the business iself being lawful the fact that it was carried on partly in the alley did not make it unlawful.[3]

7245. Coming to nuisance—A thing may be a nuisance as to a person who voluntarily moves into the neighborhood with knowledge of its existence.[4]

7246. Necessary incidents of urban life—One living in a city must necessarily submit to the annoyances which are incidental to urban life and individual comfort must in many cases yield to the public good.[5]

7247. Estoppel—Consent—A person is not estopped from objecting to a nuisance resulting from the operation of a manufacturing plant simply because he did not object to the construction of the plant.[6] A party cannot complain of a nuisance created with his consent.[7]

[92] See Dorman v. Ames, 12-451(347).
[93] R. L. 1905 § 4987; Laws 1907 cc. 387, 425; Minn. C. & P. Co. v. Koochiching Co., 97-429, 107+405; Minn. C. & P. Co. v. Pratt, 101-197, 112+395. See Note, 107 Am. St. Rep. 195.
[94] Dorman v. Ames, 12-451(347); Anderson v. Chi. etc. Ry., 85-337, 88+1001.
[95] Pine City v. Munch, 42-342, 44+197.
[96] Aldrich v. Wetmore, 52-164, 53+1072; Page v. Mille Lacs L. Co., 53-492, 55+608.
[97] See § 7284.
[98] Romer v. St. P. C. Ry., 75-211, 77+825.
[99] St. Paul v. Gilfillan, 36-298, 31+49.
[1] St. Paul v. Gilfillan, 36-298, 31+49; Romer v. St. P. C. Ry., 75-211, 77+825; Nelson v. Swedish etc. Assn., 126+723.
[2] See Romer v. St. P. C. Ry., 75-211, 77+825; Matthews v. Stillwater etc. Co., 63-493, 65+947.
[3] Kaje v. Chi. etc. Ry., 57-422, 59+493.
[4] See Romer v. St. P. C. Ry., 75-211, 220, 77+825.
[5] Romer v. St. P. C. Ry., 75-211, 77+825.
[6] Matthews v. Stillwater etc. Co., 63-493, 65+947.
[7] Mpls. M. Co. v. Bassett, 31-390. 18+100. See Knapheide v. Eastman, 20-478 (432).

7248. Exercise of care no defence—The exercise of due care is no defence. In other words a recovery may be had for a nuisance without proof of negligence on the part of the defendant.[8]

7249. Collection of dangerous substances—Doctrine of Rylands v. Fletcher—A person who, for his own purposes, brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, is prima facie liable for all the damage which is the natural consequence of its escape without proof of negligence. This general principle has been applied to a tunnel through which water broke and washed out and undermined adjacent land;[9] to a collection of ice and snow on a roof;[10] to a reservoir of crude petroleum;[11] to a reservoir of water;[12] and to a collection of water by means of a dam.[13] It is only those things the natural tendency of which is to become a nuisance or do mischief, if they escape, which their owner keeps at his peril. The rule is not to be extended. It is inapplicable to escaping fire,[14] gas,[15] or electricity.[16]

7250. Power to declare things nuisances—The legislature cannot authorize a municipality to declare a thing a nuisance which, from the nature of the case, is not and cannot become such. It may authorize a municipality to declare the emission of dense smoke from smoke-stacks and chimneys a public nuisance. The charter of St. Paul (Sp. Laws 1874 c. 1) confers no power on the city council to declare what acts or omissions shall constitute a public nuisance. Under the charter the council is authorized to remove or abate nuisances in the public streets, and such as are injurious to the public health or safety. This refers to things which are nuisances per se or which may be determined to be such by competent authority, and implies no authority to declare things to be nuisances, without investigation, which may or may not become such, according to circumstances.[17]

7251. Things authorized by legislature—If the legislature expressly authorizes an act which must inevitably result in public injury, what would otherwise be a nuisance may be said to be legalized; but if it authorizes an erection which does not necessarily produce such a result, but such result flows from the manner of construction or operation, the legislative license is no defence. In order to justify a nuisance by legislative authority, it must be the natural and probable result of the act authorized, so that it may fairly be said to be covered by the legislation conferring the power.[18] What is authorized by the legislature cannot be a public nuisance, but it may be a private nuisance as to individuals who are specially injured thereby.[19] Railways are always constructed and operated under authority of law. Where there is no taking of or encroachment on one's property or property rights by the construction and operation of a railway any inconveniences caused by it, as from noises, smoke, cinders, etc., not due to improper construction or

[8] Cahill v. Eastman, 18-324(292); Hannem v. Pence, 40-127, 41+657; Berger v. Mpls. G. Co., 60-296, 62+336; Bowers v. Miss. etc. Co., 78-398, 81+208.

[9] Cahill v. Eastman, 18-324(292); Knapheide v. Eastman, 20-478(432).

[10] Hannem v. Pence, 40-127, 41+657.

[11] Berger v. Mpls. G. Co., 60-296, 62+336.

[12] Wiltse v. Red Wing, 99-255, 109+114.

[13] Kray v. Muggli, 77-231, 79+964, 1026, 1064.

[14] Berger v. Mpls. G. Co., 60-296, 62+336.

[15] Gould v. Winona G. Co., 100-258, 111+254.

[16] Musolf v. Duluth E. E. Co., 108-369, 122+499.

[17] St. Paul v. Gilfillan, 36-298, 31+49.

[18] Pine City v. Munch, 42-342, 44+197.

[19] Bowers v. Miss. etc. Co., 78-398, 81+208; Hueston v. Miss. etc. Co., 76-251, 79+92; Weaver v. Miss. etc. Co., 28-534, 11+114; Adams v. Chi. etc. Ry., 39-286, 39+629; Romer v. St. P. C. Ry., 75-211, 77+825; Anderson v. Chi. etc. Ry., 85-337, 88+1001.

negligence in operating it, furnish no ground of action.[20] A canal constructed under legislative authority is not a public nuisance unless improperly constructed or maintained.[21]

7252. Nuisances legalized by municipalities—A municipality cannot legalize a private nuisance consisting of a private railway operated in a public street to the injury of abutting property owners.[22] A thing legally authorized by a municipality cannot be a public nuisance, yet it may be a private nuisance as to individuals who are specially injured thereby.[23] An area under a sidewalk and a coalhole therein are not nuisances when constructed with the consent of the municipal authorities and such consent may be implied.[24]

7253. Obstruction of navigable waters—The obstruction of navigable waters is a public nuisance.[25] The maintenance of booms and sorting gaps for logs in a river has been held to constitute a private nuisance.[26] Piling in a river to facilitate the floating of logs has been held not a public nuisance, because authorized by law, but a private nuisance as to a riparian owner whose shores were washed away by water, ice, and logs diverted by the piling.[27]

7254. Proximate cause of injury—The nuisance must be the proximate cause of the injury.[28]

7255. Things considered as nuisances—Cases are cited below involving the consideration of the following things as nuisances: obstructions in streets and highways;[29] obstructions in public waters;[30] dams;[31] railways;[32] a sewer emptying into a natural watercourse;[33] a building overhanging a public street;[34] accumulations of filth;[35] a wooden flouring-mill run by water-power;[36] a privy and stable adjacent to a residence;[37] the emission of smoke, dirt, and cinders from chimneys and smoke stacks;[38] a ditch and embankment causing water to be collected and thrown on adjacent land;[39] a ditch forming part of a city waterworks causing an overflow of adjacent land;[40] a private building on public grounds;[41] a cesspool;[42] a discharge of water from a roof to the wall of an adjacent building;[43] petroleum escaping from a reservoir and overflowing adjacent land;[44] nauseous gases escaping from

[20] Carroll v. Wis. C. Co., 40–168, 41+661.
[21] Patterson v. Duluth, 21–493.
[22] Gustafson v. Hamm, 56–334, 57+1054.
[23] Romer v. St. P. C. Ry., 75–211, 77+825. See Keil v. St. Paul, 47–288, 50+83 (street at certain grade).
[24] Korte v. St. Paul T. Co., 54–530, 56+246.
[25] R. L. 1905 § 4987; Minn. C. & P. Co. v. Pratt, 101–197, 112+395; Minn. C. & P. Co. v. Koochiching Co., 97–429, 107+405; Viebahn v. Crow Wing County, 96–276, 104+1089; St. Anthony Falls etc. Co. v. Morrison, 12–249(162).
[26] Page v. Mille Lacs L. Co., 53–492, 55+608 (overruling Swanson v. Miss. etc. Co., 42–532, 44+986; Lammers v. Brennan, 46–209, 48+766).
[27] Bowers v. Miss. etc. Co., 78–398, 81+208.
[28] See Moore v. Townsend, 76–64, 78+880; Aldrich v. Wetmore, 56–20, 57+221; Simpson v. Stillwater W. Co., 62–444, 64+1144; Nelson v. Swedish etc. Assn., 126+723.
[29] See § 4179.
[30] See § 6944.
[31] See § 10196.
[32] See § 8153.
[33] O'Brien v. St. Paul, 18–176(163).
[34] Chute v. State, 19–271(230); Hannem v. Pence, 40–127, 41+657.
[35] Chute v. State, 19–271(230); Duluth v. Dunn, 40–301, 41+1049; Aldrich v. Wetmore, 56–20, 57+221; Anderson v. Burlington etc. Ry., 82–293, 84+145.
[36] Mpls. M. Co. v. Tiffany, 22–463.
[37] Pierce v. Wagner, 29–355, 13+170. See Aldrich v. Wetmore, 56–20, 57+221.
[38] St. Paul v. Gilfillan, 36–298, 31+49; State v. Sheriff, 48–236, 51+112; Matthews v. Stillwater etc. Co., 63–493, 65+947; St. Paul v. Johnson, 69–184, 72+64; Kaje v. Chi. etc. Ry., 57–422, 59+493.
[39] Sloggy v. Dilworth, 38–179, 36+451.
[40] Eisenmenger v. Board Water Comrs., 44–457, 47+156.
[41] Buffalo v. Harling, 50–551, 52+931.
[42] Aldrich v. Wetmore, 56–20, 57+221.
[43] Ferman v. Lombard I. Co., 56–166, 57+309.
[44] Berger v. Mpls. G. Co., 60–296, 62+336.

a gas plant;[45] offensive odors from petroleum tanks;[46] a slaughter-house and rendering works;[47] stockyards;[48] keeping and storing fish;[49] disagreeable noises from street railway cars turning curves;[50] a tunnel through which water broke and washed out adjacent land;[51] a well in a ravine to divert the natural flow of water;[52] a reservoir of water;[53] gas escaping from mains in a street;[54] a bridge over a navigable river;[55] a cemetery.[01]

PRESCRIPTION

7256. In general—A right to maintain a public nuisance cannot be acquired by prescription.[56] A right to maintain a nuisance which is both public and private or wholly private may be acquired by prescription, at least where there is an actual invasion of the property of another.[57] Whether such a right can be acquired where there is no such invasion is an open question in this state. In any event, to acquire the right, the nuisance must have been continued in substantially the same way, and with equally injurious results, for the entire statutory period. The burden of proving the right rests on him who asserts it.[58]

WHO LIABLE

7257. Creator—One who creates a nuisance is liable therefor though he is not the owner of the premises.[59] He who erects a nuisance is liable for the damages arising from the erection, and also for the continuance thereof. The erection may of itself cause no injury, though an action may be proper to assert a right or prevent a threatened injury.[60]

7258. Owner of premises—An owner of land is liable for a nuisance thereon created or maintained by another with his consent.[61] An owner cannot escape liability by a sale,[62] or by turning over possession to a tenant,[63] or by employing an independent contractor.[64]

7259. Landlord and tenant—An owner who leases premises with a nuisance thereon is liable to third parties for injuries resulting from the nuisance. This rule is not affected by the fact that his lessee covenants to repair.[65] The tenant may also be liable as a continuer of the nuisance.[66] A landlord has been held not liable for a coalhole in a sidewalk left open by his tenant.[67]

[45] Matthews v. Stillwater etc. Co., 63-493, 65+947.

[46] Friburk v. Standard Oil Co., 66-277, 68+1090.

[47] Red Wing v. Guptil, 72-259, 75+234.

[48] Anderson v. Burlington etc. Ry., 82-293, 84+145; Anderson v. Chi. etc. Ry., 85-337, 88+1001.

[49] Gilbert v. Boak, 86-365, 90+767.

[50] Romer v. St. P. C. Ry., 75-211, 77+825.

[51] Cahill v. Eastman, 18-324(292); Knapheide v. Eastman, 20-478(432).

[52] Simpson v. Stillwater W. Co., 62-444, 64+1144; Voligny v. Stillwater W. Co., 73-181, 75+1132.

[53] Wiltse v. Red Wing, 99-255, 109+114.

[54] Gould v. Winona G. Co., 100-258, 111+254.

[55] Vicbahn v. Crow Wing County, 96-276, 104+1089.

[01] Nelson v. Swedish etc. Assn., 126+723.

[56] Matthews v. Stillwater etc. Co., 63-493, 65+947; Isham v. Broderick, 89-397, 95+224.

[57] Mueller v. Fruen, 36-273, 30+886; Matthews v. Stillwater etc Co., 63-493, 65+947; Kray v. Muggli, 77-231, 79+964, 1026, 1064. See § 122.

[58] Matthews v. Stillwater etc. Co., 63-493, 65+947. See Note, 30 Am. St. Rep. 556.

[59] Dorman v. Ames, 12-451(347); Cahill v. Eastman, 18-324(292).

[60] Sloggy v. Dilworth, 38-179, 36+451.

[61] Simpson v. Stillwater W. Co., 62-444, 64+1144.

[62] Dorman v. Ames, 12-451(347); Sloggy v. Dilworth, 38-179, 36+451.

[63] Hannem v. Pence, 40-127, 41+657. See § 7259.

[64] Moore v. Townsend, 76-64, 78+880.

[65] Isham v. Broderick, 89-397, 95+224; Hannem v. Pence, 40-127, 41+657; Ferman v. Lombard I. Co., 56-166, 57+309.

[66] Ferman v. Lombard I. Co., 56-166, 57+309.

[67] Korte v. St. Paul T. Co., 54-530, 56+246. See L'Herault v. Minneapolis, 69-261, 72+73.

7260. Occupier of premises—As a general rule, the occupier of premises, who has such control of them as to give the right to abate a nuisance thereon, is a continuer of it if he does not abate it on notice. Such is the case with a grantee or tenant of premises on which the grantor or landlord has created a nuisance.[68]

7261. Joint and several liability—Where lands are unlawfully flooded with surface water, as the result of the joint act of several parties, each may be sued for the entire damages. But where the damage is the result of the acts of several, acting independently of each other, each is liable for his proportion only.[69]

7262. Heirs—Devisees—Personal representatives—An heir or other person succeeding to the possession of realty can only be made liable after notice and request to abate a nuisance existing on the premises, unless, with knowledge of its character, he has actively interfered or contributed to injuries resulting therefrom. It is only by virtue of the statute that an action for damages occurring in the life-time of the ancestor survives against his legal representatives.[70]

7263. Servant—A servant of the owner or occupant of premises has been held not liable under a smoke ordinance of St. Paul.[71]

7264. Cities—A city is liable for a nuisance in its streets, whether created by its authority or not, if it has actual or constructive notice thereof.[72] It cannot escape liability by employing an independent contractor.[73]

7265. Continuer—The continuer of a nuisance is not ordinarily liable therefor without notice to abate.[74] The originator of a nuisance remains liable to successive actions for damages resulting from the maintenance thereof.[75]

7266. Grantee—A grantee of premises may be liable for the continuance of a nuisance thereon created by his grantor.[76]

7267. Mortgagee—A mortgagee in possession may be liable for the continuance of a nuisance.[77]

7268. Various cases—Purchasers of grain remaining after the burning of an elevator have been held not liable for a nuisance created by worthless grain left by them on the premises.[78] The board of water commissioners of St. Paul has been held liable for a nuisance upon land not taken by it for its system of waterworks.[79]

ABATEMENT WITHOUT PROCESS

7269. When allowable—A private person suffering peculiar injury from a public nuisance may abate it summarily, without judicial process, in exceptional cases of emergency. This right is not absolute and is not favored by the courts.[80]

ACTIONS IN GENERAL

7270. Limitation of actions—By statute an action for damages caused by a milldam must ordinarily be brought within two years after the erection of

[68] Ferman v. Lombard I. Co., 56–166, 57+309.
[69] Sloggy v. Dilworth, 38–179, 36+451.
[70] Id.
[71] St. Paul v. Johnson, 69–184, 72+64.
[72] Cleveland v. St. Paul, 18–279(255).
[73] Moore v. Townsend, 76–64, 78+880.
[74] See § 7275.
[75] Sloggy v. Dilworth, 38–179, 36+451. See § 7276.
[76] Sloggy v. Dilworth, 38–179, 36+451; Ferman v. Lombard I. Co., 56–166, 57+309.
[77] Ferman v. Lombard I. Co., 56–166, 57+309.
[78] Duluth v. Dunn, 40–301, 41+1049.
[79] Eisenmenger v. Board, Water Comrs., 44–457, 47+156.
[80] Felt v. Elmquist, 104–33, 115+746; Reed v. Board Park Comrs., 100–167, 110+1119. See 124 Am. St. Rep. 588.

the dam.[81] This statute begins to run from the time when the damage is occasioned and not from the time of the erection of the dam.[82] It is inapplicable to an action to abate or enjoin a dam.[83] Under G. S. 1866 c. 66 title 2 § 4 it was held that the maintenance of a sewer for six years did not bar an action for damages and an injunction.[84] Under Pub. St. (1849–1858) c. 60 § 12, it was held that an equitable action to abate a dam was not barred within ten years from its erection.[85] The statute of limitations begins to run against an action for a continuance of a nuisance from the time of the injury.[86] The fact that an action for damages is barred does not affect the right to abate. An action to abate is not defeated by mere delay short of the period of prescription.[87]

7271. Injunction—The only common-law remedy for the abatement of a public nuisance was by indictment, but it is now well settled that a court of equity may, in a proper case, take jurisdiction of public nuisances in civil actions for their abatement, and to enjoin their maintenance. This jurisdiction is grounded upon the greater efficacy and promptitude of the remedies administered in such actions, enabling the court to restrain nuisances that are threatened or in progress, as well as to abate those already in existence, and effect their final suppression by injunction, which will often also prevent a multiplicity of suits.[88] Such an action will lie not only at the instance of the attorney general, but also at the instance of a municipality as an agency of the state.[89] A private individual may also enjoin a public nuisance which, as to him, is also a private nuisance.[90] Where the legal right is clear an injunction will be granted though the damages are small.[91] An action will also lie to enjoin a purely private nuisance.[92]

7272. Action for damages—A simple action for damages will lie for injuries resulting from a nuisance.[93] An action will lie for the flowage of another's land though the damages are nominal.[94] The erection of a nuisance may of itself cause no injury, but an action may be maintained to assert a right or prevent a threatened injury.[95]

7273. Statutory action to abate and for damages—The statute provides that an action may be brought by any person whose property is injuriously affected or whose personal enjoyment is lessened by a nuisance, and by the judgment the nuisance may be enjoined or abated, as well as damages recovered.[96] This action is neither purely legal or purely equitable, but is of a mixed nature. It is properly triable by the court, but by consent of the parties the issue as to the existence of the nuisance and the quantum of damages may be tried by a jury. The abatement and injunction do not follow the recovery of damages as a matter of course, but their allowance rests in the

[81] R. L. 1905 § 4078; Dorman v. Ames, 12–451(347); Barrows v. Fox, 39–61, 38+777.

[82] Thornton v. Turner, 11–336(237); Hempsted v. Cargill, 46–118, 48+558.

[83] Cook v. Kendall, 13–324(297); Thornton v. Webb, 13–498(457).

[84] O'Brien v. St. Paul, 18–176(163).

[85] Eastman v. St. Anthony Falls etc. Co., 12–137(77). See Cook v. Kendall, 13–324(297); Thornton v. Webb, 13–498(457); Mueller v. Fruen, 36–273, 30+886.

[86] Sloggy v. Dilworth, 38–179, 36+451.

[87] Mueller v. Fruen, 36–273, 30+886.

[88] Hutchinson v. Filk, 44–536, 47+255; Stearns County v. St. Cloud etc. Ry., 36–425, 32+91. See Chadbourne v. Zilsdorf, 34–43, 24+308.

[89] See § 7284.

[90] Nelson v. Swedish etc. Assn., 126+723. See § 7285.

[91] Gustafson v. Hamm, 56–334, 57+1054.

[92] Gilbert v. Boak, 86–365, 90+767.

[93] See, for example, Anderson v. Burlington etc. Ry., 82–293, 84+145; Anderson v. Chi. etc. Ry., 85–337, 88+1001; Bowers v. Miss. etc. Co., 78–398, 81+208; Moore v. Townsend, 76–64, 78+880; Hannem v. Pence, 40–127, 41+657; Lommeland v. St. P. etc. Ry., 35–412, 29+119.

[94] Dorman v. Ames, 12–451(347).

[95] Sloggy v. Dilworth, 38–179, 36+451.

[96] R. L. 1905 § 4446.

sound discretion of the court.[97] The plaintiff may recover all damages resulting from the nuisance, whether direct or consequential. If necessary to a complete and effectual abatement of the nuisance, an injunction against its continuance may be adjudged for that purpose and the plaintiff may be placed in possession.[98] The statute does not change the rule that an action will lie for the flowage of land without proof of any actual damages.[99] A judgment abating a nuisance should specify how and by whom it shall be done. It may direct the sheriff to do it.[1] An action will not lie for an abatement and damages where the injury is merely theoretical and not substantial.[2]

7274. Parties—All persons whose property is affected by a nuisance, though they own the property in severalty and not jointly, may join in an action to abate the nuisance, but they cannot join with a cause of action for that relief their several claims for damages, in which there is no joint or common interest.[3] In an equitable action to abate a dam one who claims an interest in the shore where the dam abuts is a proper party defendant.[4]

7275. Notice to abate before suit—An action to abate a nuisance cannot be maintained against a mere continuer of it without a preliminary notice to abate.[5] A failure to serve notice may be waived by answering to the merits.[6] An heir or other person succeeding to the possession of real property on the death of the owner can only be made liable after notice and request to abate a nuisance existing on the premises, unless, with knowledge of its character, he has actively interfered, or contributed to injuries resulting therefrom.[7] No notice is necessary before bringing an action for damages against one who causes a nuisance.[8] A mere rental agent has been held not a proper person upon whom to serve a notice to abate under an ordinance of St. Paul.[9]

7276. Successive actions for continuing nuisances—Every continuance of a nuisance, or recurrence of the injury, is an additional nuisance, forming in itself the subject-matter of a new action.[10] But the abatement of a nuisance and recovery of damages predicated thereon and incident thereto, constitutes but one cause of action; and, where suit has been brought to abate a nuisance, the judgment entered therein is a bar to a subsequent action for damages based on the same facts. In such case it is immaterial that no attempt was made to recover damages, or that the pleading in the prior case was insufficient in that respect.[11] But one action can be maintained for the erection of a nuisance.[12]

7277. Joinder of causes of action—A cause of action for injuries resulting from noxious vapors from a cesspool or stagnant water suffered to remain on his premises by the owner, in an excavation thereon made by him, may be

[97] Finch v. Green, 16-355(315).
[98] Colstrum v. Mpls. etc. Ry., 33-516, 24+255.
[99] Dorman v. Ames, 12-451(347).
[1] Ames v. Cannon River Mfg. Co., 27-245, 6+787.
[2] Dorman v. Ames, 12-451(347).
[3] Grant v. Schmidt, 22-1; Kray v. Muggli, 77-231, 79+964, 1026, 1064; Nahte v. Hansen, 106-365, 119+55.
[4] Eastman v. St. Anthony Falls etc. Co., 12-137(77).
[5] Thornton v. Smith, 11-15(1); Eisenmenger v. Board Water Comrs., 44-457, 47+156; Ferman v. Lombard I. Co., 56-166, 57+309.
[6] Bartlett v. Siman, 24-448.
[7] Sloggy v. Dilworth, 38-179, 36+451.
[8] Aldrich v. Wetmore, 56-20, 57+221; Isham v. Broderick, 89-397, 95+224.
[9] St. Paul v. Clark, 84-138, 86+893.
[10] Dorman v. Ames, 12-451(347); Harrington v. St. P. etc. Ry., 17-215(188); Adams v. Hastings etc. Ry., 18-260(236); O'Brien v. St. Paul, 18-176(163); Brakken v. Mpls. etc. Ry., 29-41, 11+124; Sloggy v. Dilworth, 38-179, 36+451; Byrne v. Mpls. etc. Ry., 38-212, 36+339; Adams v. Chi. etc. Ry., 39-286, 39+629; Lamm v. Chi. etc. Ry., 45-71, 47+455; Bowers v. Miss. etc. Co., 78-398, 81+208; Gilbert v. Boak, 86-365, 90+767.
[11] Gilbert v. Boak, 86-365, 90+767. See Nahte v. Hansen, 106-365, 119+55.
[12] Sloggy v. Dilworth, 38-179, 36+451.

joined with one for damages from depositing dirt or rubbish removed from such excavation, and deposited in the street in front of the adjoining premises.[13] A complaint for obstructing a public highway, certain public lands contiguous to a lake, and a public drainage system, has been held not to state several causes of action.[14] The abatement of a nuisance and recovery of damages predicted thereon and incident thereto, constitute but one cause of action.[15]

7278. Complaint—In a civil action for a nuisance the complaint must state facts which in law constitute a nuisance from which the plaintiff has suffered special injury.[16] In an action for a private nuisance a general allegation of damages is apparently sufficient to enable the plaintiff to recover all the damages that are the natural and necessary consequence of the nuisance to himself and family.[17] In a private action for a public nuisance the complaint must state facts to show that the plaintiff has suffered peculiar and special damages differing in kind from those suffered by the general public.[18] Where the action is against a mere continuer of a nuisance it is necessary to allege the service of notice to abate before suit, whether the action is for damages or for an abatement.[19] In an action against a railway company for obstructing a street, it has been intimated that it is necessary to allege that the railway was "unlawfully" or "wrongfully" built in or across the street.[20] If damages are sought in an action to abate they should be claimed in the complaint.[21] A complaint for an obstruction of a public highway, of certain public lands contiguous to a lake, and a public drainage system, has been sustained.[22] A complaint has been held sufficient to admit evidence of personal discomfort and suffering on account of noxious odors.[23]

7279. Answer—Matter in justification or excuse must be specially pleaded by the defendant.[24]

7280. Variance—Under a complaint for one kind of a nuisance one of an entirely different character cannot be proved.[25]

7281. Law and fact—Where the evidence is not conclusive the question of nuisance is for the jury.[26] It is for the jury to determine whether and to what extent a loss of business is attributable to a nuisance.[27]

7282. Evidence—Admissibility—Cases are cited below involving the admissibility of evidence.[28]

[13] Aldrich v. Wetmore, 56–20, 57+221.
[14] Albert Lea v. Knatvold, 89–480, 95+309.
[15] Gilbert v. Boak, 86–365, 90+767.
[16] O'Brien v. St. Paul, 18–176(163).
[17] See Pierce v. Wagner, 29–355, 13+170.
[18] Rochette v. Chi. etc. Ry., 32–201, 20+140; Shero v. Carey, 35–423, 29+58; Thelan v. Farmer, 36–225, 30+670; Lammers v. Brennan, 46–209, 48+766; Guilford v. Mpls. etc. Ry., 94–108, 102+365.
[19] Thornton v. Smith, 11–15(1).
[20] Aldrich v. Wetmore, 52–164, 53+1072; Rochette v. Chi. etc. Ry., 32–201, 20+140.
[21] See Gilbert v. Boak, 86–365, 90+767.
[22] Albert Lea v. Knatvold, 89–480, 95+309.
[23] Aldrich v. Wetmore, 56–20, 57+221.
[24] O'Brien v. St. Paul, 18–176(163).
[25] Id.
[26] Anderson v. Chi. etc. Ry., 85–337, 88+1001; Moore v. Townsend, 76–64, 78+880.
[27] Aldrich v. Wetmore, 56–20, 57+221.
[28] Finch v. Green, 16–355(315) (evidence to prove that the nuisance was maintained wilfully held inadmissible under the pleadings); Ofstie v. Kelly, 33–440, 23+863 (evidence held properly restricted to depreciation of rental value generally); Lommeland v. St. P. etc. Ry., 35–412, 29+119 (opinions of competent witnesses in reference to the extent of the injury and the value of the growing crops may be received, and also the average product or yield of like crops under similar conditions, and, within reasonable limitations as to time, the average market value of such grain, less the expense of harvesting and marketing); Byrne v. Mpls. etc. Ry., 38–212, 36+339 (in an action for damages from a permanent obstruction of a watercourse, and the consequent flooding of the plaintiff's land, a former recovery for the same cause held admissible); Aldrich v. Wetmore, 56–20, 57+221 (in an action including two causes of action evidence that

7283. Evidence—Sufficiency—Cases are cited below holding evidence sufficient [29] or insufficient [30] to justify a verdict for the plaintiff.

PRIVATE ACTION FOR PUBLIC NUISANCE

7284. Municipalities—A county,[31] village,[32] town,[33] or city,[34] may maintain an action to abate a public nuisance affecting the municipality when it is given authority over such nuisances by its charter or the general laws. It has been said that a municipality has no control over nuisances within its corporate limits except such as is conferred upon it by its charter or general laws.[35] But such authority may apparently be conferred by implication.[36]

7285. Private individual—An individual cannot maintain a private action for a public nuisance by reason of any injury which he suffers in common with the public.[37] If the rule were otherwise, where one man might have an action all men might have the like, resulting in multiplicity of suits. The rule is sustained by considerations both of principle and public policy.[38] But when an individual sustains special injury from a public nuisance, differing in kind and not merely in degree, from that sustained by the general public, he may maintain a private action.[39] It is the nature of the right affected, and not the number who suffer, which determines whether a private action will lie for creating or maintaining a public nuisance. To entitle a party to maintain a private action for the obstruction of a public street, it is unnecessary that the obstruction should cut off all access to his property. If an obstruction in a street merely interferes with a person's traveling on the street no private action will lie. But if he has property or business in the vicinity of the obstruction which is injured by reason of the interruption of convenient access to it, the right interfered with is a private property right, and a private action will lie.[40] It is impossible to lay down any general rule by which to determine whether an injury from a public nuisance is sufficiently peculiar and special to justify a private action. In border cases the court must necessarily draw the line somewhat arbitrarily and naturally the cases are irreconcilable.[41]

plaintiff had brought a former action including only one of such causes held inadmissible in chief for the defendant—evidence of the nature and extent of the discomfort and inconvenience suffered by plaintiff and his wife held admissible); Friburk v. Standard Oil Co., 66–277, 68+1090 (evidence that plaintiff made no complaint of nuisance before suit held admissible—evidence that plaintiff's family consisted of her husband and six children held admissible to show the use to which she was putting the property injured by the nuisance); Moore v. Townsend, 76–64, 78+880 (opinion of a witness as to dangerous character of thing charged to be a nuisance held inadmissible); Anderson v. Burlington etc. Ry., 82–293, 84+145 (questions propounded to witnesses as to rental value of premises calling for an opinion of witnesses on the main issues held improper but harmless); Anderson v. Chi. etc. Ry., 85–337, 88+1001 (opinions of persons living in the neighborhood as to the diminution in the rental value of premises held admissible).

[29] Berger v. Mpls. G. Co., 60–296, 62+336; Friburk v. Standard Oil Co., 66–277, 68+1090; Bowers v. Miss. etc. Co., 78–398, 81+208; Anderson v. Burlington etc. Ry., 82–293, 84+145; Anderson v. Chi. etc. Ry., 85–337, 88+1001.

[30] Simpson v. Stillwater W. Co., 62–444, 64+1144.

[31] Stearns County v. St. Cloud etc. Ry., 36–425, 32+91.

[32] Pine City v. Munch, 42–342, 44+197; Buffalo v. Harling, 50–551, 52+931.

[33] Hutchinson v. Filk, 44–536, 47+255.

[34] Red Wing v. Guptil, 72–259, 75+234; Albert Lea v. Knatvold, 89–480, 95+309.

[35] Pine City v. Munch, 42–342, 44+197. See, also, Red Wing v. Guptil, 72–259, 75+234; Buffalo v. Harling, 50–551, 52+931.

[36] Stearns County v. St. Cloud etc. Ry., 36–425, 32+91.

[37] Guilford v. Mpls. etc. Ry., 94–108, 102+365. See cases under § 7287.

[38] Swanson v. Miss. etc. Co., 42–532, 44+986.

[39] Viebahn v. Crow Wing County, 96–276, 104+1089; Nelson v. Swedish etc. Assn., 126+723. See cases under § 2286.

[40] Aldrich v. Wetmore, 52–164, 53+1072; Fitzer v. St. P. C. Ry., 105–221, 117+434 and § 4180.

[41] Page v. Mille Lacs L. Co., 53–492, 55+608; Kaje v. Chi. etc. Ry., 57–422, 59+

7286. Private action held to lie—Where an obstruction in a street was directly in front of the property of the plaintiff;[42] where an obstruction in a street was near the property of the plaintiff and cut off all access thereto;[43] where an obstruction in a street prevented free access to the shop of the plaintiff from one direction, whereby his business was seriously injured;[44] where a private railway was operated in a street directly in front of a lot of the plaintiff;[45] where one end of an alley, on which the property of the plaintiff abutted was closed up by an obstruction, the alley being too narrow for teams to turn in;[46] where an obstruction in a navigable stream prevented the plaintiff from freely floating logs down to his mill and to market;[47] where a railway was operated in a public street directly in front of a lot of the plaintiff;[48] where a bridge was built over a navigable river so as to interfere with the navigation of the river by the plaintiff;[49] where a cemetery would be injurious to the health of the plaintiff.[61]

7287. Private action held not to lie—Where the complaint did not show that the plaintiff had any property or business near the obstruction in the street constituting the alleged nuisance;[50] where an obstruction in a street did not cut off convenient access to the property of the plaintiff;[51] where an obstruction in a street cut off the most convenient and usual means of access to the property of the plaintiff;[52] where the nuisance consisted of a stairway and railway in front of a store which the plaintiff had rented from the defendant;[53] where the nuisance complained of consisted in a city excluding the public from access to a lake, within the city limits, except under certain rules and regulations, the complaint not showing that the plaintiff was a riparian owner;[54] where the complaint merely showed that an obstruction in a road near the plaintiff's farm required him to take longer and worse roads in going to market and forced him to trespass upon private lands;[55] where the complaint did not sufficiently allege the nature of the special injury;[56] where the plaintiff suffered from smoke from the engines of a private railway in a public street near but not abutting his property, and access to his property was rendered less safe by such railway;[57] where a railway was operated near but not in front of the property of the plaintiff and did not seriously impair his access;[58] where the obstruction consisted of railway tracks in city streets;[59] where the nuisance was a dam in a river;[60] where a barn projected but slightly into an alley.[61]

493; Viebahn v. Crow Wing County, 96-276, 104+1089.

[42] Farrant v. First Div. etc. Ry., 13-311 (286); Wilder v. DeCou, 26-10, 1+48.

[43] Brakken v. Mpls. etc. Ry., 29-41, 11+124; Hayes v. Chi. etc. Ry., 46-349, 49+61

[44] Aldrich v. Wetmore, 52-164, 53+1072; Fitzer v. St. P. C. Ry., 105-221, 117+434. See Vanderburgh v. Minneapolis, 98-329, 108+480.

[45] Gustafson v. Hamm, 56-334, 57+1054.

[46] Kaje v. Chi. etc. Ry., 57-422, 59+493.

[47] Page v. Mille Lacs L. Co., 53-492, 55+608 (overruling Swanson v. Miss. etc. Co., 42-532, 44+986; Lammers v. Brennan, 46-209, 48+766.

[48] Adams v. Chi. etc. Ry., 39-286, 39+629; Schurmeier v. St. P. etc. Ry., 10-82 (59).

[49] Viebahn v. Crow Wing County, 96-276, 104+1089.

[61] Nelson v. Swedish etc. Assn., 126+723.

[50] Dawson v. St. Paul etc. Co., 15-136 (102).

[51] Shaubut v. St. P. etc. Ry., 21-502; Barnum v. Minn. Trans. Ry., 33-365, 23+538.

[52] Rochette v. Chi. etc. Ry., 32-201, 20+140. See Carroll v. Wis. C. Co., 40-168, 41+661.

[53] Ofstie v. Kelly, 33-440, 23+863.

[54] Long v. Minneapolis, 61-46, 63+174.

[55] Shero v. Carey, 35-423, 29+58.

[56] Thelan v. Farmer, 36-225, 30+670.

[57] Gundlach v. Hamm, 62-42, 64+50.

[58] Adams v. Chi. etc. Ry., 39-286, 39+629; Lakkie v. Chi. etc. Ry., 44-438, 46+912.

[59] Guilford v. Mpls. etc. Ry., 94-108, 102+365.

[60] St. Anthony Falls etc. Co. v. Morrison, 12-249(162).

[61] Johnson v. Andengaard, 100-130, 110+369.

DAMAGES

7288. Measure—Where the injury is a total loss or destruction of property the measure of damages is the value of the property. Thus the measure of damages for the destruction of growing crops is the value of the same standing on the ground, and not the loss as measured by the rental value of the land.[62] Where the injury is of a temporary character the measure of damages is the difference between the rental value of the land free from and subject to the nuisance.[63] Where the premises are occupied by the plaintiff and his family as a home, his damages are not limited to the diminution of the rental value of the premises during the continuance of the nuisance, but he may recover damages for any actual inconvenience and physical discomfort which materially impairs the comfortable and healthful enjoyment and occupancy of his home by himself and family and for any actual injury to their health or property caused directly by the nuisance, without fault on their part.[64] In an action to abate and for damages both direct and consequential damages are recoverable.[65] Where property is permanently depreciated in value the amount of the depreciation is the measure of damages.[66] Damages have been held recoverable for loss of business and good will;[67] for loss of trees;[68] for expenses and loss of employment occasioned by sickness;[69] and for expenses incurred by a town for the repair of a highway.[70]

7289. To what time assessable—In an action for the recovery of damages, where the injury is only of a temporary character, damages are recoverable only up to the date of the institution of the action.[71] The reasons assigned for this rule are, that every continuance of a nuisance is a fresh nuisance for which an action will lie and if a plaintiff were permitted to recover prospective damages it would be for a distinct subsequent cause of action,[72] that the law cannot presume a continuance of the wrong,[73] and that damages can only be predicated on the facts pleaded.[74] Damages arising after the commencement of the action are recoverable if they result from injuries inflicted prior thereto.[75] In an equitable action to enjoin and abate a nuisance and for damages therefor, damages are recoverable down to the trial, though the injury is of a temporary character.[76] In an action for damages, where the injury is of a permanent character, all damages both past and prospective, are recoverable. The test whether the injury is permanent, is not necessarily the character, as to permanency, of the obstruction or structure causing the injury, but whether the whole injury results from the original wrongful act, or from the wrongful continuance of the state of facts produced by such act.[77]

[62] Byrne v. Mpls. etc. Ry., 38-212, 36+339; Lommeland v. St. P. etc. Ry., 35-412, 29+119. See Hayden v. Albee, 20-159(143) (injury to trees); Bowers v. Miss. etc. Co., 78-398, 81+208 (injury to shore from piling in river).

[63] Adams v. Chi. etc. Ry., 39-286, 39+629; Brakken v. Mpls. etc. Ry., 29-41, 11+124; Id., 31-45, 16+459; Berger v. Mpls. G. Co., 60-296, 62+336; Ofstie v. Kelly, 33-440, 23+863; Anderson v. Chi. etc. Ry., 85-337, 88+1001.

[64] Pierce v. Wagner, 29-355, 13+170; Berger v. Mpls. G. Co., 60-296, 62+336; Anderson v. Chi. etc. Ry., 85-337, 88+1001.

[65] Colstrum v. Mpls. etc. Ry., 33-516, 24+255.

[66] See Hayden v. Albee, 20-159(143).

[67] Aldrich v. Wetmore, 52-164, 53+1072. See Todd v. Mpls. etc. Ry., 39-186, 39+318.

[68] Hayden v. Albee, 20-159(143).

[69] Isham v. Broderick, 89-397, 95+224.

[70] Hutchinson v. Filk, 44-536, 47+255.

[71] Brakken v. Mpls. etc. Ry., 29-41, 11+124; Pierce v. Wagner, 29-355, 13+170; Lamm v. Chi. etc. Ry., 45-71, 47+455; Gilbert v. Boak, 86-365, 90+767.

[72] Dorman v. Ames, 12-451(347).

[73] Brakken v. Mpls. etc. Ry., 29-41, 11+124; Sloggy v. Dilworth, 38-179, 36+451.

[74] Gilbert v. Boak, 86-365, 90+767.

[75] Hayden v. Albee, 20-159(143).

[76] Gilbert v. Boak, 86-365, 90+767. See Dorman v. Ames, 12-451(347); Hayden v. Albee, 20-159(143).

[77] Bowers v. Miss. etc. Co., 78-398, 81+208.

7290. Discretion of jury—Excessive damages—Where recovery is had for injury to person, health, or comfort no fixed measure of damages can be laid down. Much must be left to the discretion of the jury. Cases are cited below involving the excessiveness of damages.[78]

7291. Exemplary damages—Exemplary damages are sometimes recoverable as in other actions ex delicto.[79]

7292. Action by wife—A wife cannot recover damages resulting to the family from a nuisance.[80]

CRIMINAL PROSECUTIONS

7293. Pleading and evidence—Cases are cited below involving questions of pleading [81] and evidence.[82]

OATH

Cross-References

See Public Officers, 7987; and other specific heads.

7294. Definition—An oath, in its broadest sense, includes any form of attestation by which a party signifies that he is bound in conscience to perform acts faithfully and truthfully.[83]

7295. Sufficiency—While an oath taken in compliance with a statute need not be in the precise terms of the statute, it must conform to it in substance.[84] Uplifting of the hand is unnecessary. The particular formality with which an oath is administered has never been regarded in this state as of great importance. The essential thing is that the party taking the oath shall go through some declaration, or formality, before the officer which indicates to him that the party consciously asserts or affirms the truth of the fact to which he gives testimony.[85]

OBITA DICTA—See Stare Decisis.

OBJECTIONS AND EXCEPTIONS—See Appeal and Error, 384, 385; Trial, 9723–9749, 9779, 9797, 9798, 9800.

OBLIGATION—The word "obligation" is sometimes used to denote a legal duty arising out of contract.[86] It is often used to denote any legal duty.[87] In the early days of the common law it was limited to a special kind of contract also called a bond.[88] Right and obligation are correlative.[89]

[78] Pierce v. Wagner, 29–355, 13+170; Berger v. Mpls. G. Co., 60–296, 62+336; Friburk v Standard Oil Co., 66–277, 68+1090; Anderson v. Burlington etc. Ry., 82–293, 84+145; Anderson v. Chi. etc. Ry., 85–337, 88+1001; Isham v. Broderick, 89–397, 95+224.

[79] See Finch v. Green, 16–355(315).

[80] Friburk v. Standard Oil Co., 66–277, 68+1090.

[81] Chute v. State, 19–271(230) (an indictment for maintaining a building overhanging a street and allowing filth to remain in the building held double—variance); St. Paul v. Hennessy, 38–94, 35+576 (complaint under an ordinance of St. Paul for maintaining an unsafe building held insufficient).

[82] Chute v. State, 19–271(230) (indictment for maintaining a dangerous building —resolutions of city council declaring the building unsafe held inadmissible—fact that defendant had been advised by competent builders that building was safe held inadmissible).

[83] State v. Gay, 59–6, 21, 60+676.

[84] State v. McLeod County, 27–90, 6+421.

[85] State v. Day, 108–121, 121+611.

[86] Morrison v. Lovejoy, 6–319(224, 235); Folsom v. Carli, 6–420(284).

[87] Morrison v. Lovejoy, 6–319(224, 235); Sibilrud v. Mpls. etc. Ry., 29–58, 11+146. See State v. Southern Minn. Ry., 18–40 (21); Pollock, Jurisprudence (2 ed.) 84.

[88] Folsom v. Carli, 6–420(284, 289).

[89] State v. Southern Minn. Ry., 18–40 (21).

OBSCENE LANGUAGE—See Breach of the Peace, 1101.
OBSTRUCT—See note 90.
OBVIOUS—See note 91.
OCCUPANCY, OCCUPANT—See Homestead, 4215; Public Lands, 7940; note 92.
OCCUPYING CLAIMANTS' ACT—See Improvements.
OFFENCE—See Criminal Law, 2406, 2425, 2426.
OFFER—See Contracts, 1740–1749; Sales, 8499, 8500; Vendor and Purchaser, 10000.
OFFER OF EVIDENCE—See Trial, 9717.
OFFER OF JUDGMENT—See Judgments, 4981; Justices of the Peace, 5304.
OFFICE—See Public Officers; Quo Warranto.
OFFICERS—See Public Officers.
OFFICIAL BONDS—See Public Officers, 8018.
OFFICIAL RECORDS—See Evidence, 3347.
OFFICIAL REPORTS—See Evidence, 3348.
OFFICIAL YEAR—See Public Officers, 7988.
OFFSPRING—See note 93.
OILS—See Inspection.
OLEOMARGARINE—See Food, 3778.
OMNIA RITE ACTA PRESUMUNTUR—See Evidence, 3436.
ONE-HALF—See note 94.
ON OR ABOUT—See note 95.
ONUS PROBANDI—See Criminal Law, 2449; Evidence, 3468; Trial, 9788.
OPEN ACCOUNTS—See Accounts, 59.
OPENING AND CLOSE—See Criminal Law, 2478; Trial, 9712.
OPENING DEFAULT—See Garnishment, 4017; Judgments, 5003–5035; Justice of the Peace, 5318.
OPINION EVIDENCE—See Evidence, 3311.
OPPORTUNITY—See note 96.
OPTIONS—See Contracts, 1753; Landlord and Tenant, 5404, 5413; Vendor and Purchaser, 10016; Wagers, 10133.
OR—See Statutes, 8976.
ORDER OF PROOF—See Trial, 9715.
ORDERS—See Motions and Orders, 6503–6512.
ORDERS FOR PAYMENT OF MONEY—See Assignments, 554; Contracts, 1840.
ORDERS TO SHOW CAUSE—See Motions and Orders, 6513.
ORDINANCES—See Criminal Law, 2406; Evidence, 3452; Injunction, 4483; Insurance, 4656; Intoxicating Liquors; Municipal Corporations, 6748.
ORDINARY CARE—See Negligence, 6970.
ORGANIZATION, ORGANIZED—See note 97.
ORIGINAL—See note 98.

90 State v. Kilty, 28-421, 10+475.
91 Price v. Standard etc. Co., 92-238, 241, 99+887.
92 Davis v. Murphy, 3-119(69); Leech v. Rauch, 3-448(332); Carson v. Smith, 12-546(458); Quehl v. Peterson, 47-13, 49+390; Cutting v. Patterson, 82-375, 380, 85+172; Thompson v. Berlin, 87-7, 91+25; McCauley v. McCauleyville, 127+190.
93 King v. Lacrosse, 42-488, 44+517.
94 Baldwin v. Winslow, 2-213(174); Cogan v. Cook, 22-137.
95 Lockwood v. Bigelow, 11-113(70).
96 In re Hause, 32-155, 19+973.
97 State v. Parker, 25-215; State v. School Dist., 54-213, 55+1122.
98 Castner v. Chandler, 2-86(68); Crowell v. Lambert, 10-369(295, 298).

ORIGINAL ENTRIES—See Evidence, 3346.
ORPHANS—See Insurance, 4823, and note 1.
OTHER—See Statutes, 8977; and note 2.
OUSTER—See Adverse Possession; Ejectment; Forcible Entry and Detainer; Landlord and Tenant; Trespass.
OWNER—See Property, 7855.
OWNERSHIP—See Property, 7855.
OYER—See note 3.
PAIN—See Evidence, 3292.
PAPER BOOKS—See Appeal and Error, 353.
PAPERS—See Witnesses, 10340.

PARDONS

7296. Conditional pardon—Breach—Recommitment—A convict who has received and accepted a conditional pardon cannot be arrested and remanded to suffer his original sentence because of an alleged non-performance of the condition, upon the mere order of the governor. He is entitled to a hearing before the court in which he was convicted, or some superior court of criminal jurisdiction, and an opportunity to show that he has performed the condition of his pardon, or that he has a legal excuse for not having done so. On such hearing the court may, in its discretion, if in doubt as to the facts, take the verdict of a jury, but the convict is not entitled to a jury trial as a matter of right, except upon the question whether he is the same person who was convicted, if he pleads that he is not.[4]

PARENT AND CHILD

Cross-References

See Adverse Possession, 114; Assault and Battery, 537; Carriers, 1239.

RIGHTS OF PARENTS

7297. To custody of child—Prior to R. L. 1905 § 3834 the statute gave the custody of the child to the father in preference to the mother,[5] but it was nevertheless held that the welfare of the child ought to be the prime consideration with the courts in determining the custody, and that it might be awarded to the mother, if manifestly for the best interest of the child.[6] An order awarding the custody is subject to change at any time when conditions change.[7] In awarding the custody to one parent it is discretionary with the court to prescribe conditions, and to provide for access to the child by the other parent at stated intervals.[8] A contract between parents to deliver the custody of

[1] Fischer v. Malchow, 93-396, 101+602.
[2] Grimes v. Byrne, 2-89(72); St. Paul v. Traeger, 25-248; Berg v. Baldwin, 31-541, 18+821; Brown v. Corbin, 40-508, 42+481; Goodwin v. Kumm, 43-403, 45+853; Hardwick etc. Co. v. Chi. etc. Ry., 124+819.
[3] Swift v. Fletcher, 6-550(386, 391).
[4] State v. Wolfer, 53-135, 54+1065.
[5] G. S. 1894 § 4540.
[6] State v. Flint, 63-187, 65+272; State v. O'Malley, 78-163, 80+1133; State v. Greenwood, 84-203, 87+489; Arne v. Holland, 85-401, 404, 89+3; State v. Anderson, 89-198, 94+681; Gauthier v. Walter, 124+634. See State v. Ott, 98-533, 107+1134.
[7] State v. Flint, 63-187, 65+272.
[8] Cases supra.

the child to a third party is not binding.[9] The right of a parent to the custody is superior to the right of a third person. The presumption is that a parent is a fit person to be intrusted with the care of the child, and the burden of proving the contrary is on him who asserts it.[10]

7298. To control child—The father is the natural guardian of his children, and may control their persons, as to the place of their domicil, the place of their education, the course of their travels for health, pleasure, or instruction, and in all the various aspects in which the exercise of such control may be invoked, depending upon the station in life of the parties, and other circumstances of each individual case. Yet this control of the person of the child by the father, is by no means an arbitrary and absolute one. It is subject to the control of a court of equity.[11]

7299. To earnings of child—A parent is entitled to the earnings of a minor child, but he may waive the right.[12]

7300. To recover for injuries to child—Statute—By statute a parent may sue for injuries to a minor child without regard to loss of service.[13] The statute is constitutional.[14] It is applicable only to a minor child.[15] It authorizes an action by the parent in all cases where, at common law, an action might be maintained by the child.[16] No damages are recoverable except those suffered by the child. The action is for the benefit of the child, not the parent, and whatever is recovered is held by the parent in trust for the child.[17] The judgment is a bar to a subsequent action by the child, by his guardian, general or ad litem, or by himself after majority.[18] It is not a bar to a subsequent independent action by the parent for any losses which he may have sustained personally.[19] It is unnecessary to allege in the complaint that the action is brought for the benefit of the child, if the only damages alleged or claimed are those sustained by the child.[20] The negligence of the parent is not imputable to the child.[21] A parent cannot sue for the negligent killing of his child.[22] An action under the statute may be defeated by a settlement of the child's claim by his parent.[23] Provision is made for a bond from the parent before receiving any money in settlement or in satisfaction of a judgment.[24]

7301. To recover for loss of services, etc.—The parent of a child injured by the negligence of another may recover for consequent loss of services, expenses of medical attendance, etc.[25] In such an action the contributory negligence of the parent will defeat recovery.[26]

[9] State v. Anderson, 89–198, 94+681.
[10] State v. Martin, 95–121, 103+888.
[11] Townsend v. Kendall, 4–412(315).
[12] See § 4451.
[13] Laws 1907 c. 58; Gardner v. Kellogg, 23–463.
[14] Lathrop v. Schutte, 61–196, 63+493; Hess v. Adamant Mfg. Co., 66–79, 68+774.
[15] Gardner v. Kellogg, 23–463; Schmit v. Mitchell, 59–251, 61+140.
[16] Gardner v. Kellogg, 23–463; Buechner v. Columbia S. Co., 60–477, 62+817; Lathrop v. Schutte, 61–196, 63+493; Hess v. Adamant Mfg. Co., 66–79, 68+774; Nyman v. Lynde, 93–257, 101+163; Johnson v. Mpls. etc. Ry., 101–396, 112+534.
[17] Gardner v. Kellogg, 23–463; Lathrop v. Schutte, 61–196, 63+493; Hess v. Adamant Mfg. Co., 66–79, 68+774; Bamka v. Chi. etc. Ry., 61–549, 63+1116; Picciano v. Duluth etc. Ry., 102–21, 112+885.
[18] Lathrop v. Schutte, 61–196, 63+493; Hess v. Adamant Mfg. Co., 66–79, 68+774.
[19] Bamka v. Chi. etc. Ry, 61–549, 63+1116.
[20] Buechner v. Columbia S. Co., 60–477, 62+817.
[21] Mattson v. Minn. etc. Ry., 95–477, 104+443.
[22] See § 2607.
[23] Johnson v. Mpls. etc. Ry., 101–396, 112+534; Picciano v. Duluth etc. Ry., 102–21, 112+885.
[24] Laws 1907 c. 58. See, prior to the amendment of 1907, Lathrop v. Schutte, 61–196, 63+493; Powell v. G. N. Ry., 102–448, 113+1017.
[25] Mattson v. Minn. etc. Ry., 98–296, 108+517. See Gardner v. Kellogg, 23–463, 467; Bamka v. Chi. etc. Ry., 61–549, 63+1116; Marengo v. G. N. Ry., 84–397, 87+1117.
[26] Mattson v. Minn. etc. Ry., 95–477, 104+443; Id., 98–296, 108+517.

DUTIES OF PARENTS

7302. To maintain child—A father is bound to support his minor children even though they have property of their own.[27] If the father dies the mother is bound to support her children, unless they have property of their own. A widow who marries a second husband is not liable for the support of her minor child, but is entitled to have his income applied thereto. A step-father is not liable for the support of the children of his wife by her former husband. But if he voluntarily assumes the parental relation, and receives them into his family under circumstances such as to raise a presumption that he has undertaken to support them gratuitously, he cannot afterwards claim compensation for their support.[28] If the children are provided for by both their mother and step-father there is no presumption that such support is gratuitous on his part.[29] A wife has implied authority from her husband to purchase necessaries for his children.[30] The law implies a contract on the part of a parent who enters a railway train with a child, not sui juris, and subject to payment of fare, to pay the fare of such child.[31] The liability of a father is not affected by a divorce which gives the custody of the children to his wife and is silent as to their support, and this liability may be enforced in an original action by the wife after the divorce,[32] or by motion for a modification of the judgment in the action for divorce.[33] A contract between a husband and a wife for the support of their children has been sustained.[34]

7303. To educate child—It is the duty of a parent to educate his children.[35]

7304. To protect child—A parent may protect a child from an assault, as the party assaulted may protect himself, but may not protect a child in committing an assault.[36]

7305. To care for child—The parent or guardian of a child is required to exercise that degree of care for the safety of the child which a reasonably prudent and cautious person ordinarily exercises under the same or similar conditions and circumstances. In determining in a particular case whether such care was exercised the jury are entitled to take into consideration the place of the accident, the character of the community, the intelligence of the people, and the means and opportunities at command in connection with the other circumstances.[37]

RIGHTS OF CHILD

7306. Use of parent's property—A child has a right to use, in a careful and proper manner, such property of the parent as is customarily applied to family purposes, subject to such regulations as the parent may prescribe.[38]

7307. Recovery for services—If a child after majority lives with a parent, as one standing in the relation of parent, the presumption is that services rendered, or support furnished, by one to the other are gratuitous. This presumption may be overcome by proof of an express agreement to pay, or of facts tending to show that both parties at the time expected payment to be

[27] In re Besondy, 32-385, 387, 20+366. See Bennett v. Gillette, 3-423(309, 312); Kraft v. Kraft, 70-144, 72+804.
[28] In re Besondy, 32-385, 387, 20+366.
[29] Unke v. Dahlmier, 78-320, 80+1130; Eiken v. Eiken, 79-360, 82+667.
[30] See § 4276.
[31] Braun v. N. P. Ry., 79-404, 82+675, 984.
[32] Spencer v. Spencer, 97-56, 105+483.
[33] McAllen v. McAllen, 97-76, 106+100.
[34] Kraft v. Kraft, 70-144, 72+804.
[35] Id.
[36] State v. Herdina, 25-161.
[37] Mattson v. Minn. etc. Ry., 98-296, 108+517.
[38] Bennett v. Gillette, 3-423(309).

made. It is ordinarily for the jury to say whether the presumption has been overcome.[39]

7308. Right to sue parent for tort—As a general rule a minor cannot sue his parent for a tort, but if he has been emancipated he can. A mere waiver, however, of the right to the earnings of a minor does not alone constitute such emancipation. There must be a surrender of the right to his services and to the control of his person.[40]

EMANCIPATION

7309. What constitutes—Marriage—The mere waiver by a parent of the right to the earnings of a minor does not alone constitute an emancipation. To constitute an emancipation there must be a surrender of the right to his services and to the control of his person.[41] Marriage emancipates a minor.[42]

GIFTS

7310. Presumption—In the absence of fraud or undue influence a voluntary payment of money by a parent to a child will be presumed to be a gift.[43] A gift from a parent to a child or from a child to a parent is presumptively valid.[44]

7311. Fraud and undue influence—Cases are cited below involving questions of fraud and undue influence in connection with conveyances from parent to child.[45]

7312. Evidence—Sufficiency—Evidence held sufficient to justify a finding of an accepted parol gift of land from a father to a son.[46]

PARKS—See Eminent Domain, 3025; Municipal Corporations, 6608.
PARKWAY—See Municipal Corporations, 6608.

PARLIAMENTARY LAW

7313. Removal of officers—A president of a city council has been held not an officer of the city, but merely an officer or servant of the council, and as such, removable by the council, according to the rules of parliamentary law.[47]

PAROL EVIDENCE—See Evidence, 3368; and other specific heads.

[39] Einolf v. Thomson, 95-230, 103+1026; Donahue v. Donahue, 53-460, 55+602; McCord v. Knowlton, 79-299, 82+589; Baxter v. Gale, 74-36, 76+954; Wetherill v. Canney, 62-341, 346, 64+818; Begin v. Begin, 98-122, 107+149. See Johanke v. Schmidt, 79-261, 82+582.

[40] Taubert v. Taubert, 103-247, 114+763.

[41] Id.

[42] State v. Lowell, 78-166, 80+877.

[43] Jenning v. Rohde, 99-335, 109+597.

[44] Gustafson v. Gustafson, 92-139, 99+631; Prescott v. Johnson, 91-273, 97+891; Rader v. Rader, 108-139, 121+393; Naeseth v. Hommedal, 109-153, 123+287. See Ashton v. Thompson, 32-25, 18+918; Fischer v. Sperl, 94-421, 103+502.

[45] O'Neil v. O'Neil, 30-33, 14+59; Pinger v. Pinger, 40-417, 42+289; Graham v. Burch, 44-33, 46+148; Albrecht v. Albrecht, 44-70, 46+145; Gustafson v. Gustafson, 92-139, 99+631.

[46] Schmitt v. Schmitt, 94-414, 103+214.

[47] State v. Kiichli, 53-147, 54+1069.

PARTIES

Cross-References

See Conflict of Laws, 1547; Contracts, 1892–1901; Husband and Wife, 4288–4298; Pleading, 7500–7508; Torts, 9643; and specific actions.

7314. Qualifications in general—To be entitled to recognition in the courts of this state, a party must, in the absence of statutory provisions to the contrary, be either a natural or artificial person.[48]

7315. Real party in interest—Statute—It is provided by statute that except as otherwise expressly provided by law every action shall be prosecuted in the name of the real party in interest.[49] The following persons have been held the real party in interest: an assignee, legal or equitable, of a thing in action;[50] a party holding the legal title, though others may have an equitable interest,[51] a pledgee of a note payable to order and not indorsed to him;[52] a pledgee of a note payable to order and not indorsed;[53] the holder of a certificate of deposit payable to order and not indorsed;[54] the owner of a note, though the note by mistake was indorsed to his agent;[55] the holder of a note unconditionally indorsed by the payee;[56] the payee of a bill of exchange made payable really but not expressly, for collection;[57] a cestui que trust, the trustee having died and no successor having been appointed;[58] an executor;[59] an infant.[60] The following persons have been held not the real party in interest: an indorsee "for collection;"[61] a public officer.[62]

7316. In equity—The general principle which underlies the doctrine of parties in equity is that it should be the constant aim of a court of equity to do complete justice by deciding upon and settling the rights of all parties interested in the subject-matter of the suit, so that the performance of the decree of the court may be perfectly safe to those who are compelled to obey it, and also that future litigation may be prevented.[63] It is the general rule

[48] St. Paul Typo. v. St. P. B. Union, 94–351, 102+725.

[49] R. L. 1905 § 4053; Grinnell v. Illinois C. Ry., 109–513, 124+377.

[50] Russell v. Minn. Outfit, 1–162(136); Castner v. Austin, 2–44(32); Helfer v. Alden, 3–332(232); MacDonald v. Kneeland, 5–352(283, 294); Tuttle v. Howe, 14–145(113); Bennett v. McGrade, 15–132(99); Lahmers v. Schmidt, 35–434, 29+169; Schlieman v. Bowlin, 36–198, 30+879; Anderson v. Reardon, 46–185, 48+777; Maxcy v. N. H. F. Ins. Co., 54–272, 55+1130; Bates v. Richards, 56–14, 57+218; Anchor Invest. Co. v. Kirkpatrick, 59–378, 61+29; Struckmeyer v. Lamb, 64–57, 65+930; Dobberstein v. Murphy, 64–127, 66+204; Lynott v. Dickerman, 65–471, 67+1143; Hurley v. Bendel, 67–41, 69+477; Laramee v. Tanner, 69–156, 71+1028; Wood v. Bragg, 75–527, 78+93; Jackson v. Sevatson, 79–275, 82+634.

[51] Winona etc. Ry. v. St. P. etc. Ry., 23–359; Triggs v. Jones, 46–277, 48+1113; St. Paul etc. Co. v. Thomas, 60–140, 61+1134; Anderson v. Reardon, 46–185, 48+777; Vanstrum v. Liljengren, 37–191, 33+555; Elmquist v. Markoe, 45–305, 47+970.

[52] White v. Phelps, 14–27(21). See Castner v. Austin, 2–44(32).

[53] Pease v. Rush, 2–107(89).

[54] Cassidy v. First Nat. Bank, 30–86, 14+363.

[55] Conger v. Nesbitt, 30–436, 15+875.

[56] Elmquist v. Markoe, 45–305, 47+970; Rosemond v. Graham, 54–323, 56+38.

[57] Vanstrum v. Liljengren, 37–191, 33+555; Minn. T. Mfg. Co. v. Heipler, 49–395, 52+33.

[58] Judd v. Dike, 30–380, 15+672.

[59] Hamilton v. McIndoo, 81–324, 84+118.

[60] Price v. Phoenix M. L. Ins. Co., 17–497(473); Perine v. Grand Lodge, 48–82, 50+1022; Peterson v. Baillif, 52–386, 54+185.

[61] Rock County Nat. Bank v. Hollister, 21–385; Third Nat. Bank v. Clark, 23–263. See Vanstrum v. Liljengren, 37–191, 33+555; Minn. T. Mfg. Co. v. Heipler, 49–395, 52+33.

[62] Willis v. Standard Oil Co., 50–290, 52+652; Balcombe v. Northup, 9–172(159).

[63] Fish v. Berkey, 10–199(161, 165); Johnson v. Robinson, 20–170(153); Gra-

that all persons materially interested, either legally or beneficially, in the subject-matter of the suit, are to be made parties, either as plaintiffs or defendants, however numerous they may be, so that there may be a complete decree that shall bind them all. But there are exceptions to this general rule. The rule does not extend to those who are consequentially interested in the subject-matter.[64] When the questions to be litigated are of common interest to a large number of persons, and it is impracticable to bring them all into court, one or more may proceed in equity for the benefit of all.[65] In some cases the parties in court may be deemed to represent others who are not made parties.[66] Who shall be made parties in equity is a question of convenience and discretion, rather than of absolute right, to be determined according to the exigencies of the particular case.[67] There is an important distinction as respects parties defendant between those who are necessary and those who are merely proper. Necessary parties are those without whom no decree at all can be effectively made determining the principal issues in the cause. Proper parties are those without whom a substantial decree may be made, but not a decree which shall completely settle all the questions which may be involved in the controversy and conclude the rights of all the persons who have any interest in the subject-matter of the litigation.[68] Persons not interested in the subject-matter of an action, and whose rights will not be affected in any way by a judgment therein, are not necessary parties thereto.[69] As a general rule, in the absence of statute to the contrary, a person whose interest in the subject-matter in litigation and whose liability to respond to the plaintiff's demand is determinable wholly from his independent relation thereto, unaffected by and disconnected from the liability of the defendant named in the action, is not a necessary party to the action.[70] The complaint must show that the person sought to be made a defendant has an interest in the subject-matter of the action, and it is not sufficient that the defendant may in some way be affected by the decree.[71] It is not of vital importance whether a party is made a plaintiff or defendant.[72]

7317. Persons jointly interested—When two or more persons are jointly entitled, or have a joint legal interest in the property affected, they must, in general, join in the action, or the defendant may plead in abatement.[73] All persons interested in a single cause of action may join in an action to recover thereon though their interests are distinct and severable.[01]

7318. Trustees—Parties expressly authorized to sue—A trustee of an express trust,[74] or a person expressly authorized by statute to sue,[75] may sue without joining with him the person for whose benefit the action is brought.

ham v. Minneapolis, 40–436, 42+291; Disbrow v. Creamery P. M. Co., 104–17, 115+751.

[64] Winslow v. Minn. etc. Ry., 4–313(230); Graham v. Minneapolis, 40–436, 42+291.

[65] Pencille v. State etc. Co., 74–67, 76+1026; Jackson v. Holbrook, 36–494, 501, 32+852. See Goncelier v. Foret, 4–13(1); R. L. 1905 § 4053.

[66] Winslow v. Minn. etc. Ry., 4–313(230); Mayall v. Mayall, 63–511, 65+942; Mathews v. Lightner, 85–333, 88+992.

[67] Baldwin v. Canfield, 26–43, 1+261; N. W. etc. Co. v. Norwegian etc. Seminary, 43–449, 45+868; Pencille v. State etc. Co., 74–67, 76+1026.

[68] Tatum v. Roberts, 59–52, 60+848; Reiser v. Gigrich, 59–368, 61+30; Lumbermen's Ins. Co. v. St. Paul, 77–410, 80+357; Rudd v. Fosseen, 82–41, 84+496; Cornish v. West, 82–107, 84+750; Disbrow v. Creamery P. M. Co., 104–17, 115+751.

[69] Rudd v. Fosseen, 82–41, 84+496; Anderson v. Scandia Bank, 53–191, 54+1062. See Banning v. Bradford, 21–308.

[70] Kettle River v. Bruno, 106–58, 118+63.

[71] Newman v. Home Ins. Co., 20–422 (378); McNair v. Toler, 21–175; Banning v. Bradford, 21–308.

[72] See Crump v. Ingersoll, 44–84, 46+141.

[73] Peck v. McLean, 36–228, 30+759. See Rowland v. McLaughlin, 125+1019.

[01] Carlton County etc. Co. v. Foley, 126+727.

[74] R. L. 1905 § 4055; St. Anthony M. Co. v. Vandall, 1–246(195); Langdon v.

7319. Wife of party—It is not ordinarily necessary to join the wife of a party in an action involving his property.[76]

7320. Associates under common name—Statute—It is provided by statute that parties doing business under a common name may be sued under such name.[77] The statute is applicable to fraternal or benevolent associations engaged in business.[78] It has been held applicable to trustees holding stock in corporations for the benefit of a railway company.[79] It is inapplicable to unincorporated associations not engaged in business, such as labor unions [80] or athletic associations.[81] It does not authorize an association to sue in its associate name.[82] The action is against the associates; not against the association.[83] The complaint need not name the associates.[84] Service of summons on one member of the association will authorize a judgment which will bind all the associate property.[85] A judgment against the association does not bind the individual property of the associates, but a personal judgment against the associates personally served may be entered. Before ordering such a judgment the court should insert the names of the associates personally served.[86] An affidavit of service of summons to the effect that the persons served are members of the association and doing business under the associate name is sufficient to confer jurisdiction.[87] The mere fact that one is an agent of certain persons in a business does not authorize him to transact the business for them by a common name so as to render them liable under the statute.[88]

7321. Defendant not served with summons—A person is not a party to an action merely because he is named as a defendant. He must be served with process or voluntarily appear in order to become a party.[89]

7322. Want of capacity to sue—Remedy—Objection to the capacity of the plaintiff to sue must be taken by demurrer or answer or it is waived.[90]

DEFECT OF PARTIES

7323. Demurrer or answer—Where there is a defect of parties plaintiff or defendant, if the defect appears on the face of the complaint, the objection must be taken by demurrer; if the defect does not appear on the face of the complaint, the objection may be taken by answer; and if no such objection is taken either by demurrer or answer, the defendant is deemed to have

Thompson, 25–509; Donohue v. Ladd, 31–244, 17+381; Henning v. Raymond, 35–303, 29+132; Perine v. Grand Lodge, 48–82, 50+1022; Moulton v. Haskell, 50–367, 52+960; Seibert v. Mpls. etc. Ry., 52–148, 53+1134; Williamson v. Selden, 53–73, 54+1055; Struckmeyer v. Lamb, 64–57, 65+930; Ueland v. Haugan, 70–349, 73+169; State v. Nelson, 79–373, 82+674.

[75] R. L. 1905 § 4055; Mower County v. Smith, 22–97, 111. See Willis v. Standard Oil Co., 50–290, 52+652.

[76] Stitt v. Smith, 102–253, 113+632.

[77] R. L. 1905 § 4068. See 20 Harv. L. Rev. 58.

[78] Cornfield v. Order B. A., 64–261, 66+970; Martin v. N. P. B. Assn., 68–521, 71+701; Taylor v. Order of R. C., 89–222, 94+684. See Perine v. Grand Lodge, 48–82, 50+1022.

[79] Venner v. G. N. Ry., 108–62, 121+212.

[80] St. Paul Typo. v. St. P. B. Union, 94–351, 102+725.

[81] George v. University etc. Assn., 107–424, 120+750.

[82] Dimond v. Minn. S. Bank, 70–298, 73+182; St. Paul Typo. v. St. P. B. Union, 94–351, 102+725.

[83] Gale v. Townsend, 45–357, 47+1064; Dimond v. Minn. S. Bank, 70–298, 73+182.

[84] Dimond v. Minn. S. Bank, 70–298, 73+182.

[85] Hinkley v. St. Anthony etc. Co., 9–55 (44).

[86] Gale v. Townsend, 45–357, 47+1064; Dimond v. Minn. S. Bank, 70–298, 73+182.

[87] Id.; Taylor v. Order of R. C., 89–222, 94+684.

[88] Cooper v. Breckenridge, 11–341(241).

[89] Hokanson v. Gunderson, 54–499, 56+172.

[90] Tapley v. Tapley, 10–448(360); Rich v. Rich, 12–468(369); McNair v. Toler, 21–175; Pope v. Waugh, 94–502, 103+500. See Hamilton v. McIndoo, 81–324, 84+118.

waived the same. The objection cannot be raised for the first time on the trial by motion for dismissal, for judgment on the pleadings, or for a directed verdict, or by objection to evidence. The rule is the same in actions ex contractu and actions ex delicto. There is no distinction between a defect of parties plaintiff and of parties defendant.[91] Where there is a defect of parties plaintiff, and the objection is taken by answer, defendant is not, on the defect being shown on the trial, entitled to verdict on the merits of the action, but at most only to a dismissal; and when, in such case, no motion is made to dismiss the action because of such defect, it is waived.[92]

7324. Objection must be specific—The objection of defect of parties, whether raised by demurrer or answer, must be distinctly raised and must specifically show wherein the defect consists, naming the person who should have been joined.[93]

7325. Bringing in party—If a necessary party is named as a defendant in the title of the action, but is not brought in as a party by service of summons on him, the proper practice is for the court to continue the action or delay the trial until he is brought in as a party.[94] In equity it is held that the court may, on its own motion, at the trial, continue or dismiss the action for want of a necessary defendant.[95] The court may continue an action until a necessary party is brought in.[96]

MISJOINDER OF PARTIES

7326. Misjoinder of parties plaintiff—The misjoinder of two parties as plaintiffs, when the cause of action is in one alone, is no ground for a dismissal of the complaint as to both. It is a mere irregularity which may be corrected at any time, before or after judgment, by striking out the name of the party improperly joined.[97] The objection cannot be raised for the first time on appeal.[98]

7327. Misjoinder of parties defendant—A defendant improperly joined may demur on the ground that the complaint does not state facts sufficient to constitute a cause of action.[99] A party who is properly made a defendant cannot object by demurrer that others are improperly joined with him.[1]

[91] Davis v. Chouteau, 32–548, 21+748; Cover v. Baytown, 12–124(71); Lowry v. Harris, 12–255(166); Stewart v. Erie etc. Co., 17–372(348); McRoberts v. Southern M. Ry., 18–108(91); Blakeley v. LeDuc, 22–476; Miller v. Darling, 22–303; Baldwin v. Canfield, 26–43, 1+261; Allis v. Ware, 28–166, 9+666; Jones v. Minneapolis, 31–230, 17+377; Tarbox v. Gorman, 31–62, 16+466; Sandwich Mfg. Co. v. Herriott, 37–214, 33+782; Graham v. Minneapolis, 40–436, 42+291; Arthur v. Willius, 44–409, 46+851; Densmore v. Shepard, 46–54, 48+528; Christian v. Bowman, 49–99, 51+663; Thurston v. Thurston, 58–279, 59+1017; Benson v. Silvey, 59–73, 60+847; Moore v. Bevier, 60–240, 62+281; Stewart v. G. N. Ry., 65–515, 68+208; Harper v. Carroll, 66–487, 507, 69+610, 1069; Bell v. Mendenhall, 71–331, 73+1086; Mason v. St. Paul etc. Co., 82–336, 85+13; Disbrow v. Creamery P. M. Co., 104–17, 115+751; Budds v. Frey, 104–481, 117+158.

[92] Mason v. St. Paul etc. Co., 82–336, 85+13.

[93] Davis v. Chouteau, 32–548, 21+748; Jones v. Minneapolis, 31–230, 17+377; Jaeger v. Sunde, 70–356, 73+171; Anderson v. Dyer, 94–30, 101+1061; Disbrow v. Creamery P. M. Co., 104–17, 115+751.

[94] N. W. etc. Co. v Norwegian etc. Seminary, 43–449, 45+868. See Thurston v. Thurston, 58–279, 59+1017; Julius v. Callahan, 63–154, 65+267.

[95] Harper v. Carroll, 66–487, 507, 69+610.

[96] Cover v. Baytown, 12–124(71).

[97] Wiesner v. Young, 50–21, 52+390.

[98] Breault v. Merrill, 72–143, 75+122.

[99] Lewis v. Williams, 3–151(95).

[1] Lewis v. Williams, 3–151(95); Goncelier v. Foret, 4–13(1); Nichols v. Randall, 5–304(240); Mitchell v. Bank of St. Paul, 7–252(192).

BRINGING IN PARTIES

7328. Statute—The statute provides for the bringing in of additional parties when necessary for a full determination of an action.[2] Parties may be thus brought in only when it is necessary to secure a full determination of the controversy between the original parties tendered by the complaint, answer, or counterclaim.[3] An infant may be made a defendant under the statute.[4] A motion to bring in other parties will be denied, if not made with reasonable diligence, where the other defendants would be prejudiced by granting it.[5]

7329. In general—Where a complaint fails to state a cause of action against a person he cannot be brought in except on an amended complaint.[6] The court on its own motion may order new parties to be brought in and may continue a cause for that purpose.[7] Failure to bring in a party as ordered may be a ground for dismissal.[8] Cases are cited below in which the bringing in of additional parties was denied.[9] In an action on a joint obligation if all the obligors are not made defendants the court may require them to be brought in.[10]

SUBSTITUTION

7330. On transfer of interest—An action does not abate by a transfer of interest.[11] An action may be continued in the name of the original plaintiff though he has assigned the right of action pendente lite.[12] It is discretionary with the court either to allow the action to continue in the name of the original plaintiff or to order the substitution of the successor in interest.[13] The court does not take judicial notice of a transfer pendente lite. It is the duty of the transferee to acquaint the court with the fact of transfer and ask leave either to continue the action in the name of the original plaintiff or to be substituted.[14] The right of substitution, and the consequent complete elimination of a party to the record, arises only in those cases where the whole beneficial interest in the cause of action is assigned and transferred pendente lite. If by the terms of such an assignment the plaintiff retains any substantial interest in the further prosecution of the action, or may become liable to the assignee if the action fails, intervention by the assignee, and not substitution, is the proper remedy.[15] The supreme court may order a substitution.[16] Cases are cited below in which parties were substituted as successors in interest.[17]

[2] R. L. 1905 § 4069. Statute cited and applied, Chadbourn v. Rahilly, 34–346, 25+633; State v. Mpls. etc. Ry., 39–219, 39+153; Farmers' Nat. Bank v. Backus, 64–43, 66+5; Bishop v. Hyde, 66–24, 68+95.

[3] Clay etc. Co. v. Alcox, 88–4, 92+464. See Crosby v. Scott, 93–475, 101+610; Kettle River v. Bruno, 106–58, 118+63.

[4] Markell v. Ray, 75–138, 77+788.

[5] Sundberg v. Goar, 92–143, 99+638.

[6] Penfield v. Wheeler, 27–358, 7+364.

[7] Cover v. Baytown, 12–124(71); Johnson v. Robinson, 20–170(153); Harper v. Carroll, 66–487, 507, 69+610. See Smith v. St. Paul, 65–295, 68+32.

[8] Cover v. Baytown, 12–124(71); N. W. etc. Co. v. Norwegian etc. Seminary, 43–449, 45+868.

[9] Davis v. Sutton, 23–307; Welch v. Marks, 39–481, 40+611; Boen v. Evans, 72–169, 75+116.

[10] R. L. 1905 § 4282.

[11] R. L. 1905 § 4064; American E. Co. v. Crowley, 105–233, 117+428.

[12] Whitacre v. Culver, 9–295(279); Chisholm v. Clitherall, 12–375(251); Rogers v. Holyoke, 14–220(158); Bennett v. McGrade, 15–132(99); Nichols v. Chi. etc. Ry., 36–452, 32+176; Brown v. Kohout, 61–113, 63+248.

[13] Brown v. Kohout, 61–113, 63+248; Slosson v. Ferguson, 31–448, 18+281.

[14] Chisholm v. Clitherall, 12–375(251); Rogers v. Holyoke, 14–220(158).

[15] Walker v. Sanders, 103–124, 114+649.

[16] Keough v. McNitt, 7–29(15).

[17] Bradley v. N. P. Ry., 38–234, 36+345; Waite v. Coaracy, 45–159, 47+537; Willoughby v. St. P. etc. Co., 80–432, 83+377.

7331. On death of party—Provision is made by statute for the substitution of the representative of a deceased party.[18] The remedy by motion is exclusive. It is a substitute for the former bill of revivor and original bill in the nature of revivor. The facts upon which the motion is based may be contested.[19] Whether the motion is made within a reasonable time is a question for the trial court, and its determination will rarely be reversed on appeal.[20] Though the statute is in terms permissive, and not mandatory, the court is not at liberty to exercise an arbitrary discretion, but in case of death, at least of the plaintiff, where the action cannot otherwise proceed, substitution should always be allowed unless good cause is shown to the contrary.[21] In the case of the death of a plaintiff his executor or administrator is ordinarily substituted as a matter of course.[22] A foreign administrator may be substituted.[23] The term "representative" as used in the statute includes not only executors and administrators, but also all who occupy the position held by the decedent, succeeding to his rights and liabilities.[24] In an action on a joint and several contract, if one of the defendants dies, the action may be continued against the survivor without joining the representative of the deceased defendant.[25] Where one of two joint parties on the same side of a contract dies, the survivor may maintain an action without having the representative of the decedent substituted.[26]

7332. Who may object—A stranger to an action cannot object to a substitution of parties.[27]

PARTITION

Cross-References

See Executors and Administrators, 3626, 3659.

7333. Nature of action—The statutory action for partition is of an equitable nature, and is governed by the rules of pleading, practice, and evidence applicable to an ordinary civil action.[28] It is an action in rem.[29]

7334. When action lies—The statute prescribes when an action for partition will lie.[30] It will lie between tenants in common though the land is in possession of their tenants for a term of years.[31] It is not essential that the land be held or claimed adversely to the plaintiff.[32] It will lie for a partition of the reversion, though the land is in possession, under an outstanding particular estate.[33] It will not lie against one who is only tenant for life of the

[18] R. L. 1905 § 4064.

[19] Landis v. Olds, 9-90(79); Lough v. Pitman, 25-120; Willoughby v. St. P. etc. Co., 80-432, 83+377. See, under former statutes, Lee v. O'Shaughnessy, 20-173 (157).

[20] Willoughby v. St. P. etc. Co., 80-432, 83+377; St. Paul etc. Ry. v. Eckel, 82-278, 84+1008; Hunt v. O'Leary, 78-281, 80+1120. See Waite v. Coaracy, 45-159, 47+537; Boeing v. McKinley, 44-392, 46+766. See, under former statute, Stocking v. Hanson, 22-542; Lee v. O'Shaughnessy, 20-173(157).

[21] Landis v. Olds, 9-90(79).

[22] Id.; Stocking v. Hanson, 22-542; Jordan v. Secombe, 33-220, 224, 22+383; Brown v. Brown, 35-191, 28+238; Cooper v. St. P. C. Ry., 55-134, 56+588.

[23] Brown v. Brown, 35-191, 28+238.

[24] Willoughby v St. P. etc. Co., 80-432, 83+377.

[25] Lanier v. Irvine, 24-116.

[26] Hedderly v. Downs, 31-183, 17+274; Northness v. Hillestad, 87-304, 91+1112.

[27] Hunt v. O'Leary, 78-281, 80+1120.

[28] McArthur v. Clark, 86-165, 90+369.

[29] D'Autremont v. Anderson, 104-165, 116+357.

[30] R. L. 1905 § 4392. See Horton v. Maffitt, 14-289(216); Bell v. Dangerfield, 26-307, 3+698; Keith v. Mellenthin, 92-527, 100+366.

[31] Cook v. Webb, 19-167(129).

[32] Bonham v. Weymouth, 39-92, 38+805.

[33] Smalley v. Isaacson, 40-450, 42+352.

whole property.[34] But where the life estate extends only to a part of the land, an actual partition or sale thereof may be had, though it affects the life estate.[35]

7335. Issues triable—The whole matter of title, and of the rights of the parties in the premises, may be determined, and a partition ordered, if the plaintiff shows himself seized of the requisite title, whether the land is held or claimed adversely to him or not.[36]

7336. Basis of partition—Relative qualities and quantities—The statute does not require that the parts alloted be of the same average quality. It merely requires that relative qualities and quantities shall be taken into consideration, in order that the value of the allotments may be in proportion to the respective interests of the parties in the whole property.[37]

7337. Summons—The form and service of summons is prescribed by statute.[38]

7338. Pleading—The general rules of pleading applicable to ordinary civil actions apply to the statutory action for partition.[39] The requisites of a complaint are prescribed by statute.[40]

7339. Conflicting claims of defendants not a defence—Under the statute, the plaintiff may be allowed judgment alloting him the share he is entitled to, without waiting for a determination of the conflicting claims of owners of other undivided interests. And the court by its judgment may cause the portions or shares in dispute to be alloted to the defendants claiming such undivided shares, without determining their respective rights thereto.[41]

7340. Waiver or suspension of right—A right to partition may be waived or suspended for a limited time by agreement of the parties in interest.[42]

7341. Reimbursement for repairs—Where one cotenant leases his moiety to the other, the tenant under the lease cannot, in an action for partition, charge his landlord for repairs made during the tenancy, in the absence of a special agreement for compensation.[43]

7342. Costs, charges, and disbursements—Attorney's fees—Provision is made for an apportionment of the costs, charges, and disbursements.[44] The allowance of attorney's fees rests in the discretion of the court.[45]

7343. Sale—A sale of the land may be had if it appears that a partition would work great prejudice to the owners.[46] Provision is made by statute for satisfying liens.[47] A sale for a grossly inadequate price may be set aside.[48]

[34] R. L. 1905 § 4399; Smalley v. Isaacson, 40–450, 42+352.

[35] Hanson v. Ingwaldson, 77–533, 80+702.

[36] Bonham v. Weymouth, 39–92, 38+805. See, as to the adjustment of rights of creditors, Keith v. Mellenthin, 92–527, 100+366. See, as to the practice of courts of equity, Howe v. Spalding, 50–157, 52+527.

[37] R. L. 1905 § 4397; La Motte v. Mohr, 78–127, 80+850.

[38] R. L. 1905 § 4393; Martin v. Parker, 14–13(1) (necessity of addressing to unknown persons); Welch v. Marks, 39–481, 40+611 (service by publication—opening default); D'Autremont v. Anderson, 104–165, 116+357 (service by publication—wrong initial of middle name fatal).

[39] McArthur v. Clark, 86–165, 90+369 (general allegation of ownership sufficient to admit proof of any legal title—title by adverse possession admissible under general denial); Smalley v. Isaacson, 40–450, 42+352 (sham denial of knowledge or information).

[40] R. L. 1905 § 4394; Martin v. Parker, 14–13(1); Bell v. Dangerfield, 26–307, 3+698; Hennes v. Huston, 93–334, 101+1133.

[41] Howe v. Spalding, 50–157, 52+527.

[42] Roberts v. Wallace, 100–359, 111+289.

[43] Schmidt v. Constans, 82–347, 85+173.

[44] R. L. 1905 § 4401.

[45] Hanson v. Ingwaldson, 84–346, 87+915.

[46] R. L. 1905 §§ 4392, 4405; Fritz v. Ramspott, 76–489, 79+520; Hennes v. Huston, 93–334, 101+1133.

[47] R. L. 1905 § 4406; Johnson v. Avery, 56–12, 57+217. See Fritz v. Ramspott, 76–489, 79+520.

[48] Johnson v. Avery, 56–12, 57+217; Johnson v. Avery, 60–262, 62+283.

7344. Evidence—Sufficiency—Cases are cited below involving the sufficiency of evidence to justify particular findings.[49]

7345. Final judgment—Appeal—The final judgment is that provided in R. L. 1905 § 4398, and on an appeal therefrom the judgment provided for in R. L. 1905 § 4395 may be reviewed.[50]

PARTITION FENCES—See Fences, 3755.

[49] Dawson v. Mayall, 45–408, 48+12; McGovern v. McGovern, 84–143, 86+1102; Cook v. Koochiching Co., 99–472, 109+1120.

[50] Dobberstein v. Murphy, 44–526, 47+171.

PARTNERSHIP

Cross-References

See Bankruptcy, 742; Bills and Notes, 890, 971; Corporations, 2012; Execution, 3517; Exemptions, 3693; Insolvency, 4556, 4557, 4636; Parties, 7320.

IN GENERAL

7346. What constitutes—Partnership is a contractual relation existing between persons who have combined their property, labor, and skill, in an enterprise or business, as principals, for the purpose of joint profit. There are no arbitrary tests by which to determine whether a partnership exists. The intention of the parties controls, but the question is not whether they intended

to form a partnership, but whether they intended to combine their property, labor and skill in an enterprise or business, as principals, for the purpose of joint profit.[51] Formerly a sharing of profits was deemed conclusive evidence of a partnership.[52] Now it is regarded as only prima facie evidence of a partnership. Persons are not liable as partners to third persons, though they share the profits of a business, unless the business is carried on by themselves personally, or by others as their real or ostensible agents.[53] One may be a partner in a business, or in the profits arising from it, without being partner or part owner in the property with which it is carried on.[54] A joint stock company may be a partnership.[55] It is essential that the joint enterprise be for gain or profit—in other words, that there be a business enterprise.[56] One may be estopped to deny that he is a partner as against the other partners.[57] The owners of a vessel, though tenants in common, may run it as a partnership.[58]

7347. Not a person or entity—A firm has no legal existence distinct from the partners composing it—it is not a person,[59] or distinct legal entity.[60]

7348. Partnership by estoppel or holding out—Persons not partners inter se may render themselves liable as such, as to third persons, by holding themselves out to be partners; and, on the principle of estoppel, this may be by words spoken or written, or by conduct leading to the belief that they are partners.[61] The person seeking to enforce such a liability must have acted in reliance on such holding out.[62] Parties are held prima facie to be partners

[51] McDonald v. Campbell, 96–87, 104+760; McAlpine v. Millen, 104–289, 116+583; Russell v. Minn. Outfit, 1–162(136); Penn. Ins. Co. v. Murphy, 5–36(22); Bidwell v. Madison, 10–13(1); McMahon v. Davidson, 12–357(232); Wright v. Davidson, 13–449(415); Wood v. Cullen, 13–394(365); McCarthy v. Nash, 14–127(95); Connolly v. Davidson, 15–519(428); Warner v. Myrick, 16–91(81); Clonan v. Thornton, 21–380; Delaney v. Dutcher, 23–373; Hankey v. Becht, 25–212; Holbrook v. St. Paul etc. Co., 25–229; Miles v. Wann, 27–56, 6+417; French v. Donohue, 29–111, 12+354; Bohrer v. Drake, 33–408, 23+840; King v. Remington, 36–15, 29+352; Cirkel v. Croswell, 36–323, 31+513; Stern v. Harris, 40–209, 41+1036; Newell v. Cochran, 41–374, 43+84; Bergh v. Sloan, 53–116, 54+943; Thompson v. Johnson, 55–515, 57+223; Met. T. Co. v. Northern T. Co., 61–462, 63+1030; Baldwin v. Eddy, 64–425, 67+349; McKasy v. Huber, 65–9, 67+650; Rosenbaum v. Howard, 69–41, 71+823; Messenger v. St. P. C. Ry., 77–34, 79+583; State v. U. S. Ex. Co., 81–87, 83+465; Baremore v. Selover, 100–23, 110+66; Treacy v. Power, 103–212, 114+760; Diamond R. Co. v. Hans, 105–249, 117+504; Pure Oil Co. v. Mainguy, 105–522, 117+504; Stoakes v. Larson, 108–234, 121+1112. In the following cases persons were held not partners: Moody v. Rathburn, 7–89(58); Fay v. Davidson, 13–523(491); Delaney v. Timberlake, 23–383; Wass v. Atwater, 33–83, 22+8; Johnson v. Corser, 34–355, 25+799; Nesbitt v. Robbins, 34–380, 25+802; Smith v. Barclay, 49–365, 51+1166; Lynch v. Hillstrom, 64–521, 67+636.

[52] Warner v. Myrick, 16–91(81); Connolly v. Davidson, 15–519(428); Wright v. Davidson, 13–449(415); Fay v. Davidson, 13–523(491); McDonald v. Campbell, 96–87, 104+760.

[53] McDonald v. Campbell, 96–87, 104+760. See Connolly v. Davidson, 15–519(428, 439).

[54] Hankey v. Becht, 25–212; Moody v. Rathburn, 7–89(58).

[55] State v. U. S. Ex. Co., 81–87, 83+465.

[56] Johnson v. Corser, 34–355, 360, 25+799; St. Paul Typo. v. St. Paul B. Union, 94–351, 359, 102+725.

[57] Tyler v. Omeis, 76–537, 79+528.

[58] Russell v. Minn. Outfit, 1–162(136).

[59] Morrison v. Mendenhall, 18–232(212, 221); Tidd v. Rines, 26–201, 2+497.

[60] Stephens v. Olson, 62–295, 297, 64+898; Hawkins v. Mahoney, 71–155, 166, 73+720; State v. U. S. Ex. Co., 81–87, 90, 83+465. There is a tendency to treat a partnership as an entity under the present bankruptcy act. See Loomis v. Wallblom, 94–392, 396, 102+1114; 20 Harv. L. Rev. 589. In the business world a firm is generally treated as an entity and there is no good reason why the law should not conform to business usage. See 22 Harv. L. Rev. 393.

[61] Cirkel v. Croswell, 36–323, 31+513; Wood v. Cullen, 13–394(365); Connolly v. Davidson, 15–519(428, 439); Pence v. Arbuckle, 22–417, 422; Delaney v. Dutcher, 23–373; Coleman v. Pearce, 26–123, 1+846.

[62] Brown v. Grant, 39–404, 40+268.

as to creditors, upon slighter proof than is necessary to establish that relation among themselves. Evidence of representations, conduct, and circumstances calculated to induce the belief in the existence of a partnership is admissible, and ordinarily the question is for the jury.[63] Evidence held insufficient to give rise to an estoppel.[64]

7349. Evidence of partnership—The fact of a partnership and who compose it may be proved by oral evidence, though there are written articles.[65] A partner may testify as to who compose the firm.[66] The fact that a person is a partner may be proved by his admissions.[67] The declarations of one person that another not present is his partner is not competent evidence of the fact except against the declarant,[68] or to show notice or knowledge of a holding out.[69] That parties hold themselves out and do business as partners is prima facie evidence that they are such.[70] Entries in the account books of a firm are not evidence against a person to show that he was a member of the firm, unless accompanied by other evidence tending to show that he had knowledge of such entries and assented thereto, expressly or impliedly.[71] The fact of sharing the profits of a firm is strong evidence of membership therein.[72] Cases are cited below involving unimportant rulings as to evidence of partnership.[73]

THE CONTRACT

7350. Necessity—Partnership relations must always be assumed by mutual consent and unanimously, for they are strictly voluntary and personal. A third person cannot be introduced into a firm as a partner without or against the consent of a single member.[74]

7351. Executory—Persons who have entered into a contract to become partners at some future time, or upon the happening of some future contingency, do not become partners until the agreed time has arrived or the contingency has happened. The relation does not arise until the partnership is actually launched.[75]

7352. Execution—Law and fact—Whether parties executed a certain contract for a partnership has been held a question of fact for the jury.[76]

7353. Delivery—Escrow—Where the parties signed an instrument embodying the terms of a proposed commercial partnership for five years, with the understanding that it should not operate as a present contract, but should become such only upon the fulfilment of certain conditions, and for that reason the instrument was retained by the scrivener who drafted it, it was held, that there was no delivery of the instrument, and hence no contract.[77]

7354. Estoppel—A person may be estopped from denying that he executed a contract of partnership.[78]

7355. Parol evidence—The parol evidence rule applies to partnership agreements.[79]

[63] Rosenbaum v. Howard, 69–41, 71+823.
[64] Wolter v. Pfeiffer, 92–247, 99+1134.
[65] McEvoy v. Bock, 37–402, 34+740.
[66] Gates v. Manny, 14–21(13); Rosenbaum v. Howard, 69–41, 71+823. See Marvin v. Dutcher, 26–391, 4+685.
[67] Tozer v. Hershey, 15–257(197, 202); McDonald v. Campbell, 96–87, 104+760.
[68] Sullivan v. Murphy, 23–6; McNamara v. Eustis, 46–311, 48+1123; Boosalis v. Stevenson, 62–193, 64+380; McDonald v. Campbell, 96–87, 104+760.
[69] Brown v. Grant, 39–404, 40+268.
[70] McCarthy v. Nash, 14–127(95).
[71] Rosenbaum v. Howard, 69–41, 71+823.
[72] See § 7346.
[73] Couch v. Steele, 63–504, 65+946; Van Brunt v. Greaves, 32–68, 19+345.
[74] Dow v. State Bank, 88–355, 361, 93+121.
[75] Dow v. State Bank, 88–355, 93+121; Hill v. Webb, 43–545, 45+1133.
[76] McKasy v. Huber, 65–9, 67+650.
[77] Hill v. Webb, 43–545, 45+1133.
[78] Tyler v. Omeis, 76–537, 79+528.
[79] McAlpine v. Millen, 104–289, 116+583. See Keough v. McNitt, 6–513(357).

7356. Stranger—A stranger to a contract of partnership has been held not entitled to enforce its stipulations.[80]

7357. Particular contracts construed—Cases are cited below involving the construction of particular partnership contracts.[81]

POWER OF PARTNER TO BIND FIRM

7358. In general—The act of one partner does not bind the others unless it was within his actual or implied authority.[82] The liability of one partner for the acts of another is but the liability of a principal for the acts of an agent.[83] Each partner is an agent for the others as to all matters pertaining to the firm business.[84] If the contract of partnership is silent, or the party with whom the dealing has taken place has no notice of its limitations, the authority for each transaction may be implied from the nature of the business, according to the usual and ordinary course in which it is carried on by those engaged in it, in the locality which is its seat, or as reasonably necessary or fit for its successful prosecution. If it cannot be found in that, it may still be inferred from the actual, though exceptional, course and conduct of the business of the partnership itself, as personally carried on, with the knowledge, actual or presumed, of the partner sought to be charged.[85]

7359. Restrictive agreements—Partners may by agreement restrict the power of any one of them, and no act done in contravention of such agreement will bind the firm as to persons with notice.[86]

7360. Matters foreign to firm business—One partner is not bound by the acts of another outside the scope of the firm business, unless they were authorized or assented to by him. The person seeking to charge him for such acts has the burden of proving such authority or assent.[87]

7361. Notice of scope of business—Persons dealing with a firm are chargeable with notice of the scope of its business, and the consequent limit to the implied power of a partner to bind the firm.[88]

7362. Notice to one notice to all—Notice to one partner as to matters within the scope of the partnership is notice to all.[89]

7363. To borrow money and execute negotiable paper—A partner in a trading partnership has implied power to borrow money and execute the firm note therefor. In the case of non-trading firms such power may be implied from the nature of the business, according to the usual course in which it is carried on; or, if it cannot be found in that, it may still be inferred from the actual, though exceptional, course and conduct, of the business of the firm itself, as personally carried on, with the knowledge, actual or presumed, of

[80] Greenwood v. Sheldon, 31-254, 17+478.

[81] Gaslin v. Pinney, 23-26 (limitation of power to sign firm name to notes, etc.); Brandt v. Edwards, 91-505, 98+647 (compensation of partner); Crawford v. Vennum, 100-549, 111+1132 (right to purchase partner's interest); Morrison v. Mendenhall, 18-232(212) (articles held to authorize partner to execute assignments of mortgages belonging to firm).

[82] First Nat. Bank v. Stadden, 103-403, 115+198.

[83] Connolly v. Davidson, 15-519(428, 438); Vetsch v. Neiss, 66-459, 462, 69+315.

(108); Deakin v. Underwood, 37-98, 101,

[84] Selden v. Bank of Commerce, 3-166 23+318; Flarsheim v. Brestrup, 43-298, 45+438; Wilson v. Richards, 28-337, 344, 9+872; Bank of Com. v. Selden, 3-155 (99); Irvine v. Myers, 4-229(164).

[85] Vetsch v. Neiss, 66-459, 69+315.

[86] Wilson v. Richards, 28-337, 9+872; Selden v. Bank of Com., 3-166(108). See Gaslin v. Pinney, 23-26.

[87] Irvine v. Myers, 4-229(164); Bank of Com. v. Selden, 3-155(99); Selden v. Bank of Com., 3-166(108); Osborne v. Stone, 30-25, 13+922; Van Dyke v. Seelye, 49-557, 52+215, and cases under § 7368.

[88] Maurin v. Lyon, 69-257, 261, 72+72.

[89] King v. Remington, 36-15, 29+352. See Robertson v. Anderson, 96-527, 105+ 972.

the partner sought to be charged. It is ordinarily a question of fact for the jury. The fact that the money borrowed is actually used for the benefit of the firm is not decisive.[90]

7364. Borrowing money to form partnership—Borrowing money to enable the parties to form a partnership is not a partnership transaction.[91]

7365. Use of borrowed money by firm—If a partner borrows money on his own account and credit, the firm is not liable therefor, though it is used for firm purposes.[92]

7366. Misappropriation of borrowed money—If a partner borrows money for his firm the liability of the firm is unaffected by the fact that the partner afterwards misappropriates the money.[93]

7367. Held to have implied power—To insure the firm property;[94] to mortgage firm property for a firm debt;[95] to renew the firm indorsement of a note;[96] to employ a servant;[97] to render an account;[98] to confirm an application of payments;[99] to accept in the firm name a bill drawn against the firm;[1] to dispose of the firm property;[2] to collect firm debts.[3]

7368. Held not to have implied power—To guarantee the debt of a third person;[4] to bind the firm or apply its property to satisfy his individual debts;[5] to accept in his individual name a bill drawn against the firm;[6] to assign all the firm property for the benefit of creditors;[7] to publish a libel;[8] to submit a firm controversy to arbitration;[9] to give a firm note for a firm debt which the partner had promised the other partners to pay;[10] to execute firm notes or bills for the accommodation of, or as surety for, a third person;[11] to purchase wheat for speculative purposes.[12]

7369. To execute power—If a person delegates authority to a firm it is an appointment of the firm as his agent, and not of the individual members as his several and separate agents. Hence each partner may execute the power and the act of one is the act of all.[13]

7370. Torts—All the partners are liable for a tort committed by a partner in the course of the firm business.[14]

[90] First Nat. Bank v. Stadden, 103–403, 115+198; Vetsch v. Neiss, 66–459, 69+315. See, as to firm paper generally, Gaslin v. Pinney, 23–26; Wilson v. Richards, 28–337, 9+872; Leithauser v. Baumeister, 47–151, 49+660; Bank of Com. v. Selden, 3–155(99); Selden v. Bank of Com., 3–166(108); Van Dyke v. Seelye, 49–557, 52+215; Osborne v. Stone, 30–25, 13+922.

[91] Metzner v. Baldwin, 11–150(92).

[92] Nat. Bank of Com. v. Meader, 40–325, 41+1043.

[93] Nat. Bank of Com. v. Meader, 40–325, 41+1043.

[94] Penn. Ins. Co. v. Murphy, 5–36(22).

[95] Chittenden v. German-Am. Bank, 27–143, 6+773.

[96] Wilson v. Richards, 28–337, 9+872.

[97] Sterling v. Bock, 40–11, 41+236. See Stoakes v. Larson, 108–234, 121+1112.

[98] Milwaukee H. Co. v. Finnegan, 43–183, 45+9.

[99] Flarsheim v. Brestrup, 43–298, 45+438.

[1] Heenan v. Nash, 8–407(363).

[2] Russell v. Minn. Outfit, 1–162(136, 141). See Barbieri v. Messner, 106–102, 118+258.

[3] Barrett v. McKenzie, 24–20, 24.

[4] Selden v. Bank of Com., 3–166(108); Osborne v. Stone, 30–25, 13+922; Osborne v. Thompson, 35–229, 28+260.

[5] Bank of Com. v. Selden, 3–155(99); Selden v. Bank of Com., 3–166(108); Hinds v. Backus, 45–170, 47+655; Farwell v. St. Paul T. Co., 45–495, 48+326; Davis v. Smith, 27–390, 7+731. See Wilson v. Richards, 28–337, 343, 9+872; Davis v. Smith, 29–201, 12+531.

[6] Heenan v. Nash, 8–407(363).

[7] Stein v. La Dow, 13–412(381).

[8] Woodling v. Knickerbocker, 31–268, 17+387.

[9] Walker v. Bean, 34–427, 26+232.

[10] Leithauser v. Baumeister, 47–151, 49+660.

[11] Van Dyke v. Seelye, 49–557, 52+215. See Note, 31 Am. St. Rep. 754.

[12] Maurin v. Lyon, 69–257, 72+72.

[13] Deakin v. Underwood, 37–98, 33+318.

[14] Vanderburgh v. Bassett, 4–242(171) (conversion); Coleman v. Pearce, 26–123, 1+846 (fraud); Berkey v. Judd, 22–287 (fraud); Whittaker v. Collins, 34–299, 25+632 (negligence); Woodling v. Knickerbocker, 31–268, 17+387 (libel).

7371. Ratification—An unauthorized act of a partner may be ratified by the other partners so as to bind them.[15]

7372. After dissolution—After the dissolution of a firm the acts or admissions of one partner are not admissible against his former partners unless assented to or authorized by them.[16]

7373. Liability of new partner or firm—A person becoming a member of an existing firm, or forming a partnership with another in the latter's existing business, does not thereby become liable for the debts already incurred, nor does the new firm become liable for them. An agreement, express or implied, is necessary to create such liability, not only between the creditors and the new firm, but also between the partners. The presumption is against the assumption of such liability, and the burden of proving it is on him who asserts it.[17] A new firm may expressly contract to assume the liabilities of the old firm,[18] and an action will lie on such contract by a creditor of the old firm.[19]

RIGHTS AND LIABILITIES INTER SE

7374. Duty to observe good faith—It is the duty of partners to observe the utmost good faith toward one another in all their transactions. The relation between them is fiduciary. A partner has no right to obtain any secret or private advantage from a firm transaction, and if he does, he is chargeable as a trustee for the other partners.[20] Before acting for the firm upon an important and unusual matter a partner should consult the other partners, if practicable.[21] Where there are more than two partners one of them cannot convey or release to another valuable firm property without the knowledge or consent of the others.[22] Persons negotiating for a partnership are bound by the same rules of good faith as actual partners.[23]

7375. Duty to use care—A partner is responsible to his partners for a failure to take reasonable care of the firm property.[24]

7376. Duty and right to know firm affairs—A partner has a right to know all the facts of the firm business, and he is chargeable with notice thereof.[25]

7377. Right to share profits—A right to share in the profits does not depend on express agreement. It is implied in the fact of partnership.[26]

7378. Obligation to share losses—An obligation to share losses is one of the ordinary incidents of a partnership. It is implied in the absence of agreement.[27]

7379. Management of business—The management of the business, including the extent to which the several partners shall participate, is a matter which

[15] Stein v. La Dow, 13-412(381); First Nat. Bank v. Parsons, 19-289(246); Sterling v. Bock, 40-11, 41+236; Van Dyke v. Seelye, 49-557, 52+215; Stanek v. Libera, 73-171, 75+1124.

[16] First Nat. Bank v. Strait, 65-162, 67+987; Nat. Bank of Com. v. Meader, 40-325, 41+1043; Whitney v. Reese, 11-138 (87); Bryant v. Lord, 19-396(342). See § 3411.

[17] Mattison v. Farnham, 44-95, 46+347. See Moran v. Small, 68-101, 70+850.

[18] Clark v. Lindeke, 43-463, 45+863.

[19] Maxfield v. Schwartz, 43-221, 45+429.

[20] Hodge v. Twitchell, 33-389, 23+547; King v. Remington, 36-15, 29+352; Newell v. Cochran, 41-374, 43+84; Yorks v. Tozer, 59-78, 60+846; Hardin v. Jamison, 60-348, 62+394; Bloom v. Lofgren, 64-1, 65+960; Shackleton v. Kneisley, 48-451, 51+470; Stitt v. Rat Portage L. Co., 98-52, 107+824; Church v. Odell, 100-98, 110+346; Treat v. Kellogg, 104-54, 115+947; McAlpine v. Millen, 104-289, 116+583. See Stanek v. Libera, 73-171, 75+1124.

[21] Yorks v. Tozer, 59-78, 60+846.

[22] Hardin v. Jamison, 60-348, 62+394.

[23] Bloom v. Lofgren, 64-1, 65+960.

[24] Bohrer v. Drake, 33-408, 23+840.

[25] Coleman v. Pearce, 26-123, 130, 1+846.

[26] Fountain v. Menard, 53-443, 55+601; Rosenbaum v. Howard, 69-41, 71+823; Baremore v. Selover, 100-23, 110+66.

[27] Baremore v. Selover, 100-23, 110+66; McAlpine v. Millen, 104-289, 116+583.

may be regulated by agreement. A single partner may be invested with the exclusive management.[28]

7380. Partner in exclusive management—A partner who is in exclusive control and management of the firm business is charged with some duties in addition to those which arise out of the partnership relation.[29]

FIRM PROPERTY

7381. Partner's interest—The interest which each partner has in the assets is his distributive share after all the debts of the firm have been paid. Each partner has a lien on the firm property to the end that he may insist on its being applied to the payment of the firm debts. In other words, firm property is held by the partners subject to a trust for the payment of the firm debts.[30] The interest of a partner is subject to levy and sale on execution,[31] and he may sell or assign it. The purchaser does not become a partner in the firm by virtue of his purchase, but a tenant in common with the other partner or partners. He cannot interfere with the right of the other partners to settle up the firm affairs.[32] A partner has no separate property in the firm claims; he owns them jointly with the other members.[33]

7382. Realty as a firm asset—The realty of a partnership is regarded as personalty for partnership purposes, so far as the statute of frauds and the technical rules of conveyancing will permit. It is a firm asset subject to the same liabilities as other firm property. The partners holding the legal title are trustees for the partnership and the other partners.[34] Whether realty is to be regarded as a firm asset depends on the agreement and intention of the parties, express or implied. This is a matter of inference and evidence, and may be proved by parol.[35] If firm property is traced into the hands and possession of a partner the burden is on him to show why it should not be treated as a firm asset.[36] Partnership realty is not subject to inheritance or to the statutory interest of a wife until it has performed all its functions to the partnership. During the continuance of the partnership the parties may sell or mortgage the firm realty without their wives joining.[37] If firm realty held by individual partners is sold to a bona fide purchaser it will cease to be a firm asset.[38] Firm realty may be sold to satisfy firm obligations and the holder of the legal title may be compelled to execute a conveyance.[39] An assignment of firm property for the benefit of creditors includes firm realty and the assignee or purchaser can compel a conveyance of the legal title from the holder thereof.[40] Realty owned by partners may be used in the business without becoming firm property.[41]

[28] McAlpine v. Millen, 104–289, 116+583.
[29] Id.
[30] Schalck v. Harmon, 6–265(176); Arnold v. Wainwright, 6–358(241, 253); Pease v. Rush, 2–107(89, 92); Palmer v. Tyler, 15–106(81); Barrett v. McKenzie, 24–20, 24; Thorpe v. Pennock, 99–22, 108+940.
[31] See § 3510.
[32] Schalck v. Harmon, 6–265(176).
[33] Day v. McQuillan, 13–205(192).
[34] Arnold v. Wainwright, 6–358(241); Sherwood v. St. P. etc. Ry., 21–127; Churchill v. Proctor, 31–129, 134, 16+694; Brown v. Morrill, 45–483, 490, 48+328; Hardin v. Jamison, 60–348, 62+394; Masterman v. Lumbermen's Nat. Bank, 61–299, 63+723; Barton v. Lovejoy, 56–380, 57+935; Woodward v. Nudd, 58–236, 59+1010; Fountain v. Menard, 53–443, 55+601; Hanson v. Metcalf, 46–25, 48+441; Stitt v. Rat Portage L. Co., 98–52, 107+824. See 23 Harv. L. Rev. 553.
[35] Brown v. Morrill, 45–483, 490, 48+328; Sherwood v. St. P. etc. Ry., 21–127; Arnold v. Wainwright, 6–358(241).
[36] Hardin v. Jamison, 60–348, 62+394.
[37] Woodward v. Nudd, 58–236, 59+1010.
[38] Arnold v. Wainwright, 6–358(241).
[39] Barton v. Lovejoy, 56–380, 57+935.
[40] Hanson v. Metcalf, 46–25, 48+441.
[41] Moody v. Rathburn, 7–89(58).

7383. Effect of conveyance to partnership—A conveyance to a partnership is properly made to the individual members thereof.[42] A partnership, as such, cannot take and hold the legal title to realty. If a conveyance is made to a partnership in the firm name the grantor will hold the legal title in trust for the members of the firm.[43] A conveyance to a partnership in the firm name vests the legal title in those members of the firm who are designated in the firm name.[44] The words "doing business under the firm name," etc. in a conveyance to the members of a firm have been held descriptio personarum.[45]

7384. Application to payment of firm debts—The right to have firm property applied to the payment of firm debts is a right which each partner has against the other partners. It may be terminated by agreement, or by a good-faith sale and transfer of the firm property. Partnership creditors have no lien upon the firm property. But firm creditors may be subrogated to the rights of the partners to have the property of the partnership applied to the payment of firm debts before it is used to pay the individual debts of the partners or otherwise improperly disposed of. This right of the creditors ceases, however, when the rights of the partners against each other are lost by the disposition of the property. The members of a partnership have the right to dispose of the property of the firm, and thus destroy this equity of creditors. But the rights of creditors cannot be defeated by the sale of firm property which is made for the purpose of defrauding the creditors.[46]

7385. Transfer of firm property—Partnerships, like individuals, possess the jus disponendi.[47] A cause of action for negligence has been held property and included in a transfer of all the firm property to one of the partners on dissolution.[48]

7386. Assignment—A firm may assign to a third person a claim held by the firm against one of its members, and the assignee may sue in his own name.[49]

7387. Conversion to firm purposes—A quantity of lumber has been held converted to firm purposes with the implied consent of all the partners.[50]

DISSOLUTION

7388. What effects—A firm is dissolved by the death of one of the partners;[51] by an assignment for the benefit of creditors;[52] by a completion of the undertaking for which it was formed;[53] by the efflux of the time for which it was formed;[54] and by the voluntary act of a partner, the partnership being at will.[55]

7389. Contracts for dissolution—Construction—Cases are cited below involving the construction of particular contracts for the dissolution of partnerships.[56]

[42] Morrison v. Mendenhall, 18–232(212, 221).

[43] Tidd v. Rines, 26–201, 2+497; Baker v. Thompson, 36–314, 31+51. See German L. Assn. v. Scholler, 10–331(260); Morrison v. Mendenhall, 18–232(212).

[44] Gille v. Hunt, 35–357, 29+2; Foster v. Johnson, 39–378, 40+255; Menage v. Burke, 43–211, 45+155; Dwyer v. Whiteman, 92–55, 99+362; Schlag v. Gooding, 98–261, 108+11. See Townshend v. Goodfellow, 40–312, 41+1056.

[45] Morrison v. Mendenhall, 18–232(212).

[46] Thorpe v. Pennock, 99–22, 108+940.

[47] Thorpe v. Pennock, 99–22, 108+940; Morrison v. Mendenhall, 18–232(212).

[48] Blakeley v. Le Duc, 22–476.

[49] Russell v. Minn. Outfit, 1–162(136).

[50] Person v. Wilson, 25–189.

[51] Hoard v. Clum, 31–186, 17+275. See First Nat. Bank v. Strait, 75–396, 78+101; Dow v. State Bank, 88–355, 93+121.

[52] Moody v. Rathburn, 7–89(58, 65).

[53] Bohrer v. Drake, 33–408, 23+840.

[54] Schalck v. Harmon, 6–265(176).

[55] Stitt v. Rat Portage L. Co., 98–52, 107+824.

[56] Rose v. Roberts, 9–119(109) (partner

7390. Voluntary—Partnership at will—Where no definite time is fixed for the continuance of a partnership it is at will, and either party may dissolve it at will.[57]

7391. On death of partner—In the absence of previous agreement to the contrary, the death of a partner works a total dissolution of a partnership; that is to say, a dissolution both as respects the deceased and surviving partners. A simple provision in the articles for the continuance of the partnership for a fixed period is not such an agreement. The right of the surviving partners, and the representatives of the deceased partner, to have the partnership wound up, is absolute.[58]

7392. Liability of retiring partner—A retiring partner is not ordinarily liable for the future acts of his partners, as to persons with notice of his retirement.[59] He is a surety of the other partners who assume the firm debts.[60] He is liable on the old contracts of the firm, unless they are modified by the parties with notice of his retirement.[61]

7393. Liability for debt overlooked—Where, upon a final settlement, it was supposed that all debts of the firm were paid, but one was inadvertently overlooked, and one partner subsequently paid it, he was held entitled to recover one-half of the amount from his partner.[62]

7394. Liability of executor of deceased partner—If an executor of a deceased partner continues the business, with the surviving partner, he is personally liable for the debts of the firm contracted while he so acts, but not for those contracted during the life of the deceased partner.[63]

7395. Notice of dissolution—A retiring partner is liable for the future acts of his partners as to persons who have had dealings with the firm, unless he gives them notice of his retirement or they receive it from another source.[64] As to persons who have had no previous dealings with the firm, but who have known of its existence, a general notice such as a publication in a newspaper is sufficient. No notice of any kind is necessary as regards persons who have had no knowledge of the firm.[65] No particular form of notice is essential.[66] A, an agent of B, acquired knowledge of a firm while previously acting as agent for C. It was held, that B, by reason of such knowledge of A, was entitled to notice of a dissolution of the firm.[67] Whether a principal had notice through his agent has been held a question for the jury.[68]

7396. Powers and duties of surviving partners—On the dissolution of a firm by death the surviving partner settles the affairs of the firm, which is deemed to continue for that purpose. He has the exclusive right to the possession, and control of the firm assets, and power to dispose of them. He

held a purchaser and not a trustee of his copartners); Blakeley v. Le Duc, 22–476 (cause of action held transferred to a partner); Whitaker v. Hesler, 26–73, 1+577 (sale of interest of one partner to another excepting certain accounts); Moon v. Allen, 82–89, 84+654 (stipulation for assumption of firm debts); Brandt v. Edwards, 91–505, 98+647 (right to excess of firm capital); Black v. Berg, 101–9, 111+386 (liability for certain items).

[57] Stitt v. Rat Portage L. Co., 98–52, 107+824.

[58] Hoard v. Clum, 31–186, 17+275.

[59] See § 7395.

[60] Wendlandt v. Sohre, 37–162, 33+700; Leithauser v. Baumeister, 47–151, 49+660; Porter v. Baxter, 71–195, 73+856.

[61] Porter v. Baxter, 71–195, 73+856. See Freeman v. Berkey, 45–438, 48+194.

[62] Wendlandt v. Sohre, 37–162, 33+700.

[63] Mattison v. Farnham, 44–95, 46+347.

[64] Reid v. Frazer, 37–473, 35+269; Davison v. Sherburne, 57–355, 59+316; First Nat. Bank v. Strait, 75–396, 78+101; Robertson v. Anderson, 96–527, 105+972.

[65] Swigert v. Aspden, 52–565, 54+738; Haines v. Starkey, 82–230, 84+910.

[66] Robertson v. Anderson, 96–527, 105+972.

[67] Haines v. Starkey, 82–230, 84+910.

[68] Robertson v. Anderson, 92–527, 105+972.

is a trustee for the creditors, and the heirs or representatives of the deceased partner. He may make an assignment of firm property for the benefit of creditors, and it will pass the equitable title of firm realty in the name of the deceased partner.[69] When necessary to pay firm debts, he may sell firm realty standing in the name of the deceased partner, and the devisees or heirs may be compelled to convey the legal title to the purchaser.[70]

7397. Fraudulent—A dissolution has been held fraudulent and not to release from liability.[71]

7398. Powers of partners in winding up—A partnership is deemed to continue after dissolution for the sole purpose of winding up its affairs. Each partner has full power, unless it is expressly confided to some other person, to pay and collect the debts of the firm or to settle and adjust them, and to do all other acts necessary to wind up the affairs of the firm, and to complete transactions begun but not completed at the time of the dissolution.[72]

7399. Assets—Trust money, held by by one partner, but entered in the firm books, has been held not a firm asset.[73]

7400. Apportionment of premium—If a partner to whom a premium is paid is guilty of misconduct justifying a dissolution the premium may be apportioned and recovered in part, in an action to dissolve.[74]

7401. Distribution of assets—After the firm debts are paid the partners are entitled to have the remaining assets divided among them equally, or otherwise according to agreement.[75] For purposes of distribution the court may convert real into personal property.[76] A debtor of the firm cannot question the distribution.[77] Partners have the right to dissolve the partnership, and divide the property of the firm between them, provided there is no intention of delaying or hindering their creditors in the collection of debts.[78]

7402. Firm capital—Upon dissolution of a firm a partner has been held entitled to an excess of firm capital, contributed by him, with interest as agreed.[79] Capital does not bear interest in the absence of an express agreement, or a usage of the firm to allow it. If allowed at all it ceases at dissolution.[80]

7403. Accounting—In connection with proceedings to dissolve a partnership, each partner is entitled to an account of all firm transactions. An adjustment of the accounts is a necessary condition precedent to a determination of the rights of the parties under the partnership agreement. There are exceptional cases in which no order for an accounting is proper, where the parties have agreed on a settlement, or where the court finding the facts and granting relief has had before it all or sufficient evidence pertaining to the accounts so that its findings operate as an accounting. That, under particular circumstances, it may be difficult to make a true accounting, or that the only statement possible will at best approximate correctness, is no reason for refusing the redress of accounting.[81] Cases are cited below involving the items chargeable on an accounting between partners,[82] the effect of an accounting,[83]

[69] Hanson v. Metcalf, 46–25, 48+441; Brown v. Farnham, 55–27, 35, 56+352.
[70] Barton v. Lovejoy, 56–380, 57+935.
[71] Utley v. Clements, 79–68, 81+739; State v. Clements, 82–434, 85+229; Thorpe v. Pennock, 99–22, 108+940.
[72] Schalck v. Harmon, 6–265(176).
[73] McCarthy v. Donnelly, 90–104, 95+760.
[74] Corcoran v. Sumption, 79–108, 81+761.
[75] Brandt v. Edwards, 91–505, 98+647; Pease v. Rush, 2–107(89).
[76] Fountain v. Menard, 53–443, 55+601.
[77] Pease v. Rush, 2–107(89).
[78] Thorpe v. Pennock, 99–22, 108+940.
[79] Brandt v. Edwards, 91–505, 98+647.
[80] St. Paul T. Co. v. Finch, 52–342, 54+190.
[81] Reis v. Reis, 99–446, 109+997.
[82] Johnson v. Garrett, 23–565 (certain moneys coming into a partner's hands and unaccounted for); Bohrer v. Drake, 33–408, 23+840 (partner held entitled to reimbursement for payment of partner's note given to raise firm capital); St. Paul

fraud in accounting,[84] mistake in accounting,[85] and questions of pleading and practice in actions for an accounting and dissolution.[86]

7404. Receiver—The appointment of a receiver is not an inevitable consequence of a dissolution by a judicial decree. Thus it has been held that ordinarily, unless cause is shown why the business should be taken out of the hands of a partner, he will be allowed to wind up the business because of his experience, and of the saving in expense to the firm, especially when such partner has advanced the capital of the business.[87]

ACTIONS

7405. Between firms with common member—An action will lie by one firm against another having a common member.[88]

7406. Between partners—As a general rule one partner cannot sue another in an action at law on firm accounts.[89]

7407. By partners—Partners may sue in the firm name for a firm debt or for the recovery of firm property, though the interest of one of them therein has been levied on.[90] Partners may join in an action for an injury to the firm credit. Where one partner colludes with a stranger to injure the co-

T. Co. v. Finch, 52–342, 54+190 (interest on capital not ordinarily allowable in absence of agreement); Yorks v. Tozer, 59–78, 60+846 (unnecessary expenses incurred without consultation); Lizee v. Robert, 96–169, 104+836 (partner held improperly charged with certain stock and materials bought for the benefit of the firm). See Lawson v. Viehman, 50–488, 52+967; Rines v. Ferrell, 107–251, 119+1055.

[83] Broderick v. Beaupre, 40–379, 42+83 (annual accountings held not to constitute settlements and not to affect a partner's right to a guaranteed profit).

[84] Berkey v. Judd, 12–52(23); Id., 22–287; McAlpine v. Millen, 104–289, 116+583.

[85] Cobb v. Cole, 44–278, 46+364; Id., 51–48, 52+985.

[86] Chouteau v. Rice, 1–106(83) (supplemental bill sustained); Berkey v. Judd, 12–52(23) (fraud—immaterial allegations properly stricken out); Berkey v. Judd, 14–394(300) (issues triable by court); Palmer v. Tyler, 15–106(81) (action maintainable by partner who has not paid his full share of the capital stock—causes of action properly joined—one to whom a partner has fraudulently conveyed firm property a proper party defendant—receiver—full relief to be awarded); Barron v. Mullin, 21–374 (receiver); Johnson v. Garrett, 23–565 (receiver); McClung v. Capehart, 24–17 (demand before suit unnecessary—limitation of actions); Churchill v. Proctor, 31–129, 16+694 (action maintainable by one who has purchased the interest of a partner—causes of action properly joined); Bausman v. Woodman, 33–512, 24+198 (complaint sustained); Henning v. Raymond, 35–303, 29+132 (receiver); Stern v. Harris, 40–209, 41+1036 (complaint sustained); Shackleton v. Kneisley, 48–451, 51+470 (causes of action properly joined—jurisdiction of district court—complaint sustained—full relief to be granted); Fountain v. Menard, 53–443, 55+601 (complaint sustained); Berlin M. Works v. Security T. Co., 60–161, 61+1131 (receiver); Walsh v. St. Paul etc. Co., 60–397, 62+383 (receiver—full relief to be granted); Masterman v. Lumbermen's Nat. Bank, 61–299, 63+723 (receiver); Corcoran v. Sumption, 79–108, 81+761 (pleading counterclaim for misconduct of plaintiff—unnecessary to allege bringing of action); Betcher v. Betcher, 83–215, 86+1 (jurisdiction of district court—accounting by executor); Gee v. Gee, 84–384, 386, 87+1116 (action held one for an accounting); Shipley v. Bolduc, 93–414, 101+952 (complaint sustained—issues triable by court); Reis v. Reis, 99–446, 109+997 (relief allowable—judgment of dissolution—receiver); Rines v. Ferrell, 107–251, 119+1055 (parol evidence—defences—findings sustained).

[87] Reis v. Reis, 99–446, 109+997. See, as to receivers, Johnson v. Garrett, 23–565; Henning v. Raymond, 35–303, 29+132; Berlin M. Works v. Security T. Co., 60–161, 61+1131; Walsh v. St. Paul etc. Co., 60–397, 62+383; Masterman v. Lumbermen's Nat. Bank, 61–299, 63+723.

[88] Crosby v. Timolat, 50–171, 52+526.

[89] Christopherson v. Olson, 104–330, 116+840. See Russell v. Minn. Outfit, 1–162 (136); Wood v. Cullen, 13–394(365); Cochrane v. Quackenbush, 29–376, 13+154; Bohrer v. Drake, 33–408, 23+840.

[90] Day v. McQuillan, 13–205(192); Barrett v. McKenzie, 24–20; Lane v. Lenfest, 40–375, 42+84.

partners, the latter may maintain a joint action for the injury.[91] Objection that an action is brought in the firm name without specifying the partners is waived by pleading to the merits and going to trial.[92]

7408. Pleading—In actions by or against partners it is not ordinarily necessary to allege partnership.[93] If an instrument sued on is pleaded as having been made to partners, as such, or is executed under an apparent firm name, it may be necessary to allege partnership in order to connect the partners with the instrument.[94] If an allegation of partnership is material it must be proved if denied. It is put in issue by a general denial.[95] If a partnership is alleged and proved the firm name is immaterial and need not be proved though alleged.[96] A complaint against several as partners may be amended by striking out the name of one of the defendants to conform to the proof.[97] A denial that the plaintiffs "were copartners, as alleged in the complaint, or otherwise" has been held to put an allegation of partnership in issue.[98] A failure to allege partnership has been held waived by voluntarily litigating the issues without objection.[99]

LIMITED PARTNERSHIP

7409. Necessity of cash contribution—In the formation of a limited partnership the provisions of the statute must be strictly complied with, and the contribution of the special partner must be in actual cash, otherwise his liability will be that of a general partner.[1]

7410. Capital—Interest—It has been held, under a certain contract of limited partnership, that the capital of plaintiff's intestate was not due and payable on the date of expiration of the term of partnership, but only as the firm assets were realized after dissolution, and after all the liabilities of the firm were paid, and that during such liquidation of the business such capital did not draw interest.[2]

MINING PARTNERSHIP

7411. Special rules governing—Mining partnerships are not governed in all respects by the same rules as other partnerships.[3]

PARTY—See note 4.
PARTY AGGRIEVED—See Probate Court, 7785; and note 5.
PARTY NAMES—See Elections, 2933, 2943.

[91] Cochrane v. Quackenbush, 29-376, 13+154.
[92] French v. Donohue, 29-111, 12+354.
[93] Jaeger v. Hartman, 13-55(50); Birdsall v. Fischer, 17-100(76); Boosalis v. Stevenson, 62-193, 64+380; Dobson v. Hallowell, 53-98, 54+939; Freeman v. Curran, 1-169(144); Hayward v. Grant, 13-165(154). But see, Foerster v. Kirkpatrick, 2-210(171); Irvine v. Myers, 4-229(164); Fetz v. Clark, 7-217(159); Stickney v. Smith, 5-486(390).
[94] See Birdsall v. Fischer, 17-100(76); Hayward v. Grant, 13-165(154); Dessaint v. Elling, 31-287, 17+480.
[95] Fetz v. Clark, 7-217(159); Irvine v. Myers, 4-229(164); McKasy v. Huber, 65-9, 67+650.
[96] Stickney v. Smith, 5-486(390).
[97] Miles v. Wann, 27-56, 6+417.
[98] Dessaint v. Elling, 31-287, 17+480.
[99] Keene v. Masterman, 66-72, 68+771.
[1] In re Allen, 41-430, 43+382.
[2] St. Paul T. Co. v. Finch, 52-342, 54+190.
[3] See Hoard v. Clum, 31-186, 17+275 (duration).
[4] McPheeters v. Ronning, 95-164, 103+889.
[5] Stewart v. Duncan, 40-410, 42+89.

PARTY WALLS

7412. In general—A purchaser with notice of a party-wall agreement has been held bound by the agreement of his grantor to pay one-half the cost of the wall upon using it.[6] A party-wall agreement has been held to create an incumbrance within a covenant against incumbrances.[7] Such an agreement has been held not invalidated by a mutual mistake as to the boundary line.[8] A covenant to pay the value of a part of a party wall when used has been held personal and assignable apart from the land. An heir of the covenantor has been held to take cum onere. A covenant in a party-wall agreement has been held not merged in a lease.[9] Covenants in a party-wall agreement generally run with the land.[10]

7413. Easement—The adjoining owners of a party wall and the land covered by it have each an easement in that portion thereof owned by the other.[11] A party-wall agreement creates an equitable charge, easement, or servitude [12]—cross or reciprocal easements.[13]

7414. Front wall—A front wall, though tied or fastened to a party wall, is no part thereof. Neither of the owners of a party wall has a right to extend his front wall beyond the dividing line.[14]

7415. Ownership—Ordinarily the adjoining owners are not owners in common of a party wall, but each owns in severalty so much of the wall as stands on his own land, subject to an easement or servitude in favor of the other to have it maintained as a party wall.[15]

7416. Contracts construed—Cases are cited below involving the construction of particular party-wall contracts.[16]

PASS—See note 17.
PASSBOOKS—See Banks and Banking, 781; Depositaries, 2704.
PASSENGER ELEVATORS—See Carriers, 1210.
PASSENGERS—See Carriers.
PASSIVE TRUSTS—See Trusts, 9879.
PATENT AMBIGUITIES—See Evidence, 3406; Wills, 10262.
PATENT MEDICINES—See Constitutional Law, 1610.

[6] Warner v. Rogers, 23-34.
[7] Mackey v. Harmon, 34-168, 24+702.
[8] Houghton v. Mendenhall, 50-40, 52+269.
[9] Pillsbury v. Morris, 54-492, 56+170.
[10] First Nat. Bank v. Security Bank, 61-25, 63+264; Kimm v. Griffin, 67-25, 69+634; Nat. Life Ins. Co. v. Lee, 75-157, 77+794. See Note, 82 Am. St. Rep. 679.
[11] Warner v. Rogers, 23-34; Mackey v. Harmon, 34-168, 24+702; Pillsbury v. Morris, 54-492, 498, 56+170; Kimm v. Griffin, 67-25, 69+634.
[12] First Nat. Bank v. Security Bank, 61-25, 29, 63+264. See, upon the subject in general, Note, 89 Am. St. Rep. 924.
[13] Graff v. Buchanan, 46-254, 48+915.
[14] Johnson v. Minn. T. Co., 91-476, 98+321; Stein v. Golden Rule, 108-182, 121+880.
[15] Johnson v. Minn. T. Co., 91-476, 98+321.
[16] Stein v. Berrisford, 108-177, 121+879 (window openings); Stein v. Golden Rule, 108-182, 121+880 (improper extension of shutters and advertising devices beyond dividing line).
[17] Brown v. St. P. etc. Ry., 36-236, 31+941.

PATENTS

Cross-References

See Evidence, 3356 (proof of letters patent); Public Lands, 7908.

7417. Nature—A patent is a mere monopoly or exclusive right to an invention, not existing at common law, but by special grant from the government.[18]

7418. Control of Congress exclusive—A statute regulating the sale of patent rights has been held invalid because interfering with the exclusive control of Congress over the subject-matter.[19]

7419. Jurisdiction—An action to enforce a contract for an interest in a patent has been held within the jurisdiction of the state courts.[20]

7420. Utility—A patent regularly issued is prima facie evidence of the utility and novelty of the device or invention covered by it.[21] A useful invention is one which may be applied to some beneficial use in society, in contradistinction to an invention which is injurious to the morals, the health, or the good order of society. It is unnecessary to establish that the invention is of such general utility as to supersede all other inventions now in practice to accomplish the same purpose. It is sufficient that it has no obnoxious or mischievous tendency, that it may be applied to practical uses, and that, so far as it is applied, it is salutary. If its practical utility is very limited, it will follow that it will be of little or no profit to the inventor; and if it is trifling, it will sink into utter neglect. The law, however, does not look to the degree of utility; it simply requires that it should be capable of use, and that the use be such as sound morals and policy do not discountenance or prohibit.[22]

7421. Novelty—The fact that a particular device or improvement claimed to be a new invention is of practical value and utility over any other may properly be considered on the question of novelty.[23]

7422. Licenses and other contracts—The purchaser of a patented article from the patentee, or other person authorized to sell, ordinarily acquires by his purchase an unrestricted right to use the article. A license may be inferred from the acquiescence of the patentee in the use of the patented article.[24] In order to sustain the defence of want of consideration in a contract for the sale of a patent right it is not enough that its practical utility is limited, or that the patented article cannot be manufactured and sold at a profit, if it is capable of use.[25] Cases are cited below involving the construction of particular contracts relating to patented articles.[26]

7423. Implied contract to pay for use—An action will lie on an implied contract to pay for the use of a patented article. The licensee is estopped to deny the validity of the patent as between the government and the patentee.

[18] Deane v. Hodge, 35–146, 150, 27+917. See State v. Creamery P. M. Co., 126+126.

[19] Crittenden v. White, 23–24. See State v. Creamery P. M. Co., 126+126.

[20] Fuller v. Schutz, 88–372, 93+118. See Roots v. Decker, 127+417.

[21] Deane v. Hodge, 35–146, 27+917.

[22] Wilson v. Hentges, 26–288, 3+338. See Van Norman v. Barbeau, 54–388, 55+1112.

[23] Deane v. Hodge, 35–146, 153, 27+917.

[24] Hankee v. Arundel, 98–219, 108+842.

[25] Wilson v. Hentges, 26–288, 3+338; Van Norman v. Barbeau, 54–388, 55+1112.

[26] Travis v. Hunter, 41–176, 42+1015 (contract for payment of royalty); Root v. Childs, 68–142, 70+1078 (contract assigning a patent right); Mankato M. Co. v. Willard, 94–160, 102+202 (contract to indemnify for loss from the manufacture of a patented article); Myrick v. Purcell, 99–457, 109+995 (contract for sale of interest in patent right).

The measure of damages is a reasonable royalty. If the patent has been used by the licensee only, and there is no established royalty, general evidence as to the value of the use is admissible.[27]

7424. Proof—Proof of letters patent by the original, under the seal of the Patent Office, has been held proper.[28]

7425. Fraud—A patent procured by fraud on the government is void.[29]

PATROL LIMITS—See Intoxicating Liquors, 4905.

PAUPERS

7426. Liability of relatives—The "bad conduct" of a pauper which will relieve a relative from liability for his support under the statute must involve moral delinquency and be the natural and proximate cause of the poverty.[30] Recourse to the liability of relatives is not a condition precedent to an action by one town against another.[31]

7427. Nature of municipal duty—The duty of municipalities to care for the poor is statutory,[32] governmental, or political,[33] and continuing.[34]

7428. Effect of division of town—Upon a division of a town and the creation of an independent municipality from a part of its territory, the settlement of a self-supporting person is in the municipality in which he happens to dwell at the time of such division; but if a person goes from one part of the town to another part, which is afterwards incorporated as a new municipality, and is there continuously supported from the date of his removal until such division as a pauper by the old town, it thereafter continues liable for his support.[35]

7429. Actions between municipalities—If a municipality gives necessary care to a pauper having a legal settlement in another municipality it may recover from the latter its disbursements,[36] and without first having recourse to the relatives of the pauper.[37] The fact that claims were not itemized and certified, when presented to the plaintiff in such an action, is no defence.[38] nor the fact that an application was not properly made to the plaintiff.[39] The notice required by Laws 1903 c. 298 § 1, is not a condition precedent to the right of recovery by a town for expenses incurred in caring for a pauper who is a county charge. Such notice is for the purpose of giving the county authorities an opportunity to examine into the matter and determine whether the county is liable and should assume control of the case.[40]

7430. Settlement—The statute prescribes what shall constitute a settlement.[41] Where a person having a legal settlement in one place removes to

[27] Deane v. Hodge, 35-146, 27+917.
[28] Owsley v. Greenwood, 18-429(386).
[29] Fuller v. Schutz, 88-372, 93+118.
[30] R. L. 1905 § 1485; Mower County v. Robertson, 79-357, 82+666.
[31] Cordova v. Le Sueur Center, 74-515, 77+290, 430.
[32] Robbins v. Homer, 95-201, 103+1023.
[33] Odegaard v. Albert Lea, 33-351, 353, 23+526; Wellcome v. Monticello, 41-136, 140, 42+930.
[34] Wellcome v. Monticello, 41-136, 140, 42+930.
[35] Peterson v. Emardville, 101-24, 111+652.
[36] Lyon County v. Murray County, 29-240, 13+43; Lexington v. Sharon, 74-290, 77+48.
[37] Cordova v. Le Sueur Center, 74-515, 77+290, 430.
[38] Albion v. Maple Lake, 71-503, 74+282.
[39] Cordova v. Le Sueur Center, 78-36, 80+836.
[40] Highland Grove v. Clay County, 101-11, 111+651.
[41] R. L. 1905 § 1488. See, under prior statutes, Lyon County v. Murray County, 29-240, 13+43; Wellcome v. Monticello, 41-136, 42+930; Albion v. Maple Lake, 71-503, 74+282; Louriston v. Swift County, 89-91, 93+1052.

another he may acquire a new settlement in the latter, though at the time of his removal, and thereafter, he was not self-supporting, but was aided or supported by private charity, at least if he has never received public aid in the former place.[42] Cases are cited below involving findings as to settlements of paupers.[43]

7431. Compulsory removal—The statute authorizing the removal of a pauper to the place of his true settlement is constitutional.[44]

7432. Application for relief—The fact that an application for relief was made to a supervisor of a town and not to the board of supervisors has been held not to relieve a town from liability.[45] The fact that an application was not under the oath of two credible persons, as provided by Sp. Laws 1881 c. 221, has been held not a defence to an action between two municipalities.[46] The right of a pauper to assistance in an emergency does not depend upon the prior recognition by the authorities of the fact that he was a pauper; it depends upon the facts themselves.[47]

7433. Employment of physicians—Under G. S. 1866 c. 15 a single county commissioner was not authorized to employ a physician for a pauper.[48] A physician has been held entitled to recover from a town for emergency services to a pauper without express agreement.[49]

7434. Evidence—Admissibility—The direct testimony of a pauper is admissible as to his settlement, but reputation is not. Certain special laws have been held admissible to show that a county was under a town system.[50]

7435. Special acts—Construction—Cases are cited below involving the construction of various special acts relating to paupers.[51]

PAWNBROKERS

Cross-References

See Receiving Stolen Goods, 8267.

7436. Definition—A pawnbroker is a person engaged in the business of loaning money on pawn or pledge.[52]

7437. Regulation—License—In a complaint charging a person with engaging in and conducting the business of pawnbroker without a license, it is unnecessary to state the particular instances where money was loaned on pledge or pawn.[53]

PAYABLE—See note 54.

[42] Cordova v. Le Sueur Center, 78–36, 80+836.

[43] Lexington v. Sharon, 74–290, 77+48; Highland Grove v. Clay County, 101–11, 111+651; Hewitt v. Hubbard County, 103–41, 114+261.

[44] R. L. 1905 § 1500; Lovell v. Seeback, 45–465, 48+23.

[45] Tessier v. Lake Pleasant, 57–145, 58+871.

[46] Cordova v. Le Sueur Center, 78–36, 80+836.

[47] Robbins v. Homer, 100–547, 110+1134.

[48] Benley v. Chisago County, 25–259.

[49] Robbins v. Homer, 95–201, 103+1023; Id., 100–547, 110+1134. See R. L. 1905 § 1501.

[50] Albion v. Maple Lake, 71–503, 74+282.

[51] Fenhold v. Freeborn County, 29–158, 12+458 (Sp. Laws 1875 c. 74 making paupers a town charge in Freeborn county); Odegaard v. Albert Lea, 33–351, 23+526 (id.); Wellcome v. Monticello, 41–136, 42+930 (Sp. Laws 1887 c. 90 making paupers in villages a village charge in Wright county); Pushor v. Morris, 53–325, 55+143 (Laws 1893 c. 249 repealing Sp. Laws 1889 c. 273 relating to the care of the poor in Stevens county); Cordova v. Le Sueur Center, 74–515, 77+290, 430 (Sp. Laws 1881 c. 221 and 1885 c. 71 relating to the care of poor in Le Sueur county).

[52] St. Paul v. Lytle, 69–1, 71+703.

[53] Id.

[54] Easton v. Hyde, 13–90(83).

PAYMENT

Cross-References

See Deposits in Court; Tender; and other specific heads.

IN GENERAL

7438. Definition—The word "payment" is here used in the sense of a delivery and acceptance of money, or its equivalent, in discharge of a pecuniary obligation.[55]

7439. By volunteer—Payment of a debt by a volunteer will discharge the debt if accepted by the creditor as payment.[56] Advantage of a payment by a volunteer cannot be taken by the debtor as a discharge of his debt unless it was intended by the payor and the creditor to operate as a discharge.[57] If A officiously pays the debt of B, he cannot require B to reimburse him, at least if B did not ratify the transaction.[58] If B assents to the payment he is bound by it, and it has the same effect as if made by himself.[59] Where one not the debtor, nor under any legal or moral obligation to pay a debt, agrees to pay, and does pay, a sum less than the whole debt, in consideration of an agreement on the part of the creditor to satisfy and discharge the whole, no action will lie against the debtor to recover the balance of his indebtedness.[60]

7440. To joint obligees—One of two joint obligees to a contract has a right to receive payment thereon, and such payment discharges the obligation, to the amount paid, whether in whole or in part. An obligor has no legal right to pay a third person a sum due to the two joint obligees, without authority from both of them.[61]

7441. Deposit with third party—Revocation—When a debtor delivers to a third person money to pay to his creditor, the relation between the debtor and third person is that of principal and agent, until the creditor assents to the transaction; and, until such assent, the debtor may revoke the intended appropriation. Any disposition by the debtor, such as an assignment for the benefit of creditors, inconsistent with the appropriation first intended, will be a revocation. The assent of the creditor to the deposit with the agent may be presumed when he has knowledge of it, but his knowledge of it will not be presumed.[62]

7442. Out of particular fund—The general rule is that an appropriation of a particular fund to pay a claim, or a promise to pay it out of a particular fund, does not limit the remedy to that fund, but is an absolute covenant to pay, unless there is an express limitation of the liability to the particular fund.[63] When a note or bond is, by its provisions, payable out of a particular fund, and no other provision is made for its payment, the liability to pay it exists only when the fund exists, and to the extent of that fund; but, this rule

[55] See Forrest v. Henry, 33–434, 23+848.

[56] See Schmidt v. Ludwig, 26–85, 1+803; Chairman, Bd. of Health v. Renville County, 89–402, 95+221.

[57] Chairman, Bd. of Health v. Renville County, 89–402, 95+221.

[58] Price v. Doyle, 34–400, 26+14; Edwards v. Hardwood Mfg. Co., 59–178, 60+1097; Rosemond v. N. W. etc. Co., 62–374, 64+925; Bryant v. Nelson, 94–305, 102+859. See Felton v. Bissel, 25–15, 20; Savage v. Madelia F. W. Co., 98–343, 347, 108+296.

[59] Clarkin v. Brown, 80–361, 83+351.

[60] Clark v. Abbott, 53–88, 55+542.

[61] Moore v. Bevier, 60–240, 62+281.

[62] Simonton v. First Nat. Bank, 24–216; Trunkey v. Crosby, 33–464, 23+846.

[63] Langdon v. Northfield, 42–464, 44+984. See Voak v. Nat. Invest. Co., 51–450, 53+708.

does not apply where the mortgage securing the bond provides also another fund out of which the bond is made payable, but in such case the bond is payable out of either or both funds.[64] One who had contracted to pay a specified sum of money "out of the proceeds" of the first article sold of a specified kind becomes at once absolutely liable to make such payment, if in making such sale he includes also other property, a gross and unapportioned price being received for the whole.[65] A covenant by a debtor to pay his creditor out of a designated fund, of which the debtor retains control, when the same is received by him, is a personal covenant only, and cannot be construed either as an equitable assignment of, or a lien on, the fund.[66]

7443. Direction to agent to pay—A direction by the maker of notes, to one acting as his agent, to apply money in his hands to the payment of the notes, the agent holding the notes as the agent of the payee, does not, of itself, constitute or have the effect of such an application of the money.[67]

MEDIUM OF PAYMENT

7444. By promissory note—The giving of a promissory note for an antecedent debt is not an absolute payment of the debt unless it is so agreed. The presumption is that the note is accepted as a conditional payment only,[68] and the effect is to suspend the right of action until the note is due.[69] The acceptance of a note "for," or "on account of," or "in payment of," an existing debt, in the absence of an express agreement that it is taken in satisfaction of the debt, is to be taken as a conditional payment only. The mere recital in a receipt or other writing of the fact of payment by note is not, by itself, sufficient evidence of absolute payment, and that the creditor assumes the risk of its being paid, but is upon the implied understanding that the note will be paid, and only shows that when paid it shall be a discharge of the original debt.[70] The acceptance of a note will operate as a payment if it is so agreed by the parties, expressly or impliedly.[71] The burden of proving the agreement is on him who asserts it.[72] The same rules apply whether the note is that of the debtor or a third person.[73] Where a debtor, at the request of his creditor, executes his note to a third person, the note may operate as a payment.[74] Whether a note operates as a payment is determined by the law of the place of the contract.[75] An agreement to pay in the notes of a third party does not imply an agreement to indorse them.[76]

[64] Seibert v. Mpls. etc. Ry., 58-39, 59+822.

[65] Nat. C. & L. Builder v. Cyclone etc. Co., 49-125, 51+657.

[66] Plymouth C. Co. v. Seymour, 67-311, 315, 69+1079.

[67] Moore v. Norman, 52-83, 53+809.

[68] Geib v. Reynolds, 35-331, 28+923 (the statement in this case as to the necessity of an "express" agreement is erroneous); Combination S. & I. Co. v. St. P. C. Ry., 47-207, 49+744; Hanson v. Tarbox, 47-433, 50+474; Washington S. Co. v. Burdick, 60-270, 62+285; Seymour v. Bank of Minn., 79-211, 224, 81+1059. See Milwain v. Sanford, 3-147(92); Devlin v. Chamblin, 6-468(325); Wakefield v. Spencer, 8-376(336); Wharton v. Anderson, 28-301, 305, 9+860; Olson v. Cremer, 43-232, 45+616 (due-bill).

[69] Combination S. & I. Co. v. St. P. C. Ry., 47-207, 49+744; Lundberg v. N. W. El. Co., 42-37, 43+685. See Linne v. Forrestal, 51-249, 53+547.

[70] Combination S. & I. Co. v. St. P. C. Ry., 47-207, 49+744.

[71] Keough v. McNitt, 6-513(357); Donnelly v. Simonton, 13-301(278); Goenen v. Schroeder, 18-66(51); Paine v. Smith, 33-495, 24+305; Bausman v. Credit G. Co., 47-377, 50+496; Union etc. Co. v. Taggart, 55-95, 56+579; Bishop v. Buckeye P. Co., 57-219, 58+872; Wiley v. Dean, 67-62, 69+629; Seymour v. Bank of Minn., 79-211, 224, 81+1059; Kennedy v. Fidelity & C. Co., 100-1, 110+97. See Miller v. McCarty, 47-321, 50+235.

[72] Geib v. Reynolds, 35-331, 28+923; Devlin v. Chamblin, 6-468(325).

[73] Combination S. & I. Co. v. St. P. C. Ry., 47-207, 49+744.

[74] See Linne v. Forrestal, 51-249, 53+547.

[75] Thomson v. Palmer, 52-174, 53+1137.

[76] Paine v. Smith, 33-495, 24+305.

7445. By check—The giving of his check by a debtor to his creditor for the amount of the debt is not an absolute payment of the debt unless it is so agreed. The presumption is that the check is received as a conditional payment, and until it is paid the debt remains.[77] If the check is paid, the payment of the debt generally relates back to the receipt of the check.[78] If the check is returned by the creditor the debt remains.[79] If a creditor accepts a check, and agrees to credit the amount thereof, the burden is on him to show that the check was returned, or that it was not paid on due presentment.[80] If the creditor deposits the check with his banker, not for mere collection, and receives credit therefor, the debt is paid.[81]

7446. By draft—The giving of a draft for a debt is not an absolute payment of the debt unless it is so agreed. The presumption is that it is accepted as conditional payment only. The burden of proving the contrary is on him who asserts it.[82]

TIME OF PAYMENT

7447. Before due—A debtor cannot compel his creditor to receive payment before it is due. One who pays money before it is due pays at his own risk. Authority to an agent to receive payment is not authority to receive it before it is due.[83]

7448. Extension—A valid agreement to extend the time of payment of a debt is a defence to an action on the debt during the time of extension.[84] Where, for a valuable consideration, a creditor has agreed with his debtor to postpone and extend the time for payment, so that the debt shall be payable from time to time in instalments, an action to recover the entire indebtedness cannot be maintained, though the debtor has wholly failed to pay as the instalments fall due, until the amount of the last instalment is due.[85] The agreement for an extension may be implied.[86]

7449. Presumption—When it is uncertain when a debt was paid, it will be presumed that it was paid when due.[87]

7450. When due—Demand—In the case of an ordinary debt, where no time for its payment, or condition precedent to the right to require payment, is agreed upon, it is payable at once. Where it is agreed to pay "on demand," the bringing of suit is ordinarily a sufficient demand. The parties may, however, by their contract, make an actual demand necessary.[88] When a contract obligation to pay a stated sum of money becomes complete, a right of action to recover it arises at once, in the absence of any agreement making a previous demand necessary.[89]

[77] Good v. Singleton, 39–340, 40+359; Sardeson v. Menage, 41–314, 43+66; National Bank of Com. v. Chi. etc. Ry., 44–224, 46+342; Goodall v. Norton, 88–1, 92+445; Hillestad v. Lee, 91–335, 338, 97+1055; Wright v. Lynch, 102–96, 112+892; First Nat. Bank v. McConnell, 103–340, 114+1129; Note, 69 Am. St. Rep. 346. See, as to payment to laborers by time checks, Jamison v. Ray, 73–249, 75+1049.

[78] Sardeson v. Menage, 41–314, 43+66.

[79] Good v. Singleton, 39–340, 40+359.

[80] Goodall v. Norton, 88–1, 92+445.

[81] Board of Ed. v. Robinson, 81–305, 84+105.

[82] Devlin v. Chamblin, 6–468(325).

[83] Park v. Cross, 76–187, 78+1107.

[84] Lyman v. Rasmussen, 27–384, 7+687; Wheaton v. Wheeler, 27–464, 8+599; Hall v. Parsons, 105–96, 101, 117+240.

[85] Napa Valley W. Co. v. Daubner, 63–112, 65+143.

[86] St. Paul T. Co. v. St. Paul Ch. of Com., 64–439, 67+350.

[87] Johnson v. Carpenter, 7–176(120).

[88] Branch v. Dawson, 33–399, 23+552; Brown v. Brown, 28–501, 11+64; Horn v. Hansen, 56–43, 57+315.

[89] Ganser v. Fireman's etc. Co., 34–372, 25+943. See Montgomery v. Leuwer, 94–133, 102+367.

7451. Time of day—When a payment is to be made on a particular day, the debtor is entitled to the whole of the day until the close of business hours in which to make payment.[90]

PLACE OF PAYMENT

7452. In general—Where no place of payment is agreed upon it is the duty of the debtor to seek the creditor and make payment to him personally wherever he may be,[91] but a debtor is not bound to follow his creditor out of the state.[92] The place of payment may be specially agreed upon.[93]

RECEIPTS

7453. Definition and nature—A receipt is a written acknowledgment or admission of the payment of money.[94] It is not normally a contract, but it may embody a contract.[95] It is in the nature of an admission.[96]

7454. What constitutes—An itemized bill marked paid is a receipt for the items contained in the bill.[97] Cases are cited below involving various forms of receipts.[98]

7455. As evidence against strangers—It is the general rule that a receipt is inadmissible against strangers to prove the fact of payment.[99] But it may be admitted against strangers in connection with the testimony of the person making the payment, by way of corroboration.[1] Tax receipts are an exception to the general rule.[2]

7456. Conclusiveness—A receipt may be contradicted or modified by parol, unless it constitutes a contract.[3] It is of no higher evidence than the testimony of a witness.[4] But it is prima facie evidence of the fact recited, and if it purports to be in full payment it is conclusive evidence of full payment, if not contradicted.[5]

APPLICATION OF PAYMENTS

7457. By the parties—In making a payment a debtor may apply it as he pleases.[6] If the debtor makes no application of a payment, the creditor may apply it as he pleases.[7] If an application is not made at the time of a payment, it may be made later by agreement of the parties, and it may be different from what the law would have made.[8] The right of the parties to make such application as they please is sometimes limited by the rights of third parties.[9]

90 Daly v. Proetz, 20–411(363); Pratt v. Tinkcom, 21–142.

91 Branch v. Dawson, 33–399, 401, 23+552.

92 Gill v. Bradley, 21–15, 20.

93 Balme v. Wambaugh, 16–116(106).

94 Cummings v. Baars, 36–350, 353, 31+449; McKinney v. Harvie, 38–18, 35+668; Thompson v. Layman, 41–295, 42+1061.

95 See § 3391.

96 Turrell v. Morgan, 7–368(290); Burke v. Ray, 40–34, 41+240.

97 Steffens v. Nelson, 94–365, 102+871.

98 Butler v. Bohn, 31–325, 17+862; Gross v. Diller, 33–424, 23+837; Farnham v. Murch, 36–328, 31+453; Gran v. Spangenberg, 53–42, 54+933.

99 Ferris v. Boxell, 34–262, 25+592; Heartz v. Klinkhammer, 39–488, 40+826; Houston v. Nord, 39–490, 40+568; Cain v. Mead, 66–195, 68+840.

1 Cain v. Mead, 66–195, 68+840.

2 Seigneuret v. Fahey, 27–60, 6+403; Board of Trustees v. Brown, 66–179, 68+837.

3 See § 3391.

4 Burke v. Ray, 40–34, 41+240.

5 Morris v. St. P. & C. Ry., 21–91; Cappis v. Wiedemann, 86–156, 90+368; Wherley v. Rowe, 106–494, 119+222.

6 Solomon v. Dreschler, 4–278(197). A debtor who pays money ordinarily determines the conditions upon which it is received. Kenny v. Seu Si Lun, 101–253, 256, 112+220. See, upon the subject in general, Note, 96 Am. St. Rep. 44.

7 Solomon v. Dreschler, 4–278(197); Newell v. Houlton, 22–19, 22; Stitt v. Rat Portage L. Co., 92–365, 100+1125; Hawver v. Ingalls, 93–371, 101+604.

8 Flarsheim v. Brestrup, 43–298, 45+438.

9 See Whittacre v. Fuller, 5–508(401); Mills v. Kellogg, 7–469(377); Allen v. Jones, 8–202(172); Tomlinson v. Simpson,

7458. By the court—If no application is made by the parties the law applies it.[10] It is sometimes said that the law will apply a payment as justice requires.[11] This, however, does not mean that a court, in making an application, will consider solely the justice of the particular case. It will follow well settled rules and the presumed intention of the parties.[12] Where there is a single account consisting of several items, payments will be applied according to priority of time; that is, the first item on the debit side of the account is discharged or reduced by the first item on the credit side.[13] This rule is unaffected by the fact that one item is better secured than another. But it is based on the presumed intention of the parties, and it will not be applied where the evidence clearly shows a different intention.[14] Where there are secured and unsecured claims a court will apply a payment on the unsecured claim.[15] Where there is principal and interest due a court will apply a payment so as first to satisfy the interest.[16] Where there is a legal and an illegal claim a court will apply a payment on the legal claim.[17] It is not the rule in this state that a court will always apply a payment in the way most beneficial to the creditor.[18] A court will not disturb an application made by the parties.[19]

7459. Out of a particular fund—A payment made from the proceeds of mortgaged property must, as a general rule, be applied in payment of the mortgage debt. And the proceeds of property held by a bailee on a lien must be applied to the satisfaction of the lien.[20]

7460. Change of application—An application once made cannot be changed except by mutual consent of the parties.[21] The parties may change an application by agreement at any time. After acquiescing in the application of a payment in extinguishing one demand, and accepting the benefit of it for that purpose, a debtor cannot avail himself of the same fund to extinguish another demand, though, when he made the payment, he directed its application on the latter.[22]

RECOVERY OF PAYMENTS

7461. Voluntary payments—It is a general rule that money voluntarily paid, with full knowledge of the facts, cannot be recovered back, though the claim on which the payment was made was illegal. If one chooses to give away his money, or to take his chances whether he is giving it away or not, he cannot afterwards change his mind, and recover it by action.[23] It is con-

33–443, 23+864; Merchants Ins. Co. v. Herber, 68–420, 71+624; Pond v. O'Connor, 70–266, 270, 73+159, 248.

[10] Lash v. Edgerton, 13–210(197); Scheffer v. Tozier, 25–478.

[11] Solomon v. Dreschler, 4–278(197); Hersey v. Bennett, 28–86, 9+590.

[12] Hersey v. Bennett, 28–86, 9+590. See 21 Harv. L. Rev. 623.

[13] Hersey v. Bennett, 28–86, 9+590; Wolford v. Andrews, 29–250, 13+167; Jefferson v. Church of St. Matthew, 41–392, 43+74; Miller v. Shepard, 50–268, 272, 52+894; Winnebago P. Mills v. Travis, 56–480, 58+36; Redwood County v. Citizens' Bank, 67–236, 241, 69+912; Pond v. O'Connor, 70–266, 73+159, 248; Id., 80–272, 83+169. See Tomlinson v. Simpson, 33–443, 448, 23+864; Merchants Ins. Co. v. Herber, 68–420, 425, 71+624.

[14] Hersey v. Bennett, 28–86, 9+590; Pond v. O'Connor, 70–266, 73+159, 248.

[15] Lash v. Edgerton, 13–210(197); Gardner v. Leck, 52–522, 54+746. See Tomlinson v. Simpson, 33–443, 23+864.

[16] Lash v. Edgerton, 13–210(197); Weide v. St. Paul, 62–67, 64+65; Bay View L. Co. v. Myers, 62–265, 64+816; Keigher v. St. Paul, 69–78, 72+54.

[17] Solomon v. Dreschler, 4–278(197). See Scheffer v. Tozier, 25–478.

[18] See Tomlinson v. Simpson, 33–443, 23+864.

[19] Pond v. O'Connor, 70–266, 73+159, 248.

[20] Thorne v. Allen, 72–461, 463, 75+706.

[21] Pond v. O'Connor, 70–266, 73+159, 248.

[22] Flarsheim v. Brestrup, 43–298, 45+438.

[23] Shelley v. Lash, 14–498(373, 378); Shillock v. Gilbert, 23–386; De Graff v. Ramsey County, 46–319, 48+1135; Joannin

trary to the policy of the law to permit one to take inconsistent positions, repudiate his acts, and disturb a settlement voluntarily entered into by him.[24] But while the rule is a wholesome one, it is to be applied cautiously for it often works injustice.[25] Where a party is in possession of land claiming title thereto adversely, and in hostility to the true owner, and pays taxes thereon as owner, he cannot, after judgment of ouster against him, recover the amount so paid, or the consideration of the deed under which he claims, of the prevailing party, in a personal action against the latter.[26] The general rule applies to the voluntary payment of taxes [27] and excessive interest.[28]

7462. Involuntary payments—Duress—Money paid under unlawful compulsion or duress may be recovered back. There is no general test of duress. Each case is necessarily determined largely by its own facts. The courts, however, by a gradual process of exclusion and inclusion have arranged certain classes of cases on one or the other side of the line. There may be duress as regards realty as well as personalty. To constitute duress there must be some actual or threatened exercise of power possessed, or reasonably supposed to be possessed, by the party exacting or receiving the payment, over the person or property of the party making the payment, from which the latter has no other means of immediate relief than by paying the money demanded.[29] To entitle a party to recover back money paid under a claim that it was a forced or compulsory payment, it must appear that it was paid upon a wrongful claim or unjust demand, under the pressure of actual or threatened personal restraint or harm, or of an actual or threatened seizure or interference with his property of serious import to him; and that he could escape from or prevent the injury only by making such payment.[30] It may be stated generally that whenever the demandant is in position to seize or detain the property of him against whom the claim is made without a resort to judicial proceedings, in which the party may plead, offer proof, and contest the validity of the claim, payment under protest, to recover or retain the property, will be considered as made under compulsion, and the money can be recovered back, at least where a failure to get or retain immediate possession and control of the property would be attended with serious loss or great inconvenience.[31] A payment of an illegal demand in order to obtain possession of personalty detained otherwise than by judicial process, and where the immediate need of possession is so serious and urgent that a resort to an action would involve grave hardship, is compulsory.[32] Where the law affords an adequate remedy against an illegal demand a payment of the demand will be deemed voluntary. But if the remedy afforded by the law would not avoid serious hardship a payment of the demand will be deemed compulsory.[33] But the mere fact that a lawsuit is threatened, or that property has been seized on legal process, to

v. Ogilvie, 49–564, 566, 52+217; Scharffbillig v. Scharffbillig, 51–349, 53+713; Carson v. Cochran, 52–67, 53+1130; Leveroos v. Reis, 52–259, 53+1155; Chaska v. Hedman, 53–525, 55+737. See Farrell v. Burbank, 57–395, 59+485; Keener, Quasi Contracts; Note, 94 Am. St. Rep. 408.

[24] 22 Harv. L. Rev. 52.

[25] American B. M. Union v. Hastings, 67–303, 308, 69+1078.

[26] Scharffbillig v. Scharffbillig, 51–349, 53+713.

[27] See § 9516.

[28] See § 9991.

[29] Joannin v. Ogilvie, 49–564, 52+217; State v. Nelson, 41–25, 42+548. It has been said that duress exists where one is by the unlawful conduct of another induced to do or perform some act under circumstances which deprive him of the exercise of his free will. State v. Ladeen, 104–252, 116+486. See 20 Harv. L. Rev. 580; 22 Id. 52.

[30] Kraemer v. Deustermann, 37–469, 35+276.

[31] Joannin v. Ogilvie, 49–564, 52+217.

[32] Fargusson v. Winslow, 34–384, 25+942; Joannin v. Ogilvie, 49–564, 568, 52+217.

[33] De Graff v. Ramsey County, 46–319, 48+1135; State v. Nelson, 41–25, 42+548;

enforce an illegal demand, will not render a payment of the demand compulsory, at least in the absence of fraud.[34] The mere refusal of a party to pay a debt, or to perform a contract, is not duress, so as to avoid a contract procured by means of such refusal, though the other party was influenced in entering into it by his financial necessities.[35] To make a payment compulsory it is unnecessary that it should be made under protest.[36] A threat of unlawful arrest may constitute duress, if it is sufficient to overcome the mind and will of a person of ordinary firmness. To recover a payment in such a case it must appear that it was made through fear of the threatened arrest.[37] In determining whether an alleged payment was in fact made under compulsion, evidence tending to show fraud or undue influence should receive due consideration.[38] A payment has been held compulsory where it was made to clear a title of an unfounded mechanic's lien claim, so that the payor might secure a loan on the property which he had negotiated in order to raise money to pay a prior overdue mortgage and other pressing debts, he having no other available means of raising the money;[39] where an excessive charge for water was paid to prevent a water company from shutting off the supply of water from a large building in which many persons were employed;[40] and where a subsequent mortgagee was compelled to pay an excessive amount to redeem from the foreclosure of a prior mortgage.[41] A payment of rent made in fear of losing a tenancy at will has been held not compulsory.[42] The existence of a mortgage, with a power of sale, to secure an overdue debt, is not of itself a sufficient constraint upon the will of the debtor to amount to legal duress or compulsion, to enable him to recover back excessive interest paid by him for forbearance on the part of the creditor.[43] The recovery of illegal taxes is considered elsewhere.[44]

7463. Payments induced by fraud—Payments induced by fraud of the payee may be recovered.[45]

7464. Payments under mistake of fact—It is a general rule that money paid under a mistake of fact affecting the liability of the payor may be recovered back in an action as for money had and received.[46] To justify a recovery the money must have been received under such circumstances that, in equity and good conscience, the payee ought not to retain it. The mistake must relate to a fact which is material—essential to the transaction between the parties. A payment made under the influence of a mistake, concerning a fact, which, even if it were as it is supposed to be, would create no legal obligation, but merely operate as an inducement upon the mind of the party paying the money, the other party being without fault, would not justify a recovery as for money had and received.[47] The basis of the action is the

Fargusson v. Winslow, 34-384, 25+942; Joannin v. Ogilvie, 49-564, 52+217.

[34] Joannin v. Ogilvie, 49-564, 568, 52+217; Mpls. S. & P. Co. v. Cunningham, 59-325, 61+329.

[35] Cable v. Foley, 45-421, 47+1135; Joannin v. Ogilvie, 49-564, 568, 52+217.

[36] See § 9517.

[37] Flanigan v. Minneapolis, 36-406, 31+359.

[38] Tapley v. Tapley, 10-448(360); Kraemer v. Deustermann, 37-469, 35+276.

[39] Joannin v. Ogilvie, 49-564, 52+217.

[40] Panton v. Duluth G. & W. Co., 50-175, 52+527. See State v. Nelson, 41-25, 27, 42+548.

[41] Bennett v. Healey, 6-240(158).

[42] Mpls. S. & P. Co. v. Cunningham, 59-325, 61+329. See Joannin v. Ogilvie, 49-564, 569, 52+217.

[43] Nutting v. McCutcheon, 5-382(310).

[44] See § 9516.

[45] Schaller v. Borger, 47-357, 50+247.

[46] Bernheimer v. Marshall, 2-78(61); Miss. R. Co. v. Ankeny, 18-17(1, 9); Henderson v. Sibley County, 28-515, 520, 11+91; Sibley v. Pine County, 31-201, 17+337; Lund v. Davies, 47-290, 50+79; Braithwait v. Bain, 66-325, 69+4; Parks v. Fogleman, 97-157, 105+560.

[47] Langevin v. St. Paul, 49-189, 51+817. See McClure v. Bradford, 39-118, 38+753.

moral obligation to make restitution where one has received money of another which in equity and good conscience he ought not to retain.[48] Hence it is always permissible to show in defence facts that would make it inequitable to compel the defendant to make restitution.[49]

7465. Payments under mistake of law—It is a general rule that money paid under a mistake of law cannot be recovered back, where the transaction is unaffected by any fraud, trust, confidence, or the like, and both parties knew all the facts.[50]

7466. Demand—An action will not lie for the recovery of money voluntarily paid until a demand is made therefor.[51] A demand is necessary to set interest running on money paid by mistake merely.[52]

7467. Pleading—In an action for the recovery of money paid under duress, or by mistake, the facts constituting the duress or mistake must be specifically alleged. A general allegation of duress or mistake is insufficient.[53]

PLEADING

7468. In general—In an action on a contract to pay a specific sum of money at a certain time it has been held unnecessary to allege a non-payment, payment being considered new matter to be specially pleaded by the defendant.[54] In other actions it is generally unnecessary to allege non-payment, payment being a matter of defence.[55] Where there is no allegation of non-payment in the complaint, payment is new matter to be specially pleaded in the answer, and is inadmissible under a general denial.[56] Where there is a necessary allegation of non-payment in the complaint, payment may probably be proved under a general or specific denial.[57] Facts excusing non-payment are inadmissible under a plea of payment.[58] Where a complaint on a note alleges non-payment, an allegation in an answer of payment is not new matter requiring a reply.[59] An allegation of a payment, without showing that it was paid on the claim sued upon, is insufficient.[60] An indefinite allegation of part payment has been sustained.[61]

PAYMENT INTO COURT—See Deposits in Court.
PEDDLERS—See Hawkers and Peddlers.
PEDIGREE—See Evidence, 3297.
PENAL—See Corporations, 2080, 2089, 2108.
PENAL STATUTES—See Conflict of Laws, 1552; Statutes, 8989.

[48] Henderson v. Sibley County, 28–515, 520, 11+91; Sibley v. Pine County, 31–201, 17+337; Duluth v. McDonnell, 61–288, 63+727.
[49] Duluth v. McDonnell, 61–288, 63+727; Pillager v. Hewett, 98–265, 107+815.
[50] Erkens v. Nicolin, 39–461, 40+567; Fidelity & C. Co. v. Gillette, 92–274, 99+1123. See Ford v. Brownell, 13–184(174); Perkins v. Trinka, 30–241, 15+115; Barge v. Van Der Horck, 57–497, 59+630; Keener, Quasi Contracts; 5 Columbia L. Rev. 366; 7 Id. 476; 21 Harv. L. Rev. 225.
[51] Ford v. Brownell, 13–184(174).
[52] Sibley v. Pine County, 31–201, 17+337.
[53] Kraemer v. Deustermann, 37–469, 35+276; Rand v. Hennepin County, 50–391, 52+901; Mpls. S. & P. Co. v. Cunningham, 59–325, 61+329.
[54] First Nat. Bank v. Strait, 71–69, 73+645; Marshall & I. Bank v. Child, 76–173, 177, 78+1048; Montgomery v. Leuwer, 94–133, 103+367. These cases seem to confuse a question of pleading and a question of proof. No doubt the production of the instrument makes out a prima facie case of non-payment, but the question of pleading is a very different one.
[55] St. Paul F. Co. v. Wegmann, 40–419, 42+288; Romer v. Conter, 53–171, 54+1052.
[56] Farnham v. Murch, 36–328, 31+453.
[57] See McArdle v. McArdle, 12–98(53).
[58] Voak v. Nat. Invest. Co., 51–450, 53+708.
[59] McArdle v. McArdle, 12–98(53).
[60] Esch v. Hardy, 22–65.
[61] Colter v. Greenhagen, 3–126(74).

PENALTIES

Cross-References

See Contracts, 1797; Fines; Limitation of Actions, 5657.

7469. Definition—The word "penalty" is here used in the sense of money recoverable in a civil action under a statute imposing payment thereof as a punishment for a violation of its provisions.[62] The words "penalty" and "fine" are often used synonymously.[63]

7470. Necessity of default—A penalty cannot be imposed upon a party unless he is in default of some legal duty.[64]

7471. Penalties imply prohibitions—Where a statute imposes a penalty for doing an act, the act is thereby rendered unlawful, though it is not prohibited in terms, the infliction of a penalty implying a prohibition.[65]

7472. Effect of excessive penalties—An excessive penalty does not necessarily invalidate the entire law imposing it.[66]

7473. Appeal—No appeal lies from a judgment of acquittal in an action for a statutory penalty, though the action is brought by an informer.[67]

PENDENCY OF ANOTHER ACTION—See Abatement and Revival, 4; Pleading, 7553.

PERCOLATING WATERS—See Waters, 10175.

PEREMPTORY CHALLENGES—See Jury.

PERFORMANCE—See Contracts, 1779; note 68.

PERISHABLE GOODS—See Carriers, 1333.

PERJURY

7474. What constitutes—The oath administered must be pursuant to, and required or authorized by, some law.[69] A statement in an affidavit for an attachment that affiant is plaintiff's attorney is material, and if false, may be the basis of a charge of perjury. There must be an oath actually administered. Merely subscribing an affidavit is not sufficient.[70] The crime of perjury was not defined by statute prior to the Penal Code.[71] At common law a charge of perjury could be made only upon an oath before a court of justice.[72] There must be a wilful intention to swear falsely.[73] The fact that the oath is administered in an irregular manner is no defence.[74]

7475. Indictment—An indictment must contain "assignments of perjury" and the form given in G. S. 1894 § 7239, No. 24, was insufficient in this regard.[75] An allegation that the testimony of the accused was wilfully and

[62] See Merchants' Nat. Bank v. N. W. etc. Co., 48-349, 51+117.

[63] State v. Morgan, 55-183, 56+688.

[64] Redwood County v. Winona etc. Co., 40-512, 524, 41+465, 42+473; State v. N. P. Ry., 95-43, 48, 103+731.

[65] Solomon v. Dreschler, 4-278(197).

[66] Red Lake Falls M. Co. v. Thief River Falls, 109-52, 122+872.

[67] Kennedy v. Raught, 6-235(155).

[68] McGuire v. Neils, 97-293, 107+130.

[69] State v. McCarthy, 41-59, 42+599; State v. Scatena, 84-281, 87+764.

[70] State v. Madigan, 57-425, 59+490.

[71] State v. Stein, 48-466, 51+474.

[72] State v. McCarthy, 41-59, 42+599.

[73] See Schmidt v. Witherick, 29-156, 12+448.

[74] R. L. 1905 § 4832; State v. Day, 108-121, 121+611.

[75] State v. Nelson, 74-409, 77+223 (overruling State v. Thomas, 19-484, 418). See State v. Scott, 78-311, 81+3.

corruptly false is equivalent to an allegation that he wilfully and knowingly testified falsely. A description of a justice court in which the offence was committed has been held sufficient.[76] It must be alleged that the accused was duly sworn, but no set form of words need be used. A document verified by an attached affidavit has been held sufficiently identified. An indictment under Laws 1895 c. 175 § 104 for perjury in connection with the annual report of an insurance company, has been held not to charge two offences.[77] It is unnecessary to aver that matter assigned as perjury is material where its materiality appears from the facts alleged. Where it is assigned as perjury that the accused in an affidavit for attachment swore falsely that he was the attorney for the plaintiff in the attachment suit, it is unnecessary to allege that the accused was an attorney at law.[78]

7476. Evidence—Sufficiency—Cases are cited below involving the sufficiency of evidence.[79]

SUBORNATION OF PERJURY

7477. What constitutes—The crime consists of two essential elements—the commission of perjury by the person suborned, and the wilful procuring or inducing him to do so by the suborner.[80]

7478. Corroboration—The fact of the perjury cannot be proved by the uncorroborated testimony of the suborned; but the fact that he was suborned by the accused may be proved by his uncorroborated testimony.[81]

7479. Evidence—Sufficiency—Evidence held sufficient to warrant a conviction.[82]

PERMIT—See note 83.
PER MY ET PER TOUT—See Tenancy in Common, 9596.
PERPETUATION OF TESTIMONY—See Depositions, 2713.

PERPETUITIES

7480. Restraints on alienation—It is provided by statute that the absolute power of alienation shall not be suspended, by any limitation or condition whatever, for a longer period than during the continuance of two lives in being at the creation of the estate, except that a contingent remainder in fee may be created on a prior remainder in fee, to take effect in the event that the persons to whom the first remainder is limited die under the age of twenty-one years, or upon any other contingency by which the estate of such persons may be determined before they attain their full age.[84] The absolute power of alienation may be suspended during the minority of a minor named in the instrument creating the suspension. In such a case the suspension ceases with the death of the minor before coming to majority.[85] There can be no suspension for a fixed time, for such term, however short, may extend

[76] State v. Stein, 48–466, 51+474.
[77] State v. Scott, 78–311, 81+3.
[78] State v. Madigan, 57–425, 59+490.
[79] State v. Madigan, 57–425, 59+490 (production of affidavit regular in form, with proof that the accused signed it, and that the officer before whom it purports to be sworn to signed the jurat and affixed his seal, sufficient evidence that the accused swore to the affidavit); State v. Day, 108–121, 121+611 (evidence of oath held sufficient though person administering it had no distinct remembrance of it).
[80] State v. Renswick, 85–19, 88+22.
[81] Id.
[82] Id.
[83] LaBelle v. Powers, 103–515, 114+1131.
[84] R. L. 1905 §§ 3204, 3205. See Rong v. Haller, 109–191, 123+471, 806.
[85] Simpson v. Cook, 24–180.

beyond the continuance of lives. It may be made to depend upon an event other than the extinction of life, provided it is such that it must happen within the indicated lives. The suspension must cease at or before the extinction of such lives. It may be created to continue during a minority, for the minority must cease with the death of the minor. In such case the suspension cannot extend beyond the life of the minor, and it may be terminated by his coming to majority within the life. An estate, to continue during the minority, is not an absolute term of years corresponding with the possible duration of the minority, but is determined by the death of the minor before he attains his age. A limitation, then, on two minorities, is not for a longer period, and it may turn out to be for a shorter period than a limitation on the two lives. Three minorities, however, may extend beyond any two of the lives which might be designated; and the suspension cannot be created to continue during more than two minorities, where minorities instead of lives are selected to measure the period of suspension. The two lives during which the suspension may continue, and it is the same where minorities are selected, must be either expressly mentioned or so indicated that they can be known.[86] A contract of a landowner with an agent, whereby the latter is given the exclusive right to sell the land for a period of sixty days, is not in restraint of the power of alienation.[87] A devise of realty to executors, in trust to sell as soon as in their judgment it can be sold for a reasonable price, does not suspend the power of alienation. That the power of alienation may not be exercised within the period prescribed by the statute is not the test. The test is, can it be exercised, and a good title passed, within the prescribed period.[88] In this state the absolute power of alienation, as respects realty, cannot be lawfully suspended by the creation of a trust for more than two lives in being. But as to personalty the common-law rule still prevails, and a trust therein may continue for one or more lives in being at the death of a testator, and twenty-one years and a fraction. By the statute the absolute power of alienation is not suspended, where there is a person in being by whom an absolute fee in possession can be conveyed. And where a single trust embraces both personal and real property, and it does not offend against the rule as to perpetuities in respect to the personalty, and by the instrument creating the trust an unconditional power of sale is given to the trustees, under which they may at any time convey the lands, and the converted fund is subject to a valid trust, the power of alienation is not suspended, and the trust is not in contravention of the statute.[89] A testator devised and bequeathed his real and personal property to his wife on condition that in no case should she give or bequeath one cent of it to any member of his family or to any relative of her own. The condition was held void as in restraint of alienation.[90] The rule against perpetuities and restraints on alienation does not apply to a conveyance to trustees in trust for the use of a religious society for a meeting house, burial ground, or parsonage,[91] or to a devise to a municipality in trust for the maintenance of a kindergarten.[92]

PERSON—The word "person" may include corporations, partnerships and unincorporated associations.[93]

[86] Id.; Rong v. Haller, 109–191, 123+471, 806.
[87] Fairchild v. Rogers, 32–269, 20+191.
[88] Atwater v. Russell, 49–22, 56, 51+624; Id., 49–57, 77, 51+629.
[89] In re Tower, 49–371, 52+27.
[90] Morse v. Blood, 68–442, 71+682.
[91] R. L. 1905 § 3140; Lane v. Eaton, 69–141, 71+1031.
[92] Owatonna v. Rosebrock, 88–318, 92+1122.
[93] R. L. 1905 § 5514(11); First Nat.

PERSONALLY—See note 94.
PERSONAL PROPERTY—See Taxation, 9128; note 95.
PERSONAL REPRESENTATIVES—See Executors and Administrators, 3554.
PERSONAL SERVICE—See Process, 7810, and note 96.
PER STIRPES—See Descent and Distribution, 2729.
PHARMACY—See Druggists.

PHOTOGRAPHERS

7481. Right to use negative—There is an implied contract between a photographer and his customer that the negative for which the customer sits shall only be used for the printing of such photographic portraits as the customer may order or authorize.[97]

PHOTOGRAPHS—See Evidence, 3260, 3280.
PHYSICAL EXAMINATION—See Evidence, 3262.

PHYSICIANS AND SURGEONS

Cross-References

See Witnesses, 10314.

REGULAR PHYSICIANS AND SURGEONS

7482. Definition—A physician is a person skilled in medicine and surgery.[98] The words "family physician" have been held to mean the physician who usually attends and is consulted by the members of a family in the capacity of a physician.[99]

7483. Regulation—License—The licensing of physicians and surgeons is regulated by statute,[1] which has been held constitutional against various objections.[2] A certificate authorizes the holder to practice medicine in all its branches, including surgery,[3] but not dentistry.[4] The word "unprofessional" in the statute is synonymous with "dishonorable." [5] For a physician to publish an advertisement containing false statements as to his ability to cure disease, knowing them to be false when he makes them, and intending there-

Bank v. Loyhed, 28-396, 10+421 (corporations); Forrest v. Henry, 33-434, 23+848 (state); State v. Minn. Club, 106-515, 119+494 (club). See Intoxicating Liquors, 4909.

[94] Toner v. Advance T. Co., 45-293, 294, 47+810.

[95] State v. Scanlan, 89-244, 94+686.

[96] Damon v. Baldwin, 101-414, 112+536.

[97] Moore v. Rugg, 44-28, 46+141.

[98] Goss v. Goss, 102-346, 113+690. See Stewart v. Raab, 55-20, 56+256.

[99] Price v. Phoenix etc. Co., 17-497(473).

[1] R. L. 1905 §§ 2295-2300; Laws 1909 c. 474; Wolf v. State Board, 109-360, 123+1074 (revocation of license—power of board of medical examiners—notice of hearing).

[2] State v. State M. E. Board, 32-324, 20+238 (powers of state medical board—grounds for refusing certificate—right of applicant to hearing—unprofessional conduct); State v. State Board, 34-387, 26+123 (power of board to revoke certificate not a delegation of judicial power); State v. Fleischer, 41-69, 42+696 (board cannot arbitrarily disregard qualifications of applicants); Wolf v. State Board, 109-360, 123+1074 (Laws 1909 c. 474 held constitutional).

[3] Stewart v. Raab, 55-20, 56+256.

[4] State v. Taylor, 106-218, 118+1012.

[5] State v. State M. E. Board, 32-324, 20+238.

by to deceive the public, is unprofessional and dishonorable conduct within the meaning of the statute.[6] The provision making it a criminal offence to practice without a license is to be reasonably construed so as to effectuate its objects, to prevent fraud and conserve the public health. That an unlicensed person has practiced medicine is the gist of the offence. That such a person has for a fee prescribed a drug, medicine, or other agency for the treatment of disease is one kind of evidence of guilt, but not the exclusive substance of the offence.[7]

7484. Surgical operation—Consent of patient—It is ordinarily a legal wrong for a physician to perform a surgical operation upon a person without his consent, express or implied from the circumstances. An exception is made in the case of an unconscious person in imperative need of immediate surgical aid.[8]

7485. Actions for services—Cases are cited below involving actions by physicians for their services.[9]

DENTISTS

7486. Regulation—License—The practice of dentistry is regulated by statute,[10] which has been held constitutional against various objections.[11] An ordinary physician and surgeon cannot practice dentistry without securing a license as a dentist.[12] Practicing without a license is a criminal offence.[13]

VETERINARIANS

7487. Regulation—License—A veterinary surgeon is a person lawfully practicing the art of treating and healing injuries and diseases of domestic animals.[14] Veterinarians are required to be licensed by the state veterinary board.[15] In an action by a veterinarian for services, it is unnecessary for him to allege and prove a license.[16]

MALPRACTICE

7488. Standard of conduct—A physician or surgeon is not an insurer that he will effect a cure. Unless he contracts to do more he is only bound to exercise such care, skill, and diligence, as is usually exercised by physicians or surgeons in good standing of the same school of practice. He is not required to come up to the highest standard of skill known to the profession.[17] He is

[6] State v. State Board, 34–391, 26+125.

[7] State v. Oredson, 96–509, 105+188. See State v. Crombie, 107–171, 119+660.

[8] Mohr v. Williams, 95–261, 104+12; Id., 98–494, 108+818. See 18 Harv. L. Rev. 624; 20 Id. 154.

[9] Powell v. Newell, 59–406, 61+335 (sickness of physician and consequent inability to attend patient as a defence); Lyford v. Martin, 79–243, 82+479 (unnecessary to allege license to practice); Williams v. Griffin, 84–279, 87+773 (services rendered to servant of corporation—verdict for plaintiff justified by the evidence); Pickler v. Caldwell, 86–133, 90+307 (contract to effect a cure or make no charge—admission of certain book entries held harmless—exclusion of certain evidence held ground for a new trial); Head v. Am. Bridge Co., 88–81, 92+467 (services rendered to servant of corporation—certain "subsequent services," held duly authorized); Leonard v. Clark, 107–1, 119+485 (services rendered to servant injured in a laundry—controversy as to whether they were rendered at the request of defendant—verdict for defendant sustained).

[10] R. L. 1905 §§ 2313–2319; Laws 1907 c. 117.

[11] State v. Vandersluis, 42–129, 43+789; State v. Crombie, 107–166, 119+658; Id., 107–171, 119+660.

[12] State v. Taylor, 106–218, 118+1012.

[13] R. L. 1905 § 2319; Laws 1907 c. 117; State v. Crombie, 107–166, 119+658 (complaint sustained—evidence held to justify conviction).

[14] Lyford v. Martin, 79–243, 82+479.

[15] R. L. 1905 §§ 2350–2353.

[16] Lyford v. Martin, 79–243, 82+479.

[17] Getchell v. Hill, 21–464; Martin v. Courtney, 75–255, 77+813; Id., 87–197, 91+487; Henslin v. Wheaton, 91–219, 97+882; Awde v. Cole, 99–357, 109+812; Staloch

entitled to have his conduct tested by the rules and principles of the school of medicine to which he belongs;[18] but this rule has been held inapplicable to a use of X-rays, not for medicinal purposes, but to locate a foreign substance in the body of a patient.[19] The negligence of a surgeon in determining to perform a primary operation during a condition of shock is to be determined by reference to pertinent facts then in existence, which were known, or which ought to have been known, in the exercise of due care, and not by reference to knowledge acquired after the operation has been performed. To the ordinary rule that the exercise of defendant's best judgment is no defence in an action for damages caused by his negligence, a general exception is recognized with respect to cases involving matters of opinion and judgment only. A physician entitled to practice his profession, possessing the requisite qualifications, and applying his skill and judgment with due care, is not ordinarily liable for damages consequent upon an honest mistake or an error of judgment in making a diagnosis, in prescribing treatment, or in determining upon an operation, where there is reasonable doubt as to the nature of the physical conditions involved, or as to what should be done in accordance with recognized authority and good current practice. The exception in malpractice cases applies to the formation of the judgment by such physician. It may not extend to the previous acquisition of data essential to a proper conclusion or to consequent conduct in the subsequent selection and use of instrumentalities with which he may execute that judgment.[20]

7489. Instances of malpractice considered—Malpractice in treating a broken thigh;[21] in treating a broken arm;[22] in ordering a druggist to prepare a prescription;[23] in amputating an arm;[24] in failing to remove a portion of the placenta after a miscarriage;[25] in treating a wound after an amputation of the toes of a foot and in making a further amputation, blood-poison having set in;[26] in applying X-rays;[27] in treating an injury to the spinal vertebrae;[28] in amputating a crushed and bruised leg, the tibia of which had suffered an oblique, compound, comminuted fracture;[29] in operating for appendicitis and caring for the wound;[30] in applying electricity to the head.[31]

7490. Contributory negligence—Contributory negligence on the part of the patient is a complete defence.[32]

7491. Burden of proof—A person claiming a cause of action for neglect to employ the degree of care, diligence, and skill required must prove such neglect, and that the injury or want of cure resulted from it.[33] There is no presumption of negligence from the mere fact that a patient dies immediately after an operation. The doctrine of res ipsa loquitur does not apply.[34]

7492. Law and fact—The question of negligence is ordinarily one of fact for the jury,[35] but where the evidence is conclusive the court may direct a verdict as in other civil cases.[36]

v. Holm, 100-276, 111+264. See Note, 93 Am. St. Rep. 657.

[18] Martin v. Courtney, 75-255, 77+813.

[19] Henslin v. Wheaton, 91-219, 97+882.

[20] Staloch v. Holm, 100-276, 111+264. See Frisk v. Cannon, 126+67.

[21] Chamberlain v. Porter, 9-260(244).

[22] Jacobs v. Cross, 19-523(454); Getchell v. Hill, 21-464; Getchell v. Lindley, 24-265.

[23] Stone v. Evans, 32-243, 20+149.

[24] Bennison v. Walbank, 38-313, 37+447.

[25] Moratzky v. Wirth, 67-46, 69+480; Id., 74-146, 76+1032.

[26] Martin v. Courtney, 75-255, 77+813; Id., 87-197, 91+487.

[27] Henslin v. Wheaton, 91-219, 97+882.

[28] Wittenberg v. Onsgard, 78-342, 81+14.

[29] Staloch v. Holm, 100-276, 111+264.

[30] Awde v. Cole, 99-357, 109+812.

[31] Frisk v. Cannon, 126+67.

[32] Chamberlain v. Porter, 9-260(244).

[33] Getchell v. Hill, 21-464; Martin v. Courtney, 75-255, 77+813.

[34] Staloch v. Holm, 100-276, 111+264.

[35] Chamberlain v. Porter, 9-260(244); Moratzky v. Wirth, 67-46, 69+480; Bennison v. Walbank, 38-313, 37+447; Frisk v. Cannon, 126+67.

[36] Martin v. Courtney, 87-197, 91+487.

7493. Damages—There is no fixed measure of damages. They are not limited to the expenses incurred by the party in being cured, or to what will necessarily and inevitably result from the injury. But they cannot be remote, contingent, or speculative. They must be the natural and proximate consequence of the act complained of. In an action for malpractice in setting a limb, the pain, suffering, and disability to use the limb, both present and prospective, are proper elements of damage. The jury should be limited in the consideration of such elements to such as have resulted from the injury, over and above what would have resulted had the limb been treated with ordinary surgical skill. Whether evidence in relation to plaintiff's family is admissible on the question of damages is an open question.[37] In an action by a husband for damages resulting to himself from injuries to his wife caused by the malpractice of a physician, damages for loss of service which appears necessarily to result from the nature of the injury, may be recovered as part of the general damages, without being specially pleaded. Damages for the mental anxiety or the injured feelings of a husband, father, or master, if recoverable at all in such cases, are to be allowed by the jury as matter of aggravation, upon consideration of the facts and circumstances of the case, and not upon the statements of witnesses as to the amount of such damages.[38] Cases are cited below holding damages not excessive.[39]

7494. Evidence—Admissibility—Cases are cited below involving the admissibility of evidence.[40]

7495. Expert testimony—In determining the relative value of the evidence of medical experts the jury are to consider their professional knowledge and experience, freedom from bias, and the reasons they are able to give for their conclusions. The opinion of one expert may be of greater value than that of several others holding an opposite opinion. The evidence is to be weighed not measured.[41] Where it was apparent that the jury disregarded the expert testimony a new trial was granted.[42]

7496. Evidence—Sufficiency—Cases are cited below holding evidence sufficient,[43] or insufficient,[44] to justify a verdict for the plaintiff; and sufficient,[45] or insufficient,[46] to require a submission to the jury.

PIERS—See Navigable Waters, 6949.
PLACE—See Pleading, 7522.
PLACE OF ABODE—See Process, 7812.
PLACE OF TRIAL—See Venue.
PLANS—See Evidence, 3259.
PLANS AND SPECIFICATIONS—See Contracts, 1842.
PLATS—See Boundaries, 1059; Dedication.
PLEA IN ABATEMENT—See Criminal Law, 2445; Pleading, 7579.

[37] Chamberlain v. Porter, 9–260(244).
[38] Stone v. Evans, 32–243, 20+149.
[39] Getchell v. Lindley, 24–265; Chamberlain v. Porter, 9–260(244).
[40] Jacobs v. Cross, 19–523(454) (evidence of the manner in which an amputation was performed held inadmissible under the pleadings); Staloch v. Holm, 100–276, 111+264 (fact that patient dies immediately after an operation is not of itself evidence of negligence on the part of the operating surgeon).
[41] Getchell v. Hill, 21–464; Getchell v. Lindley, 24–265; Bennison v. Walbank, 38–313, 37+447; Martin v. Courtney, 75–255, 77+813; Staloch v. Holm, 100–276, 111+264.
[42] Getchell v. Hill, 21–464.
[43] Chamberlain v. Porter, 9–260(244); Getchell v. Lindley, 24–265; Bennison v. Walbank, 38–313, 37+447; Moratzky v. Wirth, 74–146, 76+1032; Frisk v. Cannon, 126+67.
[44] Getchell v. Hill, 21–464; Martin v. Courtney, 75–255, 77+813; Staloch v. Holm, 100–276, 111+264.
[45] Moratzky v. Wirth, 67–46, 69+480; Henslin v. Wheaton, 91–219, 97+882.
[46] Martin v. Courtney, 87–197, 91+487.

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IN GENERAL

7497. Pleadings defined—Pleadings are the written allegations of what is affirmed on the one side, or denied on the other, disclosing to the court or jury, who have to try the cause, the real matter in dispute between the parties.[47]

7498. Object of pleadings—The primary object of pleadings is to apprise each party of the grounds of claim or defence asserted by the other, in order that he may come to trial with the necessary proof and be saved the expense

[47] Desnoyer v. L'Hereux, 1-17(1).

and trouble of preparing to prove or disprove facts about which there is no real controversy between the parties.[48] The object of all rules of pleading is to secure the brief, orderly, and plain statement of the facts on which the respective contentions of the parties to the action are based, so as to produce definite issues.[49]

7499. Code and common-law pleading compared—The fundamental principles of pleading are the same under the code as at common law.[50] The form rather than the substance of pleading was changed by the code.[51] At common law it was just as necessary to allege the facts as under the code.[52] The code effected greater changes in procedure than in pleading. Its chief effect upon pleading has been to relieve it of technicality and make it subordinate to the substantive law.[53] The code system of pleading is designed to administer justice unhampered by the artificial distinctions and technicalities incident to the forms of action at common law and the distinction between law and equity.[54] In practice code pleading has not proved so successful in forming sharply defined issues as common-law pleading.[55]

JOINDER OF CAUSES OF ACTION

7500. Arising out of same transaction—It is provided by statute that causes of action may be joined if they arise out of "the same transaction, or transactions connected with the same subject of action." [56] This provision is incapable of exact definition.[57] It is so obscure and general as to justify the construction which shall be found most convenient and best calculated to promote the ends of justice. It is broad enough to include the former equity rules.[58] It includes causes of action ex delicto. The word "transaction" embraces something more than contractual relations. It includes any occurrences or affairs the result of which vests in a party the right to maintain an action, whether the occurrence is in the nature of tort or otherwise.[59] A cause of action ex delicto and one ex contractu may be joined if they arise out of the same transaction.[60] The mere fact that relief may be partly legal and partly equitable is not decisive as to whether there is one or more causes of action. The manifest design of the statute is to avoid a multiplicity of suits by enabling parties to settle in one action all their differences arising out of and relating to the same transaction.[61] Various cases are cited below in which it was held that causes of action were properly,[62] or improperly [63] joined.

[48] Kingsley v. Gilman, 12-515(425, 430); Finley v. Quirk, 9-194(179, 186); Lawrence v. Willoughby, 1-87(65); Huey v. Pinney, 5-310(246, 257); Dennis v. Johnson, 47-56, 49+383.

[49] Rees v. Storms, 101-381, 112+419.

[50] Caldwell v. Auger, 4-217(156, 161).

[51] Foerster v. Kirkpatrick, 2-210(171).

[52] Solomon v. Vinson, 31-205, 17+340.

[53] Rees v. Storms, 101-381, 112+419.

[54] Todd v. Bettingen, 109-493, 124+443.

[55] Disbrow v. Creamery P. M. Co., 104-17, 115+751.

[56] R. L. 1905 § 4154.

[57] Gertler v. Linscott, 26-82, 1+579.

[58] Fish v. Berkey, 10-199(161).

[59] Mayberry v. N. P. Ry., 100-79, 110+356.

[60] Gertler v. Linscott, 26-82, 1+579; Humphrey v. Merriam, 37-502, 35+365; Reed v. Bernstein, 103-66, 114+261. See N. W. Railroader v. Prior, 68-95, 70+869.

[61] First Div. etc. Ry. v. Rice, 25-278, 293; Gilbert v. Boak, 86-365, 90+767.

[62] Nichols v. Randall, 5-304(240) (an action for the sale of mortgaged premises, surrender of a quitclaim deed and personal judgment for damages); Montgomery v. McEwen, 7-351(276) (an action for the recovery of the amount due on a note and for delivery and cancelation of a note and mortgage forming a part of the same transaction); Fish v. Berkey, 10-199(161) (an action against a trustee as such and against him personally); Palmer v. Tyler, 15-106(81) (an action for an accounting, the appointment of a receiver, and to set aside a conveyance); First Div. etc. Ry. v. Rice, 25-278 (an action for the possession of a railroad, the appointment of a

7501. Legal and equitable—Legal and equitable causes of action may be joined provided they satisfy the other requirements of the statute.[64]

7502. Must affect all the parties—Causes of action cannot be joined unless they affect all the parties to the action,[65] but it is unnecessary that all the parties be equally affected.[66] All persons interested in a single cause of action may join in an action to recover thereon though their interests are distinct and severable.[01]

receiver, the payment of money, and an accounting); Winona etc. Ry. v. St. P. etc. Ry., 26-179, 2+489 (an action to compel a conveyance from a legal to an equitable owner and for an accounting); Greenleaf v. Egan, 30-316, 15+254 (an action by a principal against his agent for conversion and an accounting); Churchill v. Proctor, 31-129, 16+694 (an action to foreclose and for an accounting); Jones v. Morrison, 31-140, 16+854 (an action for several acts of conspiracy against a stockholder); Little v. Willford, 31-173, 17+282 (an action for an injunction and for an injury to the inheritance); Mulvehill v. Bates, 31-364, 17+959 (an action by a parent for damages resulting from injury to a child, with a claim for sickness and suffering of child); Shackleton v. Kneisley, 48-451, 51+470 (an action for an accounting and to wind up a partnership); Ham v. Johnson, 51-105, 52+1080 (an action for reformation and specific performance); Aldrich v. Wetmore, 56-20, 57+221 (an action for injuries from noxious vapors from a cesspool in an excavation and for damages from depositing dirt from such excavation); Whiting v. Clugston, 73-6, 75+759 (an action for the appointment of a receiver, collection of rents and application of same on a personal judgment); French v. Smith, 81-341, 84+44 (an action by a trustee in bankruptcy to set aside a preferential payment and a fraudulent transfer of property by the bankrupt); Albert Lea v. Knatvold, 89-480, 95+309 (an action to abate a nuisance and for an injunction); Dwinnell v. Mpls. etc. Co., 90-383, 97+110 (action against several subscribers to an insurance "guaranty fund"); Hunt v. Dean, 91-96, 97+574 (an action to subject separate tracts of land to the satisfaction of a judgment); Redner v. New York etc. Co., 92-306, 99+886 (action against several insurance companies to set aside an award); Anderson v. Dyer, 94-30, 101+1061 (action for conspiracy of several corporations against a stockholder of an independent company); Parsons v. Wilson, 94-416, 103+163 (an action for the recovery of money lost at gambling); Fegelson v. Niagara etc. Co., 94-486, 103+495 (action against several insurance companies for adjustment of proportionate liability of each); State v. Knife Falls B. Corp., 96-194, 104+817 (action by state to determine relative rights of the public, the relator, and several defendants to the use of the St. Louis river); Wilson v. Youngman, 96-288, 104+946 (action for relief on account of alleged fraud in connection with a contract for the purchase of land); Reed v. Bernstein, 103-66, 114+261 (claim for unpaid rent and for damages occasioned by the wrongful act of the tenant in setting fire to building); Pleins v. Wachenheimer, 108-342, 122+166 (action for damages and cancelation); Carlton County etc. Co. v. Foley, 126+727 (an insurance company, which has paid the amount of a loss covered by one of its policies, may join with the owner of the property destroyed in an action against a third person for negligently causing the loss, even though a part of the property so destroyed, and for which recovery was sought, was not included in the policy).

[63] Holmes v. Williams, 16-164(146) (cause of action for damages for withholding one piece of realty and one to recover possession of another, with damages for detaining the same); Gertler v. Linscott, 26-82, 1+579 (cause of action ex contractu and one ex delicto). See cases under §§ 7502, 7503.

[64] Montgomery v. McEwen, 7-351(276); First Div. etc. Ry. v. Rice, 25-278, 292, Greenleaf v. Egan, 30-316, 15+254; Todd v. Bettingen, 98-170, 175, 107+1049; Disbrow v. Creamery P. M. Co., 104-17, 115+751; Pleins v. Wachenheimer, 108-342, 122+166.

[65] Hanna v. Duxbury, 94-8, 101+971; Sanders v. Classon, 13-379(352); State v. Knife Falls B. Corp., 96-194, 104+817; Trowbridge v. Forepaugh, 14-133(100); Berg v. Stanhope, 43-176, 45+15; Langevin v. St. Paul, 49-189, 51+817; Anderson v. Scandia Bank, 53-191, 54+1062; First Nat. Bank v. Lambert, 63-263, 65+451; Sturtevant v. Mast, 66-437, 69+324; Palmer v. Tyler, 15-106(81); Nichols v. Randall, 5-304(240); Pleins v. Wachenheimer, 108-342, 122+166. See Ramsey County v. Elmund, 89-56, 93+1054; Nahte v. Hansen, 106-365, 119+55.

[66] Jones v. Morrison, 31-140, 16+864; Foster v. Landon, 71-494, 74+281; State v. Knife Falls B. Corp., 96-194, 104+817; Mayberry v. N. P. Ry., 100-79, 110+356.

[01] Carlton County etc. Co. v. Foley, 126+727.

7503. Must be consistent—Inconsistent causes cannot be joined though they arise out of the same transaction or are connected with the same subject of action.[67]

7504. Injury to person or property—A cause of action for trespass to realty may be joined with one for assault.[68] A claim for money wrongfully withheld may be joined with one for money wrongfully or fraudulently exacted.[69] When the several acts of negligence concur in giving rise to a single right of action they may be united in the same complaint.[70]

7505. In equity—Multifariousness—In equity causes of action may be joined if they might have been included in a bill in equity under the old practice without making it multifarious. A bill in equity is not multifarious, where one general right only is claimed by it, though the defendants have only separate interests in distinct questions which arise out of or are connected with such right. All of the defendants, however, must be affected in some respect by the action, or by some part thereof, but they need not be equally affected.[71]

7506. Actions against trustees—Claims against a trustee by virtue of a contract, or arising by operation of law, may be joined.[72]

7507. Complaint insufficient in part—Where one of two causes of action attempted to be stated in a complaint is bad for want of facts constituting a cause of action there is no misjoinder of causes of action.[73]

7508. Remedy for misjoinder—Objection to a misjoinder is to be taken by demurrer or answer and if not so taken it is waived.[74] When the objection is first raised on the trial it is wholly discretionary with the court to compel an election.[75]

ENTITLING

7509. In general—The number of the judicial district is not an essential element of the title.[76] Where several counties are attached together for judicial purposes a complaint is properly entitled if it names them all.[77] After a change of venue the venue in the title should be changed accordingly.[78] The full Christian names of the parties should be given, but the use of initials

[67] Vaule v. Steenerson, 63–110, 65+257. See Anderson v. Dyer, 94–30, 101+1061; Davis v. Severance, 49–528, 52+140; Wagner v. Nagel, 33–348, 23+308; Hause v. Hause, 29–252, 13+43; Plummer v. Mold, 22–15; Hawley v. Wilkinson, 18–525(468) and cases under § 7500.

[68] R. L. 1905 § 4154(3); Craig v. Cook, 28–232, 9+712.

[69] Kraemer v. Deustermann, 37–469, 35+276.

[70] Mayberry v. N. P. Ry., 100–79, 110+356.

[71] State v. Knife Falls B. Corp., 96–194, 104+817; Wilson v. Youngman, 96–288, 104+946; Anderson v. Dyer, 94–30, 101+1061; North v. Bradway, 9–183(169); Fish v. Berkey, 10–199(161); Palmer v. Tyler, 15–106(81); Jones v. Morrison, 31–140, 16+854; Foster v. Landon, 71–494, 74+281; Hanna v. Duxbury, 94–8, 14, 101+971; First Nat. Bank v. Lambert, 63–263, 65+451; Fegelson v. Niagara F. Ins. Co., 94–486, 103+495; Redner v. N. Y. F. Ins. Co., 92–306, 99+886; Dwinnell v. Mpls. etc. Co., 90–383, 97+110; Carlton County etc. Co. v. Foley, 126+727.

[72] R. L. 1905 § 4154(7); Winona etc. Ry. v. St. P. etc. Ry., 26–179, 2+489. See Fish v. Berkey, 10–199(161).

[73] Howe v. Coates, 90–508, 97+129; Mpls. etc. Ry. v. Brown, 99–384, 109+817.

[74] Gardner v. Kellogg, 23–463; James v. Wilder, 25–305; Mulvehill v. Bates, 31–364, 17+959; Densmore v. Shepard, 46–54, 48+528; Davis v. Hamilton, 85–209, 88+744; Campbell v. Ry. Transfer Co., 95–375, 104+547; Lyon County v. Lien, 105–55, 116+1017.

[75] Hawley v. Wilkinson, 18–525(468); Plummer v. Mold, 22–15; Hause v. Hause, 29–252, 13+43; Wagner v. Nagel, 33–348, 23+308; Rhodes v. Pray, 36–392, 32+86; Davis v. Severance, 49–528, 52+140. See Armstrong v. Chi. etc. Ry., 45–85, 47+459.

[76] State v. Munch, 22–67.

[77] Young v. Young, 18–90(72). See State v. Stokely, 16–282(249); State v. McCartey, 17–76(54).

[78] R. L. 1905 § 4088; Nystrom v. Quinby, 68–4, 70+777.

is not a fatal defect.[79] The middle name need not be given, but it is proper practice to insert it by initial.[80] The suffix "Jr." need not be given.[81] Entitling a cause in a particular county and bringing the action therein is a designation of that county as the place of trial.[82] The addition of the word executor, assignee, or the like, to the name of the plaintiff, without something more, is mere description of the person and surplusage.[83]

NUMBERING

7510. Rules of court—It is provided by rule of court that "in all cases of more than one distinct cause of action, defence, counterclaim or reply, the same shall not only be separately stated, but plainly numbered; and all pleadings not in conformity with this rule may be stricken out on motion."[84] A rule of court requires the folios of all pleadings to be marked and numbered.[85]

ALLEGATIONS IN GENERAL

7511. Language employed—The statute requires a plain and concise statement of the facts, without unnecessary repetition.[86] Simplicity and terseness of expression should be the aim of the pleader.[87]

7512. Facts should be alleged as they exist or occurred—Facts should ordinarily be alleged as they actually exist or occurred rather than according to their legal effect or operation. But a pleading which alleges facts according to their legal effect or operation is sufficient and is sometimes to be commended as avoiding objectionable prolixity of statement.[88]

7513. Must be true—Inconsistency—It is a requirement of code pleading that a party should plead his facts truly.[89] One of the corollaries of this rule is that he must not make inconsistent allegations[90]—he cannot plead inconsistent causes of action[91] or inconsistent defences.[92] Inconsistency in allegations is waived if timely objection is not taken.[93]

7514. Facts must be alleged directly and positively—Facts must be alleged directly and positively and not by way of rehearsal, argument, inference or reasoning; and if not so alleged they are not admitted by a failure to traverse them, or by a demurrer.[94] A pleading which is faulty in this regard is demurrable, if the essential facts are not otherwise sufficiently pleaded;[95]

[79] Kenyon v. Semon, 43–180, 45+10. See § 6913.

[80] See Stewart v. Colter, 31–385, 18+98; State v. Higgins, 60–1, 61+816.

[81] Bidwell v. Coleman, 11–78(45).

[82] Hurning v. Hurning, 80–373, 379, 83+342.

[83] Jaeger v. Hartman, 13–55(50).

[84] Rule 6, District Court.

[85] Rule 7, District Court.

[86] R. L. 1905 §§ 4127, 4130; State v. Cooley, 58–514, 60+338; Scofield v. Nat. El. Co., 64–527, 67+645; Atwater v. Spalding, 86–101, 90+370; Lovering v. Webb, 108–201, 120+688, 121+911.

[87] West v. Eureka Imp. Co., 40–394, 42+87.

[88] Elliot v. Roche, 64–482, 67+539; Estes v. Farnham, 11–423(312, 319); Weide v. Porter, 22–429; Larson v. Schmaus, 31–410, 18+273; Gould v. Sub-Dist. No. 3, 7–203(145); Todd v. Mpls. etc. Ry., 37–358, 35+5; Lee v. Mpls. etc. Ry., 34–225, 25+399; Stees v. Kranz, 32–313, 20+241.

[89] Folsom v. Carli, 6–420(284, 290).

[90] See Hausman v. Mulheran, 68–48, 70+866.

[91] See § 7503.

[92] See § 7580.

[93] Dean v. Goddard, 55–290, 56+1060.

[94] Moulton v. Doran, 10–67(49); Taylor v. Blake, 11–255(170); Hall v. Williams, 13–260(242); Chesterson v. Munson, 27–498, 8+593; Coolbaugh v. Roemer, 30–424, 15+869; Biron v. Board W. Comrs., 41–519, 43+482; Welch v. Bradley, 45–540, 48+440; Carlson v. Minn. T. Co., 47–337, 50+229; Sprague v. Wells, 47–504, 50+535; Petzold v. Petzold, 53–39, 54+933; Rossman v. Mitchell, 73–198, 75+1053; Berry v. Dole, 87–471, 92+334; Anderson v. Settergren, 100–294, 111+279.

[95] Berry v. Dole, 87–471, 92+334; Rossman v. Mitchell, 73–198, 75+1053; Carl-

but it is not demurrable if the essential facts may be fairly and reasonably inferred from the facts directly alleged.[96] Objection to the defect is ordinarily waived if not made before trial.[97]

7515. Alternative allegations—Allegations must not be in the alternative. In other words it is not permissible to allege that a fact is so or so. Where the only effect of alternative allegations is to render the pleading indefinite or uncertain the remedy is by motion; but where a pleading alleges two statements of fact in the alternative, one of which constitutes a cause of action and the other not, the allegations neutralize each other, and a general demurrer will lie.[98]

7516. Ultimate not evidentiary facts to be alleged—Only the ultimate, issuable facts, should be alleged and not the evidentiary facts by which they may be proved on the trial;[99] and this is true in equitable as well as legal actions.[1] If, in any case, a pleading which states only evidence can be held good, it can only be where the evidence stated is such that the conclusions of fact necessary to sustain the action or defence must inevitably follow.[2] Evidentiary matter does not render a pleading demurrable if the essential facts are also alleged and alleged directly.[3] Such matter may be treated as evidence in the case if it is admitted by the answer, but it is not admitted by a mere failure to deny.[4] A party is not required to prove the evidentiary facts which he pleads.[5] Evidentiary matter may be stricken out on motion before trial.[6]

7517. Conclusions of law—A pleading must allege facts and not mere conclusions of law.[7] But this rule does not forbid the pleading of composite facts including elements of both law and fact.[8] Cases are cited below holding

son v. Minn. T. Co., 47–337, 50+229 and cases supra.

[96] Mastad v. Swedish Brethren, 83–40, 44, 85+913; Brunswick v. Brackett, 37–58, 33+214; Dugan v. St. P. & D. Ry., 40–544, 42+538; Anderson v. Settergren, 100–294, 111+270. See § 7724.

[97] Welch v. Bradley, 45–540, 48+440.

[98] Anderson v. Mpls. etc. Ry., 103–224, 114+1123; Clague v. Hodgson, 16–329 (291, 297).

[99] Zimmerman v. Morrow, 28–367, 10+139; Vermilye v. Vermilye, 32–499, 18+832, 21+736; Wilcox v. Davis, 4–197(139); Thomson v. Palmer, 52–174, 53+1137; O'Neill v. Johnson, 53–439, 55+601; Carver County v. Bongard, 82–431, 85+214; Cummings v. Thompson, 18–246(228); Johnson v. Velve, 86–46, 90+126; Eisenberg v. Matthews, 84–76, 86+870; Lovering v. Webb, 106–62, 118+61; Burgett v. Wis. C. Ry., 109–216, 123+411; Bjelos v. Cleveland Cliffs I. Co., 109–320, 123+922; Miller v. Natwick, 125+1022.

[1] Vermilye v. Vermilye, 32–499, 18+832, 21+736.

[2] Zimmerman v. Morrow, 28–367, 10+139.

[3] Loomis v. Youle, 1–175(150); Fish v. Berkey, 10–199(161, 166).

[4] Dexter v. Moodey, 36–205, 30+667.

[5] Jagger v. Nat. G. A. Bank, 53–386, 55+545.

[6] Cathcart v. Peck, 11–45(24).

[7] Griggs v. St. Paul, 9–246(231); Finley v. Quirk, 9–194(179, 187).

[8] Clark v. Chi. etc. Ry., 28–69, 9+75 (negligence—negligently—see § 7058); Curtiss v. Livingston, 36–380, 31+357 (the defendants succeeded to and became possessed of said life interest and estate—conveyed—contracted—agreed); In re Stevens, 38–432, 38+111 (preference); First Nat. Bank v. St. Croix B. Corp., 41–141, 42+861 (general allegation of ownership—converted); O'Neill v. Johnson, 53–439, 55+601 (want of probable cause); Mitchell v. Mitchell, 45–50, 47+308 (assaulted); Nixon v. Reeves, 65–159, 67+989 (imprisoned without probable cause); Foran v. Levin, 76–178, 78+1047 (assaulted); Nininger v. Carver County, 10–133(106) (executed in due form of law, and issued—purchased); Atwater v. Spalding, 86–101, 90+370 (general allegation of ownership); First Nat. Bank v. Rogers, 13–407(376) (levied upon); Rohrer v. Turrill, 4–407(309) (id.); Hoag v. Mendenhall, 19–335(289) (duly assigned—indorsed—made); Pinney v. Fridley, 9–34(23) (duly foreclosed); Webb v. Bidwell, 15–479(394) (duly levied and assessed taxes); Folsom v. Chisago County, 28–324, 9+881 (duly contracted); Mpls. etc. Ry. v. Morrison, 23–308 (duly organized); Goetz v. School Dist., 31–164, 17+276 (a duly qualified teacher of and in the public schools of the state); Steele v. Fish, 2–153(129) (actual

particular allegations to be mere conclusions of law.[9] The pleading of conclusions of law renders a complaint demurrable,[10] unless the essential facts are otherwise sufficiently alleged.[11] An allegation which is a mere legal conclusion is not traversable,[12] and is not admitted by a demurrer [13] or failure to deny.[14] It may be stricken out on motion as sham or irrelevant.[15]

7518. Facts presumed—Legality—Regularity—It is unnecessary to allege facts which the law will presume.[16] When it is alleged that a contract was made it is unnecessary to allege facts to show that it was legally made, and when it is alleged that an act was done it is unnecessary to allege facts to show that it was legally or regularly done.[17] An exception to this general rule has been made in the case of an infant plaintiff.[18] If a pleader unnecessarily alleges a fact which would be presumed in the absence of allegation the adverse party may raise an issue thereon by a denial.[19]

possession and occupancy); Glass v. St. P. etc. Co., 43–228, 45+150 (duly filed and recorded); State v. Ames, 31–440, 18+277 (duly authorized); Meeker County v. Butler, 25–363 (duly taken and received); Pope v. G. N. Ry., 94–429, 103+331 (allegations that the plaintiff was without fault and in the due performance of his duty); Stewart v. Simmons, 101–375, 112+282 (that a lien statement was filed within ninety days after the furnishing and delivery of the last items of material and labor); Lovering v. Webb, 106–62, 118+61 (action for money had and received); Christiansen v. Chi. etc. Ry., 107–341, 120+300 (general allegation of negligence).

[9] Banning v. Armstrong, 7–46(31) (lawful manner); Buck v. Colbath, 7–310(238) (wrongful); Frasier v. Williams, 15–288 (219) (an allegation of indebtedness); Wilson v. Clarke, 20–367(318) (that said defendant neglected and refused to furnish to him, the plaintiff, freight for transportation, according to the terms of said agreement); Knudson v. Curley, 30–433, 15+873 (that said sale of said land was made without authority of law, and is void); Price v. Doyle, 34–400, 26+14 (constituted and was a valid lien upon the premises); Hoxsie v. Empire L. Co., 41–548, 43+476 (real owner); Rand v. Hennepin County, 50–391, 52+901 (that a party was "compelled" to pay); Temple v. Norris, 53–286, 55+133 (not a person of suitable age and discretion); Dennis v. Nelson, 55–144, 56+589 (which amended complaint set forth an entirely different and distinct cause of action from that set forth in the original complaint in said action); Seibert v. Mpls. etc. Ry., 58–39, 50, 59+822 (has also neglected to keep and perform its covenants to keep in good repair the rolling stock * * * and to replace such rolling stock when lost or destroyed); Clifford v. Minor, 67–512, 70+798 (that words * * * are surplusage and were inserted therein by the inadvertence and mistake of the scrivener); Heron v. St. P. etc. Ry., 68–542, 71+706 (allegations that it was the "duty" of a rail-company to do certain things); Mpls. L. Co. v. McMillan, 79–287, 82+591 (that a party did not have "legal cause"); Moon v. Allen, 82–89, 84+654 (that an obligation was an obligation and liability of a firm); Esch v. White, 82–462, 85+238 (that the plaintiffs were not the real parties in interest); Fitzpatrick v. Simonson, 86–140, 90+378 (that certain tax titles "are wholly and absolutely void, and of no force or effect"); Vachon v. Nichols, 126+278 (that a duebill "is now due and payable").

[10] Griggs v. St. Paul, 9–246(231); Price v. Doyle, 34–400, 26+14; Esch v. White, 82–462, 85+238.

[11] Fitzpatrick v. Simonson, 86–140, 90+378.

[12] See § 7570.

[13] See § 7542.

[14] See § 7576.

[15] Dennis v. Nelson, 55–144, 56+589.

[16] Finley v. Quirk, 9–194(179, 186); Nininger v. Carver County, 10–133(106); Smith v. Jordan, 13–264(246); Pinney v. King, 21–514; Chamberlain v. Tiner, 31–371, 18+97; Ennis v. Buckeye P. Co., 44–105, 46+314; Dennis v. Johnson, 47–56, 49+383; Oevermann v. Loebertmann, 68–162, 70+1084.

[17] Nininger v. Carver County, 10–133 (106); Folsom v. Chisago County, 28–324, 9+881; Randall v. Constans, 33–329, 23+530; Ryan v. School Dist., 27–433, 8+146; Soule v. Thelander, 31–227, 17+373; Collom v. Bixby, 33–50, 21+855; Walsh v. Kattenburgh, 8–127(99); Rohrer v. Turrill, 4–407(309); Dodge v. Chandler, 13–114(105); Nelson v. Nugent, 62–203, 64+392; Lyford v. Martin, 79–243, 82+479; Carver County v. Bongard, 82–431, 85+214.

[18] Irvine v. Irvine, 5–61(44).

[19] Dennis v. Johnson, 47–56, 49+383; Lotto v. Davenport, 50–99, 52+130; State v. Akeley, 107–54, 119+387.

7519. Continuance of state of facts alleged—Presumption—It is the general rule that where a state of facts is alleged to exist its continuance is presumed until the contrary appears,[20] but it is held that this does not apply to an allegation of ownership in ejectment.[21]

7520. Facts judicially noticed—Facts of which judicial notice will be taken need not be alleged.[22]

7521. Time—If the time of an act or event is an essential element of a cause of action it must be alleged with precision and proved as alleged. It is insufficient in such cases to plead the time as "on or about" a certain day.[23] Ordinarily time is not material.[24] An allegation that a condition has existed since a certain date does not include that date.[25]

7522. Place—It is sufficient to describe a place as "in the county and state aforesaid," if the name of the county and state are in the title of the pleading.[26]

7523. Intention—When the intention with which an act is done is material it may be directly alleged as a fact.[27]

7524. Title—In pleading title to either real or personal property a general allegation of ownership is sufficient to admit proof of any legal title, general or special,[28] but not of an equitable title.[29] Where a pleading attempts to show title to realty in a party by stating the specific facts through which he claims it, if any fact necessary to the passing of the title to him is omitted, the pleading is bad though it concludes that by reason of such facts he is seized in fee simple.[30] If a party pleads a specific title, or one acquired in a particular way, he will be limited in his proofs to the particular title pleaded.[31]

7525. Pleading by copy—In actions on written instruments it is proper to plead the instrument by copy, that is, by setting it out in haec verba rather than according to its legal effect.[32] In pleading by copy it is unnecessary to include the names of witnesses or an acknowledgment.[33]

7526. Exhibits—In actions on written contracts the contract or a copy thereof may be attached to a pleading and made a part thereof for purposes of essential averment by proper allegation.[34] And in any case papers may be attached to pleadings as exhibits in explanation of the facts alleged in the pleading. Recitals in exhibits are not to be taken as essential averments of the facts constituting a cause of action or defence unless they are clearly made

[20] Rhone v. Gale, 12–54(25); Jaeger v. Hartman, 13–55(50). See § 3438.

[21] See § 2875.

[22] Finney v. Callendar, 8–41(23); Shartle v. Minneapolis, 17–308(284); Webb v. Kennedy, 20–419(374).

[23] Lockwood v. Bigelow, 11–113(70); Balch v. Wilson, 25–299; Griggs v. St. Paul, 9–246(231); Adams v. Minneapolis, 20–484(438).

[24] Finley v. Quirk, 9–194(179); Clague v. Hodgson, 16–329(291); Hayden v. Albee, 20–159(143); McMurphy v. Walker, 20–382(334).

[25] Lawver v. G. N. Ry., 97–36, 105+1129.

[26] See State v. Bell, 26–388, 5+970; Hughes v. Meehan, 84–226, 87+768.

[27] Wilcox v. Davis, 4–197(139).

[28] McArthur v. Clark, 86–165, 90+369; Atwater v. Spalding, 86–101, 90+370.

[29] See § 2876.

[30] Pinney v. Fridley, 9–34(23); Bell v. Dangerfield, 26–307, 3+698; Jellison v. Halloran, 40–485, 488, 42+392; First Nat. Bank v. St. Croix B. Corp., 41–141, 42+861; Casey v. McIntyre, 45–526, 48+402; Carlson v. Presbyterian Bd. of Relief, 67–436, 70+3; Gehr v. Knight, 77–88, 79+652; Bloemendal v. Albrecht, 79–304, 82+585; Bartleson v. Munson, 105–348, 117+512. See Buckholz v. Grant, 15–406(329); Atkinson v. Duffy, 16–45(30); Cleveland v. Stone, 51–274, 53+647.

[31] O'Malley v. St. P. etc. Ry., 43–289, 294, 45+440; Pinney v. Fridley, 9–34(23).

[32] Elliot v. Roche, 64–482, 67+539. See § 1902.

[33] Roberts v. Nelson, 65–240, 68+14.

[34] Elliott v. Roche, 64–482, 67+539; Union S. P. Co. v. Olson, 82–187, 84+756.

so by proper averment in the pleading to which they are attached.[35] If they are properly made essential averments of a cause of action or defence, their sufficiency may be determined on a demurrer to the complaint to which they are attached.[36]

COMPLAINT

7527. Separate statement of causes of action—When a complaint includes more than one cause of action each must be separately stated and plainly numbered.[37] Each must be complete in itself, but the allegations of one may be made a part of another by apt words of reference.[38] Matters of mere inducement, such as incorporation, may be alleged at the beginning of the pleading, distinct from the other allegations, and need not be made a part of each cause of action.[39] Each cause of action is sometimes called a "count."[40] The exclusive remedy for a failure to state several causes of action separately is a motion before trial.[41]

7528. Paragraphs—The mere fact that the several paragraphs of a complaint are separately numbered is of itself insufficient to determine their character as separate and distinct counts, or causes of action.[42]

7529. Every essential fact must be alleged—Every fact which the plaintiff must prove in order to recover must be alleged.[43]

7530. Prima facie case sufficient—The plaintiff is required to allege in his complaint only those facts which, under a general denial, it would be necessary for him to prove, in the first instance, to protect himself from a nonsuit, and to show himself entitled to a judgment.[44] In other words only the material or issuable facts need be alleged.[45]

7531. Surplusage—If a complaint alleges all the essential facts of a cause of action and also non-essential facts the latter need not be proved in order to recover on the former. They may be treated as surplusage.[46]

7532. Allegations on information and belief—Facts may be alleged in a complaint upon information and belief.[47] But this mode of pleading is not often permissible for the plaintiff. It cannot be employed in alleging facts actually or presumptively known to the pleader.[48] Whatever is essential to the rights of the plaintiff and is necessarily within his knowledge, ought to be alleged positively and with precision.[49]

7533. Conditions precedent—Where the plaintiff's right of action is conditional upon the performance of some act or the occurrence of some event,

[35] Union S. P. Co. v. Olson, 82–187, 84+756; Sprague v. Wells, 47–504, 50+535; Taylor v. Blake, 11–255(170, 182); Realty R. G. Co. v. Farm etc. Co., 79–465, 82+857; Stewart v. Simmons, 101–375, 112+282. See Mpls. etc. Ry. v. Grethen, 86–323, 90+573; Danvers F. E. Co. v. Johnson, 93–323, 328, 101+492.

[36] Union S. P. Co. v. Olson, 82–187, 84+756.

[37] R. L. 1905 § 4154; Rule 6, Dist. Ct.; Newell v. How, 31–235, 17+383; West v. Eureka Imp. Co., 40–394, 42+87.

[38] Newell v. How, 31–235, 17+383; Gertler v. Linscott, 26–82, 1+579; Knappen v. Freeman, 47–491, 50+533; La Plant v. Firemen's Ins. Co., 68–82, 70+856; Realty R. G. Co. v. Farm etc. Co., 79–465, 82+857.

[39] West v. Eureka Imp. Co., 40–394, 42+87.

[40] Merrill v. Dearing, 22–376; Fredin v. Richards, 61–490, 494, 63+1031.

[41] Craig v. Cook, 28–232, 9+712; Newell v. How, 31–235, 17+383. See Davis v. Hamilton, 85–209, 88+744.

[42] Merrill v. Dearing, 22–376.

[43] Bernheimer v. Marshall, 2–78(61, 68); Griggs v. St. Paul, 9–246(231, 234).

[44] Jones v. Ewing, 22–157; Spink v. Ryan, 72–178, 75+18.

[45] Weide v. Porter, 22–429. See cases under § 7529.

[46] Steamboat War Eagle v. Nutting, 1–256(201); Meyenberg v. Eldred, 37–508, 35+371; Smalley v. Isaacson, 40–450, 42+352; Jagger v. Nat. G. A. Bank, 53–386, 55+545. See Dennis v. Johnson, 47–56, 49+383; Geer v. Ouray County, 97 Fed. 435.

[47] State v. Cooley, 58–514, 60+338.

[48] See § 7566.

[49] Lockwood v. Bigelow, 11–113(70).

the performance of the act or the occurrence of the event must be alleged in the complaint.[50] By statute, in pleading the performance of conditions precedent in contracts, it is unnecessary to plead the facts showing such performance, but it may be stated generally that the party duly performed all the conditions on his part.[51] The statute applies only to contracts.[52] It is inapplicable to performance by a stranger to the contract.[53] Except as provided by the statute it is necessary for the plaintiff to allege the facts showing performance. It is not enough for him to allege in a general way that he has performed all the conditions by him to be performed.[54] Failure to allege performance, or facts in excuse, renders a complaint demurrable if the defect appears on the face thereof.[55] If the defect appears on the face of the complaint, or is admitted by the reply, the objection may be raised by a motion for dismissal on the trial, by objecting to the introduction of evidence, or for the first time on appeal.[56] Failure to perform a condition precedent may be set up by answer.[57]

7534. Conditions subsequent—If payment is not to be made if a certain contingency happens it is unnecessary to allege in the complaint the nonhappening of the contingency.[58] A condition subsequent is a matter of defence.[59]

7535. Anticipating defences—It is unnecessary to anticipate and negative possible defences, or to state matters which would come more properly from the adverse party.[60] If a complaint states facts constituting a cause of action, but also states facts which constitute a defence thereto, it is demurrable.[61]

7536. Duplicity—A complaint must not be double, that is, it must not state the facts constituting a single cause of action in a double and inconsistent aspect. The exclusive remedy for this defect is a motion before trial. If the objection is first raised on the trial it is wholly discretionary with the court to compel an election.[62] In an action by several plaintiffs the complaint

[50] Johnson v. Howard, 20-370(322); Wilson v. Clarke, 20-367(318); Root v. Childs, 68-142, 70+1078; Briggs v. Rutherford, 94-23, 101+954; Biron v. Board W. Comrs., 41-519, 43+482; Mosness v. G. A. Ins. Co., 50-341, 52+932; Lane v. St. P. etc. Co., 50-227, 52+649; Parr v. Johnson, 37-457, 35+176; Snow v. Johnson, 1-48 (32); St. Paul etc. Ry. v. Robbins, 23-439; Mpls. H. Works v. Libby, 24-327; Potter v. Holmes, 65-377, 68+63; Hobart v. Kehoe, 126+66; Vachon v. Nichols, 126+278.

[51] R. L. 1905 § 4150; Mosness v. G. A. Ins. Co., 50-341, 52+932; Wood v. Robbins, 56-48, 57+317; Taylor v. Marcum, 60-292, 62+330; Andreas v. Holcombe, 22-339.

[52] Biron v. Board W. Comrs., 41-519, 43+482.

[53] Johnson v. Howard, 20-370(322); Bergmeier v. Eisenmenger, 59-175, 60+1097.

[54] Johnson v. Howard, 20-370(322); Biron v. Board W. Comrs., 41-519, 43+482; Mosness v. G. A. Ins. Co., 50-341, 52+932.

[55] Wilson v. Clarke, 20-367(318); Johnson v. Howard, 20-370(322). Biron v. Board W. Comrs., 41-519, 43+482.

[56] Parr v. Johnson, 37-457, 35+176; Mosness v. G. A. Ins. Co., 50-341, 52+932.

[57] Nichols v. Minneapolis, 30-545, 16+410.

[58] Root v. Childs, 68-142, 70+1078.

[59] Shartle v. Minneapolis, 17-308(284, 290).

[60] Jones v. Ewing, 22-157; Hocum v. Weitherick, 22-152; Clark v. Chi. etc. Ry., 28-69, 9+75; Hennessy v. St. P. etc. Ry., 30-55, 14+269; Young v. Young, 18-90 (72); Laudenschlager v. N. W. etc. Assn., 36-131, 30+447; Meyer v. Berlandi, 53-59, 54+937; Gray v. First Div. etc. Ry., 13-315(289); St. Paul L. Co. v. Dayton, 37-364, 34+335; Root v. Childs, 68-142, 70+1078; Shartle v. Minneapolis, 17-308(284); McMillan v. Cheeney, 30-519, 16+404; St. Paul F. Co. v. Wegmann, 40-419, 42+288; Hospes v. N. W. etc. Co., 48-174, 50+1117; Spink v. Ryan, 72-178, 75+18; Blethen v. Stewart, 41-205, 42+932; Romer v. Conter, 53-171, 54+1052; Schrepfer v. Rockford Ins. Co., 77-291, 79+1005; Lyford v. Martin, 79-243, 82+479; Carver County v. Bongard, 82-431, 85+214.

[61] Clark v. Chi. etc. Ry., 28-69, 72, 9+75; Millette v. Mehmke, 26-306, 3+700.

[62] Dean v. Leonard, 9-190(176); Marsh v. Webber, 13-109(99); Hawley v. Wilkinson, 18-525(468); Hewitt v. Brown,

is not double merely because, in alleging a cause of action in favor of all, it alleges facts which might sustain an action brought by only one.[63]

7537. Demand for relief—The demand for relief is no part of the cause of action and is not traversable [64] or subject to demurrer.[65] A party cannot recover greater damages than he demands, but this limitation may be avoided by amendment.[66] If the defendant appears, the demand for relief is of little importance,[67] but in case of a default it limits strictly the relief which may be awarded.[68] A demand for alternative relief is sometimes made.[69] To a specific demand for relief is often added a general demand, "and for such other and further relief as to the court may seem just," but as such a demand cannot be made the basis for any relief on default [70] it is a waste of words. The nature of an action is determined by the facts alleged and not by the demand for relief.[71] If the facts stated in a complaint constitute a single cause of action, a demand for inconsistent forms of relief will not render the pleading demurrable on the ground of a misjoinder of several causes of actions.[72] It is a general rule of pleading that a party does not lose the benefit of matter pleaded by asking for it a greater effect than it is entitled to.[73]

CROSS-COMPLAINT

7538. In general—A cross-complaint will lie in this state though it is not expressly authorized by statute. The order should provide for the service of the complaint on all the parties against whom it is directed, and they should answer it.[74] The cause of action which one defendant may set up against his codefendant by a cross-complaint must be one arising out of, or having reference to, the subject of the original action.[75] A cross-complaint is a suit brought by a defendant against the plaintiff, or against him and a codefendant, to obtain independent relief.[76]

DEMURRER

7539. Statutory grounds exclusive—Demurrer will not lie except on the grounds specified in the statute.[77]

7540. Raises issue of law—A demurrer raises an issue of law upon which the court is to render judgment.[78]

21–163; Plummer v. Mold, 22–15; Wagner v. Nagel, 33–348, 23+308; Exley v. Berryhill, 36–117, 30+436; Ingle v. Angell, 126+400.

[63] Whelan v. Sibley County, 28–80, 9+175.

[64] Colstrum v. Mpls. etc. Ry., 31–367, 18+94; Hatch v. Coddington, 32–92, 19+393; Albert Lea v. Knatvold, 89–480, 95+309.

[65] See § 7555.

[66] Elfelt v. Smith, 1–125(101); Eaton v. Caldwell, 3–134(80); Nichols v. Wiedemann, 72–344, 75+208, 76+41.

[67] See § 5041.

[68] See § 4996.

[69] Connor v. Board of Ed., 10–439(352); Henry v. Meighen, 46–548, 49+323, 646.

[70] Minn. L. O. Co. v. Maginnis, 32–193, 20+85; Prince v. Farrell, 32–293, 20+234. See § 4996.

[71] Mpls. etc. Ry. v. Brown, 99–384, 109+817.

[72] Colstrum v. Mpls. etc. Ry., 31–367, 18+94.

[73] Townsend v. Mpls. etc. Co., 46–121, 48+682.

[74] Pioneer F. Co. v. St. Peter etc. Co., 64–386, 67+217; Pine Tree L. Co. v. McKinley, 83–419, 86+414. See Howe v. Spalding, 50–157, 52+527; Jewett v. Iowa L. Co., 64–531, 67+639; Palmer v. Bank of Zumbrota, 65–90, 67+893; Sturtevant v. Mast, 66–437, 69+324; Maxwell v. Northern T. Co., 70–334, 73+173.

[75] Am. Exch. Bank v. Davidson, 69–319, 72+129.

[76] Spooner v. Bay St. Louis Synd., 47–464, 50+601.

[77] Seager v. Burns, 4–141(93); Powers v. Ames, 9–178(164); Reynolds v. La Crosse etc. Co., 10–178(144); Campbell v. Jones, 25–155; Leuthold v. Young, 32–122, 124, 19+652; Nelson v. Pelan, 34–243, 25+406; Freeman v. Paulson, 107–64, 119+651.

[78] Knoblauch v. Foglesong, 38–459, 38+366; Porter v. Fletcher, 25–493, 495. See Deuel v. Hawke, 2–50(37, 43).

7541. Defect must appear on face of pleading—It is a fundamental rule that demurrer will not lie except for defects apparent upon the face of the pleading to which it is directed.[79]

7542. Admits facts well pleaded—A demurrer admits all the material facts well pleaded,[80] and also all necessary legal inferences arising from the facts so pleaded.[81] It does not admit conclusions of law, or facts alleged by way of recital or inference, or in other respects not well pleaded.[82] It admits inferences of fact which may fairly be made from the facts well pleaded.[83]

7543. To whole of pleading—A demurrer cannot be good in part and bad in part. It must be good to the whole extent to which it is interposed. If it is interposed to a whole pleading, and the pleading contains at least one good cause of action or defence, it is bad.[84]

7544. To part of pleading—A demurrer will only lie to a whole pleading or to the whole of a single cause of action or defence.[85] It will lie to a single cause of action or defence though not separately stated.[86]

7545. Joint—If several parties join in a demurrer it must be overruled if the pleading against which it is directed is good as to any of the demurrants.[87]

7546. Party cannot demur and answer—A party cannot at the same time demur and answer to the same matter. A demurrer cannot be inserted in the body of an answer.[88]

7547. Reaches first defective pleading—A demurrer reaches the first pleading defective in substance. Upon a demurrer to an answer or reply the sufficiency of the complaint may be questioned.[89] Whether this rule applies where by the answer the complaint has become the subject of an issue of fact, and the demurrer is to a counterclaim which alleges a separate and independent cause of action, is an open question in this state.[90] The only defects of sub-

[79] Powers v. Ames, 9–178(164); Reynolds v. La Crosse etc. Co., 10–178(144); Mpls. H. Works v. Libby, 24–327; Bell v. Mendenhall, 71–331, 337, 73+1086; Mendenhall v. Duluth D. G. Co., 72–312, 75+232; Everett v. O'Leary, 90–154, 95+901.

[80] Cowley v. Davidson, 10–392(314); Nininger v. Carver County, 10–133(106); Baker v. N. W. G. L. Co., 36–185, 30+464; St. Paul L. Co. v. Dayton, 37–364, 34+335; Reiser v. Gigrich, 59–368, 61+30; Birch v. Security S. & L. Assn., 71–112, 73+513; Sacks v. Minneapolis, 75–30, 77+563; Kosmerl v. Snively, 85–228, 88+753; Sorenson v. Carey, 96–202, 104+958; Bena T. Co. v. Sauve, 104–472, 116+947; Wessel v. Wessel, 106–66, 118+157.

[81] Bena T. Co. v. Sauve, 104–472, 116+947.

[82] Chouteau v. Rice, 1–106(83, 90); Griggs v. St. Paul, 9–246(231); Taylor v. Blake, 11–255(170); Johnson v. Howard, 20–370(322). See Wessel v. Wessel, 106–66, 118+157.

[83] Wessel v. Wessel, 106–66, 118+157; Vukelis v. Virginia L. Co., 107–68, 119+509. See § 7724.

[84] First Nat. Bank v. How, 28–150, 9+626; Armstrong v. Hinds, 9–356(341); Miller v. Rouse, 8–124(97); Winona etc. Ry. v. St. P. etc. Ry., 26–179, 2+489; Grant v. Grant, 53–181, 54+1059; Am. B. & L. Assn. v. Stoneman, 53–212, 54+1115; Vaule v. Steenerson, 63–110, 65+257; Gammons v. Johnson, 69–488, 72+563; Johnson v. White, 78–48, 80+838.

[85] Knoblauch v. Foglesong, 38–459, 38+366; Bass v. Upton, 1–408(292); Armstrong v. Hinds, 9–356(341); Daniels v. Bradley, 4–158(105); Palmer v. Smith, 21–419; Pratt v. Sparkman, 42–448, 44+663; Dean v. Howard, 49–350, 51+1102; Steenerson v. G. N. Ry., 64–216, 66+723. See Seibert v. Mpls. etc. Ry., 52–148, 53+1134.

[86] Bass v. Upton, 1–408(292); Anderson v. Scandia Bank, 53–191, 54+1062.

[87] Clark v. Lovering, 37–120, 33+776; Petsch v. Dispatch P. Co., 40–291, 41+1034; Palmer v. Bank of Zumbrota, 65–90, 67+893; Johnson v. Velve, 86–46, 90+126. See Lewis v. Williams, 3–151(95); Goncelier v. Foret, 4–13(1).

[88] Lace v. Fixen, 39–46, 38+762.

[89] First Nat. Bank v. How, 28–150, 9+626; Loomis v. Youle, 1–175(150); Smith v. Mulliken, 2–319(273); Yoss v. De-Freudenrich, 6–95(45); Stratton v. Allen, 7–502(409); Lockwood v. Bigelow, 11–113(70); Townsend v. Fenton, 30–528, 16+421; Bausman v. Woodman, 33–512, 24+198; Brown v. Baker, 65–133, 67+793; Dwinnell v. Kramer, 87–392, 92+227; Hanson v. Byrnes, 96–50, 104+762; Branton v. McLaughlin, 109–244, 123+808.

[90] Hanson v. Byrnes, 96–50, 104+762.

stance within the rule are want of jurisdiction of the subject-matter and insufficiency of the facts alleged to constitute a cause of action.[91]

7548. Grounds must be specified—The statute requires a demurrer to specify the grounds of objection.[92] A general demurrer to a pleading to the effect that it does not state facts sufficient to constitute a cause of action or defence is sufficient without further specification.[93] A party may specify as many of the statutory grounds as he desires, but he is limited to those specified.[94] The ground of objection cannot be shifted on appeal.[95] A demurrer for defect of parties must point out the defect and name the persons omitted.[96]

7549. For insufficiency of the facts—General demurrer—If a complaint states facts entitling the plaintiff to any relief, either legal or equitable, it is not subject to a general demurrer though the plaintiff misconceived the nature of his cause of action and demanded the wrong relief.[97] Under a general demurrer the following objections, if they appear upon the face of the complaint, may be raised: that the complaint does not state facts constituting a cause of action against the defendant and in favor of the plaintiff, though it may state a cause of action between others;[98] former adjudication;[99] that the action is barred by the statute of limitations;[1] contributory negligence;[2] that the action is prematurely brought;[3] that the contract alleged is void under the statute of frauds;[4] failure to plead a foreign statute;[5] the defence of bona fide purchaser;[6] that the facts alleged do not authorize equitable relief;[7] misjoinder of parties;[8] that the plaintiff has an adequate remedy at law;[9] that the allegations are in the alternative.[10] The following objections cannot be raised: want of legal capacity or authority to sue;[11] misjoinder of causes of action;[12] defect of parties;[13] want of jurisdiction of the subject-matter;[14] or inconsistency between the relief to which the complaint entitles the plaintiff and the prayer in the summons.[15]

7550. For want of jurisdiction—Demurrer will lie for want of jurisdiction of the person of the defendant,[16] or of the subject-matter of the action.[17]

7551. For defect of parties—A demurrer for defect of parties must state specifically wherein the defect consists and name the parties omitted.[18] A demurrer for a defect of parties is not a substitute for the common-law plea in abatement. Where a complaint shows a cause of action to have accrued

91 Stratton v. Allen, 7–502(409); Lockwood v. Bigelow, 11–113(70); Hanson v. Byrnes, 96–50, 104+762.

92 R. L. 1905 § 4129.

93 Monette v. Cratt, 7–234(176).

94 Seager v. Burns, 4–141(93); Powers v. Ames, 9–178(164); Walsh v. Byrnes, 39–527, 40+831; Bell v. Mendenhall, 71–331, 73+1086; Rossman v. Mitchell, 73–198, 75+1053; Disbrow v. Creamery P. M. Co., 125+115.

95 N. W. Railroader v. Prior, 68–95, 70+869.

96 See § 7324.

97 See § 7555.

98 Rossman v. Mitchell, 73–198, 75+1053.

99 Monette v. Cratt, 7–234(176).

1 See § 5659.

2 Clark v. Chi. etc. Ry., 28–69, 9+75.

3 Iselin v. Simon, 62–128, 64+143.

4 Wentworth v. Wentworth, 2–277(238); Wilson v. Schnell, 20–40(33); Russell v. Wis. etc. Ry., 39–145, 39+302.

5 Myers v. Chi. etc. Ry., 69–476, 72+694.

6 Newton v. Newton, 46–33, 48+450.

7 Sanborn v. Eads, 38–211, 36+338; Lloyd v. Simons, 97–315, 105+902.

8 See § 7327.

9 Lloyd v. Simons, 97–315, 105+902.

10 Anderson v. Mpls. etc. Ry., 103–224, 114+1123.

11 Gould v. Sub-Dist., 7–203(145); Soule v. Thelander, 31–227, 17+373; Walsh v. Byrnes, 39–527, 40+831; Rossman v. Mitchell, 73–198, 75+1053.

12 Smith v. Jordan, 13–264(246).

13 Bell v. Mendenhall, 71–331, 73+1086; Svanburg v. Fosseen, 75–350, 78+4.

14 Powers v. Ames, 9–178(164).

15 Freeman v. Paulson, 107–64, 119+651.

16 Reynolds v. La Crosse etc. Co., 10–178(144).

17 Powers v. Ames, 9–178(164); Benson v. Silvey, 59–73, 60+847.

18 Jaeger v. Sunde, 70–356, 73+171; Anderson v. Dyer, 94–30, 101+1061; Disbrow v. Creamery P. M. Co., 104–17, 115+751.

to plaintiff and others jointly, a demurrer for the non-joinder of such others will lie, though the complaint does not show that they are alive.[19] The defect must affirmatively appear from the face of the pleading.[20] An excess of parties is not a ground for demurrer as "a defect of parties." [21]

7552. For want of capacity to sue—To sustain a demurrer for want of capacity to sue it is not enough that such want does not appear; it is essential that it should appear affirmatively.[22]

7553. For pendency of another action—The pendency of another action between the parties is ground for demurrer when it appears upon the face of the complaint.[23]

7554. For misjoinder of causes of action—The proper remedy for a misjoinder of causes of action is a demurrer on that ground.[24] A general demurrer does not cover the objection.[25] All the defendants need not join.[26] If the facts stated in a complaint constitute a single cause of action, a demand for inconsistent forms of relief does not render the pleading demurrable on the ground of a misjoinder of causes of action.[27]

7555. Defects for which demurrer will not lie—Demurrer will not lie because the complaint demands the wrong relief,[28] or inconsistent relief,[29] or greater relief than the facts alleged warrant.[30] It will not lie for a defect in the allegation of damages;[31] or for misjoinder or excess of parties;[32] or for indefiniteness;[33] or for redundancy;[34] or for non-existence of the facts alleged;[35] or for suing by initials;[36] or for failure to state several causes of action separately;[37] or for irrelevancy;[38] or for a defect in a verification;[39]

[19] Porter v. Fletcher, 25-493.

[20] Mendenhall v. Duluth etc. Co., 72-312, 75+232.

[21] Hoard v. Clum, 31-186, 17+275.

[22] State of Wis. v. Torinus, 22-272; Mpls. H. Works v. Libby, 24-327; Soule v. Thelander, 31-227, 17+373; Walsh v. Byrnes, 39-527, 40+831; Lehigh Valley C. Co. v. Gilmore, 93-432, 101+796.

[23] Coles v. Yorks, 31-213, 17+341; Somers v. Dawson, 86-42, 90+119.

[24] See § 7508.

[25] Smith v. Jordan, 13-264(246).

[26] Trowbridge v. Forepaugh, 14-133(100).

[27] Colstrum v. Mpls. etc. Ry., 31-367, 18+94.

[28] Connor v. Board of Ed., 10-439(352); Metzner v. Baldwin, 11-150(92); First Div. etc. Ry. v. Rice, 25-278; Canty v. Latterner, 31-239, 17+385; Leuthold v. Young, 32-122, 19+652; Bohrer v. Drake, 33-408, 23+840; Dye v. Forbes, 34-13, 24+309; Third Nat. Bank v. Stillwater G. Co., 36-75, 30+440; Alworth v. Seymour, 42-526, 44+1030; Crosby v. Timolat, 50-171, 52+526; Payne v. Loan & G. Co., 54-255, 55+1128; Bay View L. Co. v. Myers, 62-265, 64+816; Rule v. Omega etc. Co., 64-326, 67+60; Morey v. Duluth, 69-5, 71+694; Bell v. Mendenhall, 71-331, 73+1086; Kenaston v. Lorig, 81-454, 84+323; Albert Lea v. Knatvold, 89-480, 95+309; Disbrow v. Creamery P. M. Co., 104-17, 115+751; Lovering v. Webb, 106-62, 118+61.

[29] Connor v. Board of Ed., 10-439(352); Metzner v. Baldwin, 11-150(92); Colstrum v. Mpls. etc. Ry., 31-367, 18+94; Leuthold v. Young, 32-122, 19+652.

[30] Lockwood v. Bigelow, 11-113(70); First Div. etc. Ry. v. Rice, 25-278; Seibert v. Mpls. etc. Ry., 58-39, 59+822; Mpls. etc. Ry. v. Brown, 99-384, 109+817.

[31] Cowley v. Davidson, 10-392(314); Partridge v. Blanchard, 23-69; Steenerson v. G. N. Ry., 64-216, 66+723.

[32] Lewis v. Williams, 3-151(95); Goncelier v. Foret, 4-13(1); Hoard v. Clum, 31-186, 17+275.

[33] Chouteau v. Rice, 1-106(83); Nininger v. Carver County, 10-133(106); Dewey v. Leonard, 14-153(120); Spottswood v. Herrick, 22-548; Clark v. Chi. etc. Ry., 28-69, 9+75; Curtiss v. Livingston, 36-380, 31+357; Snowberg v. Nelson, 43-532, 45+1131; Am. B. Co. v. Kingdom P. Co., 71-363, 73+1089; Crawford v. Lillibridge, 89-276, 94+868; Smith v. G. N. Ry., 92-11, 99+47; Anderson v. Mpls. etc. Ry., 103-224, 114+1123; Matteson v. U. S. etc. Co., 103-407, 115+195; Blunt v. Egeland, 104-351, 116+653; Lovering v. Webb, 106-62, 118+61; Bjelos v. Cleveland Cliffs I. Co., 109-320, 123+922.

[34] Loomis v. Youle, 1-175(150); Fish v. Berkey, 10-199(161).

[35] Williams v. Langevin, 40-180, 41+936; Royal Ins. Co. v. Clark, 61-476, 63+1029; Stevens v. Staples, 64-3, 65+959.

[36] Gardner v. McClure, 6-250(167).

[37] Craig v. Cook, 28-232, 9+712; Newell v. How, 31-235, 17+383.

[38] Fish v. Berkey, 10-199(161); Erickson v. Child, 87-487, 92+1130.

or for failure to obtain leave of court to sue;[40] or for bringing an action in the wrong county;[41] or because plaintiff's remedy is in equity;[42] or because the summons is not served on a codefendant;[43] or because two counterclaims are not stated separately;[44] or for a discrepancy between the relief to which the complaint entitles the plaintiff and the prayer in the summons.[45]

7556. To answer—Counterclaims—There is only one statutory ground of demurrer to an answer,[46] but under it the objection may be raised that a counterclaim cannot be determined without the presence of other parties.[47] That a cause of action pleaded as a counterclaim is not a proper subject of counterclaim is ground for demurrer.[48] Prior to Revised Laws 1905, it was held that an answer not containing new matter but consisting only of denials of what is alleged in the complaint was not subject to demurrer.[49]

7557. To reply—A reply is demurrable for insufficiency when, if true, it is in law, for any reason, no answer to the new matter in the answer, though its insufficiency is such that it could properly be stricken out on motion. A reply which is responsive to nothing in the answer, but merely attempts to remedy the shortcomings of the complaint, is demurrable.[50]

7558. Notice and place of hearing—An issue of law arising upon a demurrer may be noticed for hearing before the court in the county wherein the action is pending at any time, whether it be at a term of the court or not.[51]

7559. Effect of sustaining demurrer—Judgment—When a demurrer to a complaint is sustained, without leave to amend, the defendant is entitled to a judgment of dismissal with costs.[52]

7560. Amendment after demurrer—When a demurrer is sustained it is left to the discretion of the trial court to allow the party to amend his pleading upon proper terms.[53] The supreme court will rarely allow an amendment upon sustaining a demurrer, but will leave it to the trial court to grant or refuse leave to amend after the case is remanded.[54] If a party amends his pleading after demurrer he cannot thereafter question the decision on the demurrer.[55] Unless the decision on demurrer involves the plaintiff's right of action under any complaint which the facts would warrant, it is ordinarily advisable for him to amend his complaint to conform to the views of the court rather than to appeal. Appeals from orders overruling demurrers are not favored.[56] A right to amend may be waived.[57]

7561. Effect of overruling demurrer—Judgment—When a demurrer is overruled, without leave to withdraw the demurrer and plead over, the case

[39] McMath v. Parsons, 26-246, 2+703.
[40] Leuthold v. Young, 32-122, 19+652; Litchfield v. McDonald, 35-167, 28+191; McCollister v. Bishop, 78-228, 80+1118.
[41] Tullis v. Brawley, 3-277(191); Merrill v. Shaw, 5-148(113); Nininger v. Carver County, 10-133(106); Gill v. Bradley, 21-15; Kipp v. Cook, 46-535, 49+257; Smith v. Barr, 76-513, 79+507.
[42] Benson v. Silvey, 59-73, 60+847; Bell v. Mendenhall, 71-331, 73+1086.
[43] St. Paul L. Co. v. Dayton, 37-364, 34+335.
[44] Campbell v. Jones, 25-155.
[45] Freeman v. Paulson, 107-64, 119+651.
[46] R. L. 1905 § 4134.
[47] Campbell v. Jones, 25-155.
[48] Campbell v. Jones, 25-155; Walker v. Johnson, 28-147, 9+632; Lace v. Fixen, 39-46, 38+762.
[49] Nelson v. Pelan, 34-243, 25+406.
[50] Bausman v. Woodman, 33-512, 24+198. A demurrer to a reply operates as a motion for judgment on the pleadings, and is practically a demurrer to the complaint. Branton v. McLaughlin, 109-244, 123+808.
[51] Johnson v. Velve, 86-46, 90+126.
[52] Deuel v. Hawke, 2-50(37, 43); Aetna Ins. Co. v. Swift, 12-437(326).
[53] R. L. 1905 § 4156.
[54] Farley v. Kittson, 27-102, 6+450, 7+267; Haven v. Place, 28-551, 11+117.
[55] Becker v. Sandusky City Bank, 1-311(243).
[56] Benton v. Schulte, 31-312, 17+621; Martin v. G. N. Ry., 124+825. See Cordill v. Minn. El. Co., 89-442, 95+306.
[57] Aetna Ins. Co. v. Swift, 12-437(326).

stands exactly as if no answer had been interposed and the plaintiff is entitled to judgment on his complaint for all the relief therein demanded, as in case of default.[58]

7562. Pleading over—A demurrant has no absolute right to withdraw his demurrer and plead over. The trial court has discretionary power in the matter and in allowing a party to plead over it may impose reasonable conditions.[59] If a demurrant desires to plead over he should ask leave.[60] When a party withdraws his demurrer and pleads over he cannot thereafter question the decision on the demurrer.[61] The supreme court will rarely grant leave to plead over, upon overruling a demurrer, but will leave it to the trial court to grant or refuse leave after the case is remanded.[62]

ANSWER

7563. Joint—All the allegations in a joint answer are to be taken as made by all the parties joining.[63] A joint answer must be good as to all the defendants. If it is not good as to all it is bad as to all.[64]

7564. Responsive to complaint—A defendant may in his answer allege matters that will be a defence to any cause of action which the plaintiff may prove and recover for within the allegations, though such cause of action may not be of the precise character indicated by all those allegations, and though such matter might not be a defence if all such allegations should be proved.[65]

7565. Definiteness—A denial, whether specific or general, should leave no room for doubt as to what is denied and what admitted.[66]

7566. Denial of knowledge or information—If the defendant has no personal knowledge of the facts alleged in the complaint, or of a part of them, and no information regarding them sufficient to form a belief as to their truth or falsity, he may put them in issue by simply denying any knowledge or information sufficient to form a belief as to them.[67] But this form of denial is not permissible when the facts are actually or presumptively within the knowledge of the defendant. Facts concerning the defendant's own acts, property, or personal affairs are presumed to be within his knowledge, and if he employs this form of denial as to such matters it may be stricken out as sham. If he is ignorant of his own affairs it is his duty to investigate and learn the truth before answering. If there is justification for ignorance the facts constituting the justification should be alleged.[68] Matters of public record easily accessible to the defendant cannot be denied in this manner.[69] A denial in this form when the facts are actually or presumptively within the knowledge of the defendant makes a good issue so long as it remains in the record. The only way to object to it is to move to strike it out as sham before

[58] R. L. 1905 § 4186; Deuel v. Hawke, 2-50(37, 43); Daniels v. Bradley, 4-158 (105).

[59] R. L. 1905 § 4156; Denton v. Scully, 26-325, 4+41; Flaherty v. Mpls. etc. Ry., 39-328, 40+160; Potter v. Holmes, 74-508, 77+416.

[60] Potter v. Holmes, 72-153, 75+591.

[61] Coit v. Waples, 1-134(110); Thompson v. Ellenz, 58-301, 59+1023; Cook v. Kittson, 68-474, 71+670.

[62] Farley v. Kittson, 27-102, 6+450, 7+267.

[63] Lampsen v. Brander, 28-526, 11+94.

[64] Whitcomb v. Hardy, 68-265, 71+263.

[65] Smalley v. Isaacson, 40-450, 42+352.

[66] Montour v. Purdy, 11-384(278).

[67] R. L. 1905 § 4130; Morton v. Jackson, 2-219(180); Mower v. Stickney, 5-397 (321); Ames v. First Div. etc. Ry., 12-412 (295); Smalley v. Isaacson, 40-450, 42+352; Schroeder v. Capehart, 49-525, 52+140.

[68] Morton v. Jackson, 2-219(180); Minor v. Willoughby, 3-225(154); Starbuck v. Dunklee, 10-168(136); Nelson v. Richardson, 31-267, 17+388; Wheaton v. Briggs, 35-470, 29+170; Schroeder v. Capehart, 49-525, 52+140; Larson v. Shook, 68-30, 70+775.

[69] Wheaton v. Briggs, 35-470, 29+170; Smalley v. Isaacson, 40-450, 42+352.

pleading.[70] In using this form of denial it is advisable to follow the exact language of the statute.[71]

7567. Denial upon information and belief—If the defendant has no personal knowledge of any or all the facts alleged in the complaint, but has information sufficient to form a belief as to their falsity, he may deny them upon information and belief.[72]

7568. Denials controlled by admissions—If an answer includes a denial and also an admission the latter controls.[73]

7569. Specific denials control—If there is a specific denial and also a general denial in the same answer the former controls and if insufficient no issue is formed.[74]

7570. Non-traversable allegations—Allegations of immaterial matters,[75] of legal conclusions,[76] of unliquidated damages,[77] and of time generally,[78] are not traversable. Nor is the demand for relief.[79]

7571. Negative pregnant—A negative pregnant is a negative that implies an affirmative.[80] A general denial is never a negative pregnant.[81] It was formerly held that a general denial was a negative pregnant as regards material allegations of value.[82] A specific denial of value as alleged in the complaint has been held a negative pregnant.[83] When several facts are alleged conjunctively, a conjunctive denial is a species of negative pregnant.[84] The effect of a negative pregnant is the admission of the fact sought to be denied.[85] It has this effect, however, only when the fact so denied is a material, traversable fact. In actions for unliquidated damages allegations of value are not traversable. They must be proved though not denied. Hence denials in the form of negative pregnant do not admit the value as alleged.[86]

7572. General denial—While not expressly authorized by statute a general denial has been in use in this state ever since the adoption of the code.[87] The approved form is, "the defendant for answer to the complaint herein denies each and every allegation thereof."[88] Various forms have been held suffi-

[70] Smalley v. Isaacson, 40-450, 42+352; Schroeder v. Capehart, 49-525, 52+140.

[71] See Trustees v. Nesbitt, 65-17, 67+652.

[72] State v. Cooley, 58-514, 60+338.

[73] McClung v. Bergfeld, 4-148(99); Derby v. Gallup, 5-119(85); Scott v. King, 7-494(401); Henry v. Hinman, 21-378; St. Anthony Falls etc. Co. v. King, 23-186; Lampsen v. Brander, 28-526, 11+94; Gaffney v. St. P. etc. Ry., 38-111, 35+728; Stadtler v. School Dist., 71-311, 73+956.

[74] Pullen v. Wright, 34-314, 26+394. See Brandt v. Shepard, 39-454, 40+521; Horn v. Butler, 39-515, 40+833.

[75] Freeman v. Curran, 1-169(144); Finley v. Quirk, 9-194(179); Wilder v. St. Paul, 12-192(116); Newman v. Springfield etc. Co., 17-123(98); Gross v. Diller, 33-424, 23+837; Dennis v. Johnson, 47-56, 49+383; First Nat. Bank v. Strait, 71-69, 73+645.

[76] Finley v. Quirk, 9-194(179); Catheart v. Peck, 11-45(24); Frasier v. Williams, 15-288(219); Downer v. Read, 17-493 (470); Holbrook v. Sims, 39-122, 39+74.

[77] Pullen v. Wright, 34-314, 26+394.

[78] Finley v. Quirk, 9-194(179); McMurphy v. Walker, 20-382(334).

[79] Hatch v. Coddington, 32-92, 19+393.

[80] German-Am. Bank v. White, 38-471, 38+361; Frasier v. Williams, 15-288(219, 225); McMurphy v. Walker, 20-382(334); Paine v. Smith, 33-495, 24+305; Pullen v. Wright, 34-314, 26+394; Stone v. Quaal, 36-46, 29+326; Fredericksen v. Singer Mfg. Co., 38-356, 37+453; Curtiss v. Livingston, 36-312, 30+814; Pound v. Pound, 60-214, 62+264; Jarrett v. G. N. Ry., 74-477, 77+304; O'Gorman v. Sabin, 62-46, 54, 64+84. See Kingsley v. Gilman, 12-515(425, 429).

[81] German-Am. Bank v. White, 38-471, 38+361.

[82] See § 7572.

[83] Lynd v. Picket, 7-184(128); Burt v. McKinstry, 4-204(146); Durfee v. Pavitt, 14-424(319); Hertz v. Hartmann, 74-320, 77+232.

[84] Pullen v. Wright, 34-314, 26+394.

[85] See cases supra.

[86] Pullen v. Wright, 34-314, 26+394; German-Am. Bank v. White, 38-471, 38+361. See § 7572.

[87] Kingsley v. Gilman, 12-515(425); Stone v. Quaal, 36-46, 29+326.

[88] Moen v. Eldred, 22-538; Stone v.

cient [89] or insufficient.[90] It has the same effect as a specific denial or each allegation. It has as wide a scope as the allegations of the pleading to which it is directed and puts in issue every material allegation thereof,[91] including material allegations of value,[92] and inferences of fact implied by law from the express allegations.[93]

7573. Qualified general denial—A qualified general denial, that is, a general denial coupled with admissions or other qualifications, is sufficient if it leaves no uncertainty as to the allegations admitted or denied.[94]

7574. Evidence admissible under a general denial—Under a general denial any evidence is admissible which tends directly to controvert the allegations of the complaint [95] or the evidence admitted thereunder.[96] Any evidence

Quaal, 36-46, 29+326; Caldwell v. Bruggerman, 4-270(190); Hodgson v. Mather, 92-299, 100+87.

[89] Moen v. Eldred, 22-538; Fogle v. Schaeffer, 23-304; Peterson v. Ruhnke, 46-115, 48+768.

[90] Starbuck v. Dunklee, 10-168(136); Montour v. Purdy, 11-384(278); Dodge v. Chandler, 13-114(105).

[91] Fetz v. Clark, 7-217(159); Kingsley v. Gilman, 12-515(425); Fogle v. Schaeffer, 23-304; Stone v. Quaal, 36-46, 29+326; German-Am. Bank v. White, 38-471, 38+361; Nunnemacker v. Johnson, 38-390, 38+351. See Johnson v. Oswald, 38-550, 552, 38+630.

[92] German-Am. Bank v. White, 38-471, 38+361 (overruling McClung v. Bergfeld, 4-148(99); Dean v. Leonard, 9-190(176); Pottgieser v. Dorn, 16-204(180); Hecklin v. Ess, 16-51(38); Moulton v. Thompson, 26-120, 1+836; Coleman v. Pearce, 26-123, 1+846; Jellett v. St. P. etc. Ry., 30-265, 15+237; Steele v. Thayer, 36-174; 30+758).

[93] Hodgson v. Mather, 92-299, 100+87.

[94] Jellison v. Halloran, 40-485, 42+392; Kingsley v. Gilman, 12-515(425); Becker v. Sweetzer, 15-427(346); Leyde v. Martin, 16-38(24); Davenport v. Ladd, 38-545, 38+622; Horn v. Butler, 39-515, 40+833; Fegelson v. Dickerman, 70-471, 73+144; Fitzpatrick v. Simonson, 86-140, 90+378; Loveland v. Gravel, 95-135, 103+721; Elliott v. McAllister, 106-25, 117+921.

[95] Bond v. Corbett, 2-248(209) (loan of money alleged—evidence in denial of loan admissible); Caldwell v. Bruggerman, 4-270(190) (allegation of title to personalty—fact that delivery necessary to vesting of title was not made admissible); McClelland v. Nichols, 24-176 (action for conversion—evidence of right of possession in defendant at time of conversion admissible); Sloan v. Becker, 31-414, 18+143 (evidence tending to show that a deed was not executed as a mortgage); Webb v. Michener, 32-48, 19+82 (action on note—denial of consideration—evidence that it was made in fraud of creditors admissible); Ortt v. Mpls. etc. Ry., 36-396, 31+519 (action against carrier on special contract to carry to Chicago—evidence that injury occurred after the property had passed beyond the defendant's terminus admissible); Johnson v. Oswald, 38-550, 38+630 (action for conversion—general allegation of title in plaintiff—evidence of fraud invalidating title and rescission of sale admissible); Scone v. Amos, 38-79, 35+575 (under a general denial of a complaint alleging that defendant hired plaintiff to work, and agreed to pay him, defendant may prove that he, as agent for another, made the contract of hiring, and disclosed his principal to plaintiff); Beard v. First Nat. Bank, 41-153, 43+7, 8 (allegation of ownership of personalty—evidence that alleged ownership had been transferred to another by gift admissible); King v. La Crosse, 42-488, 44+517 (replevin—chattel mortgage to third party admissible); Christianson v. Chi. etc. Ry., 61-249, 63+639 (action for personal injuries—allegation of a release of cause of action—evidence in denial of release admissible); Iselin v. Simon, 62-128, 64+143 (general rule stated); Johnson v. Morstad, 63-397, 65+727 (action for conversion—books of account of defendant tending to show a purchase of the property from plaintiff by defendant admissible); Hanson v. Diamond I. M. Co., 87-505, 92+447 (action for money had and received—general rule stated and applied); Loftus v. Smith, 90-418, 97+125 (action on note—evidence that note was indorsed by defendant in a representative capacity admissible); Jenning v. Rohde, 99-335, 109+597 (action to recover money loaned—evidence that money was paid as a gift admissible); Sodini v. Gaber, 101-155, 111+962 (unlawful detainer proceedings—evidence tending to show that the relation of landlord and tenant did not exist between the parties admissible under a plea of not guilty—general rule stated); Stitt v. Rat Portage L. Co., 101-93, 111+948 (action on logging contract—evidence of a special contract admissible); Rogers v. Clark, 104-198, 116+739 (action to determine adverse claims—evidence of title in third party admissible). Any evidence bearing

is admissible which tends to disprove any fact which the plaintiff is bound to prove in order to recover,[97] or upon which he relies for that purpose.[98] In other words the defendant may prove any fact inconsistent with the allegations of the complaint. He is not limited to mere matters of denial, but may prove affirmative matter, if it is inconsistent with the allegations of the complaint.[99] While matter in the nature of confession and avoidance of the allegations of the complaint cannot be proved under a general denial,[1] matter in the nature of confession and avoidance of facts proved by the plaintiff under a general allegation in his complaint are admissible. Where the plaintiff pleads his cause of action in general terms, so that it does not disclose the facts, the defendant, under a general denial, may introduce any evidence which tends to contradict, explain, or avoid the facts proved by the plaintiff on the trial.[2] The defendant is not bound to plead more specifically than the plaintiff. He is not bound in his answer to anticipate, and confess and avoid, the facts which the plaintiff may prove under a general allegation in his complaint.[3] A general denial will admit evidence tending to controvert the inferences of fact implied by law from the express allegations of the complaint.[4] If doubt exists as to whether defensive matter is admissible under a general denial great liberality should be shown in allowing an amendment to render it admissible.[5]

7575. Objections not raised by answer—It is not permissible to object by answer that the action was commenced and prosecuted without authority of the plaintiff;[6] or that the plaintiff has not filed security for costs.[7]

7576. Facts admitted by failure to deny—Every material allegation of the complaint not controverted by the answer is admitted.[8] Facts not alleged in a traversable form are not admitted by a failure to deny.[9]

7577. Demand of judgment—Except when a counterclaim or equity requiring affirmative relief is pleaded, an answer need not conclude with a demand for judgment.[10]

NEW MATTER CONSTITUTING A DEFENCE

7578. Definition—New matter constituting a defence is matter in the nature of confession and avoidance. It is matter which, admitting the facts

directly upon any issuable fact traversed by the pleadings is admissible without being pleaded. Seibert v. Leonard, 21–442. See Bills and Notes, 1038, 1039; Brokers, 1161; Chattel Mortgages, 1474, 1479, 1481; Contracts, 1891, 1918; Conversion, 1945; Ejectment, 2884, 2886; Garnishment, 4005; Quieting Title, 8049; Release, 8376; Replevin, 8412.

[96] Loftus v. Smith, 90–418, 97+125; Jenning v. Rohde, 99–335, 109+597; Plummer v. Mold, 14–532(403).

[97] Cushing v. Seymour, 30–301, 307, 15+249; Sodini v. Gaber, 101–155, 111+962.

[98] Lautenschlager v. Hunter, 22–267; Register P. Co. v. Willis, 57–93, 58+825.

[99] Sodini v. Gaber, 101–155, 111+962; Christianson v. Chi. etc. Ry., 61–249, 63+639; Cushing v. Seymour, 30–301, 15+249. See Rees v. Storms, 101–381, 112+419.

[1] See § 7585.

[2] Fort Dearborn Nat. Bank v. Security Bank, 87–81, 91+257; Com. etc. Co. v. Dokko, 72–229, 75+106; Nichols v. Minn. T. Mfg. Co., 70–528, 73+415; Terry v. Wilson's Estate, 50–570, 52+973; Adamson v. Wiggins, 45–448, 48+185; Wakefield v. Day, 41–344, 43+71; Johnson v. Oswald, 38–550, 38+630; Ellingsen v. Cooke, 37–400, 34+747; Cushing v. Seymour, 30–301, 15+249; Furman v. Tenny, 28–77, 9+172; Tupper v. Thompson, 26–385, 4+621; Jones v. Rahilly, 16–320(283); Walker v. Ward, 104–386, 116+647; Dickson v. St. Paul, 105–165, 117+426; Bartleson v. Munson, 105–348, 117+512.

[3] Wakefield v. Day, 41–344, 43+71.

[4] Hodgson v. Mather, 92–299, 100+87.

[5] Rees v. Storms, 101–381, 112+419.

[6] Hall v. Southwick, 27–234, 6+799.

[7] Henry v. Bruns, 43–295, 45+444.

[8] R. L. 1905 § 4145; Olson v. Hurley, 33–39, 21+842.

[9] Moulton v. Doran, 10–67(49).

[10] See Wildermann v. Donnelly, 86–184, 90+366.

[11] Craig v. Cook, 28–232, 234, 9+712; Finley v. Quirk, 9–194(179, 187); Nash v. St. Paul, 11–174(110, 113) and cases under § 7585.

alleged in the complaint to be true as facts, avoids their legal effect or operation.[11] What constitutes new matter necessarily depends upon the pleadings in the particular action. The same matter may be "new" in one action and not in another.

7579. Matters in abatement—The plea in abatement of the common-law system of pleading does not exist under the code. If matters in abatement appear upon the face of a pleading, they are now taken advantage of by demurrer, and if they do not so appear, they are set up in the answer or reply as new matter constituting a defence. Matters in abatement may be joined with defences in bar.[12]

7580. Several defences must be consistent—A defendant may plead as many defences, legal or equitable, as he has, if they are not inconsistent; and the pleading of one defence cannot be construed as a waiver of another.[13] Two defences are consistent if both may be true and they are to be held inconsistent only when the proof of one necessarily disproves the other.[14] It is no test of inconsistency that if one is proved true the other is unnecessary.[15] An objection that defences are inconsistent is not favored.[16] It is to be taken by a motion to compel an election.[17] Cases are cited below holding particular defences either consistent [18] or inconsistent.[19]

7581. Partial defences—Though partial defences are not expressly authorized by the statute the right to plead them is unquestioned.[20]

[12] Page v. Mitchell, 37-368, 34+896; Porter v. Fletcher, 25-493; Somers v. Dawson, 86-42, 90+119; Druhe v. Fischbein, 101-81, 111+950.

[13] R. L. 1905 § 4132; Lane v. St. P. F. & M. Ins. Co., 50-227, 231, 52+649; Warner v. Lockerby, 31-421, 423, 18+145, 821; Conway v. Wharton, 13-158(145, 148); Booth v. Sherwood, 12-426(310, 314); Derby v. Gallup, 5-119(85, 95); Rees v. Storms, 101-381, 112+419.

[14] Steenerson v. Waterbury, 52-211, 53+1146; Roblee v. Secrest, 28-43, 8+904; Gammon v. Ganfield, 42-368, 44+125; Backdahl v. Grand Lodge, 46-61, 48+454; Rees v. Storms, 101-381, 112+419.

[15] Gammon v. Ganfield, 42-368, 44+125; Backdahl v. Grand Lodge, 46-61, 48+454; Rees v. Storms, 101-381, 112+419.

[16] Rees v. Storms, 101-381, 112+419.

[17] Conway v. Wharton, 13-158(145); Cook v. Finch, 19-407(350).

[18] Steenerson v. Waterbury, 52-211, 53+1146 (general denial and payment); Mpls. C. Co. v. Williamson, 51-53, 52+986 (surrender of premises to landlord and neglect of landlord rendering premises untenantable); Backdahl v. Grand Lodge, 46-61, 48+454 (two suspensions from a benefit society); Gammon v. Ganfield, 42-368, 44+125 (failure of machine to conform to sample and breach of warranty); Warner v. Lockerby, 31-421, 18+145, 821 (action for slander—denial and matter in mitigation); Roblee v. Secrest, 28-43, 8+904 (non-delivery of goods sold and fraud in sale); Conway v. Wharton, 13-158 (145) (statute of limitations and accord and satisfaction); First Nat. Bank v. Lincoln, 36-132, 30+449 (general denial and payment); Booth v. Sherwood, 12-426(310) (license and denial of title); Kennedy v. McQuaid, 56-450, 58+35 (general denial and conveyance to third party); Osborne v. Waller, 73-52, 75+732 (extension of time and payment); Branham v. Bezanson, 33-49, 21+861 (claim of title from different sources in action to determine adverse claims); La Plant v. Firemen's Ins. Co., 68-82, 70+856 (denial of liability by insurer and action prematurely brought); Bank of Glencoe v. Cain, 89-473, 95+308 (signatures not genuine—fraud in procuring them); Ferguson v. Trovaten, 94-209, 102+373 (contract for sale of land and performance taking oral agreement out of statute of frauds); Rees v. Storms, 101-381, 112+419 (action for rent—general denial and subsequent oral agreement).

[19] Derby v. Gallup, 5-119(85) (action for conversion—general denial and justification for taking); Zimmerman v. Lamb, 7-421(336) (id.); Scott v. King, 7-494 (401) (replevin—general denial and justification for taking); Cook v. Finch, 19-407(350) (contract revoked, annulled and modified); Stadtler v. School Dist., 71-311, 73+956 (denial and admission of same matter).

[20] Weitzner v. Thingstad, 55-244, 248, 56+817; Nichols v. Soderquist, 77-509, 80+630; Stevens v. Johnson, 28-172, 9+677; Torinus v. Buckham, 29-128, 12+348; Durment v. Tuttle, 50-426, 52+909; Aultman v. Torrey, 55-492, 57+211; Warner v. Lockerby, 31-421, 18+145, 821.

7582. Defendant must not be stranger to new matter—One may not defend an action by asserting facts or rights which do not concern him and in which he has no lawful interest.[21]

7583. Action against one of several obligors—If A sues B on an obligation of B and C, B may set up any defence which B and C might have set up had they been sued jointly.[22] An answer good as to the plaintiff is not vitiated by asking relief which cannot be granted for want of proper parties to the action.[23]

7584. Hypothetical admissions—Hypothetical statements or admissions may be made in an answer for the purpose of enabling a defendant to plead all his defences.[24]

7585. Must be specially pleaded—New matter in the nature of confession and avoidance, that is, matter which, admitting the truth of the facts alleged in the complaint, would tend to avoid their legal effect and operation, must be specially pleaded.[25] A denial goes to the facts alleged and not to the liability arising from those facts.[26] In pleading new matter it is unnecessary to state that it is pleaded as a defence. If it is in a defensive pleading, and is a defence, it is enough.[27]

7586. Defences must be pleaded separately—When several defences are pleaded they must be separately stated and plainly numbered.[28]

EQUITIES

7587. Nature—An "equity," to be pleadable under the statute, must be one which, according to the rules governing courts of equity under the former system, would have entitled the defendant to relief, wholly or in part, against the liability set forth in the complaint. An equitable defence should contain in substance the elements of a bill in equity and its sufficiency, other than as to matters of mere form, is to be determined by the application of the rules observed in courts of equity when relief was granted there under the former practice.[29] If the facts giving rise to the equity also constitute a cause of

[21] Herber v. Christopherson, 30–395, 15+676; Cathcart v. Peck, 11–45(24). See Bausman v. Eads, 46–148, 48+769.

[22] Nichols v. Soderquist, 77–509, 80+630. See McKinnon v. Palen, 62–188, 64+387.

[23] Campbell v. Jones, 25–155.

[24] Nunnemacker v. Johnson, 38–390, 38+351; McKasy v. Huber, 65–9, 67+650.

[25] Bank of Com. v. Selden, 1–340(251); Finley v. Quirk, 9–194(179); Case v. Favier, 12–89(48); Warner v. Myriek, 16–91(81); Daly v. Proetz, 20–411(363); Brown v. Eaton, 21–409; Lautenschlager, v. Hunter, 22–267; Adams v. Adams, 25–72, 76; Livingston v. Ives, 35–55, 27+74; Farnham v. Murch, 36–328, 31+453; Gaffney v. St. P. etc. Ry., 38–111, 35+728; MacFee v. Horan, 40–30, 41+239; Jackson v. Kansas City P. Co., 42–382, 44+126; Rothschild v. Burritt, 47–28, 49+393; Kennedy v. McQuaid, 56–450, 58+35; Register P. Co. v. Willis, 57–93, 58+825; Dodge v. McMahan, 61–175, 63+487; Christianson v. Chi. etc. Ry., 61–249, 252, 63+639; Anderson v. Rockwood, 62–1, 63+1023; O'Gorman v. Sabin, 62–46, 59, 64+84; Iselin v. Simon, 62–128, 64+143; Roberts v. Nelson, 65–240, 68+14; Reishus v. Benner, 91–401, 98+186; Trainor v. Schutz, 98–213, 107+812; Hall v. Skahen, 101–460, 112+865; Dickson v. St. Paul, 105–165, 117+426.

[26] Iselin v. Simon, 62–128, 64+143.

[27] Townsend v. Mpls. etc. Co., 46–121, 48+682.

[28] R. L. 1905 § 4132; Rule 6, Dist. Ct See Bass v. Upton, 1–408(292).

[29] Gates v. Smith, 2–30(21); McClane v. White, 5–178(139); Barker v. Walbridge, 14–469(351); Birdsall v. Fischer, 17–100(76); Wallrich v. Hall, 19–383(329); Wheaton v. Thompson, 20–196(175, 183); First Nat. Bank v. Kidd, 20–234(212); Williams v. Murphy, 21–534; Kean v. Connelly, 25–222, 228; Crockett v. Phinney, 33–157, 22+292; McKinney v. Bode, 33–450, 454, 23+851; Knoblauch v. Foglesong, 37–320, 33+865; Probstfield v. Czizek, 37–420, 34+896; Thwing v. Hall, 40–184, 41+815; Becker v. Northway, 44–61, 46+210; Rogers v. Castle, 51–428, 53+651; Vaule v. Miller, 69–440, 72+452; Freeman v. Brewster, 70–203, 72+1068; Richardson v. Merritt, 74–354, 77+234; Deering v. Poston,

action at law the answer should allege facts showing the inadequacy of the remedy at law.[30] The equity must be perfect at the time it is pleaded and not depend on the happening of a contingent event. It is perfect if the relief sought will make it so.[31]

7588. Must be specially pleaded—An "equity" is new matter and must generally be pleaded specially,[32] but it is sometimes admissible under a general denial.[33]

7589. Affirmative relief need not be sought—While an "equity" may be such as would have authorized affirmative relief by a court of equity under the former system it may now be pleaded for defensive purposes solely, without asking for affirmative relief.[34]

7590. Failure to plead—Effect—Under a former statute it was held that if a defendant failed to plead his equities he could not thereafter sue upon them.[35]

7591. Practice—Where an equitable defence or counterclaim is interposed in a legal action the legal issues are triable by a jury and the equitable ones by the court. The order of trial is in the discretion of the court, to be determined by the exigencies of the particular case.[36]

RECOUPMENT

7592. Definition—Recoupment, in this connection, means the right of a defendant, in an action on contract, to plead and prove as a defence, in whole or in part, the damages, whether liquidated or unliquidated, which he has sustained by reason of the plaintiff's breach of the contract sued upon.[37]

7593. Basis of doctrine—Some cases give as a reason for the doctrine that it is to avoid circuity of action, but the more satisfactory reason is that there is a natural equity, especially as to claims arising out of the same transaction, that one claim should compensate the other, and that the balance only should be recovered.[38] The doctrine is sometimes grounded on the idea of a partial or complete failure of consideration.[39]

7594. Effect of statute of counterclaims—The common-law doctrine of recoupment is not affected by the statute of counterclaims, except that the right is thereby extended, so that the party entitled to recoup may, if he so elects, go beyond abating or barring the plaintiff's claim, and recover an affirmative judgment for the difference in his favor.[40] But in order to recover an affirmative judgment he must plead his counterclaim as such.[41]

7595. When allowable—In an action for services the defendant may recoup the damages resulting from the negligence of the plaintiff in the performance

78–29, 80+783; Crosby v. Scott, 93–475, 101+610; Stevenson v. Murphy, 106–243, 119+47.

[30] Gates v. Smith, 2–30(21); Barker v. Walbridge, 14–469(351); Birdsall v. Fischer, 17–100(76); Probstfield v. Czizek, 37–420, 34+896.

[31] Knoblauch v. Foglesong, 37–320, 33+865.

[32] Crockett v. Phinney, 33–157, 22+292; Freeman v. Brewster, 70–203, 72+1068.

[33] Travelers' Ins. Co. v. Walker, 77–438, 80+618.

[34] Probstfield v. Czizek, 37–420, 34+896; Rogers v. Castle, 51–428, 53+651.

[35] Fowler v. Atkinson, 6–503(350).

[36] Crosby v. Scott, 93–475, 101+610. See Guernsey v. Am. Ins. Co., 17–104(83); Ashton v. Thompson, 28–330, 9+876.

[37] Townsend v. Mpls. etc. Co., 46–121, 124, 48+682; Aultman v. Torrey, 55–492, 57+211; Harlan v. St. P. etc. Ry., 31–427, 18+147.

[38] Townsend v. Mpls. etc. Co., 46–121, 48+682.

[39] Wilson v. Reedy, 33–503, 24+191; Aultman v. Torrey, 55–492, 57+211; Stevens v. Johnson, 28–172, 9+677.

[40] Townsend v. Mpls. etc. Co., 46–121, 124, 48+682; Harlan v. St. P. etc. Ry., 31–427, 18+147; Folsom v. Carli, 6–420(284, 289); Morrison v. Lovejoy, 6–319(224, 235); Mason v. Heyward, 3–182(116, 121); Smith v. Dukes, 5–373(301, 305).

[41] See § 7617.

of his contract of employment.[42] Damages from a breach of warranty upon a sale of goods may be recouped in an action for the price or on a note therefor.[43] Damages from a failure to fully perform a contract may be recouped where the plaintiff is allowed to recover for a substantial performance.[44] Various cases are cited below in which the right of recoupment was recognized.[45]

7596. Pleading—Recoupment is new matter to be specially pleaded.[46] The same facts may constitute a defence by way of recoupment or a counterclaim. To be available as a counterclaim they must be pleaded as such, but if they are pleaded as a counterclaim they are nevertheless available as a defence by way of recoupment.[47]

7597. Statute of limitations—The right of recoupment continues as long as the claim of the plaintiff.[48]

COUNTERCLAIM

7598. Nature—A counterclaim is in the nature of a cross-action, and a defendant who pleads one is, as to that, considered as if he had brought his action.[49] The effect of a counterclaim may be to just balance the claim set up in the complaint, but there is no such thing in the law as setting up one right of action as a bar to another right of action.[50] There can be no counterclaim to a mere defence.[51]

7599. As a defence—Matter may be such that it is available either as a defence or a counterclaim.[52] Matter pleaded expressly as a counterclaim, though not proper as such, may be available as a defence.[53] If a counterclaim is pleaded in a reply it can only be used as a defence.[54]

7600. Construction of statute—The statute authorizing the pleading of counterclaims is to be liberally construed.[55] The policy of the code is to prevent multiplicity of actions.[56]

7601. Must be an independent cause of action—A counterclaim must be a complete and independent cause of action, either legal or equitable. While it may be an equitable cause of action, it must be something more than a mere

[42] Harlan v. St. P. etc. Ry., 31–427, 18+147. See Lyford v. Martin, 79–243, 82+479; Peterson v. Mayer, 46–468, 49+245.

[43] Stevens v. Johnson, 28–172, 9+677; Mass. L. & T. Co. v. Welch, 47–183, 49+740; Rugland v. Thompson, 48–539, 51+604; Wilson v. Reedy, 33–503, 24+191; Aultman v. Torrey, 55–492, 57+211.

[44] Peterson v. Mayer, 46–468, 49+245.

[45] McKinnon v. Palen, 62–188, 64+387 (action against partner—recoupment of damages as if all partners sued); Pioneer Press Co. v. Hutchinson, 63–481, 65+938 (action for rent—recoupment of damages from breach of covenant to make improvements); Duluth etc. Co. v. Klovdahl, 55–341, 56+1119 (damages from defect in title of land sold); Sykes v. St. Cloud, 60–442, 454, 62+613 (damages for failure to supply water for fires); Abrahamson v. Lamberson, 68–454, 71+676; Id., 72–308, 75+226 (as between vendor and vendee of land).

[46] Leeds v. Little, 42–414, 44+309. See Horn v. Western L. Assn., 22–233; Bennett v. Morton, 46–113, 48+678.

[47] Townsend v. Mpls. etc. Co., 46–121, 48+682.

[48] Aultman v. Torrey, 55–492, 57+211.

[49] Slocum v. Mpls. M. Assn., 33–438, 23+862; Eastman v. Linn, 20–433(387); Wilson v. Fairchild, 45–203, 206, 47+642.

[50] Cooper v. Simpson, 41–46, 42+601; Townsend v. Mpls. etc. Co., 46–121, 48+682.

[51] Townsend v. Mpls. etc. Co., 46–121, 48+682.

[52] Griffin v. Jorgenson, 22–92; Eastman v. Linn, 20–433(387); Townsend v. Mpls. etc. Co., 46–121, 48+682; Aultman v. Torrey, 55–492, 57+211.

[53] Townsend v. Mpls. etc. Co., 46–121, 48+682; Germania Bank v. Osborne, 81–272, 83+1084.

[54] Townsend v. Mpls. etc. Co., 46–121, 48+682.

[55] Goebel v. Hough, 26–252, 2+847; Midland Co. v. Broat, 50–562, 52+972; Hackett v. Kanne, 98–240, 107+1131.

[56] Morrison v. Lovejoy, 6–319(224); Hall v. Parsons, 105–96, 117+240.

equitable defence. The test is, would it authorize an independent action by the defendant against the plaintiff.[57]

7602. Must exist against a plaintiff and in favor of a defendant—A counterclaim "must be an existing one in favor of a defendant and against a plaintiff, between whom a several judgment might be had in the action."[58] If A sues B and C on a joint obligation an individual claim of B or C against A cannot be pleaded as a counterclaim.[59] If A and B sue C on a joint claim C cannot plead as a counterclaim a claim against A or B individually.[60] A cause of action which cannot be determined without bringing in new parties cannot be pleaded as a counterclaim.[61] If the subject of counterclaim is a tort, it is no objection that all the tortfeasors are not parties.[62] A counterclaim must be a cause of action in the defendant against the plaintiff, which may be adjudicated and determined between them. If the cause of action is such that an action upon it could not be maintained by the defendant alone against the plaintiff alone, it cannot be made the subject of counterclaim.[63]

7603. Must exist against the plaintiff—A counterclaim must be a cause of action existing against the plaintiff which would authorize a judgment against him.[64] But in an action by an executor or administrator the defendant may set off any claim he had against the estate.[65] And in an action by an undisclosed principal the defendant may sometimes set off a claim against the agent.[66]

7604. Must exist in favor of the defendant—It is the general rule that the defendant cannot set up as a counterclaim a cause of action existing in favor of another person, whatever his relations with such person may be.[67] A claim of stockholders individually cannot be interposed in an action against the corporation,[68] and in an action against stockholders a claim of the corporation cannot be interposed.[69] If a surety is sued alone, or together with his principal, he cannot set up as a counterclaim a cause of action existing in favor of his principal—not even one arising out of the contract in suit. But if the principal is a party, and insolvent, a court of equity will allow the surety to set off a debt due the principal from the plaintiff. If the action is brought against the surety alone the principal may intervene and set off his claim.[70] If a partner is sued on what is really a firm obligation, he may avail himself of any recoupment of which the partners would have a right to avail themselves if the action were against all of them.[71] In an action against a firm

[57] Mason v. Heyward, 3-182(116); Culbertson v. Lennon, 4-51(26); Folsom v. Carli, 6-420(284); Swift v. Fletcher, 6-550(386, 392); Englebrecht v. Rickert, 14-140(108); Lash v. McCormick, 17-403 (381); Linn v. Rugg, 19-181(145); First Nat. Bank v. Kidd, 20-234(212); Banning v. Bradford, 21-308, 313; Reed v. Newton, 22-541; Garner v. Reis, 25-475; Campbell v. Jones, 25-155, 157; Sylte v. Nelson, 26-105, 1+811; Brackett v. Osborne, 31-454, 18+153; Ward v. Anderberg, 36-300, 30+890; McPherson v. Runyon, 41-524, 43+392; Lynch v. Free, 64-277, 66+973.

[58] R. L. 1905 § 4131.

[59] Cooper v. Brewster, 1-94(73); Birdsall v. Fischer, 17-100(76). See Balch v. Wilson, 25-299.

[60] Peck v. Snow, 47-398, 50+470; Maurin v. Lyon, 69-257, 261, 72+72.

[61] See Wilcox v. Comstock, 37-65, 33+42; Little v. Simonds, 46-380, 49+186; Campbell v. Jones, 25-155; Crosby v. Scott, 93-475, 101+610; Baremore v. Selover, 100-23, 110+66.

[62] Walker v. Johnson, 28-147, 9+632.

[63] Campbell v. Jones, 25-155. See Ecorse v. Earhart, 96 Fed. 925.

[64] Linn v. Rugg, 19-181(145); Spencer v. Levering, 8-461(410); Campbell v. Jones, 25-155, 157.

[65] See § 3670.

[66] Baxter v. Sherman, 73-434, 76+211.

[67] Carpenter v. Leonard, 5-155(119).

[68] Gallagher v. Germania B. Co., 53-214, 54+1115.

[69] Mealey v. Nickerson, 44-430, 46+911.

[70] Becker v. Northway, 44-61, 46+210.

[71] McKinnon v. Palen, 62-188, 64+387.

a cause of action against a partner individually cannot be set up as a counterclaim.[72]

7605. Must exist in defendant at commencement of action—A cause of action which is not mature at the commencement of the action cannot be set up as a counterclaim.[73] A cause of action assigned to the defendant after the commencement of the action cannot be set up as a counterclaim.[74] A cause of action cannot be pleaded as a counterclaim unless it existed in favor of the defendant at the commencement of the action.[75] A cause of action for damages for breach of contract, arising simultaneously and concurrently with the commencement of an action, may be interposed as a counterclaim therein.[76]

7606. Consistency with remainder of answer—A counterclaim for breach of warranty has been held not inconsistent with a denial of the plaintiff's title to the notes sued upon.[77] In an action by a landlord against a tenant to recover rent, there is no inconsistency between an admission in the answer that the defendant is indebted for rent and a counterclaim for repairs made by the defendant for which the plaintiff agreed to pay him.[78]

7607. Responsive to complaint—A defendant may set up any cause of action that would be a proper counterclaim to any cause of action which the plaintiff may prove within the allegations of the complaint, though such cause of action may not be of the precise character indicated by those allegations and though the cause of action might not be a proper counterclaim if all such allegations should be proved.[79]

7608. Claims connected with the subject of the action—The statute provides for the pleading as a counterclaim of a cause of action, whether ex contractu or ex delicto, connected with the subject of the action.[80] The phrase "subject of the action" is indefinite, and should be liberally construed.[81] It is apparently synonymous with "subject-matter of the action."[82] The connection must be such that the determination of plaintiff's cause of action would not do exact justice without at the same time determining defendant's cause of action.[83] Cases are cited below holding particular claims either connected[84] or not connected[85] with the subject of the action.

7609. Claims arising out of the "transaction" alleged—The statute provides for the pleading as a counterclaim of a cause of action, whether ex contractu or ex delicto, arising out of the transaction pleaded in the complaint as the foundation of plaintiff's claim.[86] As pointed out elsewhere the term "transaction" is incapable of exact definition.[87] In this connection it is broader than the term "contract." It refers to commercial or business transac-

[72] Maurin v. Lyon, 69–257, 72+72.
[73] Stensgaard v. St. P. etc. Co., 50–429, 52+910. See Milliken v. Mannheimer, 49–521, 52+139.
[74] Northern T. Co. v. Hiltgen, 62–361, 64+909.
[75] Fergus etc. Co. v. Otter Tail County, 60–212, 62+272.
[76] Hall v. Parsons, 105–96, 117+240.
[77] Wilson v. Reedy, 32–256, 20+153.
[78] Hausman v. Mulheran, 68–48, 70+866.
[79] Smalley v. Isaacson, 40–450, 42+352.
[80] R. L. 1905 § 4131.
[81] Goebel v. Hough, 26–252, 2+847.
[82] Hanson v. Byrnes, 96–50, 104+762; Hackett v. Kanne, 98–240, 107+1131.
[83] Barker v. Walbridge, 14–469(351).
[84] Eastman v. Linn, 20–433(387); Matthews v. Torinus, 22–132; Goebel v. Hough, 26–252, 2+847; Lahiff v. Hennepin etc. Assn., 61–226, 63+493; Pioneer Press Co. v. Hutchinson, 63–481, 65+938; Vaule v. Miller, 69–440, 72+452; Hackett v. Kanne, 98–240, 107+1131.
[85] Morrison v. Lovejoy, 6–319(224); Illingworth v. Greenleaf, 11–235(154); Majerus v. Hoscheid, 11–243(160); Barker v. Walbridge, 14–469(351); Schmidt v. Bickenbach, 29–122, 12+349; Allen v. Coates, 29–46, 11+132; Jones v. Swank, 54–259, 55+1126; McLane v. Kelly, 72–395, 75+601; Thomssen v. Ertz, 93–280, 101+304; Hanson v. Byrnes, 96–50, 104+762.
[86] R. L. 1905 § 4131.
[87] See § 7500.

tions or dealings, something in the nature of a contract or a series of contracts relating to the same business or subject-matter.[88] The transaction is not necessarily limited to the facts stated in the complaint, but the defendant may set up new facts to show the entire transaction and counterclaim accordingly. Under this provision of the statute a claim ex contractu may be counterclaimed in an action ex delicto.[89] Cases are cited below holding claims to arise out of the transaction alleged,[90] or the reverse.[91]

7610. Claims "arising out of the contract" alleged—The statute provides for the pleading, as a counterclaim, of a cause of action, whether ex contractu or ex delicto, arising out of the contract pleaded in the complaint as the foundation of plaintiff's claim.[92] This provision covers cases in which recoupment would be allowed at common law.[93] It includes claims for breach of warranty.[94] In an action on contract for services the defendant may counterclaim his damages resulting from the negligence of the plaintiff in the performance of the same contract of employment.[95] Cases are cited below holding various causes of action not to arise out of the contract alleged.[96]

7611. Claims ex contractu in actions ex contractu—A cause of action arising on contract may be counterclaimed in an action on contract. It is unnecessary that the counterclaim should be connected with the subject of the action or arise out of the transaction pleaded in the complaint as the foundation of the plaintiff's claim [97] or that the damages recoverable should be liquidated.[98] A judgment, whether rendered in an action ex contractu or ex delicto, is a contract within the meaning of the statute.[99] An action on a judgment is an action on contract within the statute.[1] Where an injured party may waive the tort and sue on the contract implied by law his cause of action may be counterclaimed in an action ex contractu; and when he is the plaintiff suing on such an implied contract the defendant may plead a counterclaim arising out of contract.[2]

7612. Claims ex contractu in action ex delicto—In an action ex delicto a cause of action ex contractu may be counterclaimed if it arises out of the

[88] King v. Coe, 93–52, 100+667; Barker v. Walbridge, 14–469(351). See, for an apparently improper use of the term, Hackett v. Kanne, 98–240, 107+1131.

[89] King v. Coe, 93–52, 100+667.

[90] Lowry v. Hurd, 7–356(282); Steele v. Etheridge, 15–501(413, 420); Lahiff v. Hennepin etc. Assn., 61–226, 63+493; King v. Coe, 93–52, 100+667; Hackett v. Kanne, 98–240, 107+1131.

[91] Barker v. Walbridge, 14–469(351); Allen v. Coates, 29–46, 11+132; Schmidt v. Bickenbach, 29–122, 12+349; Jones v. Swank, 54–259, 55+1126; Fergus etc. Co. v. Otter Tail County, 60–212, 62+272; McLane v. Kelly, 72–395, 75+601; Thomssen v. Ertz, 93–280, 101+304.

[92] R. L. 1905 § 4131; Folsom v. Carli, 6–420(284, 289); Koempel v. Shaw, 13–488 (451); Lahiff v. Hennepin etc. Assn., 61–226, 63+493; Pioneer Press Co. v. Hutchinson, 63–481, 65+938; Jourdain v. Luchsinger, 91–111, 97+740.

[93] See § 7592.

[94] Schurmeier v. English, 46–306, 48+1112; Mass. L. & T. Co. v. Welch, 47–183, 49+740; Felsenthal v. Hawks, 50–178, 52+528.

[95] Harlan v. St. P. etc. Ry., 31–427, 18+147.

[96] Majerus v. Hoscheid, 11–243(160); Schmidt v. Bickenbach, 29–122, 12+349; McLane v. Kelly, 72–395, 75+601; Thomssen v. Ertz, 93–280, 101+304.

[97] R. L. 1905 § 4131(2); Morrison v. Lovejoy, 6–319(224); Folsom v. Carli, 6–420(284); Lowry v. Hurd, 7–356(282); Bidwell v. Madison, 10–13(1); Brady v. Brennan, 25–210; Burns v. Jordan, 43–25, 44+523; Midland Co. v. Broat, 50–562, 52+972; Laybourn v. Seymour, 53–105, 54+941; Way v. Colyer, 54–14, 55+744; Hausman v. Mulheran, 68–48, 70+866; Crosby v. Scott, 93–475, 101+610; Schick v. Suttle, 94–135, 102+217; Baremore v. Selover, 100–23, 110+66.

[98] Morrison v. Lovejoy, 6–319(224).

[99] Midland Co. v. Broat, 50–562, 52+972. See § 4964.

[1] Way v. Colyer, 54–14, 55+744.

[2] Downs v. Finnegan, 58–112, 59+981; Schick v. Suttle, 94–135, 102+217.

same contract or transaction or is connected with the subject of the action;[3] otherwise not.[4]

7613. Claims ex delicto—In an action ex delicto a cause of action ex delicto cannot be counterclaimed unless it arises out of the same transaction or is connected with the subject of the action.[5] In an action ex contractu a cause of action ex delicto may be counterclaimed if it arises out of the same contract or transaction or is connected with the subject of the action;[6] otherwise not.[7]

7614. Claims against insolvents—Claims against an insolvent cannot be counterclaimed against the assignee or receiver of the insolvent if they were acquired by the defendant after the assignment of the insolvent, or in anticipation of insolvency.[8] The setting off of claims in insolvency proceedings and in actions by assignees or receivers in insolvency is generally governed by the rules of equity.[9]

7615. Public funds—An attorney cannot, under the statute of counterclaims, offset his claim for services against public funds.[10]

7616. Equitable causes of action—An equitable as well as a legal cause of action may be counterclaimed.[11]

7617. Mode of pleading a counterclaim—In pleading a counterclaim all the material facts constituting the cause of action must be alleged, with a demand for relief, as in a complaint. Allegations may be made by reference to the complaint.[12] A counterclaim must be pleaded as such; otherwise, it can only be used defensively and it is not admitted by a failure to deny.[13] It is not essential that the new matter be expressly designated as a counterclaim. It is sufficient if it appears that it was pleaded as a counterclaim. A demand for affirmative relief on the new matter sufficiently characterizes it as a counterclaim.[14] Matter may be voluntarily litigated as a counterclaim though not pleaded as such.[15]

7618. Pleading several counterclaims—A party may plead several counterclaims in the same answer. They should be pleaded separately. If not so pleaded the remedy is not demurrer, but a motion.[16]

7619. Mode of objecting to counterclaim—The only way a plaintiff may object that a cause of action pleaded as a counterclaim is not the proper subject of counterclaim in the particular action is by demurrer. If he fails to demur he waives the objection and the counterclaim must be tried as if proper.[17] That a counterclaim cannot be determined without the presence of

[3] King v. Coe, 93–52, 100+667.

[4] Thomssen v. Ertz, 93–280, 101+304; Hanson v. Byrnes, 96–50, 104+762; Illingworth v. Greenleaf, 11–235(154).

[5] Allen v. Coates, 29–46, 11+132.

[6] Harlan v. St. P. etc. Ry., 31–427, 18+147; McLane v. Kelly, 72–395, 75+601; Jourdain v. Luchsinger, 91–111, 97+740.

[7] Steinhart v. Pitcher, 20–102(86); Schmidt v. Bickenbach, 29–122, 12+349; Warner v. Foote, 40–176, 41+935; Jones v. Swank, 54–259, 55+1126; McLane v. Kelly, 72–395, 75+601.

[8] Northern T. Co. v. Hiltgen, 62–361, 64+909; Northern T. Co. v. Healy, 61–230, 63+625; Northern T. Co. v. Rogers, 60–208, 62+273.

[9] See § 7624.

[10] Washington County v. Clapp, 83–512, 86+775.

[11] Vaule v. Miller, 69–440, 72+452; Crosby v. Scott, 93–475, 101+610.

[12] Curtiss v. Livingston, 36–312, 30+814; Eastman v. Linn, 20–433(387); Wilson v. Fairchild, 45–203, 47+642; Holgate v. Broome, 8–243(209); Independent B. Assn. v. Burt, 109–323, 123+932.

[13] Broughton v. Sherman, 21–431; Griffin v. Jorgenson, 22–92; Townsend v. Mp'ls. etc. Co., 46–121, 48+682; Aultman v. Torrey, 55–492, 57+211.

[14] Griffin v. Jorgenson, 22–92; Farrell v. Burbank, 57–395, 59+485.

[15] Phelps v. Compton, 72–109, 75+19.

[16] Campbell v. Jones, 25–155.

[17] Walker v. Johnson, 28–147, 9+632; Miss. etc. Co. v. Prince, 34–71, 24+344; Lace v. Fixen, 39–46, 38+762; Warner v. Foote, 40–176, 41+935; Talty v. Torling, 79–386, 82+632. See Downs v. Finnegan, 58–112, 59+981.

other parties may be raised by demurrer.[18] The objection that the facts pleaded in the answer as a counterclaim do not constitute a cause of action is not waived by a failure to demurrer or reply, but may be taken on the trial or after verdict.[19] The objection that the cause of action counterclaimed is immature may be waived by trial without objection.[20] A counterclaim may be stricken out as sham.[21]

7620. Failure to plead counterclaim—Effect—The defendant is not bound to plead a counterclaim. He may reserve it for a separate action.[22]

7621. Pleading counterclaim not an admission—It is now provided by statute that the pleading of a counterclaim shall not be construed as an admission of any cause of action alleged in the complaint.[23] The rule was formerly otherwise.[24]

7622. Relief awarded—When matter is pleaded in an answer as a counterclaim, the defendant must have such relief, though not specifically demanded in the answer, as the facts proved within its allegations show him entitled to.[25] He may have an affirmative judgment against the plaintiff if he proves facts justifying it.[26]

SETOFF

7623. At law—In district court practice the setoff of common law is now merged in the counterclaim. Whenever a claim might have been set off at common law it may now be counterclaimed.[27] The term "setoff" is still retained in justice court practice.[28]

7624. In equity—In the absence of special circumstances courts of equity follow the statute of counterclaims. But the equitable right of setoff was not derived from and is not dependent upon the statute of counterclaims. In cases not within the statute a court of equity will permit an equitable setoff, if from the nature of the claim or from the situation of the parties it would be impossible to secure full justice in a cross-action. When such equities exist a court of equity will set off a separate debt against a joint debt, or a joint debt against a separate debt.[29] The insolvency of a party is sufficient ground for equitable setoff in cases where a counterclaim could not be interposed under the statute,[30] and the equitable powers of a court in such cases is not affected by the fact that the party has made an assignment under the insolvency act.[31] Demands cannot be set off in equity unless they are mutual.[32]

[18] Campbell v. Jones, 25–155.

[19] Schurmeier v. English, 46–306, 48+1112; Lace v. Fixen, 39–46, 38+762.

[20] Stensgaard v. St. Paul etc. Co., 50–429, 52+910.

[21] Monitor D. Co. v. Moody, 93–232, 100+1104.

[22] Douglas v. First Nat. Bank, 17–35 (18); Paine v. Sherwood, 21–225, 230; Thoreson v. Mpls. H. Works, 29–341, 13+156; Osborne v. Williams, 39–353, 40+165; Jordahl v. Berry, 72–119, 75+10.

[23] R. L. 1905 § 4131.

[24] Mason v. Heyward, 3–182(116); Whalon v. Aldrich, 8–346(305); Koempel v. Shaw, 13–488(451); Paine v. Sherwood, 19–315(270); Id., 21–225; Trainor v. Worman, 34–237, 25+401.

[25] Wilson v. Fairchild, 45–203, 47+642; Germania Bank v. Osborne, 81–272, 83+1084; Crosby v. Scott, 93–475, 101+610.

[26] Mason v. Heyward, 3–182(116).

[27] Folsom v. Carli, 6–420(284); Morrison v. Lovejoy, 6–319(224).

[28] See § 5284.

[29] Becker v. Northway, 44–61, 46+210; Laybourn v. Seymour, 53–105, 54+941; Gallagher v. Germania B. Co., 53–214, 54+1115; Birdsall v. Fischer, 17–100(76); Wallrich v. Hall, 19–383(329); Wunderlich v. Merchants Nat. Bank, 109–468, 124+223.

[30] St. Paul etc. Co. v. Leck, 57–87, 58+826; Becker v. Northway, 44–61, 46+210; Laybourn v. Seymour, 53–105, 54–941; Martin v. Pillsbury, 23–175; Hunt v. Conrad, 47–557, 50+614; Markell v. Ray, 75–138, 146, 77+788; Richardson v. Merritt, 74–354, 77+234; Cosgrove v. McKasy, 65–426, 68+76; Seymour v. Burton, 78–79, 80+846; Wunderlich v. Merchants Nat. Bank, 109–468, 124+223.

[31] St. Paul etc. Co. v. Leck, 57–87, 58+826; Laybourn v. Seymour, 53–105, 54+

The right of setoff must be mutual.[33] A party may be estopped from claiming a setoff in equity.[34] The mere non-residence of a debtor is not a ground for equitable setoff.[35] The demands of stockholders individually cannot be interposed as equitable setoffs to a demand against the corporation, even though the plaintiff is insolvent.[36]

REPLY

7625. Denial of knowledge or information—A reply that the plaintiff "denies that it has any knowledge or information sufficient to form a belief as to the truth of the allegations contained in said answer" has been sustained against objection first made after trial.[37]

7626. General denial—A reply in terms denying specifically each and every allegation of new matter in the answer has been sustained as against an objection first made on the trial.[38] A qualified general denial has been held to admit certain items of a counterclaim in the answer.[39] An allegation in a reply denying "each and every * * * matter and thing in said answer contained, save as the same * * * may have been heretofore stated in his complaint," has been held sufficient to put in issue the traversable facts of the answer.[40]

7627. Departure—There is a departure when a party quits or departs from the case or defence which he first made and has recourse to another. A test of departure is, could evidence of the facts alleged in the reply be received under the allegations of the complaint? If not, then there is a departure.[41] If the complaint fails to state a cause of action there cannot be a departure, strictly speaking, in the reply.[42] A variance or inconsistency between a complaint and reply upon immaterial matters is not a departure.[43] A departure is a defect of substance which may be taken advantage of by demurrer,[44] by motion for dismissal,[45] by motion to strike out,[46] by request for instructions,[47] or by motion for judgment on the pleadings.[48] Objection to a departure must be taken before verdict or it is waived.[49] It is discretionary with the court to allow a departure to be corrected by an amendment.[50]

7628. Complaint cannot be aided by reply—The plaintiff must recover, if at all, upon the cause of action set out in his complaint. A complaint can-

941; Cosgrove v. McKasy, 65–426, 68+76; Stolze v. Bank of Minn., 67–172, 69+813; Becker v. Seymour, 71–394, 73+1096. See Northern T. Co. v. Rogers, 60–208, 62+273; Fitzgerald v. State Bank, 64–469, 67+361; Knutson v. N. W. etc. Assn., 67–201, 69+889; Balch v. Wilson, 25–299; Northern T. Co. v. Healy, 61–230, 63+625; Northern T. Co. v. Hiltgen, 62–361, 64+909.

[32] Balch v. Wilson, 25–299.

[33] Gallagher v. Germania B. Co., 53–214, 54+1115.

[34] Fitzgerald v. State Bank, 64–469, 67+361.

[35] Birdsall v. Fischer, 17–100(76).

[36] Gallagher v. Germania B. Co., 53–214, 54+1115.

[37] Trustees v. Nesbitt, 65–17, 67+652.

[38] Peterson v. Ruhnke, 46–115, 48+768.

[39] Leyde v. Martin, 16–38(24).

[40] Fitzpatrick v. Simonson, 86–140, 90+378.

[41] Trainor v. Worman, 34–237, 25+401; Estes v. Farnham, 11–423(312); Lane v. St. P. etc. Co., 50–227, 52+649; Hoxsie v. Kempton, 77–462, 80+353; Bishop v. Travis, 51–183, 53+461; Chicago B. & I. Co. v. Olson, 80–533, 83+461; James v. St. Paul, 72–138, 75+5; Strauch v. Flynn, 108–313, 122+320.

[42] Mosness v. German etc. Co., 50–341, 52+932.

[43] Bishop v. Travis, 51–183, 53+461.

[44] Bausman v. Woodman, 33–512, 24+198; Bishop v. Travis, 51–183, 53+461; James v. St. Paul, 72–138, 75+5.

[45] Hoxsie v. Kempton, 77–462, 80+353.

[46] Bausman v. Woodman, 33–512, 24+198; James v. St. Paul, 72–138, 75+5; Strauch v. Flynn, 108–313, 122+320.

[47] Trainor v. Worman, 34–237, 25+401.

[48] Webb v. Bidwell, 15–479(394); Townsend v. Mpls. etc. Co., 46–121, 48+682.

[49] Abraham v. Holloway, 41–163, 42+870; Whitney v. Nat. M. A. Assn., 57–472, 59+943.

[50] Hoxsie v. Kempton, 77–462, 80+353.

not be aided by a reply. This is a necessary consequence of the rule against departure. The office of a reply is to meet the allegations of the answer and not to change the character of the action or to enlarge the rights and remedies of the plaintiff.[51]

7629. Fortifying complaint by reply—New assignment—Though a distinct cause of action or ground for relief cannot be set up in the reply allegations which explain or fortify the complaint, or controvert or avoid the matter pleaded in the answer, are permissible. A more particular and exact statement of the facts constituting the cause of action is not a departure.[52]

7630. Waiver—When a reply should have been made to new matter in the answer, but such matter is treated on the trial as in issue without a reply, the want of a reply will be deemed waived.[53]

7631. Counterclaim in reply—If a counterclaim is pleaded in a reply it can only be used defensively.[54]

7632. Necessity—Admission by failure to reply—A reply is unnecessary in any case where its allegations would be a mere repetition of those contained in the complaint.[01] Affirmative matter in the answer which merely tends to controvert the allegations of the complaint is not new matter requiring a reply. New defensive matter in an answer, to require a reply, must be in the nature of confession and avoidance.[55] Under a former statute an "equity" was not admitted by failure to reply.[56]

7633. Admission of counterclaim by failure to reply—A counterclaim is new matter and consequently admitted by a failure to reply.[57] But to require a reply a counterclaim must be pleaded as such.[58] If the facts pleaded as a counterclaim do not constitute a counterclaim they are not admitted by a failure to reply.[59]

SUPPLEMENTAL PLEADINGS

7634. Distinguished from amended pleadings—An amended pleading introduces facts existing at the time of the original pleading. A supplemental pleading introduces facts occurring after the original pleading.[60]

7635. A matter of right—Diligence—Upon a proper showing a party is entitled as of right to an order allowing him to serve a supplemental plead-

[51] Bernheimer v. Marshall, 2-78(61); Tullis v. Orthwein, 5-377(305); Webb v. Bidwell, 15-479(394); Hatch v. Coddington, 32-92, 19+393; Bausman v. Woodman, 33-512, 24+198; Trainor v. Worman, 34-237, 25+401; Boon v. State Ins. Co., 37-426, 34+902; Townsend v. Mpls. etc. Co., 46-121, 48+682; James v. St. Paul, 72-138, 75+5.

[52] Bishop v. Travis, 51-183, 53+461; Trainor v. Worman, 34-237, 25+401; Johnson v. Hillstrom, 37-122, 33+547; Rosby v. St. P. etc. Ry., 37-171, 33+698; Larson v. Schmaus, 31-410, 18+273; Mpls. etc. Ry. v. Home Ins. Co., 64-61, 66+132; Estes v. Farnham, 11-423(312); Niebels v. Howland, 97-209, 106+337.

[53] Matthews v. Torinus, 22-132; Lyons v. Red Wing, 76-20, 78+868; Merchants Nat. Bank v. Barlow, 79-234, 82+364; Lyford v. Martin, 79-243, 82+479.

[54] Townsend v. Mpls. etc. Co., 46-121, 48+682.

[01] Pott v. Hanson, 109-416, 124+17.

[55] Craig v. Cook, 28-232, 9+712; Olson v. Tvete, 46-225, 48+914; King v. Burnham, 93-288, 101+302; McArdle v. McArdle, 12-98(53); Reed v. Newton, 22-541; Conway v. Elgin, 38-469, 38+370; Engel v. Bugbee, 40-492, 42+351; Pinger v. Pinger, 40-417, 42+289; West v. Hennessey, 58-133, 59+984; Williams v. Mathews, 30-131, 14+577; Lyons v. Red Wing, 76-20, 24, 78+868; Strauch v. Flynn, 108-313, 122+320; Pott v. Hanson, 109-416, 124+17.

[56] First Nat. Bank v. Kidd, 20-234(212).

[57] Schurmeier v. English, 46-306, 48+1112.

[58] See § 7617.

[59] Englebrecht v. Rickert, 14-140(108); Lash v. McCormick, 17-403(381); Linn v. Rugg, 19-181(145); First Nat. Bank v. Kidd, 20-234(212); Reed v. Newton, 22-541; Sylte v. Nelson, 26-105, 1+811; Ward v. Anderberg, 36-300, 30+890.

[60] Guptill v. Red Wing, 76-129, 78+970; State v. Dist. Ct., 91-161, 97+581.

ing.[61] But it is left to the discretion of the court to determine whether the applicant has exercised proper diligence in making his application,[62] and the court may refuse to allow a party to serve a supplemental pleading which is manifestly false,[63] or one which pleads only immaterial matter.[64]

7636. Supplemental complaint—A supplemental complaint cannot set up a distinct cause of action accruing subsequent to the service of the original complaint. If the original complaint is wholly defective it cannot be sustained by a supplemental one.[65] A party cannot sue on an unripe claim and afterwards, by supplemental complaint, set up the fact of the maturing of the claim. A party must recover on a right existing at the commencement of the action.[66] While a party cannot set up, by supplemental complaint, a title acquired since the commencement of the action he may allege facts strengthening his title. If in his complaint he alleges an equitable title he may by supplemental complaint set up a legal title subsequently acquired. The function of a supplemental complaint is to strengthen the plaintiff's cause of action by alleging material facts, occurring subsequent to the commencement of the action. Facts may be thus alleged which will enlarge or change the kind of relief to which the plaintiff is entitled.[67]

7637. Supplemental answer—Facts material to the case occurring subsequent to the original answer may be set up by supplemental answer.[68] Where new matter of independent defence arises after verdict, the remedy is not a motion for a new trial on the ground of newly discovered evidence, which has no relevancy to the issues litigated by the trial, but by a motion to be permitted to make a supplemental answer, with a stay of proceedings on the verdict until the issue tendered by the supplemental answer can be determined.[69]

7638. Necessity—Admission of evidence—In the absence of a supplemental answer evidence of facts occurring after the service of the original answer is generally inadmissible.[70]

7639. Objection—Objection to a supplemental complaint cannot be made for the first time on the trial.[71]

7640. After judgment—A supplemental pleading is allowable after as well as before judgment.[72]

VERIFICATION

7641. Statute—Remedy for defects—The statute provides for the verification of pleadings.[73] It may be made before an attorney in the action if he is a notary.[74] The court may allow a pleading to be amended by the insertion

[61] Malmsten v. Berryhill, 63–1, 65+88. Contra, Lough v. Bragg, 19–357(309).

[62] Malmsten v. Berryhill, 63–1, 65+88; Voak v. Nat. Invest. Co., 51–450, 53+708; Evans v. Staalle, 88–253, 92+951. See Reilly v. Bader, 50–199, 52+522; Lathrop v. Dearing, 59–234, 61+24; Stacy v. Stephen, 78–480, 81+391.

[63] Malmsten v. Berryhill, 63–1, 65+88.

[64] Evans v. Staalle, 88–253, 92+951.

[65] Eastman v. St. Anthony Falls etc. Co., 17–48(31); Meyer v. Berlandi, 39–438, 40+513.

[66] Eide v. Clarke, 65–466, 68+98.

[67] Lowry v. Harris, 12–255(166); Meyer v. Berlandi, 39–438, 40+513. See Chouteau v. Rice, 1–106(83); Todd v. Johnson, 56–60, 64, 57+320; Hall v. Sauntry, 80–348, 83+156; Ness v. Davidson, 49–469, 476, 52+46.

[68] See Harrington v. St. P. etc. Ry., 17–215(188); Hursh v. First Div. etc. Ry., 17–439(417); Voak v. Nat. Invest. Co., 51–450, 53+708; Guptill v. Red Wing, 76–129, 78+970; Poehler v. Reese, 78–71, 78, 80+847; Hall v. Sauntry, 80–348, 83+156; State v. Dist. Ct., 91–161, 97+581.

[69] Bandler v. Bradley, 124+644.

[70] Guptill v. Red Wing, 76–129, 78+970; Harrington v. St. P. etc. Ry., 17–215 (188); Hall v. Sauntry, 80–348, 83+156.

[71] Lowry v. Harris, 12–255(166).

[72] State v. Dist. Ct., 91–161, 97+581. See Ness v. Davidson, 49–469, 52+46.

[73] R. L. 1905 § 4142; State v. Cooley, 58–514, 60+338.

[74] See Young v. Young, 18–90(72).

of a verification.[75] A pleading not properly verified may be treated as not verified at all.[76] The remedy for a defective verification, or for the want of a verification, is a prompt return of the pleading.[77] A verification is not a part of a cause of action or defence. It is a distinct proceeding and not subject to demurrer.[78]

BILL OF PARTICULARS

7642. When demandable—A bill of particulars is demandable only in actions on account. In other cases, if a party wishes a more particular statement of the cause of action or defence, he must resort to a motion to make the pleading more definite and certain. Under the code there is no such general right to demand a bill of particulars as existed under the former system.[79] It is not demandable in any case except where the account is set forth in a pleading—that is, alleged as a cause of action, counterclaim, or setoff.[80] The term "account" means items of work and labor, of goods sold and delivered, of professional services, and the like.[81] To bring an account within the statute the items thereof need not have been entered in a book.[82]

7643. Demand—Waiver—A stipulation to furnish a bill of particulars within a certain time waives the necessity of making the statutory demand, and has the same effect as such a demand.[83]

7644. Effect—The furnishing of a bill of particulars of professional services does not exclude expert testimony as to the value of such services.[84]

7645. Remedy for failure to furnish—The remedy for a failure to furnish a bill of particulars is to bring to the knowledge of the court on the trial the fact of a demand having been properly made, and to object to the admission of evidence of the account. The objection cannot be made by answer.[85] Objection to the sufficiency of a bill of particulars cannot be made on the trial, but only by motion, before trial, for a more specific bill.[86] An order for a more specific bill is not appealable.[87] To warrant the court in refusing to receive any evidence in support of the complaint upon the ground that a party has not complied with the order of the court to serve a bill of particulars, it should clearly appear that the party's attorney had notice of such order, or had waived notice thereof.[88]

INDEFINITE PLEADINGS

7646. In general—The facts constituting a cause of action or defence must be alleged with certainty, but no more than reasonable certainty is required. The requisite degree of certainty necessarily depends upon the nature of the cause of action or defence and the circumstances of the particular case. No general rule can be laid down except that a party may be required on motion to make his allegations more definite and certain when they are so indefinite

[75] State v. Ward, 79-362, 82+686.
[76] Smith v. Mulliken, 2-319(273).
[77] Smith v. Mulliken, 2-319(273); Folsom v. Carli, 5-333(264); Hayward v. Grant, 13-165(154); Taylor v. Parker, 17-469(447); McMath v. Parsons, 26-246, 2+703.
[78] McMath v. Parsons, 26-246, 2+703.
[79] R. L. 1905 § 4151; Mower County v. Smith, 22-97; Jones v. Northern T. Co., 67-410, 69+1108; St. Louis County v. Am. L. & T. Co., 75-489, 78+113.
[80] St. Louis County v. Am. L. & T. Co., 75-489, 78+113.
[81] Jones v. Northern T. Co., 67-410, 69+1108; Davis v. Johnson, 96-130, 104+766.
[82] Lonsdale v. Oltman, 50-52, 52+131.
[83] Tuttle v. Wilson, 42-233, 44+10.
[84] Calhoun v. Akeley, 82-354, 85+170.
[85] Tuttle v. Wilson, 42-233, 44+10; Henry v. Bruns, 43-295, 45+444; Lonsdale v. Oltman, 50-52, 52+131; Jones v. Northern T. Co., 67-410, 69+1108.
[86] Mpls. E. Co. v. Vanstrom, 51-512, 53+768; Davis v. Johnson, 96-130, 104+766.
[87] Van Zandt v. Wood, 54-202, 55+863.
[88] Kramer v. N. W. El. Co., 91-346, 98+96.

that the precise nature of his cause of action or defence is not apparent.[89] To justify such a motion the indefiniteness must appear on the face of the pleading, and not relate to the evidence by which the allegations may be proved on the trial. A party cannot be required to plead his evidence.[90] A motion to make more definite and certain or to strike out cannot be allowed to take the place of a demurrer.[91]

7647. Discretion of trial court—The matter of requiring a pleading to be made more definite and certain lies very much in the discretion of the trial court and its action will not be reversed on appeal where, upon the merits, the substantial rights of the party are not affected.[92]

7648. Remedy by motion exclusive—The exclusive remedy for indefiniteness is a motion, before trial, to make more definite and certain or to strike out.[93] It is discretionary with the court to entertain a motion after a demurrer has been overruled and before an answer has been served.[94] Indefiniteness cannot be objected to by demurrer,[95] or by motion for judgment on the pleadings,[96] or by a request for instructions to disregard,[97] or by objection to the admission of evidence,[98] or for the first time on appeal.[99]

7649. Motion papers—The moving papers should specify the particular allegations objected to.[1]

7650. Proof aliunde—It has been held that where a pleading is attacked as evasive and uncertain the court is not confined to the pleading itself, but proof aliunde may be considered.[2]

7651. Order—Appeal—The order should specify wherein the pleading is to be made more definite and certain and it may direct that the pleading be stricken out if not amended. A pleading should not ordinarily be stricken out without leave to amend being first given.[3] An order denying a motion to make a pleading more definite and certain is not appealable.[4]

[89] Fraker v. St. P. etc. Ry., 30–103, 14+366; Am. B. Co. v. Kingdom P. Co., 71–363, 73+1089; Freeman v. Freeman, 39–370, 40+167; Whelan v. Sibley County, 28–80, 84, 9+175; Orth v. St. P. etc. Ry., 43–208, 45+151; Scofield v. Nat. El. Co., 64–527, 67+645; Bowers v. Schuler, 54–99, 55+817; Kingsley v. Gilman, 12–515(425); Madden v. Mpls. etc. Ry., 30–453, 16+263; Colter v. Greenhagen, 3–126(74); Cathcart v. Peck, 11–45(24); Pugh v. Winona etc. Ry., 29–390, 13+189; Lehnertz v. Mpls. etc. Ry., 31–219, 17+376; Dunn v. Burlington etc. Ry., 35–73, 80, 27+448; Tierney v. Mpls. etc. Ry., 31–234, 17+377; Casey v. Am. B. Co., 95–11, 103+623; Keating v. Brown, 30–9, 13+909; Matteson v. U. S. etc. Co., 103–407, 115+195.

[90] Lee v. Mpls. etc. Ry., 34–225, 25+399; Todd v. Mpls. etc. Ry., 37–358, 35+5; Bowers v. Schuler, 54–99, 55+817; St. Paul T. Co. v. St. Paul Ch. of Com., 70–486, 73+408. See Madden v. Mpls. etc. Ry., 30–453, 16+263.

[91] Whelan v. Sibley County, 28–80, 84, 9+175; Truesdell v. Hull, 35–468, 29+72; King v. Nichols, 53–453, 55+604; Am. B. Co. v. Kingdom P. Co., 71–363, 73+1089.

[92] Madden v. Mpls. etc. Ry., 30–453, 16+263; Cathcart v. Peck, 11–45(24); Fraker v. St. P. etc. Ry., 30–103, 14+366; Tierney v. Mpls. etc. Ry., 31–234, 17+377; Orth v. St. P. etc. Ry., 43–208, 45+151; Lehnertz v. Mpls. etc. Ry., 31–219, 17+376.

[93] R. L. 1905 § 4144; Stickney v. Smith, 5–486(390); Barnsback v. Reiner, 8–59(37); Madden v. Mpls. etc. Ry., 30–453, 16+263; Guthrie v. Olson, 32–465, 21+557; Peterson v. Ruhnke, 46–115, 48+768; King v. Nichols, 53–453, 55+604; Pugh v. Winona etc. Ry., 29–390, 13+189; Anderson v. Mpls. etc. Ry., 103–224, 114+1123; Matteson v. U. S. etc. Co., 103–407, 115+195.

[94] Lovering v. Webb, 108–201, 120+688, 121+911.

[95] See § 7555.

[96] See § 7694.

[97] Barnsback v. Reiner, 8–59(37).

[98] Pugh v. Winona etc. Ry., 29–390, 13+189; St. Paul T. Co. v. St. Paul Ch. of Com., 70–486, 73+408; Peterson v. Ruhnke, 46–115, 48+768; Allis v. Day, 14–516(388).

[99] Slater v. Olson, 83–35, 85+825; Larson v. G. N. Ry., 108–519, 121+121.

[1] Truesdell v. Hull, 35–468, 29+72.

[2] Colter v. Greenhagen, 3–126(74). It would seem that this case has been inferentially overruled. See § 7646.

[3] See Colter v. Greenhagen, 3–126(74); Cathcart v. Peck, 11–45(24); Pugh v. Winona etc. Ry., 29–390, 13+189.

[4] Am. B. Co. v. Kingdom P. Co., 71–363, 73+1089 (overruling Pugh v. Winona etc. Ry., 29–390, 13+189).

IRRELEVANT PLEADINGS

7652. Definition—An irrelevant allegation is one which has no material relation to the case—one which does not form or tender any material issue.[5]

7653. Striking out—The remedy for irrelevancy in a pleading is a motion before trial to strike out or for judgment.[6] It is only when matter is clearly and indisputably irrelevant that an order striking it out is justifiable.[7] On appeal from a judgment a motion to strike out irrelevant matter will be reviewed only so far as to determine whether there was an abuse of discretion affecting substantial rights.[8]

7654. What constitutes—Cases are cited below involving the relevancy of particular allegations.[9]

REDUNDANT PLEADINGS

7655. What constitutes—Illustrations of redundant allegations will be found in the cases cited below.[10]

7656. Remedy—The remedy for redundancy in a pleading is a motion to strike out.[11]

SHAM PLEADINGS

7657. Definition and nature—A sham pleading is one which is false.[12] It presents no real issue for trial and is presumed to have been interposed for delay or other unworthy purpose.[13] It may be sham though interposed in good faith and in the belief of its truth.[14]

7658. To be stricken out cautiously—To justify a court in striking out a pleading as sham its falsity must be clear and indisputable. It is the duty of the court to discriminate carefully between its right to determine whether there is a real issue to be tried and the trial itself of an issue on motion.[15] When the allegations of an answer are fairly supported by the affidavits of the defendant and others, against like affidavits on behalf of the plaintiff, it cannot ordinarily be said that the falsity of the answer is clear and indisputable. For a court to assume to say this, unless in very extraordinary cir-

[5] Morton v. Jackson, 2-219(180); Hayward v. Grant, 13-165(154). See Goodrich v. Parker, 1-195(169).

[6] R. L. 1905 § 4136; Fish v. Berkey, 10-199(161, 166); Russell v. Chambers, 31-54, 16+458; Henry v. Bruns, 43-295, 45+444; Lydiard v. Daily News Co., 124+985.

[7] Stewart v. Minn. T. Co., 41-71, 42+787; Hansen v. St. Paul G. Co., 82-84, 84+727.

[8] Haug v. Haugan, 51-558, 53+874.

[9] Morton v. Jackson, 2-219(180); Lovejoy v. Morrison, 10-136(108); Berkey v. Judd, 12-52(23); Hayward v. Grant, 13-165(154); Brisbin v. Am. Ex. Co., 15-43 (25); Clague v. Hodgson, 16-329(291); Winona etc. Ry. v. St. P. etc. Ry., 23-359; State v. Lake City, 25-404, 421; Jellett v. St. P. etc. Ry., 30-265, 15+237; Quinby v. Minn. T. Co., 38-528, 38+623; Stewart v. Minn. T. Co., 41-71, 42+787; Henry v. Bruns, 43-295, 45+444; Oleson v. Journal P. Co., 47-300, 50+80; Haug v. Haugan, 51-558, 53+874; Pye v. Bakke, 54-107, 55+904; Dennis v. Nelson, 55-144, 56+589; Harbo v. Blue Earth County, 63-238, 65+457; Oliver M. Co. v. Clark, 65-277, 68+23; Security Bank v. Holmes, 68-538, 71+699; Erickson v. Child, 87-487, 92+1130; Lydiard v. Daily News Co., 124+985.

[10] West v. Eureka Imp. Co., 40-394, 42+87; State v. Lake City, 25-404, 421; Fraker v. St. P. etc. Co., 30-103, 105, 14+366; Jellett v. St. P. etc. Ry., 30-265, 269, 15+237; Russell v. Chambers, 31-54, 16+458; Pye v. Bakke, 54-107, 110, 55+904; Oliver M. Co. v. Clark, 65-277, 68+23; Security Bank v. Holmes, 68-538, 71+699.

[11] Loomis v. Youle, 1-175(150); Fish v. Berkey, 10-199(161, 166); Cathcart v. Peck, 11-45(24); Russell v. Chambers, 31-54, 16+458.

[12] State v. Weber, 96+422, 105+490; Morton v. Jackson, 2-219(180). See Note, 113 Am. St. Rep. 639.

[13] Barker v. Foster, 29-166, 12+460.

[14] State v. Weber, 96-422, 105+490.

[15] Barker v. Foster, 29-166, 12+460; Wright v. Jewell, 33-505, 24+299; Pfaender v. Winona etc. Ry., 84-224, 87+618; First Nat. Bank v. Lang, 94-261, 102+700; Brown v. Peterson, 101-53, 111+733; Estate of Beckwith v. Golden Rule, 108-89, 121+427.

cumstances, would in effect be to try the controversy between the parties upon affidavits and to deprive the defendant of his right to a regular trial by jury or otherwise, with all its manifest advantages.[16] An answer alleging a material fact constituting a defence, and verified by the defendant, should not be stricken out as sham upon affidavit of the plaintiff simply denying the fact alleged, the falsity of the answer not being clearly and indisputably shown.[17]

7659. When part is sham—Where part of an answer is sham, but another part is good and puts in issue material allegations of the complaint, the court cannot strike out the whole, and order judgment for the plaintiff notwithstanding the answer.[18]

7660. Verified pleading may be stricken out—A sham pleading may be stricken out on motion though it is verified.[19]

7661. Denials may be stricken out—A pleading containing a general denial, or specific denial, may be stricken out as sham.[20] A denial of any knowledge or information of facts which the pleader knows or ought to know is sham and may be stricken out.[21]

7662. Counterclaim—A sham counterclaim may be stricken out on motion.[22]

7663. Time of motion to strike out—It should be made promptly upon service of the sham pleading, but it is discretionary with the court to entertain it any time before trial.[23]

7664. Affidavits on motion—A motion to strike out is usually based on affidavits of the parties and third persons and other documentary evidence.[24] Where affidavits in support of the motion make out a clear prima facie case of falsity they will be taken as true for the purposes of the motion, if not met by counter-affidavits, and the motion granted.[25] The court may take into consideration the quibbling and evasive character of the defendant's counter-affidavits.[26]

7665. Burden of proof—On a motion to strike out an answer as sham the defendant is not required to prove the truth of his defence or the truth of the allegations called in question. The burden of proving their falsity is on the plaintiff.[27]

7666. Amendment discretionary—Upon striking out a sham pleading it is discretionary with the court to order judgment or allow an amended pleading to be served.[28]

[16] Wright v. Jewell, 33–505, 24+299; City Bank v. Doll, 33–507, 24+300; Smith v. Betcher, 34–218, 25+347.

[17] City Bank v. Doll, 33–507, 24+300; First Nat. Bank v. Lang, 94–261, 102+700.

[18] Schmitt v. Cassilius, 31–7, 16+453.

[19] Conway v. Wharton, 13–158(145); Hayward v. Grant, 13–165(154); Barker v. Foster, 29–166, 12+460; Nelson v. Richardson, 31–267, 17+388; Wheaton v. Briggs, 35–470, 29+170; Stevens v. McMillin, 37–509, 35+372; Dobson v. Hallowell, 53–98, 54+939; White v. Moquist, 61–103, 63+255; State v. Weber, 96–422, 105+490.

[20] Nelson v. Richardson, 31–267, 17+388; Stevens v. McMillin, 37–509, 35+372; Dobson v. Hallowell, 53–98, 54+939; Bardwe'l v. Brown, 57–140, 58+872; First Nat. Bank v. Lang, 94–261, 102+700.

[21] Wheaton v. Briggs, 35–470, 29+170; Smalley v. Isaacson, 40–450, 42+352; Larson v. Shook, 68–30, 70+775.

[22] Monitor D. Co. v. Moody, 93–232, 100+1104.

[23] Barker v. Foster, 29–166, 12+460.

[24] See Sandwich Mfg. Co. v. Earl, 56–390, 394, 57+938; Dobson v. Hallowell, 53–98, 54+939; Fletcher v. Byers, 55–419, 57+139; Bardwell v. Brown, 57–140, 58+872; White v. Moquist, 61–103, 63+255.

[25] Barker v. Foster, 29–166, 12+460; Van Loon v. Griffin, 34–444, 26+601; Dobson v. Hallowell, 53–98, 54+939; White v. Moquist, 61–103, 63+255.

[26] Thul v. Ochsenreiter, 72–111, 75+4; Hertz v. Hartmann, 74–320, 77+232.

[27] Pfaender v. Winona etc. Ry., 84–224, 87+618; Schmitt v. Cassilius, 31–7, 16+453.

[28] Hertz v. Hartmann, 74–320, 77+232; First Nat. Bank v. Lang, 94–261, 102+700.

7667. Pleadings held sham or the reverse—Cases are cited below holding pleadings to be sham and subject to be stricken out on motion;[29] or the reverse.[30]

FRIVOLOUS PLEADINGS

7668. Answer—A frivolous answer is one which is so glaringly insufficient as a defence that the court can determine its insufficiency upon bare inspection, without argument.[31]

7669. Demurrer—A demurrer should not be stricken out as frivolous unless it is manifest from mere inspection, and without argument, that there was no reasonable ground for interposing it, and hence that it was presumably put in in bad faith, for mere purposes of delay. It should not be stricken out where there is such room for debate, as to the sufficiency of the pleading demurred to, that an attorney of ordinary intelligence might have interposed a demurrer in entire good faith.[32] If a demurrer is bad, but not frivolous, and the court erroneously strikes it out as frivolous, but grants the party leave to plead over, it is error without prejudice, and on appeal the order striking out the demurrer will not be reversed.[33]

7670. Counterclaim—A frivolous counterclaim may be stricken out on motion.[34]

VARIANCE

7671. General rule—The evidence must follow the allegations. In order to recover it is not enough for the plaintiff to prove a cause of action; he must prove the cause of action alleged in his complaint.[35] It is sufficient, however, if the allegations and proof substantially correspond.[36]

7672. Immaterial variance—When the disagreement between the facts alleged and the facts proved, or sought to be proved, is so slight that it is per-

[29] Hayward v. Grant, 13–165(154); Barker v. Foster, 29–166, 12+460; Nelson v. Richardson, 31–267, 17+388; Schmitt v. Cassilius, 31–7, 16+453; Van Loon v. Griffin, 34–444, 26+601; Wheaton v. Briggs, 35–470, 29+170; Stevens v. McMillin, 37–509, 35+372; Smalley v. Isaacson, 40–450, 42+352; Dennis v. Nelson, 55–144, 56+589; Dobson v. Hallowell, 53–98, 54+939; Fletcher v. Byers, 55–419, 57+139; Sandwich Mfg. Co. v. Earl, 56–390, 57+938; Bardwell v. Brown, 57–140, 58+872; White v. Moquist, 61–103, 63+255; Larson v. Shook, 68–30, 70+775; Thul v. Ochsenreiter, 72–111, 75+4; Hertz v. Hartmann, 74–320, 77+232; Monitor D. Co. v. Moody, 93–232, 100+1104; First Nat. Bank v. Lang, 94–261, 102+700; State v. Weber, 96–422, 105+490; Lynn v. Schunk, 101–22, 111+729; Brown v. Peterson, 101–53, 111+733; First S. Bank v. Schatz, 104–425, 116+917.

[30] Morton v. Jackson, 2–219(180); Conway v. Wharton, 13–158(145); State v. Sherwood, 15–221(172); Roblee v. Secrest, 28–43, 8+904; City Bank v. Doll, 33–507, 24+300; Wright v. Jewell, 33–505, 24+299; Smith v. Betcher, 34–218, 25+347; McDermott v. Deither, 40–86, 41+544; Smith v. Mussetter, 58–159, 59+995; Pfaender v. Winona etc. Ry., 84–224, 87+618; Estate of Beckwith v. Golden Rule, 108–89, 121+427.

[31] Morton v. Jackson, 2–219(180); Roblee v. Secrest, 28–43, 8+904; First Nat. Bank v. Lang, 94–261, 102+700; State v. Weber, 96–422, 105+490.

[32] Hatch v. Schusler, 46–207, 48+782; Olsen v. Cloquet L. Co., 61–17, 63+95; Perry v. Reynolds, 40–499, 42+471; Nelson v. Nugent, 62–203, 64+392; Jaeger v. Hartman, 13–55(50); State of Wis. v. Torinus, 22–272; Quinn v. Shortall, 29–106, 12+153; Hurlburt v. Schulenburg, 17–22(5).

[33] Friesenhahn v. Merrill, 52–55, 53+1024.

[34] Monitor D. Co. v. Moody, 93–232, 100+1104.

[35] Desnoyer v. L'Hereux, 1–17(1); Snow v. Johnson, 1–48(32); Lawrence v. Willoughby, 1–87(65); Karns v. Kunkle, 2–313(268); Helfer v. Alden, 3–332(232); Folsom v. Carli, 6–420(284, 290); Cochrane v. Halsey, 25–52, 61; Burton v. St. P. etc. Ry., 33–189, 22+300; Marshall v. Gilman, 47–131, 49+688; Cremer v. Miller, 56–52, 57+318; Joannin v. Barnes, 77–428, 80+364; Ecker v. Isaacs, 98–146, 107+1053; First Nat. Bank v. Stadden, 103–403, 115+198.

[36] Blakeman v. Blakeman, 31–396, 18+103; Irish-Am. Bank v. Bader, 59–329, 61+328.

fectly obvious that the adverse party could not have been misled in his preparation for trial, the variance is deemed immaterial, and the court will either disregard it altogether, or order an immediate amendment without costs.[37]

7673. Material variance—When the disagreement between the facts alleged and the facts proved or sought to be proved is so great that the adverse party might reasonably have been misled in his preparation for trial and such party makes it appear to the court that he was actually misled, the variance cannot be disregarded and an amendment will be ordered with costs, or a continuance granted, with leave to amend, with or without costs, in the discretion of the court. It is not enough that there is a material variance appearing on the face of the pleadings and evidence, but the fact that the adverse party has been misled must be proved aliunde the pleadings and evidence.[38]

7674. Fatal variance—Failure of proof—When the disagreement between the facts alleged and the facts proved is of such a character that a different cause of action than the one set up in the pleading is proved, the court cannot order or grant an amendment over objection but must dismiss the action or direct a verdict. To prove fatal the disagreement need not extend to all the facts. The same facts may enter into two different causes of action. A disagreement as to a single material fact may prove fatal. The test is not the extent of disagreement in the facts, but the different character of the causes of action made out by the facts.[39] Where the complaint states a cause of action ex delicto a recovery cannot be had upon a cause of action ex contractu.[40] Where a complaint states a cause of action on an express contract, recovery cannot be had on proof of a contract implied by law.[41] Under an allegation of legal title an equitable title cannot be proved.[42] By statute all parties to a joint contract are jointly and severally liable, and may be sued jointly or severally at the election of the plaintiff. Where an action is brought against one of the parties so liable, and the complaint alleges a contract made by him, and the evidence on the trial shows a joint contract with defendant and other persons, there is, in the absence of a showing that defendant was misled to his prejudice, no fatal variance between the allegations and the proof.[43]

7675. Waiver—Trial of issues by consent—Presumption—The parties to an action may, by consent or without objection, try issues not made by the pleadings and when they do so the case is to be determined exactly as if such

[37] Wilcox v. Ritteman, 88–18, 92+472; Short v. McRea, 4–119(78); Caldwell v. Bruggerman, 4–270(190); Chapman v. Dodd, 10–350(277); Rau v. Minn. V. Ry., 13–442(407); Sonnenberg v. Riedel, 16–83 (72); Hartz v. St. P. etc. Ry., 21–358; Johnston v. Clark, 30–308, 15+252; Blakeman v. Blakeman, 31–396, 18+103; Mykleby v. Chi. etc. Ry., 39–54, 38+763; Iverson v. Dubay, 39–325, 40+159; Moser v. St. P. etc. Ry., 42–480, 44+530; Erickson v. Schuster, 44–441, 46+914; Fravell v. Nett, 46–31, 48+446; Nichols v. Dedrick, 61–513, 63+1110; Anderson v. Johnson, 74–171, 77+26; St. Louis County v. Am. L. & T. Co., 75–489, 78+113; Nutzmann v. Germania etc. Co., 82–116, 84+730; Olson v. Minn. etc. Ry., 89–280, 94+871; Lemon v. De Wolf, 89–465, 95+316; Gaar v. Brundage, 89–412, 94+1091; Briggs v. Rutherford, 94–23, 101+954; Kaufman v. Barbour, 103–173, 114+738; Derham v. Donohue, 155 Fed. 385.

[38] Short v. McRea, 4–119(78); Washburn v. Winslow, 16–33(19); Hayden v. Albee, 20–159(143); Kaufman v. Barbour, 103–173, 114+738.

[39] Irish-Am. Bank v. Bader, 59–329, 61+328; Scofield v. Nat. El. Co., 64–527, 67+645; Downs v. Finnegan, 58–112, 59+981; White v. Culver, 10–192(155); McCarty v. Barrett, 12–494(398); Leighton v. Grant, 20–345(298); O'Brien v. St. Paul, 18–176(163); Cowles v. Warner, 22–449; Cummings v. Long, 25–337; Benson v. Dean, 40–445, 42+207; Dennis v. Spencer, 45–250, 47+795; Com. etc. Co. v. Dokko, 71–533, 74+891; Waggoner v. Preston, 83–336, 86+335; Donahue v. N. W. etc. Co., 103–432, 115+279.

[40] Mpls. H. Works v. Smith, 30–399, 16+462.

[41] See § 1904.

[42] See § 2875.

[43] Morgan v. Brach, 104–247, 116+490.

issues had been formed by the pleadings,[44] and full measure of relief awarded.[45] After having litigated a question of fact without objection it is too late to claim that the pleading of the adverse party did not sufficiently aver the fact in controversy.[46] A party waives a variance if he himself calls out the objectionable evidence,[47] or fails to make timely and specific objection to it.[48] Evidence is presumed to have been offered and received with reference to the issues made by the pleadings. Prima facie, the issues tried are those made by the pleadings. Where there is no express or formal waiver, but it is to be gathered from the course of the trial, the record of the trial must make it appear very clearly that the parties did in fact, and without objection, litigate the issue not pleaded as though it were in the pleadings. Any other rule would be liable to operate as a surprise and to work injustice. A consent to try issues not made by the pleadings cannot be inferred merely from the fact that evidence pertinent to such issues was received without objection, if such evidence was also pertinent to issues actually made by the pleadings.[49]

7676. Objections—When must be made—Objection to a variance between the pleadings and proof cannot be made for the first time on appeal.[50] It must be made on the trial and if the variance is material but not fatal it must be made as soon as the evidence is offered.[51] It is ordinarily too late when plaintiff rests.[52] If the variance is fatal the objection may be made to the evidence,[53] or by a motion for a dismissal,[54] or by exception to instructions.[55]

[44] Winona v. Minn. etc. Co., 27-415, 427, 8+148; Warner v. Foote, 40-176, 41+935; Ambuehl v. Matthews, 41-537, 43+477; Abraham v. Holloway, 41-163, 42+870; Wayzata v. G. N. Ry., 50-438, 52+913; Erickson v. Fisher, 51-300, 53+638; Lyons v. Red Wing, 76-20, 78+868; Whalon v. Aldrich, 8-346(305); Rogers v. Hastings etc. Ry., 22-25; Madson v. Madson, 80-501, 83+396; Bradley v. Bradley, 97-130, 106+338; Maul v. Steele, 95-292, 104+4; Hostetter v. Illinois C. Ry., 104-25, 115+748. See Bick v. Mpls. etc. Ry., 107-78, 82, 119+505.

[45] Bassett v. Haren, 61-346, 63+713.

[46] Osborne v. Williams, 37-507, 35+371; Butler v. Winona M. Co., 28-205, 9+697; Thoreson v. Mpls. H. Works, 29-341, 13+156; Isaacson v. Mpls. etc. Ry., 27-463, 8+600; Almich v. Downey, 45-460, 48+197; Keene v. Masterman, 66-72, 68+771; Wilson v. N. W. etc. Assn., 53-470, 477, 55+626; Spear v. Snider, 29-463, 13+910; Vaillancour v. Mpls. etc. Ry., 106-348, 119+53; Woodruff v. Bearman, 108-118, 121+426.

[47] Reed v. G. N. Ry., 76-163, 78+974.

[48] Cummings v. Petsch, 41-115, 42+789; Johnson v. Avery, 41-485, 43+340; Adams v. Castle, 64-505, 67+637; Raitila v. Consumers Ore Co., 107-91, 119+490.

[49] Winona v. Minn. etc. Co., 27-415, 6+795, 8+148; O'Neil v. Chicago etc. Ry., 33-489, 24+192; Livingston v. Ives, 35-55, 27+74; Mahoney v. St. Paul etc. Ry., 35-361, 29+6; Farnham v. Murch, 36-328, 31+453; Payette v. Day, 37-366, 34+592; Barteau v. Barteau, 45-132, 47+645; Fergestad v. Gjertsen, 46-369, 49+127; Bowen v. Thwing, 56-177, 57+468; Elston v. Fieldman, 57-70, 58+830; Peach v. Reed, 87-375, 92+229; Diamond v. Dennison, 102-302, 113+696; Hostetter v. Illinois C. Ry., 104-25, 115+748.

[50] St. Paul v. Kuby, 8-154(125); Washburn v. Winslow, 16-33(19); Lough v. Thornton, 17-253(230); Cushman v. Carver County, 19-295(252); Messerschmidt v. Baker, 22-81; Hartz v. St. Paul etc. Ry., 21-358; Rogers v. Hastings & D. Ry., 22-25; Merriam v. Pine City L. Co., 23-314; Nelson v. Thompson, 23-508; Cairncross v. McGrann, 37-130, 33+548; Clark v. Austin, 38-487, 38+615; Johnson v. Avery, 41-485, 43+340; Ambuehl v. Matthews, 41-537, 43+477; Almich v. Downey, 45-460, 48+197; Wayzata v. G. N. Ry., 50-438, 52+913; Erickson v. Fisher, 51-300, 53+638; O'Connor v. Delaney, 53-247, 54+1108; Hand v. Nat. L. S. Ins. Co., 57-519, 59+538; Red River Valley I. Co. v. Cole, 62-457, 64+1149; Lyons v. Red Wing, 76-20, 78+868; Madson v. Madson, 80-501, 83+396; Thomas v. Murphy, 87-358, 91+1097; Lemon v. De Wolf, 89-465, 95+316.

[51] Adams v. Castle, 64-505, 67+637.

[52] Id.

[53] First Nat. Bank v. Strait, 71-69, 73+645.

[54] Cowles v. Warner, 22-449; Irish-Am. Bank v. Bader, 59-329, 61+328; Gaar v. Fritz, 60-346, 62+391.

[55] Benson v. Dean, 40-445, 42+207.

indulged in favor of the sufficiency of the complaint. The test is not whether a demurrer would have been sustained. The objection will be overruled if the complaint can be sustained by the most liberal construction.[93]

7688. By plaintiff—Insufficient answer—The objection that the facts set up in the answer do not constitute a defence is not waived by failure to demur but may be raised on the trial by objection to the introduction of any evidence under it.[94]

JUDGMENT ON THE PLEADINGS

7689. When allowable—Judgment on the pleadings may be ordered when the answer admits or fails to deny all the material allegations of the complaint;[95] when a reply admits or fails to deny the defence pleaded in the answer;[96] when the reply admits or fails to deny the counterclaim pleaded in the answer;[97] when a plea admits but does not sufficiently avoid;[98] when the new matter pleaded in an answer does not constitute a defence;[99] when there is a departure in the reply;[1] when the complaint is insufficient.[2]

7690. When counterclaim pleaded—When the defendant pleads a counterclaim a motion by the plaintiff for judgment on the pleadings is properly denied,[3] unless the counterclaim is for merely nominal damages.[4]

7691. Motion by plaintiff—Complaint insufficient—A motion by the plaintiff for judgment on the pleadings is properly denied if his complaint is insufficient.[5]

7692. Must be on pleadings alone—Judgment other than for dismissal cannot be ordered on the pleadings and evidence.[6]

7693. Motion admits facts—A motion for judgment on the pleadings is in the nature of a demurrer and admits the facts well pleaded though they are indefinitely pleaded.[7]

7694. Construction of pleading—Upon a motion for judgment on the pleadings every reasonable intendment will be indulged in favor of the sufficiency of the pleading. The test is not whether a demurrer would have been sustained. The motion will be denied if the pleading can be sustained by the most liberal construction.[8] The mere fact that a pleading is indefinite is not a ground for granting the motion.[9]

AMENDMENT

7695. As of right—The statute authorizes a party to amend his pleading once, as of course, "at any time before the period for answering it has expired;

[94] See Aultman v. Falkum, 51-562, 53+875; Larson v. Shook, 68-30, 70+775; St. Paul T. Co. v. St. Paul Ch. of Com., 70-486, 73+408.

[95] Norton v. Beckman, 53-456, 55+603; Lloyd v. Secord, 61-448, 63+1099; Horn v. Butler, 39-515, 40+833.

[96] Gaffney v. St. P. etc. Ry., 38-111, 35+728.

[97] Schurmeier v. English, 46-306, 48+1112.

[98] Gaffney v. St. P. etc. Ry., 38-111, 35+728.

[99] Clarke v. Patrick, 60-269, 62+284.

[1] See § 7627.

[2] See § 7682.

[3] Cummings v. Taylor, 21-366.

[4] Hitchcock v. Turnbull, 44-475, 47+153.

[5] Balcombe v. Northup, 9-172(159).

[6] Woodling v. Knickerbocker, 31-268, 17+387. See Duluth Ch. of Com. v. Knowlton, 42-229, 44+2.

[7] Stewart v. Erie etc. Co., 17-372(348); Jellison v. Halloran, 40-485, 42+392; Tripp v. N. W. Nat. Bank, 41-400, 43+60; Mpls. L. Co. v. McMillan, 79-287, 82+591; Weicher v. Cargill, 82-265, 84+1007.

[8] Malone v. Minn. S. Co., 36-325, 31+170; Kelly v. Rogers, 21-146, 151; McAllister v. Welker, 39-535, 41+107; Fountain v. Menard, 53-443, 55+601; Mpls. L. Co. v. McMillan, 79-287, 82+591; Weicher v. Cargill, 82-265, 84+1007; Roebuck v. Wick, 98-130, 107+1054.

[9] Webb v. Bidwell, 15-479(394); Stewart v. Erie etc. Co., 17-372(348); Malone v. Minn. S. Co., 36-325, 31+170.

or, if the trial be not delayed thereby, it may be so amended within twenty days after the same has been answered, demurred to, or replied to." [10]

7696. Discretion of trial court—The amendment of pleadings is a matter lying almost wholly in the discretion of the trial court and its action will not be reversed on appeal except for a clear abuse of discretion.[11] The power of the trial court in this regard is very great. It must exercise its discretion with reference to the facts of the particular case and in furtherance of justice.[12] This power of the trial court, however, is not absolute, and in a few cases the supreme court has reversed for an abuse of discretion.[13]

7697. To be allowed liberally—Amendments are to be allowed with liberality where justice would be furthered, especially where a meritorious defence is sought to be interposed.[14] If a court is in doubt whether defensive matter is admissible under a general denial it should ordinarily allow an amendment to render it admissible.[15]

7698. Dependent on stage of action—The liberality to be shown in the allowance of amendments depends very much upon the stage of the action. Before trial amendments are allowed with great liberality and almost as a matter of course. On the trial they are allowed liberally, but less liberally than before trial. After trial they are allowed cautiously and sparingly—especially after judgment and after a disposition of the case on appeal.[16] It is the general rule that a party seeking an amendment must move with reasonable diligence.[17]

7699. Meritoriousness of defence—While all defences are equally good in law, yet a court may, to a certain extent, take into account the nature of a defence in determining whether to allow it to be set up by amendment.[18]

7700. Time of matter introduced—Matter arising subsequent to the original pleading cannot be introduced by amendment, but only by supplemental pleading.[19]

7701. As to parties—The court may at any time amend the name of any party except for the purpose of acquiring jurisdiction.[20] In an action brought in favor of a minor in the name of the guardian the name of the ward may be added by amendment.[21] The name of a plaintiff improperly joined may be stricken out.[22]

7702. Immaterial matters—An amendment as to immaterial matters will not be allowed.[23]

7703. Motion—When a party asks leave to amend his pleading he must inform the court in what particular he desires to amend it.[24] It has been held

[10] R. L. 1905 § 4156; Griggs v. Edelbrock, 59–485, 61+555; Swank v. Barnum, 63–447, 65+722.

[11] Winona v. Minn. etc. Co., 29–68, 11+228; Fowler v. Atkinson, 5–505(399); Holmes v. Campbell, 13–66(58); Forman v. Saunders, 92–369, 100+93; Wasser v. Western L. S. Co., 97–460, 107+160; Seager v. Armstrong, 99–526, 109+1134.

[12] Pfefferkorn v. Haywood, 65–429, 68+68.

[13] Rice v. Longfellow, 78–394, 81+207; Hoatson v. McDonald, 97–201, 106+311; Todd v. Bettingen, 102–260, 113+906.

[14] Cool v. Kelly, 85–359, 362, 88+988; Burke v. Baldwin, 54–514, 520, 56+173; Rice v. Longfellow, 78–394, 81+207 (held abuse of discretion not to allow an amendment).

[15] Rees v. Storms, 101–381, 112+419.

[16] Todd v. Bettingen, 102–260, 113+906.

[17] Sundberg v. Goar, 92–143, 99+638.

[18] Mpls. etc. Ry. v. Firemen's Ins. Co., 62–315, 64+902.

[19] Guptill v. Red Wing, 76–129, 78+970; State v. Dist. Ct., 91–161, 97+581.

[20] McEvoy v. Bock, 37–402, 34+740. See Atwood v. Landis, 22–558; Casper v. Klippen, 61–353, 63+737; Erskine v. McIlrath, 60–485, 62+1130; Davis v. Chouteau, 32–548, 21+748.

[21] Perine v. Grand Lodge, 48–82, 50+1022; Beckett v. N. W. etc. Assn., 67–298, 69+923.

[22] Wiesner v. Young, 50–21, 52+390.

[23] Newman v. Springfield etc. Co., 17–123 (98); Carli v. Union etc. Co., 32–101, 20+89; Fidelity M. L. Assn. v. Germania Bank, 74–154, 76+968.

[24] Barker v. Walbridge, 14–469(351).

that an error, if any, in granting an ex parte order for an amendment is cured by a subsequent allowance of the same amendment upon due notice.[25] In all cases where an application is made for leave to amend a pleading, or for leave to answer or reply after the time limited by statute, or to open a judgment and for leave to answer and defend, such application must be accompanied with a copy of the proposed amendment, answer or reply as the case may be, and an affidavit of merits, and be served upon the adverse party.[26] An order for amendment may be made on default by the adverse party.[27]

7704. Service of order—An order granting leave to amend need not be served upon the adverse party unless it so directs.[28]

7705. Terms—The imposition of terms upon the allowance of amendment lies in the discretion of the trial court and its action will not be reversed on appeal except for a clear abuse of discretion. Courts have uniformly sanctioned the practice of allowing amendments, after issue joined, upon such terms as the circumstances of each particular case might require, as payment of costs up to the time of amendment, accepting short notice of trial, rejecting certain defences or causes of action, or requiring a party to admit the truth of his adversary's plea or a part of the same.[29] Where in the course of trial, the court grants plaintiff's motion to amend the complaint by omitting certain facts which had been admitted in the answer and by tendering entirely new issues, and the defendant claims to have been misled, and is not prepared to proceed with the trial, and requests a continuance of the case, the defendant cannot be required to disclose by affidavit the names of witnesses, or what particular evidence he desires to produce upon another trial, as a condition to a continuance.[30]

7706. Effect—Limitations—Answering—Demurrer—Notice of trial—An amended pleading supersedes the original and is to be construed as the only one interposed in the case.[31] Unless the amendment introduces a new cause of action the statute of limitations is arrested by the service of the original pleading.[32] Where a complaint is amended after answer, the defendant may answer anew if he elects, but he is not bound to do so; and, if he does not, the answer to the original will stand as the answer to the amended complaint, and the defendant will not be in default except as to the new or additional facts not put in issue by his answer.[33] A defendant may demur, and allege that an amended complaint states no cause of action, though that ground was not assigned upon demurrer to the original complaint.[34] A notice of trial is not avoided by a subsequent amendment of the pleadings.[35]

7707. Before trial—The amendment of pleadings before the trial is a matter lying almost wholly in the discretion of the trial court.[36] For obvious

[25] Markell v. Ray, 75–138, 77+788.
[26] Rule 17, District Court.
[27] Bruns v. Schreiber, 48–366, 51+120.
[28] Holmes v. Campbell, 12–221(141).
[29] Caldwell v. Bruggerman, 8–286(252); Deering v. McCarthy, 36–302, 30+813; Nichols v. Dedrick, 61–513, 63+1110; Traynor v. Sielaff, 62–420, 64+915.
[30] Despatch L. Co. v. Employers' etc. Corp., 105–384, 117+506.
[31] Becker v. Sandusky City Bank, 1–311 (243); Oleson v. Newell, 12–186(114); Hanscom v. Herrick, 21–9, Hastay v. Bonness, 84–120, 86+896; Loftus v. Smith, 90–418, 97+125; Pleins v. Wachenheimer, 108–342, 122+166.
[32] Bruns v. Schreiber, 48–366, 51+120. See Boen v. Evans, 72–169, 75+116; Markell v. Ray, 75–138, 77+788.
[33] Ermentrout v. Am. F. Ins. Co., 63–194, 65+270; Avery v. Peck, 80–519, 83+1083.
[34] Disbrow v. Creamery P. M. Co., 125+115.
[35] Griggs v. Edelbrock, 59–485, 61+555; Stevens v. Curry, 10–316(249).
[36] Winona v. Minn. etc. Co., 29–68, 11+228; Fowler v. Atkinson, 5–505(399); Mpls. etc. Ry. v. Firemen's Ins. Co., 62–315, 64+902; Boen v. Evans, 72–169, 75+116; Swank v. Barnum, 63–447, 65+722; Patterson v. Melchior, 106–437, 119+402.

reasons amendments are more freely granted before than upon the trial. It has even been held immaterial that an amendment changes the nature of the cause of action.[37] It has been held permissible to allow a complaint to be amended so as to ask for equitable relief though it originally asked for damages.[38]

7708. On the trial—Discretion—The amendment of pleadings on the trial is a matter lying almost wholly in the discretion of the trial court. Cases are cited below sustaining an order on the trial allowing an amendment of a complaint;[39] disallowing an amendment of a complaint;[40] allowing an amendment of an answer;[41] disallowing an amendment of an answer;[42] disallowing an amendment of a reply;[43] disallowing an amendment of a counterclaim.[44]

7709. Scope of allowable amendment of complaint—A complaint cannot be amended on the trial by introducing an entirely new cause of action.[45] Any amendment is permissible which is merely an amplification or change in the statement of the manner in which the contract was broken or the injury inflicted. A cause of action is the violation of a right and so long as the same violation of the same right is preserved, any amendment in the statement of the particulars of the violation is allowable.[46] A cause of action ex contractu cannot be converted into one ex delicto by amendment.[47]

7710. Increasing damages—The amount of damages claimed may be increased by amendment on the trial,[48] and on appeal from a justice court they may be increased beyond the jurisdiction of the justice.[49]

7711. Scope of allowable amendment of answer—A court should be especially liberal in allowing a defendant to amend his answer so as to set up all the defences he has. It is proper to allow him on the trial to set up an entirely new defence by amendment, upon such terms as may be just.[50]

7712. To cure defective pleadings—When objection is made on the trial to a defect in a pleading which may be cured by an amendment counsel should

[37] Myrick v. Purcell, 99-457, 109+995. And see Holmes v. Campbell, 12-221(141).

[38] Holmes v. Campbell, 12-221(141).

[39] Caldwell v. Bruggerman, 8-286(252); Rau v. Minn. etc. Ry., 13-442(407); Sheehy v. Hinds, 27-259, 6+781; Traynor v. Sielaff, 62-420, 64+915; Niven v. Craig, 63-20, 65+86; Berryhill v. Healey, 89-444, 95+314; Despatch L. Co. v. Employers' L. A. Corp., 105-384, 117+506, 118+152; Anderson v. Foley, 124+987.

[40] White v. Culver, 10-192(155); Carli v. Union etc. Co., 32-101, 20+89; Smith v. Prior, 58-247, 59+1016; Luse v. Reed, 63-5, 65+91; St. Paul T. Co. v. St. P. Ch. of Com., 70-486, 73+408; Boen v. Evans, 72-169, 75+116; Fidelity M. L. Assn. v. Germania Bank, 74-154, 76+968; Porter v. Winona etc. Co., 78-210, 80+965; Byard v. Palace C. H. Co., 85-363, 88+998; Seager v. Armstrong, 99-526, 109+1134; Gracz v. Anderson, 104-476, 116+1116.

[41] Caldwell v. Bruggerman, 8-286(252); Osborne v. Williams, 37-507, 35+371; Brown v. Radebaugh, 84-347, 87+937; Davis v. Hamilton, 88-64, 73, 92+512; Church v. Odell, 100-98, 110+346; Wilson v. N. W. etc. Co., 103-35, 114+251; Segerstrom v. Swenson, 105-115, 117+478.

[42] Morrison v. Lovejoy, 6-319(224); Brazil v. Moran, 8-236(205); Butler v. Paine, 8-324(284); Newman v. Springfield etc. Co., 17-123(98); Kiefer v. Rogers, 19-32(14); Iltis v. Chi. etc. Ry., 40-273, 41+1040; Bitzer v. Campbell, 47-221, 49+691; Kennedy v. McQuaid, 56-450, 58+35; Ingalls v. Oberg, 70-102, 72+841; Dennis v. Pabst, 80-15, 82+978; Pierce v. Brennan, 88-50, 92+507; Hall v. Skahen, 101-460, 112+865; Goess v. Chi. etc. Ry., 104-495, 116+1115.

[43] Stensgaard v. St. P. etc. Co., 50-429, 52+910.

[44] Iverson v. Dubay, 39-325, 40+159.

[45] Bruns v. Schreiber, 48-366, 51+120; Iverson v. Dubay, 39-325, 40+159; Smith v. Prior, 58-247, 59+1016; Mpls. etc. Co. v. Cunningham, 59-325, 61+329; Traynor v. Sielaff, 62-420, 64+915; Swank v. Barnum, 63-447, 65+722; Porter v. Winona etc. Co., 78-210, 80+965; Byard v. Palace C. H. Co., 85-363, 88+998. See contra as to amendment before trial, Myrick v. Purcell, 99-457, 109+995.

[46] Daley v. Gates, 65 Vt. 591; Bruns v. Schreiber, 48-366, 51+120; Dougan v. Turner, 51-330, 53+650.

[47] Smith v. Prior, 58-247, 59+1016.

[48] Austin v. N. P. Ry., 34-473, 26+607. See § 7537.

[49] McOmber v. Balow, 40-388, 42+83.

[50] Rees v. Storms, 101-381, 112+419.

ordinarily ask for an amendment rather than seek a remedy by appeal and the trial court should freely grant such an application.[51]

7713. Conforming pleadings to proof—Variance—Where it clearly appears that the variance between the pleadings and proof has not misled the adverse party to his prejudice in maintaining his action or defence on the merits the trial court, either upon the trial or thereafter, may order the pleadings amended to conform to the proofs.[52] And in such a case the supreme court may remand the case with directions to the trial court to allow such an amendment.[53] But a court has no power to grant an amendment of a complaint after verdict to conform to evidence which was seasonably objected to on the trial as inadmissible under the pleadings and without which the plaintiff could not have recovered.[54] Where issues not formed by the pleadings are tried by consent or without objection it is always proper for the court to order an amendment to conform the pleadings to the proof, but it is not necessary to do so.[55] The court cannot conform the pleadings to the proof where the amendment would "substantially change the claim or defence," [56] except where issues outside the pleadings have been tried by consent or without objection.

7714. After judgment—The statute gives a trial court discretionary power to amend pleadings after judgment,[57] but it is a power to be cautiously exercised.[58] Pleadings may be amended after judgment to conform to the proof.[59] A complaint on a joint debt may be changed to one on a joint and several debt.[60] An amendment of an insufficient statement for judgment by confession will not be allowed to the prejudice of third parties.[61]

7715. On motion for new trial—A refusal to allow an amendment of an answer, involving a complete change in the theory of the defence, has been held proper, two amendments of the answer having been allowed on the trial.[62] An order allowing an amendment of an answer setting up the defence that the obligation sued upon was joint has been held an abuse of discretion.[63]

7716. After appeal and remand—The district court has discretionary power to grant an amendment raising new issues after a case has been disposed of on appeal to the supreme court and remanded, but it is a power to be sparingly and cautiously exercised.[64] When an affirmance is of the trial court's order for judgment, it ordinarily amounts to a direction not to proceed to a deter-

[51] Cordill v. Minn. El. Co., 89-442, 95+306.

[52] Adams v. Castle, 64-505, 67+637; Cairncross v. McGrann, 37-130, 33+548; Erickson v. Bennet, 39-326, 40+157; Almich v. Downey, 45-460, 48+197; Dougan v. Turner, 51-330, 53+650; Nichols v. Dedrick, 61-513, 63+1110; O'Gorman v. Sabin, 62-46, 64+84; St. Louis County v. Am. L. & T. Co., 75-489, 78+113; Klein v. Funk, 82-3, 84+460; Forman v. Saunders, 92-369, 100+93; Maul v. Steele, 95-292, 104+4; Foster v. Gordon, 96-142, 104+765; English v. Mpls. etc. Ry., 96-213, 104+886; Briggs v. Rutherford, 94-23, 101+954; Shaw v. Staight, 107-152, 119+951.

[53] Adams v. Castle, 64-505, 67+637; First Nat. Bank v. Strait, 71-69, 76, 73+645.

[54] Guerin v. St. P. etc. Co., 44-20, 46+138. See Mpls. etc. Co. v. Cunningham, 59-325, 61+329.

[55] Isaacson v. Mpls. etc. Ry., 27-463, 8+600; Maul v. Steele, 95-292, 104+4; Gracz v. Anderson, 104-476, 478, 116+1116; Red Lake Falls M. Co. v. Thief River Falls, 109-52, 122+872. See Martini v. Christensen, 65-489, 67+1019.

[56] R. L. 1905 § 4157.

[57] Pfefferkorn v. Haywood, 65-429, 68+68; Aultman v. O'Dowd, 73-58, 75+756; Western L. Assn. v. Thompson, 79-423, 82+677; State v. Dist. Ct., 91-161, 97+581; Church v. Odell, 100-98, 110+346.

[58] North v. Webster, 36-99, 30+429; Lamm v. Armstrong, 95-434, 104+304.

[59] See § 7713.

[60] Pfefferkorn v. Haywood, 65-429, 68+68.

[61] Wells v. Gieseke, 27-478, 8+380; Auerbach v. Gieseke, 40-258, 41+946.

[62] Wasser v. Western etc. Co., 97-460, 107+160.

[63] Hoatson v. McDonald, 97-201, 106+311.

[64] Burke v. Baldwin, 54-514, 56+173; Reeves v. Cress, 80-466, 83+443; Cool v. Kelly, 85-359, 88+988; Winona v. Minn. etc. Co., 29-68, 11+228.

mination, as in case of reversal on appeal, but to enter the judgment affirmed. After such affirmance amendments to the pleading which involve a new trial should not be allowed, except possibly in extraordinary cases, and then only when the proposed amendment sets forth, clearly and distinctly, a basis for relief which has not before been presented for judicial determination.[65]

7717. In supreme court—The supreme court will rarely allow a pleading to be amended on appeal, especially if it will necessitate a remand of the case for the trial of new issues.[66]

CONSTRUCTION

7718. As affected by time—The degree of strictness with which pleadings are to be construed depends upon the time and mode of objection to their sufficiency. A pleading which would be bad on demurrer may be good on a motion to make more definite and certain, and a pleading which would be bad on demurrer may be good on motion for dismissal, in arrest of judgment, or on appeal.[67]

7719. Liberal construction—Statute—The statute requires that pleadings shall be liberally construed, in determining their sufficiency, with a view to substantial justice between the parties.[68] This is in accordance with the modern tendency to subordinate the adjective or remedial law to the substantive law.[69] Hair-splitting in the construction of pleadings is no longer permissible.[70]

7720. Ordinary sense of words—Words are to be construed in their ordinary, popular sense, unless they are obviously used in a technical sense.[71]

7721. As a whole—A pleading is to be construed as a whole and according to its general tenor.[72]

7722. Specific allegations prevail over general—If general and specific allegations or denials in the same pleading are inconsistent the latter control.[73] Specific allegations cannot be aided by general allegations.[74] Where a general result or fact is alleged and also the specific facts by which such general result is reached the latter control and if insufficient to support the general result the pleading is bad.[75]

7723. Against the pleader—The common-law rule that a pleading is always to be taken most strongly against the pleader occasionally crops up in our cases;[76] but it is to be applied, if at all,[77] in subordination to the general statutory rule of liberal construction.[78] It certainly has no application when a pleading is first attacked on the trial or on appeal.[79]

[65] Todd v. Bettingen, 102-260, 113+906.

[66] State v. G. N. Ry., 106-303, 336, 119+202 (application of state for an amendment to enable it to recover a penalty under R. L. 1905 § 1009 denied).

[67] Seibert v. Mpls. etc. Ry., 58-39, 51, 59+822.

[68] R. L. 1905 § 4143; Hoag v. Mendenhall, 19-335(289, 291); Johnson v. Robinson, 20-189(169); State v. Cooley, 58-514, 520, 60+338; Moon v. Allen, 82-89, 95, 84+654; Redner v. N. Y. F. Ins. Co., 92-306, 99+886.

[69] See Rees v. Storms, 101-381, 112+419.

[70] Redner v. N. Y. F. Ins. Co., 92-306, 99+886.

[71] Starkey v. Minneapolis, 19-203(166).

[72] Hanscom v. Herrick, 21-9; Merrill v. Dearing, 22-376; Stein v. Passmore, 25-256, 258; Barkey v. Johnson, 90-33, 95+583.

[73] Gowan v. Bensel, 53-46, 54+934; Perry v. Reynolds, 40-499, 42+471; Horn v. Butler, 39-515, 40+833; Martin County Bank v. Day, 73-195, 198, 75+1115; Yorks v. Mooberg, 84-502, 87+1115. See Fitzpatrick v. Simonson, 86-140, 90+378; Hayes v. St. Louis T. Co., 137 Fed. 80.

[74] Coe v. Ware, 40-404, 42+205; Parker v. Jewett, 52-514, 55+56.

[75] Carlson v. Presby. Board, 67-436, 70+3; Casey v. McIntyre, 45-526, 48+402; Dana v. Porter, 14-478(355); State v. Ring, 29-78, 81, 11+233; Moon v. Allen, 82-89, 93, 84+654.

[76] Derby v. Gallup, 5-119(85, 96); Irvine v. Irvine, 5-61(44); Wagner v. Finnegan, 54-251, 254, 55+1129.

[77] See Casey v. Am. B. Co., 95-11, 103+623.

[78] See § 7719.

[79] See §§ 7725, 7726.

7724. On demurrer—On a demurrer a pleading is to be liberally construed. It is sufficient if the facts appear substantially, however inartificially they may be stated. Not only the facts stated, but also such as may fairly and reasonably be inferred from the allegations, must be assumed to be true.[80] When a complaint presents two apparent theories of plaintiff's cause of action, one sufficiently pleaded and the other insufficiently, the court will adopt the theory that will sustain the action rather than the one which would defeat it.[81]

7725. On the trial—Arrest of judgment—The rules for the construction of pleadings on a motion for dismissal,[82] on a motion for judgment on the pleadings,[83] when objection is made to the admission of evidence,[84] and on a motion in arrest of judgment [85] are stated elsewhere.

7726. On appeal—When the sufficiency of a pleading is questioned for the first time on appeal every reasonable intendment is indulged in its support. It is more liberally construed than on demurrer. It will be sustained if the essential facts of a cause of action or defence can be reasonably inferred from the allegations.[86] Even a conclusion of law may be sustained, if, by any reasonable intendment, it can be held to contain an inference of a necessary fact.[87] A construction of the pleadings adopted by the parties on the trial will be followed on appeal.[88]

7727. Aider by answer—When objection to the sufficiency of a complaint is made on the trial, or in arrest of judgment, or on appeal, the objection will be overruled if the deficiencies of the complaint are made good by the answer. If essential facts omitted from the complaint are alleged or admitted in the answer the defect is cured. The complaint is said to be "aided" by the answer.[89] But a party cannot rely on allegations in his adversary's pleadings to make out his cause of action or defence and at the same time put such allegations in issue by denials.[90] An admission, in an answer, of a cause of action

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[80] Warren v. King, 96-190, 104+816; Chamber of Com. v. Wells, 96-492, 105+1124; Colbroth v. Flick, 90-489, 97+375; Casey v. Am. B. Co., 95-11, 103+623; Moon v. Allen, 82-89, 95, 84+654; Mastad v. Swedish Brethren, 83-40, 44, 85+913; Dugan v. St. P. etc. Ry., 40-544, 42+538; Chamberlain v. Tiner, 31-371, 18+97; Hoag v. Mendenhall, 19-335(289); Wessel v. Wessel, 106-66, 118+157; Vukelis v. Virginia L. Co., 107-68, 119+509; Branton v. McLaughlin, 109-244, 123+808; Martin v. G. N. Ry., 124+825.

[81] Casey v. Am. B. Co., 95-11, 103+623.

[82] See § 7684.

[83] See § 7694.

[84] See § 7687.

[85] See § 4988.

[86] Smith v. Dennett, 15-81(59); Piper v. Johnston, 12-60(27); Holmes v. Campbell, 12-221(141); McArdle v. McArdle, 12-98 (53); Hurd v. Simonton, 10-423(340); Drake v. Barton, 18-462(414); Spencer v. St. P. etc. Ry., 21-362; Cochrane v. Quackenbush, 29-376, 13+154; Solomon v. Vinson, 31-205, 17+340; Frankoviz v. Smith, 34-403, 26+225; Trebby v. Simmons, 38-508, 38+693; Dorr v. McDonald, 43-458, 45+864; Bromberg v. Minn. F. Assn., 45-318, 47+975; Seibert v. Mpls. etc. Ry., 58-39, 51, 59+822; Campbell v. Worman, 58-561, 60+668; Northern T. Co. v. Markell, 61-271, 63+735; Mpls. etc. Ry. v. Home Ins. Co., 64-61, 66+132; Trustees v. Nesbitt, 65-17, 67+652; Bendikson v. G. N. Ry., 80-332, 83+194; Slater v. Olson, 83-35, 85+825; Miller v. Ganser, 87-345, 92+3; Peach v. Reed, 87-375, 380, 92+229; Halvorsen v. Orinoco M. Co., 89-470, 95+320; Norton v. Wilkes, 93-411, 101+619; Kubesh v. Hanson, 93-259, 101+73; Carey v. Switchmen's Union, 98-28, 107+129; Vance v. G. N. Ry., 106-172, 118+674; Christiansen v. Chi. etc. Ry., 107-341, 120+300; Larson v. G. N. Ry., 108-519, 121+121.

[87] Seibert v. Mpls. etc. Ry., 58-39, 51, 59+822.

[88] Keyes v. Mpls. etc. Ry., 36-290, 30+888; Fritz v. McGill, 31-536, 18+753; Peteler v. N. W. etc. Co., 60-127, 61+1024.

[89] Bennett v. Phelps, 12-326(216); Shartle v. Minneapolis, 17-308(284); Rollins v. St. Paul L. Co., 21-5; Gibbens v. Thompson, 21-398; Warner v. Lockerby, 28-28, 8+879; Lesher v. Getman, 30-321, 15+309; Hedderly v. Downs, 31-183, 17+274; McMahon v. Merrick, 33-262, 22+543; Monson v. St. P. etc. Ry., 34-269, 25+595; Erickson v. Fisher, 51-300, 304, 53+638; Ritchie v. Ege, 58-291, 59+1020; Nixon v. Reeves, 65-159, 67+989.

[90] Mosness v. German-Am. Ins. Co., 50-341, 52+932.

in favor of the plaintiff, wholly different from that alleged in the complaint, does not entitle the plaintiff to a recovery under such complaint.[91]

7728. Aider by reply—A defective answer may be aided by a reply.[92]

7729. Aider by verdict—Where there is any defect, imperfection, or omission in any pleading, whether in substance or form, which would have been a fatal objection upon demurrer, yet, if the issue joined is such as necessarily required, on the trial, proof of the facts so defectively or imperfectly stated or omitted, and without which it is not to be presumed that either the judge would direct the jury to give or the jury would have given the verdict such defect, imperfection, or omission is cured by the verdict.[93]

OBJECTIONS ON APPEAL

7730. In general—It is the general rule, subject only to the exceptions stated in sections 7731, 7732, that a pleading cannot be attacked for the first time on appeal.[94]

7731. Want of jurisdiction of subject-matter—The objection that a pleading sets forth a subject-matter of which the court has not jurisdiction is never waived and may be raised by either party for the first time on appeal.[95]

7732. Failure to state cause of action—In this state the objection that a complaint does not state facts sufficient to constitute a cause of action may be raised for the first time on appeal.[96] This is an exception to the general rule that the supreme court will only consider questions already passed upon by the lower court. It is apparently authorized by statute[97] in this state, but independent of statute the supreme court undoubtedly has authority, by virtue of its general supervisory jurisdiction, to set aside a judgment which is not based on any actionable wrong.[98] The objection may be raised in the supreme court though the judgment was rendered on default and no application to set it aside has been made below.[99] Though the right exists to set aside a judgment on appeal because of the insufficiency of the complaint it is rarely exercised. An objection to a pleading for insufficiency raised for the first time in the supreme court will be overruled if the defect is of such a nature that it might have been remedied by an amendment on the trial if the attention of the trial court and the adverse party had been called to it by a timely and specific objection;[1] or if the omission of essential allegations has been cured by answer,[2] reply,[3] verdict,[4] or the reception of evidence without objection;[5]

[91] Brandt v. Shepard, 39–454, 40+521.

[92] Pye v. Bakke, 54–107, 110, 55+904.

[93] 1 Williams' Saunders, 227, 228; Coit v. Waples, 1–134(110); Daniels v. Winslow, 2–113(93); Lee v. Emery, 10–187 (151); Hurd v. Simonton, 10–423(340); Chesterson v. Munson, 27–498, 8+593; Christiansen v. Chi. etc. Ry., 107–341, 120+300; Weicherding v. Krueger, 109–461, 124+225.

[94] Howland v. Fuller, 8–50(30); Holmes v. Campbell, 12–221(141); Lowry v. Harris, 12–255(166); Cock v. Van Etten, 12–522(431); Taylor v. Parker, 17–469(447); Reed v. Pixley, 25–482. See §§ 7646–7670.

[95] Ames v. Boland, 1–365(268); Stratton v. Allen, 7–502(409); Hagemeyer v. Wright County, 71–42, 73+628. See Lee v. Parrett, 25–128; Anderson v. Hanson, 28–400, 10+429; Wrolson v. Anderson, 53–508, 55+597 (as to rule on appeal from justice court).

[96] Stratton v. Allen, 7–502(409); Lee v. Emery, 10–187(151); McArdle v. McArdle, 12–98(53); Holmes v. Campbell, 12–221(141).

[97] R. L. 1905 § 4129.

[98] Slacum v. Pomeroy, 6 Cranch (U. S.) 221; Teal v. Walker, 111 U. S. 242; Maher v. Ashmead, 30 Pa. St. 344.

[99] Smith v. Dennett, 15–81(59); Northern T. Co. v. Markell, 61–271, 63+735.

[1] Hartz v. St. Paul etc. Ry., 21–358, Spencer v. St. Paul etc. Ry., 21–362; Wampach v. St. Paul etc. Ry., 21–364; Merriam v. Pine City L. Co., 23–314. See Dunnell, Minn. Pr. § 1829.

[2] See § 7727.

[3] See § 7728.

[4] See § 7729.

[5] See § 7675.

or if it can be sustained by the most liberal construction.[6] The sufficiency of a complaint cannot be questioned for the first time on appeal in the absence of a record containing all the evidence, except on appeal from a default judgment.[7]

FILING

7733. Necessity—The statute requires all pleadings to be filed with the clerk on or before the second day of the term at which the action is noticed for trial, and if they are not filed as required the court may continue the action or strike it from the calendar.[8] It is unnecessary to file pleadings in a case not noticed for trial.[9] The clerk has no discretion in the matter. He cannot refuse to file a pleading on the ground that it contains libelous matter.[10]

PLEAS—See Criminal Law, 2442.

PLEDGE

Cross-References

See Bills and Notes, 978, 1034, 1035, 1042; Carriers, 1308, 1311, 1322; Chattel Mortgages, 1424; Conflict of Laws, 1538; Corporations, 2063; Execution, 3509; Suretyship, 9106; Usury, 9990.

7734. Definition—A pledge is a bailment of personal property as security for a debt or other obligation.[11]

7735. Nature and object of pledge—The primary object of a pledge is to put it into the power of the pledgee to reimburse himself for the money advanced when it becomes due and remains unpaid. The contract carries with it an implication that the security shall be made effectual to discharge the obligation.[12] The bailment is for the benefit of both parties.[13]

7736. What constitutes—In the ordinary case of notes deposited as collateral security for a debt they are regarded in the light of a pledge, and the parties sustain the relation of pledgor and pledgee.[14] Whether the discounting of a bill or note with the general indorsement of the holder is a sale of the paper, or a loan to the holder, secured by the paper and indorsement as collateral, is ordinarily a question of fact.[15] A contract has been construed as an assignment of a lease of realty as collateral security for the payment of a note.[16] A deposit in a bank has been held to constitute collateral security for money loaned.[17]

7737. The contract—By agreement the parties may vary their common-law powers and duties with respect to the pledge.[18] After the contract is made, neither party can, by anything he alone may do, vary the powers and duties attaching to the relation.[19] Cases are cited below involving the construction of particular contracts.[20]

[6] See § 7726.
[7] Peach v. Reed, 87-375, 92+229.
[8] R. L. 1905 § 4121.
[9] Young v. Young, 18-90(72).
[10] Nixon v. Dispatch P. Co., 101-309, 112+258.
[11] Century Dict. See Note, 49 Am. Dec. 730; 32 Am. St. Rep. 711.
[12] Lamberton v. Windom, 12-232(151, 156); White v. Phelps, 14-27(21, 23).
[13] Ware v. Squyer, 81-388, 84+126.
[14] Castner v. Austin, 2-44(32). See First Nat. Bank v. Buchan, 79-322, 82+641.
[15] Becker's Invest. Agency v. Rea, 63-459, 65+928; Stolze v. Bank of Minn., 67-172, 69+813.
[16] Penney v. Lynn, 58-371, 59+1043.
[17] Fidelity etc. Assn. v. Germania Bank, 74-154, 76+968.
[18] Goldsmidt v. Trustees, 25-202; Cooper v. Simpson, 41-46, 42+601.
[19] Mpls. etc. Co. v. Betcher, 42-210, 44+5; Cooper v. Simpson, 41-46, 49, 42+601.
[20] Van Dusen v. Piper, 42-43, 43+684; Newton v. Van Dusen, 47-437, 50+820; Second Nat. Bank v. Sproat, 55-14, 56+

7738. Consideration—If a third party, without any consideration personal to himself, gives his note to a creditor as collateral to the mere naked debt of another, without any circumstance of advantage to the debtor, or disadvantage to the creditor, the note is without consideration. A renewal of such note, unless there is some consideration to support it, other than the mere surrender of the original note, is also without consideration.[21]

7739. Who may pledge property—A warehouseman may pledge his property by issuing his own warehouse receipt.[22] A factor cannot pledge property consigned to him.[23] A building and loan association may loan on pledges.[24]

7740. Delivery and possession of property—Possession by the pledgee is necessary to the existence and continuance of a pledge.[25] The possession need not be actual. The delivery of a recognized symbol of title, such as a bill of lading or warehouse receipt, which serves to put the pledgee in the control and constructive possession of the property, is sufficient.[26] Possession by the pledgor as agent of the pledgee may even be sufficient.[27] If a pledgee takes possession before the liens of creditors attach his rights are superior to theirs, though he did not take possession until after the contract of pledge.[28] A perfected pledge has been held not avoided or terminated by a nominal consignment of the property to the pledgor upon a shipment.[29] A delivery, good for the purpose of a sale, is good for the purpose of a pledge.[30] The delivery and receipt need not be manual. No formal delivery is necessary. It is enough if the property being present, it is committed by the pledgor to the exclusive control and charge of the pledgee.[31] A contract of pledge becomes executed only by specifying the goods to which it is to attach—by the appropriation of the specific goods to the contract.[32] When the pledgor is a warehouseman, the public has notice from that fact that the title and legal possession of property in his warehouse may be in others, though the actual physical possession is in himself. And where the property is a part of a larger mass of the same kind and quality, as wheat in an elevator, separation or segregation from the uniform mass is unnecessary to constitute an appropriation of the property to the contract. The pledgee becomes tenant in common with the other owners.[33]

7741. Effect on title—The general property in the thing pledged remains in the pledgor. But the pledgee has something more than a mere lien; he has a special property.[34] Mere default does not change the title; the pledgee has not a defeasible title becoming absolute at law by default in the performance of the prescribed condition.[35] The assignment by the vendor of an ex-

254; Watson v. Smith, 60–206, 62+265; Winston v. Hart, 65–439, 68+72; North Star H. F. Co. v. Rinkey, 92–80, 99+429.

[21] Turle v. Sargent, 63–211, 65+349; West Coast Co. v. Bradley, 127+6.

[22] Nat. Ex. Bank v. Wilder, 34–149, 24+699; Fishback v. Van Dusen, 33–111, 122, 22+244.

[23] Baxter v. Sherman, 73–434, 439, 76+211.

[24] State v. Am. S. & L. Assn., 64–349, 67+1.

[25] Combs v. Tuchelt, 24–423; Nat. Ex. Bank v. Wilder, 34–149, 24+699; Mahoney v. Hale, 66–463, 69+334.

[26] Nat. Ex. Bank v. Wilder, 34–149, 24+699; Eggers v. Nat. Bank of Com., 40–182, 41+971; Ratzer v. Burlington etc. Ry., 64–245, 66+988. See Bank of Litchfield v. Elliott, 83–469, 86+454; Swedish-Am. Nat. Bank v. First Nat. Bank, 89–98, 116, 94+218.

[27] Cooley v. Minn. T. Ry., 53–327, 333, 55+141.

[28] Prouty v. Barlow, 74–130, 76+946.

[29] Cooley v. Minn. T. Ry., 53–327, 55+141.

[30] Nat. Ex. Bank v. Wilder, 34–149, 156, 24+699. See Freiberg v. Steenbock, 54–509, 56+175.

[31] Combs v. Tuchelt, 24–423.

[32] Fishback v. Van Dusen, 33–111, 122, 22+244; Nat. Ex. Bank v. Wilder, 34–149, 156, 24+699.

[33] Nat. Ex. Bank v. Wilder, 34–149, 156, 24+699.

[34] White v. Phelps, 14–27(21); Van Eman v. Stanchfield, 13–75(70, 75); Norton v. Baxter, 41–146, 42+865; Hershey v. Welch, 96–145, 104+821.

[35] Norton v. Baxter, 41–146, 42+865.

ecutory contract for the sale of realty as security for the payment of a debt due the assignee vests in the assignee a lien upon the vendor's interest in the property to the extent of the debt secured, not exceeding the purchase money unpaid on the contract.[36]

7742. Pledgee a bona fide purchaser—An indorsee of negotiable paper before maturity, as collateral security for a debt then contracted, is a bona fide purchaser; but if, in an action against the maker, the latter shows a good defence as to the pledgor, the recovery against him should be limited to the amount of the principal debt for which the collateral security is held.[37]

7743. Tender—Discharge of lien—A tender after maturity has been held to satisfy the debt and to discharge the lien of the pledgee.[38]

7744. Assignment by pledgee—The lien of the pledgee is not a distinct right of property capable of being transferred or assigned. A pledged note cannot be assigned by the pledgee without assigning the debt for which it is security.[39]

7745. Pledge of corporate stock—The pledgee may sue in his own name to protect his interests as a pledgee and need not act through the corporation.[40] Ordinarily the pledgee does not become a stockholder and the pledgor does not cease to be one.[41] The pledgee is entitled to have the stock transferred on the stock books,[42] and if he has the stock registered in his name absolutely he renders himself liable as a stockholder.[43] Where the pledgee of stock put it out of his control, by canceling the certificates and reissuing the stock to a third party to hold as security for the completion or consummation of another and different contract, without the pledgor's consent, it was held that he was guilty of conversion. The pledgee had an option to purchase the stock at a specified price. It was held that he might elect to consider the conversion as an exercise of the option, and to sue to recover such price.[44] A person who holds the legal title to stock of a corporation, which has been pledged to a bank as collateral security for a loan, and who is able to get possession of the stock certificate at any time upon payment of the loan, may make a valid sale of the stock.[45] A finding of conversion by the pledgee held not justified by the evidence.[46]

7746. Use of property—A pledgee of wearing apparel has no right to use it.[47]

7747. Negligence of pledgee—A creditor to whom negotiable paper is pledged as security for a debt is required to exercise due diligence to preserve the debt pledged from being lost by reason of the insolvency of the maker of the paper.[48] In the absence of express agreement the pledgee is only required to exercise ordinary care to preserve the property. Loss or depreciation of the property through the negligence of the pledgee does not operate to extinguish pro tanto, the debt secured.[49] The position of the pledgee is one of trust. The creditor is required at his peril to deal fairly and justly with the property.[50] An action for the value of a collateral note lost by the pledgee has

[36] Lamm v. Armstrong, 95–434, 104+304.
[37] St. Paul Nat. Bank v. Cannon, 46–95, 48+526.
[38] Norton v. Baxter, 41–146, 42+865.
[39] Van Eman v. Stanchfield, 13–75(70).
[40] Baldwin v. Canfield, 26–43, 1+261.
[41] McMullan v. Dickinson Co., 63–405, 65+661, 663.
[42] Nicollet Nat. Bank v. City Bank, 38–85, 35+577.
[43] Harper v. Carroll, 66–487, 69+610. See 1069.
[44] Upham v. Barbour, 65–364, 68+42.
[45] Hershey v. Welch, 96–145, 104+821.
[46] Windham County S. Bank v. O'Gorman, 66–361, 69+317.
[47] Scott v. Reed, 83–203, 85+1012.
[48] Lamberton v. Windom, 12–232(151); Id., 18–506(455); Spencer v. Plano Mfg. Co., 79–35, 81+538.
[49] Cooper v. Simpson, 41–46, 42+601; Mpls. etc. Co. v. Betcher, 42–210, 44+5. See Note, 83 Am. St. Rep. 392.
[50] White v. Phelps, 14–27(21, 23). See

been defeated by the insolvency of the makers of the note.[51] A pledgee must use ordinary care against theft, and the burden is on him to show such care in an action against him by the pledgor for conversion.[52] It is the duty of the pledgee to keep control of the property so that at any time the pledgor pays the debt the pledgee will be ready to restore the property; and if he does not so keep it, but puts it beyond his control, he is guilty of conversion.[53] Evidence held not to show any misapplication or diversion of collaterals.[54]

7748. Conversion by pledgee—Cases are cited below involving a conversion of the property by the pledgee.[55]

7749. Pledgee may resort to other remedies—The holder of collateral security is not confined to such security, but may make his debt out of any of the debtor's unexempt property, unless special facts are shown rendering it inequitable to permit him to do so.[56]

7750. Action by pledgee for debt pledged—A pledgee may sue in his own name on a note payable to order, though not indorsed to him.[57] In case of a debt pledged, the pledgee may receive payment of the debt, and sue for it.[58]

7751. Sale of property to satisfy debt—Notice—Upon default by the pledgor the pledgee is authorized to sell the property to satisfy the debt without an order of court,[59] but an order of court may be obtained.[60] An exception to the general rule is made in the case of commercial paper, and it cannot be sold without an order of court.[61] A pledgee cannot sell without reasonable notice to the pledgor to redeem, and of the time and place of sale.[62] In the absence of express agreement the pledgee is not required to sell within any particular time. The pledgor cannot make it the duty of the pledgee to sell by merely requesting or directing him to do so subject to the contract of pledge. But the contract may make it his duty to sell within a specified time.[63] A contract has been held to authorize a sale of a note and mortgage.[64] A merely colorable or pretended sale does not affect the rights of the pledgor, except as against a bona fide purchaser.[65] The pledgee is required to use reasonable diligence to secure the best possible returns from the sale.[66] A purchaser of notes from a pledgee, with notice that they were held in pledge, is not protected by the fact that the pledgor, at the time of the pledge, indorsed them in blank.[67]

7752. Rights of purchaser from pledgor—If a tender by a pledgor is refused without sufficient reason the pledgee loses his right to retain the pledge, as against one who has, subsequent to the making of the pledge, acquired rights in the property, though the pledgor did not keep his tender good. A merely colorable and pretended sale of pledged property by the pledgee does not

Merchants Nat. Bank v. Allemania Bank, 71-477, 74+203.

[51] Spencer v. Plano Mfg. Co., 79-35, 81+538.

[52] Ware v. Squyer, 81-388, 84+126.

[53] Upham v. Barbour, 65-364, 68+42.

[54] Mahoney v. Barber, 67-308, 69+886.

[55] Upham v. Barbour, 65-364, 68+42; Windham County S. Bank v. O'Gorman, 66-361, 69+317; Mahoney v. Barber, 67-308, 69+886; Merchants Nat. Bank v. Allemania Bank, 71-477, 74+203; Scott v. Reed, 83-203, 85+1012.

[56] Spooner v. Travelers Ins. Co., 76-311, 79+305.

[57] White v. Phelps, 14-27(21).

[58] Goldsmidt v. Trustees, 25-202, 205.

[59] White v. Phelps, 14-27(21); Goldsmidt v. Trustees, 25-202.

[60] Cleghorn v. Minn. etc. Co., 57-341, 59+320.

[61] Cleghorn v. Minn. etc. Co., 57-341, 59+320; White v. Phelps, 14-27(21); Swedish-Am. Nat. Bank v. Davis, 64-250, 66+986.

[62] Goldsmidt v. Trustees, 25-202; White v. Phelps, 14-27(21, 23).

[63] Cooper v. Simpson, 41-46, 42+601; Mpls. etc. Co. v. Betcher, 42-210, 44+5.

[64] Watson v. Smith, 60-206, 62+265.

[65] Norton v. Baxter, 41-146, 42+865.

[66] Second Nat. Bank v. Sproat, 55-14, 56+254.

[67] Goldsmidt v. Trustees, 25-202.

affect the rights of the pledgor as against one not standing in the position of a bona fide purchaser.[68]

PLUMBERS—See Constitutional Law, 1610.
POINTING—See note 69.
POINTS AND AUTHORITIES—See Appeal and Error, 353–356; Supreme Court, 9074.

POISONS

7753. Negligence in sale—Labeling—A druggist has been held liable for the negligence of his clerk in selling a poison without a label, causing the death of the purchaser.[70]

POLICEMEN—See Municipal Corporations, 6589.
POLICE POWER—See Constitutional Law, 1603–1611.
POLITICAL PARTIES—See Elections, and note 71.
POLITICAL POWERS—See Constitutional Law, 1588.
POLLING JURY—See Criminal Law, 2482; Trial, 9822.
POOL ROOMS—See Constitutional Law, 1610; Gaming, 3941, 3945.
POOR—See Paupers.
POPULATION—See Evidence, 3457.
POSSESSION—See Adverse Possession; Ejectment, 2872; Notice, 7232; Property, 7856; Vendor and Purchaser, 10075.
POSSESSION AS NOTICE—See Vendor and Purchaser, 10075.

POST OFFICE

7754. Withdrawal of mail by sender—After a letter is placed in the post office, it passes out of the control of the sender and into that of the person to whom it is addressed. The sender has no right to intercept or recall it, or direct its delivery to some other person.[72]

7755. Contracts for carriage of mail—A contract for the carriage of mail between a star route mail contractor and a subcontractor is subject to the approval of the Postmaster General.[73]

POSTPONEMENT—See Continuance.
POUNDMASTER'S SALE—See Animals, 277.
POWER COUPLED WITH INTEREST—See Agency, 227.

[68] Norton v. Baxter, 41–146, 42+865.
[69] Wilson v. N. W. etc. Assn., 53–470, 55+626.
[70] Osborne v. McMasters, 40–103, 41+543.
[71] Davidson v. Hanson, 87–211, 91+1114, 92+93.
[72] Webster v. Penrod, 103–69, 73, 114+257.
[73] Gaines v. Trengrove, 77–349, 79+1045 (Postmaster General as umpire between parties as to performance—cancelation of contract by Postmaster General).

POWERS

Cross-References

See Mortgages, 6307; Trusts; Wills.

7756. Definition—A power is an authority to do some act in relation to lands, or the creation of estates therein, or of charges thereon, which the owner granting or reserving such power might himself lawfully perform.[74]

7757. Statutory regulation—The subject of powers is regulated exclusively by statute. All powers not authorized by statute are abolished. The common-law rules on the subject are important only as aids in construction.[75] While the statute regulates powers, it does not create them.[76] Our general statutes relating to powers do not apply to a simple power of attorney to convey lands in the name and for the benefit of another.[77]

7758. How granted—A power may be granted by a suitable clause in a conveyance of some estate in the lands to which the power relates, or by a devise in a will.[78]

7759. General powers—Definition—A power is general when it authorizes the alienation in fee, by means of a conveyance, will, or charge, of the lands embraced in the power, to any alienee whatever.[79]

7760. Beneficial powers—Definition—A general or special power is beneficial when no person other than the grantee has, by the terms of its creation, any interest in its execution.[80]

7761. Powers in trust—A general power is in trust when any person or class of persons, other than the grantee of such power, is designated as entitled to the proceeds, or any portion of the proceeds, or other benefits, to arise from the alienation of the lands according to the power.[81] A trust power does not cease to be imperative when the grantee has the right to select any, and exclude others, of the persons designated as the objects of the trust.[82]

7762. When irrevocable—Every power, beneficial or in trust, is irrevocable, unless an authority to revoke it is reserved or granted in the instrument creating the power.[83]

7763. Absolute power of disposition—Effect—Every power of disposition is deemed absolute, by means of which the grantee is enabled, in his life time, to dispose of the entire fee for his own benefit.[84] The effect of granting such a power is prescribed by statute.[85]

7764. Excess of power in execution—Where there is a complete execution of a power, and something ex abundanti added, which is improper, the execution is good, and only the excess void. But where there is not a complete

[74] R. L. 1905 § 3267; Carson v. Cochran, 52–67, 72, 53+1130.

[75] R. L. 1905 § 3266; Hershey v. Meeker Co. Bank, 71–255, 265, 73+967; Ashton v. G. N. Ry., 78–201, 203, 80+963.

[76] Webb v. Lewis, 45–285, 288, 47+803.

[77] R. L. 1905 § 3325.

[78] R. L. 1905 § 3299; St. Paul T. Co. v. Mintzer, 65–124, 131, 67+657.

[79] R. L. 1905 § 3270; Hershey v. Meeker Co. Bank, 71–255, 73+967.

[80] R. L. 1905 § 3272; Ness v. Davidson, 45–424, 426, 48+10; Hershey v. Meeker Co. Bank, 71–255, 265, 73+967; Rogers v. Clark, 104–198, 220, 116+739.

[81] R. L. 1905 § 3287; Ness v. Davidson, 45–424, 48+10. See Smith v. Glover, 50–58, 68, 52+210.

[82] R. L. 1905 § 3290; Atwater v. Russell, 49–57, 84, 51+629.

[83] R. L. 1905 § 3301; Am. L. & T. Co. v. Billings, 58–187, 190, 59+998; Rogers v. Clark, 104–198, 220, 116+739.

[84] R. L. 1905 § 3278; Hershey v. Meeker Co. Bank, 71–255, 73+967; Ashton v. G. N. Ry., 78–201, 80+963.

[85] R. L. 1905 §§ 3274–3277; Hershey v. Meeker Co. Bank, 77–255, 73+967; Ashton v. G. N. Ry., 78–201, 80+963; Rogers v. Clark, 104–198, 220, 116+739.

execution of the power, and the boundaries between the excess and execution are not distinguishable, the execution is bad.[86]

7765. Defective execution—Equitable relief—If the execution of a power in trust is defective, its proper execution may be decreed in equity, in favor of the person designated as the object of the trust.[87]

7766. Omission to recite power—In a conveyance under a power it is not indispensable to recite the power or to refer to it.[88]

POWERS OF ATTORNEY—See Agency, 170.

PRACTICAL CONSTRUCTION—See Constitutional Law, 1579; Contracts, 1820; Evidence, 3405; Landlord and Tenant, 5388; Statutes, 8911, 8952; Taxation, 9136, 9177.

PRAYER FOR RELIEF—See Pleading, 7537, 7577.

PRECEDENTS—See Stare Decisis.

PRE-EMPTION—See Public Lands, 7919.

PREFERENCES—See Bankruptcy, 743, 755; Insolvency, 4593.

PRELIMINARY EXAMINATION—See Bail, 719; Criminal Law, 2428–2439.

PRELIMINARY INJUNCTIONS—See Injunctions.

PREMEDITATED—See Homicide, 4228.

PREPONDERANCE OF EVIDENCE—See Evidence, 3473; Negligence, 7047; Trial, 9788.

PRESCRIPTION—See Limitation of Actions; Nuisance, 7256; Roads, 8446; Waters, 10156, 10184, 10193.

PRESENTS—See Gifts.

PRESERVATIVES—See Adulteration, 100; Food, 3781.

PRESUMPTION OF INNOCENCE—See Criminal Law, 2451; Evidence, 3437.

PRESUMPTIONS—See Appeal and Error, 368–383; Evidence, 3430; Taxation, 9170; and other specific heads.

PREVAILING PARTY—See Costs, 2206, 2228.

PRIMA FACIE EVIDENCE—See Evidence, 3226.

PRIMARY ELECTION—See Elections, 2929.

PRIMARY EVIDENCE—See Evidence, 3263.

PRINCIPAL AND ACCESSORY—See Criminal Law, 2415.

PRINCIPAL AND AGENT—See Agency.

PRINCIPAL AND SURETY—See Suretyship.

PREMISES—See note 89.

PRESCRIPTIVE RIGHT—A right or privilege appurtenant and incident to realty, passing with the title thereto.[90]

PRIOR—See note 91.

[86] Thomas v. Joslin, 30–388, 15+675. See R. L. 1905 § 3314.

[87] R. L. 1905 § 3322; Babcock v. Collins, 60–73, 61+1020.

[88] R. L. 1905 § 3315; Babcock v. Collins, 60–73, 81, 61+1020; Ashton v. G. N. Ry., 78–201, 204, 80+963.

[89] State v. Bryant, 97–8, 105+974.

[90] Kray v. Muggle, 84–90, 96, 86+882, 1102.

[91] Coe v. Caledonia etc. Ry., 27–197, 6+621.

PRISONS

7767. Jailer—Appointment and compensation—Provision is made by statute for the appointment by the sheriff of jailers, matrons, night watchmen, and assistants, and the fixing of their compensation by the judge of the district court.[92]

7768. Compensation for boarding prisoners—The compensation allowed to sheriffs for boarding prisoners is fixed by statute.[93]

PRIVATE INJURY—See Indictment, 4399.
PRIVATE INTERNATIONAL LAW—See Conflict of Laws.
PRIVATE PROSECUTOR—See Criminal Law, 2418.
PRIVATE WAYS—See Easements, 2857–2864.
PRIVILEGE—See note 94.
PRIVILEGE AGAINST SELF-INCRIMINATION—See Witnesses, 10337.
PRIVILEGED COMMUNICATIONS—See Libel and Slander; Witnesses.
PRIVILEGE FROM ARREST—See State, 8835.
PRIVILEGES—See Corporations, 2019.
PRIVILEGES AND IMMUNITIES OF CITIZENS—See Constitutional Law, 1695, 1699.
PRIVILEGIA FAVORABILIA—See note 95.
PRIVITY, PRIVIES—See Adverse Possession, 117; Judgments, 5173; and note 96.
PROBABLE CAUSE—See False Imprisonment; Malicious Prosecution.

PROBATE COURT

Cross-References

See Courts; Descent and Distribution; Executors and Administrators; Judges; Wills.

IN GENERAL

7769. Judge—Term—Salary—The constitution provides that the judge shall be elected by the voters of the county for the term of two years.[97] A judge elected upon a vacancy holds for the full constitutional term of two years, not merely for the unexpired portion of his predecessor's term.[98] The election of a judge provided for by the last clause of section 10 of article 6 of the constitution, is one which becomes necessary by reason of the happening of a vacancy. The clause does not refer to or control elections of judges which

[92] R. L. 1905 § 5467; State v. McIntyre, 25–383 (jailer deputy of sheriff—power of judge in fixing compensation).
[93] R. L. 1905 § 5472; Laws 1909 c. 192. See Bodkin v. Kerr, 97–301, 107+137 (agreement between sheriff and his wife for the latter to board prisoners—rights of creditors of sheriff).
[94] Dike v. State, 38–366, 367, 38+95; International T. Co. v. Am. L. & T. Co., 62–501. 503, 65+78, 632. See Corporations, 2019.
[95] First Div. etc. Ry. v. Parcher, 14–297 (224, 251).
[96] Newman v. Home Ins. Co., 20–422 (378, 386); Sherin v. Brackett, 36–152, 30+551; Minn. D. Co. v. Johnson, 96–91, 104+1149, 107+740.
[97] Const. art. 6 § 7. See, as to appointment of judge by county board, State v. Falk, 89–269, 274, 94+879.
[98] Crowell v. Lambert, 9–283(267).

come on in the ordinary course of electing judges, and which would have been held had no vacancy occurred.[99] The salary of a probate judge is a charge on the county, though he is a state officer.[1]

JURISDICTION

7770. In general—The jurisdiction of probate courts is defined by the constitution.[2] It is not a common-law or statutory jurisdiction.[3] It is expressly limited and restricted to the estates of deceased persons and persons under guardianship.[4] Within its sphere this jurisdiction is exclusive. The constitution gives to probate courts the exclusive original jurisdiction over the estates of deceased persons and persons under guardianship, in the same manner and to the same extent that it gives to the district courts jurisdiction over civil cases in law and equity arising out of other matters of contract or tort.[5] When the construction of a will is necessary to the administration of the estate of a decedent the probate court possesses exclusive original jurisdiction.[6] But while the jurisdiction of the probate court over the estates of decedents is exclusive, it is exclusive only for the purposes of administration. In determining the scope of administration proceedings reference must be had to the law at the time of the adoption of the constitution. The constitution specifies the general subject of the jurisdiction of the probate court without defining its extent, which is left, under certain limitations, to be fixed by statute. The jurisdiction of the probate court to determine claims against the estates of decedents is not exclusive except as provided by statute. Where the claim is ex delicto the district court has jurisdiction.[7] The legislature cannot enlarge or diminish the jurisdiction conferred by the constitution, but it may regulate its exercise by prescribing modes of procedure to be followed by the court in exercising it, including the process or proceedings by which the jurisdiction shall attach to a particular estate.[8] A probate court cannot be interfered with in the exercise of its exclusive jurisdiction by an injunction issued out of the district court.[9] The powers of probate courts are not only general but plenary in cases where they are authorized to act. They are not courts of limited jurisdiction in the ordinary sense of that term.[10] Their

[99] State v. Black, 22–336.

[1] Steiner v. Sullivan, 74–498, 502, 77+286.

[2] Const. art. 6 § 7.

[3] State v. Probate Ct., 84–289, 292, 87+783.

[4] Peterson v. Vanderburgh, 77–218, 221, 79+828.

[5] Paine v. First Div. etc. Ry., 14–65(49); State v. Ueland, 30–277, 15+245; Wiswell v. Wiswell, 35–371, 29+166; Culver v. Hardenbergh, 37–225, 233, 33+792; Reiser v. Gigrich, 59–368, 377, 61+30; Boltz v. Schutz, 61–444, 64+48; Luse v. Reed, 63–5, 11, 65+91; Brandes v. Carpenter, 68–388, 391, 71+402; Starkey v. Sweeney, 71–241, 244, 73+859; O'Brien v. Larson, 71–371, 373, 74+148; Betcher v. Betcher, 83–215, 218, 86+1; Duxbury v. Shanahan, 84–353, 355, 87+944; Fitzpatrick v. Simonson, 86–140, 147, 90+378; Appleby v. Watkins, 95–455, 104+301; Hanson v. Nygaard, 105–30, 117+235; Wellner v. Eckstein, 105–444, 453, 117+830. Some cases have intimated that there might be concurrent jurisdiction in the probate and district courts over some subjects. State v. Ueland, 30–277, 282, 15+245; Mousseau v. Mousseau, 40–236, 242, 41+977; Peterson v. Vanderburgh, 77–218, 222, 79+828; Levi v. Longini, 82–324, 327, 84+1017, 86+333; Duxbury v. Shanahan, 84–353, 355, 87+944; McAlpine v. Kratka, 98–151, 155, 107+961. See Appleby v. Watkins, 95–455, 463, 104+301.

[6] Appleby v. Watkins, 95–455, 104+301.

[7] Comstock v. Matthews, 55–111, 56+583; State v. Probate Ct., 103–325, 115+173. See State v. Ueland, 30–277, 15+245; Foreman v. Hennepin County, 64–371, 374, 67+207.

[8] Culver v. Hardenbergh, 37–225, 232, 33+792; Mousseau v. Mousseau, 40–236, 238, 41+977; Foreman v. Hennepin County, 64–371, 67+207. See State v. Ueland, 30–29, 14+58.

[9] O'Brien v. Larson, 71–371, 373, 74+148.

[10] Harrison v. Harrison, 67–520, 521, 70+802; Fitzpatrick v. Simonson, 86–140, 146, 90+378.

jurisdiction is general, and as respects the subjects committed to them they have all the powers that any court has.[11] They have implied power to do whatever is reasonably necessary to carry out the powers expressly conferred.[12]

7771. Of estates of decedents—The jurisdiction of the probate court over the estates of decedents is for the purpose of administering them and includes all matters pertaining to administration.[13] Estates are settled and administered by executors and administrators under the jurisdiction, supervision and control of the probate courts.[14] To give rise to such jurisdiction there must be a death and ownership of property by the decedent.[15] In the exercise of this jurisdiction probate courts are authorized to take charge of, preserve, and distribute according to law the property of decedents;[16] to construe wills whenever necessary for purposes of administration;[17] and to determine who are creditors, legatees, devisees, and next of kin.[18] The theory of our statutes governing the administration of estates of decedents, is that the rights and claims of all persons interested in the estate of a decedent are to be determined, in the first instance, by the probate court.[19]

7772. Court first acquiring jurisdiction has exclusive jurisdiction—It is provided by statute that "jurisdiction acquired by a probate court shall preclude the subsequent exercise of jurisdiction by any other probate court over the same matter, except as otherwise specially provided by law."[20] The court whose jurisdiction is first properly invoked has jurisdiction of the entire estate of the decedent within the state regardless of county lines.[21]

7773. County in which administration should be had—The statute prescribes in what county administration should be had.[22] It was designed to prevent conflict between the probate courts of the several counties.[23] In the case of a non-resident decedent administration must be had in a county where he left property subject to administration, and this is so though the proceedings are based on a will probated in another state.[24] A right of action for the death of a non-resident is an "asset" giving the court of the county where the injury was inflicted jurisdiction.[25]

7774. Presumption of jurisdiction—Collateral attack on orders and judgments—The probate court is a court of superior jurisdiction and enjoys the same presumptions of jurisdiction as superior courts of common-law jurisdiction. Its orders, judgments, and decrees are presumed to be within its jurisdiction, and are not subject to collateral attack for want of jurisdiction not affirmatively appearing on the face of the record.[26] An exception to this general rule is made by statute in relation to sales of realty.[27]

[11] Davis v. Hudson, 29–27, 35, 11+136; McNamara v. Casserly, 61–335, 341, 63+880; Buntin v. Root, 66–454, 457, 69+330; Harrison v. Harrison, 67–520, 521, 70+802.

[12] State v. Ueland, 30–277, 15+245; Culver v. Hardenbergh, 37–225, 233, 33+792; Mousseau v. Mousseau, 40–236, 41+977; State v. Probate Ct., 66–246, 68+1063; Levi v. Longini, 82–324, 327, 84+1017, 86+333; Betcher v. Betcher, 83–215, 218, 86+1; Wellner v. Eckstein, 105–444, 454, 117+830.

[13] Mousseau v. Mousseau, 40–236, 41+977.

[14] Culver v. Hardenberg, 37–225, 233, 33+792.

[15] Fitzpatrick v. Simonson, 86–140, 146, 90+378.

[16] State v. Probate Ct., 33–94, 95, 22+10; Mousseau v. Mousseau, 40–236, 238, 41+977.

[17] State v. Ueland, 30–277, 15+245; Appleby v. Watkins, 95–455, 104+301.

[18] Mousseau v. Mousseau, 40–236, 239, 41+977.

[19] Huntsman v. Hooper, 32–163, 20+127.

[20] R. L. 1905 § 3626.

[21] Chadbourne v. Alden, 98–118, 121, 107+148.

[22] R. L. 1905 § 3627.

[23] Culver v. Hardenbergh, 37–225, 233, 33+792.

[24] Putnam v. Pitney, 45–242, 244, 47+790; In re Southard, 48–37, 50+932.

[25] Hutchins v. St. P. etc. Ry., 44–5, 46+79.

[26] Dayton v. Mintzer, 22–393; Davis v. Hudson, 29–27, 11+136; Culver v. Hardenbergh, 37–225, 230, 33+792; Curran v. Kuby, 37–330, 33+907; Menage v. Jones, 40–254, 255, 41+972; Stahl v. Mitchell, 41–

7775. Continuous during administration—When the jurisdiction of a probate court once attaches to an estate it continues over the administration until it is closed.[28]

7776. No general equity jurisdiction—The probate court is not invested with general equity jurisdiction;[29] but it possesses all the powers, whether legal or equitable, essential to the due exercise of the jurisdiction conferred by the constitution.[30]

7777. When jurisdiction attaches—The jurisdiction of the probate court over the estate of a decedent attaches when its general jurisdiction is invoked by the presentation to the court of a proper petition by some person entitled to take such action.[31]

7778. Held to have jurisdiction—To construe a will, whenever a construction is necessary to the administration of the estate of a decedent;[32] to make an election for an insane or incompetent person to take under a will;[33] to order paid out of the estate of an insane person the witness fees and attorney's fees incurred in proceedings for his restoration to capacity;[34] to compel an accounting by an executor after his discharge, the estate not being fully administered;[35] to render a decree of heirship, as provided by Laws 1897 c. 157;[36] to determine a claim to an estate on a contract by the decedent to make a will in favor of the claimant;[37] to determine the claim of a third party to a distributive share of an estate.[38]

7779. Held not to have jurisdiction—To determine a controversy between an heir or devisee and a third person claiming under him;[39] to make partition of realty after it has been assigned to those entitled to it;[40] of an action by a representative to recover real or personal property alleged to belong to the estate, or to recover a debt owing to the estate;[41] to determine a claim to property under a deed from the decedent;[42] to enforce specifically a contract for the conveyance of realty;[43] to determine that a party has no right to the specific performance of a contract to convey made by the decedent;[44] to order a payment to be made to an executor in his individual capacity;[45] to declare and enforce a trust arising from the purchase by a guardian of realty with

325, 332, 43+385; Burrell v. Chi. etc. Ry., 43–363, 364, 45+849; Logenfiel v. Richter, 60–49, 61+826; Kurtz v. St. P. & D. Ry., 61–18, 22, 63+1; McNamara v. Casserly, 61–335, 340, 63+880; State v. Kilbourne, 68–320, 322, 71+396; Fitzpatrick v. Simonson, 86–140, 90+378; Hadley v. Bourdeaux, 90–177, 95+1109; Aho v. Republic I. & S. Co., 104–322, 116+590; Hanson v. Nygaard, 105–30, 32, 117+235. See 22 Harv. L. Rev. 442.

[27] R. L. 1905 § 3774; Kurtz v. St. P. & D. Ry., 61–18, 22, 63+1; Cater v. Steeves, 95–225, 103+885.

[28] Culver v. Hardenbergh, 37–225, 33+792; Rice v. Dickerman, 47–527, 529, 50+698; Boltz v. Schutz, 61–444, 64+48; Hanson v. Nygaard, 105–30, 117+235.

[29] State v. Probate Ct., 103–325, 115+173. See Peterson v. Vanderburgh, 77–218, 79+828.

[30] Wellner v. Eckstein, 105–444, 446, 454, 117+830.

[31] Hanson v. Nygaard, 105–30, 117+235.

[32] State v. Ueland, 30–277, 15+245; Appleby v. Watkins, 95–455, 104+301.

[33] State v. Ueland, 30–277, 15+245; Washburn v. Van Steenwyk, 32–336, 354, 20+324; Culver v. Hardenbergh, 37–225, 233, 33+792; State v. Hunt, 88–404, 93+314.

[34] Kelly v. Kelly, 72–19, 74+899.

[35] Betcher v. Betcher, 83–215, 86+1.

[36] Fitzpatrick v. Simonson, 86–140, 90+378.

[37] Kleeberg v. Schrader, 69–136, 72+59.

[38] Starkey v. Sweeney, 71–241, 73+859.

[39] Farnham v. Thompson, 34–330, 336 26+9. See State v. Probate Ct., 33–94, 22–10; Mousseau v. Mousseau, 40–236, 41+977; Dobberstein v. Murphy, 44–526, 47+171; In re Langevin, 45–429, 47+1133; Kleeberg v. Schrader, 69–136, 138, 72+59; Starkey v. Sweeney, 71–241, 73+859.

[40] Hurley v. Hamilton, 37–160, 33+912.

[41] State v. Probate Ct., 33–94, 96, 22+10.

[42] Mousseau v. Mousseau, 40–236, 239, 41+977.

[43] Svanburg v. Fosseen, 75–350, 364, 78+4; Fitzpatrick v. Simonson, 86–140, 147, 90+378.

[44] Mousseau v. Mousseau, 40–236, 41+977.

[45] Wrigley v. Watson, 81–251, 254, 83+989.

money of the ward, the guardian dying after the purchase;[46] to compel a representative to make a further accounting after final decree, such decree being unreversed and unmodified;[47] of an action by distributees against personal representatives for shares assigned to them by the court;[48] of an action for the recovery of realty;[49] of an action to recover the purchase price of land belonging to minors sold by a guardian;[50] of an action to enforce and administer a trust estate in realty;[51] of an action to determine and discharge equitable mortgages and liens;[52] to approve the settlement of a claim for death by wrongful act;[53] to distribute money recovered by a representative under the statute for death by wrongful act;[54] to issue writs of habeas corpus.[55]

7780. Unorganized county attached to organized county—Where a county "established," but not organized, nor authorized to have a probate court, is attached for judicial purposes to an "organized" county, the probate court of the latter has jurisdiction over the former.[56]

RECORDS

7781. Books to be kept—Files—Entries—Evidence—The statute prescribes certain books of record to be kept by probate courts.[57] In making entries it is unnecessary to use the seal of the court.[58] They may be made by the clerk under the direction of the judge. They should be made promptly; but a delay, even of years, is not fatal, at least if made during the term of the judge.[59] Letters of guardianship should be recorded in the "record of letters," and such record is competent evidence of the letters without the production of the originals and without accounting for them.[60] An order granting or denying the application of a person under guardianship to be restored to capacity should be recorded in the "record of orders." Interlocutory orders, within the meaning of the statute, include orders appointing representatives, orders for hearing on intermediate petitions, and the like.[61] Files are on the same footing as entries in the minutes.[62] The clerk may authenticate and certify copies of the records.[63]

7782. Import verity—Collateral attack—The probate court is a court of record, and except as provided by R. L. 1905 § 3774,[64] its records import verity and are not subject to collateral attack for error or irregularity.[65]

PRACTICE

7783. Petition—Issues—Pleadings—In probate practice there are no pleadings. Proceedings are initiated by petition. The practice is informal and largely in the control of the judge.[66] All petitions relating to a particular subject-matter may be heard and disposed of at once.[67]

[46] Bitzer v. Bobo, 39–18, 38+609.
[47] State v. Probate Ct., 84–289, 87+783.
[48] Schmidt v. Stark, 61–91, 63+255; State v. Probate Ct., 84–289, 294, 87+783.
[49] Fitzpatrick v. Simonson, 86–140, 147, 90+378.
[50] Peterson v. Baillif, 52–386, 54+185.
[51] Mayall v. Mayall, 63–511, 517, 65+942.
[52] State v. Probate Ct., 103–325, 115+173.
[53] Aho v. Republic I. & S. Co., 104–322, 116+590.
[54] Mayer v. Mayer, 106–484, 119+217.
[55] In re Lee, 1–60(44).
[56] State v. Wilcox, 24–143.
[57] R. L. 1905 § 3625.
[58] Tidd v. Rines, 26–201, 207, 2+497.
[59] Davis v. Hudson, 29–27, 39, 11+136.
[60] Id.
[61] State v. Probate Ct., 83–58, 85+917.
[62] Dayton v. Mintzer, 22–393.
[63] Fitzpatrick v. Simonson, 86–140, 148, 90+378.
[64] Kurtz v. St. P. & D. Ry., 61–18, 22, 63+1; Cater v. Steeves, 95–225, 103+885.
[65] Dayton v. Mintzer, 22–393; Curran v. Kuby, 37–330, 331, 33+907; Logenfiel v. Richter, 60–49, 51, 61+826; Kurtz v. St. P. & D. Ry., 61–18, 22, 63+1. See § 5145.
[66] R. L. 1905 § 3638.
[67] Chadwick v. Dunham, 83–366, 368, 86+351.

7784. Vacation of orders and judgments—Amendment—A probate court is authorized to vacate its orders, judgments, or decrees on the ground of fraud, surprise, excusable inadvertence or neglect.[68] A probate court has the same power to correct, modify, or amend its records as a district court.[69] It cannot modify or reverse its orders or judgments after the time to appeal therefrom has expired.[70] It cannot vacate its orders or judgments after the subject-matter has passed beyond its jurisdiction.[71] The probate of a will cannot be vacated for failure to appoint a guardian for minors interested in the estate.[72]

APPEAL TO DISTRICT COURT

7785. Who may appeal—*a. In general*—An "aggrieved party" under the statute [73] is one who, as heir, devisees, legatee, or creditor, has what may be called a legal interest in the assets of the estate and their due administration.[74] A debtor of the estate is not such a party.[75] An heir may appeal though he did not appear and take part in the proceedings. Upon the death of an heir a special administrator may perfect an appeal.[76] Under a former statute one not appearing could only appeal when he "had not due notice or opportunity to be heard." [77] The estate cannot appeal as such.[78] Only a party aggrieved by it can question a specific provision of a final decree of distribution.[01]

b. From allowance or disallowance of claims—A payee of a note given for the benefit of another has been held a "creditor" within the statute.[79] One not "interested" in the estate cannot appeal.[80] Objection that one has no right to appeal cannot be made for the first time in the supreme court.[81] Proof of the fact of the refusal of the representative to appeal need not be made prior to appeal, but may be made at any time when the fact is called in question.[82]

7786. What orders, judgments, and decrees appealable—Under the statute [83] the following are appealable: an order admitting a will to probate and record or refusing the same; [84] an order appointing an executor, administrator, or guardian, or removing him, or refusing to make such appointment or re-

[68] R. L. 1905 § 3872(8); In re Gragg, 32–142, 19+651 (vacation of order allowing claims—collusion between administrator and claimants); In re Hause, 32–155, 19+973 (vacation of order allowing guardian's account); Fern v. Leuthold, 39–212, 39+399 (vacation of final decree); In re Kidder, 53–529, 55+738 (vacation of order allowing claims held not justified by facts); In re Thompson, 57–109, 58+682 (vacation of final decree); Larson v. How, 71–250, 73+966 (vacation of order allowing a will); Levi v. Longini, 82–324, 84+1017, 86+333 (vacation of order allowing guardian's account obtained by fraud); State v. Bazille, 89–440, 95+211 (vacation of final decree to permit creditor to present claim); St. Paul G. Co. v. Kenny, 97–150, 106+344 (vacation of final decree obtained by fraud—when justifiable as against purchaser from distributee).

[69] R. L. 1905 § 3633(4); State v. Probate Ct., 84–289, 295, 87+783; Tomlinson v. Phelps, 93–350, 101+496. See Kurtz v. St. P. & D. Ry., 65–60, 67+808; Hanson v. Ingwaldson, 77–533, 80+702.

[70] Tomlinson v. Phelps, 93–350, 101+496.

[71] State v. Probate Ct., 33–94, 22+10. See Hurley v. Hamilton, 37–160, 33+912; Kurtz v. St. P. & D. Ry., 65–60, 67+808; Hanson v. Ingwaldson, 77–533, 80+702.

[72] In re Mousseau, 30–202, 14+887.

[73] R. L. 1905 § 3873.

[74] In re Hardy, 35–193, 28+219; Edgerly v. Alexander, 82–96, 84+653. See State v. Bazille, 81–370, 84+120; Rong v. Haller, 106–454, 119+405.

[75] In re Hardy, 35–193, 28+219.

[76] Sheeran v. Sheeran, 96–484, 105+677.

[77] In re Hause, 32–155, 19+973; In re Brown, 32–443, 21+474.

[78] Columbus' Estate v. Monti, 6–568(403).

[01] Casey v. Brabec, 126+401.

[79] Lake v. Albert, 37–453, 35+177.

[80] Semper v. Coates, 93–80, 100+663.

[81] McAlpine v. Kratka, 92–411, 100+233.

[82] Schultz v. Brown, 47–255, 49+982.

[83] R. L. 1905 § 3872.

[84] In re Brown, 32–443, 21+474; Graham v. Burch, 47–171, 177, 49+697; Foster v. Gordon, 96–142, 144, 104+765.

moval;[85] an order authorizing or refusing to authorize real property to be sold, mortgaged, or leased, or confirming or refusing to confirm such sale, mortgaging, or leasing;[86] an order allowing or disallowing the claim of a creditor against the estate, or disallowing a counterclaim, in whole or in part, to the amount in either case of twenty dollars or more;[87] an order or decree by which a legacy or distributive share is allowed or payment thereof directed, or such allowance or direction refused, when the amount in controversy exceeds twenty dollars;[88] an order setting apart property, or making an allowance for the widow, the widow and children, or children, or refusing the same;[89] an order allowing the account of an executor, administrator, or guardian, or refusing to allow the same, when the amount allowed or disallowed exceeds twenty dollars;[90] an order vacating or refusing to vacate a previous order, judgment, or decree alleged to have been procured by fraud, misrepresentation, or through surprise or excusable inadvertence or neglect;[91] an order or decree directing or refusing a conveyance of realty;[92] a final judgment or decree assigning the residue of the estate of a decedent;[93] an order denying an application for the restoration to capacity of any person under guardianship.[94]

7787. Appeal from part of an order or judgment—An appeal may be taken from a part of a final order or judgment if the part whereby the appellant is aggrieved is so far distinct and independent that it may be adjudicated on appeal without bringing up for review the entire order or judgment.[95] Where the probate court allows a portion and disallows the balance of a claim of the same general character presented against the estate of a decedent, and an appeal is taken from that portion only of such order which disallows the claim, the same is not effectual, and will not operate to confer jurisdiction upon the district court.[96]

7788. Time—An appeal from an order, judgment, or decree must be taken within thirty days after notice thereof; and in the absence of notice, within six months from its entry.[97]

7789. Notice of appeal—A notice of appeal must specify the order, judgment, or decree appealed from.[98] Where, upon the refusal of the executor or administrator to do so, a creditor, devisee, or heir appeals from the allowance of a claim against the estate, the notice of appeal should be to the effect that

[85] Mumford v. Hall, 25–347, 354; Brown v. Huntsman, 32–466, 21+555; State v. Probate Ct., 83–58, 85+917; Foster v. Gordon, 96–142, 144, 104+765.

[86] State v. Probate Ct., 19–117(85); Dee v. Wilson, 91–115, 97+647.

[87] Capehart v. Logan, 20–442(395); State v. Probate Ct., 28–381, 382, 10+209; State v. Probate Ct., 51–241, 53+463; Smith v. Pence, 62–321, 64+822; State v. Probate Ct., 72–434, 75+700; State v. Probate Ct., 76–132, 134, 78+1039.

[88] Mintzer v. St. Paul T. Co., 45–323, 47+973 (order fixing interest of surviving spouse in homestead); State v. Willrich, 72–165, 75+123 (inapplicable to realty).

[89] Tracy v. Tracy, 79–267, 271, 82+635. See Mintzer v. St. Paul T. Co., 45–323, 47+973.

[90] Watson v. Watson, 65–335, 68+44; St. Paul T. Co. v. Kittson, 84–493, 87+1012 (appeal from part of order).

[91] In re Mousseau, 30–202, 204, 14+887; In re Gragg, 32–142, 19+651; In re Hause, 32–155, 157, 19+973; State v. Probate Ct., 33–94, 95, 22+10; Larson v. How, 71–250, 73+966; Levi v. Longini, 82–324, 327, 84+1017, 86+333; Tomlinson v. Phelps, 93–350, 101+496 (vacating part of previous order).

[92] See State v. Probate Ct., 33–94, 22+10.

[93] State v. Willrich, 72–165, 75+123 (overruled by Laws 1899 c. 27). See Penstock v. Wentworth, 75–2, 5, 77+420.

[94] State v. Probate Ct., 83–58, 85+917 (overruled by Laws 1901 c. 147); Rong v. Haller, 106–454, 119+405.

[95] Capehart v. Logan, 20–442(395); St. Paul T. Co. v. Kittson, 84–493, 87+1012; First Unitarian Soc. v. Houliston, 96–342, 105+66.

[96] Stellmacher v. Bruder, 93–98, 100+473.

[97] R. L. 1905 § 3874; Knutsen v. Krook, 127+11. See, under former statutes, Auerbach v. Gloyd, 34–500, 27+193; In re Charles, 35–438, 29+170.

[98] R. L. 1905 § 3874; Foster v. Gordon, 96–142, 144, 104+765.

such creditor, devisee, or heir appeals.[99] A notice is to be liberally construed.[1] Formerly an amendment of a notice was expressly prohibited.[2] A notice of appeal from an order admitting a will to probate may be served on the attorney of the proponent of the will.[3] A service on an executor has been sustained.[4] A notice of appeal was held equivalent to an "application" for an appeal under a former statute.[5]

7790. Return—The statute requires the probate court to make a return to the district court upon an appeal being perfected.[6] The district court acquires jurisdiction of the subject-matter when the return is filed. Subsequent proceedings are not jurisdictional.[7]

7791. Bond—If the condition of a bond substantially covers the provisions of the statute, and secures to the respondent all that the law designed for him, it is sufficient, though not in the exact words of the statute. The fact that a bond is executed by only one surety does not go to the jurisdiction of the district court over the subject-matter of the appeal, but is a mere irregularity, which the respondent may waive, or which the district court may allow to be remedied by amending the bond or filing a new one.[8] An undertaking is sufficient.[9]

7792. Placing cause on calendar of district court—The statute provides that on or before the first day of the term for which the cause is noticed, the appellant shall cause it to be entered on the calendar; otherwise the appeal shall be dismissed.[10] The district court may relieve an appellant from his default in complying with this provision.[11]

7793. Suspension of order, judgment, or decree—The statute provides that an appeal shall suspend the operation of the order, judgment, or decree appealed from until the appeal is determined or the district court shall otherwise order.[12] An appeal from an order admitting a will to probate does not affecting an order appointing an executor, unless an appeal is also taken from such order.[13]

7794. Trial in district court—Pleadings—Jury—The trial in the district court is de novo, as if the cause had originated there.[14] Formerly an appeal was allowed on questions of law alone. Such an appeal was determined in the district court on the record of the probate court.[15] The statute provides that "if the appeal be from the allowance or disallowance of a claim or counterclaim, the district court, on or before the second day of the term, shall direct pleadings to be made up as in civil actions, defining the issues to be tried. Such appeal shall then be heard and tried in the same manner as other issues of fact are heard and tried in such court. All other appeals shall be tried by the court without a jury, unless the court orders the whole issue or some specific question of fact involved therein to be tried by jury or referred."[16]

99 Schultz v. Brown, 47–255, 49+982.
1 First Unitarian Soc. v. Houliston, 96–342, 105+66.
2 McCloskey v. Plantz, 76–323, 79+176.
3 In re Brown, 32–443, 21+474.
4 Rong v. Haller, 106–454, 119+405.
5 Lake v. Albert, 37–453, 35+177.
6 R. L. 1905 § 3875. See, under former statute, In re Post, 33–478, 24+184.
7 Hintermeister v. Brady, 70–437, 438, 73+145.
8 Riley v. Mitchell, 38–9, 35+472.
9 In re Brown, 35–307, 29+131.
10 R. L. 1905 § 3877.
11 Hintermeister v. Brady, 70–437, 73+145.
12 R. L. 1905 § 3876. See, prior to statute, Dutcher v. Culver, 23–415.
13 Foster v. Gordon, 96–142, 104+765.
14 R. L. 1905 § 3877; Washburn v. Van Steenwyk, 32–336, 355, 20+324; In re Mills, 34–296, 25+631; Strauch v. Uhler, 95–304, 104+535; Turner v. Fryberger, 99–236, 240, 107+1133, 109+229. See, as to practice on appeal from an order allowing a final account, Wheaton v. Pope, 91–299, 306, 97+1046.
15 In re Post, 33–478, 24+184.
16 R. L. 1905 § 3878.

A trial without pleadings is an irregularity merely.[17] The pleadings must be based on the claim presented in the probate court.[18] The right to a jury trial is statutory; not constitutional.[19] When specific questions of fact are submitted to a jury its findings are conclusive upon the court, unless set aside for cause.[20] In all cases involving the trial of issues of fact the court must make findings of fact and conclusions of law as in ordinary civil actions.[21] An appeal to the district court from an order of the probate court vacating and setting aside an administrator's account presents for review in the appellate court ordinarily the propriety of the order appealed from, and not the merits of the administrator's account. But where, on such an appeal, the parties voluntarily litigate the merits of the administrator's account, and the court hears, adjusts, and determines the same, the parties are bound by the result to the same extent as though the matters were properly before the court.[22] Where a party answered a complaint in the district court and proceeded to trial without objection, it was held that the district court had jurisdiction, though the claim was ex delicto and hence not provable in the probate court.[23]

7795. Judgment in district court—Affirmance—Remand—Costs—The statute provides for a judgment in the district court or a remand of the case to the probate court with directions for the further disposition of the case in that court.[24] The district court may enter a judgment of affirmance where the appellant fails to appear and prosecute his appeal, or where the order or decree appealed from is sustained on the merits. Where the appellant does not appear and prosecute his appeal, the district court is not required to hear evidence and determine the case on its merits. In such a case it is improper to enter both a dismissal and an affirmance, but either one may be entered. An application to be relieved from default in the prosecution of an appeal is addressed to the discretion of the district court.[25] The district court may render such judgment as the probate court ought to have rendered, but its jurisdiction is appellate, not original, and it exercises probate rather than common-law jurisdiction. It has no greater or different jurisdiction than the probate court had in the premises.[26] On an appeal from an order of the probate court allowing the final account of an administrator, the district court cannot determine the right of the administrator to compensation for services rendered or for disbursements made subsequent to the filing of his account in the probate court.[27] Provision is made by statute for costs in the district court.[28] An appeal may be dismissed for want of jurisdiction.[29]

[17] Lake v. Albert, 37–453, 35+177.

[18] Stuart v. Stuart, 70–46, 72+819. See Palmer v. Pollock, 26–433, 4+1113; Chadwick v. Dunham, 83–366, 86+351.

[19] Schmidt v. Schmidt, 47–451, 50+598.

[20] Marvin v. Dutcher, 26–391, 407, 4+685; In re Pinney, 27–280, 6+791.

[21] Turner v. Fryberger, 99–236, 107+1133; Swick v. Sheridan, 107–130, 119+791. See Palmer v. Pollock, 26–433, 4+1113.

[22] Bradley v. Bradley, 97–130, 106+338.

[23] First Nat. Bank v. Strait, 65–162, 167, 67+987.

[24] R. L. 1905 § 3879; Tracy v. Tracy, 79–267, 82+635 (judgment of affirmance with costs); Turner v. Fryberger, 99–236, 240, 107+1133, 109+229 (statute cited).

[25] Blandin v. Brennin, 106–353, 119+57.

[26] Berkey v. Judd, 31–271, 17+618; Huntsman v. Hooper, 32–163, 20+127; Graham v. Burch, 47–171, 49+697; Tracy v. Tracy, 79–267, 82+635; State v. Probate Ct., 83–58, 85+917; Chadwick v. Dunham, 83–366, 86+351; Wheaton v. Pope, 91–299, 305, 97+1046; Strauch v. Uhler, 95–304, 104+535; Turner v. Fryberger, 99–236, 240, 107+1133, 109+229.

[27] Turner v. Fryberger, 99–236, 107+1133, 109+229.

[28] R. L. 1905 § 3880; Tracy v. Tracy, 79–267, 272, 82+635; Gilman v. Maxwell, 79–377, 82+669; Casey v. Brabec, 126+401.

[29] Capehart v. Logan, 20–442(395).

7795a. Scope of review—Claim to estate—A claim to the whole or a part of an estate, allowed by the probate court, may be determined by the district court on appeal from a final decree, though no appeal was taken from the order allowing the claim.[01]

7796. Relief from default—An application to be relieved from default in the prosecution of an appeal is addressed to the discretion of the district court.[30]

PROBATE LAW—See Descent and Distribution; Executors and Administrators; Probate Court; Wills.

PROBATE OF WILLS—See Wills, 10244.

PROCEDURE—See Action, 90.

PROCEEDING—See Appeal and Error, 302; Attorney and Client, 684; and note 31.

[01] Knutsen v. Krook, 127+11.
[30] Blandin v. Brennin, 106-353, 119+57.
[31] State v. Bergman, 37-407, 34+737; In re Grundysen, 53-346, 348, 55+557.

PROCESS

Cross-References

See Constitutional Law, 1638; Executors and Administrators, 3676; Insurance, 4725; Justices of the Peace, 5295; Parties, 7320; Sheriffs and Constables.

IN GENERAL

7797. Definition—Process is a generic term applied in practice to the several writs issued in an action. It is so called because it "proceeds" from a court. In a broader sense it is nearly synonymous with "proceedings," and means the entire proceedings in an action from the beginning to the end.[32] An "original process" is one by which an action is commenced.[33]

7798. Formal requisites—The constitution provides that the style of all process shall be, "The State of Minnesota." [34] It is provided by statute that "every writ or process issuing from a court of record shall be tested in the name of the presiding judge, be signed by the clerk and sealed with the seal of the court, be dated on the day of its issue, and before delivery to the officer for service, shall be indorsed by the clerk with the name of the attorney or other person procuring the same." [35] A summons is not a process or writ re-

[32] Dorman v. Bayley, 10-383(306); Hanna v. Russell, 12-80(43); Wolf v. McKinley, 65-156, 68+2.

[33] Pierce v. Huddleston, 10-131(105).

[34] Const. art. 6 § 14.

[35] R. L. 1905 § 93. An attorney procuring a writ must subscribe or indorse his name thereon and add his place of resi-

quired to run in the name of the state.[36] That an execution does not run in the name of the state is a defect of form only which does not render it void.[37] A writ of attachment signed by the judge, but not by the clerk, and without the seal of the court is absolutely void.[38] A writ of attachment need not show by what officer it was allowed.[39] An execution should be dated as of the day it issues from the clerk's office and not as of the day it is delivered to the sheriff.[40] The seal of the court and not the seal of the clerk must be used.[41] A writ may be signed by a deputy clerk.[42]

7799. Statutory forms—While there are authorities holding that an act of the legislature prescribing forms of process in legal procedure is mandatory, and that such forms must in all cases be used, such is not the rule in this state.[43]

7800. When deemed issued—A process is issued when filled out and completed, with an intention to have it served, or at least when it is given to an officer for service, or deposited in a place designated by an officer for that purpose.[44]

7801. Pleading—In pleading the process of a court of inferior and limited jurisdiction, it is necessary to allege every fact requisite to show that such court had acquired jurisdiction of the subject-matter, the parties, and the process.[45]

SUMMONS—IN GENERAL

7802. Nature—A mere notice—Section 14 of article 6 of our constitution provides that the style of all process shall be, "The State of Minnesota." A summons is not process within the meaning of this provision and need not run in the name of the state. It is a mere notice given by plaintiff or his attorney to the defendant that proceedings have been instituted and judgment will be taken against him if he fails to defend. This notice is not issued out of or under the seal of the court, or by the authority of the court or any judicial officer. The fact that the court acquires jurisdiction by its service does not prove it process, for it is competent for the legislature to provide that the court shall acquire jurisdiction by the service of the complaint without a summons, or in any other manner by which the defendant may be notified that proceedings have been instituted against him.[46]

7803. Contents—A summons must notify the defendant, in substance,[47] that if he fails to serve his answer as required by the summons the plaintiff, if the action is for the recovery of a debt or a liquidated money demand only, will take judgment for an amount specified therein;[48] in other actions, that he will apply to the court for the relief demanded in the complaint.[49]

dence and the particular location of his place of business, by street, number, or otherwise, Rule 4, District Court.

[36] See § 7802.

[37] Thompson v. Bickford, 19–17(1).

[38] Wheaton v. Thompson, 20–196(175); O'Farrell v. Heard, 22–189.

[39] Shaubhut v. Hilton, 7–506(412).

[40] Mollison v. Eaton, 16–426(383).

[41] State v. Barrett, 40–65, 41+459.

[42] Clements v. Utley, 91–352, 98+188 (a writ signed "L. H. Prosser, Clerk, by D. W. Bacon," has been sustained).

[43] Lawton v. Barker, 105–102, 104, 117+249.

[44] Webster v. Penrod, 103–69, 71, 114+257.

[45] Clark v. Norton, 6–412(277).

[46] Hanna v. Russell, 12–80(43); Lowry v. Harris, 12–255(166); First Nat. Bank v. Estenson, 68–28, 70+775; Plano Mfg. Co. v. Kaufert, 86–13, 16, 89+1124. See Cleland v. Tavernier, 11–194(126); Thompson v. Bickford, 19–17(1); Shatto v. Latham, 33–36, 21+838; Wolf v. McKinley, 65–156, 68+2.

[47] R. L. 1905 § 4103.

[48] Sibley County v. Young, 21–335.

[49] Hotchkiss v. Cutting, 14–537(408); White v. Iltis, 24–43; Heinrich v. Englund, 34–395, 26+122.

7804. Signature—A summons may be subscribed by the printed signature of the plaintiff or his attorney.[50] A written signature purporting to be that of the plaintiff in the action, but made by his agent in his presence and by his express direction is sufficient.[51]

7805. Defects—Waiver—Mere formal defects or irregularities in a summons cannot be taken advantage of collaterally, but are deemed waived unless the defendant moves to set aside the service. It is sufficient if a summons conforms to the statute substantially.[52]

7806. Filing complaint or serving it with summons—Regularly the complaint must be filed prior to the service of summons, or served with the summons;[53] but a failure to do either is a mere irregularity, the remedy for which is a motion to set aside the service.[54]

SERVICE OF SUMMONS

7807. Proper service essential—Notice of action insufficient—Service must be made in the mode prescribed by the statute. It is not sufficient to make one a party to an action that he is named therein as such, or that he has notice of its pendency or of an abortive service upon him.[55] While the statute must be followed, it is probably sufficient if it is followed substantially.[56]

7808. By whom—A summons may be served by the sheriff of the county in which the defendant is found, or by any other person not a party to the action.[57] It may be served by the attorney of the plaintiff.[58]

7809. Persons exempt from service—Fraud—A resident of another state who has in good faith come into this state to give evidence as a witness in a cause here, is exempt from service of a summons in a civil action against him, in coming, while in attendance, and for a reasonable time thereafter in which to return.[59] And this rule applies to non-resident parties coming as witnesses.[60] The service of a summons upon a defendant who has been induced to come into the state for that purpose by the fraud of the plaintiff confers no jurisdiction on the court.[61] A member of the legislature is not exempt during

[50] Herrick v. Morrill, 37–250, 33+849. See West v. St. P. etc. Ry., 40–189, 41+1031.

[51] Hotchkiss v. Cutting, 14–537(408).

[52] Hanna v. Russell, 12–80(43) (absence of name of state and number of judicial district not fatal); Hotchkiss v. Cutting, 14–537(408) (irregularities in signing, in the notice to serve an answer, and in the notice of applying to the court for relief, held not fatal); Gould v. Johnston, 24–188 (fixing different times for answering not fatal); White v. Iltis, 24–43 (use of "decision" for "direction" in notice of application to the court not fatal); Heinrich v. Englund, 34–395, 26+122 (variance between complaint and summons as to relief); Lee v. Clark, 53–315, 55+127 (omission of attorney's name on copy of summons not fatal); Plano Mfg. Co. v. Kaufert, 86–13, 89+1124 (a summons is not void if it clearly informs the defendant that it is intended for him, and requires him to answer the complaint of the plaintiff, though it is not formally directed to him). See, as to defects in published summons, § 7830.

[53] R. L. 1905 § 4105.

[54] Millette v. Mehmke, 26–306, 3+700; Houlton v. Gallow, 55–443, 57+141; Kimball v. Brown, 73–167, 75+1043.

[55] Bausman v. Tilley, 46–66, 48+459; Savings Bank v. Authier, 52–98, 53+812; Hokanson v. Gunderson, 54–499, 56+172; Berryhill v. Sepp, 106–458, 119+404.

[56] See Damon v. Baldwin, 101–414, 112+536 and cases under § 7805.

[57] R. L. 1905 § 4104. See Crosby v. Farmer, 39–305, 307, 40+71 (any one not a party may serve—common-law rule); Miller v. Miller, 39–376, 40+261 (repeal of special act requiring service by sheriff in Ramsey county); Kirkpatrick v. Lewis, 46–164, 47+970 (party cannot serve).

[58] First Nat. Bank v. Estenson, 68–28, 70+775.

[59] Sherman v. Gundlach, 37–118, 33+549. See 23 Harv. L. Rev. 474.

[60] First Nat. Bank v. Ames, 39–179, 39+308 (party). See 23 Harv. L. Rev. 474.

[61] Columbia P. Co. v. Bucyrus etc. Co., 60–142, 62+115. See Chubbuck v. Cleveland, 37–466, 35+362; Hay v. Tuttle, 67–56, 69+696.

a session.[62] A fugitive from justice brought here by interstate rendition proceedings is not exempt.[63]

7810. Personal service—Personal service must be direct. That is, it must be on the defendant personally and not through the mediation of a third person.[64] It may be made either by handing to and leaving with the party to be served a copy of the original summons, or by reading the original summons to him.[65]

7811. Persons with whom summons may be left—A person fourteen years old is prima facie a person of "suitable age and discretion." It is unnecessary that he should understand the nature of judicial proceedings.[66] He must be an actual resident in the house.[67] The summons may be left with a person living in the same suite of rooms of an apartment house as the person to be served, though he is not a member of the family or household of such person.[68]

7812. What constitutes "house of usual abode"—The phrase "at the house of usual abode," as used in the statute providing for service of summons,[69] means the customary or settled place of residence for the time being—the place where one is actually living when service is made.[70] It may be a boarding house,[71] or jail.[72] In the case of a married man it is presumptively the house where his wife and family reside.[73] It is not the equivalent of domicil in all particulars, for one's place of abode or home once acquired does not necessarily continue until another one is obtained.[74] A service at a house in which the defendant is not in fact living is a nullity, and it is immaterial that the defendant receives notice of the service.[75]

7813. On domestic private corporations—In an action against a domestic private corporation the summons may be served by delivering a copy thereof to its president, vice-president, secretary, cashier, or treasurer, or to any director or managing agent thereof.[76] Special provision is made for service on railway companies,[77] and corporations having no officer within the state.[78]

7814. On foreign corporations—To constitute a person an agent of a foreign corporation, so as to authorize the service of summons upon him under R. L. 1905 § 4109, subd. 3, he must be an agent in fact, and not one by mere implication or construction of law. He must be one having in fact representative capacity and derivative authority.[79] To authorize service under this

[62] Rhodes v. Walsh, 55–542, 57+212.
[63] Reid v. Ham, 54–305, 56+35.
[64] Heffner v. Gunz, 29–108, 12+342; Savings Bank v. Authier, 52–98, 53+812.
[65] Damon v. Baldwin, 101–414, 112+536.
[66] Temple v. Norris, 53–286, 55+133.
[67] Heffner v. Gunz, 29–108, 12+342.
[68] Brigham v. Conn. etc. Co., 79–350, 82+668.
[69] R. L. 1905 § 4106.
[70] Berryhill v. Sepp, 106–458, 119+404; Missouri etc. Co. v. Norris, 61–256, 63+634; Vaule v. Miller, 64–485, 67+540.
[71] Lee v. Macfee, 45–33, 47+309.
[72] Berryhill v. Sepp, 106–458, 119+404.
[73] Missouri etc. Co. v. Norris, 61–256, 63+634; Berryhill v. Sepp, 106–458, 119+404.
[74] Missouri etc. Co. v. Norris, 61–256, 63+634.
[75] Berryhill v. Sepp, 106–458, 119+404.
[76] R. L. 1905 § 4109(1). See In re St. Paul etc. Ry., 36–85, 30+432 (exclusive mode of service at time of decision); Lindeke v. Associates R. Co., 146 Fed. 630 (landlord and tenant—notice to quit served on treasurer of corporation sufficient under this statute).
[77] R. L. 1905 § 4110; Schoch v. Winona etc. Ry., 55–479, 57+208; Hillary v. G. N. Ry., 64–361, 67+80 (ticket agent in union station agent for companies using station); Slaughter v. Canadian Pac. Ry., 106–263, 119+398. See, under former statute, In re St. Paul etc. Ry., 36–85, 30+432 (condemnation proceedings).
[78] R. L. 1905 § 4109(2); Hinckley v. Kettle River Ry., 70–105, 72+835 (statute held constitutional—conclusiveness of sheriff's return—affidavit of secretary of state as to service); Hinckley v. Kettle River Ry., 80–32, 82+1088 (statute applicable where officers may be within the state, but not known or accessible).
[79] Mikolas v. Walker, 73–305, 76+36; Wold v. Colt, 102–386, 114+243; North Wis. C. Co. v. Oregon etc. Ry., 105–198,

provision the corporation must be doing business in this state.[80] And whether it is so doing business as to authorize such service is a question of due process of law under the federal constitution.[81] If a foreign corporation has no property within this state, or the cause of action did not arise here, or it is not doing business here, jurisdiction cannot be acquired over it by personal service of summons on one of its officers or agents casually or temporarily within the state.[82] If a foreign corporation has appointed an agent in this state, with authority to accept service of process, as provided by statute, delivery of a copy of a summons to such agent is deemed service on the corporation.[83] Special provision is made for service on foreign insurance [84] and railway [85] companies.

7815. Notice of no personal claim—It is provided by statute that when in an action involving the title to realty "there are defendants against whom no personal claim is made, the plaintiff may serve upon them, at the time of the service of the summons, a notice subscribed by him or his attorney, and setting forth the general object of the action, a description of the property affected by it, and that no personal claim is made against such defendants. If any defendant on whom such notice is served unreasonably defends the action, he shall pay full costs to the plaintiff." [86]

PROOF OF SERVICE

7816. Affidavit of personal service—It is unnecessary that the affidavit should state that the person upon whom the service was made was to affiant known to be the person upon whom service was required to be made.[87] In an action against partners under a firm name the affidavit of the person who served the summons that the persons upon whom he served it (naming them) are members of the firm named in the summons is sufficient.[88] The absence of a venue is not fatal.[89]

7817. Affidavit of substituted service—When service is made by leaving a copy of the summons at the defendant's usual place of abode good practice requires that the affidavit should state the name of the person with whom it is left, but it is not indispensable.[90] It is of course unnecessary when leaving a summons at the defendant's usual place of abode to state in the affidavit of

117+391. See Hillary v. G. N. Ry., 64–361, 67+80; Hess v. Adamant Mfg. Co., 66–79, 68+774; State v. Adams Ex. Co., 66–271, 68+1085.

[80] North Wis. C. Co. v. Oregon etc. Ry., 105–198, 117+391. See McCord v. Doyle, 97 Fed. 22 (withdrawal of local office held not to defeat service).

[81] Wold v. Colt, 102–386, 114+243.

[82] State v. Dist. Ct., 26–233, 2+698; Strom v. Montana C. Ry., 81–346, 84+46; Connery v. Quincy etc. Ry., 92–20, 22, 99+365. See Sullivan v. La Crosse etc. Co., 10–386 (308); Guernsey v. Am. Ins. Co., 13–278 (256).

[83] R. L. 1905 § 4109(4); Tolerton v. Barck, 84–497, 88+19.

[84] R. L. 1905 §§ 1705, 4109. See § 4725.

[85] R. L. 1905 § 4110; Schoch v. Winona etc. Ry., 55–479, 57+208; Hillary v. G. N. Ry., 64–361, 67+80 (ticket agent in union station agent for companies using station); Slaughter v. Canadian Pac. Ry., 106–263, 119+398 (where a foreign railway company does not own or operate a railway within this state, but its cars are brought into the state by another railway company under some joint traffic arrangement, the foreign company is not transacting business within this state—a ticket agent of such local railway company, who sells through joint tickets over the local line within the state and also over the foreign line beyond the state is not a ticket agent of the foreign company upon whom service of process may be made under the statute). See, under former statute, In re St. Paul etc. Ry., 36–85, 30+432 (condemnation proceedings).

[86] R. L. 1905 § 4390; Siebert v. Quesnel, 65–107, 67+803 (unreasonable defence).

[87] Young v. Young, 18–90(72); Cunningham v. Water-Power S. Co., 74–282, 77+137.

[88] Gale v. Townsend, 45–357, 47+1064.

[89] Young v. Young, 18–90(72).

[90] Vaule v. Miller, 64–485, 67+540.

service that the defendant could not be found. Under our statute substituted service is permissible even when the defendant can be found. It is otherwise in justice court practice.[91]

7818. Return of sheriff—The return of an officer of the service of summons is conclusive in collateral proceedings, but the defendant may impeach it upon motion or other direct proceedings in the action to set aside the judgment on default, if the rights of third parties have not intervened.[92] But upon grounds of public policy the return of the officer should be deemed strong evidence of the facts as to which the law requires him to certify and should ordinarily be upheld unless opposed by clear and satisfactory evidence.[93] A misnomer in the return is not fatal.[94] To a summons addressed to two defendants a sheriff returned that the defendants, naming them conjunctively, could not be found. It was held that the return should be construed disjunctively.[95] If the language of a return fairly admits of an interpretation which will make the return legal and sufficient, it should be so construed upon collateral attack. When a return shows that the summons was properly and personally served on the defendant, it is immaterial that the officer making the service also certifies that the name by which the defendant was described in the papers served was not his true name, but only an alias.[96] A return that "after diligent search I have been unable to find such person within my county," has been sustained.[97] A return of service by leaving a copy at the usual place of abode has been sustained.[98] A court may set aside or amend a false return and thereby make its record conform to the fact.[99] Ordinarily a return is not complete until it is filed.[1]

7819. Admission of service—Proof of a written admission of service by a party is incomplete without proof of the genuineness of his signature.[2] A written admission of service is presumed to have been made on the day of its date.[3] An admission of service by an infant defendant is ineffectual.[4]

7820. Supplying or amending proof nunc pro tunc—The jurisdiction of the court is acquired by the fact of the service of summons and not by the proof of such fact filed of record. Consequently the proof of such service may be amended or supplied on motion.[5] In an action commenced against a non-resident defendant by publication of summons, where judgment for want of an answer is properly entered, except that the affidavit of publication is insufficient, if the summons was in fact duly served, and no facts appear to show that it would be unjust to the defendant, or would affect intervening rights of third persons, the court ought to allow a proper affidavit of publication to be filed nunc pro tunc.[6] Of course the omission of acts essential to the acquisition of jurisdiction cannot be remedied by amendment. It is funda-

91 See Goener v. Woll, 26–154, 2+163; Vaule v. Miller, 64–485, 67+540.
92 Crosby v. Farmer, 39–305, 40+71; Burton v. Schenck, 40–52, 41+244.
93 Jensen v. Crevier, 33–372, 23+541; Gray v. Hays, 41–12, 42+594; Knutson v. Davies, 51–363, 53+646; Allen v. McIntyre, 56–351, 57+1060; Value v. Miller, 69–440, 72+452; Osman v. Wisted, 78–295, 80+1127.
94 Sandwich Mfg. Co. v. Earl, 56–390, 57+938.
95 Blinn v. Chessman, 49–140, 51+666.
96 Sodini v. Sodini, 94–301, 102+861.
97 Slocum v. McLaren, 106–386, 119+406.
98 Goener v. Woll, 26–154, 2+163.
99 Osborne v. Wilson, 37–8, 32+786; Suchaneck v. Smith, 53–96, 54+932.
1 Corson v. Shoemaker, 55–386, 57+134; Easton v. Childs, 67–242, 69+903.
2 Masterson v. Le Claire, 4–163(108). See Kipp v. Fullerton, 4–473(366).
3 Rahilly v. Lane, 15–447(360).
4 Phelps v. Heaton, 79–476, 82+990.
5 Hinkley v. St. Anthony Falls etc. Co., 9–55(44); Fowler v. Cooper, 81–19, 83+464; Mille Lacs County v. Morrison, 22–178.
6 Burr v. Seymour, 43–401, 45+715; Crombie v. Little, 47–581, 588, 50+823; Fowler v. Cooper, 81–19, 25, 83+464; Stai v. Selden, 87–271, 92+6; Bigelow v. Chatterton, 51 Fed. 614. See Bennett v. Blatz, 44–56, 46+319; State v. Crosley Park L. Co., 63–205, 65+268.

mental that a court cannot acquire jurisdiction by an amendment of the record nunc pro tunc.

PUBLICATION OF SUMMONS

7821. In what cases authorized—Service of summons by publication is authorized where the defendant is a foreign corporation, having property within the state;[7] where the action is for divorce, or a separation from bed and board, and the court has ordered that service be made by published notice;[8] where the subject of the action is real or personal property within the state, in or upon which the defendant has or claims a lien or interest, or the relief demanded consists wholly or partly in excluding him from any such interest or lien;[9] where the action is to foreclose a mortgage or to enforce a lien on realty;[10] on unknown heirs, in actions relating to realty;[11] and on unknown defendants in actions to determine adverse claims.[12] Under a former statute, in actions for the recovery of money the summons could be served on a non-resident by publication only when the action arose on contract.[13]

7822. No order of court necessary—Under the law as it now stands no judicial investigation of the sufficiency of the affidavit before publication is provided for. An order of the court authorizing the publication of summons is unnecessary, except in actions for divorce. All that a party need do is to file the statutory affidavit and then proceed to the publication as a matter of right. Unlike many statutes upon this subject our statute does not require that the facts should be "made to appear" or be "shown" by the affidavit. All that is necessary is that the affidavit should "state" such facts.[14]

7823. Affidavit—The affidavit required by the statute[15] is jurisdictional and must state all the statutory requirements. Reference cannot be made to the complaint on file in the action for the purpose of supplying material facts omitted from the affidavit.[16] The affidavit must state facts positively and not on information and belief, except where the latter form is expressly authorized.[17] It need not be sworn to on the day on which the action is commenced. All that is necessary is that it be sworn to within such reasonably brief period before the publication that no presumption can fairly arise that the state of facts has changed in the meantime. It is not void because entitled in an action

[7] R. L. 1905 § 4112(1); Broome v. Galena etc. Co., 9–239(225) (under Pub. St. 1849–1858, c. 60 § 54); Strom v. Montana C. Ry., 81–346, 84+46 (property must be of substantial value and such as to justify a reasonable probability that the creditor can secure something from a sale thereof that can be applied as a payment on his demand); Connery v. Quincy etc. Ry., 92–20, 22, 99+365 (necessity of property in this state).

[8] R. L. 1905 § 4112(4); Becklin v. Becklin, 99–307, 109+243. See, under Wisconsin statute, McHenry v. Bracken, 93–510, 101+960.

[9] R. L. 1905 § 4112(5); Lane v. Innes, 43–137, 45+4 (action to set aside a fraudulent conveyance); Crombie v. Little, 47–581, 50+823 (action to foreclose a mortgage); Corson v. Shoemaker, 55–386, 57+134 (action to reform description of land in a deed); Fowler v. Jenks, 90–74, 95+887, 96+914, 97+127 (action involving shares of stock in a domestic corporation).

[10] R. L. 1905 § 4112(6); Crombie v. Little, 47–581, 50+823 (action to foreclose a mortgage).

[11] R. L. 1905 § 4388. See, as to opening default, Boeing v. McKinley, 44–392, 46+766; Hoyt v. Lightbody, 93–249, 101+304.

[12] See § 8046.

[13] Hencke v. Twomey, 58–550, 60+667 (liability of stockholder held on contract within statute).

[14] Crombie v. Little, 47–581, 50+823; Easton v. Childs, 67–242, 69+903; McClymond v. Noble, 84–329, 87+838. Under a former statute an order of court was necessary. Cleland v. Tavernier, 11–194 (126); Smith v. Valentine, 19–452(393). See, as to order for publication in action for divorce under Wisconsin statute, McHenry v. Bracken, 93–510, 101+960.

[15] R. L. 1905 § 4111. See, as to requisites of affidavit under former statute, Mackubin v. Smith, 5–367(296); Harrington v. Loomis, 10–366(293); Gemmell v. Rice, 13–400(371).

[16] Gilmore v. Lampman, 86–493, 90+1113.

[17] Feikert v. Wilson, 38–341, 37+585.

not actually commenced at the time.[18] An affidavit for publication of summons against a foreign corporation need not show that there is no person within the state upon whom service might legally be made.[19] A statement in an affidavit that "the defendant is a corporation or company, established and doing business under and by virtue of the laws of the state of Illinois" sufficiently shows the corporate character of the defendant.[20] An affidavit which alleged that the action was brought under G. S. 1878 c. 75 § 2, to determine adverse claims to certain real property; that all the defendants named were non-residents and their residences unknown; that affiants had searched for such defendants but neither they nor their places of residence could be found, has been held sufficient as to the nature of the action and the non-residence of defendants.[21]

7824. Filing affidavit—The filing of the affidavit is a condition precedent to publication—a jurisdictional prerequisite. It cannot be filed after publication, or after the commencement of publication.[22] A failure of the officer with whom an affidavit is filed to make an indorsement on it of the filing is not fatal.[23]

7825. Mailing copy of summons—The mailing of a copy of the summons to a non-resident does not constitute personal service, though it is duly received. It is the publication of the summons that gives the court jurisdiction and not the service through the mails.[24]

7826. Filing the complaint—Proper practice requires that the complaint should be filed before the commencement of the publication, but this is not jurisdictional.[25]

7827. Return of sheriff—Prior to the revision of 1905 the making and filing of the return of the sheriff that the defendant could not be found was not a jurisdictional prerequisite to the publication of summons.[26] To a summons addressed to two defendants a sheriff returned that the defendants, naming them conjunctively, could not be found. This official return was construed as meaning that neither of the defendants could be found.[27]

7828. Time of publication—The publication need not be made on the same day of each week,[28] and it is valid though one of the publications is on a holiday.[29]

7829. Affidavit of publication—An affidavit of publication for "six successive weeks" is insufficient,[30] unless it appears to have been made in a weekly paper.[31] An affidavit stating that the summons was published "seven" weeks, once a week, the date of the first and last publication being shown, from which it clearly appeared that six weeks was intended, has been held sufficient.[32] The affidavit need not show that the publication was on the same day of each week.[33]

[18] Crombie v. Little, 47–581, 50+823.
[19] Broome v. Galena etc. Co., 9–239(225).
[20] Id.
[21] Inglee v. Welles, 53–197, 55+117.
[22] Barber v. Morris, 37–194, 33+559; Brown v. St. P. etc. Ry., 38–506, 38+698; Bardwell v. Collins, 44–97, 46+315; Cousins v. Alworth, 44–505, 47+169; Easton v. Childs, 67–242, 69+903; Bogart v. Kiene, 85–261, 88+748.
[23] Bogart v. Kiene, 85–261, 88+748.
[24] Bausman v. Tilley, 46–66, 48+459. See Martin v. Pond, 30 Fed. 15 (mailing to wrong address not fatal).
[25] Lane v. Innes, 43–137, 45+4; Crombie v. Little, 47–581, 50+823.
[26] Easton v. Childs, 67–242, 69+903 (overruling Corson v. Shoemaker, 55–386, 57+134); Gilmore v. Lampman, 86–493, 90+1113; Perkins v. Gibbs, 108–151, 121+605.
[27] Blinn v. Chessman, 49–140, 51+666.
[28] Raunn v. Leach, 53–84, 54+1058.
[29] Malmgren v. Phinney, 50–457, 52+915.
[30] Ullman v. Lion, 8–381(338); Golcher v. Brisbin, 20–453(407); Godfrey v. Valentine, 39–336, 40+163; Bigelow v. Chatterton, 51 Fed. 614.
[31] McHenry v. Bracken, 93–510, 101+960.
[32] Lane v. Innes, 43–137, 45+4.
[33] Raunn v. Leach, 53–84, 54+1058.

7830. Form of summons—Defects—Misnomer—Our statute makes no special provision respecting the form and contents of a summons to be published. It is therefore proper to use the ordinary summons. A published summons should always state that the complaint has been filed but this is not essential to the jurisdiction of the court. Where the summons, as published, contains the requisites of process to bring the party into court, formal defects therein will not prevent jurisdiction attaching, any more than in cases of personal service, if publication thereof is shown by the record to have been authorized and to have been made and completed in conformity with the statute.[34] Errors and defects in the proceedings taken to obtain jurisdiction of non-residents, of a nature tending to mislead and prejudice the defendant, are fatal to the jurisdiction of the court. Though the failure to insert the middle initial of the defendant's name in a summons where service is made by publication might not be fatal error, the use of a wrong initial will not confer jurisdiction over the real party defendant. The publication of a summons to "George H. Leslie" confers no jurisdiction over "George W. Leslie." [35] A service of summons against "John O. Shea" by publication, has been held not to give jurisdiction against "John O'Shea." [36] A slight variance in the spelling and pronunciation of the name of a defendant has been held not fatal.[37]

7831. Personal service out of state—It is provided by statute that personal service of summons without the state, proved by the affidavit of the person making the same made before an authorized officer having a seal, shall have the same effect as a publication of summons.[38] Personal service under this statute is simply a substitute for service by publication and must be preceded by a strict compliance with all the statutory requirements essential to publication.[39]

7832. Statute must be followed and construed strictly—Service of summons by publication is in derogation of common law and allowable only where expressly authorized by statute. Statutes authorizing such a mode of service are to be strictly construed and followed, as it is the general policy of the law to secure actual notice to persons against whom judicial proceedings are instituted.[40]

7833. When and how jurisdiction acquired—Jurisdiction is acquired by the publication of summons and not by the proof thereof filed, and the proof can be supplied or amended nunc pro tunc.[41] The service of the summons is deemed complete and jurisdiction thereby acquired at the expiration of the time prescribed for publication, that is, when the last publication has been made.[42]

7834. Presumption of jurisdiction—Ordinarily the jurisdiction of a domestic court of superior jurisdiction over the person of the defendant will be presumed in the absence of facts in the record affirmatively showing the contrary, but this presumption does not obtain where jurisdiction is acquired over a non-resident by publication of summons. The record must affirmatively show compliance with the statutory requirements.[43]

[34] Lane v. Innes, 43–137, 45+4.
[35] D'Autremont v. Anderson, 104–165, 116+357.
[36] Clary v. O'Shea, 72–105, 75+115.
[37] Lane v. Innes, 43–137, 45+4.
[38] R. L. 1905 § 4111.
[39] Spencer v. Koell, 91–226, 97+974. See Sodini v. Sodini, 94–301, 102+861.
[40] Morey v. Morey, 27–265, 6+783; Barber v. Morris, 37–194, 33+559; Cousins v. Alworth, 44–505, 47+169; Shepherd v. Ware, 46–174, 48+773; Ware v. Easton, 46–180, 48+775; Corson v. Shoemaker, 55–386, 57+134; Gilmore v. Lampman, 86–493, 90+1113; McHenry v. Bracken, 93–510, 514, 101+960; D'Autremont v. Anderson, 104–165, 116+357.
[41] See § 7820.
[42] Auerbach v. Maynard, 26–421, 4+816.
[43] Godfrey v. Valentine, 39–336, 40+163;

7835. Constitutionality of statutes—It is for the legislature of a state to prescribe the mode of bringing parties into court; but this general power is subject to the limitation that the mode prescribed must be due process of law.[44] What is due process of law in this regard depends upon the nature of the action and the residence of the defendant. The process of a court cannot run beyond the territory of its sovereign and jurisdiction over a non-resident cannot be acquired by publication of summons in actions in personam.[45] But where the action is in rem, that is, where the subject of the action is real or personal property or personal status within the jurisdiction of the court, the legislature may authorize the service of summons on non-residents by publication.[46] The legislature may even authorize the service of summons on residents by publication in actions in rem. Thus it has been held that our statute authorizing the publication of summons in actions to determine adverse claims against "unknown claimants" is constitutional.[47] On the other hand it has been held that in actions in personam, of a strictly judicial character, and proceeding according to the common law, service of summons by publication in a newspaper, upon resident defendants, who are personally within the state and can be found therein, is not due process of law.[48] So much of Laws 1901 c. 278, as provides for the service of the summons in a personal action against a natural person who is a citizen of another state, but carries on business in this state, on his agent in charge of the business, without a seizure of his property by the process of the court, is unconstitutional.[49]

7836. Extent of jurisdiction acquired over non-residents—A court cannot acquire jurisdiction to render a personal judgment against a non-resident by publication of summons. Except in cases involving personal status or where that mode of service may be considered as having been assented to in advance, service by publication in actions against non-residents is effectual only where, in connection with process against the person for commencing the action, the property in the state is brought under the control of the court and subjected to its disposition by process adapted to that purpose, as for example, by attachment, or where the judgment is sought as a means of reaching such property, or affecting some interest therein; in other words, where the action is in the nature of a proceeding in rem. Where the proceeding is wholly in personam service by publication against a non-resident is ineffectual for any purpose. In an action to enforce a pecuniary liability against a non-resident, where process is constructively served by publication, and he does not voluntarily appear, the proceedings, though in form in personam are, in effect, in rem. It is only by attaching property that the court acquires jurisdiction, and then only to the extent of the property attached.[50]

Burr v. Seymour, 43–401, 45+715. See Bogart v. Kiene, 85–261, 88+748.

[44] Bardwell v. Collins, 44–97, 46+315; Shepherd v. Ware, 46–174, 48+773; Hinckley v. Kettle River Ry., 70–105, 72+835.

[45] See § 7836.

[46] Lane v. Innes, 43–137, 45+4; Shepherd v. Ware, 46–174, 48+773; Crombie v. Little, 47–581, 50+823; Corson v. Shoemaker, 55–386, 57+134.

[47] Shepherd v. Ware, 46–174, 48+773; McClymond v. Noble, 84–329, 87+838. See State v. Westfall, 85–437, 89+175.

[48] Bardwell v. Collins, 44–97, 46+315; Smith v. Hurd, 50–503, 52+922; McNamara v. Casserly, 61–335, 63+880.

[49] Cabanne v. Graf, 87–510, 92+461.

[50] Pennoyer v. Neff, 95 U. S. 714; Heffner v. Gunz, 29–108, 12+342; Kenney v. Goergen, 36–190, 31+210; Cousins v. Alworth, 44–505, 47+169; Lydiard v. Chute, 45–277, 47+967; Daly v. Bradbury, 46–396, 49+190; Crombie v. Little, 47–581, 50+823; Plummer v. Hatton, 51–181, 53+460; Corson v. Shoemaker, 55–386, 57+134; Cabanne v. Graf, 87–510, 92+461; Boyle v. Musser, 88–456, 93+520.

ABUSE OF PROCESS

7837. What constitutes—The wilful use of judicial process for a purpose not justified by law is an abuse for which an action will lie.[51]

7838. Distinguished from malicious prosecution—An action for abuse of process differs from an action for malicious prosecution in that want of probable cause is not an essential element, and the original proceeding need not have terminated.[52]

PROCHEIN AMI—See Infants, 4452.
PRO CONFESSO—See Judgments, 4995.
PRODUCTION OF DOCUMENTS—See Evidence, 3284; Inspection.
PROFITS—See Damages, 2535, 2583; and note 53.
PRO FORMA ORDERS—See Motions and Orders, 6508.

PROHIBITION

7839. Constitutional provision—The constitution of this state provides that the supreme court shall have "appellate jurisdiction in all cases, both in law and equity." [54] This would undoubtedly be held to authorize the issuance of the writ of prohibition irrespective of statute.[55]

7840. General nature and office of writ—A writ of prohibition, as employed in this state, is an extraordinary writ issuing out of the supreme court for the purpose of keeping inferior courts, or tribunals, corporations, officers and individuals invested by law with judicial or quasi judicial authority, from going beyond their jurisdiction.[56] The writ is directed to the court or other tribunal and to the prosecuting party commanding the former not to entertain and the latter not to prosecute the action or proceeding.[57] The office of the writ is not to correct errors or reverse illegal proceedings, but to prevent or restrain the usurpation of inferior tribunals or judicial officers, and to compel them to observe the limits of their jurisdiction.[58] It is not a writ of right, but issues in the discretion of the court and only in extreme cases, where the law affords no other adequate remedy by motion, trial, appeal, certiorari, or otherwise.[59] It is to be used with great caution and forbearance, for the furtherance of justice, and for securing order and regularity in the subordinate tribunals of the state.[60] The exercise of unauthorized judicial or quasi judicial power is regarded as a contempt of the sovereign which should be promptly checked.[61] Three things are essential to justify the writ: first, that the court,

[51] Severns v. Brainard, 61-265, 267, 63+477. See Taylor v. Blake, 11-255(170); Stewart v. Cooley, 23-347; Rother v. Monahan, 60-186, 62+263; Rustad v. Bishop, 80-497, 83+449; Grimestad v. Lofgren, 105-286, 117+515; Hansen v. Wyman, 105-491, 494, 117+926; Garnishment, 3977; Note, 86 Am. St. Rep. 397.

[52] Pixley v. Reed, 26-80, 1+800; Grimestad v. Lofgren, 105-286, 292, 117+515.

[53] Connolly v. Davidson, 15-519(428, 436).

[54] Const. Minn. art. 6 § 2.

[55] See Brown County v. Winona etc. Co., 38-397, 37+949.

[56] Home Ins. Co. v. Flint, 13-244(228); Dayton v. Paine, 13-493(454); United States v. Shanks, 15-369(302); State v. Probate Ct., 19-117(85); State v. McMartin, 42-30, 43+572; State v. Ward, 70-58, 72+825. See, upon the general subject, Note, 111 Am. St. Rep. 929.

[57] Home Ins. Co. v. Flint, 13-244(228); Dayton v. Paine, 13-493(454).

[58] Dayton v. Paine, 13-493(454).

[59] State v. Probate Ct., 19-117(85); State v. Wilcox, 24-143; State v. Municipal Ct., 26-162, 2+166; State v. Dist. Ct., 26-233, 2+698; State v. Cory, 35-178, 28+217; State v. Young, 44-76, 46+204; State v. Ward, 70-58, 72+825; State v. Dist. Ct., 77-302, 79+960.

[60] Prignitz v. Fischer, 4-366(275); State v. Ward, 70-58, 72+825.

[61] State v. Young, 29-474, 523, 9+737; State v. McMartin, 42-30, 43+572.

officer, or person is about to exercise judicial or quasi judicial power; second, that the exercise of such power by such court, officer, or person is unauthorized by law; third, that it will result in injury for which there is no other adequate remedy.[62]

7841. To whom writ may be directed—The writ of prohibition is issued only to restrain the exercise of judicial powers. It will not issue to restrain the exercise by individuals or non-judicial bodies of political, legislative, or administrative functions.[63] It is usually directed to courts to keep them within the limits of their jurisdiction, but it may also issue to an officer or municipal body to prevent the unlawful exercise of judicial or quasi judicial power;[64] and, in rare cases, it may issue to a person or body of persons, not being in law a court, or strictly officers.[65]

7842. Other adequate remedy—The rule laid down by some text-writers and decided cases, that the writ of prohibition is not a proper remedy, when there is an adequate remedy by appeal or writ of error, is not one of universal application. It is undoubtedly correct as applied to a case where, in the course of an ordinary action, the court attempts to decide upon matters not within its jurisdiction, for all errors of that description are best corrected by the usual remedy of an appeal, writ of error or certiorari. To extend the rule further than that would almost entirely abolish the writ. There are very few proceedings of a judicial character in which a party aggrieved by a usurpation may not, either by some mode of review and correction, or by an action of trespass or otherwise, have an adequate remedy for the wrong. But in extraordinary proceedings the existence of such a remedy is not always a ground for refusing the writ.[66] Where a court is threatening to proceed in a matter over which it has no jurisdiction a writ of prohibition will not be denied merely because there is a remedy by appeal from the judgment.[67]

7843. Danger of usurpation must be real and imminent—To authorize the issuance of the writ it should be made to appear unequivocally that the inferior court is about to proceed in some matter over which it possesses no jurisdiction. This may be made to appear by setting out any acts or declarations of the court or officer which indicate his intention to pursue such a course. The mere fact that the court has been asked to proceed beyond its jurisdiction is sufficient, for the presumption is that the court will act only within its jurisdiction.[68]

7844. Jurisdiction of the person—Prohibition will not lie to question the jurisdiction of the court over the person of the defendant. The proper remedy is by motion, demurrer, or appeal.[69]

7845. When lies—In general—Want of jurisdiction of subject-matter—To warrant a court in granting the extraordinary remedy of prohibition, it must clearly appear that the inferior court or tribunal to which it is directed is proceeding in some matter over which it possesses no rightful jurisdiction, or is exceeding its legitimate powers in a matter over which it has jurisdiction.

[62] State v. Young, 29–474, 523, 9+737; State v. Ward, 70–58, 72+825; State v. Dist. Ct., 77–302, 79+960.

[63] Home Ins. Co. v. Flint, 13–244(228); Dayton v. Paine, 13–493(454); State v. Ueland, 30–29, 14+58; State v. Peers, 33–81, 21+860; State v. Ostrom, 35–480, 29+585.

[64] State v. Young, 29–474, 523, 9+737; State v. Ostrom, 35–480, 29+585; State v. Ward, 70–58, 72+825.

[65] State v. Young, 29–474, 523, 9+737; State v. McMartin, 42–30, 43+572.

[66] State v. Wilcox, 24–143. See State v. Municipal Ct., 26–162, 2+166; State v. Ward, 70–58, 72+825.

[67] State v. Dist. Ct., 77–302, 307, 79+960.

[68] Prignitz v. Fischer, 4–366(275); Dayton v. Paine, 13–493(454).

[69] State v. Dist. Ct., 26–233, 2+698.

It is a preventive, not a corrective, remedy. The only question reached by the writ, therefore, is whether the inferior court or tribunal is wholly without jurisdiction, or is exceeding its legitimate power and authority. If it has no jurisdiction of the subject-matter, prohibition is a proper remedy; but if it has jurisdiction of the particular matter, and there is no claim that it is exceeding its authority in the premises, the writ will not issue, however defective its proceedings may be.[70] In an action proceeding in the ordinary way, by summons, pleadings, trial, judgment, etc., where the cause of action is within the jurisdiction of the court, and in the course of the action any matter arises or is presented to the court which requires it to decide upon its jurisdiction, an error in such decision ought to be corrected upon review and not by prohibition. Due protection to the party in such cases does not require that the supreme court should interrupt and suspend the action of the court below until the question of jurisdiction thus raised and decided may be passed upon by that court. It is much better for the orderly administration of justice that such a case should first go through the usual course of trial and decision in the court below and then be carried to the supreme court in the ordinary way.[71] A court does not lose jurisdiction of the subject-matter by making an erroneous ruling or unauthorized order.[72] Prohibition does not lie for an excess of jurisdiction committed during the course of a trial.[73] In one case in this state it was said, obiter, that prohibition would lie "where such inferior tribunal assumes to entertain a cause over which it has jurisdiction but goes beyond its legitimate powers and transgresses the bounds prescribed by law."[74] This was a mere quotation and should not be taken unqualifiedly as the law in this state. It is certainly inconsistent with several of our cases.[75] The court may, however, lose its jurisdiction during the course of an action by reason of the subject-matter passing beyond its control.[76]

7846. Writ granted—Cases are cited below in which a writ of prohibition was granted.[77]

[70] State v. Crosby, 92-176, 99+636; State v. Craig, 100-352, 111+3.

[71] State v. Municipal Ct., 26-162, 2+166; State v. Dist. Ct., 26-233, 2+698; State v. Cory, 35-178, 28+217.

[72] State v. Dist. Ct., 77-405, 80+355.

[73] State v. Wilcox, 24-143, 147.

[74] State v. Ward, 70-58, 72+825.

[75] State v. Municipal Ct., 26-162, 2+166; State v. Dist. Ct., 26-233, 2+698; State v. Cory, 35-178, 28+217; State v. Dist. Ct., 77-405, 80+355.

[76] State v. Probate Ct., 19-117(85); State v. Young, 44-76, 46+204.

[77] In re Lee, 1-60(44) (to prevent a judge of probate from proceeding by writs of attachment and other process to enforce obedience to a writ of habeas corpus issued by him without authority); United States v. Shanks, 15-369(302) (to restrain a probate judge from administering the estate of a tribal Indian); State v. Probate Ct., 19-117(85) (to restrain a probate court from reviewing the proceedings for a sale, after confirmation, the confirmation of the sale having exhausted the jurisdiction of the court); State v. Young, 29-474, 523, 9+737 (to restrain certain district judges from proceeding under the act of March 2, 1881, for the adjustment of the state railroad bonds); State v. Simons, 32-540, 21+750 (to restrain a district judge from proceeding under Laws 1883 c. 73 providing for the incorporation of villages upon petition to the judge of the district court, the statute being held unconstitutional); State v. Young, 44-76, 46+204 (to restrain court from exercising jurisdiction over property of insolvent after conveyance by assignee); State v. Dist. Ct., 88-95, 92+518 (to restrain a district court from proceeding in an action upon a change of venue); State v. Thompson, 91-279, 97+887 (to restrain a city council from removing a mayor).

[78] Prignitz v. Fischer, 4-366(275) (to restrain a court commissioner from hearing and determining a motion to set aside a demurrer and for judgment, there being no evidence that he was about to entertain the motion); Home Ins. Co. v. Flint, 13-244(228) (to restrain a county attorney from proceeding under the act of March 9, 1867 requiring him to examine the financial condition of insurance companies); Dayton v. Paine, 13-493(454) (acts already done); State v. Municipal Ct., 26-162, 2+166 (unlawful detainer—equitable defence claimed to oust jurisdiction of court—

7847. Writ denied—Cases are cited below in which a writ of prohibition was denied.[78]

7848. Return of court—Adoption by party—While a party is permitted to adopt the return of the court, he is not required to do so, and whether he does or not, on the issue made on the return the question to be determined is whether the court should be restrained. The party is only restrained from moving the court to do the prohibited act, and, therefore, as a matter of course, unless it is determined that the court should be restrained, he cannot be. His acts, except in prosecuting the suit, are not a subject of inquiry in such a proceeding, for the writ only arrests judicial acts, and what he does, or threatens to do, except in moving the court in the prohibited direction, is immaterial.[79]

PROMISE—See Contracts.
PROMISSORY NOTES—See Bills and Notes.
PROMOTERS—See Corporations, 1977, 2056.
PROMPTNESS—See note 80.
PROOF—See Evidence, 3225, 3468, 3473.

proper remedy an appeal); State v. Dist. Ct., 26–233, 2+698 (want of jurisdiction over the person—summons improperly served—special appearance with motion to set aside summons—motion denied—proper remedy an appeal); State v. Ueland, 30–29, 14+58 (to restrain a probate judge from proceeding under G. S. 1878 c. 10 § 124 in respect to the incorporation of cities); State v. Peers, 33–81, 21+860 (to restrain the action of two justices of the peace from taking testimony in an election contest); State v. Cory, 35–178, 28+217 (unlawful detainer—defence of fraud and usury held to oust jurisdiction of court—proper remedy an appeal); State v. Ostrom, 35–480, 29+585 (to restrain county commissioners from proceeding in the performance of the acts necessary to submitting the question of a change of a county seat to a vote of the people); State v. McMartin, 42–30, 43+572 (to test the title of a de facto judicial officer to the office); State v. Young, 44–76, 46+204 (proceedings for contempt after appeal with a supersedeas); State v. Sullivan, 67–379, 69+1094 (to restrain a person from acting as a judge of a court claimed to be organized under an unconstitutional statute); State v. Ward, 70–58, 72+825 (trial of mayor by common council—removal from office for cause); State v. Dist. Ct., 77–405, 80+355 (conviction before justice for crime claimed not to be within jurisdiction of justice—appeal on law and facts to district court—motion to dismiss for want of jurisdiction in justice denied); Pottgieser v. Dist. Ct., 81–420, 84+1115 (to restrain a district court from correcting an official election ballot); Bem-Way-Bin-Ness v. Eshelby, 87–108, 91+291 (to restrain a district court from taking jurisdiction of an action of ejectment brought by an Indian); State v. Bazille, 89–440, 95+211 (to restrain a probate court from hearing and determining an application to set aside a final decree and allow a creditor to file a claim); State v. Dist. Ct., 90–457, 97+132 (to restrain a district court and city in proceedings under a home rule charter relating to the allowance of claims against the city); State v. Crosby, 92–176, 99+636 (to restrain a judge and clerk of a district court from proceeding in the establishment of a drainage ditch under Laws 1902 c. 38); State v. Craig, 100–352, 111+3 (to restrain a mayor and aldermen from hearing an election contest); State v. Baxter, 104–364, 116+646 (to restrain a judge and clerk of a district court in ditch proceedings).

[79] R. L. 1905 §§ 4569–4571; Dayton v. Paine, 13–493(454).

[80] McQueen v. Burhans, 77–382, 387, 80+201.

PROPERTY

IN GENERAL

7849. Definition—Property is ownership or the subject of ownership—the exclusive right to possess, enjoy, and dispose of a thing; a thing owned; that to which a person has the legal title, whether in his possession or not.[81]

7850. What constitutes—Bonds of the state,[82] an inchoate right to public lands,[83] an established business,[84] the good will of a business,[85] a franchise,[86] a right to damages for injuries to the person caused by the wrongful act of another,[87] and a trade secret,[88] have been held to be property.

7851. Dominion—The right of uncontrolled possession, use, and disposal; power of control.[89] One has exclusive dominion over land which he owns absolutely.[90]

7852. Above and below surface—It is a maxim of the common law that an owner of land owns whatever is above or below the surface.[91]

7853. Building on land of another—Ownership and possession being shown of a building located upon the land of another, it will not be presumed that the building was so located without authority.[92]

TITLE

7854. Definition—Title is ordinarily synonymous with ownership.[93] As applied to realty it is sometimes used in the sense of the means whereby the owner has the just and legal possession and enjoyment; the lawful cause or ground of possessing that which is ours.[94] One has a complete title if he has possession, right of possession, and right of property.[95]

OWNERSHIP

7855. Definition—Absolute or complete ownership is the exclusive right to possess, enjoy, and dispose of a thing;[96] the maximum of claim or right in a specific thing allowed by law;[97] the right by which a thing belongs specifically to some person or body;[98] the entirety of the powers of use and disposal allowed by law.[99] An owner is a person in whom is vested the ownership, dominion, or title to property; one who owns; a rightful proprietor; one who has the legal or rightful title, whether he is the possessor or not;[1] one having

[81] Banning v. Sibley, 3-389(282, 298).
[82] Banning v. Sibley, 3-389(282).
[83] Red River etc. Ry. v. Sture, 32-95, 20+229.
[84] Aldrich v. Wetmore, 52-164, 172, 53+1072. See Hansen v. Wyman, 105-491, 494, 117+926.
[85] See § 4045.
[86] McRoberts v. Washburne, 10-23(8).
[87] Mattson v. Minn. etc. Ry., 95-477, 488, 104+443.
[88] Elaterite P. & M. Co. v. Frost, 105-239, 117+388.
[89] Century Dict.
[90] Lamprey v. Danz, 86-317, 321, 90+578; Realty Co. v. Johnson, 92-363, 365, 100+94.
[91] O'Brien v. St. Paul, 25-331, 335; Stillwater W. Co. v. Farmer, 89-58, 64, 93+907; Erickson v. Crookston etc. Co., 105-182, 193, 117+435. See Lanpher v. Glenn, 37-4, 33+10.
[92] Jones v. G. N. Ry., 100-56, 110+260.
[93] Century Dict.
[94] Loy v. Home Ins. Co., 24-315. The word "interest" is broader than the word "title," and includes both legal and equitable rights. Gibb v. Phil. etc. Co., 59-267, 61+137.
[95] Camp v. Smith, 2-155(131, 142); Allen v. Allen, 48-462, 51+473.
[96] Banning v. Sibley, 3-389(282, 298).
[97] Pollock, Expansion of the Common Law, 12.
[98] Century Dict.
[99] Pollock, Jurisprudence, 175.
[1] Atwater v. Spalding, 86-101, 90+370. See Davis v. Murphy, 3-119(69, 73); Ejectment, 2875; Eminent Domain, 3076.

dominion over a thing;[2] one who has the usufruct, control or occupation of property.[3] One may be deemed an owner though he has only an equitable title,[4] or a limited or qualified title.[5] One may be an owner of land though he has an estate less than the fee.[6] The word owner is not a legal term having a technical signification, but a word of common parlance.[7] He is the true owner who has the best right to possess, and to set or leave others in his place fortified with like rights and exercising like powers over the thing in question.[8]

POSSESSION

7856. Definition—Possession is the physical control which belongs of right to unqualified ownership; the having a thing in such manner as to exclude the control of other persons; that detention of or dominion over a thing by one person which precludes others from the adverse physical occupancy of or dominion over it.[9] Actual possession or occupancy of land is an open, visible occupancy, as distinguished from the constructive possession which follows the legal title. It means possession in fact, effected by actual entry upon the land and actual occupancy.[10] Occupancy and possession are ordinarily synonymous.[11] Constructive possession is possession through the occupancy of others, or that possession which is imputed by the law to one who has title to a thing of which no one is in actual possession.[12]

7857. Basis of property rights—Possession is the basis of property rights. Actual enjoyment and control of land or goods, the recognition of peaceable enjoyment and control as deserving the protection of the law, the defence of them against usurpation, and, at need, restitution by the power of the state for the person who has been deprived of them by unauthorized force; these are the points that stand in the forefront of the common law when we take it as presented by its own history and in its native authorities. Or, more briefly, possession guaranteed by law is with us a primary, not a secondary notion. Possession and rights to possess are the subject-matter of our remedies and forms of action. The notion of ownership, as the maximum of claim or right in a specific thing allowed by law, is not primary, but developed out of conflicting claims to possession and disposal. He is the true owner who has the best right to possess, and to set or leave others in his place fortified with like rights and exercising like powers over the thing in question.[13]

7858. As title or evidence of title to realty—Actual possession of realty is prima facie evidence of title in fee thereto.[14] It is title or ownership, and

[2] Benjamin v. Wilson, 34–517, 520, 26+ 725.

[3] Parker v. Mpls. etc. Ry., 79–372, 82+ 673.

[4] Atkins v. Little, 17–342(320, 327); Wilder v. Haughey, 21–101, 106; Hook v. Northwest T. Co., 91–482, 98+463.

[5] Benjamin v. Wilson, 34–517, 520, 26+ 725; Miller v. Adamson, 45–99, 47+452; Moritz v. St. Paul, 52–409, 54+370; State v. Corbett, 57–345, 59+317; Morey v. Duluth, 75–221, 77+829; Cumbey v. Lovett, 76–227, 79+99; St. Paul v. Clark, 84–138, 86+893.

[6] Parker v. Mpls. etc. Ry., 79–372, 82+ 673.

[7] Benjamin v. Wilson, 34–517, 520, 26+ 725.

[8] Pollock, Expansion of the Common Law, 12.

[9] Century Dict. See, upon the general subject, Pollock and Wright, Possession; Holmes, Common Law, c. 6; Markby, Elements of Law, c. 9; Salmond, Jurisprudence, 238–272; Pollock, Jurisprudence (2 ed.) c. 7; Holland, Jurisprudence (10 ed.) p. 185; 18 Harv. L. Rev. 196.

[10] Cutting v. Patterson, 82–375, 380, 85+ 172. See Quehl v. Peterson, 47–13, 49+ 390.

[11] Thompson v. Berlin, 87–7, 91+25.

[12] Century Dict.

[13] Pollock, Expansion of the Common Law, 11.

[14] Steele v. Fish, 2–153(129); Wilder v. St. Paul, 12–192(116, 122); Rau v. Minn. V. Ry., 13–442(407); St. Paul etc. Ry. v. Matthews, 16–341(303, 312); Sherwood v. St. P. & C. Ry., 21–127; Perkins v. Morse,

not mere evidence thereof, as against every one not showing a better title.[15] Mere possession is not alone presumptive evidence of title as against an admitted prior title in fact.[16]

7859. As title or evidence of title to personalty—Actual possession of personalty is prima facie evidence of ownership thereof.[17] It is title or ownership, and not mere evidence thereof, as against every one not showing a better title.[18]

7860. Owner presumptively entitled to possession—The legal owner of either real [19] or personal [20] property is presumptively entitled to the possession thereof. The legal owner is deemed to be in constructive possession of vacant land.[21] This imaginary or fictitious possession is assumed, however, only so far as may be necessary to enable the owner to assert and protect his rights. It does not, of itself, amount to an assertion of them. That, the owner must do for himself; the law will not do it for him.[22] The legal owner of personalty may have possession of it, though it is not in his actual custody or occupation.[23]

PROPRIETOR—An owner; the person who has the legal right or exclusive title to anything, whether in possession or not.[24]

PROSECUTING ATTORNEYS—See Counties, 2307, and note 25.

PROSECUTOR—See Criminal Law, 2418.

PROSPECTUS—See Contracts, 1746.

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PROVINCE OF COURT AND JURY—See Criminal Law, 2477; Trial 9707–9711.

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PUBLIC—See note 26.

PUBLICATION—See Process, 7821, and note 27.

PUBLIC CONTRACTORS—See Municipal Corporations, 6720.

PUBLIC HEALTH—See Health.

30–11, 13+911; Sherin v. Brackett, 36–152, 30+551; Witt v. St. P. etc. Ry., 38–122, 35+862; Adolph v. Mpls. & P. Ry., 42–170, 172, 43+848; Moe v. Chesrown, 54–118, 55+832; Stevens v. Sandnes, 108–271, 121+902.

[15] Herrick v. Churchill, 35–318, 29+129; Sherin v. Brackett, 36–152, 30+551; Olson v. St. P. etc. Ry., 38–419, 37+953; Swain v. Lynd, 74–72, 75, 76+958.

[16] Perkins v. Morse, 30–11, 13+911.

[17] Derby v. Gallup, 5–119(85, 101); McClellan v. St. P. etc. Ry., 58–104, 59+978; Gaertner v. Western El. Co., 104–467, 116+945.

[18] Anderson v. Gouldberg, 51–294, 53+636; O'Donnell v. Burroughs, 55–91, 56+579; Pound v. Pound, 60–214, 62+264.

[19] Bena T. Co. v. Sauve, 104–472, 116+947; Norton v. Frederick, 107–36, 119+492.

[20] Haven v. Place, 28–551, 553, 11+117; Fletcher v. Neudeck, 30–125, 14+513.

[21] Murphy v. Hinds, 15–182(139, 141); Washburn v. Cutter, 17–361(335); Allis v. Nininger, 25–525; Seymour v. Carli, 31–81, 83, 16+495; Olson v. Minn. etc. Ry., 89–280, 94+871.

[22] Allis v. Nininger, 25–525.

[23] Goodell v. Ward, 17–17(1).

[24] Davis v. Murphy, 3–119(63, 73).

[25] State v. Rue, 72–296, 75+235 (discretion of court to allow private attorney to act as prosecuting attorney).

[26] Hennepin County v. Brotherhood of Gethsemane, 27–460, 8+595.

[27] Pratt v. Tinkcom, 21–142; Warsop v. Hastings, 22–437; Coe v. Caledonia etc. Ry., 27–197, 6+621; Gaston v. Merriam, 33–271, 22+614; State v. Scott County, 43–322, 45+614; Wolfe v. Moorehead, 98–113, 107+728.

PUBLIC LANDS

IN GENERAL

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IN GENERAL

7861. Definition—The words "public lands" are generally used to describe such lands as are subject to sale or other disposal under general laws.[28]

7862. Presumption of title in United States—It has been held that certain facts did not raise a presumption that the title was in the United States.[29]

7863. Federal ownership and control—Powers of Congress—With respect to the public domain, the constitution vests in Congress the power of disposition and of making all needful rules and regulations. That power is subject to no limitations. Congress has the absolute right to prescribe the times, the conditions and the mode of transferring this property, or any part of it, and to designate the persons to whom the transfer shall be made. No state legislation can interfere with this right, or embarrass its exercise; and to prevent the possibility of any attempted interference with it, a provision has been usually inserted in the compacts by which new states have been admitted into the Union, that such interference with the primary disposal of the soil by the United States shall never be made. Such a provision was inserted in our enabling act, and is embodied in our state constitution, with the further provision that this state will never interfere with any regulations Congress may find necessary for securing the title to bona fide purchasers.[30]

[28] Minn. v. Hitchcock, 185 U. S. 373, 391.
[29] Preiner v. Meyer, 67-197, 69+887.
[30] Russell v. Lowth, 21-167; Monette v. Cratt, 7-234(176, 183); Coleman v. St. P.

In the unsold lands of the United States, within this state, the United States has but a proprietary interest, and the right of primary disposal thereof, and to make such regulations as Congress may find necessary for securing title to bona fide purchasers, and the right of exemption from taxation by the state. With these exceptions, such lands are subject to the same control by the state government as any other lands, over which its jurisdiction extends. When the United States has sold the lands and secured the title to the purchaser, the lands are relieved from all control of the federal government, except such as is incident to the general relation of the state to the federal union.[31] It has been said that the sovereignty in the public lands within the several states is in the states.[32]

7864. State may authorize roads through public lands—The state may authorize public roads through public lands of the United States.[33]

7865. Land warrants—A land warrant of the United States is not extinguished by mere location, nor until it is accepted in payment of the land by the decision of the Land Department confirming the entry.[34] Where a warrant is canceled the locator or his assignee has the right to file another warrant, or pay in cash in lieu of the canceled warrant, and thereupon a patent will be issued upon the original location.[35] Evidence has been held to require a finding that an entry with a military land warrant by A, though made in his own name, was made with a land warrant belonging to B, who had left it with A as his agent to enter land with it.[36]

LAND DEPARTMENT

7866. Organization—The Land Department is under the supervision of the Commissioner of the General Land Office, subject to the supervisory control of the Secretary of the Interior.[37]

7867. Exclusive jurisdiction—Until the government parts with its ownership the courts have no jurisdiction to entertain actions involving controversies between individuals respecting the title of public lands. The law, in the absence of some specific provision to the contrary, commits, in the first instance, all matters affecting the disposition of public lands of the United States, and the adjustment of all private claims thereto, and grants therefor under Congressional legislation, to the General Land Office, under the supervision of the Secretary of the Interior; and while such matters are pending and undetermined in such department the courts have no jurisdiction thereof.[38] It is generally laid down in the cases that courts have no jurisdiction until the legal title has passed from the government by the execution of a patent, but it has been held in this state that a court had jurisdiction where the Secretary of the Interior had finally settled a controversy as to title, and nothing remained but the mere ministerial act of issuing a patent.[39] The courts have jurisdiction of actions to enforce mere possessory rights, though the title has not passed from the government.[40]

etc. Ry., 38–260, 263, 36+638. See Camp v. Smith, 2–155(131); Irvine v. Marshall, 7–286(216).

[31] State v. Bachelder, 5–223(178).

[32] Camp v. Smith, 2–155(131, 144).

[33] Simonson v. Thompson, 25–450, 453.

[34] Johnson v. Gilfillan, 8–395(352).

[35] Wheeler v. Merriman, 30–372, 15+665.

[36] Lambert v. Stees, 47–141, 49+662.

[37] Randall v. Edert, 7–450(359).

[38] McHenry v. Nygaard, 72–2, 74+1106; Matthews v. O'Brien, 84–505, 88+12; St. Paul etc. Ry. v. Olson, 87–117, 91+294; Sims v. Morrison, 92–341, 100+88; Humbird v. Alger, 94–523, 102+1133; Humbird v. Avery, 195 U. S. 480; Love v. Flahive, 205 U. S. 195. See Sage v. Rudnick, 91–325, 98+89, 100+106; State v. Red River L. Co., 109–185, 123+412.

[39] McHenry v. Nygaard, 72–2, 74+1106; White v. Wright, 83–222, 86+91. See Jones v. Hoover, 144 Fed. 217.

[40] Michaelis v. Michaelis, 43–123, 44+1149; Hastay v. Bonness, 84–120, 86+896;

7868. No jurisdiction after title passes—When the legal title to public land has passed from the government the Land Department has no jurisdiction to determine controversies between individual claimants concerning the title or right to the possession thereof.[41]

7869. Rules and regulations—All entries of public lands are made subject to the rules and regulations of the Land Department.[42]

7870. Acts presumptively valid—The acts of the Land Department are presumed valid until the contrary is made to appear.[43]

7871. Instructions to local land officers—Certain instructions of the Commissioner of the General Land Office, issued to local land officers, in relation to half-breed scrip under the act of Congress of July 17, 1854, have been considered the acts of the President, with the binding force of law.[44]

7872. Construction of orders—Force—The construction placed by the Land Department on its orders is entitled to great respect, and, unless clearly unreasonable, or violative of some legal principle, should be adopted and followed by the courts.[45]

7873. Construction of statutes—Force—The decisions of the Land Department involving statutory construction have not the force of judicial decisions, and are not binding on the courts, but they are entitled to great respect.[46]

7874. Conclusions of law not binding on courts—The conclusions of law made by the Land Department in cases arising before it are not binding on the courts, and this is so though they are in the form of findings of fact.[47]

7875. Findings of fact—Conclusiveness—The determination of the Land Department of questions of fact in a case within its jurisdiction is conclusive upon the courts, in the absence of fraud, imposition, or mistake.[48] The same rule applies where the question determined is one of mixed law and fact. In such a case the determination of the question of fact involved is conclusive, in the absence of fraud, imposition, or mistake.[49]

7876. Irregular procedure—Waiver—A claimant has been held to have waived by a certain stipulation objection to the irregular way in which the Land Department proceeded to determine his qualifications and rights as a pre-emptor.[50]

7877. Negligence—Effect on rights of entryman—The proper application of a party entitled to enter land at the government land office, made in

Matthews v. O'Brien, 84–505, 88+12; Sims v. Morrison, 92–341, 100+88.

[41] Sage v. Rudnick, 91–325, 98+89, 100+106; Love v. Flahive, 205 U. S. 195. See State v. Bachelder, 5–223(178).

[42] Randall v. Edert, 7–450(359); Gray v. Stockton, 8–529(472); Lamson v. Coffin, 102–493, 114+248.

[43] Corbett v. Wood, 32–509, 21+734.

[44] Monette v. Cratt, 7–234(176).

[45] Hastings & D. Ry. v. Whitney, 34–538, 27+69 (affirmed, 132 U. S. 357); St. Paul etc. Ry. v. Ward, 47–40, 49+401.

[46] Donohue v. St. P. etc. Ry., 101–239, 246, 112+413 (affirmed, 210 U. S. 21); Rogers v. Clark, 104–198, 211, 116+739.

[47] Buffalo L. & E. Co. v. Strong, 91–84, 97+575 (affirmed, 203 U. S. 582).

[48] Leech v. Rauch, 3–448(332); State v. Bachelder, 5–223(178); State v. Stevens, 5–521(416); Monette v. Cratt, 7–234(176); Warren v. Van Brunt, 12–70(36); Mankato v. Meagher, 17–265(243); Bishop v. Hyde, 66–24, 31, 68+95 (affirmed, 177 U. S. 281); Roy v. Duluth etc. Ry., 69–547, 72+794 (affirmed, 173 U. S. 587); O'Connor v. Gertgens, 85–481, 89+866 (affirmed, 191 U. S. 237); Curry v. Sandusky F. Co., 88–485, 93+896; Buffalo L. & E. Co. v. Strong, 91–84, 89, 97+575 (affirmed, 203 U. S. 582); Sage v. Maxwell, 91–527, 99+42; White v. Neils, 100–16, 110+371; Donohue v. St. P. etc. Ry., 101–239, 244, 112+413; Lamson v. Coffin, 102–493, 114+248; Rogers v. Clark, 104–198, 211, 116+739; Love v. Flahive, 205 U. S. 195. See Osborn v. Froyseth, 105–16, 116+1113 (grounds of rejection of claim not stated—presumption); State v. Red River L. Co., 109–185, 123+412.

[49] O'Connor v. Gertgens, 85–481, 89+866. See Buffalo L. & E. Co. v. Strong, 91–84, 97+575 (affirmed, 203 U. S. 582); Donohue v. St. P. etc. Ry., 101–239, 112+413.

[50] Bishop v. Hyde, 66–24, 68+95.

good faith, must be regarded as filed of the date it is delivered by the applicant for filing; and the negligence of the clerks to do their duty in noting thereon a statement that the same was filed of that date does not deprive the person making such entry of his rights in that respect.[51]

RAILROAD LAND GRANTS

7878. Certification to state—A certification of land to the state for a railway company has the effect of a patent. It is evidence, but not conclusive evidence, of title. It may be set aside in proper proceedings for fraud or mistake, but is not subject to collateral attack by one not interested in the land. Where an entry by a settler has the effect of taking the land out of a grant, a certification including such land is void as to the settler.[52]

7879. Deed by governor to railway company—A deed executed by the governor, containing recitals to show his authority to convey, conveying land to a railway company under a federal grant, has been held, with other proof, to show title in a party.[53]

7880. Construction—A public grant of lands to a railway company is to be construed strictly against the grantee in favor of the government and its grantees.[54] It is to be construed not merely as a grant, but also as a law, and such effect must be given to it as will carry out the intention of the legislature.[55] Cases are cited below involving the construction of particular grants.[56]

7881. Conditions—Forfeiture—Extensions—A grant in praesenti, upon conditions subsequent, is not forfeited by mere default of the grantee in the conditions, but only by some affirmative act of the state, after the breach or default, declaring or asserting the forfeiture. The right of the state to a forfeiture must be asserted by judicial proceedings, the equivalent of an inquest of office at common law, finding the fact of forfeiture, and adjudging a restoration of the estate on that ground; or there must be some legislative assertion of ownership of the property for the breach of the condition; and until this is done the grant remains vested in the grantee, notwithstanding the breach of the condition. Moreover, if, after the breach, the grantee proceeds and earns the grant by the construction of its road, before any action on the part of the state asserting or declaring a forfeiture, the state cannot afterwards divest the grantee of the land by declaring a forfeiture.[57] Upon noncompliance with the conditions of the grant the right to declare a forfeiture is generally absolute.[58] An individual cannot raise the objection that a company

[51] Hastay v. Bonness, 84–120, 86+896.

[52] Winona etc. Ry. v. Randall, 29–283, 13+127; Minn. etc. Co. v. Davis, 40–455, 42+299; Weeks v. Bridgman, 41–352, 43+81; Id., 46–390, 49+191 (affirmed, 159 U. S. 541); Winona etc. Co. v. Ebilcisor, 52–312, 54+91.

[53] Winona etc. Ry. v. Randall, 29–283, 13+127.

[54] Weeks v. Bridgman, 46–390, 49+191; St. Paul etc. Ry. v. Brown, 24–517, 583.

[55] Nash v. Sullivan, 29–206, 214, 12+698.

[56] De Graff v. St. P. etc. Ry., 23–144 (act of 1857 and subsequent acts—Sp. Laws 1874 c. 105—impairment of contract with company); St. Paul etc. Ry. v. Brown, 24–517 (act of March 6, 1868 granting swamp lands to St. Paul & Pacific Ry. Co.—act of Feb. 13, 1865 setting apart swamp lands to state institutions—extent of grant); Simonson v. Thompson, 25–450 (act of March 3, 1857—rights of Minn. & Pacific Ry. Co.); Winona etc. Ry. v. St. P. etc. Ry., 27–128, 6+461 (affirmed, 112 U. S. 720) (act of March 3, 1865); Nash v. Sullivan, 29–206, 12+698 (act of March 3, 1865—St. Vincent branch of St. Paul & Pacific Ry. Co.—act of March 3, 1871—conveyance of grant by Sp. Laws 1865 c. 6); Prince v. Eheim, 55–36, 56+239 (act of May 12, 1864 granting four additional alternate sections per mile—how to be selected).

[57] Mpls. etc. Ry. v. Duluth etc. Ry., 45–104, 47+464. See White v. Neils, 100–16, 110+371.

[58] St. Paul etc. Ry. v. Broulette, 65–367, 368, 67+1010. See White v. Neils, 100–16, 110+371; Sage v. Crowley, 83–314, 86+409

has failed to perform the conditions of its grant.[59] Railway companies have frequently been given extensions of time in which to perform.[60]

7882. Right of way over public lands—The federal and state governments have by various acts, expressly or by implication, granted to railway companies a right of way over public lands. Cases are cited below involving a construction of such grants and a determination of the rights of railway companies thereunder as against settlers.[61]

7883. Lands reserved and sold by state—The "railroad land-grant" lands reserved and retained by the state, and subsequently sold by it, pursuant to the provisions of Sp. Laws 1877 c. 201 § 9, are subject to taxation in the hands of the grantees of the state; and no one but the United States can raise the question of the authority of the state to dispose of these lands for the purposes expressed in the act referred to.[62]

7884. Wrongful conveyance by state—Where the governor wrongfully conveys to another lands belonging to a railway company under a land grant. such person may be charged as a trustee of the legal title for the company.[63]

7885. When right of company attaches—As to lands within place limits the right of the company attaches upon the definite location of the road by the filing and acceptance of a map of such location in the office of the Commissioner of the General Land Office. As to indemnity lands the right does not attach until specific tracts are actually selected by it, with the approval of the Secretary of the Interior. Up to the time of such approval lands within indemnity limits, though embraced in the company's list of selections, are subject to be disposed of by the United States or to be settled upon under the pre-emption laws of the United States. The company acquires no vested interest in any particular lands, within or without place limits, merely by filing a map of general route and having the same approved by the Secretary of the Interior.[64]

7886. Withdrawal of lands granted—In some of the granting statutes the Land Department has been expressly required to reserve and withdraw from market or entry lands which might become subject to selection. In some cases it has done so without express authority.[65] Such withdrawal is merely to give the railway company a reasonable time within which to make its selec-

[59] Western Ry. v. De Graff, 27–1, 9, 6+341; Sage v. Crowley, 83–314, 86+409. See State v. Torinus, 26–1, 49+259.

[60] Winona etc. Ry. v. St. P. etc. Ry., 27–128, 6+461 (act of Congress of March 3, 1865); Nash v. Sullivan, 29–206, 12+698 (id.); St. Paul etc. Ry. v. Broulette, 65–367, 67+1010 (Sp. Laws 1877 c. 201, extending time for completion of St. Paul & Pac. Ry. Co.'s Extension Lines, as amended by Sp. Laws 1878 c. 71, construed); Sage v. Crowley, 83–314, 86+409 (extension to Hastings & Dakota Ry. Co.).

[61] Harrington v. St. P. etc. Ry., 17–215 (188, 200); Simonson v. Thompson, 25–450; Red River etc. Co. v. Sture, 32–95, 20+229; Coleman v. St. P. etc. Ry., 38–260, 36+638; Radke v. Winona etc. Ry., 39–262, 39+624; Id., 42–61, 43+967; Tuttle v. Chi. etc. Ry., 61–190, 63+618; N. P. Ry. v. Townsend, 84–152, 86+1007 (overruled, 190 U. S. 267). See Denver etc. Ry. v. Alling, 99 U. S. 463; St. Joseph etc. Ry. v. Baldwin, 103 U. S. 426; N. P. Ry. v. Townsend, 190 U. S. 267; N. P. Ry. v. Hasse, 197 U. S. 9.

[62] Morrison County v. St. P. etc. Ry., 42–451, 44+982.

[63] Winona etc. Ry. v. St. P. etc. Ry., 26–179, 2+489.

[64] Sjoli v. Dreschel, 199 U. S. 564 (overruling Sjoli v. Dreschel, 90–108, 95+763); N. P. Ry. v. Wass, 104–411, 116+937; Donohue v. St. P. etc. Ry., 101–239, 112+413 (affirmed, 210 U. S. 21); Sage v. Rudnick, 91–325, 331, 98+89, 100+106; Prince v. Eheim, 55–36, 56+239; Resser v. Carney, 52–397, 54+89; St. Paul etc. Ry. v. Ward, 47–40, 49+401; Wecks v. Bridgman, 41–352, 43+81; Id., 46–390, 49+191; Musser v. McRae, 38–409, 38+103; Id., 44–343, 46+673; Winona etc. Ry. v. St. P. etc. Ry., 26–179, 2+489; Cass County v. Morrison, 28–257, 9+761. See Winona etc. Ry. v. Randall, 29–283, 13+127.

[65] Prince v. Eheim, 55–36, 56+239; O'Connor v. Gertgens, 85–481, 89+866; N. P. Ry. v. Wass, 104–411, 417, 116+937.

tion. It acquires no vested rights by the withdrawal. A voluntary order of withdrawal is revocable, and, in part, is revoked by allowing settlement and entry of a certain tract under the pre-emption or homestead laws.[66] An order of withdrawal is inoperative as against vested rights of entrymen. If lands held by entrymen at the time of the withdrawal are subsequently abandoned they will, until a selection made by the railway company, be deemed still open for homestead or pre-emption entry.[67] When a withdrawal order properly made ceases to be in force, the lands withdrawn thereunder do not pass under a grant of unreserved, unsold, or otherwise unappropriated lands, but becomes a part of the public domain, to be disposed of under the general land laws or acts of Congress specially describing them.[68] It was formerly held in this state that so long as an executive withdrawal continued in force, the lands covered thereby were not subject to entry, and no lawful settlement on them could be acquired.[69] The rule is now otherwise.[70] The construction placed by the Land Department upon its orders of withdrawal are entitled to great respect, and, unless clearly unreasonable, or violative of some legal principle, should be adopted and followed by the courts. The rule adopted is to construe such orders strictly in favor of the government, that is to say, as operating in praesenti, and not in futuro, and lands are therefore excluded from a withdrawal as from a grant.[71]

7887. Distinction between place and indemnity lands—Lands within primary limits and lands within indemnity limits of a railroad land grant are both granted. One distinction between them is that as to lands within the primary limits the company's right attaches upon definite location, while as to lands within indemnity limits it does not attach until selection. A further distinction is that lands within the primary limits, when once excepted from the grant, remain in that condition; whereas, the status of indemnity lands at the date of selection determines the company's right at that time only, and such lands are subject to subsequent selection at any time at which they may be free.[72]

7888. Indemnity lands—Selection—Withdrawal—A railway company acquires no vested right to lands within indemnity limits until specific selections thereof are made, with the approval of the Secretary of the Interior. Up to the time such approval is given, lands within indemnity limits, though embraced by the company's list of selections, are subject to be disposed of by the United States, or to be settled upon and occupied under the pre-emption or homestead laws. The Secretary of the Interior has no authority to withdraw from sale or settlement lands within indemnity limits which have not been previously selected, with his approval, to supply deficiencies within place limits.[73]

7889. Revocation of grant—When direct grant vests—The act of Congress of June 29, 1854, granting certain lands to the territory of Minnesota,

[66] Prince v. Eheim, 55–36, 56+239.

[67] St. Paul etc. Ry. v. Ward, 47–40, 49+401.

[68] Northern L. Co. v. O'Brien, 204 U. S. 190.

[69] Sage v. Swenson, 64–517, 67+544; Sage v. Crowley, 83–314, 86+409; O'Connor v. Gertgens, 85–481, 89+866.

[70] Sage v. Maxwell, 91–527, 99+42.

[71] Hastings & D. Ry. v. Whitney, 34–538, 27+69 (affirmed, 132 U. S. 357); St. Paul etc. Ry. v. Ward, 47–40, 49+401.

[72] Donohue v. St. P. etc. Ry., 101–239, 112+413 (affirmed, 210 U. S. 21).

[73] Sjoli v. Dreschel, 199 U. S. 564 (reversing Sjoli v. Dreschel, 90–108, 95+763); State v. Sage, 75–448, 78+14; Sage v. Maxwell, 91–527, 99+42; N. P. Ry. v. Wass, 104–411, 116+937; Id., 105–525, 117+1126; Osborn v. Froyseth, 105–16, 116+1113. See, however, Norton v. Frederick, 107–36, 119+492. The following cases are more or less overruled: Sage v. Swenson, 64–517, 67+544; Sage v. Crowley, 83–314, 86+409; O'Connor v. Gertgens, 85–481, 89+866.

to aid in the construction of a certain railroad, vested in the territory a present estate in the lands, subject to a condition for their revesting in the United States. Congress had no power to revoke such grant. The act of the territorial legislature, of March 4, 1854, incorporating the defendant, and providing that all such lands as may be afterwards granted by Congress to the territory, to aid in the construction of its railroad, shall immediately become the property of the company, without any further act or deed, vested in the company the title acquired by the territory under the Congressional act.[74]

7890. Imposing new conditions on grant—The act of Congress of 1870, requiring the Northern Pacific Railway Company to pay the cost of surveying, selecting, and conveying lands in its grants, was valid.[75]

7891. Transfer of indemnity lands—A transfer of certain indemnity lands of the Hastings & Dakota Railway Company to a trustee for the benefit of its stockholders, the company's franchise being forfeited by a judgment of court, has been sustained.[76] The right of the company to such lands became vested on the completion of its road, and was subject to sale or assignment.[77]

7892. Conflict of grants—Cases are cited below involving conflicting grants.[78]

7893. Exceptions—Protection of bona fide settlers—Generally grants of lands to railway companies expressly except lands to which pre-emption or homestead rights have attached. And in the absence of such exception such lands are impliedly excepted.[79] In 1862 a special act was passed by our legislature for the protection of bona fide settlers on lands within the grant of the St. Paul & Pacific Railway Company.[80]

7894. Rights of settlers—Whether the rights of a settler on land within a railway grant are superior to the rights of the company generally depends upon the time when the respective rights of the settler and the company attached. Those which are prior in time generally prevail.[81]

7895. Purchasers from railroad—Land not in grant—Relief—Provision was made by the act of Congress of March 3, 1887 for the relief of bona fide purchasers of land from railway companies, where the company was unable to convey, because, for some reason, the land was excepted from the grant to the company. Such persons were allowed to purchase from the government.[82]

[74] U. S. v. Minn. etc. Ry., 1–127(103) (writ of error withdrawn, 18 How. 241).

[75] N. P. Ry. v. Rockne, 115 U. S. 600 (overruling Cass County v. Morrison, 28–257, 9+761).

[76] Sage v. Crowley, 83–314, 86+409; Norton v. Frederick, 107–36, 119+492.

[77] Norton v. Frederick, 107–36, 119+492.

[78] Winona etc. Ry. v. St. P. etc. Ry., 27–128, 6+461 (affirmed, 112 U. S. 720); Mpls. etc. Ry. v. Duluth etc. Ry., 45–104, 47+464; Sage v. Rudnick, 91–325, 98+89, 100+106.

[79] Hastings & D. Ry. v. Whitney, 34–538, 27+69 (affirmed, 132 U. S. 359); Weeks v. Bridgman, 41–352, 43+81; Id., 46–390, 49+191 (affirmed, 159 U. S. 541); Winona etc. Co. v. Ebilcisor, 52–312, 54+91; St. Paul etc. Ry. v. Broulette, 65–367, 67+1010; Donohue v. St. P. etc. Ry., 101–239, 112+413.

[80] Peterson v. First Div. etc. Ry., 27–218, 6+615.

[81] Winona etc. Ry. v. Randall, 29–283, 13+127; Red River etc. Ry. v. Sture, 32–95, 20+229; Hastings & D. Ry. v. Whitney, 34–538, 27+69 (affirmed, 132 U. S. 315); Weeks v. Bridgman, 41–352, 43+81; Id., 46–390, 49+191; St. Paul etc. Ry. v. Ward, 47–40, 49+401; Winona etc. Co. v. Ebilcisor, 52–312, 54+91; Prince v. Eheim, 55–36, 56+239; St. Paul etc. Ry. v. Broulette, 65–367, 67+1010; McHenry v. Nygaard, 72–2, 74+1106; Sage v. Crowley, 83–314, 86+409; N. P. Ry. v. Townsend, 84–152, 86+1007 (reversed, 190 U. S. 267); Sjoli v. Dreschel, 90–108, 95+763 (reversed, 199 U. S. 564); Sage v. Maxwell, 91–527, 99+42; Donohue v. St. P. etc. Ry., 101–239, 112+413 (affirmed, 210 U. S. 21); N. P. Ry. v. Wass, 104–411, 116+937; Houston v. N. P. Ry., 109–273, 123+922.

[82] O'Connor v. Gertgens, 85–481, 89+866.

7896. Private attack on grant—An individual cannot assail a title conveyed by the government on the ground that the grantee has failed to perform the conditions annexed.[83]

DEEDS, MORTGAGES, AND CONTRACTS BEFORE PATENT

7897. Contracts of pre-emptor prior to patent—A contract whereby a party about to enter land under the United States pre-emption act, in consideration of the payment by another of one-fourth of all expenses incurred by him in making final proof, agrees to pay over to such other person one-fourth of the amount derived from a sale of the land at its proper value after title is secured, is not prohibited by the pre-emption act.[84]

7898. Contracts of pre-emptor to convey—Contracts of a pre-emptor to convey or to give another an interest in the land entered, made before final proof, are invalid;[85] otherwise, if made after final proof, though before the issuance of a patent.[86] An agreement by a pre-emptor, who has occupied and improved lands, and filed the statement of his intention to pre-empt them, to abandon his rights, his occupancy, and improvements, so that another may enter upon and pre-empt the lands, is not in violation of the pre-emption laws.[87] If the pre-emptor violates the law his entry is vitiated in toto.[88]

7899. Contracts of homesteader to convey—It has been laid down broadly in a recent decision by the federal supreme court that a sale of a homestead prior to the issue of patent is void under the statutes of the United States. But while a homesteader cannot make a valid and enforceable contract to sell the land he is seeking to enter, he is not bound to perfect his application, but may abandon or relinquish his rights in the land, and if he in fact makes a sale he is no longer interested in the land and the government can treat the sale as a relinquishment and patent the land to another.[89] A homesteader may transfer or relinquish his inchoate homestead right to another.[90] An agreement by a homesteader to convey the land entered as soon as he should make final proof of his claim upon a consideration to be paid at that time, has been sustained.[91] After a homesteader has made final proof he may sell and convey the land before final receipt or patent is issued, and vest in the purchaser all rights possessed by him. In such a case the government will, upon proper showing, issue the patent to the purchaser.[92]

7900. Mortgages prior to patent—It is now well settled that a homesteader or pre-emptor may mortgage the land prior to patent, and even prior to final proof.[93] Formerly the rule was otherwise in this state.[94]

[83] Western Ry. v. De Graff, 27-1, 6+341; Mpls. etc. Ry. v. Duluth etc. Ry., 45-104, 47+464; Sage v. Crowley, 83-314, 86+409. See Morrison County v. St. P. etc. Ry., 42-451, 44+982.

[84] Gross v. Hafemann, 91-1, 97+430; Id., 92-367, 100+94 (affirmed, 199 U. S. 342).

[85] St. Peter Co. v. Bunker, 5-192(153); Evans v. Folsom, 5-422(342); Bruggerman v. Hoerr, 7-337(264); Ferguson v. Kumler, 11-104(62); Warren v. Van Brunt, 12-70(36); Bishop v. Hyde, 66-24, 68+95 (affirmed, 177 U. S. 281). See Nicholson v. Congdon, 95-188, 103+1034.

[86] Camp v. Smith, 2-155(131); Sharon v. Wooldrick, 18-354(325). See McAlpin v. Resch, 82-523, 85+545.

[87] Olson v. Orton, 28-36, 8+878. See Lindersmith v. Schwiso, 17-26(10).

[88] Hyde v. Bishop, 177 U. S. 281.

[89] Love v. Flahive, 205 U. S. 195. See Webster v. Luther, 50-77, 82, 52+271.

[90] Lindersmith v. Schwiso, 17-26(10). See Olson v. Orton, 28-36, 8+878.

[91] Townsend v. Fenton, 30-528, 16+421.

[92] Sims v. Morrison, 92-341, 344, 100+88.

[93] Jones v. Tainter, 15-512(423); Chauncey v. Wass, 35-1, 30, 25+457, 30+826; Stewart v. Smith, 36-82, 30+430; Lewis v. Wetherell, 36-386, 31+356; Lang v. Morey, 40-396, 42+88; Gross v. Hafemann, 91-1, 97+430 (affirmed, 199 U. S. 342). See 6 L. R. A. (N. S.) 934.

[94] McCue v. Smith, 9-252(237); Woodbury v. Dorman, 15-338(272).

7901. Prohibitions in special acts against transfers—Special acts sometimes contain prohibitions against transfers before patent.[95]

7902. Conveyance for church, cemetery, or school purposes—A settler on public lands is specially authorized by statute to transfer, by warranty against his own acts, any portion of his claim for church, cemetery, or school purposes, without affecting his right to perfect his claim and obtain a patent.[96]

7903. Conveyance by entryman under treaty—A conveyance by one entering land under the provisions of the treaty of Feb. 22, 1855, between the United States and the Mississippi band of the Chippewa Indians, has been sustained, though made before final payment of the purchase price.[97]

7904. Compromise agreements—A and B each claimed to have made improvements upon, and to have the exclusive right to purchase, land of the United States, and entered into an agreement by which they agreed, that each should furnish to C one-half the purchase money to buy it in his own name, and convey the same according to the decision of five persons, to be chosen as in the agreement specified, and C, accordingly, with the money furnished him, bought the land in his own name. It was held that neither A nor B could abandon or repudiate this contract, and that under it, C might convey to A or B, or both, as he might be directed by the five persons chosen, as provided in the contract.[98]

7905. Sale of improvements and possessory rights—Consideration—An agreement to sell an interest in improvements and possessory rights in a tract of government land, held by a person occupying the same, in expectation of securing title thereto, and with a prospect of a profitable mutual investment, no illegality in the transaction being suggested, has been held a sufficient consideration for the purchase price.[99]

7906. Forfeiture for illegal contract—Waiver—The government may enforce a forfeiture of the rights of an entryman who attempts to make an illegal transfer of the land entered, but if it waives a forfeiture no one else can insist upon it.[1]

7907. Deed from half-breed—A deed by a half-breed, of land within the Indian reservation near Lake Pepin, has been held not void as against public policy or as contrary to the acts of Congress.[2]

PATENT

7908. Necessity—A patent is unnecessary to vest a railway company with the legal title of place lands.[3]

7909. Delivery unnecessary—Conveys title by record—Title by patent from the United States is title by record, and delivery of the patent to the grantee is not essential to pass the title.[4]

7910. Issuance to purchaser from entryman—In certain cases the government will, upon a proper showing, issue a patent to a purchaser from an entryman.[5]

[95] McAlpine v. Resch, 82-523, 85+545 (act for relief of settlers on indemnity lands of Northern Pacific Ry. Co.—29 U. S. St. 246—restrictions of act held not to benefit a subsequent purchaser who procured a deed in fraud of the first grantee).

[96] Eimer v. Wellsand, 93-444, 101+612 (person receiving patent with notice of contract by prior entryman to convey for church purposes under statute held charged with trust).

[97] Nicholson v. Congdon, 95-188, 103+1034.

[98] Irvine v. Marshall, 7-286(216).

[99] Bedford v. Small, 31-1, 16+452.

[1] Woodbury v. Dorman, 15-338(272). See McAlpine v. Resch, 82-523, 85+545.

[2] Hope v. Stone, 10-141(114).

[3] McHenry v. Nygaard, 72-2, 13, 74+1106.

[4] Rogers v. Clark, 104-198, 208, 116+739.

[5] Sims v. Morrison, 92-341, 100+88.

7911. Issuance to widow, heirs, or devisees—Provision is made by statute for the issuance of a patent to the widow, heirs, or devisees of a deceased entryman.[6]

7912. Effect of issuing to deceased person—When a patent issues to a person deceased at its date the title inures to and vests in the heirs, devisees, and assignees of such person, the same as if it had been issued to him during life.[7]

7913. Recitals—A recital in a patent has been held notice to all of an exemption from liability for debts and of the act under which it was issued.[8]

7914. When takes effect—Relation—A patent generally takes effect, by virtue of the doctrine of relation, prior to the date of its execution. It is prima facie evidence of title in the patentee from the very inception of the proceedings to acquire title.[9] The doctrine of relation applies only when necessary to protect the rights of persons who have acquired an equitable right or claim to the title.[10]

7915. After-acquired title—A patent does not convey an after-acquired title.[11]

7916. As evidence of title—The patent of a state, when regular on its face—that is, when it is in proper form, is signed by the proper officer, and has the proper seal—is everywhere evidence of the passage of the state's title to the land. The patent, like the deed of an individual passes the title.[12] A patent from the United States is evidence of title in the grantee.[13] It is rather the evidence that the title is already in the grantee, than the title itself.[14] A patent by a state passes its title, but does not establish that it had title.[15]

7917. Conclusiveness—Collateral attack—In the absence of fraud, imposition, or mistake, a patent is conclusive against collateral attack, if the Land Department had jurisdiction to dispose of the land. It is in the nature of an official declaration by that branch of the government to which the alienation of public lands, under the law, is intrusted, that all the requirements preliminary to its issuance, have been complied with.[16] It cannot be attacked collaterally for irregularities in the conduct of those who are appointed by the government to supervise the progressive course of a title from the commencement to its consummation in a patent.[17] But a patent may be attacked collaterally by showing that the state had no title or that the Land Department had no authority to dispose of the land because the law did not authorize

[6] Anderson v. Peterson, 36-547, 32+861 (patent to "minors"—persons under twenty-one are minors within federal statute though they are not minors under state statute); Hayes v. Carroll, 74-134, 76+1017 (proof by widow of homesteader—patent issued to heirs of homesteader by mistake—heirs charged as trustees for widow); Donohue v. St. P. etc. Ry., 101-239, 112+413 (completion of entry of deceased homesteader by his heirs—subsequent abandonment—reversion of land to public domain).

[7] Gilbert v. McDonald, 94-289, 102+712.

[8] Finnegan v. Brown, 90-396, 402, 97+144.

[9] Camp v. Smith, 2-155(131, 141); Winona etc. Ry. v. Randall, 29-283, 13+127; Wheeler v. Merriman, 30-372, 380, 15+665; Red River etc. Ry. v. Sture, 32-95, 20+229; Musser v. McRae, 44-343, 46+673; Gilbert v. McDonald, 94-289, 102+712; Nicholson v. Congdon, 95-188, 103+1034; White v. Neils, 100-16, 110+371; Rogers v. Clark, 104-198, 116+739.

[10] State v. Itasca L. Co., 100-355, 111+276.

[11] Gilbert v. McDonald, 94-289, 291, 102+712.

[12] Musser v. McRae, 38-409, 38+103; McKinney v. Bode, 33-450, 23+851; Holland v. Netterberg, 107-380, 120+527.

[13] Rogers v. Clark, 104-198, 116+739; Finnegan v. Brown, 90-396, 401, 97+144; McKinney v. Bode, 33-450, 23+851.

[14] Camp v. Smith, 2-155(131, 141).

[15] Musser v. McRae, 38-409, 38+103.

[16] Rogers v. Clark, 104-198, 211, 116+739; White v. Neils, 100-16, 110+371. See Holland v. Netterberg, 107-380, 120+527.

[17] McKinney v. Bode, 33-450, 23+851. See Holland v. Netterberg, 107-380, 120+527.

its sale, or because it was reserved from sale, or because it was dedicated to a special purpose, or because it had been previously transferred to another.[18]

7918. Attack by strangers—One who has no interest in property affected by a patent cannot question it.[19] One who has initiated a claim to the land covered by a patent may attack it.[20].

PRE-EMPTION

7919. Policy of law—Construction—The pre-emption law is designed to secure a speedy settlement and cultivation of the public lands for the good of the whole community as well as the individual settler. It is therefore to receive a liberal construction for the encouragement of actual settlers.[21]

7920. Lands subject to pre-emption—Government lands included within the limits of incorporated towns are not subject to pre-emption entry.[22] Originally unsurveyed lands were not subject to entry, but this was changed in 1854.[23] Land within an Indian reservation is not subject to pre-emption.[24]

7921. Subdivisions of land—Joint entry—The pre-emption law does not authorize the subdivision of a quarter of a quarter section—a forty acre tract—for the purposes of settlement or entry. Such a tract is not subject to entry by two jointly as a whole, or severally in distinct parts.[25]

7922. Settlement and occupancy—To constitute a valid right of pre-emption the spirit and terms of the law require a personal settlement by the claimant upon the land, and the original settlement must be followed by occupancy of the land as the home of the settler; the erection of a dwelling-house thereon, and the cultivation or improvement of the land. But what shall constitute occupancy or improvement must depend upon the facts of each case, and no absolute rule can be laid down to govern all cases. In the case of a married man the settlement may be made originally without the presence of his family, and the time when the family must follow may be different in different cases. The only rule which can be laid down is that the settlement and occupancy must, under all circumstances, be reasonable as to time and manner, and show a bona fide intention on the part of the settler to occupy and improve the premises.[26] To have settled on the land in good faith and with a view to pre-empt, a person must have made an actual, genuine, and not sham settlement thereon, with the view and intent of obtaining title thereto by complying with the provisions of the pre-emption law of the United States.[27]

7923. Inchoate rights of entryman—The occupation and improvement of public lands with a view to pre-emption do not confer any vested rights in the land as against the United States; that is only obtained when the purchase money is paid and the receipt of the land office given to the purchaser. Until such time the entryman has merely a right to be preferred in the purchase

[18] Sharon v. Wooldrick, 18-354(325); St. Paul etc. Ry. v. First Div. etc. Ry., 26-31, 49+303; McKinney v. Bode, 33-450, 23+851; Burfenning v. Chi. etc. Ry., 46-20, 48+444 (affirmed 163 U. S. 321); Winona etc. Co. v. Ebilcisor, 52-312, 323, 54+91; State v. Shevlin, 62-99, 106, 64+81; Wright v. Roseberry, 121 U. S. 488; St. Louis S. & R. Co. v. Kemp, 104 U. S. 636.

[19] McKinney v. Bode, 33-450, 23+851; Minn. L. & I. Co. v. Davis, 40-455, 458, 42+299; Dawson v. Mayall, 45-408, 48+12; Winona etc. Co. v. Ebilcisor, 52-312, 54+91; Lamprey v. Mead, 54-290, 300, 55+1132; White v. Neils, 100-16, 110+371.

[20] Duluth etc. Ry. v. Roy, 173 U. S. 587 (affirming Roy v. Duluth etc. Ry., 69-547, 72+794).

[21] Camp v. Smith, 2-155(131, 141).

[22] Burfenning v. Chi. etc. Ry., 46-20, 48+444.

[23] Carson v. Smith, 5-78(58).

[24] Sharon v. Wooldrick, 18-354(325).

[25] Warren v. Van Brunt, 12-70(36).

[26] Kelley v. Wallace, 14-236(173). See Leech v. Rauch, 3-448(332).

[27] Peterson v. First Div. etc. Ry., 27-218, 6+615 (requisites of settlement and occupation under Sp. Laws 1862 c. 20—same as under general law).

over others, provided a sale is made by the United States.[28] After payment and the execution of a certificate the pre-emptor has a vested right, which descends to his heirs as realty. He cannot be deprived of this right by the arbitrary or unauthorized act of the Land Department. The government holds the legal title in trust for him. He is the equitable and beneficial owner.[29]

7924. Under treaty of 1855 with Chippewa Indians—An application to pre-empt land under the provisions of the treaty of Feb. 22, 1855, between the United States government and the Mississippi band of the Chippewa Indians, having been accepted and approved by the Land Department, vested in the entryman an equitable title, even though the purchase price was not then paid.[30]

HOMESTEADS

7925. Lands subject to entry—Government lands within the limits of an incorporated town are not subject to homestead entry.[31]

7926. Amount of land—No person is permitted to acquire more than one quarter section of land under the homestead act.[32]

7927. Entry—What constitutes—An entry consists of an affidavit setting forth the facts entitling the applicant to make entry, a formal application, and a payment of the money required.[33]

7928. Entry—Filing application—Time—A settler may lose his rights by failing to make a formal entry by filing his application within the statutory time. Mere occupancy and cultivation is not always enough to protect his claim.[34] The proper application of a party entitled to enter land at the government land office, made in good faith, must be regarded as filed of the date it is delivered by the applicant for filing; and the negligence of the clerks to do their duty in noting thereon a statement that the same was filed of that date does not deprive the person making such entry of his rights in that respect.[35]

7929. Inchoate rights of entryman—A settler who has entered public land of the United States under the provisions of the homestead law, though no patent has been issued, has an inchoate title to the land, which is property. This is a vested right which can only be defeated by his own failure to comply with the conditions of the law. If he complies with these conditions, he becomes invested with full ownership, and the absolute right to a patent.[36]

7930. Entry on contiguous quarter sections—A settler upon either surveyed or unsurveyed land may embrace in his homestead claim land in contiguous quarter sections, if he does not exceed the quantity allowed by law and his improvements are on some portion of the tract, and he does acts which put the public upon notice of the extent of his claim.[37]

[28] Red River etc. Ry. v. Sture, 32–95, 98, 20+229. See Nicholson v. Congdon, 95–188, 103+1034.

[29] Camp v. Smith, 2–155(131); Polk County v. Hunter, 42–312, 44+201.

[30] Nicholson v. Congdon, 95–188, 103+1034.

[31] Burfenning v. Chi. etc. Ry., 46–20, 48+444 (affirmed, 163 U. S. 321).

[32] Coleman v. McCormick, 37–179, 181, 33+556.

[33] Donohue v. St. P. etc. Ry., 101–239, 251, 112+413; Red River etc. Ry. v. Sture, 32–95, 98, 20+229.

[34] See McHenry v. Nygaard, 72–2, 12, 74+1106; Sjoli v. Dreschel, 90–108, 95+763 (reversed, 199 U. S. 564).

[35] Hastay v. Bonness, 84–120, 86+896.

[36] Red River etc. Ry. v. Sture, 32–95, 20+229; Lang v. Morey, 40–396, 42+88; Carner v. Chi. etc. Ry., 43–375, 45+713; Roy v. Duluth etc. Ry., 69–547, 72+794; Pairier v. Itasca County, 68–297, 71+382; Hastay v. Bonness, 84–120, 86+896; Shea v. Cloquet L. Co., 97–41, 105+552; Donohue v. St. P. etc. Ry., 101–239, 250, 112+413; Rogers v. Clark, 104–198, 116+739. See Nicholson v. Congdon, 95–188, 103+1034; Polk County v. Hunter, 42–312, 44+201.

[37] Donohue v. St. P. etc. Ry., 101–239, 112+413 (affirmed, 210 U. S. 21).

7931. Settlement and cultivation—To entitle a homesteader to a patent, he must reside upon, cultivate, and improve his claim for five years, and within two years thereafter he must make final proofs of the fact, and an affidavit that no part of the land has been alienated except as provided by law, establish his citizenship, and take the oath of allegiance.[38]

7932. Abandonment—Where heirs of a homesteader completed his entry, which operated to cancel a selection by a railway company, a subsequent abandonment of the entry by the heirs was held not to inure to the benefit of the company but to restore the land to the public domain and to render it subject to disposition according to law.[39] Upon any change of residence or abandonment of the land for more than six months the land reverts to the government.[40]

7933. Rights of deserted wife—Within the homestead laws a deserted wife is to be treated as the head of a family, and, if she retains the possession of the land entered by her husband she may continue to reside thereon, and may make final proof in his name, or make an entry thereof in her own name, upon proof of the fact of her husband's desertion. These rights of a deserted wife cannot be defeated by a collusive relinquishment by the husband. A deserted wife, left in possession of a homestead, and recognized by the Land Department as having a right to contest the entry thereof by a subsequent claimant with notice, will be protected in her possession pending such contest, and may recover damages against such claimant for his wrongful acts in dispossessing her, and removing and destroying the improvements left in her possession; and she may in such case recover exemplary damages if such acts are wilful and malicious, or accompanied with circumstances of aggravation.[41]

7934. Soldier's additional homestead—The right of a soldier under U. S. Rev. St. § 2306 to enter additional lands, sufficient, with his original entry, to make up one hundred and sixty acres, is personal property, transferable and assignable as such. It is a mere gratuity. No residence on or cultivation of the land is required.[42] The assignee of a soldier's additional homestead certificate, upon filing an application for a specific tract of land at the proper government land office, acquires an equitable title therein, which ripens into a legal title, relating back to the date of application, upon issuance of the government patent. Such equitable interest may be conveyed by quitclaim deed, and when the patent issues the legal title will inure to the benefit of the grantee. After patent issues, such grantee may maintain an action for damages for trespass upon the land committed after the date of application and before confirmation thereof.[43] The land must be located and title perfected in accordance with the rules and regulations of the Land Department.[44]

7935. Exemption from liability for debts—Lands patented under the homestead act are expressly exempted by that act from liability for debts of the patentee contracted prior to the issuing of the patent. This exemption is constitutional, and applies whether the lands are still held by the patentee or a bona fide purchaser deriving title from him.[45] It does not exempt from

[38] Hayes v. Carroll, 74–134, 137, 76+1017. See Webster v. Luther, 50–77, 83, 52+271.

[39] Donohue v. St. P. etc. Ry., 101–239, 112+413 (affirmed, 210 U. S. 21).

[40] Webster v. Luther, 50–77, 83, 52+271. See Michaelis v. Michaelis, 43–123, 44+1149.

[41] Michaelis v. Michaelis, 43–123, 44+1149.

[42] Webster v. Luther, 50–77, 52+271 (affirmed, 163 U. S. 331); Piper v. Chippewa I. Co., 51–495, 53+870; Whitesides v. Rutan, 53–520, 55+540; Bradley v. Whitesides, 55–455, 57+148; Tuman v. Pillsbury, 60–520, 63+104; Pardee v. Merritt, 75–12, 77+552; Hastay v. Bonness, 84–120, 86+896; Rogers v. Clark, 104–198, 116+739.

[43] Gilbert v. McDonald, 94–289, 102+712; Hastay v. Bonness, 84–120, 86+896.

[44] Lamson v. Coffin, 102–493, 114+248.

[45] Russell v. Lowth, 21–167. See Todd v. Johnson, 56–60, 57+320.

liability for torts.[46] Where a homesteader dies before receiving a patent, his widow, minor children, heirs, or devisees, receiving a patent as provided by statute in such cases, take the land free from liability for their prior debts.[47]

TIMBER CULTURE

7936. Inchoate rights of entryman—One who enters land under the timber-culture act and complies with its conditions acquires vested rights even as against the United States. He has a right to occupy and cultivate the land, and owns the crops which he harvests, such as hay. He may recover from a wrongdoer who destroys trees standing on the land, and his right to recover is not affected by the fact that subsequent to the injury he surrenders his claim.[48]

7937. Relinquishment of claim—Under the act of Congress providing for a written relinquishment of his claim by a timber-culture claimant, the holder for whose benefit such relinquishment is made, if seasonably filed, is enabled to enter the same, and secure the benefit thereof for himself, upon complying with the terms of the timber-culture acts. Though not strictly a conveyance or assignment, it is all the transfer which the nature of the case permits, or which would be of any avail to a purchaser. Such relinquishment is the proper subject of contract, and constitutes a valid consideration therefor.[49] The person to whom the surrender is made is entitled, if he has filed the papers, in the proper local land office, to notice of the cancelation of the entry.[50]

TOWN SITES

7938. Unsurveyed lands—Rights may be acquired in unsurveyed public lands for the purpose of town sites.[51]

7939. Necessity of occupancy—In general—Before lands can be entered under the town-site act they must be settled upon and occupied as a town site. Platting the land as a town is not enough.[52] The extent of occupancy and improvement is not the same as under the pre-emption law. It is unnecessary that the settlement should be in person or that the land should be cultivated.[53]

7940. Who are occupants—The rights of occupants are fixed at the date of submitting the proofs on which the entry is allowed, though the entry is delayed by an appeal. After the proofs are submitted no one can acquire an interest in the land entered by occupancy and improvement. The entry relates back to the date of the proofs.[54] To be a beneficiary of the act one must be in actual occupancy, personally, or by tenant or agent.[55] A county or other municipal corporation, capable of acquiring and holding realty, if in the actual occupancy of any part of a town site, may become a beneficiary under the act.[56] A town-site company may be a beneficiary.[57]

7941. Filing statement of claim—A former statute of this state required claimants to file with the trustee of the town site a statement of the nature and extent of their claims.[58]

[46] Brun v. Mann, 151 Fed. 145.
[47] Coleman v. McCormick, 37–179, 33+556.
[48] Carner v. Chi. etc. Ry., 43–375, 45+713.
[49] Palmer v. March, 34–127, 24+374; Thompson v. Hanson, 28–484, 11+86.
[50] Thompson v. Hanson, 28–484, 11+86.
[51] Carson v. Smith, 5–78(58); Wood v. Cullen, 13–394(365); Mankato v. Meagher, 17–265(243). See Cole v. Maxfield, 13–235 (220).
[52] Carson v. Smith, 12–546(458).
[53] Leech v. Rauch, 3–448(332).
[54] Leech v. Rauch, 3–448(332); Castner v. Gunther, 6–119(63); Castner v. Echard, 6–149(92); Castner v. Lowry, 6–149(92); Harrington v. St. P. etc. Ry., 17–215(188); Mankato v. Meagher, 17–265(243).
[55] Carson v. Smith, 12–546(458).
[56] Blue Earth County v. St. P. etc. Ry., 28–503, 11+73.
[57] Mankato v. Meagher, 17–265(243).
[58] Mankato v. Willard, 13–13(1, 15); Coy v. Coy, 15–119(90).

7942. Inchoate interest of occupant—The interest of an occupant is an inchoate interest in land. It may be defended against all encroachments by persons not having a paramount right. It is more than a mere right to the possession, because it contains the germ which will expand and ripen into a perfect title.[59] It is a vested right—a right to have a trust declared in his favor.[60] It may be sold and conveyed [61] and the conveyance is entitled to record.[62]

7943. Findings of Land Department—The general rules as to the conclusiveness of findings of the Land Department [63] apply to its findings in relation to entries under the town-site act.[64]

7944. Statutory action to determine conflicting claims—There was formerly a statute in this state providing for a special action to determine conflicting claims to land in town sites.[65]

7945. Action to vacate deed—Tendering expenses—An action to set aside a deed to town-site lands has been held maintainable without tendering a proportionate part of the expenses of entering the lands.[66]

7946. Abandonment—A right to have lands entered as a town site, under the act of Congress, may be lost by abandonment of the occupancy so that other persons may enter upon and occupy them, and become entitled to have them entered as a town site for their benefit; and this is the case even where the prior occupants made and recorded a town plat of the lands.[67]

7947. Deed of trustee—Where the judge who holds land under the United States town-site act, in trust for the occupants, executes an official deed for a part of it, the presumption obtains that he did his duty in all respects by compliance with all the statutory prerequisites, and that he conveyed it to the proper party; and one not a beneficiary of the trust, but a mere stranger to the title, cannot litigate or call in question the validity or regularity of the deed in those respects. As soon as the land is entered, the trustee may proceed to execute the trust by giving deeds to the beneficiaries, though the patent from the United States has not yet been issued. When issued, the patent relates back to the date of the entry, and no further deed from the trustee after its issue is necessary to vest title in such beneficiaries. But it must appear that the judge was trustee; that is, had already entered the land when he executed the deed. And a recital of that fact in the deed itself is not evidence as against a stranger to the instrument.[68] A deed by a trustee, of land with a street along the bank or shore of a navigable lake, has been held to pass the fee, subject to the public easement, to the entire street to low-water mark, including all riparian rights.[69] A deed of a trustee has been held to pass the fee to the center of a street.[70] A trustee and his representatives have been held estopped from questioning the title of an occupant to

[59] Davis v. Murphy, 3-119(69); Carson v. Smith, 5-78(58).
[60] Leech v. Rauch, 3-448(332).
[61] Hussey v. Smith, 99 U. S. 20; Carson v. Smith, 5-78(58).
[62] Davis v. Murphy, 3-119(69).
[63] See § 7875.
[64] Leech v. Rauch, 3-448(332); Mankato v. Meagher, 17-265(243).
[65] Foster v. Bailey, 1-436(310); Castner v. Gunther, 6-119(63) (nature of action—defendant cannot deny plaintiff's title unless he shows good title in himself—scope of review on appeal); Weisberger v. Tenny, 8-456(405) (answer merely denying plaintiff's title is bad—must show a right in defendant superior to that of plaintiff); Cathcart v. Peck, 11-45(24) (sufficiency of allegations of occupancy and improvements—defendant must show title).
[66] Cathcart v. Peck, 11-45(24).
[67] Weisberger v. Tenny, 8-456(405). See Cole v. Maxfield, 13-235(220).
[68] Taylor v. Winona etc. Ry., 45-66, 47+453; Lamm v. Chi. etc. Ry., 45-71, 47+455.
[69] Wait v. May, 48-453, 51+471.
[70] Harrington v. St. P. etc. Ry., 17-215(188).

whom he had executed a deed.[71] A deed to a county has been held to pass the title in fee.[72] A deed of unsurveyed lands is inoperative.[73] The title of a grantee in a trustee's deed may be impeached by proof that he had not done acts necessary to constitute an occupancy and to give him title.[74] The requirement of Laws 1857 (extra session), c. 18 § 34, that deeds to occupants should be under the hand of the president of the town, was inapplicable to towns for which no such officer as president was provided.[75]

7948. Effect of dedication—A claimant under the town-site act may, before his right to a deed is established, make a common-law dedication of the land which will bind him. Upon such a dedication the public need not file a statement with the trustee.[76] Where the person upon whose settlement land was entered as a town site under the act of Congress, has had the land surveyed and platted as a town, and the plat recorded, and by it dedicates land to public use, a third party, procuring a conveyance from the trustee, of the land dedicated, and who rests his claim in part on the original settlement, and the survey and plat, and where the survey and plat are expressly recognized in the deed from the trustee, takes subject to the dedication. Where a town plat of lands entered as a town site under the act of Congress, has been executed and recorded, dedicating lands to public use, the plat operates as a conveyance to the public, and no deed from the trustee is necessary. If the trustee conveys the fee to a third party it is subject to the dedication.[77] A trustee under the town-site act cannot dedicate any of the town site.[78]

INDIAN HALF-BREED SCRIP

7949. In general—By an act of Congress of July 17, 1854, the President was authorized to cause to be issued to certain mixed bloods certificates or scrip for the same amount of land to which each individual would be entitled in case of a division of the Pepin reservation among them pro rata. There was a provision that these certificates or scrip might be located upon the lands within the reservation, or upon other unoccupied lands subject to pre-emption or to private sale; that is, lands which had been surveyed, and also upon unsurveyed lands not reserved by the government, "upon which the applicants have respectively made improvements." There was a provision that these certificates or scrip should not embrace more than six hundred and forty nor less than forty acres each, and they were to be equally apportioned among those entitled. The certificates or scrip were made non-transferable. Cases are cited below involving the construction of the act and the determination of rights depending on the location of land with scrip.[79] Similar scrip to half-

[71] Morris v. Watson, 15–212(165).
[72] Blue Earth County v. St. P. etc. Ry., 28–503, 11+73.
[73] Cole v. Maxfield, 13–235(220).
[74] Mankato v. Meagher, 17–265(243).
[75] Remillard v. Blackmarr, 49–490, 52+133.
[76] Mankato v. Willard, 13–13(1); Mankato v. Warren, 20–144(128).
[77] Winona v. Huff, 11–119(75).
[78] Buffalo v. Harling, 50–551, 52+931.
[79] Monette v. Cratt, 7–234(176) (text, history, and object of statute—findings of land officers as to location of scrip conclusive in absence of fraud or mistake); Sharpe v. Rogers, 12–174(103) (location of scrip in Sioux half-breed reservation in Wabasha county—objection of lot owners to location—contract to withdraw objection—want of consideration); Gilbert v. Thompson, 14–544(414) (power of attorney by Sioux half-breed to sell land held to authorize conveyance of land subsequently acquired by him by means of scrip issued under act of July 17, 1854—scrip not transferable); Sharon v. Wooldrick, 18–354(325) (certain land reserved by the government held not subject to scrip); Thompson v. Myrick, 20–205(184) (affirmed, 99 U. S. 291) (one occupying land not subject to scrip may waive the exemption and allow scrip to be located thereon—scrip not transferable—contract relating to transfer held not void); Bishop v. Hyde.

breeds was authorized by the treaty of Sept. 30, 1854, between the United States and the Chippewa Indians of Lake Superior and the Mississippi. The scrip was not assignable, but the person named therein could make a valid contract to convey the land on which it might be located.[80]

SWAMP LANDS

7950. In general—Sale—The original swamp-land act of 1850 was inapplicable to the state of Minnesota, but its provisions were extended to the state by the act of 1860.[81] The state received the swamp lands from the United States free from conditions and with full power to exercise its discretion as to the manner of their sale.[82] The sale of such lands is now regulated by the constitution.[83] Title to such lands cannot be acquired by adverse possession against the state.[84] Prior to the constitutional amendment of 1881 the legislature granted certain of its swamp lands to railway companies,[85] and to individuals to aid in the construction of a state road.[86] By Laws 1865 c. 5 certain of the state swamp lands were appropriated for the establishment and support of an institution for the deaf and dumb at Faribault, for the erection and support of normal schools, and for the erection and support of a state prison.[87] Where certain lands were erroneously patented to the state as swamp lands, though in fact they were not such, a purchaser from the state of such lands, with knowledge of their occupation by a homesteader, was held to take subject to his rights.[88]

7951. What constitutes—Where the federal government surveys, selects, and conveys by patent land as swamp land, its action is conclusive as to the character of the land, except in a direct action by the government to set aside the patent for fraud or mistake, or in a private action to charge the legal owner with a trust in favor of one having a paramount equitable title.[89]

7952. Certificate of sale—Rights of holder—The owner of a state certificate of sale of school or swamp lands is entitled to possession of the land and its rents and profits, and, as against all the world except the state, he is to be treated as the owner of the land. He may maintain ejectment for its possession and trespass against a wrongdoer. When the patent for such land issues, it relates back to the date of the sale.[90]

66–24, 68+95 (affirmed, 177 U. S. 281) (contest involving location of scrip); Coursolle v. Weyerhauser, 69–328, 72+697 (scrip not transferable—nature of title acquired by location of scrip—estoppel and laches—acts of scripee before location—land after location subject to alienation); Midway Co. v. Eaton, 79–442, 82+861 (affirmed, 183 U. S. 602) (conflict between one claiming under location of scrip and one claiming under pre-emption entry—decision of Secretary of the Interior adverse to scripee held invalid—finding in favor of one holding under scrip sustained); Buffalo L. & E. Co. v. Strong, 91–84, 97+575 (two powers of attorney—one to locate certain half-breed scrip, and the other to convey the land thereby located—taken separately or together, held not to constitute an assignment or transfer of the scrip itself); State v. Itasca L. Co., 100–355, 111+276 (necessity of approval of scrip and located by Commissioner of the General Land Office before complete vesting of title in scripee).

[80] Dole v. Wilson, 20–356(308).

[81] Rice v. Sioux City etc. Ry., 110 U. S. 695.

[82] Scofield v. Scheaffer, 104–123, 116+210.

[83] Const. art. 8 § 2; R. L. 1905 § 2407; State v. Board of Control, 85–165, 194, 88+533; State v. Evans, 99–220, 223, 108+958; Scofield v. Scheaffer, 104–123, 116+210.

[84] Scofield v. Scheaffer, 104–123, 116+210.

[85] St. Paul & C. Ry. v. Brown, 24–517; Mpls. etc. Ry. v. Duluth etc. Ry., 45–104, 47+464; White v. Neils, 100–16, 110+371.

[86] Goodwin v. Rice, 26–20, 1+257.

[87] St. Paul & C. Ry. v. Brown, 24–517; White v. Neils, 100–16, 110+371.

[88] Roy v. Duluth etc. Ry., 69–547, 72+794 (affirmed, 173 U. S. 587).

[89] Lamprey v. Danz, 86–317, 90+578.

[90] White v. Neils, 100–16, 22, 110+371.

TIMBER LANDS

7953. What constitutes—The duty of determining the question of fact whether any particular tract of state land is chiefly valuable for the pine timber thereon, which fact determines the manner of its sale, is vested by law in the state land commissioner. The correctness of his decision of the question cannot be reviewed in a collateral action after the patent has been issued, and especially so by one having no interest in the land.[91]

7954. Sale of timber—In construing G. S. 1894 §§ 4011, 4012, it has been held that the sale of any pine timber on state lands is prohibited, except in special cases, where the timber is liable to waste; that the state auditor, acting as commissioner of the state land office, has no authority to sell any pine timber, under any conditions, unless the governor, the treasurer, and commissioner, or a majority of them, shall first officially sign a statement, to be indorsed upon the appraisal and estimate of such pine timber as it is proposed to sell, to the effect that a sale thereof is necessary to protect the state from loss; and that if such commissioner does attempt to sell any pine timber, and issues a permit to the purchaser to cut and remove the same, without such official statement and sanction, such sale and permit are void.[92]

7955. Permits to cut timber—Cases are cited below arising under the statute authorizing permits for the cutting of timber.[93]

7956. Recovery of timber cut under void permit—Alternative value how assessed—In an action of replevin by the state to recover the possession of logs cut from state lands under a void permit, the defendant is entitled to show, if he can, that he acted in good faith, without any knowledge in fact of the invalidity of his permit, and that in reliance thereon, and in the honest and reasonable belief that he had a legal right to do so, he cut the logs; and, further, that by his labor and money expended in cutting such logs, and transporting them to a proper market, he materially increased their value. If he establishes such facts, the alternative value of the logs is to be assessed as of the time and place of the original taking—that is, at their stumpage value—with interest thereon from the time of the taking to the date of the verdict, and the judgment so framed as to protect the interests of both parties.[94]

7957. Trespass—Action for penalty—Conversion—Laws 1895 c. 163, declaring certain acts of trespass upon state lands a crime, imposing a penalty therefor, and fixing the measure of damages recoverable in a civil action, imposes upon a casual or involuntary trespasser criminal punishment and also double damages for his wrongful acts. It has been declared constitutional against various objections.[95] A person is liable under the statute if he cuts or removes timber after the expiration of a permit.[96] An action under the

[91] White v. Neils, 100–16, 22, 110+371. See State v. Red River L. Co., 109–185, 123+412.

[92] State v. Shevlin, 62–99, 64+81.

[93] State v. Shevlin, 62–99, 64+81 (void permit may be attacked collaterally though it recites on its face facts showing that the law has been complied with); State v. Shevlin, 102–470, 113+634, 114+738 (duration of permit—extension); State v. Rat Portage L. Co., 106–1, 115+162(id.); State v. Akeley, 107–54, 119+387 (action by state for balance due—permits as evidence of sales—necessity of indorsement of appraisal of timber by majority of members of timber commission—irregularities in sale of permits—findings sustained).

[94] State v. Shevlin, 62–99, 64+81.

[95] State v. Shevlin, 99–158, 108+935; Id., 102–470, 113+634, 114+738; State v. Rat Portage L. Co., 106–1, 115+162. See State v. Clarke, 109–123, 123+54; State v. Red River L. Co., 109–185, 123+412; Shevlin v. State, 218 U. S. 57.

[96] State v. Shevlin, 102–470, 113+634; 114+738; State v. Rat Portage L. Co., 106–1, 115+162; State v. Le Sure L. Co., 106–534, 115+167, 117+923.

statute for the recovery of treble damages for a wilful trespass must be brought within three years,[97] but an action by the state for conversion to recover the value of timber removed after the expiration of a permit is not barred by the statute of limitations applicable to actions based on a statute for a penalty or forfeiture, or to actions for a penalty or forfeiture to the state.[98] The state is not estopped, in a civil action, to recover double the amount of value of timber taken by reason of the fact that the land commissioner gave the party to understand that a further extension of the permit would be granted, and by reason of the fact that the party proceeded in good faith, and the state received payment therefor, with interest, and retained the same.[99]

7958. Settlement with trespassers—Authority of state auditor—Under Laws 1874 c. 35 the state auditor was authorized to settle with a trespasser for stumpage, to state an account therefor, and to defer or extend the time for the payment.[1]

SCHOOL LANDS

7959. Title of state—How acquired—Nature—The title of the state to its school lands is traceable to the act of Congress of March 3, 1849, establishing the territorial government of Minnesota; the act of Congress of Feb. 26, 1857, authorizing the people of Minnesota to form a state government; and to the state constitution accepting the grant of Congress. The grant was not made to the state in its proprietary capacity; but in trust, for the explicit purpose of having the lands applied to the use of the schools of the state.[2]

7960. Lands included—Indian reservation—The general grant of school land to the state did not include lands in the Red Lake Indian reservation.[3]

7961. Determination of character by state auditor—The state auditor, as ex officio land commissioner, is authorized by statute to determine the character of the state's school lands, whether agricultural, timber, or mineral, and his determination thereof can be called in question, after a sale of the land based thereon, only in a direct proceeding brought for that purpose.[4]

7962. Prior rights of settlers—Under a joint resolution of Congress, passed March 3, 1857, persons who had settled on school lands before they were surveyed, were authorized to pre-empt the same, upon bringing themselves within the requirements of the pre-emption law in other respects. The state took the grant of its school lands subject to the rights of such settlers.[5]

7963. Indemnity school lands—The state does not acquire title to indemnity school lands by merely selecting them. Title does not pass to the state at least until its selection is approved by the Secretary of the Interior, and possibly not until the lands are certified to the state.[6]

7964. Sale—Resale on default—The sale of school lands is regulated by the constitution and by statute.[7] A sale not so authorized is void. A conditional sale has been held unauthorized.[8] Provision is made for a resale upon default in the payment of interest.[9]

[97] State v. Buckman, 95-272, 104+240; State v. Bonness, 99-392, 109+703.

[98] State v. Rat Portage L. Co., 106-1, 115+162.

[99] State v. Shevlin, 102-470, 113+634, 114+738.

[1] State v. Galusha, 26-238, 2+939, 3+350.

[2] Murtaugh v. Chi. etc. Ry., 102-52, 112+860; State v. Bachelder, 5-223(178); State v. Batchelder, 7-121(79). See Baker v. Jamison, 54-17, 27, 55+749.

[3] Minn. v. Hitchcock, 185 U. S. 373.

[4] State v. Red River L. Co., 109-185, 123+412.

[5] State v. Bachelder, 5-223(178); State v. Stevens, 5-521(416); State v. Batchelder, 7-121(79).

[6] Baker v. Jamison, 54-17, 55+749.

[7] Const. art. 8 § 2; R. L. 1905 §§ 2418-2438; State v. Evans, 99-220, 108+958; State v. Red River L. Co., 109-185, 123+412; Lawver v. G. N. Ry., 127+431.

[8] Wright v. Burnham, 31-285, 17+479.

[9] R. L. 1905 § 2421; McKinney v. Bode,

7965. Payment to county treasurer—Provision is made by statute for the payment to the county treasurer of moneys due on sales of school lands.[10]

7966. Certificate of sale—Rights of holder—The certificate of sale issued to a purchaser of school lands is evidence of title, and entitles the holder to possession of the land and the rents and profits thereof, but the fee remains in the state until a patent is issued.[11] A certificate is a "conveyance" within the statute against resulting trusts.[12] It becomes functus officio upon the issuance of a patent.[13]

7967. Patent—Upon the sale of state school lands the patent passes the legal title to the grantee named in it, and supersedes the certificate of sale. The right to possession of the land vests in such grantee. The patent cannot be avoided for irregularities on the part of the officers whose business it is to issue patents in such cases, though it may be defeated by want of title in the state, or want of power in the officers. Except in such cases, the patent, when regular on its face—that is, when in proper form, and signed by the proper officers and with the proper seal—is conclusive evidence of the legal title. One who has a prior equitable right to receive the patent, superior to that of the patentee, may enforce his equity by action (or when he is defendant, by answer), in which the court may cause the legal title to be vested in him, and may adjudge the possession to him.[14]

7968. Abandonment by purchaser—A finding that a holder of certificates of sale of certain school lands abandoned all claim to the lands, has been held justified by the evidence.[15]

INTERNAL IMPROVEMENT LANDS

7969. Grant to state for public buildings—By section 5 of the act of Congress authorizing the people of Minnesota territory to form a constitution and state government, ten sections of land were granted to the state for the purpose of erecting public buildings at the seat of government. The legislature may erect a new capitol building without first disposing of these lands, and exhausting the proceeds thereof in erecting the same.[16]

7970. Sale—Internal-improvement lands cannot be sold except by absolute sale as prescribed by statute. A conditional sale is unauthorized.[17]

FRAUD AND MISTAKE

7971. Misnomer in patent—Where in a patent of land the name was given "Le Claine" instead of "Le Claire," the true name, as both parties claimed under the patent as though the name were Le Claire, it was held that, as between them, it must be taken to be the true name of the patentee.[18]

7972. Erroneous entry—Transfer to tract intended—The federal statute providing for the transfer to the tracts intended of an entry of public land,

32-228, 20+94 (payment may be made by one claiming under the purchaser); State v. Bruce, 50-491, 494, 52+970.

[10] R. L. 1905 § 2428; Gerken v. Sibley County, 39-433, 40+508.

[11] R. L. 1905 § 2423; Wilder v. Haughey, 21-101, 106; McKinney v. Bode, 32-228, 20+94; Id., 33-450, 453, 23+851; Haaven v. Hoaas, 60-313, 62+110; White v. Neils, 100-16, 110+371; State v. Red River L. Co., 109-185, 123+412.

[12] Haaven v. Hoaas, 60-313, 62+110.

[13] McKinney v. Bode, 33-450, 23+851.

[14] McKinney v. Bode, 33-450, 23+851. See Butler v. Drake, 62-229, 64+559 (a patent, purporting to convey a tract in section twenty-two as school land, held not to raise a presumption of ownership in the state at the date of the patent or at any other time); State v. Red River L. Co., 109-185, 123+412.

[15] Murphy v. Burke, 47-99, 49+387.

[16] Fleckten v. Lamberton, 69-187, 72+65.

[17] Wright v. Burnham, 31-285, 17+479.

[18] Dawson v. Mayall, 45-408, 48+12.

erroneous because of a mistake in the numbers or description of the tracts on the part of the person entering, authorizes a transfer to the tracts intended only if they are unsold at the date of the transfer. A purchaser of such tracts does not take charged with notice of a prior application to make the transfer, and subject to its result.[19]

7973. Suspension of entry for irregularity—The Land Department may suspend proceedings even after the issuance of a certificate, for irregularity in the proof, and direct that further proof be furnished.[20]

7974. Cancelation of entry for fraud—The Land Department may cancel an entry for fraud even after final proof and before the issuance of patent.[21]

7975. Patent issued by mistake or inadvertence—Where a patent is issued to the wrong person by mistake or inadvertence the courts may afford appropriate relief to the person entitled to the patent, either by compelling a conveyance to him, or by quieting his title, or by declaring a trust, or by an injunction.[22]

7976. Cancelation of patents—A patent secured by fraud on the government may be canceled by a court in an action by one equitably entitled to the land.[23] It cannot be canceled by the Land Department on any ground.[24]

7977. Purchasers take subject to cancelation—Purchasers of public land from entrymen before patent issues take subject to a cancelation of the entry by the Land Department.[25]

7978. Who may raise objection—Where the United States land-officers construe an entry of land to have been made by a party as administrator of a deceased person, on behalf of the heirs of such person, and that the entry was one which could be so made, and a patent issues accordingly, no one but the United States, or some one having an interest in the land, can complain of error or mistake on the part of such officers.[26]

7979. Estoppel—Fraudulent application—Where a patent was issued to A, based on a fraudulent application, it was held that his heirs were estopped from claiming thereunder as against B, who claimed under a location made under a power of attorney executed by A.[27]

7980. Pleading—An allegation in a pleading that certain decisions of the United States Land Department and the acts done thereunder were against an act of Congress and in fraud of the party, without averring any facts, is not a sufficient allegation of fraud to admit proof under it.[28]

PROTECTION OF BONA FIDE PURCHASERS

7981. In general—Special provision is often made for the protection of bona fide settlers and purchasers.[29] And in the absence of express provision land occupied by bona fide settlers is excluded from land grants.[30]

[19] Manuel v. Fabyanski, 44-71, 46+208.

[20] Polk County v. Hunter, 42-312, 44+201. See Wheeler v. Merriman, 30-372, 380, 15+665.

[21] Judd v. Randall, 36-12, 29+589; Gray v. Stockton, 8-529(472).

[22] Duluth etc. Ry. v. Roy, 173 U. S. 587 (affirming Roy v. Duluth etc Ry., 69-547, 72+794). See Hayes v. Carroll, 74-134, 138, 76+1017; St. Paul etc. Ry. v. Olson, 87-117, 122, 91+294; Eimer v. Wellsand, 93-444, 101+612; Rogers v. Clark, 104-198, 221, 116+739.

[23] Corbett v. Wood, 32-509, 21+734; Duluth etc. Ry. v. Roy, 173 U. S. 587 (affirming Roy v. Duluth etc. Ry., 69-547, 72+794). See State v. Bachelder, 5-223(178) (reversed, 1 Wall. 109).

[24] See Sage v. Rudnick, 91-325, 334, 98+89, 100+106.

[25] Randall v. Edert, 7-450(359); Gray v. Stockton, 8-529(472).

[26] Dawson v. Mayall, 45-408, 48+12.

[27] Rogers v. Clark, 104-198, 116+739.

[28] Kelley v. Wallace, 14-236(173).

[29] Peterson v. First Div. etc. Ry., 27-218, 6+615; O'Connor v. Gertgens, 85-481, 89+866.

[30] See § 7893.

CERTIFICATES AND RECEIPTS

7982. As evidence of title—It is provided by statute that a receipt or certificate issued by a register or receiver of a United States land office shall be prima facie evidence of title in the person named therein.[31] The statute prescribes a rule of evidence and not of pleading.[32] It was not intended to create or vest title to government lands, and it cannot be construed as fixing a time when the title to such lands passes to an entryman under the homestead laws.[33] A pre-emption certificate is prima facie evidence of title, not only at the time of entry, but also at the time of settlement.[34] A duplicate issued by the proper land office of an entry under the town-site act is evidence that the land described has been settled upon and occupied as a town site in accordance with the law.[35]

SURVEYS

7983. Conclusiveness—After the government has sold lands according to a survey and plat, it cannot ordinarily dispute the truth of such survey or map.[36] Mistakes in surveys cannot be corrected by the courts.[37]

[31] R. L. 1905 §§ 4732, 4733; Camp v. Smith, 2–155(131, 142); Walsh v. Kattenburgh, 8–127(99, 103); Sharon v. Wooldrick, 18–354(325); Tidd v. Rines, 26–201, 206, 2+497; Winona etc. Ry. v. Randall, 29–283, 13+127; Polk County v. Hunter, 42–312, 314, 44+201; Preiner v. Meyer, 67–197, 200, 69+887; Matthews v. O'Brien, 84–505, 507, 88+12.

[32] Schultz v. Hadler, 39–191, 39+97.

[33] Sims v. Morrison, 92–341, 346, 100+88.

[34] Winona etc. Ry. v. Randall, 29–283, 13+127; Gilbert v. McDonald, 94–289, 102+712.

[35] Leech v. Rauch, 3–448(332).

[36] St. Paul etc. Ry. v. First Div. etc. Ry., 26–31, 49+303.

[37] Chan v. Brandt, 45–93, 47+461.

PUBLIC OFFICERS

Cross-References

See Embezzlement, 2999; Evidence, 3435; Injunction, 4485; Quo Warranto; Taxation, 9116; Witnesses, 10315.

IN GENERAL

7984. Definitions—A public office is an agency of the government.[38] A public officer is an agent of the government—a person discharging the duties of a public office.[39] The words "office" and "officer" are terms of vague and variable import, the meaning of which necessarily varies with the connection in which they are used, and, to determine it correctly in a particular instance, regard must be had to the intention of the statute and the subject-matter in reference to which the terms are used.[40] An incumbent of an office is a person in the possession of the office.[41]

7985. Nature of public office—A public office is a public agency or trust, created for the benefit of the public, and not for the benefit of the incumbent.

[38] Hennepin County v. Jones, 18-199 (182).

[39] Hennepin County v. Jones, 18-199 (182); State v. Peterson, 50-239, 243, 52+655. See, as to who are public officers, Sanborn v. Neal, 4-126(83, 91) (trustees of school district); State v. Kiichli, 53-147, 54+1069 (president of city council); State v. Schram, 82-420, 85+155 (village marshal).

[40] State v. Kiichli, 53-147, 155, 54+1069.

[41] State v. Benedict, 15-198(153).

It is not the property of the incumbent.[42] At common law an office was regarded as an incorporeal hereditament.[43]

7986. Appointment—Conditional—Prospective—Preference to soldiers—An appointment to a public office, originally coupled with a condition which is not performed, becomes a valid appointment when the appointing power subsequently dispenses with the condition, having authority to do so.[44] The general rule is that a prospective appointment to fill a vacancy sure to occur in a public office, made by an officer who, or by a body which, as then constituted, is empowered to fill the vacancy when it arises, is, in the absence of a law forbidding it, a valid appointment, and vests title to the office in the appointee.[45] A statute giving a preference in appointment to honorably discharged Union soldiers and sailors, has been held constitutional.[46] It did not give them an absolute right to appointment, enforceable by mandamus.[47]

7987. Oath—All public officers are required to take and subscribe an oath of office, or make affirmation, as provided by the constitution and statute.[48] It is proper, but not indispensable, that the oath refer specifically to the office.[49] An oath is often required by municipal charters,[50] and special acts.[51] As a general rule, a failure to take the oath of office within the time specified by law does not ipso facto create a vacancy which will prevent an officer from qualifying thereafter, if it is done before any steps are taken to declare a vacancy, though the statute declares that the office shall become vacant on refusal or neglect to take the oath within the time prescribed.[52]

7988. Term—Commencement of official year—It is provided by the constitution that all terms of office shall terminate on the first Monday in January.[53] Accordingly, the official year commences on the first Monday in January, at which time all terms of office terminate. The law does not recognize fractions of a day, and the official year begins with the beginning of the day, twelve o'clock midnight. But the constitution contemplates that the new officers shall have reasonable opportunity to qualify and assume the duties of office after the opening of business hours on that day, and in case of necessity may qualify at any time during the day. Strictly speaking, outgoing officers do not pass out of office until the close of the first day of the official year, unless their successors qualify at some time during the day; but such holding-over officers, pending the qualification of the new officials, are limited in jurisdiction on that day to the closing up of old business and to matters of necessity. All business which naturally belongs to the first day of the official year is within the jurisdiction of the incoming officials, though there may be some delay during the day in qualifying and assuming official duties.[54] Except as otherwise provided by the constitution, the legislature may lengthen or shorten a term at pleasure.[55] Changes in terms may of course be made by constitutional amendment at the pleasure of the people.[56] Unless otherwise provided

[42] Hennepin County v. Jones, 18–199 (182); State v. Frizzell, 31–460, 467, 18+316; State v. Peterson, 50–239, 243, 52+655; Yorks v. St. Paul, 62–250, 252, 64+565; State v. Wadhams, 64–318, 324, 67+64; Taylor v. Beckham, 178 U. S. 548; 14 Harv. L. Rev. 218.

[43] State v. Peterson, 50–239, 243, 52+655.

[44] State v. Ring, 29–78, 11+233.

[45] State v. O'Leary, 64–207, 66+264.

[46] State v. Miller, 66–90, 68+732.

[47] State v. Barrows, 71–178, 73+704; State v. Copeland, 74–371, 77+221.

[48] Const. art. 5 § 8; R. L. 1905 § 2677; State v. Schram, 82–420, 85+155.

[49] State v. Ladeen, 104–252, 116+486.

[50] State v. Wadhams, 64–318, 67+64; State v. Jack, 98–278, 108+10.

[51] State v. McLeod County, 27–90, 6+421.

[52] State v. Stratte, 83–194, 86+20. See State v. Wadhams, 64–318, 67+64.

[53] Const. art. 7 § 9. See, as to the effect of this constitutional amendment on existing terms of office, State v. Frizzell, 31–460, 18+316.

[54] State v. McIntosh, 109–18, 122+462.

[55] Jordan v. Bailey, 37–174, 33+778.

[56] State v. Frizzell, 31–460, 18+316.

by law, an appointive officer has no fixed term, but is removable at the pleasure of the appointing power.[57] Unless otherwise provided by law, the term of a deputy expires with that of his principal.[58] Elective officers are generally entitled to hold over until their successors are elected and qualified.[59] An express provision for such a holding over is designed to prevent a possible vacancy, and not to create an unlimited term, or to extend indefinitely the prescribed term.[60] It entitles an incumbent to hold over, in case an ineligible person is elected as his successor.[61] Unless otherwise provided, an appointment to fill a vacancy in an elective office continues until the next general election occurring after there is sufficient time to give the notice prescribed by law, and until a successor is elected and qualified.[62]

7989. Resignation—Unless otherwise provided by law, a public officer may resign at his pleasure.[63] To constitute a complete and operative resignation of public office, there must be an intention to relinquish a part of the term, accompanied by the act of relinquishment. A written resignation delivered to the board or officer authorized to receive it and to fill the vacancy thereby created is prima facie, but not conclusive, evidence of an intention to relinquish the office. A resignation of public office procured by coercion and duress is voidable, and may be repudiated; and a refusal immediately subsequent to the resignation to surrender the office is a sufficient repudiation.[64] One who voluntarily abandons or relinquishes an office, or acquiesces in his removal, is said to resign by implication.[65]

7990. Vacancies—The conditions giving rise to a vacancy in public offices are defined by statute.[66] The subject is sometimes governed by municipal charters.[67] An office cannot be deemed vacant when a person is acting in it with authority.[68] An incumbent may at any time cause a vacancy by resigning or accepting an incompatible office.[69]

7991. Deputies—As a general rule a deputy may perform any ministerial act which his principal may perform.[70]

ELIGIBILITY

7992. In general—Constitutional provision—The word "eligible," in this connection means qualified to be elected.[71] By virtue of the constitution the general test of eligibility is the right to vote.[72] The constitutional provision

[57] Egan v. St. Paul, 57-1, 58+267; Parish v. St. Paul, 84-426, 87+1124.

[58] State v. Barrows, 71-178, 73+704.

[59] State v. Benedict, 15-198(153); Scott County v. Ring, 29-398, 13+181; Jordan v. Bailey, 37-174, 33+778; Taylor v. Sullivan, 45-309, 47+802; Norwood v. Holden, 45-313, 47+971; State v. Streukens, 60-325, 62+259; State v. Marr, 65-243, 68+8; State v. Jack, 98-278, 108+10. See, as to officers who do not hold over, State v. Sherwood, 15-221(172); State v. Frizzell, 31-460, 18+316; State v. O'Leary, 64-207, 66+264.

[60] Scott County v. Ring, 29-398, 13+181.

[61] State v. Benedict, 15-198(153); Taylor v. Sullivan, 45-309, 47+802.

[62] R. L. 1905 § 2671; State v. Benedict 15-198(153); Scott County v. Ring, 29-398, 13+181.

[63] Barnum v. Gilman, 27-466, 469, 8+375; State v. Dart, 57-261, 59+190.

[64] State v. Ladeen, 104-252, 116+486.

[65] Byrnes v. St. Paul, 78-205, 80+959. See Larsen v. St. Paul, 83-473, 86+459.

[66] R. L. 1905 § 2667; State v. Benedict, 15-198(153) (death of person elected before commencement of term); Scott County v. Ring, 29-398, 13+181 (failure to qualify on re-election); Norwood v. Holden, 45-313, 47+971 (non-residence in district—effect of redistricting); State v. O'Leary, 64-207, 66+264 (expiration of term with no right to hold over); State v. Stratte, 83-194, 86+20 (failure to qualify); State v. Hays, 105-399, 117+615 (ceasing to be a resident of county).

[67] State v. Jack, 98-278, 108+10 (failure to qualify).

[68] Jordan v. Bailey, 37-174, 33+778.

[69] Barnum v. Gilman, 27-466, 469, 8+375.

[70] Crowell v. Lambert, 10-369(295, 300); Piper v. Chippewa I. Co., 51-495, 53+870.

[71] Taylor v. Sullivan, 45-309, 47+802.

[72] Const. art. 7 § 7; State v. Clough, 23-17; Barnum v. Gilman, 27-466, 8+375;

applies to all elective offices, including municipal offices.[73] Eligibility is to be determined as of the date of the election, and not as of the date when the term of office begins.[74]

7993. Women—Women are eligible to hold any office pertaining to the management of schools and libraries.[75] They are eligible to the office of county superintendent of schools.[76]

7994. Presumption—A person appointed in regular form to a public office is presumed to have been eligible to such office, in the absence of evidence to the contrary.[77]

7995. Incompatible offices—Incompatibility does not depend upon the physical inability of one person to discharge the duties of both offices. The test is the character and relation of the offices; that is, whether the functions of the two are inherently inconsistent and repugnant. If one is not subordinate to the other, and no necessary antagonism would result from an attempt of one person to discharge the duties of both offices, there is no incompatibility.[78]

7996. No religious or property test—No religious or property test can be required as a qualification for a public office.[79]

7997. Legislative control—The legislature cannot enlarge or restrict the qualifications prescribed by the constitution,[80] but it may regulate, within reasonable limits, the mode in which the right to be a candidate shall be exercised.[81]

POWERS, DUTIES, AND LIABILITIES

7998. Functions of office—Statutory powers—As a general rule duties imposed by law upon public officers are functions and attributes of the office rather than of the officer.[01] Public officers whose authority is wholly statutory are bound to exercise it in conformity to the statute, and all persons dealing with them are charged with notice of the nature and extent of their authority.[82]

7999. Liability on contracts—When public officers in good faith contract with parties having equal means of knowledge with themselves, they do not become personally liable, though they exceed their authority, unless an intention to incur a personal liability is clearly expressed.[83] If they sign a public contract in their individual names they are prima facie personally liable, but it may be shown by parol that they contracted in their public capacity.[84] Persons dealing with public officers are charged with notice of their powers.[85]

8000. Liability for money received—Where a statute, either in direct terms or from its general tenor, imposes the duty upon a public officer to pay

State v. Streukens, 60–325, 326, 62+259. See, under territorial laws, Territory of Minn. v. Smith, 3–240(164).

[73] State v. Holman, 58–219, 59+1006.

[74] Territory of Minn. v. Smith, 3–240 (164); Taylor v. Sullivan, 45–309, 47+802 (overruling dicta in Barnum v. Gilman, 27–466, 8+375).

[75] Const. art. 7 § 8; Trautmann v. McLeod, 74–110, 76+964.

[76] State v. Gorton, 33–345, 23+529.

[77] State v. Ring, 29–78, 11+233.

[78] Kenney v. Goergen, 36–190, 31+210; State v. Hays, 105–399, 117+615.

[79] Const. art. 1 § 17; State v. Scott, 99–145, 108+828 (filing fee under primary law not a property test).

[80] State v. Holman, 58–219, 59+1006; State v. Bates, 102–104, 111, 112+1026.

[81] State v. Moore, 87–308, 92+4.

[01] State v. Johnson, 126+479.

[82] Hall v. Ramsey County, 30–68, 14+263; Security T. Co. v. Heyderstaedt, 64–409, 67+219.

[83] Sanborn v. Neal, 4–126(83); Balcombe v. Northup, 9–172(159); First Nat. Bank v. Becker County, 81–95, 83+468; Schieber v. Von Arx, 87–298, 92+3.

[84] Fowler v. Atkinson, 6–578(412); Balcombe v. Northup, 9–172(159); Bingham v. Stewart, 13–106(96); Id., 14–214(153).

[85] Reed v. Seymour, 24–273, 280; Mitchell v. St. Louis County, 24–459; Hall v. Ramsey County, 30–68, 14+263.

over moneys received and held by him in his official capacity, the obligation thus imposed is an absolute one, unless it is limited by the statute imposing the duty, or by the conditions of his official bond. In respect to such liability there is no distinction between public and private funds. It is no defence that the money is lost or stolen without fault on the part of the officer.[86] This absolute liability is now materially modified by the statutes relating to public depositaries.[87]

8001. Liability for negligence—A ministerial officer is liable for negligence in the discharge of a special duty to an individual.[88]

8002. Liability to a penalty—A penalty may be imposed for a neglect to perform a duty according to the requirements of the law, even though the prescribed act be performed in a manner or at a time other than that directed, and so that the ultimate purposes of the law may have been really accomplished.[89]

8003. Who may question acts—As a general rule courts will not review the acts of public officers at the suit of individuals having no peculiar interest therein.[90]

8004. Criminal liability—Malfeasance and nonfeasance—A wilful neglect of official duty by a public officer is a criminal offence.[91] An officer who corruptly does an act beyond his authority, assuming to act officially and under his official designation, in a manner likely to deceive and mislead others is guilty of misbehavior in office.[92] An officer who knowingly audits or pays false claims is criminally liable.[93]

COMPENSATION

8005. Incident to title to office—De jure and de facto officers—The salary annexed to a public office is incident to the title to the office, and not to its occupation and exercise, or to the usurpation or colorable possession of it. A de jure officer may recover a salary, though the office has been occupied by a de facto officer who has been paid the salary during his occupancy.[94] But an officer de jure cannot sue for the salary of his office while it is in the possession of an officer de facto, who receives the salary, and the board paying it has no notice of the claim of the officer de jure.[95] A de facto officer cannot recover for services not actually performed.[96] He cannot recover the emoluments of the office, even though he discharges its duties, if he fails to qualify.[97] An officer has been held not estopped from claiming the full salary attached to his office by accepting an illegally reduced salary.[98]

[86] Hennepin County v. Jones, 18–199 (182); McLeod County v. Gilbert, 19–214 (176); Redwood County v. Tower, 28–45, 8+907; Board of Ed. v. Jewell, 44–427, 46+914; State v. Bobleter, 83–479, 86+461; N. P. Ry. v. Owens, 86–188, 90+371. See, as to what constitutes a receipt of money, Board of Ed. v. Robinson, 81–305, 84+105.

[87] See § 2698.

[88] Rosenthal v. Davenport, 38–543, 38+618; Selover v. Sheardown, 73–393, 76+50. See Hull v. Chapel, 71–408, 411, 74+156.

[89] Gutches v. Todd County, 44–383, 386, 46+678.

[90] State v. Lamberton, 37–362, 34+336.

[91] R. L. 1905 §§ 4796, 4843; State v. Coon, 14–456(340) (failure to pay over money—demand—withholding information); Davis v. Le Sueur County, 37–491, 35+364 (neglect of duty to execute process); State v. Norton, 109–99, 123+59 (withholding public funds).

[92] State v. Wedge, 24–150 (county attorney aiding criminal to escape).

[93] R. L. 1905 § 4865; State v. Bourne, 86–426, 90+1105.

[94] Larsen v. St. Paul, 83–473, 86+459. See Yorks v. St. Paul, 62–250, 64+565; Byrnes v. St. Paul, 78–205, 80+959.

[95] Parker v. Dakota County, 4–59(30).

[96] Yorks v. St. Paul, 62–250, 64+565.

[97] State v. Schram, 82–420, 85+155.

[98] Bowe v. St. Paul, 70–341, 73+184.

8006. During suspension—It is the general rule that an officer is not entitled to compensation during a legal suspension, but special circumstances may take a case out of the general rule.[99]

8007. May be decreased or taken away—A public officer has no contract or vested right to the continuance of his office or its emoluments. His office may be abolished or his term shortened, and his salary or fees may be reduced or taken away entirely.[1] Where the term of an officer with an annual salary is shortened, his salary ceases when his term ceases, and he is only entitled to a pro rata compensation.[2]

8008. None except as prescribed by law—A public officer takes his office cum onere and is entitled to no compensation for his official services except as prescribed by law.[3]

8009. Unofficial services—Extra compensation—A public officer may recover compensation for unofficial services, rendered outside of and in addition to his ordinary official services, if they could as well be performed by any other person and involve no breach of trust.[4]

REMOVAL AND SUSPENSION

8010. In general—Unless otherwise provided, an appointive officer may be removed at the pleasure of the appointing power.[5] The subject of the removal of public officers from office, either elective or appointive, is within legislative control, and the manner or method prescribed by statutory enactments therefor is exclusive.[6]

8011. By governor—Statute—The governor is authorized by statute to remove certain public officers for malfeasance or nonfeasance in office.[7] The statute carries implied authority to suspend an officer pending proceedings for his removal.[8] The governor is authorized by a special statute to suspend county treasurers upon a charge of malfeasance or nonfeasance in office, and to remove them if the charge is sustained.[9] The statute has been held constitutional.[10] An order of suspension does not become operative until issued and served. The mere fact that the governor signs it while out of the state does not invalidate it.[11] Pending proceedings for the removal of a county treasurer, he may resign or relinquish his office, but he is not eligible for reappointment to the same office for the remainder of the same term by the county board until he has been acquitted, or the proceedings dismissed. His eligibility for the office during the remainder of the term is involved in the removal proceedings which may be prosecuted for the purpose of determining such eligibility after he has thus resigned or relinquished his office.[12]

[99] Rees v. Minneapolis, 105–246, 117+432.

[1] Hennepin County v. Jones, 18–199 (182); Stevens v. Minneapolis, 29–219, 12+533; State v. Frizzell, 31–460, 18+316; Yorks v. St. Paul, 62–250, 252, 64+565.

[2] State v. Frizzell, 31–460, 18+316. See Beatty v. Sibley County, 32–470, 21+548.

[3] Warner v. Grace, 14–487(364); Thomas v. Scott County, 15–324(254); Day v. Putnam Ins. Co., 16–408(365); Bruce v. Dodge County, 20–388(339); Chapel v. Ramsey County, 71–18, 73+520; Wagener v. Ramsey County, 76–368, 79+166; State v. Smith, 84–295, 87+775; Hennepin County v. Dickey, 86–331, 90+775; Young v. Mankato, 97–4, 105+969; Vistaunet v. Thief River Falls, 126+1134.

[4] State v. Vasaly, 98–46, 107+818. See Young v. Mankato, 97–4, 105+969.

[5] Egan v. St. Paul, 57–1, 58+267; Parish v. St. Paul, 84–426, 87+1124; State v. Thompson, 91–279, 97+887.

[6] State v. Thompson, 91–279, 97+887.

[7] R. L. 1905 §§ 2668, 2669, 2676; Larrabee v. Minn. T. Co., 36–141, 30+462 (ground for removing county attorney); Hillman v. Hennepin County, 84–130, 86+890 (fees of commissioners to take testimony).

[8] State v. Megaarden, 85–41, 88+412. See Rees v. Minneapolis, 105–246, 117+432.

[9] R. L. 1905 §§ 2673–2676; Carver County v. Bongard, 82–431, 85+214 (statute cited arguendo); State v. Megaarden, 85–41, 88+412 (id.).

[10] State v. Peterson, 50–239, 52+655.

[11] Id.

[12] State v. Dart, 57–261, 59+190.

DE FACTO OFFICES AND OFFICERS

8012. Definition—An officer de facto is one who has the reputation of being the officer he assumes to be, and yet is not a good officer in point of law [13] —one who, though not legally entitled to an office, actually performs its duties, with apparent right.[14]

8013. Basis of rule—The rule which gives effect to the acts of a de facto officer is based on considerations of public policy. It would be intolerable if persons dealing with an officer were required, at their peril, to determine his right to the office.[15]

8014. De facto office—There may be a de facto officer without a de jure office. There may be a de facto office or court.[16] Where a person who is not and cannot be an officer de jure, because there is not and cannot be an office de jure to be filled by any one, usurps the functions and performs acts required by law to be done by officers who exist at the time, de jure as well as de facto, such law has not been complied with, and the acts cannot be held valid.[17]

8015. Officer holding over—An officer remaining in office and discharging its duties after the expiration of his term may be a de facto officer.[18]

8016. Possession of office—There cannot be an officer de jure and an officer de facto both in possession of the same office at the same time.[19]

8017. Validity of acts—The acts of a de facto officer are valid as to the public and third persons,[20] and cannot be attacked collaterally,[21] but they do not entitle the officer to the emoluments of the office.[22]

OFFICIAL BONDS

8018. General and special bonds—Where a public officer is required to give a special bond for certain purposes, the sureties on his general bond will ordinarily not be liable for defaults covered by the special bond.[23]

8019. Construction—Official bonds are to be construed like other contracts of suretyship.[24] They are to be construed with reference to statutes in compliance with which they are executed.[25]

8020. Successive terms—Liability—Where a person holds a public office for two or more successive terms, and executes a new bond, with new sureties, for each term, and a defalcation occurs on the part of the officer, the sureties

[13] Fulton v. Andrea, 70–445, 449, 73+256.

[14] See Parker v. Dakota County, 4–59 (30); Ramsey County v. Brisbin, 17–451 (429); Carli v. Rhener, 27–292, 7+139; Burt v. Winona etc. Ry., 31–472, 476, 18+ 285, 289; State v. McMartin, 42–30, 43+ 572.

[15] Parker v. Dakota County, 4–59(30); Burt v. Winona etc. Ry., 31–472, 476, 18+ 285, 289.

[16] Burt v. Winona etc. Ry., 31–472, 18+ 285, 289; State v. Bailey, 106–138, 118+ 676. See 22 Pol. Science Quarterly, 460.

[17] State v. Dist. Ct., 72–226, 75+224.

[18] Carli v. Rhener, 27–292, 7+139; Ramsey County v. Sullivan, 94–201, 204, 102+ 723. See Cain v. Libby, 32–491, 21+739.

[19] Carli v. Rhener, 27–292, 7+139; Fulton v. Andrea, 70–445, 73+256.

[20] Parker v. Dakota County, 4–59(30); State v. Brown, 12–538(448); McCormick v. Fitch, 14–252(185); Ramsey County v. Brisbin, 17–451(429); Carli v. Rhener, 27–292, 7+139; Burt v. Winona etc. Ry., 31–472, 18+285, 289; Quinn v. Markoe, 37–439, 35+263; State v. McMartin, 42–30, 43+572; Hankey v. Bowman, 82–328, 84+ 1002; State v. Schram, 82–420, 85+155; Ramsey County v. Sullivan, 94–201, 102+ 723; State v. Bailey, 106–138, 118+676.

[21] State v. Brown, 12–538(448); Ramsey County v. Brisbin, 17–451(429); Burt v. Winona etc. Ry., 31–472, 18+285, 289; State v. Bailey, 106–138, 118+676.

[22] State v. Schram, 82–420, 85+155.

[23] State v. Young, 23–551; Scott County v. Ring, 29–398, 13+181.

[24] Cressey v. Gierman, 7–398(316); Scott County v. Ring, 29–398, 405, 13+181; Union S. P. Co. v. Olson, 82–187, 84+756. See § 9079.

[25] Scott County v. Ring, 29–398, 13+181.

on the bond given for the term during which the defalcation occurred are alone liable.[26] A county treasurer who had filled the office during two successive terms, upon surrendering his office during the second term, failed to account for or pay over all of the funds then properly chargeable to him. It was held, that the sureties for the second term were prima facie responsible for the deficiency, and that if they would exonerate themselves upon the ground that this deficiency had occurred during the prior term, the burden was upon them to show that fact. The fact that the officer had converted funds during the first term does not show conclusively that such conversion was identical with the deficiency in question; there being evidence of continued conversion during the second term. The sureties for the second term would be responsible for money coming into the treasury during that term, though it was placed there merely to cover a previous defalcation. So they would be responsible if public money received during the second term were misapplied to cover a previous delinquency. The fact that the county board knew, when they accepted the defendant's bond, that the officer had been chargeable with conversion of funds during the prior term, does not avoid the bond.[27]

8021. Officer holding over—Where an officer was elected for a second term, but failed to qualify therefor, his sureties for the first term were held not liable for his acts while holding over except for a reasonable time in which to fill the vacancy.[28]

8022. Acts rendering sureties liable—An official act is an act by a public officer in his official capacity under color and by virtue of his office. The distinction between acts down by virtue of an office and acts done under color of office is not decisive in determining the liability of sureties on an official bond. The object of such a bond is to obtain indemnity against the misuse of an official position for wrong purposes. An act done under color of office and which would obtain no credit except for its appearing to be a regular official act is within such a bond.[29] The rule as to liability for public funds is stated elsewhere.[30]

8023. Approval—An official bond does not become operative until it is approved.[31]

8024. Defences in favor of sureties—It is no defence that other public officers were guilty of misconduct in connection with the default of the principal.[32] A surety cannot assert that his principal was not duly appointed or elected or was ineligible for the place or failed to qualify.[33] A surety cannot assert that he was ignorant of the duties of the office,[34] or that the bond was not properly approved or filed.[35]

[26] Pine County v. Willard, 39–125, 39+71; Board of Ed. v. Robinson, 81–305, 84+105; State v. Bobleter, 83–479, 86+461. See Redwood County v. Citizens' Bank, 67–236, 69+912.

[27] Pine County v. Willard, 39–125, 39+71.

[28] Scott County v. Ring, 29–398, 13+181.

[29] Hursey v. Marty, 61–430, 63+1090; Scitner v. Ransom, 82–404, 85+158; State v. Bobleter, 83–479, 488, 86+461; State v. Bourne, 86–426, 90+1105; Ramsey County v. Sullivan, 89–68, 93+1056; Hall v. Tierney, 89–407, 95+219. See Megaarden v. Hennepin County, 102–134, 112+899.

[30] See § 8000.

[31] St. Louis County v. Am. L. & T. Co., 67–112, 69+704. See Ramsey County v. Brisbin, 17–451(429).

[32] Scott County v. Ring, 29–398, 406, 13+181; Waseca County v. Sheehan, 42–57, 43+690; Renville County v. Gray, 61–242, 63+635; St. Louis County v. Security Bank, 75–174, 77+815. See, as to liability of sureties, 91 Am. St. Rep. 497 and as to effect of irregularities in bonds, 90 Am. St. Rep. 188.

[33] Ramsey County v. Brisbin, 17–451 (429); Meeker County v. Butler, 25–363; Jefferson v. McCarthy, 44–26, 46+140; Hennepin County v. State Bank, 64–180, 66+143.

[34] Cressey v. Gierman, 7–398(316); State v. Bobleter, 83–479, 86+461.

[35] Nehring v. Haines, 70–233, 72+1061.

8025. Run to state—Official bonds should run to the state in the absence of authority, express or implied, to take the same to a municipality or some public officer.[36]

8026. Leave to sue—By statute a private individual cannot sue on an official bond without leave of court.[37]

8027. Pleading—In an action on a bond of a deputy appointive officer, it is necessary to allege his appointment.[38]

CRIMES

8028. Auditing false claims—G. S. 1894 § 6421 (R. L. 1905 § 4865) authorizes the prosecution of a deputy county auditor who audits claims for redemption of taxes, where the unlawful use of the official signature and seal gives currency and value to a fraudulent demand upon the public treasury. There is no legal distinction to be tolerated under this law in the act of creating a fabricated claim by an auditing official, and the act of auditing the same when such officer knowingly attaches his official signature and seal to a demand which he has forged and manufactured himself.[39]

PUBLIC PLACES—See Civil Rights, 1488.

PUBLIC POLICY—See Conflict of Laws, 1531; Contracts, 1870; Law; Statutes, 8945; Trial, 9710; Waiver.

PUBLIC SCHOOLS—See Schools and School Districts.

PUBLIC SERVICE CORPORATIONS—See Corporations, 2181; Eminent Domain, 3020; Gas, 4019; Municipal Corporations, 6680.

PUBLIC TRIAL—See Criminal Law, 2472.

PUBLIC USE—See Eminent Domain, 3024.

PUBLIC WATERS—See Navigable Waters.

PUNCTUATION—See Contracts, 1834; Statutes, 8974.

PUNISHMENT—See Fines; Constitutional Law, 1661; Criminal Law, 2487, 2502.

PUNITIVE DAMAGES—See Damages, 2539–2558.

PURPRESTURE—See Navigable Waters, 6958.

QUALIFIED FEE—See Eminent Domain, 3041, 3042.

QUANTUM MERUIT—See Contracts, 1792; Master and Servant, 5832; Work and Labor.

QUANTUM VALEBANT—See Sales, 8645.

QUARE CLAUSUM FREGIT—See Trespass.

QUASI CONTRACTS—See Implied or Quasi Contracts.

QUESTIONS OF LAW AND FACT—See Criminal Law, 2477; Trial, 9707; and specific actions.

QUIA TIMET—See Quieting Title, 8030.

[36] St. James v. Hingtgen, 47–521, 50+700.

[37] R. L. 1905 § 4534; Litchfield v. McDonald, 35–167, 28+191; Easton v. Sorenson, 53–309, 55+128; Waseca County v. Sheehan, 42–57, 43+690; Ramsey County v. Sullivan, 89–68, 93+1056; Grams v. Murphy, 103–219, 114+753.

[38] Hall v. Williams, 13–260(242).

[39] State v. Bourne, 86–426, 90+1105.

QUIETING TITLE

IN GENERAL

8029. Election of remedies—A title to realty may be quieted by an action to remove a cloud, by a statutory action to determine adverse claims, and by ejectment. At the present time the action to remove a cloud is rarely resorted to in this state because the statutory action to determine adverse claims generally affords a better remedy.[40]

ACTION TO REMOVE A CLOUD

8030. Name and nature of action—The action is called indifferently an action to remove a cloud and an action to quiet title.[41] It is equitable in its nature, and for the purpose of serving summons by publication, is in rem.[42] It is sometimes called an action or bill quia timet.[43]

8031. Who may maintain—Possession—One may maintain the action though he is not the legal owner or in possession.[44] Under a former statute it was held that an executor or administrator, who was not in possession and had not obtained a license to sell, could not maintain an action.[45] A grantor who has conveyed by warranty deed with full covenants, and has delivered possession to the grantee under an agreement with him that a part of the purchase money shall be deposited in the hands of a third party, not to be paid over until a cloud on the title is removed, may maintain an action.[46] A municipality has been held entitled to maintain an action.[47] A grantee of the abutting shore may maintain an action against the grantee in a prior deed by the same grantor purporting to convey the soil under the water, to remove the cloud upon his riparian rights created by such deed.[48] A stockholder has been held entitled to maintain an action [49] and so has the holder of a title by adverse possession.[50] A wife has been held a proper party in an action to remove a cloud from a homestead.[51]

8032. Basis of jurisdiction—The basis of jurisdiction in this class of cases is to be found in the fact that the cloud impairs the market value of the property and the party has no adequate remedy at law. To require an owner to await an action by the party claiming under the instrument or other matter constituting the cloud, until his evidence or ability to defend against it might be lost by lapse of time, would often deny him any remedy.[52]

8033. What constitutes a cloud—To create a cloud an instrument or proceedings must be apparently valid, but in fact void. If it is void on its face

[40] See Gilman v. Van Brunt, 29–271, 13+125; Maloney v. Finnegan, 38–70, 72, 35+723.

[41] Mogan v. Carter, 48–501, 504, 51+614.

[42] Shepherd v. Ware, 46–174, 48+773.

[43] Redin v. Branhan, 43–283, 286, 45+445.

[44] Redin v. Branhan, 43–283, 286, 45+445; Bausman v. Kelley, 38–197, 36+333; Hamilton v. Batlin, 8–403(359); Donnelly v. Simonton, 7–167(110). See, as to an action by an equitable owner, Lowry v. Harris, 12–255(166), as to an action by owners of several tracts who derive title from a common grantor against a defendant claiming title to all the tracts, Lovett v. Prentice, 44 Fed. 459.

[45] Paine v. First Div. etc. Ry., 14–65(49).

[46] Styer v. Sprague, 63–414, 65+659; Chamblin v. Schlichter, 12–276(181). See 20 Harv. L. Rev. 653.

[47] Mankato v. Willard, 13–13(1).

[48] Lake Superior L. Co. v. Emerson, 38–406, 38+200.

[49] Baldwin v. Canfield, 26–43, 1+261.

[50] Dean v. Goddard, 55–290, 56+1060.

[51] Barton v. Drake, 21–299, 307.

[52] Redin v. Branhan, 43–283, 45+445; Mankato v. Willard, 13–13(1, 17); Donnelly v. Simonton, 7–167(110, 115); Hamilton v. Batlin, 8–403(359, 362); Baldwin v. Canfield, 26–43, 1+261; Barton v. Drake, 21–299, 307; 18 Harv. L. Rev. 527.

it is not a cloud. There is no occasion to go into a court of equity to have that determined to be void which has no appearance of being otherwise. The alleged cloud must be prima facie substantial. In other words, the facts claimed to constitute the cloud must be such as apparently confer some right, title, or interest in the property. If they are not such per se, but require, to give them this effect, the backing of extrinsic facts which have no real or apparent existence, they do not constitute a cloud.[53] If they are apparently valid and extrinsic evidence would be required to show their invalidity they are a cloud.[54] Whenever an instrument may be used to the injury of another, whether it is of record or otherwise, courts will, in the exercise of a sound discretion, interfere to prevent the impending injury, or one which may even by possibility accrue.[55] Mere verbal claims do not constitute a cloud.[56] Various cases are cited below in which particular instruments or proceedings are held to be a cloud,[57] or the reverse.[58]

8034. Cloud on personalty—It seems that an action will lie to remove a cloud on a title to personalty.[59]

8035. Parties defendant—Who shall be made parties is a question of convenience and discretion, rather than of absolute right, to be determined according to the exigencies of the particular case.[60] Persons claiming other lands on whose title the same cloud rests need not be made parties.[61] A grantee of a defendant before suit has been held properly brought in as a defendant.[62]

8036. Laches—Limitation of actions—The plaintiff's right of action may be defeated by his laches.[63] An action to remove a cloud has been held not barred by the lapse of six years, as being an action for relief on the ground of fraud.[64] An owner is not bound to take affirmative action to remove a cloud

[53] Gilman v. Van Brunt, 29–271, 13+125; Scribner v. Allen, 12–148(85, 88); Maloney v. Finnegan, 38–70, 35+723; Weller v. St. Paul, 5–95(70); Conkey v. Dike, 17–457(434, 443); Baldwin v. Canfield, 26–43, 1+261; Mogan v. Carter, 48–501, 51+614; Palmer v. Yorks, 77–20, 79+587; Hanson v. Johnson, 20–194(172); Owen v. Ruthruff, 81–397, 84+217. See 18 Harv. L. Rev. 527; Note, 45 Am. St. Rep. 373.

[54] Baldwin v. Canfield, 26–43, 1+261; Yager v. Merkle, 26–429, 4+819; Valentine v. St. Paul, 34–446, 26+457; Butman v. James, 34–547, 551, 27+66; New England etc. Co. v. Capehart, 63–120, 122, 65+258.

[55] Donnelly v. Simonton, 7–167(110).

[56] Bennett v. Hotchkiss, 17–89(66).

[57] MacDonald v. Kneeland, 5–352(283) (judgment); Dahl v. Pross, 6–89(38) (bond for a deed); Yoss v. De Freudenrich, 6–95(45) (bond for deed); Banning v. Armstrong, 7–40(24) (record of deed falsely dated so as to take precedence of a judgment); Donnelly v. Simonton, 7–167 (110) (foreclosure proceedings); Hamilton v. Batlin, 8–403(359) (forged deed); Lowry v. Harris, 12–255(166) (power of attorney—deeds); Mankato v. Willard, 13–13(1) (deed and record thereof); Barton v. Drake, 21–299 (judgment); Baldwin v. Canfield, 26–43, 1+261 (deed purporting to be that of a corporation); Yager v. Merkle, 26–429, 4+819 (mortgage of married woman without her husband joining); Butman v. James, 34–547, 27+66 (execution sale); Bausman v. Kelley, 38–197, 36+333 (foreclosure proceedings); Sanborn v. Eads, 38–211, 36+338 (unauthorized foreclosure); Lake Superior L. Co. v. Emerson, 38–406, 38+200 (deed); Redin v. Branhan, 43–283, 45+445 (mortgage); Johnson v. Fuller, 55–269, 56+813 (recorded contract to convey); Hamilton v. Wood, 55–482, 57+208 (sale on execution); New England etc. Co. v. Capehart, 63–120, 65+258 (mortgage and notice to redeem); Styer v. Sprague, 63–414, 65+659; Meyers v. Markham, 90–230, 96+335, 787 (recorded contract to convey).

[58] Bennett v. Hotchkiss, 17–89(66) (claim of a large amount due on a bond for a deed); Hanson v. Johnson, 20–194(172) (execution issued more than ten years after judgment and sale thereunder).

[59] MacDonald v. Kneeland, 5–352(283). See 20 Harv. L. Rev. 421.

[60] Baldwin v. Canfield, 26–43, 1+261. See Redin v. Branhan, 43–283, 45+445; Styer v. Sprague, 63–414, 65+659; Lowry v. Harris, 12–255(166).

[61] Sanborn v. Eads, 38–211, 36+338.

[62] Johnson v. Robinson, 20–170(153).

[63] Sanborn v. Eads, 38–211, 36+338; Bausman v. Kelley, 38–197, 36+333.

[64] Bausman v. Kelley, 38–197, 36+333.

put upon his title by the unauthorized act of another. He may wait until the adverse title is asserted against him.[65]

8037. Complaint—If a complaint is insufficient as a complaint in an action to remove a cloud, it may be sustained as a complaint in an action under the statute to determine adverse claims, if it contains the necessary allegations.[66] The complaint must allege facts showing the invalidity of the instrument or proceeding constituting the cloud.[67] It must show that the instrument or proceeding complained of is a cloud on the plaintiff's title.[68] A complaint has been held sufficient against objection first made on appeal.[69]

8038. Judgment—Relief allowable—Ordinarily the judgment declares the instrument or proceeding constituting the cloud void as against the plaintiff. In granting relief care should be taken not to affect the interests of persons not parties or whose interests are not represented by some party.[70] Though the plaintiff has the legal title the court will not grant equitable relief without regarding the equitable claims of the defendant.[71]

STATUTORY ACTION TO DETERMINE ADVERSE CLAIMS

8039. The statute—The statute,[72] substantially in its present form, is found in Laws 1874 c. 68. Prior to Laws 1867 c. 72 the statute did not include vacant and unoccupied land.[73] Prior to Laws 1874 c. 68 it did not include liens.[74]

8040. Nature and object of action—The action is anomalous. No such action could be maintained at common law or in equity. The position of the parties is the reverse of that in an ordinary action. The object of the action is to force one claiming an adverse interest to establish or abandon his claim.[75] The action is of an equitable nature, except when the issues tendered are strictly legal. Save as otherwise provided by statute the rules governing an equitable action to quiet title apply.[76] The object of the statute is to afford an easy and expeditious mode of quieting title to realty,[77] free from the restrictions of the equitable action to remove a cloud,[78] in cases where ejectment will not lie.[79]

[65] Bausman v. Faue, 45–412, 418, 48+13.

[66] Palmer v. Yorks, 77–20, 79+587 (overruling Walton v. Perkins, 28–413, 10+424; Knudson v. Curley, 30–433, 15+873; Bovey v. Dow, 68–273, 71+2).

[67] Walton v. Perkins, 28–413, 10+424; Knudson v. Curley, 30–433, 15+873.

[68] Cleveland v. Stone, 51–274, 53+647.

[69] Smith v. Dennett, 15–81(59).

[70] Baldwin v. Canfield, 26–43, 59, 1+261.

[71] Bausman v. Kelley, 38–197, 36+333.

[72] R. L. 1905 § 4424.

[73] Murphy v. Hinds, 15–182(139).

[74] Bidwell v. Webb, 10–59(41); Brackett v. Gilmore, 15–245(190); Turrell v. Warren, 25–9; Donohue v. Ladd, 31–244, 17+381.

[75] Walton v. Perkins, 28–413, 10+424; Meighen v. Strong, 6–177(111); Bausman v. Faue, 45–412, 416, 48+13.

[76] Mathews v. Lightner, 85–333, 336, 88+992; Johnson v. Peterson, 90–503, 97+384. See Bausman v. Faue, 45–412, 48+13; Morris v. McClary, 43–346, 46+238; Scofield v. Quinn, 54–9, 55+745; Stuart v. Lowry, 49–91, 51+662; Shepherd v. Ware, 46–174, 48+773; Barber v. Evans, 27–92, 6+445; Minn. D. Co. v. Johnson, 94–150, 102+381; Holland v. Netterberg, 107–380, 120+527. If the claim rests upon a legal title to the property, the sole question for determination is as to the sufficiency of such title as against the plaintiff's possession, under the rules of law applicable to questions of that character. If the claim is an equitable one, equitable principles and rules must govern in its determination; and in settling the rights of the parties in respect thereto, the court may exercise its equity powers in granting whatever relief the nature of the case upon the facts may require, and upon such terms and conditions as may be necessary to do complete justice. Barber v. Evans, 27–92, 6+445.

[77] Steele v. Fish, 2–153(129); Mathews v. Lightner, 85–333, 88+992; Sache v. Wallace, 101–169, 112+386.

[78] Palmer v. Yorks, 77–20, 79+587.

[79] Meighen v. Strong, 6–177(111); Eastman v. Lamprey, 12–153(89); Conklin v. Hinds, 16–457(411).

The action is not strictly in rem, except, perhaps, where the relief demanded is a transfer of title.[80]

8041. Tried as a bill to redeem—An action cannot properly be converted into an action in the nature of a suit in equity to redeem, but if it is so tried without objection, the parties are bound.[81]

8042. What claims determinable—An action will lie for the determination of one adverse claim, which may be specified in the complaint, and if the complaint in an equitable action to remove a cloud cannot be sustained as such, it may be sustained under the statute, if it is sufficient for that purpose.[82] Any interest or estate in or lien upon land whether legal or equitable, claimed adversely to the plaintiff, whether claimed under the same or a different and independent source from that under which the plaintiff claims, may be determined.[83] A contingent interest may be determined.[84] The claims of persons not made parties are not determinable.[85]

8043. Who may maintain action—One who is in actual possession may maintain an action whether he has title or not.[86] An equitable owner may maintain an action and secure a judgment barring the defendant from asserting a legal title.[87] One not in possession and having no property interest cannot maintain an action.[88] An assignee for the benefit of creditors may maintain an action.[89] Where A held the fee, and B owned the timber on the land by virtue of a contract, it was held that A and B together might maintain an action and that the defendant could not defeat B's right to maintain the action by securing a deed of the fee from A after the commencement of the action.[90]

8044. Possession and vacancy—An action will lie under the statute by a party who is in possession of land, whether he has any property interest in it or not,[91] but the possession in all cases must be actual and not merely constructive.[92] Possession through a tenant is sufficient.[93] Plaintiff need not prove possession of all the land described in the complaint. He may succeed as to a part and fail as to the remainder.[94] Whether the plaintiff is or is not in

[80] Shepherd v. Ware, 46–174, 48+773; Minn. D. Co. v. Johnson, 94–150, 102+381.

[81] Abraham v. Holloway, 41–163, 42+870.

[82] Palmer v. Yorks, 77–20, 79+587 (overruling Walton v. Perkins, 28–413, 10+424; Knudson v. Curley, 30–433, 15+873; Bovey v. Dow, 68–273, 71+2).

[83] Walton v. Perkins, 33–357, 23+527; Alt v. Graff, 65–191, 68+9; State v. Bachelder, 5–223(178); State v. Stevens, 5–521(416); Weide v. Gehl, 21–449; Barber v. Evans, 27–92, 6+445; School Dist. v. Wrabeck, 31–77, 16+493; Donohue v. Ladd, 31–244, 17+381; Hunter v. Cleveland etc. Co., 31–505, 18+645; Windom v. Wolverton, 40–439, 42+296; Bausman v. Faue, 45–412, 48+13; Stuart v. Lowry, 49–91, 51+662; Scofield v. Quinn, 54–9, 55+745; Brown v. Jones, 52–484, 55+54.

[84] Mathews v. Lightner, 85–333, 88+992; Minn. D. Co. v. Dean, 85–473, 89+848. See Mpls. etc. Ry. v. Lund, 91–45, 97+452.

[85] Wilder v. St. Paul, 12–192(116, 122); Campbell v. Jones, 25–155.

[86] See § 8044.

[87] School Dist. v. Wrabeck, 31–77, 16+493; Roy v. Duluth etc. Ry., 69–547, 72+794.

[88] Jellison v. Halloran, 40–485, 42+392; James v. St. Paul, 72–138, 75+5; Coffman v. London etc. Co., 98–416, 108+840. See Eide v. Clarke, 65–466, 68+98.

[89] Hunter v. Cleveland etc. Co., 31–505, 18+645.

[90] Hall v. Sauntry, 80–348, 83+156.

[91] Steele v. Fish, 2–153(129); Wilder v. St. Paul, 12–192(116); Barber v. Evans, 27–92, 6+445; Herrick v. Churchill, 35–318, 29+129; Baker v. Thompson, 36–314, 31+51; Knight v. Alexander, 38–384, 37+796; Child v. Morgan, 51–116, 52+1127; Eide v. Clarke, 65–466, 68+98.

[92] Steele v. Fish, 2–153(129); State v. Bachelder, 5–223(178); Meighen v. Strong, 6–177(111); Hamilton v. Batlin, 8–403(359); Eastman v. Lamprey, 12–153(89); Wilder v. St. Paul, 12–192(116); Byrne v. Hinds, 16–521(469); Murphy v. Hinds, 15–182(139); Conklin v. Hinds, 16–457(411); Greene v. Dwyer, 33–403, 23+546; Miesen v. Canfield, 64–513, 67+632.

[93] Lowe v. Lowe, 83–206, 86+11. A tenant cannot attorn to a stranger so as to put him in possession for the purposes of an action. Trimble v. Lake Superior etc. Co., 99–11, 108+867.

[94] Wellendorf v. Tesch, 77–512, 80+629.

possession, or the land is vacant or not, does not go to the merits of the controversy, and if the defendant in his answer alleges title in himself, and asks for affirmative relief, he waives all objections as to vacancy or possession, and the plaintiff need not prove vacancy or possession.[95] There is no such waiver where the defendant merely alleges his own title, but asks for no affirmative relief.[96] Where the complaint alleges that the plaintiff is in possession and evidence admitted without objection shows that the land is vacant the variance is waived.[97] A finding that land was vacant and unoccupied at the commencement of the action has been sustained.[98]

8045. Parties defendant—Wife—The wife of a party defendant need not be made a party in order to cut out her inchoate statutory interest in his land.[99]

8046. Unknown defendants—Provision is made by statute for making unknown claimants defendants and serving summons against them by publication.[1] The statute is constitutional.[2] It is to be construed, and complied with, strictly. All record owners and lienors must be named in the summons and reasonable diligence must be exercised to ascertain known claimants.[3] The court acquires jurisdiction over the unknown defendants though the named defendant was dead when the action was commenced,[4] and though one of the unknown defendants was at the time a resident of the state. No order of court is necessary to authorize the publication of summons.[5]

8047. Limitation of actions—Laches—If a party relies on a legal title and seeks no equitable relief, his right to relief is barred only by the lapse of time prescribed by the statute of limitations.[6] A defendant asserting title and asking for affirmative relief waives the objection that the action is barred.[7]

8048. Complaint—It is unnecessary for the plaintiff, in his complaint, to anticipate or specify the nature of the adverse claim. He need only allege that the defendant claims some estate, interest, or lien on the land, without alleging that the claim is invalid, or that the defendant does him a wrong in making it.[8] When the plaintiff is in possession all that he need allege is that he is in actual possession and that defendant claims an estate or interest in or lien upon the land.[9] When the land is vacant the plaintiff must allege some title or interest in himself.[10] It is insufficient for him to allege that he "claims" title.[11] It is unnecessary for him to plead the sources of his title.[12] He must allege that the land is vacant or unoccupied.[13] If he is the equitable owner he must plead the facts giving rise to his equity.[14] In general, the statutory conditions entitling

[95] Hooper v. Henry, 31–264, 17+476; Windom v. Schuppel, 39–35, 38+757; Abraham v. Holloway, 41–163, 42+870; Burke v. Lacock, 41–250, 42+1016; Mitchell v. McFarland, 47–535, 50+610; Todd v. Johnson, 56–60, 57+320; McRoberts v. McArthur, 62–310, 64+903; Kipp v. Hagman, 73–5, 75+746; Palmer v. Yorks, 77–20, 79+587.

[96] Cartwright v. Hall, 88–349, 93+117.

[97] Messerschmidt v. Baker, 22–81.

[98] Hall v. Conn. etc. Co., 76–401, 79+497.

[99] Stitt v. Smith, 102–253, 113+632.

[1] R. L. 1905 § 4425.

[2] Shepherd v. Ware, 46–174, 48+773.

[3] Ware v. Easton, 46–180, 48+775; Shepherd v. Ware, 46–174, 48+773. See Dewey v. Kimball, 89–454, 465, 95+317, 895, 96+704.

[4] Inglee v. Welles, 53–197, 55+117; McClymond v. Noble, 84–329, 87+838.

[5] McClymond v. Noble, 84–329, 87+838.

[6] Morris v. McClary, 43–346, 46+238.

[7] London etc. Co. v. Gibson, 77–394, 80+205.

[8] Barber v. Evans, 27–92, 6+445; Walton v. Perkins, 28–413, 415, 10+424; Stuart v. Lowry, 49–91, 97, 51+662.

[9] Steele v. Fish, 2–153(129); Wilder v. St. Paul, 12–192(116, 121); Barber v. Evans, 27–92, 6+445.

[10] Myrick v. Coursalle, 32–153, 19+736; Herrick v. Churchill, 35–318, 29+129; Jellison v. Halloran, 40–485, 42+392; Wakefield v. Day, 41–344, 43+71; Wheeler v. Winnebago P. Mills, 62–429, 64+920.

[11] Herrick v. Churchill, 35–318, 29+129.

[12] Buffalo L. & E. Co. v. Strong, 91–84, 97+575.

[13] Conklin v. Hinds, 16–457(411).

[14] Stuart v. Lowry, 49–91, 51+662; Hersey v. Lambert, 50–373, 52+963.

the plaintiff to relief must be alleged.[15] Under a general allegation of ownership title by adverse possession may be shown.[16]

8049. Answer—It is for the defendant to disclose the nature of his claim in his answer.[17] He should draft his answer as if he were the plaintiff setting forth his claim against a defendant.[18] If his title or interest is an equitable one the facts giving rise to the equity must be alleged with as much particularity as in a bill of equity and cannot be shown under an allegation of title and ownership in fee.[19] He may claim title from several sources.[20] A general allegation of ownership is sufficient to admit proof of any legal title, as, for example, title by adverse possession.[21] If the defendant pleads one source of title he cannot prove another.[22] He may plead a cause of action in ejectment by way of counterclaim if the plaintiff is in possession.[23] A general allegation of title in the complaint may be met by a general denial in the answer and under such denial it may be shown that a deed absolute in form was in fact a mortgage and that it had been paid.[24] The defendant may sometimes, under a general denial, prove title in a third party even without connecting himself with such title.[25] A qualified general denial has been held sufficient.[26] The defendant may not only attack the cause of action alleged in the complaint, but he may also allege any estate or interest, legal or equitable, he has in the land, which is good against the plaintiff's cause of action.[27]

8050. Disclaimer—Costs—It is provided by statute that if the defendant enters a disclaimer or suffers a default no costs can be recovered against him.[28] A disclaimer sometimes entitles the plaintiff to judgment on the pleadings.[29] A disclaimer has been held not to control the judgment.[30]

8051. Claims not asserted waived—All claims not asserted by a defendant are waived, if they might have been asserted.[31]

8052. Reply—When the defendant asserts a legal title a plaintiff in possession may, in reply, plead facts showing an equitable title of such a nature that it should prevail over the legal title.[32] Whether a reply is necessary depends upon the nature of the answer.[33] Where the answer denies generally the title of the plaintiff, and by way of new matter sets forth the defendant's title, without alleging the source of plaintiff's title and defendant's prior right, the plaintiff may reply by simply taking issue upon such new matter, without denying notice or alleging superior equities. The pleadings will then simply present the issue of the ownership of the legal title.[34] Where the defendant interposes an answer in the nature of a cross action in ejectment for the recovery of the possession, and the plaintiff in reply sets up a claim for improvements under the "occupying claimants' act" in case defendant establishes title, the matters set up in the reply constitute no part of plaintiff's case in chief under the com-

[15] Jellison v. Halloran, 40–485, 42+392.
[16] McArthur v. Clark, 86–165, 90+369.
[17] Barber v. Evans, 27–92, 6+445; Stuart v. Lowry, 49–91, 51+662.
[18] Walton v. Perkins, 28–413, 10+424; Stuart v. Lowry, 49–91, 51+662.
[19] Stuart v. Lowry, 49–91, 51+662.
[20] Branhan v. Bezanson, 33–49, 21+861.
[21] McArthur v. Clark, 86–165, 90+369.
[22] Hall v. Sauntry, 80–348, 83+156.
[23] Eastman v. Linn, 20–433(387); Mueller v. Jackson, 39–431, 40+565; Godfrey v. Valentine, 50–284, 52+643.
[24] Wakefield v. Day, 41–344, 43+71.
[25] Rogers v. Clark, 104–198, 116+739.
[26] Jellison v. Halloran, 40–485, 42+392.
[27] Campbell v. Jones, 25–155, 158.
[28] R. L. 1905 § 4426; Brackett v. Gilmore, 15–245(190) (overruled by change of statute); Steele v. Fish, 2–153(129) (statute cited); Wilder v. St. Paul, 12–192(116, 121) (id.).
[29] See § 8057.
[30] Mpls. T. Co. v. Eastman, 47–301, 50+82, 930.
[31] Weide v. Gehl, 21–449, 445.
[32] State v. Bachelder, 5–223(178); School Dist. v. Wrabeck, 31–77, 16+493; Scofield v. Quinn, 54–9, 55+745; James v. St. Paul, 72–138, 75+5; Bingham v. Bingham, 105–271, 117+488.
[33] See Broughton v. Sherman, 21–431; Fifield v. Norton, 79–264, 82+581.
[34] Bailey v. Galpin, 40–319, 41+1054.

plaint, but are only defensive to defendant's answer.[35] A reply setting up a cause of action for the reformation of the deed under which the defendant claimed title has been held a departure from the complaint.[36] Cases are cited below involving various forms of replies.[37]

8053. Proof of title—A deed from a person not in possession, or not shown to be the owner, does not establish a title, and when reliance is placed solely upon proof of paper title, the chain thereof must be from the original patentee,[38] or from a common source of title of both parties.[39] When title is proved to have existed at a particular time it is presumed to have continued until it is shown to have ceased.[40] Mere possession is not alone presumptive evidence of title as against an admitted prior title in fact.[41] A patent from the United States makes out a prima facie case.[42]

8054. Title in third party—As a general rule a defendant, who is in possession, may defeat recovery by the plaintiff by proof of title in a third party, even though he does not connect himself with such title.[43]

8055. Burden of proof when plaintiff in possession—To make out a prima facie case plaintiff must prove his possession if it is denied in the answer.[44] He need not do so if the defendant alleges title in himself and asks for affirmative relief. In such a case the burden of proof is on the defendant at the outset.[45] It is not essential to his cause of action that the plaintiff should prove possession of all the land described in the complaint. He may succeed as to a part of the land and fail as to the remainder.[46] To make out a prima facie case the plaintiff is not required to prove his title, and this is so even though he has unnecessarily alleged it and it is denied in the answer. His title is not in issue and the defendant cannot attack it.[47] When the plaintiff has made out a prima facie case in proof of his possession, the burden of going on with the evidence shifts to the defendant, and he must either overcome plaintiff's prima facie proof of possession or prove a valid claim in himself.[48]

8056. Burden of proof when land vacant—At the outset the plaintiff must prove that the land is vacant, if the fact of vacancy is in issue.[49] He need not do so if the defendant alleges title in himself and asks for affirmative relief.[50] He also has the burden of proving title in himself. He has no right to compel the defendant to disclose and prove his claim unless he himself has a good title. But all that he need do in the first instance, to shift the burden of going on with the evidence, is to make out his title prima facie.[51]

[35] Mueller v. Jackson, 39–431, 40+565.
[36] James v. St. Paul, 72–138, 75+5.
[37] Weide v. Gehl, 21–449; Hunter v. Cleveland etc. Co., 31–505, 18+645; Scofield v. Quinn, 54–9, 55+745; Alt v. Graff, 65–191, 68+9.
[38] Cartwright v. Hall, 88–349, 93+117.
[39] McRoberts v. McArthur, 62–310, 64+903. See Perkins v. Morse, 30–11, 13+911, 14+879.
[40] Lind v. Lind, 53–48, 54+934.
[41] Perkins v. Morse, 30–11, 13+911, 14+879.
[42] Rogers v. Clark, 104–198, 116+739.
[43] Id.
[44] Meighen v. Strong, 6–177(111); Wilder v. St. Paul, 12–192(116, 122); Eastman v. Lamprey, 12–153(89, 96); Murphy v. Hinds, 15–182(139); Walton v. Perkins, 28–413, 10+424; Herrick v. Churchill, 35–318, 319, 29+129.
[45] See § 8044.
[46] Wellendorf v. Tesch, 77–512, 80+629.
[47] Wilder v. St. Paul, 12–192(116).
[48] Wilder v. St. Paul, 12–192(116); Walton v. Perkins, 28–413, 10+424.
[49] Conklin v. Hinds, 16–457(411, 413); Cartwright v. Hall, 88–349, 93+117.
[50] See § 8044.
[51] Conklin v. Hinds, 16–457(411); Walton v. Perkins, 28–413, 10+424; Myrick v. Coursalle, 32–153, 19+736; Herrick v. Churchill, 35–318, 29+129; Jellison v. Halloran, 40–485, 42+392; Wakefield v. Day, 41–344, 43+71; Abraham v. Holloway, 41–163, 42+870; Pinney v. Russell, 52–443, 54+484; Wheeler v. Winnebago P. Mills, 62–429, 64+920; Cartwright v. Hall, 88–349, 93+117.

Failure of the plaintiff to make this preliminary proof is waived if the defendant demands affirmative relief and proves a common source of title.[52] The plaintiff must prove an estate or interest; a mere right of action is insufficient.[53] When the plaintiff has made out a prima facie case the burden of going on with the evidence shifts and the defendant must overcome plaintiff's prima facie proof or prove his own claim.[54] If the plaintiff fails to make out a prima facie case, or if, upon all the evidence, it appears that the plaintiff has no title or interest, the action should be dismissed on motion of the defendant. The latter is not called upon to disclose or prove a claim against a person who has no title or interest.[55] If the defendant alleges an interest he must prove it unless it is admitted.[56]

8057. Judgment on the pleadings—If the complaint alleges possession in the plaintiff, and the answer does not assert a claim in behalf of the defendant, the plaintiff is entitled to judgment on the pleadings;[57] otherwise if the complaint alleges that the land is vacant.[58] If the answer denies the asserted title of the plaintiff, and alleges that the defendant is in possession, it is error to grant judgment on the pleadings to the defendant, though the answer fails to allege title in the defendant.[59] If the facts alleged in a reply constitute a defence, or entitle the plaintiff to any relief, legal or equitable, as against the defendant's asserted title, it is error to grant judgment on the pleadings against the plaintiff.[60] Judgment on the pleadings may be granted for a failure to reply as in other cases.[61]

8058. Judgment—The judgment necessarily varies with the pleadings and proof in the particular action.[62] It does not ordinarily award possession.[63] When the land is vacant and the plaintiff fails to prove title in himself he cannot complain of a judgment, whether regular or not, adjudging title in the defendant.[64] The judgment does not ordinarily transfer or vest the title,[65] but it affects or determines the title.[66] It may bind contingent interests upon the principle of representation.[67] Where, in an action brought by the holder of a tax certificate, the tax title is found defective because of the insufficiency of the notice of expiration of the period for redemption, it is the duty of the court, under R. L. 1905 § 969, to determine the amount and validity of the plaintiff's lien for taxes paid by him.[68] A judgment held not controlled by a disclaimer in the answer.[69] A judgment on default transferring the title held void and subject to collateral attack.[70]

QUITCLAIM DEEDS—See Deeds, 2694–2697; Recording Act, 8302.
QUORUM—See Corporations, 2079; State, 8838; Towns, 9659.

52 McRoberts v. McArthur, 62–310, 64+903.
53 James v. St. Paul, 72–138, 75+5.
54 Walton v. Perkins, 28–413, 10+424; Wakefield v. Day, 41–344, 43+71.
55 Cartwright v. Hall, 88–349, 93+117; Pinney v. Russell, 52–443, 54+484.
56 Howe v. Nelson, 94–526, 103+1132.
57 Perkins v. Morse, 30–11, 13+911; Morrill v. Little Falls Mfg. Co., 46–260, 48+1124.
58 Wheeler v. Winnebago P. Mills, 62–429, 64+920 (overruling Donohue v. Ladd, 31–244, 17+381).
59 Jellison v. Halloran, 40–485, 42+392.
60 Scofield v. Quinn, 54–9, 55+745.
61 Fifield v. Norton, 79–264, 82+581.
62 See Walton v. Perkins, 33–357, 23+527; Windom v. Wolverton, 40–439, 42+296; Bausman v. Faue, 45–412, 48+13; Roy v. Duluth etc. Ry., 69–547, 72+794; Hunter v. Cleveland etc. Co., 31–505, 18+645.
63 Godfrey v. Valentine, 50–284, 52+643; McRoberts v. McArthur, 69–506, 72+796.
64 Myrick v. Coursalle, 32–153, 19+736.
65 Minn. D. Co. v. Johnson, 94–150, 102+381; Sache v. Wallace, 101–169, 112+386. See Lord v. Hawkins, 39–73, 38+689.
66 Shepherd v. Ware, 46–174, 48+773.
67 Mathews v. Lightner, 85–333, 88+992. See Minn. D. Co. v. Dean, 85–473, 89+848.
68 Foster v. Clifford, 124+632.
69 Mpls. T. Co. v. Eastman, 47–301, 50+82, 930.
70 Sache v. Wallace, 101–169, 112+386.

QUO WARRANTO

IN GENERAL

8059. Nature—The proceeding authorized by our constitution and statutes is not the ancient common-law writ of quo warranto, but the information in the nature of quo warranto substantially as left by the changes introduced by the statute of 9 Anne c. 20.[71] The writ of quo warranto has had a long and interesting history, which is summarized in one of our cases.[72]

WHEN LIES

8060. In general—Quo warranto will lie against individuals for intrusion into public offices, and against private and public corporations for usurpation of franchises, or to oust them from the enjoyment thereof.[73] The writ is not to be extended beyond what it was at common law.[74]

8061. Other adequate remedy—Quo warranto is an extraordinary remedy and is not granted where the party has other adequate remedy.[75] But the mere fact that a remedy is afforded by the statutory action in the nature of quo warranto will not necessarily defeat a common-law quo warranto.[76]

8062. Allowance discretionary—Quo warranto is not a writ of right, but its allowance rests largely in the discretion of the court. It is proper for the court to consider all the circumstances of the case, including the position and motives of the relator, and the necessity and policy of allowing the writ.[77] The court should also weigh the considerations of public convenience involved, and compare them with the injury complained of, in determining whether to grant or refuse the application. The fact that a successful prosecution of the proceedings, which are brought to test the title to a municipal office, may result in the suspension of all municipal government in a city for a long period of time may properly be taken into account in deciding upon the application.[78]

8063. Executive department cannot be controlled—Quo warranto cannot be used to control the action of the executive department by the courts, but the legal propriety and effect of the action of officers of the executive department may be determined by the courts when the same are brought in question in causes requiring judicial action by quo warranto.[79]

8064. Public or municipal corporations—Quo warranto will lie to test the legality of the organization of a school district,[80] city,[81] village,[82] or county.[83] It will lie against a county to oust it from adjoining territory illegally

[71] State v. Minn. T. M. Co., 40–213, 225, 41+1020; State v. Tracy, 48–497, 51+613; State v. Kent, 96–255, 104+948.

[72] State v. Kent, 96–255, 104+948.

[73] State v. Tracy, 48–497, 51+613.

[74] State v. Minn. T. M. Co., 40–213, 224, 41+1020.

[75] State v. Dowlan, 33–536, 24+188; State v. Gates, 35–385, 28+927; State v. Lockerby, 57–411, 59+495; State v. Moriarty, 82–68, 84+495.

[76] State v. St. P. etc. Ry., 35–222, 28+245; State v. Minn. T. M. Co., 40–213, 41+1020.

[77] State v. School Dist., 85–230, 88+751.

[78] State v. Dahl, 69–108, 117, 71+910.

[79] State v. Fidelity etc. Co., 39–538, 41+108.

[80] State v. Sharp, 27–38, 6+408; State v. Independent School Dist., 42–357, 44+120; State v. School Dist., 54–213, 55+1122; State v. School Dist., 85–230, 88+751.

[81] State v. Thief River Falls, 76–15, 78+867; State v. Kiewel, 86–136, 90+160.

[82] State v. Gallagher, 42–449, 44+529; State v. Tracy, 48–497, 51+613; State v. Minnetonka, 57–526, 59+972; State v. Fridley Park, 61–146, 63+613; State v. Reads, 76–69, 78+883; State v. Holloway, 90–271, 96+40; State v. Kent, 96–255, 104+948; State v. Harris, 102–340, 113+887.

[83] State v. Crow Wing County, 66–519,

annexed to the county, and over which the county has assumed jurisdiction.[84] It will not lie, at the instance of a private person having no interest in the matter distinct from the general public, to test the validity of proceedings had for the purpose of organizing a municipal or quasi municipal corporation.[85]

8065. Private corporations—Quo warranto will lie to test the right of a foreign corporation to do business in this state;[86] or to forfeit the franchises of a corporation;[87] or to test the right of a person to hold an office in a corporation.[88]

8066. Public officers—Except as otherwise provided by statute,[89] quo warranto is the appropriate remedy to try the title to a public office and oust a usurper,[90] including the question of eligibility.[91] The constitutionality of the act under which an officer holds office may be inquired into in quo warranto proceedings.[92] Quo warranto will lie to oust an officer who has been suspended by the governor pending proceedings for his removal.[93] Where one assumes to hold and exercise the duties of a public office, known to the law, and the duties and powers of which are defined by law, an action in the nature of quo warranto will lie against him, to test the question whether the office is authorized within the particular district where he assumes to hold and exercise it.[94] Quo warranto will not lie to prevent official acts in excess of jurisdiction, or to correct official misconduct.[95] The validity of an ordinance under which an officer holds office may be inquired into in quo warranto proceedings.[96]

8067. Estoppel—Where the right of a corporation to assert its corporate existence is questioned by a state because of some defect or irregularity in the proceedings for organization, the doctrine of waiver operating by way of estoppel in pais is applicable as against the state. Its conduct may have been such as to constitute a declaration that a forfeiture of corporate rights will not be insisted upon, and that the right to declare such forfeiture is waived.[97] Acquiescence of the relator in the irregularities complained of does not estop the state.[98]

68+767, 69+925, 73+631; State v. Larson, 89–123, 94+226; State v. Falk, 89–269, 94+879; State v. McDonald, 101–349, 112+278. See State v. Olson, 107–136, 119+799.

[84] State v. Crow Wing County, 66–519, 68+767, 69+925, 73+631. See State v. Minnetonka, 57–526, 59+972.

[85] State v. Olson, 107–136, 119+799.

[86] State v. Fidelity etc. Co., 39–538, 41+108; State v. Somerby, 42–55, 43+689; State v. Crow Wing County, 66–519, 530, 68+767, 69+925, 73+631.

[87] State v. St. P. etc. Ry., 35–222, 28+245; State v. Minn. C. Ry., 36–246, 30+816; State v. Minn. etc. Co., 40–213, 41+1020; State v. Park, 58–330, 59+1048.

[88] State v. Lockerby, 57–411, 59+495; State v. Otis, 58–275, 59+1015; State v. Oftedal, 72–498, 75+692.

[89] See § 8074.

[90] State v. Williams, 25–340; State v. Sibley, 25–387; State v. Guiney, 26–313, 3+977; State v. Sanderson, 26–333, 3+984; State v. Sharp, 27–38, 6+408; Barnum v. Gilman, 27–466, 8+375; State v. Dowlan, 33–536, 24+188; State v. Harrison, 34–526, 26+729; State v. McMartin, 42–30, 43+572; Taylor v. Sullivan, 45–309, 47+802; Burke v. Leland, 51–355, 53+716; State v. Holman, 58–219, 59+1006; Trautmann v. McLeod, 74–110, 76+964; State v. Wilder, 75–547, 78+83; State v. Ritt, 76–531, 79+535; State v. O'Connor, 81–79, 83+498; State v. Board of Control, 85–165, 88+533; State v. Westfall, 85–437, 89+175; State v. Grabarkiewicz, 88–16, 92+446; State v. Bernier, 98–1, 38+368; State v. Hays, 105–399, 117+615.

[91] Taylor v. Sullivan, 45–309, 47+802; State v. Gylstrom, 77–355, 79+1038; State v. McMahon, 94–532, 103+1133; State v. Hays, 105–399, 117+615.

[92] State v. Ritt, 76–531, 79+535; State v. O'Connor, 81–79, 83+498; State v. Westfall, 85–437, 89+175.

[93] State v. Megaarden, 85–41, 88+412.

[94] State v. Parker, 25–215.

[95] State v. Crow Wing County, 66–519, 530, 68+767, 69+925, 73+631.

[96] State v. Grabarkiewicz, 88–16, 92+446.

[97] State v. School Dist., 85–230, 88+751; State v. Harris, 102–340, 113+887.

[98] State v. Sharp, 27–38, 6+408.

PROCEDURE

8068. Governed by common-law rules—In the absence of statute or controlling considerations to the contrary, the proceeding is governed by the rules of the common law.[99]

8069. Jurisdiction of supreme and district courts—The supreme court has original jurisdiction to issue writs of quo warranto.[1] But the constitution and the statutes recognize that such proceedings should ordinarily be brought in the district court. The supreme court will award the writ originally only under exceptional circumstances, where the public interests would suffer by the delay and uncertainty caused by proceeding in the district court.[2] The district courts have original jurisdiction to issue writs of quo warranto in accordance with common-law principles.[3]

8070. Leave to file information—Discretion—Private relator—When the attorney general, acting in his official capacity as chief law officer of the state, exhibits an information in the nature of quo warranto to the district court, and asks that a writ issue in behalf of the state, the court has no discretion, but must grant leave to file the information as a matter of course and direct the writ to issue. Upon the return, it is the duty of the court to try the issues of law and fact presented thereby, and to determine the same on the merits, according to the rules of law applicable thereto. On the other hand, if the attorney general makes such an application to the supreme court, the court has discretionary power to deny the application and it will do so unless it thinks that the public interests would suffer by the delay and uncertainty caused by proceeding in the district court.[4] Granting leave to a private person to file an information, either in his own name, or in the name of the attorney general, is discretionary with the court, even though there is a substantial defect in the title by which the office or franchise is held.[5] A private person, having no interest in the matter distinct from the general public, will not be allowed to file an information to test the validity of proceedings had for the purpose of organizing municipal or quasi municipal corporations.[6] In general a private person, having no interest in the matter distinct from the general public, will not be allowed to file an information, without the consent of the attorney general, to test the right of an incumbent of a public office to hold the same.[7] But it has been held that the supreme court "has the right, and under some circumstances, in the exercise of a sound judicial discretion, it may become its duty, to allow an information in the nature of quo warranto to be filed by a private person, having no personal interest in the question distinct from the public, to test the right of an incumbent of a public office to hold the same, notwithstanding the attorney general has refused to give his consent thereto. But the granting or with-

[99] State v. Sharp, 27–38, 6+408; State v. Tracy, 48–497, 51+613; State v. Dahl, 69–108, 71+910; State v. Kent, 96–255, 267, 104+948.

[1] R. L. 1905 § 72; State v. Sharp, 27–38, 6+408; State v. St. P. etc. Ry., 35–222, 28+245; State v. Minn. C. Ry., 36–246, 30+816; State v. Minn. etc. Co., 40–213, 41+1020; State v. Dahl, 69–108, 71+910; State v. Kent, 96–255, 104+948.

[2] State v. Otis, 58–275, 59+1015; State v. Kent, 96–255, 104+948; State v. Dowlan, 33–536, 24+188; State v. Gates, 35–385, 28+927; State v. Lockerby, 57–411, 59+495; State v. Moriarty, 82–68, 84+495.

[3] R. L. 1905 § 92; State v. Otis, 58–275, 59+1015; State v. Kent, 96–255, 104+948.

[4] State v. Kent, 96–255, 104+948.

[5] State v. Dowlan, 33–536, 24+188; State v. Harrison, 34–526, 26+729; State v. Lockerby, 57–411, 59+495; State v. Dahl, 69–108, 71+910.

[6] State v. Olson, 107–136, 119+799 (limiting State v. Dahl, 69–108, 71+910; State v. McDonald, 101–349, 112+278); State v. Tracy, 48–497, 51+613.

[7] Barnum v. Gilman, 27–466, 8+375. See Taylor v. Sullivan, 45–309, 47+802.

holding leave to file such information at the instance of a private person rests in the sound legal discretion of the court, and is not a matter of strict legal right, and when the attorney general has refused to consent the case should be exceptional, and one in which it clearly appears that the public interests require it to justify the court in overruling his judgment." [8] Whenever the court has discretionary power in this connection it exhausts its discretion when it exercises it upon the preliminary application for leave to file the information. This presumes, however, that the court actually exercises its discretion, and does not deprive it of the right to dismiss the proceedings if it subsequently appears that it acted improvidently or through inadvertence, or a misapprehension of the facts.[9]

8071. Parties defendant—Proceedings to restrain a corporation from an unlawful exercise of franchises must be against the corporation, and not merely against its officers and agents.[10]

8072. Burden of proof—The burden of proof is on the respondent. The ordinary rules of pleading and proof do not apply. It is ordinarily for the respondent to allege and prove facts which justify him in exercising the powers which he does. He is called upon to disclose "by what warrant" he exercises the powers specified.[11]

8073. Motion to quash—A motion to quash the proceedings is in the nature of a demurrer to the information.[12]

STATUTORY ACTION IN NATURE OF QUO WARRANTO

8074. In general—The statute [13] was designed to afford a civil action which should be a substitute for the writ of quo warranto and information in the nature of quo warranto. As originally enacted in 1851 its first section expressly abolished those common-law remedies. The statutes of 1866 repealed this section but adopted, in substance, the remainder of the original chapter. It has been held that this repeal had the effect of restoring to the district courts power to issue writs of quo warranto,[14] and in 1876 the supreme court was clothed with a like power.[15] It results that in many cases we have in this state concurrent remedies afforded by this statute and the common law information in the nature of quo warranto.[16] The two remedies are in substance the same and governed by the same general principles.[17] The difference is merely a difference in the form of pleading and the mode of commencing the action. The statutory action, however, has a somewhat broader scope than the common law remedy.[18] It is left to the discretion of the attorney general to determine whether he shall proceed by civil action in the district court or by information in the supreme court.[19] But while, quo warranto having been revived in this state, we now have the two remedies, yet the office of the writ of quo warranto ought not to be extended beyond what it was at common law. The remedy by civil action is more in accordance with the ordinary mode of

[8] State v. Dahl, 69–108, 71+910. See State v. Olson, 107–136, 119+799.
[9] State v. Kent, 96–255, 258, 104+948.
[10] State v. Somerby, 42–55, 43+689.
[11] State v. Sharp, 27–38, 6+408; State v. Crow Wing County, 66–519, 532, 68+767, 69+925, 73+631; State v. Gylstrom, 77–355, 79+1038.
[12] State v. Independent School Dist., 42–357, 44+120.
[13] R. L. 1905 §§ 4543–4555.
[14] State v. Lockerby, 57–411, 59+495; State v. Otis, 58–275, 59+1015; State v. Kent, 96–255, 104+948.
[15] Laws 1876 c. 58 § 1.
[16] State v. St. P. etc. Ry., 35–222, 28+245; State v. Minn. etc. Co., 40–213, 224, 41+1020; State v. Moriarty, 82–68, 84+495; State v. Kent, 96–255, 268, 104+948.
[17] People v. Thatcher, 55 N. Y. 529; People v. Hall, 80 N. Y. 117.
[18] State v. Parker, 25–215, 218; State v. Minn. etc. Co., 40–213, 224, 41+1020; State v. Kent, 96–255, 268, 104+948.
[19] State v. St. P. etc. Ry., 35–222, 28+245.

judicial procedure in determining property rights, and ought to be pursued except in those special or exceptional cases where the public interests seem to demand a more speedy or summary mode of procedure than by action in the district court.[20] The statutory action is an ordinary civil action commenced by summons, and, aside from burden of proof and trial by jury, is governed by the general rules of pleading and procedure. The defendant must show, before he can have a judgment in his favor, that he has a legal title to the office. Possession is not, in such action, evidence of his right; the burden is upon him to prove that his possession is a legal and rightful one. When, however, the action is brought on the relation of one claiming the office, the failure of the defendant to prove his title does not establish that of the relator. Upon that issue the plaintiff has the affirmative and the burden is upon him to maintain it. The defendant makes out a prima facie case by the production of a certificate of election issued to him by the proper officers.[21] In an action under the statute two dissimilar interests may be united—that of the state to oust an intruder from office, and that of the relator to have his title to the office determined, and for damages for the usurpation.[22]

RACE—See note 23.
RACEWAY—See Waters, 10154.

RAILROAD AND WAREHOUSE COMMISSION

8075. General supervision of railways—The commission is clothed with general supervision of railways to protect the public against unjust discriminations, unreasonable and unequal rates, unfair restrictions, and inadequate service. The statute creating the commission was designed to give practical effect to the principle that railways are public highways and must be operated with due regard to the interests of the public and not exclusively with regard to the pecuniary profit of the corporations operating them. It is in accord with the public policy of this state to regulate, but not to own railways.[24]

8076. What railways subject to commission—The commission has no control over a mere private railway.[25] Suburban electric railways may be subject to the commission.[26]

8077. Power to fix railway rates—Judicial review—The commission is authorized to investigate the reasonableness of railway rates, and if it finds them unreasonable, to make a tariff of rates.[27] Such a tariff, however, is not conclusive, but is subject to judicial review.[28] Rates fixed by the commission are to be deemed prima facie reasonable in all courts. In other words, in any judicial investigation as to their reasonableness, the burden is on the railway company to prove that they are unreasonable.[29] In a judicial review of the action of the commission in making rates, a court has no authority to make

[20] State v. Minn. etc. Ry., 40–213, 41+1020.

[21] People v. Thatcher, 55 N. Y. 525; State v. Norton, 46 Wis. 342. See State v. Murray, 41–123, 42+858; State v. Gay, 59–6, 60+676.

[22] Territory of Minn. v. Smith, 3–240 (164).

[23] Farrier v. State Agr. Soc., 36–478, 32+554.

[24] State v. Chi. etc. Ry., 38–281, 37+782; State v. St. P. etc. Ry., 40–353, 42+21; Farwell etc. Assn. v. Mpls. etc. Ry., 55–8, 56+248.

[25] Liedel v. N. P. Ry., 89–284, 94+877 (branch road held subject to commission).

[26] See Mpls. etc. Ry. v. Manitou Forest Synd., 101–132, 112+13.

[27] R. L. 1905 §§ 1969, 1970.

[28] Chicago etc. Ry. v. Minnesota, 134 U. S. 418 (overruling State v. Chi. etc. Ry., 38–281, 37+782; State v. Mpls. E. Ry., 40–156, 41+465).

[29] R. L. 1905 § 1969; State v. Mpls. etc. Ry., 80–191, 83+60.

rates. The question for a court in such cases is whether the rates fixed by the commission are so unreasonably low as to be confiscatory—a taking of the property of the railway company without compensation and without due process of law. The test as to what constitutes a reasonable rate, and the rules which should govern courts in reviewing rates, have been considered at length in two important cases in this state.[30] For the law on the subject it is necessary to look to the decisions of the federal supreme court.[31] Our commission cannot fix rates for carriers in another state, or for carriage between two points within this state, over a route extending across a neighboring state.[32] It is authorized to fix joint rates.[33]

8078. Miscellaneous powers—The commission may compel a railway company to make connections with other roads;[34] to maintain stations and depots;[35] and to afford equal facilities to all shippers of grain who erect or desire to erect warehouses on its right of way.[36]

8079. Enforcement of orders—Provision is made by statute for enforcing the orders of the commission by judicial proceedings.[37]

8080. Right to demand information—The commission has the right to demand from a carrier information as to all of its property and business within the state, but not as to its property out of the state or as to its interstate business. Carriers cannot determine for themselves whether they will answer or not, on the ground that it is not possible for them to do so. It is their duty to answer candidly so far as reasonably possible, and to state facts which they claim excuse them from answering more fully.[38]

8081. Authorizing increase of capital stock—A statute authorizing the commission in its judgment to allow an increase of capital stock for such purposes and on such terms as it may deem advisable, or in its discretion to refuse it, has been held unconstitutional as an attempt to delegate legislative power.[39]

8082. Appeal to district court—Provision is made by statute for appeals to the district court from the orders of the commission.[40]

RAILROAD CARS—See note 41.
RAILROAD LAND GRANTS—See Public Lands.

[30] Steenerson v. G. N. Ry., 69–353, 72+713; State v. Mpls. etc. Ry., 80–191, 83+60. See also Steenerson v. G. N. Ry., 60–461, 62+826; Jacobson v. Wis. etc. Ry., 71–519, 74+893.

[31] See Beale and Wyman, Railroad Rate Regulation; Noyes, American Railroad Rates; 21 Harv. L. Rev. 175.

[32] State v. Chi. etc. Ry., 40–267, 41+1047.

[33] R. L. 1905 § 1981; Jacobson v. Wis. etc. Ry., 71–519, 74+893; State v. Mpls. etc. Ry., 80–191, 83+60.

[34] Jacobson v. Wis. etc. Ry., 71–519, 74+893 (affirmed, 179 U. S. 287); State v. Willmar etc. Ry., 88–448, 93+112.

[35] State v. Mpls. etc. Ry., 76–469, 79+510; State v. Mpls. etc. Ry., 87–195, 91+465 (affirmed, 193 U. S. 553); State v. N. P. Ry., 89–363, 95+297; State v. N. P. Ry., 90–277, 96+81.

[36] Farwell etc. Assn. v. Mpls. etc. Ry., 55–8, 56+248.

[37] R. L. 1905 § 1975; State v. Adams Ex. Co., 66–271, 68+1085 (notice to company—service of writ of mandamus—service on local agent of foreign company held sufficient); State v. Mpls. etc. Ry., 76–469, 475, 79+510 (upon the hearing in proceedings for the enforcement of an order the findings of fact of the commission are prima facie evidence of the matters therein stated); State v. Mpls. etc. Ry., 80–191, 83+60 (order of commission not conclusive as to reasonableness of rates—carrier entitled to an examination of matters of fact in which evidence de novo may be taken—unnecessary that order should have been appealed from—tariff of commission prima facie reasonable); State v. U. S. Ex. Co., 81–87, 83+465 (business of express company—duty of company to furnish information—foreign business).

[38] State v. U. S. Ex. Co., 81–87, 83+465.

[39] State v. G. N. Ry., 100–445, 111+289.

[40] Laws 1907 c. 167. See Railway Transfer Co. v. R. & W. Com., 39–231, 39+150; Mpls. etc. Ry. v. R. & W. Com., 44–336, 46+559; Steenerson v. G. N. Ry., 60–461, 472, 62+826.

[41] Benson v. Chi. etc. Ry., 75–163, 166, 77+798.

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Cross-References

See Carriers; Eminent Domain; Process, 7813, 7814; Public Lands; Street Railways; Taxation, 9541.

IN GENERAL

8083. Definitions—The word "railroad" is here used in the sense of an ordinary public, commercial railroad, for the transportation of passengers and freight. The words "railroad" and "railway" are synonymous. They do not ordinarily include street railways.[42] In statutes they sometimes include

[42] State v. Brin, 30–522, 16+406; Funk v. St. P. C. Ry., 61–435, 63+1099; State v. Duluth W. & L. Co., 76–96, 78+1032; Mpls. etc. Ry. v. Manitou Forest Synd., 101–132, 112+13.

bridges and ferries used in connection with a railroad.[43] The word "road" is often used to mean "railroad."[44]

8084. Public highways—An ordinary commercial railway is a quasi public highway.[45]

8085. Right to build and operate a franchise—The right to build and operate a railway is a franchise which can only be derived from the state.[46] The franchises of a railroad corporation are rights or privileges which are essential to the operations of the corporation, and without which its road and works would be of little value; such as the franchise to run cars, to take tolls, to appropriate earth and gravel for the bed of its road, or water for its engines, and the like. They are positive rights or privileges, without the possession of which the road of the company could not be successfully worked. Immunity from taxation is not one of them. The former may be conveyed to a purchaser of the road as part of the property of the company; the latter is personal and incapable of transfer without express statutory direction.[47]

8086. Railway companies quasi public corporations—While railway companies are not strictly public corporations they partake of a public nature. They are termed quasi public corporations. Their business is invested with a public interest. Their powers are conferred not for their benefit alone, but in trust for the benefit of the public as well. Their privileges and powers partake of the nature of sovereignty.[48] Railways are a public necessity.[49]

8087. Subject to legislative regulation—The business of a railway company is affected with a public interest and is subject to legislative control and regulation,[50] including the regulation of freight and passenger rates,[51] and the issuance of stock.[52]

8088. Development of common law governing—The principles governing the rights and liabilities of individuals are often inapplicable to railway companies, or other corporations, clothed as they are by the state with special rights, powers, and privileges, not enjoyed by individuals. The nature and character of the business of railway companies, the numerous hazards and dangers connected with the conduct of their affairs, render the law for the individual inappropriate and inefficient and the courts, in testing the various pertinent principles in connection with their peculiar features, have, by methods of differentiation and analogy, evolved new and appropriate rules for the determination of their rights and liabilities.[53]

CHARTERS

8089. Forfeiture of charters—Various grounds for the forfeiture of railway charters are prescribed by statute.[54] Cases are cited below involving the forfeiture of particular charters.[55]

[43] R. L. 1905 § 1991.

[44] Tower v. Tower etc. Ry., 68–500, 71+691.

[45] Davidson v. Ramsey County, 18–482 (432, 439); Blake v. Winona etc. Ry., 19–418(362, 369); Jacobson v. Wis. etc. Ry., 71–519, 530, 74+893; State v. St. P. etc. Ry., 98–380, 108+261.

[46] Blake v. Winona etc. Ry., 19–418(362). See Carroll v. Wis. C. Co., 40–168, 41+661.

[47] State v. G. N. Ry., 106–303, 325, 119+202.

[48] Stewart v. Erie etc. Co., 17–372(348, 372); Davidson v. Ramsey County, 18–482 (432, 439); Jacobson v. Wis. etc. Ry., 71–519, 530, 74+893; State v. Minn. Trans. Ry., 80–108, 83+32.

[49] Carroll v. Wis. C. Co., 40–168, 41+661.

[50] Blake v. Winona etc. Ry., 19–418(362); State v. Winona etc. Ry., 19–434(377); Jacobson v. Wis. etc. Ry., 71–519, 530, 74+893; State v. G. N. Ry., 100–445, 111+289.

[51] See § 8077.

[52] State v. G. N. Ry., 100–445, 111+289.

[53] State v. St. P. etc. Ry., 98–380, 401, 108+261.

[54] R. L. 1905 § 3174. See Tower v. Tower etc. Ry., 68–500, 505, 71+691.

[55] State v. Southern Minn. Ry., 18–40(21)

8090. Particular charters construed—Cases are cited below involving the construction of particular charters.[56]

SALE, LEASE, AND CONSOLIDATION

8091. Authority—Authority for the sale, lease, or consolidation of railway companies is given by general statute, with certain limitations.[57] Authority has in some instances been given by special act.[58]

8092. Between parallel or competing lines—A sale, lease, or consolidation between parallel or competing lines, is forbidden by statute.[59]

8093. Aid in construction of connecting roads—Railway companies are authorized by statute to aid in the construction of connecting roads.[60]

8094. What constitutes a sale—A lease for nine hundred and ninety nine years has been held not a sale within the terms of a right of way deed.[61]

(failure to build part of line—partial forfeiture); State v. St. P. etc. Ry., 35-222, 28+245 (failure to build part of line—partial forfeiture—sale to another company authorized by the legislature held not to forfeit corporate franchise); State v. Minn. C. Ry., 36-246, 30+816 (nonuser and misuser—suspension of business—quo warranto by attorney general—duty of court—exemption from taxation—sale of road—reserving land grant—waiver of forfeiture by state officers or by delay). See First Div. etc. Ry. v. Parcher, 14-297(224).

[56] Southern Minn. Ry. v. Stoddard, 6-150 (92) (charter of Southern Minn. Ry. Co.—discretion in locating line); Huff v. Winona etc. Ry., 11-180(114) (transfer of franchises etc. of one company to another—liability for debts—Winona & St. Peter Ry. Co. held not the same corporation as the Transit Ry. Co.); Hilbert v. Winona etc. Ry., 11-246(163) (id.); Fitz v. Minn. C. Ry., 11-414(304) (transfer of franchise and property—liability for debts—Minn. Central Ry. Co. held not same corporation as Minn. & Cedar Valley Ry. Co.); First Div. etc. Ry. v. Parcher, 14-297(224) (charter of Minn. & Pac. Ry. Co.—power to mortgage franchise—transfer of franchise etc. of Minn. & Pac. Ry. Co. to St. Paul & Pac. Ry. Co.—incorporation of First Div., St. Paul & Pac. Ry. Co.); State v. Southern Minn. Ry., 18-40(21) (charter of Southern Minn. Ry.—duty of company to construct road to village of La Crescent); McRoberts v. Southern Minn. Ry., 18-108(91) (charter of Southern Minn. Ry. Co.—authority to operate ferry—right to deviate from line defined in charter—meaning of "engineering purposes"); Morris v. St. P. etc. Ry., 19-528 (459) (charter of St. Paul & Pac. Ry. Co.—no authority to create separate corporations out of its branches); Ames v. Lake Superior etc. Ry., 21-241 (act amending charter of Nebraska & Lake Superior Ry. Co. and creating Lake Superior & Miss. Ry. Co.); De Graff v. St. P. etc. Ry., 23-144 (charters of the St. Paul & Pac. Ry. Co. and the Minnesota & Pac. Ry. Co.—time of completion—impairing obligation of contract); Mpls. etc. Ry. v. Morrison, 23-308 (charter of Mpls. & St. Louis Ry. Co.—requisites of organization—subscriptions—assessment—one notice and call for several instalments—publication of notice of assessment and call); Mpls. etc. Ry. v. Olson, 81-265, 83+1086, 84+101, 742 (charter of Mpls. & St. Louis Ry. Co.—authority to construct extensions).

[57] R. L. 1905 §§ 2895-2899; Laws 1907 c. 395; In re St. Paul etc. Ry., 36-85, 30+432 (company formed by consolidation of foreign and domestic corporations is a domestic corporation); In re Mpls. etc. Ry., 36-481, 32+556 (general statute compared with special act); Heron v. St. P. etc. Ry., 68-542, 71+706 (statute cited as authority for lease); Mpls. etc. Ry. v. Manitou Forest Synd., 101-132, 112+13 (statute cited as only authority for sale or lease of railroads or for the purchase of stock of one company by another).

[58] Pence v. St. P. etc. Ry., 28-488, 11+80 (authority to lease—Sp. Laws 1870 c. 57; 1871 c. 71—Mpls. & St. L. Ry. Co.); Freeman v. Mpls. etc. Ry., 28-443, 10+594 (id.); State v. Minn. C. Ry., 36-246, 265, 30+816 (authority for sale—Sp. Laws 1881 c. 221—Mil. & St. P. Ry. Co.); Plainview v. Winona etc. Ry., 36-505, 32+745 (Sp. Laws 1881 c. 414—purchase of Plainview Ry. Co. by Winona etc. Ry. Co.—liability of latter company). See Fitz v. Minn. C. Ry., 11-414(304); First Div. etc. Ry. v. Parcher, 14-297(224); Welsh v. First Div. etc. Ry., 25-314.

[59] R. L. 1905 § 2895; Laws 1907 c. 395; State v. Northern Securities Co., 123 Fed. 692; Pearsall v. G. N. Ry., 161 U. S. 646; Northern Securities Co. v. U. S., 193 U. S. 197; Minnesota v. Northern Securities Co., 194 U. S. 57.

[60] R. L. 1905 § 2900. See Freeman v. Mpls. etc. Ry., 28-443, 10+594; State v. Minn. C. Ry., 36-246, 265, 30+816; In re Mpls. etc. Ry., 36-481, 491, 32+556; Heron v. St. P. etc. Ry., 68-542, 71+706.

[61] Morrison v. St. P. etc. Ry., 63-75, 65+141.

8095. Liability of lessor for negligence of lessee—If a lease is unauthorized, the lessor is liable for the negligence of the lessee in operating the road under the lease.[62] If a lease is authorized the lessor is not liable for such negligence unless it retains control and possession of the road.[63]

8096. Liability of lessee for negligence—The liability of a railway company for negligence in operating its trains is not affected by the fact that it operates over a road leased from another company.[64]

8097. Construction of particular leases and sales—Cases are cited below involving the construction and effect of particular leases and sales.[65]

UNION STATIONS

8098. Powers and liabilities of union depot companies—Cases are cited below involving the nature, powers, and liabilities of the St. Paul Union Depot Company.[66]

OFFICERS AND EMPLOYEES

8099. Authority of section boss—It cannot be presumed that a section boss has any more authority than is necessary for the discharge of the duties ordinarily belonging to that position.[67]

LOCATION OF ROAD

8100. Discretion in locating route—All railway charters, which do not express the contrary, must be taken to allow the exercise of such a discretion in the location of the route, as is incident to an ordinary practical survey of the same, made with reference to the nature of the country to be passed over, and the obstacles to be encountered or avoided.[68]

8101. Alteration of route—Railway companies are authorized to change the route of their roads under conditions prescribed by statute.[69]

[62] Freeman v. Mpls. etc. Ry., 28–443, 10+594.

[63] Heron v. St. P. etc. Ry., 68–542, 71+706. See Floody v. G. N. Ry., 102–81, 112+875.

[64] Cantlon v. Eastern Ry., 45–481, 48+22. See Floody v. G. N. Ry., 102–81, 112+875.

[65] First Div. etc. Ry. v. Parcher, 14–297 (224); Welsh v. First Div. etc. Ry., 25–314; Mpls. etc. Ry. v. St. P. etc. Ry., 35–265, 28+705; St. Paul U. D. Co. v. St. P. etc. Ry., 35–320, 29+140; Plainview v. Winona etc. Ry., 36–505, 32+745.

[66] State v. St. P. U. D. Co., 42–142, 43+840 (not liable for gross earnings tax); St. P. U. D. Co. v. Minn. etc. Ry., 47–154, 49+646 (nature and object of company—right of railway companies to become members and stockholders—surrender of stock); Ahlbeck v. St. P. etc. Ry., 39–424, 40+364 (agent of railway companies in handling and checking baggage); Dean v. St. P. U. D. Co., 41–360, 43+54 (held liable for assault on passenger by servant of lessee of its parcel-room); Dickerman v. St. P. U. D. Co., 44–433, 46+907 (regulation requiring passengers to exhibit tickets at gate and forbidding them to board trains in motion held reasonable—company entitled to use reasonable force to enforce regulations); Chi. etc. Ry. v. St. P. U. D. Co., 54–411, 56+129 (a contract whereby a certain railway company was admitted to the use of all the tracks, privileges, and facilities of the depot company pending litigation to determine the terms of a permanent admission construed); Chi. etc. Ry. v. St. P. U. D. Co., 68–220, 71+23 (right of mixed trains to use tracks—power of company to make rules and regulations); Godbout v. St. P. U. D. Co., 79–188, 81+835 (company may give exclusive privileges to hackmen to solicit patronage within depot); Floody v. G. N. Ry., 102–81, 112+875 (liability of railway company for negligence of switchmen of union depot company).

[67] Halverson v. Chi. etc. Ry., 57–142, 58+871.

[68] Southern Minn. Ry. v. Stoddard, 6–150 (92); Ames v. Lake Superior etc. Ry., 21–241. See McRoberts v. Southern Minn. Ry., 18–108(91).

[69] R. L. 1905 §§ 2921, 2922; Fletcher v. Chi. etc. Ry., 67–339, 69+1085; Mpls. etc. Ry. v. Olson, 81–265, 83+1086, 84+101, 742. See Hewitt v. St. P. etc. Ry., 35–226, 28+255 (authority under charter); Mpls. etc. Ry. v. St. P. etc. Ry., 35–265, 28+705 (lease of road—verbal agreement for change of route).

8102. Engineering problems—While a railway company has a right to construct its own road and to solve its own engineering problems in accordance with its own views and to determine what structures it will erect and at what places, it may not, without liability, thereby violate rules of law for the protection of passengers and employees.[70]

RIGHT OF WAY

8103. How acquired—A right of way may be acquired by license,[71] purchase,[72] or condemnation.[73]

8104. Over public lands—Cases are cited below involving the right of railway companies to a right of way over public lands of the United States.[74]

8105. Across other railways—Railway companies are authorized by statute to extend their tracks across the tracks of other railway companies. If the two companies cannot agree on the compensation for the privilege, condemnation proceedings are authorized.[75] Like authority is sometimes found in railway charters.[76]

8106. Across or along streets, etc.—Municipalities and railway companies are authorized by statute to agree as to the terms upon which streets may be occupied for railway purposes.[77] The right to use streets for such purposes may also be acquired by condemnation.[78] The right to occupy streets is sometimes conferred by railway charters.[79] City charters sometimes authorize the council of the city to regulate the location of railways in streets.[80]

[70] Clay v. Chi. etc. Ry., 104–1, 115+949; Dolge v. N. P. Ry., 107–242, 119+1066.

[71] Kremer v. Chi. etc. Ry., 51–15, 52+977; Mpls. W. Ry. v. Mpls. etc. Ry., 58–128, 59+983.

[72] See § 8107.

[73] See § 3021.

[74] Harrington v. St. P. etc. Ry., 17–215 (188); Simonson v. Thompson, 25–450; Coleman v. St. P. etc. Ry., 38–260, 36+638.

[75] R. L. 1905 § 2915; State v. Dist. Ct., 35–461, 29+60 (court not limited to location stated in petition—order allowing crossing when not stayed by appeal); In re St. Paul etc. Ry., 37–164, 33+701 (right not absolute—court to determine whether crossing necessary and required by public interests); In re Mpls. etc. Ry., 39–162, 39+65 (place and manner of crossing must cause least possible injury consistent with accomplishment of purpose); Winona etc. Ry. v. Chi. etc. Ry., 50–300, 52+657 (power of court to impose conditions); Mpls. etc. Ry. v. Manitou Forest Synd., 101–132, 112+13 (statute applicable to all railway companies—suburban electric railways). See McManus v. Duluth etc. Ry., 51–30, 52+980 (delay in securing right—effect on municipal aid bonds).

[76] In re Mpls. etc. Ry., 36–481, 32+556 (charter of Mpls. & St. Louis Ry. Co.—evidence for petitioner held sufficient—scope of review on appeal).

[77] R. L. 1905 § 2916; Harrington v. St. P. etc. Ry., 17–215(188, 206) (consent of municipality does not relieve company of liability to abutting owners); Adams v. Hastings & D. Ry., 18–260(236) (id.); Campbell v. Stillwater, 32–308, 20+320 (effect of agreement on liability of municipality for condition of street); Gustafson v. Hamm, 56–334, 57+1054 (inapplicable to private railways); St. Paul v. Chi. etc. Ry., 63–330, 63+267, 65+649, 68+458 (inapplicable to sites for depots, freight houses, etc.—limited to railway tracks); Stillwater v. Lowry, 83–275, 86+103 (inapplicable to street railways).

[78] Kaiser v. St. P. etc. Ry., 22–149 (nature of right acquired by condemnation); Mpls. etc. Ry. v. Manitou Forest Synd., 101–132, 112+13 (suburban electric railway company may acquire right to cross streets and alleys without securing franchise from municipality).

[79] Wayzata v. G. N. Ry., 50–438, 52+913 (duty of company to keep street in such condition as not to impair its use as a highway—possession of street for trackage not adverse—occupation of street with buildings may be adverse and ripen into title by adverse possession); St. Paul v. Chi. etc. Ry., 63–330, 63+267, 65+649, 68+458 (right under Sp. Laws 1872 c. 93 to occupy public levee with tracks); Wayzata v. G. N. Ry., 67–385, 69+1073 (necessity of using street—proceedings to compel change of tracks—burden of proof—finding as to existence of more convenient route sustained by the evidence); St. P. & D. Ry. v. Duluth, 73–270, 76+35 (right of plaintiff under Sp. Laws 1861 c. 1 to construct road

8107. Right-of-way deeds—Construction—Cases are cited below involving the construction of deeds conveying land for use as a railway right of way.[81]

8108. Release—A railway company may release its easement of a right of way to the owner of the land when it is no longer needed for railway purposes. A deed of the land, without reservation to the owner of an estate in the land, will operate as such a release.[82]

8109. Misuser and abandonment—The erection or operation of a public elevator and warehouse on a right of way acquired by condemnation, either by a railway company or its lessee, is not a misuser or abandonment of the company's easement.[83] A sale to another railway company for railway purposes is not an abandonment.[84]

8110. Title—Control—Power to lease or sell—A perpetual easement for a right of way over land is an incumbrance thereon and an interest therein.[01] A railway company holds its station grounds and right of way for the public use for which the company was incorporated, yet as its private property, and to be occupied by itself or by others in the manner which it may consider best fitted to promote or not to interfere with the public use. It may in its discretion permit them to be occupied by others with structures convenient for receiving and delivering freight upon its railroad, so long as a free and safe passage is left for the carriage of freight and passengers. A railway company, being under no legal obligation to grant to any one the privilege of building an elevator upon its right of way, may, without violating any rule of public policy, grant the privilege by contract on condition that it shall not be responsible for damages caused by fires resulting from the operation of its engines.[85] A person whose interests are not affected cannot question the validity of a sale.[86]

IN STREETS

8111. An additional servitude—An ordinary commercial railway in a street is an additional servitude entitling the abutting owner to compensation, whether he owns the fee to the center of the street or not.[87] This applies to

across highways held not to extend to certain branch roads).

[80] Chicago etc. Ry. v. Porter, 43–527, 46+75 (ordinance held to be sufficient consent of council to location of switch track).

[81] Kettle River Ry., v. Eastern Ry., 41–461, 43+469 (stipulation designed to exclude other railways from acquiring right of way over same tract held illegal); Lamm v. Chi. etc. Ry., 45–71, 47+455 (deed by abutting owner on street to railway company "for railway purposes"); Mpls. M. Co. v. Mpls. etc. Ry., 51–304, 53+639; Id., 55–371, 57+64 (agreement for laying tracks on land of another); Morrison v. St. P. etc. Ry., 63–75, 65+141 (a lease for 999 years held not a sale within a stipulation that the grantor should be entitled to one-half of the purchase price upon a sale by the company); Jungblum v. Mpls. etc. Ry., 70–153, 72+971 (stipulation releasing company from liability for damages resulting from location, grade, construction, maintenance, and operation of road); Liedel v. N. P. Ry., 89–284, 94+877 (road constructed held a public road—grade not fixed in deed—change of grade—damages); Hamel v. Mpls. etc. Ry., 97–334, 107+139 (condition that premises be used for station—condition subsequent—meaning of "station"—reversion to grantor for breach of condition).

[82] Flaten v. Moorhead, 58–324, 59+1044.

[83] Gurney v. Mpls. U. El. Co., 63–70, 65+136.

[84] Crolley v. Mpls. etc. Ry., 30–541, 16+422.

[01] Delisha v. Mpls. etc. Co., 126+276.

[85] Quirk v. Mpls. etc. Ry., 98–22, 107+742.

[86] Crolley v. Mpls. etc. Ry., 30–541, 16+422.

[87] Schurmeier v. St. P. etc. Ry., 10–82 (59); Gray v. First Div. etc. Ry., 13–315 (289); Molitor v. First Div. etc. Ry., 14–285(212); Harrington v. St. P. etc. Ry., 17–215(188, 200); Adams v. H. & D. Ry., 18–260(236); Kaiser v. St. P. etc. Ry., 22–149; Brisbine v. St. P. etc. Ry., 23–114; Carli v. Stillwater etc. Co., 28–373, 10+205; Adams v. Chi. etc. Ry., 39–286, 39+629; Papooshek v. Winona etc. Ry., 44–195, 46+329; Lamm v. Chi. etc. Ry., 45–71, 47+455; Gustafson v. Hamm, 56–334,

a private as well as to a public railway,[88] and to a railway operated by horse power.[89] The measure of compensation or damages is stated elsewhere.[90]

8112. Change of grade of street—Damages—If a railway company changes the grade of a street it is liable to an abutting owner for special damages.[91]

8113. Obstruction—Nuisance—A railway may constitute or cause an unauthorized obstruction in a street—a nuisance—actionable by an abutting owner specially injured.[92]

8114. Trespass—If a railway company occupies a street for railway purposes without the consent of the abutting owner, or without condemnation proceedings, it is liable to such owner in trespass, though it proceeded under authority from the municipality.[93] Such an occupation constitutes a continuing trespass, for which successive suits for damages may be brought so long as the trespass is continued, until the occupation ripens into title by prescription.[94]

8115. Mode of construction—A railway through a street must be so constructed and maintained as not to obstruct it unnecessarily or render dangerous its use as a highway.[95]

8116. Authority from municipality—A municipality is not authorized by a general grant of power over its streets to authorize a railway company to occupy them for railway purposes.[96]

8117. Liability for noise, smoke, etc.—A railway company lawfully operating its road on a street is not liable to an abutting owner for noise, smoke, jarring of ground, etc., except in so far as his easements of light, air and access, are taken or damaged.[97]

MORTGAGES, TRUST DEEDS, AND BONDS

8118. In general—The execution of mortgages and the issuance of bonds of railway companies are regulated by statute.[98] Cases are cited below involving questions relating to such bonds and mortgages.[99]

57+1054; St. Paul v. Chi. etc. Ry., 63-330, 347, 63+267, 65+649, 68+458.

[88] Gustafson v. Hamm, 56-334, 57+1054.

[89] Carli v. Stillwater etc. Co., 28-373, 10+205.

[90] See § 3067.

[91] Karst v. St. P. etc. Ry., 22-118; Baldwin v. Chi. etc. Ry., 35-354, 29+5.

[92] Schurmeier v. St. P. etc. Ry., 10-82 (59); Farrant v. First Div. etc. Ry., 13-311(286); Shaubut v. St. P. etc. Ry., 21-502; Brakken v. Mpls. etc. Ry., 29-41, 11+124; Id., 31-45, 16+459; Id., 32-425, 21+414; Rochette v. Chi. etc. Ry., 32-201, 20+140; Barnum v. Minn. Tr. Ry., 33-365, 23+538; Colstrum v. Mpls. etc. Ry., 33-516, 24+255; Stearns County v. St. Cloud etc. Ry., 36-425, 32+91; Adams v. Chi. etc. Ry., 39-286, 39+629; Lakkie v. Chi. etc. Ry., 44-438, 46+912; Hayes v. Chi. etc. Ry., 46-349, 49+61; Gustafson v. Hamm, 56-334, 57+1054; Kaje v. Chi. etc. Ry., 57-422, 59+493; Gundlach v. Hamm, 62-42, 64+50; Benson v. St. P. etc. Ry., 62-198, 64+393; Guilford v. Mpls. etc. Ry., 94-108, 102+365; Hruska v. Mpls. etc. Ry., 107-98, 119+491.

[93] Adams v. H. & D. Ry., 18-260(236); Spencer v. St. P. etc. Ry., 21-362; Wampach v. St. P. etc. Ry., 21-364; Hartz v. St. P. etc. Ry., 21-358; Carli v. Union etc. Co., 32-101, 20+89.

[94] Lamm v. Chi. etc. Ry., 45-71, 47+455.

[95] Johnson v. St. P. etc. Ry., 31-283, 17+622; State v. St. P. etc. Ry., 35-131, 28+3; Cunningham v. Thief River Falls, 84-21, 29, 86+763.

[96] St. Paul v. Chi. etc. Ry., 63-330, 63+267, 65+649, 68+458.

[97] Adams v. Chi. etc. Ry., 39-286, 39+629; Carroll v. Wis. C. Ry., 40-168, 41+661; Lamm v. Chi. etc. Ry., 45-71, 47+455; Kaje v. Chi. etc. Ry., 57-422, 59+493.

[98] R. L. 1905 § 2901.

[99] Minn. etc. Ry. v. Sibley, 2-13(1) (deed of trust to secure state bonds in aid of railways); First Div. etc. Ry. v. Parcher, 14-297(224) (mortgage of franchise of land-grant railway companies — franchise passing to state on foreclosure or forfeiture); McIlrath v. Snure, 22-391 (receiver of Southern Minn. Ry. Co. appointed upon application of trustees of two mortgages issued by the company—authority of receiver to take possession of certain lumber and cord wood); De Graff v. Thompson,

DUTY TO BUILD AND MAINTAIN HIGHWAY CROSSINGS

8119. Statutory duty—Railway companies are required by statute to build and maintain in good repair and free from snow or other obstruction crossings of a specified kind wherever their lines cross a public road.[1] The statute has been held constitutional against the objection that it makes no provision for compensation.[2] It does not authorize all crossings to be at grade.[3] It has been held applicable to a bridge rendered necessary by a stream turned from its natural channel by a railway company.[4] A gravel crossing does not satisfy the statute.[5] A company is not entitled to compensation for building and maintaining crossings.[6]

8120. Common-law duty to restore highway—A railway company placing its tracks across a highway is under a common-law duty to restore the highway to its former condition of usefulness as a means of public passage. This duty is of a continuing nature and includes the construction of a bridge or viaduct wherever reasonably necessary.[7]

8121. Bridges or viaducts over tracks—It is the duty of a railway company, at its own expense, to extend a highway over or under its tracks by means of a bridge or viaduct, with the necessary approaches thereto, whenever reasonably necessary for the convenience and safety of the public travel over the highway. This duty is of a continuing nature and involves the duty to

24-452 (mortgage given by First Division, St. Paul & Pac. Ry. Co. construed—company entitled to income while in possession—garnishment—mortgagee in possession); Rice v. St. P. etc. Ry., 24-464 (mortgage given by St. Paul & Pac. Ry. Co.—possession not recoverable without foreclosure—mortgagee entitled to possession on default—mortgagee in possession entitled to collect tolls, rents and incomes—mortgagee not entitled to receiver—term "receivers" in mortgage construed); Welsh v. First Div. etc. Ry., 25-314 (St. Paul & Pac. Co.—bonds secured by mortgage—suit on coupons pending foreclosure by trustees—nature and scope of foreclosure suit—interest on coupons); Manchester L. Works v. Truesdale, 44-115, 46+301 (conditional sale of engine to railway company—subsequent appointment of receiver—claim of seller postponed to those of bondholders); Guilford v. Mpls. etc. Ry., 48-560, 51+658 (railway bond stating that it is secured by mortgage is negotiable—relation between bondholders); Seibert v. Mpls. etc. Ry., 52-148, 53+1134 (trust deed or mortgage of Minneapolis & St. Louis Ry. Co.—right of bondholder to bring action to foreclose when trustee neglects to do so—stipulation limiting right—relation between bondholders—remedy of bondholder); Seibert v. Mpls. etc. Ry., 52-246, 53+1151 (mortgages of Minneapolis & St. Louis Ry. Co.—prior mortgagee not compelled to foreclose—railway company may pledge its income and stipulate to give possession of its road—how mortgagee may obtain possession—how receiver in possession shall apply net earnings); Central Trust Co. v. Moran, 56-188, 57+471 (railway rolling stock part of realty as to mortgagees—mortgagees may enjoin levy on such stock as personalty); Seibert v. Mpls. etc. Ry., 58-39, 59+822 (granting foreclosure held not a departure from complaint—bonds payable out of particular fund); Seibert v. Mpls. etc. Ry., 58-53, 59+879 (adoption of contract by receiver—payment by receiver to preserve assets); Seibert v. Mpls. etc. Ry., 58-58, 57+1068 (expenses of individual bondholders in proceedings to protect all bondholders—reimbursement out of trust fund); Seibert v. Mpls. etc. Ry., 58-65, 59+826 (attorney's fees on foreclosure of railway mortgage); Grant v. Winona etc. Ry., 85-422, 89+60 (foreclosure of railway mortgage—deficiency judgment—jurisdiction of United States circuit court—trustee representative of bondholders—purchasers of bonds put on inquiry as to powers of trustee in foreclosure proceedings—deficiency judgment a bar to action by single bondholder).

[1] R. L. 1905 § 1995.

[2] State v. Shardlow, 43-524, 46+74.

[3] State v. Mpls. etc. Ry., 39-219, 39+153.

[4] Goodhue County v. Duluth etc. Ry., 67-213, 69+898.

[5] Kemp v. N. P. Ry., 89-139, 94+439.

[6] State v. St. P. etc. Ry., 98-380, 108+261 (overruling State v. Dist. Ct., 42-247, 44+7; State v. Shardlow, 43-524, 46+74); State v. N. P. Ry., 98-429, 108+269 (affirmed, 208 U. S. 583).

[7] State v. St. P. etc. Ry., 35-131, 28+3; State v. St. P. etc. Ry., 38-246, 36+870; State v. Minn. Transfer Ry., 80-108, 83+32; Cunningham v. Thief River Falls, 84-21, 86+763; State v. St. P. etc. Ry., 98-380, 108+261.

keep the bridge or viaduct in repair and in a safe condition. It may be required by the charter of the company or by statute, under the police power, but it exists at common law. All railway companies take their charters subject to the duty and municipalities cannot by contract divest themselves of the power of enforcing it. It may be enforced at the instance of a municipality by mandamus.[8] It is only when the danger and inconvenience of a grade crossing is exceptionally great that railway companies can be required to construct a bridge or viaduct.[9] If compensation has to be made to the owners of abutting property injured by a change of grade of the street in making lateral embankments or excavations, as approaches to the crossing, the company must bear the expense as an incident of the general undertaking.[10] The work is subject to the supervision and direction of the regularly constituted highway authorities, unless it is under judicial direction.[11] Where the necessity for a bridge is due to natural conditions and not to its tracks a railway company is not bound to build a bridge.[12] A bridge over railway tracks, when necessary to make the crossing safe for public use, is a "safety device."[13]

8122. Compensation for cattle guards, etc.—Upon the laying out of a public highway across the tracks of a railway company the company is not entitled to compensation for providing and maintaining cattle-guards and sign-boards at the new crossing.[14]

8123. Liability for defective crossings—A railway company is liable for any injury resulting to a traveler for its negligence in failing to keep a crossing in a safe condition.[15] It is immaterial that the road at a crossing is not legally established, if it is openly and notoriously used as a public highway, and the company assumes to maintain a public crossing at that point.[16] A company does not relieve itself of liability in this regard by leasing its road to another company without the consent of the state.[17] A traveler is not guilty of contributory negligence in attempting to pass over a crossing with knowledge of its defective condition, if a person of ordinary prudence might reasonably

[8] State v. St. P. etc. Ry., 35–131, 28+3; State v. Mpls. etc. Ry., 39–219, 39+153; State v. Minn. Transfer Ry., 80–108, 83+32; State v. Mpls. etc. Ry., 90–88, 95+581; State v. St. P. etc. Ry., 98–380, 108+261; State v. N. P. Ry., 98–429, 108+269; State v. Wis. etc. Ry., 98–536, 108+822; State v. N. P. Ry., 99–280, 109+238, 110+975. See, as to effect of contract between municipality and company, State v. Chi. etc. Ry., 85–416, 89+1. See, as to the practice and the power of the court in mandamus proceedings to enforce the duty, State v. St. P. etc. Ry., 38–246, 36+870; State v. Mpls. etc. Ry., 39–219, 39+153; Parker v. Truesdale, 54–241, 55+901; State v. St. P. & D. Ry., 75–473, 78+87; Id., 79–57, 81+544.

[9] State v. Mpls. etc. Ry., 90–88, 95+581.

[10] State v. St. P. etc. Ry., 35–131, 28+3. See Robinson v. G. N. Ry., 48–445, 51+384 (company held not liable to abutting owners for consequential damages); Kelly v. Minneapolis, 57–294, 59+304 (change of grade of street—company held not liable). These cases are possibly affected by the subsequent amendment of the constitution providing that property shall not be "damaged" for public use without compensation. See, as to liability for obstructions caused by crossings, Farrant v. First Div. etc. Ry., 13–311(286); Brakken v. Mpls. etc. Ry., 29–41, 11+124; Id., 31–45, 16+459.

[11] Robinson v. G. N. Ry., 48–445, 51+384; Parker v. Truesdale, 54–241, 55+901.

[12] State v. St. P. etc. Ry., 62–450, 64+1140.

[13] State v. St. P. etc. Ry., 98–380, 108+261.

[14] State v. Dist. Ct., 42–247, 44+7; State v. Shardlow, 43–524, 46+74. See State v. St. P. etc. Ry., 98–380, 108+261.

[15] Kelly v. Southern Minn. Ry., 28–98, 9+588; Freeman v. Mpls. etc. Ry., 28–443, 10+594; Lillstrom v. N. P. Ry., 53–464, 55+624; Cunningham v. Thief River Falls, 84–21, 86+763; Kemp v. N. P. Ry., 89–139, 94+439; Emmons v. Mpls. etc. Ry., 92–521, 100+364. See Lehnertz v. Mpls. etc. Ry., 31–219, 17+376 (complaint held sufficiently definite); Babcock v. St. P. etc. Ry., 36–147, 30+449 (allegation of damages in complaint held sufficient).

[16] Kelly v. Southern Minn. Ry., 28–98, 9+588; Lillstrom v. N. P. Ry., 53–464, 55+624.

[17] Freeman v. Mpls. etc. Ry., 28–443, 10+594.

have thought that he could make the passage in safety under the circumstances.[18]

MISCELLANEOUS DUTIES

8124. To maintain stations and depots—Railway companies are required by statute to build and maintain depots, with suitable waiting rooms, etc., at all villages and cities on their lines. And independent of the statute the railroad and warehouse commission may require a railway company to maintain a station or build a depot wherever public convenience reasonably requires it. The place where a station is to be maintained is not to be determined solely with reference to the convenience and profit of the company. The convenience of the public is a material consideration.[19]

8125. To provide transfer facilities at crossings—Railway companies are required by statute to provide transfer facilities, where they cross other roads at grade, under certain conditions.[20]

8126. To stop at stations—A former statute [21] requiring all regular passenger trains to stop at county seats was held constitutional.[22]

8127. To stop at railway crossings—Railway companies are required by statute to cause all of their trains to come to a full stop before passing over railway junctions or crossings at grade.[23]

8128. To maintain signs at crossings—Railway companies are required by statute to maintain signs at all public road crossings.[24]

8129. To block frogs, etc.—Railway companies are required by statute to adjust, fill, block, and guard all its frogs, switches, and guard rails.[25]

DUTY TO FENCE

8130. Statute—In general—The statute [26] requiring railway companies to fence their rights of way is a constitutional exercise of the police power.[27] It

[18] Kelly v. Southern Minn. Ry., 28–98, 9+588; Lillstrom v. N. P. Ry., 53–464, 55+624.

[19] Laws 1907 c. 54; State v. Mpls. etc. Ry., 76–469, 79+510 (unincorporated villages not within statute); State v. Mpls. etc. Ry., 87–195, 91+465 (affirmed, 193 U. S. 53) (company required to build and maintain depot at unincorporated village); State v. N. P. Ry., 89–363, 95+297 (company required to reopen and maintain abandoned station at twelfth avenue in Duluth); State v. N. P. Ry., 90–277, 96+81 (company required to re-establish station at small village).

[20] R. L. 1905 § 2019; Jacobson v. Wis. etc. Ry., 71–519, 74+893 (affirmed, 179 U. S. 287) (statute held constitutional—concurrent authority of state and federal authorities—burden of proof on appeal from order of railroad and warehouse commission); State v. Willmar etc. Ry., 88–448, 93+112 (tract connections—when may be required—private tracks). See State v. St. P. etc. Ry., 40–353, 42+21; State v. Mpls. etc. Ry., 80–191, 196, 83+60; State v. Boehm, 92–374, 378, 100+95.

[21] Laws 1893 c. 60. See R. L. 1905 § 2031.

[22] State v. Gladson, 57–385, 59+487 (affirmed, 166 U. S. 427).

[23] R. L. 1905 § 2033; Starr v. G. N. Ry., 67–18, 69+632; Larson v. Mpls. etc. Ry., 85–387, 88+994; Chicago etc. Ry. v. Mpls. etc. Ry., 176 Fed. 237.

[24] R. L. 1905 § 1994; State v. Dist. Ct., 42–247, 44+7 (new highway laid across tracks—company not entitled to compensation for required signs); State v. Shardlow, 43–524, 46+74 (id.); Studley v. St. P. & D. Ry., 48–249, 51+115 (absence of sign immaterial as to traveler with knowledge of crossing). See, as to duty independent of statute or ordinance, § 8177.

[25] R. L. 1905 § 1993; Bohan v. St. P. & D. Ry., 49–488, 52+133 (statute applied); Akers v. Chi. etc. Ry., 58–540, 60+669 (no duty as to trespassers—contributory negligence a defence); Dadore v. G. N. Ry., 84–115, 86+888 (blocking out of order); Powell v. Wis. C. Ry., 159 Fed. 864 (assumption of risk). See, as to duty independent of statute, Sherman v. Chi. etc. Ry., 34–259, 25+593.

[26] R. L. 1905 § 1997.

[27] Winona etc. Ry. v. Waldron, 11–515 (392); Emmons v. Mpls. etc. Ry., 35–503, 29+202; Mpls. etc. Ry. v. Emmons, 149 U. S. 364.

is a police regulation; not a regulation of partition fences.[28] There is no such duty at common law.[29] The object of the statute is to prevent domestic animals and young children from straying upon the tracks to their own danger and to the danger of persons on trains.[30] The duty imposed by the statute is absolute and imperative,[31] and is enforced with strictness.[32] Fences must be built though cattle guards are impracticable.[33] The words "on each side of" in the statute mean the margin or border of the entire grounds or right of way.[34] The existence of parallel tracks owned by different companies does not relieve either company from the statutory liability.[35] The statute applies to all railway companies.[36]

8131. Sufficiency of fence—A fence conforming to the general statute [37] defining a legal fence is sufficient.[38]

8132. Duty to maintain and repair—The statute requires railway companies not only to build fences, but also to maintain them—keep them in repair.[39] While the duty to build fences is absolute the duty to keep them in repair is governed by the general rule of ordinary or reasonable care.[40]

8133. Implied exceptions—Streets—Station grounds, etc.—The statute is subject to implied exceptions in the case of highways and public grounds,[41] and station or depot grounds.[42] The exception of station grounds does not necessarily extend to the full length of the "yards." [43] Repair shops and yards have been held to be within the statute.[44] Switching yards are excepted where a fence would necessitate cattle guards.[45] It was at one time held that public necessity or convenience was the measure or limit of exceptions,[46] but this doctrine has been so far modified as to admit an exception in favor of the safety of railway employees.[47] The burden is on the railway company to prove

[28] Gillam v. Sioux City etc. Ry., 26–268, 3+353; Smith v. Mpls. etc. Ry., 37–103, 33+316; Rosse v. St. P. & D. Ry., 68–216, 71+20. See Gould v. G. N. Ry., 63–37, 65+125.

[29] Locke v. First Div. etc. Ry., 15–350 (283); Gowan v. St. P. etc. Ry., 25–328; Frisch v. Chi. etc. Ry., 95–398, 104+228.

[30] Rosse v. St. P. & D. Ry., 68–216, 71+20; Mattes v. G. N. Ry., 100–34, 110+98; Frisch v. Chi. etc. Ry., 95–398, 104+228.

[31] Nickolson v. N. P. Ry., 80–508, 83+454; Marengo v. G. N. Ry., 84–397, 87+1117. It is not dependent on any action of the county board. Gowan v. St. P. etc. Ry., 25–328.

[32] Mattes v. G. N. Ry., 95–386, 104+234.

[33] Nelson v. G. N. Ry., 52–276, 53+1129.

[34] Gould v. G. N. Ry., 63–37, 65+125.

[35] Marengo v. G. N. Ry., 84–397, 87+1117.

[36] Gillam v. Sioux City etc. Ry., 26–268, 3+353; Fleming v. St. P. & D. Ry., 27–111, 6+448; Finch v. Chi. etc. Ry., 46–250, 48+915. See Devine v. St. P. etc. Ry., 22–8; Winger v. First Div. etc. Ry., 22–11; Whittier v. Chi. etc. Ry., 24–394.

[37] R. L. 1905 § 2749.

[38] Halverson v. Mpls. etc. Ry., 32–88, 19+392; Ellington v. G. N. Ry., 96–176, 104+827.

[39] Holtz v. Mpls. etc. Ry., 29–384, 13+147; Varco v. Chi. etc. Ry., 30–18, 13+921; Evans v. St. P. etc. Ry., 30–489, 16+271; Hovorka v. Mpls. etc. Ry., 34–281, 25+595; Graves v. Chi. etc. Ry., 47–429, 50+474. See Green v. St. P. etc. Ry., 55–192, 56+752; Swanson v. Chi. etc. Ry., 79–398, 82+670.

[40] Blais v. Mpls. etc. Ry., 34–57, 24+558; Coe v. N. P. Ry., 101–12, 111+651; Church v. Chi. etc. Ry., 102–295, 113+886 and cases under note 39 supra.

[41] Greeley v. St. P. etc. Ry., 33–136, 22+179; Rippe v. Chi. etc. Ry., 42–34, 43+652; Marengo v. G. N. Ry., 84–397, 87+1117.

[42] Greeley v. St. P. etc. Ry., 33–136, 22+179; Kobe v. N. P. Ry., 36–518, 32+783; Smith v. Mpls. etc. Ry., 37–103, 33+316; Hooper v. Chi. etc. Ry., 37–52, 33+314; Hurt v. St. P. etc. Ry., 39–485, 40+613; Cox v. Mpls. etc. Ry., 41–101, 42+924; Moser v. St. P. & D. Ry., 42–480, 44+530; Snell v. Mpls. etc. Ry., 87–253, 91+1108.

[43] Nickolson v. N. P. Ry., 80–508, 83+454.

[44] Mattes v. G. N. Ry., 95–386, 104+234; Id., 100–34, 110+98.

[45] Nickolson v. N. P. Ry., 80–508, 511, 83+454; Marengo v. G. N. Ry., 84–397, 400, 87+1117; Snell v. Mpls. etc. Ry., 87–253, 91+1108; Mattes v. G. N. Ry., 95–386, 104+234.

[46] Greeley v. St. P. etc. Ry., 33–136, 22+179; Kobe v. N. P. Ry., 36–518, 32+783; Hurt v. St. P. etc. Ry., 39–485, 40+613.

[47] Snell v. Mpls. etc. Ry., 87–253, 91+1108.

the existence of facts giving rise to an exception.[48] Mere inconvenience to the company does not create an exception.[49] Fences and cattle guards must be built to prevent domestic animals from passing over or through station grounds to the tracks beyond.[50]

8134. Within municipal limits—Prior to the revision of 1905 there was no exception as to municipal limits.[51]

8135. Cattle guards—The statute requires railway companies to build and maintain cattle guards at all road crossings and other openings.[52] Such guards are a part of the fence required by statute.[53] They are designed to keep children as well as domestic animals from entering upon the tracks.[54] The company is bound to exercise ordinary or reasonable care to keep them in repair,[55] but it is not bound to keep them free from snow and ice, except possibly under exceptional circumstances.[56] Under a former statute requiring cattle guards at "wagon crossings" it was held that private ways or farm crossings were not included.[57] The fact that cattle guards are impracticable at a given point does not affect the liability to fence.[58]

8136. Gates at farm crossings—The company owes the landowner, and those in privity with him, no duty to keep gates closed.[59] It is bound to exercise ordinary or reasonable care to keep them in repair.[60] Where a farm crossing over a railway leads from a highway to private lands on the opposite side of the track, and the railway company has closed and latched the gates from the highway, a short time before injury to stock by one of its trains, it cannot be held that it is liable for such injury. Where a railway company has put in gates at a farm crossing in the country, it is not required to station a guard at such crossing to keep the gates closed. Between the company and other parties also interested the obligation to keep gates properly closed is mutual, and demands the exercise of ordinary care from each.[61] The statute providing for locks for gates is permissive only and does not affect the question of negligence in leaving gates open if they are not furnished.[62]

8137. Special agreement with landowner—The liability of a railway company may be affected as regards an adjoining landowner by a special agreement with him to leave a portion of the right of way unfenced.[63]

8138. Fence voluntarily built by adjoining owner—The statutory duty of a railway company is discharged if the adjoining owner builds and maintains a sufficient fence.[64]

8139. Liability for failure to fence—In general—Under the statute there are two distinct liabilities—a liability for the death or injury of domestic animals and a liability for all damages resulting from a failure to comply with the

[48] Cox v. Mpls. etc. Ry., 41–101, 42+924; Croft v. Chi. etc. Ry., 72–47, 74+898; Nickolson v. N. P. Ry., 80–508, 83+454; Marengo v. G. N. Ry., 84–397, 87+1117.

[49] Greeley v. St. P. etc. Ry., 33–136, 22+179.

[50] Kobe v. N. P. Ry., 36–518, 32+783.

[51] Greeley v. St. P. etc. Ry., 33–136, 22+179; La Paul v. Truesdale, 44–275, 46+363; Croft v. Chi. etc. Ry., 72–47, 74+898, 80+628; Nickolson v. N. P. Ry., 80–508, 83+454.

[52] R. L. 1905 § 1997.

[53] Blais v. Mpls. etc. Ry., 34–57, 24+558; Mattes v. G. N. Ry., 95–386, 104+234.

[54] Mattes v. G. N. Ry., 100–34, 110+98.

[55] Miller v. N. P. Ry., 36–296, 30+892.

[56] Blais v. Mpls. etc. Ry., 34–57, 24+558; Stacey v. Winona etc. Ry., 42–158, 43+905.

[57] Sather v. Chi. etc. Ry., 40–91, 41+458.

[58] Nelson v. G. N. Ry., 52–276, 53+1129.

[59] Swanson v. Chi. etc. Ry., 79–398, 82+670. See Strobeck v. Bren, 93–428, 101+795.

[60] Chisholm v. N. P. Ry., 53–122, 54+1061; Swanson v. Chi. etc. Ry., 79–398, 82+670. See Halverson v. Chi. etc. Ry., 57–142, 58+871.

[61] Mooers v. N. P. Ry., 80–24, 82+1085.

[62] Sather v. Chi. etc. Ry., 40–91, 41+458.

[63] Whittier v. Chi. etc. Ry., 24–394; Id., 26–484, 5+372. See Cleland v. Mpls. etc. Ry., 29–170, 12+461.

[64] Hovorka v. Mpls. etc. Ry., 31–221, 17+376; Id., 34–281, 25+595.

statute.[65] No recovery can be had in any case unless the failure to fence is the proximate cause of the injury.[66]

8140. Failure to fence evidence of negligence—A change in the phraseology of the statute made in the revision of 1905 renders it uncertain whether a failure to fence is negligence per se or merely evidence of negligence.[67]

8141. Injury to railway employee—Assumption of risk—Liability to a railway employee under the statute is subject to the doctrine of assumption of risk.[68]

8142. Injury to adult pedestrian—No liability arises under the statute for injury to a trespasser walking upon the track.[69]

8143. Liability for death or injury of children—A railway company is liable under the statute where a young child strays upon a track in consequence of the company's failure to build or maintain a fence and is injured.[70] Whether the injured child would have been kept from the track by a proper fence is a question for the jury where the evidence is not conclusive,[71] and so is the question of the child's contributory negligence.[72]

8144. Liability for depreciation of land—A railway company failing to fence as required by the statute is liable to an abutting owner for the consequent diminution in the rental value of his land. The damages are not necessarily limited to what it would cost to build a fence.[73] The fact that the owner is deprived of his right to join his fences with that of the railway company may be considered as an element of damage.[74]

8145. Liability for animals killed or injured—The liability of a railway company, under the statute, for injuries to domestic animals in consequence of its neglect to build and maintain fences on each side of its road, is not limited to injuries caused by collision with trains, but extends to any injury which is the natural and proximate consequence of such neglect, that is, any injury to animals getting upon the railway which might naturally and reasonably be expected to result from such neglect, in view of the character and condition of the railway, and the uses to which it is put. But the statute does not change the general rules of law governing liability for negligence, so as to make a railway company liable for every injury which would not have occurred had a fence been built, regardless of the fact whether the neglect to fence was the proximate or only the remote cause of such injury. As in other cases of negligence the company is only liable for injuries of which the neglect to fence is the proximate cause, and which are the natural and proximate consequences of such neglect.[75]

[65] R. L. 1905 § 1998; Frisch v. Chi. etc. Ry., 95-398, 104+228. See Fleming v. St. P. & D. Ry., 27-111, 6+448.

[66] Schreiner v. G. N. Ry., 86-245, 90+400; Fezler v. Willmar etc. Ry., 85-252, 88+746. See Mehalek v. Mpls. etc. Ry., 105-128, 117+250.

[67] See Fleming v. St. P. & D. Ry., 27-111, 6+448; Savage v. Chi. etc. Ry., 31-419, 18+272; Nickolson v. N. P. Ry., 80-508, 83+454; Ellington v. G. N. Ry., 96-176, 104+827.

[68] Fleming v. St. P. & D. Ry., 27-111, 6+448.

[69] Schreiner v. G. N. Ry., 86-245, 90+400 (pedestrian pushed upon track by straying cow).

[70] Rosse v. St. P. & D. Ry., 68-216, 71+20 (overruling Fitzgerald v. St. P. etc. Ry., 29-336, 13+168); Nickolson v. N. P. Ry., 80-508, 83+454; Marengo v. G. N. Ry., 84-397, 87+1117; Fezler v. Willmar etc. Ry., 85-252, 88+746; Ellington v. G. N. Ry., 96-176, 104+827; Mattes v. G. N. Ry., 95-386, 104+234; Id., 100-34, 110+98. See Schreiner v. G. N. Ry., 86-245, 90+400; Paquin v. Wis. C. Ry., 99-170, 108+882; Erickson v. G. N. Ry., 82-60, 84+462.

[71] Fezler v. Willmar etc. Ry., 85-252, 88+746; Ellington v. G. N. Ry., 96-176, 104+827; Mattes v. G. N. Ry., 100-34, 110+98.

[72] Mattes v. G. N. Ry., 95-386, 104+234.

[73] Emmons v. Mpls. etc. Ry., 35-503, 29+202; Id., 38-215, 36+340; Id., 41-133, 42+789; Nelson v. Mpls. etc. Ry., 41-131, 42+788; Finch v. Chi. etc. Ry., 46-250, 48+915; Gould v. G. N. Ry., 63-37, 65+125; Frisch v. Chi. etc. Ry., 95-398, 104+228; Mpls. etc. Ry. v. Emmons, 149 U. S. 364.

[74] Gould v. G. N. Ry., 63-37, 65+125.

[75] Nelson v. Chi. etc. Ry., 30-74, 14+360 (mule stepping into small hole); Maher v.

The liability extends only to animals killed or injured on the right of way.[76] A railway company is not liable for damages done by animals passing over unfenced tracks and trespassing on adjoining lands.[77] The liability extends to all domestic animals that would be turned by a legal fence. Whether sheep or hogs would be turned depends on their size and is a question for the jury, unless the evidence is conclusive.[78] Liability depends on the condition of the road where animals enter and not where they are injured.[79] Liability follows a failure to maintain or keep in repair as well as to build fences.[80] Contributory negligence on the part of the owner of animals is a defence.[81] To constitute contributory negligence there must be some act or omission on the part of the owner proximately contributing to the accident.[82] Merely permitting animals to run at large unlawfully does not in itself constitute contributory negligence. To charge the owner with contributory negligence on such ground it must appear that he allowed his stock to run at large under such circumstances that the natural and probable consequence of so doing was that the stock would go upon the railway track and be injured. Liability under the statute extends to all domestic animals, including estrays.[83] The question of contributory negligence is for the jury, unless the evidence is conclusive.[84] The burden of proving contributory negligence is on the railway company.[85] If animals run away without the owner's fault he is not chargeable with contributory negligence.[86] A railway company failing to fence as required by statute is bound to run its trains with reference to the danger of animals straying upon its tracks.[87] Interest on the value of animals killed is recoverable.[88]

8146. Double costs—The statute provides that the plaintiff may recover double costs under certain conditions.[89]

Winona etc. Ry., 31–401, 18+105 (horses running into culvert); Frisch v. Chi. etc. Ry., 95–398, 104+228 (failure of company owning parallel track to fence held proximate cause); Savage v. Chi. etc. Ry., 31–419, 18+272 (horses frightened by handcar—running into barbed wire fence); Harrow v. St. P. & D. Ry., 43–71, 44+881 (horse killed near defective cattle-guard); Snell v. Mpls. etc. Ry., 87–253, 91+1108 (cows killed at crossing). See Halverson v. Mpls. etc. Ry., 32–88, 19+392; Vinson v. Chi. etc. Ry., 47–265, 50+228; Green v. St. P. etc. Ry., 60–134, 61+1130; Erickson v. G. N. Ry., 82–60, 64, 84+462; Schreiner v. G. N. Ry., 86–245, 90+400; Paquin v. Wis. C. Ry., 99–170, 108+882.

[76] Frisch v. Chi. etc. Ry., 95–398, 104+228. See Bear v. Chi. etc. Ry., 141 Fed. 25.

[77] Gowan v. St. P. etc. Ry., 25–328; Bear v. Chi. etc. Ry., 141 Fed. 25.

[78] Halverson v. Mpls. etc. Ry., 32–88, 19+392; Schimmele v. Chi. etc. Ry., 34–216, 25+347; Alexander v. Chi. etc. Ry., 41–515, 43+481.

[79] Cox v. Mpls. etc. Ry., 41–101, 42+924.

[80] See § 8132.

[81] Whittier v. Chi. etc. Ry., 24–394; Id., 26–484, 5+372 (opening in fence with consent of owner); Fleming v. St. P. & D. Ry., 27–111, 6+448; Johnson v. Chi. etc. Ry., 29–425, 13+673; Moser v. St. P. & D. Ry., 42–480, 44+530.

[82] Watier v. Chi. etc. Ry., 31–91, 16+537. See, for various acts that may constitute contributory negligence, Johnson v. Chi. etc. Ry., 29–425, 429, 13+673.

[83] Sarja v. G. N. Ry., 99–332, 109+600 (overruling Moser v. St. P. & D. Ry., 42–480, 44+530); Watier v. Chi. etc. Ry., 31–91, 16+537; Gillam v. Sioux City etc. Ry., 26–268, 3+353; Green v. St. P. etc. Ry., 55–192, 56+752; Id., 60–134, 61+1130; Ericson v. Duluth etc. Ry., 57–26, 58+822; Johnson v. Chi. etc. Ry., 29–425, 13+673.

[84] Schubert v. Mpls. etc. Ry., 27–360, 7+366 (owner allowing his cattle to graze on his own land adjacent to road); Holtz v. Mpls. etc. Ry., 29–384, 13+147 (id.); Johnson v. Chi. etc. Ry., 29–425, 13+673 (allowing animal to run in pasture with knowledge that railway fence is defective); Evans v. St. P. etc. Ry., 30–489, 16+271 (id.); Vinson v. Chi. etc. Ry., 47–265, 50+228 (driving cattle across track after train in sight); Nelson v. G. N. Ry., 52–276, 53+1129 (colt escaping from barnyard without fault of plaintiff); Chisholm v. N. P. Ry., 53–122, 54+1061 (cattle escaping from pasture).

[85] Whittier v. Chi. etc. Ry., 24–394; Cox v. Mpls. etc. Ry., 41–101, 42+924.

[86] Cox v. Mpls. etc. Ry., 41–101, 42+924.

[87] Schubert v. Mpls. etc. Ry., 27–360, 7+366.

[88] Varco v. Chi. etc. Ry., 30–18, 13+921.

[89] R. L. 1905 § 1998; Johnson v. Chi. etc. Ry., 29–425, 13+673 (constitutional);

8147. Pleading—Variance—Cases are cited below involving questions of pleading [90] and variance.[91]

8148. Evidence—Sufficiency—Cases are cited below involving the sufficiency of evidence to justify a verdict for the plaintiff.[92]

8149. Wisconsin statute—Under the Wisconsin statute [93] no recovery can be had for an injury which is not a proximate result of a failure to fence.[94]

FARM CROSSINGS

8150. Statutory duty—Railway companies are required by statute to construct proper farm crossings for the convenience of farms intersected by their roads.[95] They are not bound to keep such crossings in good condition for general public use.[96]

8151. Contractual duty—Provision for farm crossings is sometimes made by special contract between the railway company and the landowner.[97]

LIABILITY FOR NEGLIGENCE—MISCELLANEOUS CASES

8152. In general—Necessity of duty—A railway company is not liable for personal injury resulting from its negligence unless it owed a legal duty to the person injured to exercise care. If there is no duty there is no actionable negligence.[98]

8153. Liability for noise, smoke, etc.—No action lies against a railway company for the inconveniences necessarily caused to premises in the vicinity by noises, smoke, jarring of the ground, etc., arising from properly and prudently operating its road upon its own lands, or upon land in which the party complaining has no interest.[99]

8154. Failure to put out signals—The stopping of an engine for several moments at night on a main track in a large city, over which many trains were moving at brief intervals, without putting out signals or otherwise warning approaching trains, has been held negligent as a matter of law.[1]

Schimmele v. Chi. etc. Ry., 34–216, 25+347 (allowable on appeal from justice court—constitutional); Hooper v. Chi. etc. Ry., 37–52, 33+314 (not allowable when action begun within thirty days); Croft v. Chi. etc. Ry., 72–47, 80+628 (inapplicable to supreme court); State v. Shevlin, 99–158, 167, 108+935 (statute cited arguendo).

[90] Erickson v. G. N. Ry., 82–60, 84+462 (complaint held not to allege sufficiently that a child entered a right of way at a point where it was unfenced or which the company might lawfully have protected by a fence).

[91] Moser v. St. P. & D. Ry., 42–480, 44+530 (variance as to manner in which a horse was killed held immaterial); Mattes v. G. N. Ry., 95–386, 104+234 (allegation of a failure to build and maintain a fence will admit proof of a failure to build and maintain a cattle guard).

[92] Jenicke v. Mpls. etc. Ry., 27–359, 7+363 (cow found dead near track—no wounds or evidence of collision); Cleland v. Mpls. etc. Ry., 29–170, 12+461 (issue as to place where cow was struck); Church v. Chi. etc. Ry., 102–295, 113+886 (issue whether cows entered where fence was in disrepair or at gate left open).

[93] R. S. (Wis.) 1898 § 1810.

[94] Paquin v. Wis. C. Ry., 99–170, 108+882 (freight car standing on grade—defective brakes—started by trespassers—boy four years old, straying on unfenced track and climbing on car, injured).

[95] R. L. 1905 § 1996. Former statute cited: Schmidt v. Mpls. etc. Ry., 38–491, 38+487; Sigafoos v. Mpls. etc. Ry., 39–8, 38+627; Cameron v. Chi. etc. Ry., 42–75, 43+785.

[96] Johnson v. Chi. etc. Ry., 96–316, 104+961.

[97] Walters v. Mpls. etc. Ry., 76–506, 79+516 (practical construction of contract—company not bound to maintain crossing in winter—removal of planks in winter without notice). See Whittier v. Chi. etc. Ry., 26–484, 5+372; Cleland v. Mpls. etc. Ry., 29–170, 12+461; Johnson v. Chi. etc. Ry., 96–316, 104+961.

[98] Wickenburg v. Mpls. etc. Ry., 94–276, 102+713.

[99] Carroll v. Wis. C. Co., 40–168, 41+661.

[1] Smithson v. Chi. etc. Ry., 71–216, 73+853.

8155. Injury to trespassers on trains—A railway company owes no duty to trespassers on its trains except to refrain from injuring them wilfully or wantonly. It is not bound to keep a lookout for trespassers on its cars, or to presume that they will expose themselves to danger thereon; but having notice that they are in a position of danger it is bound to exercise reasonable care to avoid injuring them.[2]

8156. Frightening horses — Derailments — Collisions — Miscellaneous cases—Cases are cited below involving the liability of railway companies for injuries from the following causes: horses taking fright at trains and running away;[3] derailments;[4] collision of trains at crossings of two roads;[5] obstruction of highway with snow thrown from track;[6] obstruction of highway by

[2] Hepfel v. St. P. etc. Ry., 49-263, 51+1049 (young girl climbing on ladder of freight car with knowledge of brakeman killed by striking pile of lumber near track); Powers v. Chi. etc. Ry., 57-332, 59+307 (boy stealing a ride on a "wild train"); Pettit v. G. N. Ry., 58-120, 59+1082; Id., 62-530, 64+1019 (boy stealing a ride on flat car thrown out over end of car—duty of conductor and brakeman with knowledge of boy's presence); McNamara v. G. N. Ry., 61-296, 63+726 (plaintiff stealing a ride in a freight car—foot resting on drawbar crushed by cars coming together); Young v. G. N. Ry., 80-123, 83+32 (tramp stealing a ride injured in some undisclosed manner); Wickenburg v. Mpls. etc. Ry., 94-276, 102+713 (boy stealing ride on steps of car without knowledge of trainmen—collision at crossing of two roads); Barrett v. Mpls. etc. Ry., 106-51, 117+1047 (boy nineteen years old stealing ride in box car—forced to jump from train going at fifteen miles an hour by threats of brakeman).

[3] Gibbs v. Chi. etc. Ry., 26-427, 4+819 (negligently blowing whistle in city—verdict for plaintiff sustained); Skjeggerud v. Mpls. etc. Ry., 38-56, 35+572 (car standing on highway—plaintiff attempting to drive around—horse shied at car and tipped wagon over); Dugan v. St. P. & D. Ry., 40-544, 42+538 (negligently blowing whistle in city—plaintiff ran over by team running away—complaint held sufficient); Dugan v. St. P. & D. Ry., 43-414, 45+851 (question of negligence in blowing whistle in city held question for jury); Heininger v. G. N. Ry., 59-458, 61+558 (whistle blown upon approach to crossing in country—plaintiff riding horse and approaching crossing—failure to look for approaching trains—defendant held not negligent and plaintiff guilty of contributory negligence); Lindem v. N. P. Ry., 85-391, 89+64 (engine blowing off steam near street—special and general verdict); Gendreau v. Mpls. etc. Ry., 99-38, 108+814 (blowing whistle when approaching crowd about a fire near the track—noise caused by train running over hose of fire company and cutting it in two—horses of fire company running away and injuring plaintiff—ordinance against blowing whistle in city—exception in case of peril—evidence held not to show negligence); Everett v. G. N. Ry., 100-309, 111+281 (moving freight car by gravity on a track running along a street—horses driven along street parallel to track—failure to ring bell at crossing—company held not liable).

[4] Mahan v. Union Depot etc. Co., 34-29, 24+293 (plaintiff injured while in building near track—flatcar being pushed through a street by an engine at unlawful speed ran off track and into building—failure to shut off steam when car left track).

[5] Hanson v. Mpls. etc. Ry., 37-355, 34+223 (plaintiff a brakeman on one of the colliding trains—failure to stop exactly at stop-board not conclusive evidence of negligence—whether plaintiff was negligent in not jumping from engine held a question for the jury); Pratt v. Chi. etc. Ry., 38-455, 38+356 (duty of engineer at crossings defined—plaintiff a passenger on defendant's train—concurrent liability of both companies—verdict for plaintiff sustained); Chi. etc. Ry. v. Chi. etc. Ry., 56-406, 57+943 (action by one company against another for injury to train—counterclaim by defendant for injury to its train—verdict for the plaintiff justified by the evidence); Thompson v. Chi. etc. Ry., 64-159, 66+265 (plaintiff an engineer of one of the colliding trains—wanton or wilful injury—instructions as to contributory negligence held erroneous); Thompson v. Chi. etc. Ry., 71-89, 73+707 (plaintiff an engineer of one of the colliding trains—action against both companies for concurrent negligence—right of plaintiff to rely on compliance with law by engineer of other train—question of contributory negligence held for jury—verdict for plaintiff sustained); Wickenburg v. Mpls. etc. Ry., 94-276, 102+713 (plaintiff stealing a ride on steps of car without knowledge of trainmen—company held not liable).

[6] Phelps v. Winona etc. Ry., 37-485, 35+273.

car;[7] swinging of cable of gravel train over station platform;[8] leaving dynamite exposed and unguarded;[9] leaving car standing on grade;[10] moving a freight car by gravity on a track running along a street;[11] workmen repairing roadbed at crossing failing to give person driving horse on highway notice of the condition of the crossing and frightening his horse by continuing to hammer as horse approached crossing;[12] collision between trains of different companies operating on the tracks of a third company;[13] horse caught in telephone wire;[14] making up train in switching yards for another company.[15]

8157. Injury from defective station platform or approach—A railway company is bound to exercise ordinary or reasonable care to keep its station platforms and approaches thereto safe for those who use them rightfully, though they are not passengers, actual or presumptive. But it owes no such duty to trespassers or bare licensees.[16] It owes a higher duty to passengers.[17]

8158. Turntable cases—A railway company is bound to exercise ordinary or reasonable care to protect young children from injuring themselves in playing about a turntable owned by it, and situated in an exposed place, though they are trespassers, at least if it knows that young children are in the habit of going upon it to play. What is ordinary or reasonable care in such a case is a question for the jury, unless the evidence is conclusive.[18] Contributory negligence on the part of a child is a defence.[19]

8159. Proximate cause—Here, as elsewhere in the law of negligence, the negligence of the defendant must have been the proximate cause of the injury.[20]

INJURIES TO PERSONS ON OR NEAR TRACKS

8160. In general—Necessity of duty—A railway company is not liable on the ground of negligence for an injury to a person on or near its tracks unless it owed a duty to such person to refrain from negligence. If there is no duty there is no negligence.[21]

8161. Duty to workmen on or near track—A railway company may owe a duty to persons working about its tracks to give proper signals of the approach of trains.[22] This subject is more fully treated elsewhere.[23]

8162. Duty to persons not trespassers—A railway company is bound to exercise ordinary or reasonable care to avoid injuring persons who are on or near its tracks by its invitation or consent, expressed or implied.[24]

[7] Skjeggerud v. Mpls. etc. Ry., 38-56, 35+ 572.

[8] Klugherz v. Chi. etc. Ry., 90-17, 95+ 586.

[9] Mattson v. Minn. etc. Ry., 95-477, 104+ 443; Id., 98-296, 108+517.

[10] Paquin v. Wis. C. Ry., 99-170, 108+ 882.

[11] Everett v. G. N. Ry., 100-309, 111+281.

[12] Courtney v. Mpls. etc. Ry., 97-69, 106+ 90; Id., 100-434, 111+399.

[13] Smithson v. Chi. etc. Ry., 71-216, 73+ 853. See Searfoss v. Chi. etc. Ry., 106-490, 119+66.

[14] Halvorson v. Chi. etc. Ry., 94-531, 103+ 1132.

[15] Allen v. Wis. C. Ry., 107-5, 119+423.

[16] Christie v. Chi. etc. Ry., 61-161, 63+ 482; Sullivan v. Mpls. etc. Ry., 90-390, 97+114; Klugherz v. Chi. etc. Ry., 90-17, 95+586; Vance v. G. N. Ry., 106-172, 118+ 674. See Truax v. Mpls. etc. Ry., 89-143, 94+440.

[17] See § 1268.

[18] Keffe v. Mil. etc. Ry., 21-207; Kolsti v. Mpls. etc. Ry., 32-133, 19+655; Ekman v. Mpls. St. Ry., 34-24, 24+291; Twist v. Winona etc. Ry., 39-164, 39+402; O'Malley v. St. P. etc. Ry., 43-289, 45+440; Berg v. Mpls. etc. Ry., 95-404, 104+293. See § 6989

[19] Twist v. Winona etc. Ry., 39-164, 39+ 402.

[20] Mageau v. G. N. Ry., 102-399, 113+ 1016 (woman thrown forward from seat—died five days after childbirth and five months after accident—evidence held not to show that death was proximate result of accident).

[21] Akers v. Chi. etc. Ry., 58-540, 60+669; Wickenburg v. Mpls. etc. Ry., 94-276, 102+713; Ellington v. G. N. Ry., 96-176, 104+827.

[22] Erickson v. St. P. & D. Ry., 41-500, 43+332.

[23] See § 5936.

[24] Mark v. St. P. etc. Ry., 32-208, 20+ 131; Foss v. Chi. etc. Ry., 33-392, 23+

8163. Duty to licensees—Persons having no invitation to go upon railway tracks, but who walk thereon for their own convenience, are mere licensees, taking existing conditions as they find them, and cannot require the railway company to protect them from dangers which are as apparent and open to their own observation as to the company.[25]

8164. Duty to trespassers—A railway company owes no duty to a trespasser on its tracks except to refrain from injuring him wantonly or wilfully. A recovery cannot be obtained merely for the want of ordinary care. There is ordinarily no duty to keep a lookout for trespassers, whether adults or children. But if trespassers are discovered in a place of danger the company must exercise reasonable care to avoid injuring them.[26] Exceptional circumstances may require a company to exercise ordinary care in maintaining a lookout for trespassers, as, for example, where the company has long acquiesced in the use of its premises by the public so that it is reasonable to anticipate the presence of trespassers at a certain place.[27]

8165. Who are trespassers—Persons on the premises of a railway company without express or implied invitation from the company are trespassers.[28] Persons walking on railway tracks for their own convenience or pleasure are ordinarily to be deemed trespassers.[29] A trespasser in a railway yard, intending to pass over a highway crossing the same and continue on the right of way, may cease to retain the illegal character of a trespasser, if, when entering upon the highway, he changes his purpose, and uses the street as an exit from the railway grounds.[30] Persons loading or unloading cars are not trespassers.[31] A person working about a spur track in connection with a mill has been held not a trespasser.[32] Employees of an independent contractor working on the right of way are not trespassers.[33] A village marshal, walking over tracks to patrol yards, has been held not a trespasser.[34]

8166. Wilful or wanton injury—Cases are cited below involving the question of wilful or wanton injury in this connection.[35] The general subject is treated elsewhere.[36]

553; Iltis v. Chi. etc. Ry., 40–273, 41+1040; Jacobson v. St. P. & D. Ry., 41–206, 42+932; Erickson v. St. P. & D. Ry., 41–500, 43+332; Deisen v. Chi. etc. Ry., 43–454, 45+864; Galloway v. Chi. etc. Ry., 56–346, 57+1058; Thompson v. Mpls. etc. Ry., 79–413, 82+670; Eckert v. G. N. Ry., 104–435, 116+1024.

[25] Schreiner v. G. N. Ry., 86–245, 90+400; Gibbons v. N. P. Ry., 99–142, 108+471. See Gallagher v. N. P. Ry., 94–64, 101+942.

[26] Denman v. St. P. & D. Ry., 26–357, 4+605; Scheffler v. Mpls. etc. Ry., 32–518, 21+711; Johnson v. Truesdale, 46–345, 48+1136; Studley v. St. P. & D. Ry., 48–249, 51+115; Hepfel v. St. P. etc. Ry., 49–263, 51+1049; Sloniker v. G. N. Ry., 76–306, 79+168; Lando v. Chi. etc. Ry., 81–279, 83+1089; Ellington v. G. N. Ry., 96–176, 104+827; Paquin v. Wis. C. Ry., 99–170, 108+882; Anderson v. Mpls. etc. Ry., 103–224, 114+1123; Berg v. Duluth etc. Ry., 126+1093.

[27] Ellington v. G. N. Ry., 96–176, 182, 104+827; Sloniker v. G. N. Ry., 76–306, 79+168. See Akers v. Chi. etc. Ry., 58–540, 60+669.

[28] Akers v. Chi. etc. Ry., 58–540, 60+669; Lando v. Chi. etc. Ry., 81–279, 83+1089.

[29] See § 8163.

[30] Monahan v. Chi. etc. Ry., 88–325, 92+1115. See Lando v. Chi. etc. Ry., 81–279, 83+1089.

[31] Mark v. St. P. etc. Ry., 32–208, 212, 20+131; Jacobson v. St. P. & D. Ry., 41–206, 42+932; Deisen v. Chi. etc. Ry., 43–454, 45+864.

[32] Mark v. St. P. etc. Ry., 32–208, 20+131.

[33] Erickson v. St. P. & D. Ry., 41–500, 43+332.

[34] Johnson v. Mpls. etc. Ry., 108–302, 122+10.

[35] Sloniker v. G. N. Ry., 76–306, 79+168; Lando v. Chi. etc. Ry., 81–279, 83+1089; Gibbons v. N. P. Ry., 99–142, 108+471; Anderson v. Mpls. etc. Ry., 103–224, 114+1123. See Donaldson v. Mil. etc. Ry., 21–293; Denman v. St. P. & D. Ry., 26–357, 4+605; Scheffler v. Mpls. etc. Ry., 32–518, 21+711; Johnson v. Truesdale, 46–345, 48+1136; Hepfel v. St. P. etc. Ry., 49–263, 51+1049; Irving v. Mpls. etc. Ry., 71–9, 73+518.

[36] See § 7036.

8167. Duty of engineer to keep lookout—An engineer is not bound to keep a constant lookout to see whether the track is clear. He has other duties that occasionally prevent him from doing so.[37]

8168. Assumption as to action of persons on track—An engineer may act on the assumption that a person on a track will get off in time to avoid injury from the approaching train if he has, or ought to have, knowledge of its approach. An engineer is not bound to stop his train or slacken its speed unless it is obvious that a collision will otherwise occur. He may assume that the person has the ordinary sense of sight and hearing and will exercise ordinary care to avoid injury.[38]

8169. Contributory negligence—Law and fact—Cases are cited below holding the person injured guilty of contributory negligence as a matter of law,[39] or that the question of his negligence was one of fact for the jury.[40]

8170. Duty to look and listen—A person going upon or near a railway track is bound to be vigilant in the use of his senses of sight and hearing to avoid collision with trains. He must be alert for his own safety and look and listen for approaching trains.[41] The application of this rule in the case of injuries at crossings is considered elsewhere.[42] The rule does not apply to one who is employed in a railway yard and whose duties frequently make it necessary for him to go upon the tracks.[43]

[37] Hall v. Chi. etc. Ry., 46–439, 49+239; Maehren v. G. N. Ry., 98–375, 107+951; Searfoss v. Chi. etc. Ry., 106–490, 119+66; Miller v. Mpls. etc. Ry., 106–499, 119+218.

[38] Erickson v. St. P. & D. Ry., 41–500, 43+332; Johnson v. Treusdale, 46–345, 48+1136; Lando v. Chi. etc. Ry., 81–279, 83+1089.

[39] Carroll v. Minn. V. Ry., 13–30(18) (attempting to pull staging from track during switching operations—standing on track with back to train of cars); Donaldson v. Mil. etc. Ry., 21–293 (walking on track—stepping off to allow train to pass—stepping on again without looking—struck by second half of broken train); Denman v. St. P. & D. Ry., 26–357, 4+605 (sitting down on or near track and going to sleep—drunk); Smith v. Mpls. etc. Ry., 26–419, 4+782 (walking on track—failure to look and listen); Rogstad v. St. P. etc. Ry., 31–208, 17+287 (walking across track to get water for stock in freight car—failure to look and listen); Johnson v. Truesdale, 46–345, 48+1136 (walking on track—struck by train going in same direction—attention diverted by engine on another track); Irving v. Mpls. etc. Ry., 71–9, 73+518 (walking on track—struck by engine backing—failure to look or listen); Lando v. Chi. etc. Ry., 81–279, 83+1089 (driving wagon on track in switch yards—walking beside wagon); Fezler v. Willmar etc. Ry., 85–252, 88+746 (boy ten years old running beside the track trying to keep up with a train); Gallagher v. N. P. Ry., 94–64, 101+942 (standing on track to signal and board approaching engine—remaining on track after it was apparent that signal was not noticed); Gibbons v. N. P. Ry., 99–142, 108+471 (walking on track—double tracks—attention diverted in watching train on other track); Anderson v. Mpls. etc. Ry., 103–224, 114+1123 (standing on track watching operation of steam shovel); Hermeling v. Chi. etc. Ry., 105–136, 117+341 (attempting at night to cross track in front of approaching train forty feet away—train in plain sight—plaintiff an experienced railroad man and fully conscious of the situation); Raiolo v. N. P. Ry., 108–431, 122+489 (crossing track at "paper street"—failure to look and listen).

[40] Carroll v. Minn. V. Ry., 14–57(42) (attempting to pull staging from track during switching operations—standing on track with back to train of cars—notifying trainmen of dangerous position); Mark v. St. P. etc. Ry., 32–208, 20+131 (spur track a planing mill—decedent taking lumber from planer and carrying it across track—struck by car kicked down the spur—practice of workmen carrying lumber across track known to railway company—duty to give warning of approaching cars); Hepfel v. St. P. etc. Ry., 49–263, 51+1049 (child climbing on freight car with knowledge of brakeman); Stacklie v. St. P. & D. Ry., 73–37, 75+734 (laborer at freight warehouse—going upon switching tracks without looking).

[41] Donaldson v. Mil. etc. Ry., 21–293; Rogstad v. St. P. etc. Ry., 31–208, 17+287; Stacklie v. St. P. & D. Ry., 73–37, 75+734; Raiolo v. N. P. Ry., 108–431, 122+489. See Mark v. St. P. etc. Ry., 32–208, 20+131.

[42] See § 8188.

[43] Jordan v. Chi. etc. Ry., 58–8, 59+633. See Stacklie v. St. P. & D. Ry., 73–37, 75+734; Floan v. Chi. etc. Ry., 101–113, 111+957; Raiolo v. N. P. Ry., 108–431, 122+489.

8171. Sudden emergency—Distracting circumstances—The effect of a sudden emergency and distracting circumstances upon the question of contributory negligence is the same here as elsewhere in the law of negligence.[44] The general subject is treated elsewhere.[45]

8172. Pleading—Where a trespasser is injured while on or near the tracks of a railway company seeks to recover on the ground of wilful or wanton injury he must frame his complaint accordingly.[46]

8173. Cases classified as to facts—Walking on track;[47] crossing track;[48] standing on or near track;[49] working on or near track;[50] driving on or across track;[51] loading or unloading freight cars;[52] unloading freight on station platform from wagon standing on track;[53] child clinging to ladder of freight car;[54] child running beside track to keep up with train;[55] child about freight cars on track near coal shed;[56] drunken person sitting on or near track falling asleep;[57] laborer pushing car on spur track in brick yard—collision;[58] child playing about cars on gravity side track caught between colliding cars—collision caused by boy's companions loosening brake;[59] person standing on station platform hit by bundle of papers thrown by news agent on train;[60] person standing on station platform hit by mail bag thrown from train by mail agent;[61] trespasser walking near track pushed upon track by straying cow;[62] mail agent falling between a station platform and a train while in the act of throwing a mail bag from the platform into a passing mail car;[63] person standing on track and attempting to board an approaching engine;[64] person lying on track;[65] railway employee riding velocipede on track in going to his work.[66]

ACCIDENTS AT HIGHWAY CROSSINGS

8174. Duty of railway company—In general—A railway company is bound to exercise such care to avoid accidents at crossings as ordinary prudence would suggest.[67] It is bound to take such precaution as a prudent manage-

[44] Mark v. St. P. etc. Ry., 30–493, 16+367; Gallagher v. N. P. Ry., 94–64, 101+942.

[45] See § 7020.

[46] Anderson v. Mpls. etc. Ry., 103–224, 114+1123.

[47] Donaldson v. Mil. etc. Ry., 21–293; Smith v. Mpls. etc. Ry., 26–419, 4+782; Johnson v. Truesdale, 46–345, 48+1136; Studley v. St. P. & D. Ry., 48–249, 51+115; Akers v. Chi. etc. Ry., 58–540, 60+669; Irving v. Mpls. etc. Ry., 71–9, 73+518; Schreiner v. G. N. Ry., 86–245, 90+400; Gibbons v. N. P. Ry., 99–142, 108+471.

[48] Rogstad v. St. P. etc. Ry., 31–208, 17+287; Sloniker v. G. N. Ry., 76–306, 79+168; Raiolo v. N. P. Ry., 108–431, 122+489.

[49] Anderson v. Mpls. etc. Ry., 103–224, 114+1123.

[50] Erickson v. St. P. & D. Ry., 41–500, 43+332; Mark v. St. P. etc. Ry., 30–493, 16+367; Id., 32–208, 20+131; Heffinger v. Mpls. etc. Ry., 43–503, 45+1131. See Carroll v. Minn. V. Ry., 13–30(18); Id., 14–57(42).

[51] Lando v. Chi. etc. Ry., 81–279, 83+1089.

[52] Mark v. St. P. etc. Ry., 32–208, 212, 20+131; Jacobson v. St. P. & D. Ry., 41–206, 42+932; Deisen v. Chi. etc. Ry., 43–454, 45+864; Breen v. Ry. T. Co., 51–4, 52+975; Thompson v. Mpls. etc. Ry., 79–413, 82+670; Eckert v. G. N. Ry., 104–435, 116+1024.

[53] Foss v. Chi. etc. Ry., 33–392, 23+553.

[54] Hepfel v. St. P. etc. Ry., 49–263, 51+1049; Berg v. Duluth etc. Ry., 126+1093.

[55] Fezler v. Willmar etc. Ry., 85–252, 88+746.

[56] Ellington v. G. N. Ry., 96–176, 104+827.

[57] Denman v. St. P. & D. Ry., 26–357, 4+605.

[58] Iltis v. Chi. etc. Ry., 40–273, 41+1040.

[59] Haesley v. Winona etc. Ry., 46–233, 48+1023.

[60] McGrath v. Eastern Ry., 74–363, 77+136.

[61] Galloway v. Chi. etc. Ry., 56–346, 57+1058.

[62] Schreiner v. G. N. Ry., 86–245, 90+400.

[63] Truax v. Mpls. etc. Ry., 89–143, 94+440.

[64] Gallagher v. N. P. Ry., 94–64, 101+942.

[65] Johnson v. Mpls. etc. Ry., 108–302, 122+10.

[66] Miller v. Mpls. etc. Ry., 106–499, 119+218.

[67] Hendrickson v. G. N. Ry., 49–245, 51+1044.

ment of the road, with respect to the public safety, requires, though they may be in addition to those required by statute or though there may be no statute upon the subject.[68] It must exercise reasonable care—care commensurate with the dangers of the situation.[69] It is required to take greater precautions at a dangerous crossing in a city than at the ordinary highway crossing in the open country.[70]

8175. Duty to give signals—Statute—Engineers are required by statute to ring the bell or blow the whistle of their engines at least eighty rods from grade crossings, except within cities.[71] The statute is inapplicable to private farm crossings.[72] It does not require signals for the benefit of a person driving along a street parallel to the railway track near a crossing, but not intending to use the crossing.[73] The effect of the statute is to make the failure to give the required signals negligence per se,[74] but a traveler who is guilty of contributory negligence cannot recover though the statutory signals are not given.[75] Independent of statute it is negligent, as a matter of law, to run a train which cannot be easily stopped, at a high speed, and without any signal by bell, whistle, or otherwise, across a much-traveled street in a city or village.[76] Where a railway company has recognized and acquiesced in the use of a private wagon crossing over its tracks, and adopted the usual signals therefor on the approach of its trains, it cannot lawfully discontinue the same without notice; and a negligent omission to give them, resulting in an accident, will subject the company to an action.[77] In cases not covered by the statute it is a question for the jury, where the evidence is not conclusive, whether ordinary or reasonable care requires the giving of signals at crossings.[78] Where, by reason of an omission or a neglect to sound the whistle or ring the bell of a locomotive as it is approaching a dangerous crossing, the vigilance of a traveler upon the wagon road is allayed, and he is led into a position or situation in which his life is jeopardized and finally lost, his lack of vigilance cannot be held to amount to culpable or concurring negligence, as a matter of law.[79] One of the objects of the statute is to secure the safety of animals upon the highway.[81] The statute requires the signal to be given at least eighty rods from the crossing.[82] Independent of the statute the question of proper distance is a question for the jury, within reasonable limits.[83] It must be given sufficiently near the crossing to be

[68] Shaber v. St. P. etc. Ry., 28–103, 107, 9+575; Bolinger v. St. P. & D. Ry., 36–418, 31+856; Struck v. Chi. etc. Ry., 58–298, 59+1022; Czech v. G. N. Ry., 68–38, 70+791; Croft v. Chi. etc. Ry., 72–47, 74+898, 80+628.

[69] Czech v. G. N. Ry., 68–38, 70+791; Hendrickson v. G. N. Ry., 49–245, 51+1044.

[70] Klotz v. Winona etc. Ry., 68–341, 71+257.

[71] R. L. 1905 § 5001.

[72] Czech v. G. N. Ry., 68–38, 70+791. See Locke v. First Div. etc. Ry., 15–350(283).

[73] Everett v. G. N. Ry., 100–309, 111+281.

[74] Judson v. G. N. Ry., 63–248, 65+447. See Clark v. N. P. Ry., 47–380, 50+365; Tuthill v. N. P. Ry., 50–113, 52+384; Finley v. Chi. etc. Ry., 71–471, 74+174; Snell v. Mpls. etc. Ry., 87–253, 91+1108.

[75] Studley v. St. P. & D. Ry., 48–249, 51+115; Judson v. G. N. Ry., 63–248, 65+447; Griswold v. G. N. Ry., 86–67, 90+2; Snell v. Mpls. etc. Ry., 87–253, 91+1108; Carlson v. Chi. etc. Ry., 96–504, 105+555.

[76] Loucks v. Chi. etc. Ry., 31–526, 18+651; Beanstrom v. N. P. Ry., 46–193, 48+778. See Green v. Eastern Ry., 52–79, 53+808; Liabraaten v. Mpls. etc. Ry., 105–207, 117+423.

[77] Westaway v. Chi. etc. Ry., 56–28, 57+222.

[78] Loucks v. Chi. etc. Ry., 31–526, 532, 18+651; Czech v. G. N. Ry., 68–38, 70+791; Croft v. Chi. etc. Ry., 72–47, 74+898, 80+628; Liabraaten v. Mpls. etc. Ry., 105–207, 117+423.

[79] Hendrickson v. G. N. Ry., 49–245, 51+1044.

[81] Hohl v. Chi. etc. Ry., 61–321, 63+742.

[82] R. L. 1905 § 5001; Kelly v. St. P. etc. Ry., 29–1, 11+67.

[83] Loucks v. Chi. etc. Ry., 31–526, 18+651.

effectual as a warning.[84] Provision for signals at crossings is frequently made by ordinance,[85] and sometimes in railway charters.[86] A traveler may act, within reasonable limits, on the assumption that proper signals will be given.[87] In an early case it was held, with reference to a crossing in the country, that there was no obligation to blow the whistle, in the absence of statutory requirement.[88] One of the objects of the statute is to require signals to be given at such a distance that persons driving horses likely to be frightened may stop at a safe point. No liability for frightening horses can arise from the giving of the statutory signals in a proper manner.[89] Cases are cited below involving the sufficiency of evidence as to the giving of signals.[90]

8176. Duty to maintain gates—Railway companies are often required by ordinance to maintain gates at crossings within cities.[91] A traveler is justified in acting, within reasonable limits, on the assumption that a crossing is safe, when gates at the crossing are open, if to his knowledge they are customarily closed upon the approach of trains.[92] The failure to maintain gates has been held not the proximate cause of an injury to a boy who crossed the tracks to steal a ride on a passing freight train.[93]

8177. Duty to maintain signs—It is ordinarily for the jury to say whether the failure to maintain a sign at a particular crossing is negligence and whether it contributed to an injury even where it appears that the person injured was familiar with the crossing.[94] Railway companies are required by statute to maintain signs wherever their lines cross a public road.[95]

8178. Duty to maintain flagman—Where an accident occurred at a crossing in a city it was held a question for the jury whether it was negligent for the company not to maintain a flagman.[96] Companies are sometimes required by ordinance to maintain a flagman at certain crossings.[97] The failure to comply with such an ordinance does not excuse a traveler from looking and listening.[98] The absence of a flagman who is customarily present when trains are approaching justifies a traveler, who knows of the custom, in acting, within reasonable limits, upon the assumption that the crossing is safe.[99]

8179. Defective crossings—Cases are cited below involving accidents due in whole or in part to defective crossings.[1] The duty of railway companies in maintaining crossings is considered elsewhere.[2]

[84] Beanstrom v. N. P. Ry., 46–193, 48+778.

[85] Fritz v. First Div. etc. Ry., 22–404; Green v. Eastern Ry., 52–79, 53+808.

[86] Locke v. First Div. etc. Ry., 15–350 (283). See Loucks v. Chi. etc. Ry., 31–526, 532, 18+651.

[87] Kelly v. St. P. etc. Ry., 29–1, 11+67; Loucks v. Chi. etc. Ry., 31–526, 18+651; Hendrickson v. G. N. Ry., 49–245, 51+1044.

[88] Brown v. Mil. etc. Ry., 22–165.

[89] Heininger v. G. N. Ry., 59–458, 61+558.

[90] Kelly v. St. P. etc. Ry., 29–1, 11+67; Harris v. Mpls. etc. Ry., 33–459, 23+850; Lee v. Chi. etc. Ry., 68–49, 70+857; Cotton v. Willmar etc. Ry., 99–366, 109+835.

[91] Schneider v. N. P. Ry., 81–383, 84+124.

[92] Woehrle v. Minn. Trans. Ry., 82–165, 84+791; Stegner v. Chi. etc. Ry., 94–166, 102+205; Wardner v. G. N. Ry., 96–382, 104+1084.

[93] Mehalek v. Mpls. etc. Ry., 105–128, 117+250.

[94] Shaber v. St. P. etc. Ry., 28–103, 9+575. See Studley v. St. P. & D. Ry., 48–249, 51+115.

[95] R. L. 1905 § 1994. See § 8128.

[96] Bolinger v. St. P. & D. Ry., 36–418, 31+856. See Kelly v. St. P. etc. Ry., 29–1, 11+67; Klotz v. Winona etc. Ry., 68–341, 71+257.

[97] Johnson v. St. P. & D. Ry., 31–283, 17+622; Green v. Eastern Ry., 52–79, 53+808; Klotz v. Winona etc. Ry., 68–341, 71+257; Schneider v. N. P. Ry., 81–383, 84+124.

[98] Schneider v. N. P. Ry., 81–383, 84+124.

[99] Woehrle v. Minn. Trans. Ry., 82–165, 84+791.

[1] Lehnertz v. Mpls. etc. Ry., 31–219, 17+376; Lillstrom v. N. P. Ry., 53–464, 55+624; Kemp v. N. P. Ry., 89–139, 94+439.

[2] See § 8119.

8180. Rate of speed—A railway company is bound to exercise ordinary care and prudence and due regard for the safety of the public in regulating the speed of its engines and trains.[3] What constitutes an unreasonable speed depends upon the circumstances and is a question for the jury, unless the evidence is conclusive.[4] The speed of trains within municipal limits is commonly regulated by ordinance. Such ordinances are valid if they do not prescribe an unreasonable speed.[5] If ordinary care and prudence requires a less speed than that prescribed by an ordinance the company must act accordingly.[6] Some cases seem to hold that the running of a train at a greater speed than allowed by ordinance is negligence per se,[7] but the better view is that it is merely evidence of negligence.[8] If the plaintiff was guilty of contributory negligence he cannot recover though the train was running at an excessive speed.[9] A traveler has no right to attempt to cross a railway track in front of an approaching train at what is nothing more than a common country crossing, though it is within the limits of a city, or to use a part of the railway within said limits as a footpath, relying solely upon the expectation or belief that the trains will be run not to exceed a certain rate of speed fixed by city ordinance.[10] The fact that trains customarily approach a station slowly does not excuse a traveler from looking and listening and being on the alert.[11]

8181. Backing trains over crossings—Railway companies are bound to be especially careful in backing or pushing trains or engines over crossings.[12] Ordinary care may require them to station a brakeman on the end car [13] and a light upon a dark night.[14]

8182. Kicking cars across street—Flying switch—A railway company is bound to be especially careful in kicking cars or making flying switches across a street in a city. Whether it has taken reasonable precautions to prevent accidents while doing so is a question for the jury, unless the evidence is conclusive.[15]

[3] Shaber v. St. P. etc. Ry., 28–103, 9+575. See Loucks v. Chi. etc. Ry., 31–526, 18+651; Hutchinson v. St. P. etc. Ry., 32–398, 21+212; Harris v. Mpls. etc. Ry., 33–459, 23+850; Carney v. Chi. etc. Ry., 46–220, 48+912; Beanstrom v. N. P. Ry., 46–193, 48+778; Westaway v. Chi. etc. Ry., 56–28, 57+222; Struck v. Chi. etc. Ry., 58–298, 59+1022; Lee v. Chi. etc. Ry., 68–49, 70+857; Lammers v. G. N. Ry., 82–120, 84+728; Campbell v. Chi. etc. Ry., 108–104, 121+429.

[4] Howard v. St. P. etc. Ry., 32–214, 20+93; Bolinger v. St. P. & D. Ry., 36–418, 31+856; Mahan v. Union etc. Co., 34–29, 24+293; Liabraaten v. Mpls. etc. Ry., 105–207, 117+423.

[5] Fritz v. First Div. etc. Ry., 22–404; Shaber v. St. P. etc. Ry., 28–103, 9+575; Kelly v. St. P. etc. Ry., 29–1, 11+67; Faber v. St. P. etc. Ry., 29–465, 13+902; Knobloch v. Chi. etc. Ry., 31–402, 18+106; Mahan v. Union etc. Co., 34–29, 24+293; Bolinger v. St. P. & D. Ry., 36–418, 31+856; Weyl v. Chi. etc. Ry., 40–350, 42+24; Evison v. Chi. etc. Ry., 45–370, 48+6; Green v. Eastern Ry., 52–79, 53+808; Greenwood v. Chi. etc. Ry., 95–284, 104+3.

[6] Shaber v. St. P. etc. Ry., 28–103, 9+575.

[7] Weyl v. Chi. etc. Ry., 40–350, 42+24.

[8] Kelly v. St. P. etc. Ry., 29–1, 11+67; Faber v. St. P. etc. Ry., 29–465, 13+902; Mahan v. Union etc. Co., 34–29, 24+293.

[9] Griswold v. G. N. Ry., 86–67, 90+2; Greenwood v. Chi. etc. Ry., 95–284, 104+3.

[10] Studley v. St. P. & D. Ry., 48–249, 51+115. See Carney v. Chi. etc. Ry., 46–220, 48+912.

[11] Carney v. Chi. etc. Ry., 46–220, 48+912.

[12] Shaber v. St. P. etc. Ry., 28–103, 9+575; Kelly v. St. P. etc. Ry., 29–1, 11+67; Hutchinson v. St. P. etc. Ry., 32–398, 21+212; Bolinger v. St. P. & D. Ry., 36–418, 31+856; Westaway v. Chi. etc. Ry., 56–28, 57+222; Newstrom v. St. P. & D. Ry., 61–78, 63+253; Klotz v. Winona etc. Ry., 68–341, 71+257; Snell v. Mpls. etc. Ry., 87–253, 91+1108; Stegner v. Chi. etc. Ry., 94–166, 102+205.

[13] Johnson v. St. P. & D. Ry., 31–283, 17+622; Greenwood v. Chi. etc. Ry., 95–284, 104+3.

[14] Shaber v. St. P. etc. Ry., 28–103, 9+575; Stegner v. Chi. etc. Ry., 94–166, 102+205.

[15] Howard v. St. P. etc. Ry., 32–214, 20+93; Magner v. Truesdale, 53–436, 55+607; Monahan v. Chi. etc. Ry., 88–325, 92+1115; Olsen v. Mpls. etc. Ry., 102–395, 113+1010. See Mark v. St. P. etc. Ry., 32–208, 20+131.

8183. Assumption as to conduct of traveler—An engineer may act within reasonable limits, on the assumption that travelers approaching a crossing will exercise ordinary care for their own protection.[16]

8184. Engineers charged with knowledge—Engineers are charged with knowledge of the dangerous character of crossings due to topographical or other permanent conditions.[17]

8185. Snow and mud on crossings—Railway companies are not bound to reduce the speed of trains, for the benefit of travelers on the highway, on account of snow, ice, or mud on crossings.[18]

8186. Traveler not a trespasser—Though a railway company has the right to the use of its tracks across a public highway, the public still retains its right to use such crossing as a highway and in the proper use thereof the traveler is not a trespasser.[19] The rights of the company and the traveler are regarded as equal except that the company ordinarily has the right of way.[20] The rights and duties of each are correlative and reciprocal.[21]

8187. Duty of traveler—In general—A person crossing a railway track at a highway crossing must exercise ordinary or reasonable care to avoid collision with trains.[22] He is not required to use every precaution which might contribute to his safety, but only such as common prudence dictates.[23] The degree of precaution which common prudence dictates is in due proportion to the probability of danger.[24] In considering what ordinary care requires regard must be had to the nature of the danger to be apprehended and the reasonable probability of incurring it.[25]

8188 Duty of traveler to look and listen—A person about to cross a railway track at a highway crossing is bound to be vigilant in the use of his senses of sight and hearing to avoid collision with trains. He is ordinarily bound to look and listen for approaching trains before attempting to cross. A failure to do so ordinarily constitutes contributory negligence as a matter of law.[26] He is bound to exercise both the sense of hearing and the sense of sight. If for any reason he is unable to exercise one of these senses effectively there is all the more reason why he must be vigilant in exercising the other.[27] He must be

[16] Judson v. G. N. Ry., 63–248, 65+447.

[17] Hendrickson v. G. N. Ry., 49–245, 250, 51+1044. See Lee v. Chi. etc. Ry., 68–49, 70+857.

[18] Lee v. Chi. etc. Ry., 68–49, 70+857.

[19] Klotz v. Winona etc. Ry., 68–341, 71+257.

[20] Hendrickson v. G. N. Ry., 49–245, 51+1044; Czech v. G. N. Ry., 68–38, 70+791. See Thompson v. Chi. etc. Ry., 71–89, 98, 73+707.

[21] Czech v. G. N. Ry., 68–38, 70+791.

[22] Brown v. Mil. etc. Ry., 22–165; Kelly v. St. P. etc. Ry., 29–1, 11+67; Hutchinson v. St. P. etc. Ry., 32–398, 401, 21+212; Carney v. Chi. etc. Ry., 46–220, 221, 48+912; Tuthill v. N. P. Ry., 50–113, 115, 52+384; Campbell v. Chi. etc. Ry., 108–104, 121+429.

[23] Kelly v. St. P. etc. Ry., 29–1, 11+67.

[24] Klotz v. Winona etc. Ry., 68–341, 348, 71+257.

[25] Hutchinson v. St. P. etc. Ry., 32–398, 21+212; Hendrickson v. G. N. Ry., 49–245, 51+1044. See Carney v. Chi. etc. Ry., 46–220, 223, 48+912.

[26] Brown v. Mil. etc. Ry., 22–165; Kelly v. St. P. etc. Ry., 29–1, 4, 11+67; Abbett v. Chi. etc. Ry., 30–482, 16+266; Rogstad v. St. P. etc. Ry., 31–208, 17+287; Rheiner v. Chi. etc. Ry., 36–170, 30+548; Harris v. Mpls. etc. Ry., 37–47, 33+12; Marty v. Chi. etc. Ry., 38–108, 35+670; Weyl v. Chi. etc. Ry., 40–350, 42+24; Clark v. N. P. Ry., 47–380, 50+365; Studley v. St. P. & D. Ry., 48–249, 51+115; Magner v. Truesdale, 53–436, 55+607; Heininger v. G. N. Ry., 59–458, 61+558; Howe v. Mpls. etc. Ry., 62–71, 64+102; Judson v. G. N. Ry., 63–248, 65+447; Klotz v. Winona etc. Ry., 68–341, 71+257; Stacklie v. St. P. & D. Ry., 73–37, 75+734; Arine v. Mpls. etc. Ry., 76–201, 78+1108; Sandberg v. St. P. & D. Ry., 80–442, 83+411; Schneider v. N. P. Ry., 81–383, 84+124; Olson v. N. P. Ry., 84–258, 87+843; Griswold v. G. N. Ry., 86–67, 90+2; Carlson v. Chi. etc. Ry., 96–504, 105+555; Campbell v. Chi. etc. Ry., 108–104, 121+429.

[27] Abbett v. Chi. etc. Ry., 30–482, 486, 16+266; Rheiner v. Chi. etc. Ry., 36–170, 30+548; Judson v. G. N. Ry., 63–248, 254, 65+

continuously vigilant in using his senses of sight and hearing while he is approaching or crossing the tracks.[28] The general rule is relaxed somewhat where the company maintains gates or flagmen,[29] and in the case of a person riding in a vehicle driven by another.[30] There is no duty to look where the view is so obstructed that to look would be unavailing.[31] One must look and listen for extra as well as regular trains.[32] The track is itself a warning. It is a place of danger. It can never be assumed that cars are not approaching on a track, or that there is no danger therefrom.[33] The failure of a railway company to give signals or maintain gates or a flagman at a crossing does not relieve a traveler of his duty to look and listen. He cannot rely on such signals to remind him of danger. He is bound to be awake and alive for his own protection.[34] Where a highway crosses a double-track railway, over which trains are liable to run frequently in opposite directions, it is contributory negligence for a traveler thereon, whose view of the second track is obscured by the presence of a passing train on the track nearest to him, to pass immediately upon the crossing as soon as the way is clear, without waiting to look or listen for the approach of a train in the opposite direction on the second track.[35] A person driving or riding a horse must look and listen for approaching trains in time to stop, if necessary, at a sufficient distance from the crossing to avoid the danger of his horse becoming frightened.[36] One who goes near enough to a railway track to be in danger from any cause is required by law to exercise due care to avoid harm. This rule does not, however, amount to a hard and fast requirement that such a person must stop, look, and listen, and continue to look under all circumstances and at all times; nor is such person bound to anticipate negligence on the part of persons operating trains on such a track.[37]

8189. Presumption as to looking and listening—If the circumstances were such that if the traveler had looked and listened he must have discovered the approaching train, it will be conclusively presumed that he did not look or listen, or if he did, that he negligently disregarded the knowledge thus obtained.[38] Where the traveler is killed it will ordinarily be presumed that he

447; Schneider v. N. P. Ry., 81–383, 84+124. See Woehrle v. Minn. Trans. Ry., 82–165, 172, 84+791.

[28] Rogstad v. St. P. etc. Ry., 31–208, 17+287; Sandberg v. St. P. & D. Ry., 80–442, 83+411; Rheiner v. Chi. etc. Ry., 36–170, 30+548; Clark v. N. P. Ry., 47–380, 50+365; Snell v. Mpls. etc. Ry., 87–253, 91+1108. See Carlson v. Chi. etc. Ry., 96–504, 509, 105+555; Campbell v. Chi. etc. Ry., 108–104, 121+429.

[29] Abbett v. Chi. etc. Ry., 30–482, 16+266; Woehrle v. Minn. Trans. Ry., 82–165, 84+791; Stegner v. Chi. etc. Ry., 94–166, 102+205; Wardner v. G. N. Ry., 96–382, 104+1084.

[30] Howe v. Mpls. etc. Ry., 62–71, 64+102; Johnson v. St. P. C. Ry., 67–260, 69+900; Finley v. Chi. etc. Ry., 71–471, 74+174; Lammers v. G. N. Ry., 82–120, 84+728; Liabraaten v. Mpls. etc. Ry., 105–207, 117+423; Harmon v. Chi. etc. Ry., 107–479, 120+1022 (the driver of the vehicle may be negligent and the passenger not).

[31] Abbett v. Chi. etc. Ry., 30–482, 16+266. See Campbell v. Chi. etc. Ry., 108–104, 121+429.

[32] Judson v. G. N. Ry., 63–248, 65+447; Carlson v. Chi. etc. Ry., 96–504, 105+555.

[33] Brown v. Mil. etc. Ry., 22–165; Carney v. Chi. etc. Ry., 46–220, 48+912; Judson v. G. N. Ry., 63–248, 254, 65+447.

[34] Sandberg v. St. P. & D. Ry., 80–442, 83+411; Schneider v. N. P. Ry., 81–383, 84+124; Carlson v. Chi. etc. Ry., 96–504, 105+555.

[35] Marty v. Chi. etc. Ry., 38–108, 35+670.

[36] Heininger v. G. N. Ry., 59–458, 61+558.

[37] Campbell v. Chi. etc. Ry., 108–104, 121+429.

[38] Carlson v. Chi. etc. Rv., 96–504, 105+555 and cases cited under § 8193. To hold that there is a "conclusive" presumption of contributory negligence in such cases seems unsound. Each case necessarily depends on its own facts and there is no necessity of resorting to a presumption of negligence, much less a conclusive presumption. The rule as stated in the Carlson case ignores the fact that the train may be at such a distance when seen by the traveler that it is not negligent for him to attempt to cross in front of it. Nettersheim v. Chi. etc. Ry., 58–10, 59+

looked and listened,[39] but this presumption does not arise where the plaintiff introduces direct and affirmative evidence as to what occurred and it appears from the undisputed evidence that if the decedent had looked and listened before going upon the track he must have discovered the approaching train.[40]

8190. Duty of traveler to stop—It is not ordinarily negligent, as a matter of law, for a traveler not to stop before attempting to cross a railway track.[41] The driver of a vehicle is not ordinarily bound to stop, get down, and go ahead of the team to look for approaching trains.[42]

8191. Calculations of time and distance—A traveler approaching a crossing is not bound to make exact calculations of time and distance.[43] Evidence of measurements and experiments made by third parties after the accident, illustrated by maps and photographs of the locus in quo, is commonly introduced in this class of cases, but it ought not to be regarded as conclusive except in a very clear case.[44]

8192. Assumption that company will not be negligent—A traveler is justified in acting, within reasonable limits, on the assumption that a railway company will exercise due care in the management of its trains and in the giving of signals at crossings.[45]

8193. Contributory negligence—Law and fact—Where the evidence is conclusive that the circumstances of the accident were such that if the traveler had duly looked and listened before attempting to cross the tracks he must have seen or heard the approaching train and hence must either have failed to look or listen, or, having seen or heard the train, attempted to cross in front of it, he is charged with contributory negligence as a matter of law, unless there is affirmative evidence from which it might reasonably be inferred that he was not negligent. His own testimony that he looked and listened is not enough.[46] It is not always negligent, as a matter of law, for the driver of a team, after discovering an approaching train, to attempt to pass over the tracks rather than to stop or turn back.[47] It is not always negligent, as a matter of law, for a pedestrian to cross tracks in front of a train which he sees or hears approach-

632. What is conceived to be the true rule in this class of cases is stated in § 8193.

[39] Hendrickson v. G. N. Ry., 49–245, 51+1044; Struck v. Chi. etc. Ry., 58–298, 59+1022.

[40] Carlson v. Chi. etc. Ry., 96–504, 105+555.

[41] Shaber v. St. P. etc. Ry., 28–103, 9+575; Klotz v. Winona etc. Ry., 68–341, 71+257.

[42] Kelly v. St. P. etc. Ry., 29–1, 11+67; Beanstrom v. N. P. Ry., 46–193, 48+778; Newstrom v. St. P. & D. Ry., 61–78, 63+253.

[43] Hutchinson v. St. P. etc. Ry., 32–398, 21+212; Tuthill v. N. P. Ry., 50–113, 116, 52+384.

[44] Miller v. Truesdale, 56–274, 57+661. See Hendrickson v. G. N. Ry., 52–340, 54+189.

[45] Kelly v. St. P. etc. Ry., 29–1, 4, 11+67; Loucks v. Chi. etc. Ry., 31–526, 18+651; Hutchinson v. St. P. etc. Ry., 32–398, 21+212; Hendrickson v. G. N. Ry., 49–245, 51+1044; Newstrom v. St. P. & D. Ry., 61–78, 81, 63+253; Klotz v. Winona etc. Ry., 68–341, 350, 71+257; Woehrle v. Minn. Trans. Ry., 82–165, 84+791; Olson v. N. P. Ry., 84–258, 87+843; Campbell v. Chi. etc. Ry., 108–104, 121+429. See Studley v. St. P. & D. Ry., 48–249, 51+115.

[46] Brown v. Mil. etc. Ry., 22–165; Weyl v. Chi. etc. Ry., 40–350, 42+24; Carney v. Chi. etc. Ry., 46–220, 48+912; Studley v. St. P. & D. Ry., 48–249, 51+115; Miller v. Truesdale, 56–274, 57+661; Howe v. Mpls. etc. Ry., 62–71, 78, 64+102; Nelson v. St. P. & D. Ry., 76–189, 193, 78+1041, 79+530; Schmidt v. G. N. Ry., 83–105, 85+935; Kemp v. N. P. Ry., 89–139, 94+439; Wardner v. G. N. Ry., 96–382, 104+1084; Carlson v. Chi. etc. Ry., 96–504, 105+555.

[47] Kelly v. St. P. etc. Ry., 29–1, 11+67; Loucks v. Chi. etc. Ry., 31–526, 18+651; Weyl v. Chi. etc. Ry., 40–350, 353, 42+24; Beanstrom v. N. P. Ry., 46–193, 48+778; Nelson v. St. P. & D. Ry., 76–189, 78+1041, 79+530; Bolinger v. St. P. & D. Ry., 36–418, 31+856; Campbell v. Chi. etc. Ry., 108–104, 121+429 (busy crossing in city—train running at excessive speed—plaintiff attempting to stop horse of another about to cross tracks without a driver—whistles of approaching train frightened horse—plaintiff dragged upon track and hit by train—view obstructed).

ing.[48] In actions by husband and wife, tried together, a charge to the effect that both verdicts must necessarily be either for the plaintiff or defendant, has been held erroneous on the ground that one of the plaintiffs might have been guilty of contributory negligence and the other not.[49] Cases are cited below holding the question of contributory negligence one of law for the court [50] or of fact for the jury.[51]

[48] Nettersheim v. Chi. etc. Ry., 58–10, 59+632.

[49] Harmon v. Chi. etc. Ry., 107–479, 120+1022.

[50] Brown v. Mil. etc. Ry., 22–165 (plaintiff driving lumber wagon—familiar with crossing—view unobstructed—country crossing—failure to look or listen); Abbett v. Chi. etc. Ry., 30–482, 16+266 (city crossing—driver of team familiar with crossing—double tracks—trains passing in different directions—flagman at crossing—failure to look and listen—failure to wait for signal from flagman); Mantel v. Chi. etc. Ry., 33–62, 21+853 (collision with street car—failure of driver of car to look); Rheiner v. Chi. etc. Ry., 36–170, 30+548 (city crossing—driver of ice wagon—knew engine was in neighborhood—failure to look—effect of noise produced by wagon on duty to look); Harris v. Mpls. etc. Ry., 37–47, 33+12 (village crossing—driving team—snowing and wind blowing—irregular train—team walking—headlight visible—failure to look and listen); Marty v. Chi. etc. Ry., 38–108, 35+670 (crossing in suburbs of city—plaintiff driving loaded wagon—familiar with crossing—double tracks—second track obscured by train passing on first track—failure to look and listen for train on second track after passage of train on first track); Weyl v. Chi. etc. Ry., 40–350, 42+24 (crossing in suburbs of city—driving lumber wagon—view partially obstructed by freight cars—mules not afraid of cars—failure to look and listen); Carney v. Chi. etc. Ry., 46–220, 48+912 (village crossing near station—pedestrian familiar with crossing—knew that train was about due—wind blowing—snow falling—dark—failure to look and listen); Clark v. N. P. Ry., 47–380, 50+365 (country crossing—pedestrian familiar with situation and expecting train struck by snow plow—view partly obstructed—wind blowing and snow in air—failure to look and listen); Studley v. St. P. & D. Ry., 48–249, 51+115 (crossing in suburbs of city—girl seventeen years old walking—familiar with situation—failure to look and listen); Magner v. Truesdale, 53–436, 55+607 (city crossing—pedestrian—flying switch—failure to look and listen); Judson v. G. N. Ry., 63–248, 65+447 (country crossing—boy fourteen years old driving team—familiar with situation—irregular train—failure to look and listen); Wherry v. Duluth etc. Ry., 64–415, 67+223 (crossing blocked by freight train—plaintiff attempted to cross by climbing up over bumpers between cars); Burau v. G. N. Ry., 67–434, 69+1149 (country crossing—driving open carriage—familiar with crossing—cut near crossing—failure to look and listen); Nelson v. St. P. & D. Ry., 76–189, 78+1041, 79+530 (village crossing—decedent saw train in time to stop but attempted to cross in front of it—view obstructed by wood pile—familiar with situation); Arine v. Mpls. etc. Ry., 76–201, 78+1108, 1119 (village crossing—pedestrian failing to look and listen); Sandberg v. St. P. & D. Ry., 80–442, 83+411 (crossing in suburbs of city—pedestrian failing to look and listen); Schneider v. N. P. Ry., 81–383, 84+124 (city crossing—triple tracks—box cars on first track—pedestrian failing to look after passing first track before stepping upon second track—noise from boiler shop near by); Schmidt v. G. N. Ry., 83–105, 85+935 (village crossing near the station—driving in open carriage—view obstructed by freight cars and cattle pens—failure to look and listen); Olson v. N. P. Ry., 84–258, 87+843 (village crossing near station—pedestrian familiar with situation failing to look and listen—one train preceding another—confusing sounds from two trains); Griswold v. G. N. Ry., 86–67, 90+2 (village crossing—driver of team familiar with situation—knew train was about due—view slightly obstructed by section house—failure to look and listen); Snell v. Mpls. etc. Ry., 87–253, 91+1108 (country crossing—boy driving team with two cows tied to wagon—boy left team without a driver and walked behind to drive cows—failure to go forward at crossing to look); Kemp v. N. P. Ry., 89–139, 94+439 (country crossing—driving load of hay—failure to look and listen); Greenwood v. Chi. etc. Ry., 95–284, 104+3 (city crossing—cars backing—pedestrian failing to look and listen); Wardner v. G. N. Ry., 96–382, 104+1084 (city crossing—driving team—gates being lowered and gong sounded—failure to look and listen); Carlson v. Chi. etc. Ry., 96–504, 105+555 (city crossing—driving in covered carriage—failure to look and listen—extra train running fast).

[51] Shaber v. St. P. etc. Ry., 28–103, 9+575 (city crossing—several tracks—trains moving in opposite directions—pedestrian struck by engine moving backward in shadow of another train—view partly obstructed—no light on engine toward pedestrian but one in opposite direction); Kelly

8194. Imputed negligence—Cases involving the question of imputed contributory negligence in this connection are cited below.[52] The general subject is treated elsewhere.[53]

8195. Sudden emergency—Distracting circumstances—Cases are cited below involving the effect of a sudden emergency and distracting circumstances upon the question of contributory negligence in this connection.[54] The general subject is treated elsewhere.[55]

v. St. P. etc. Ry., 29–1, 11+67 (city crossing—several tracks—freight cars on first track—plaintiff driving struck by train on second track—cars pushed by engine); Loucks v. Chi. etc. Ry., 31–526, 18+651 (village crossing—plaintiff driving—view partly obstructed); Howard v. St. P. etc. Ry., 32–214, 20+93 (city crossing—several tracks—pedestrian injured by cars being "kicked" across street—nighttime); Hutchinson v. St. P. etc. Ry., 32–398, 21+212 (city crossing—engine backing—other engine near by—track running through cut—plaintiff driving); Corey v. N. P. Ry., 32–457, 21+479 (village crossing—freight car on side track at crossing—view obstructed by buildings—driving about freight car to avoid approaching train—horse fell into ditch); Bolinger v. St. P. & D. Ry., 36–418, 31+856 (city crossing—party driving—cars backed or pushed across street); Beanstrom v. N. P. Ry., 46–193, 48+778 (village crossing—view obstructed—three tracks—party driving); Hendrickson v. G. N. Ry., 49–245, 51+1044; Id., 52–340, 54+189 (country crossing—party driving—view obstructed—deep cut); Tuthill v. N. P. Ry., 50–113, 52+384 (country crossing—party driving cattle—failure to ride ahead and look—view obstructed); Henderson v. St. P. & D. Ry., 52–479, 55+53 (village crossing—boy eleven years old climbing over bumpers between cars—cars starting—engineer aware of situation of boy); Westaway v. Chi. etc. Ry., 56–28, 57+222 (private crossing over switch tracks in city—party driving—engine backing); Miller v. Truesdale, 56–274, 57+661 (village crossing near station—party driving—view obstructed by freight cars); Nettersheim v. Chi. etc. Ry., 58–10, 59+632 (city crossing—pedestrian familiar with situation—storm of rain and sleet—nighttime—gates down); Struck v. Chi. etc. Ry., 58–298, 59+1022 (country crossing—track running through cut—snow fences on hill above cut—party driving); Newstrom v. St. P. & D. Ry., 61–78, 63+253 (village crossing—track running through cut—bluff—view obstructed—train backing—party driving); Howe v. Mpls. etc. Ry., 62–71, 64+102 (country crossing—plaintiff riding in wagon owned and driven by another—familiar with situation); Klotz v. Winona etc. Ry., 68–341, 71+257 (city crossing—party pushing wheelbarrow with rope on shoulders—car pushed across street); Finley v. Chi. etc. Ry., 71–471, 74+174 (village crossing—view partly obstructed by building—plaintiff riding with her husband—cold winter morning—head covered); King v. Chi. etc. Ry., 77–104, 79+611 (village crossing—party driving—familiar with situation—view obstructed by building and freight car); Lammers v. G. N. Ry., 82–120, 84+728 (village crossing—plaintiff riding with husband in lumber wagon—head wrapped in shawl—child in arms); Plaunt v. Ry. Trans. Co., 86–506, 91+19; Id., 90–499, 97+433 (city crossing—cars standing on crossing—engineer assured plaintiff that he would hold engine until she had passed around it—engine started as plaintiff in act of crossing—falling on rails in hurry); Monahan v. Chi. etc. Ry., 88–325, 92+1115 (boy stealing ride on freight train); Emmons v. Mpls. etc. Ry., 92–521, 100+364 (village crossing—plaintiff driving—snow and dust in air—view obstructed by freight cars); Stegner v. Chi. etc. Ry., 94–166, 102+205; Id., 97–511, 107+559 (city crossing—several tracks—gates open—trains running in opposite directions—several bells ringing—engine backing with no light toward plaintiff); Cotton v. Willmar etc. Ry., 99–366, 109+835 (village crossing—plaintiff riding in hired carriage—servant of owner of carriage driving—top and sides of carriage up—wearing heavy coat with collar turned up—dark night—view obstructed by buildings); Olsen v. Mpls. etc. Ry., 102–395, 113+1010 (boy eleven years old crossing track at or near crossing—cars kicked in switching—no signals—issue whether boy was a trespasser); Liabraaten v. Mpls. etc. Ry., 105–207, 117+423 (village street—plaintiff in carriage driven by her father).

[52] Howe v. Mpls. etc. Ry., 62–71, 64+102; Johnson v. St. P. C. Ry., 67–260, 69+900; Finley v. Chi. etc. Ry., 71–471, 74+174; Lammers v. G. N. Ry., 82–120, 84+728; Cotton v. Willmar etc. Ry., 99–366, 109+835.

[53] See § 7037.

[54] Loucks v. Chi. etc. Ry., 31–526, 18+651; Beanstrom v. N. P. Ry., 46–193, 48+778; Plaunt v. Ry. Trans. Co., 86–506, 91+19; Campbell v. Chi. etc. Ry., 108–104, 121+429.

[55] See § 7020.

8196. Wilful or wanton injury—Cases are cited below involving the question of wilful or wanton injury.[56] The general subject is treated elsewhere.[57]

8197. Proximate cause—Cases are cited below involving the question of proximate cause.[58]

8198. Injury to property—Separate action—Where a person is injured in his person, a concomitant injury to his property is not a distinct cause of action but an item of damage.[59]

8199. Collision with street car—Evidence held to show contributory negligence on the part of the driver of a street car.[60]

8200. Pleading—A general allegation of negligence is sufficient.[61] It is unnecessary to allege that the traveler looked and listened.[62]

8201. Burden of proof—There is no presumption that a traveler was negligent. The defendant has the burden of proving affirmatively that he was.[63] The plaintiff must prove the negligence of the defendant. It cannot be inferred from the fact of the killing.[64]

8202. Evidence—Admissibility—Cases are cited below involving the admissibility of evidence.[65]

8203. Evidence—Sufficiency—In an action for negligently killing plaintiff's intestate, the fact that, while he was driving on a highway across defendant's track, a train, going at the rate of ten miles an hour and making the usual signals, ran upon and killed him, is not sufficient evidence of negligence to justify a verdict for plaintiff.[66] Evidence held insufficient to show any negligence on the part of the company in the giving of signals or the management of the train after discovering the plaintiff.[67]

FIRES CAUSED BY TRAINS

8204. Duty of company—Degree of care—A railway company is bound to exercise ordinary or reasonable care to prevent its engines from causing fires.

[56] Henderson v. St. P. & D. Ry., 52–479, 55+53; Judson v. G. N. Ry., 63–248, 65+447; Wherry v. Duluth etc. Ry., 64–415, 67+223; Lee v. Chi. etc. Ry., 68–49, 70+857; Arine v. Mpls. etc. Ry., 76–201, 78+1108, 1119; Olson v. N. P. Ry., 84–258, 87+843.

[57] See § 7036.

[58] Lillstrom v. N. P. Ry., 53–464, 55+624; Lee v. Chi. etc. Ry., 68–49, 70+857; Kemp v. N. P. Ry., 89–139, 94+439; Mehalek v. Mpls. etc. Ry., 105–128, 117+250.

[59] King v. Chi. etc. Ry., 80–83, 82+1113.

[60] Mantel v. Chi. etc. Ry., 33–62, 21+853.

[61] Clark v. Chi. etc. Ry., 28–69, 9+75; Johnson v. St. P. & D. Ry., 31–283, 17+622. See Lehnertz v. Mpls. etc. Ry., 31–219, 17+376 (complaint held sufficiently definite).

[62] Clark v. Chi. etc. Ry., 28–69, 9+75.

[63] Clark v. Chi. etc. Ry., 28–69, 9+75; Lillstrom v. N. P. Ry., 53–464, 55+624; Newstrom v. St. P. & D. Ry., 61–78, 81, 63+253; Klotz v. Winona etc. Ry., 68–341, 350, 71+257; Lammers v. G. N. Ry., 82–120, 84+728.

[64] Harris v. Mpls. etc. Ry., 33–459, 23+850.

[65] Shaber v. St. P. etc. Ry., 28–103, 9+575 (effect of dazzling light on eye—want of sign at crossing—customary speed of trains); Kelly v. St. P. etc. Ry., 29–1, 11+67 (negative evidence as to ringing of bell); Faber v. St. P. etc. Ry., 29–465, 13+902 (ordinance as to speed of trains); Harris v. Mpls. etc. Ry., 33–459, 23+850 (negative evidence as to ringing of bell); Evison v. Chi. etc. Ry., 45–370, 48+6 (testimony of fireman as to ringing bell—belief based on habit of ringing); Hendrickson v. G. N. Ry., 49–245, 51+1044 (fact that plaintiff was acquainted with crossing); Westaway v. Chi. etc. Ry., 56–28, 57+222 (customary practice as to ringing bell); Newstrom v. St. P. & D. Ry., 61–78, 63+253 (fact that other travelers under similar conditions could not hear approaching trains till almost at crossing); Klotz v. Winona etc. Ry., 68–341, 71+257 (resolution of city council requiring company to maintain a flagman at a certain crossing); Cotton v. Willmar etc. Ry., 99–366, 109+835 (negative evidence as to ringing of bell).

[66] Harris v. Mpls. etc. Ry., 33–459, 23+850.

[67] Lee v. Chi. etc. Ry., 68–49, 70+857.

What ordinary care requires depends upon the circumstances, including the force and direction of the wind, the near presence of combustible material, the dryness of the season, and the speed of the train. In all cases the care must be commensurate with the danger reasonably to be apprehended.[68] A railway company is not liable for all damage by fire which its engines may cause.[69] It is not bound to take every possible precaution.[70] It is not bound to stop or diminish its customary speed as it passes isolated buildings on dry and windy days, in the absence of fires previously set or other evidence of the danger of setting a fire.[71]

8205. Leased roads—The liability of a company is unaffected by the fact that it operates its trains over a road leased from another company.[72]

8206. Combustible material on right of way—At common law a railway company may be charged with negligence in allowing combustible materials to accumulate and remain on its right of way.[73] From April 1 to December 1 railway companies are required by statute to keep their rights of way clear of combustible materials.[74] The fact that there is combustible material on a right of way is admissible to show the degree of care required in the management of engines.[75]

8207. Use of improved appliances—While railway companies are not bound to use every possible precaution which the highest scientific skill might suggest to prevent the escape of fire from their locomotives, yet they are required to exercise a degree of care reasonably proportionate to the risks to be apprehended; and, in view of the great danger to property from fires communicated from passing locomotives, reasonable care requires that they should avail themselves of the best approved practicable appliances for the prevention of such fires.[76]

8208. Possibility of preventing fires—Judicial notice—A court or jury may take judicial notice of the fact that while it is impossible, by means of any present known appliances, to so construct and equip an engine that it will not sometimes scatter sparks and cinders that will start fires along the railway yet if it is properly constructed and properly equipped with spark arresters, and properly operated, it will not ordinarily emit sparks or cinders that will remain alive until they reach the earth.[77]

8209. Proof of negligence—Negligence may be proved by circumstantial evidence.[78] It may be proved by the emission of cinders unusual in quantity or size or carried to an unusual height or distance, though such evidence is not of the most satisfactory or conclusive character.[79]

[68] Sibilrud v. Mpls. etc. Ry., 29–58, 11+ 146; Johnson v. Chi. etc. Ry., 31–57, 16+ 488; Nichols v. Chi. etc. Ry., 36–452, 32+ 176; Wilson v. N. P. Ry., 43–519, 45+ 1132; Hayes v. Chi. etc. Ry., 45–17, 47+ 260; Hoye v. Chi. etc. Ry., 46–269, 48+ 1117; Solum v. G. N. Ry., 63–233, 65+443; Riley v. Chi. etc. Ry., 71–425, 74+171; Continental Ins. Co. v. Chi. etc. Ry., 97–467, 107+548.

[69] Continental Ins. Co. v. Chi. etc. Ry., 97–467, 481, 107+548. See Laws 1909 c. 378.

[70] Hoye v. Chi. etc. Ry., 46–269, 48+1117.

[71] Woodward v. Chi. etc. Ry., 145 Fed. 577.

[72] Cantlon v. Eastern Ry., 45–481, 48+22. See Heron v. St. P. etc. Ry., 68–542, 71+ 706 (liability of lessor).

[73] Sibilrud v. Mpls. etc. Ry., 29–58, 11+ 146; Clarke v. Chi. etc. Ry., 33–359, 23+ 536; Bowen v. St. P. etc. Ry., 36–522, 32+ 751; Hayes v. Chi. etc. Ry., 45–17, 20, 47+ 260; Heron v. St. P. etc. Ry., 68–542, 71+ 706. See Reishus v. Willmar etc. Ry., 92–371, 100+1.

[74] R. L. 1905 § 2037; Continental Ins. Co. v. Chi. etc. Ry., 97–467, 484, 107+548.

[75] Mahoney v. St. P. etc. Ry., 35–361, 29+ 6; Cantlon v. Eastern Ry., 45–481, 48+22.

[76] Hoye v. Chi. etc. Ry., 46–269, 48+1117. See Riley v. Chi. etc. Ry., 71–425, 430, 74+ 171.

[77] Burud v. G. N. Ry., 62–243, 64+562; Continental Ins. Co. v. Chi. etc. Ry., 97–467, 478, 107+548.

[78] Continental Ins. Co. v. Chi. etc. Ry., 97–467, 473, 107+548.

[79] Johnson v. Chi. etc. Ry., 31–57, 16+

8210. Proximate cause—The negligence of the company must be the proximate cause of the injury.[80]

8211. Evidence—Sufficiency as to cause of fire—Of necessity the proof must ordinarily be circumstantial.[81] The plaintiff must do more than show a mere possibility or conjecture that the fire was caused by one of defendant's engines.[82] Cases are cited below holding the evidence sufficient as to the cause of the fire.[83]

8212. Statutory presumption—Under a former statute the fact that fire was scattered or thrown from engines was prima facie evidence of negligence on the part of the company.[84] Under the present statute the liability of the company is absolute.[85]

8213. Contributory negligence—The failure of the owner to plow around hay stacks is not contributory negligence as a matter of law.[86]

8214. Title of plaintiff—Evidence held to show title in the plaintiff to property destroyed by a fire.[87]

8215. Pleading—Cases are cited below involving questions of pleading.[88]

8216. Measure of damages—Cases are cited below involving the measure of damages.[89]

8217. Admissibility of evidence—Cases are cited below involving the admissibility of evidence.[90]

488; Continental Ins. Co. v. Chi. etc. Ry., 97–467, 473, 107+548.

[80] Johnson v. Chi. etc. Ry., 31–57, 16+488 (injury held not too remote—negligence of third party in leaving combustible material near track a concurrent rather than an intervening cause); McClellan v. St. P. etc. Ry., 58–104, 59+978 (two fires mingling); Heron v. St. P. etc. Ry., 68–542, 71+706 (concurrent negligence of lessor and lessee companies).

[81] Wolff v. Chi. etc. Ry., 34–215, 25+63.

[82] Mpls. S. & D. Co. v. G. N. Ry., 83–370, 86+451; Brennan L. Co. v. G. N. Ry., 77–360, 79+1032; Id., 80–205, 83+137.

[83] Woodson v. Mil. etc. Ry., 21–60; Karsen v. Mil. etc. Ry., 29–12, 11+122; Sibley v. N. P. Ry., 32–526, 21+732; Clarke v. Chi. etc. Ry., 33–359, 23+536; Wolff v. Chi. etc. Ry., 34–215, 25+63; Nelson v. Chi. etc. Ry., 35–170, 28+215; Nichols v. Chi. etc. Ry., 36–452, 32+176; Dean v. Chi. etc. Ry., 39–413, 40+270; Hoffman v. Chi. etc. Ry., 40–60, 41+301; Wilson v. N. P. Ry., 43–519, 45+1132; Hayes v. Chi. etc. Ry., 45–17, 47+260; Hoye v. Chi. etc. Ry., 46–269, 48+1117; McClellan v. St. P. etc. Ry., 58–104, 59+978; Weber v. Winona etc. Ry., 63–66, 65+93; Flanaghan v. Chi. etc. Ry., 65–112, 67+794; Reishus v. Willmar etc. Ry., 92–371, 100+1.

[84] R. L. 1905 § 2041; Woodson v. Mil. etc. Ry., 21–60; Karsen v. Mil. etc. Ry., 29–12, 11+122; Sibilrud v. Mpls. etc. Ry., 29–58, 11+146; Johnson v. Chi. etc. Ry., 31–57, 16+488; Sibley v. N. P. Ry., 32–526, 21+732; Nelson v. Chi. etc. Ry., 35–170, 28+215; Mahoney v. St. P. etc. Ry., 35–361, 29+6; Nichols v. Chi. etc. Ry., 36–452, 32+176; Bowen v. St. P. etc. Ry., 36–522, 32+751; Dean v. Chi. etc. Ry., 39–413, 40+270; Hoffman v. Chi. etc. Ry., 40–60, 41+301; Daly v. Chi. etc. Ry., 43–319, 45+611; Hoffman v. Chi. etc. Ry., 43–334, 45+608; Doyscher v. Chi. etc. Ry., 43–427, 45+719; Wilson v. N. P. Ry., 43–519, 45+1132; Hayes v. Chi. etc. Ry., 45–17, 47+260; Cantlon v. Eastern Ry., 45–481, 48+22; Hoye v. Chi. etc. Ry., 46–269, 48+1117; De Camp v. Chi. etc. Ry., 62–207, 64+392; Burud v. G. N. Ry., 62–243, 64+562; Weber v. Winona etc. Ry., 63–66, 65+93; Solum v. G. N. Ry., 63–233, 65+443; Flanaghan v. Chi. etc. Ry., 65–112, 67+794; Continental Ins. Co. v. Chi. etc. Ry., 97–467, 107+548; Woodward v. Chi. etc. Ry., 145 Fed. 577.

[85] Laws 1909 c. 378.

[86] Karsen v. Mil. etc. Ry., 29–12, 11+122; Clarke v. Chi. etc. Ry., 33–359, 23+536; Hoffman v. Chi. etc. Ry., 40–60, 41+301.

[87] McClellan v. St. P. etc. Ry., 58–104, 59+978. See Lindsay v. Winona etc. Ry., 29–411, 13+191.

[88] Weber v. Winona etc. Ry., 63–66, 65+93; Solum v. G. N. Ry., 63–233, 65+443. See Reishus v. Willmar etc. Ry., 92–371, 100+1 (complaint construed as to issues presented).

[89] Carner v. Chi. etc. Ry., 43–375, 45+713 (hay—standing trees); Hayes v. Chi. etc. Ry., 45–17, 47+260 (standing trees); Hoye v. Chi. etc. Ry., 46–269, 48+1117 (id.); Ward v. Chi. etc. Ry., 61–449, 63+1104 (growing perennial crops—growing grass).

[90] Johnson v. Chi. etc. Ry., 31–57, 16+488 (fire thrown by another engine); Davidson v. St. P. etc. Ry., 34–51, 24+324 (negligent habit of company as to construction—expert testimony as to sparks); Nelson v. Chi. etc. Ry., 35–170, 28+215 (other fires set by same train without proof that en-

8218. Expert testimony—The testimony of experts in this connection is not ordinarily conclusive.[91]

8219. Receipt of insurance money—An action may be continued in the name of the plaintiff though after its commencement he receives insurance money for the property destroyed.[92]

FIRES SET BY SECTIONMEN

8220. In general—Cases are cited below involving the liability of railway companies for negligence in setting fires on their rights of way or in permitting them to spread.[93]

COMMON LAW LIABILITY FOR INJURIES TO ANIMALS

8221. Railway company a trespasser—Where a railway company, without acquiring the right of way, constructs and operates its road through the land of another, and one of its engines runs into a cow of the owner, it is prima facie a trespasser and liable for the resulting injury.[94]

8222. At crossings—A railway company owes no duty as regards domestic animals at a crossing, if they are unlawfully at large, except to refrain from injuring them wantonly or wilfully. It is not bound to keep a lookout for them, but if it sees them in a place of danger it must exercise reasonable care to avoid injuring them, having regard for the fact that the safety of the train and its passengers is more important than the safety of animals.[95] On the other hand, if animals at a crossing are lawfully there the railway company is bound to exercise ordinary or reasonable care to avoid injuring them, including the giving of signals.[96]

gine was same); Mahoney v. St. P. etc. Ry., 35–361, 29+6 (combustible material on right of way); Hoffman v. Chi. etc. Ry., 40–60, 41+301 (record of inspection of engines); Cantlon v. Eastern Ry., 45–481, 48+22 (combustible material on right of way); Ward v. Chi. etc. Ry., 61–449, 63+1104 (evidence admissible on the issues of damages to growing crops); Burud v. G. N. Ry., 62–243, 64+562 (other fires set by same engine on same trip in vicinity); Riley v. Chi. etc. Ry., 71–425, 74+171 (evidence as to relative merits of wire screens and perforated steel plates as spark arresters); Continental Ins. Co. v. Chi. etc. Ry., 97–467, 483, 107+548 (rules of company as to management of engines); Woodward v. Chi. etc. Ry., 145 Fed. 577 (custom of railway company as to inspection—condition of engine during preceding month not too remote).

[91] Continental Ins. Co. v. Chi. etc. Ry., 97–467, 476, 107+548. See Davidson v. St. P. etc. Ry., 34–51, 24+324.

[92] Nichols v. Chi. etc. Ry., 36–452, 32+176.

[93] Lindsay v. Winona etc. Ry., 29–411, 13+191 (owner not negligent in not anticipating and providing against negligence of company—title to hay made by trespasser—title to crops sown and gathered by trespasser); Morier v. St. P. etc. Ry., 31–351, 17+952 (fire set by sectionmen to warm coffee for their dinner); Gould v. N. P. Ry., 50–516, 52+924 (evidence held to show negligence in burning hazel brush and that sectionmen were acting with authority); Warren v. G. N. Ry., 64–239, 66+984 (evidence held sufficient to trace fire doing damage to fire set by sectionmen—title of plaintiff); Berg v. G. N. Ry., 70–272, 73+648 (plaintiff burned in attempting to save his property—proximate cause of injury—contributory negligence); Baxter v. G. N. Ry., 73–189, 75+1114 (sectionmen acting within scope of authority—evidence held insufficient to trace fire doing damage to fire set by sectionmen); Kalz v. Winona etc. Ry., 76–351, 79+310 (fire on right of way—child attracted and burned—company held not liable); Erickson v. G. N. Ry., 82–60, 84+462 (id.).

[94] Mathews v. St. P. etc. Ry., 18–434 (392).

[95] Palmer v. N. P. Ry., 37–223, 33+707; Johnson v. Mpls. etc. Ry., 43–207, 45+152.

[96] Fritz v. First Div. etc. Ry., 22–404; Palmer v. St. P. & D. Ry., 38–415, 38+100; Tuthill v. N. P. Ry., 50–113, 52+384; Hohl v. Chi. etc. Ry., 61–321, 63+742 (animal escaping without fault of owner); Croft v. Chi. etc. Ry., 72–47, 74+898. See Snell v. Mpls. etc. Ry., 87–253, 91+1108.

8223. In connection with injuries to persons—Injury to a horse which a person is riding or driving is usually treated as merely incidental to the injury to the person and recovery is had accordingly.[97]

8224. Animals trespassing on tracks—A railway company owes no duty as regards domestic animals trespassing on its tracks, except to refrain from injuring them wantonly or wilfully. It is not bound to keep a lookout for them, but if it sees them in a place of danger it must exercise reasonable care to avoid injuring them, having regard for the fact that the safety of the train and its passengers is more important than the safety of animals. The burden of proving the want of such care is on the plaintiff and the question whether such care was exercised is for the jury, unless the evidence is conclusive.[98] Where the animal is trespassing it is of course immaterial whether it is lawfully or unlawfully at large.

CRIMES

8225. Placing obstructions on tracks—It is a statutory crime to place an obstruction upon a railway track.[99]

8226. Injury to railway property—It is a statutory crime to displace, remove, injure, or destroy certain forms of railway property.[1]

8227. Obstructing highways—The obstruction of highways by cars or engines is made a misdemeanor by statute,[2] and is often prohibited by ordinance.[3]

8228. Issuance of fictitious or watered stock—It is a statutory crime for a domestic railway company to issue fictitious or watered stock.[4]

[97] King v. Chi. etc. Ry., 80–83, 82+1113.

[98] Locke v. First Div. etc. Ry., 15–350 (283); Witherell v. Mil. etc. Ry., 24–410; O'Connor v. Chi. etc. Ry., 27–166, 6+481; Palmer v. N. P. Ry., 37–223, 33+707; Hooper v. Chi. etc. Ry., 37–52, 33+314; Stacey v. Winona etc. Ry., 42–158, 43+905; Mooers v. N. P. Ry., 69–90, 71+905; Best v. G. N. Ry., 95–67, 103+709.

[99] R. L. 1905 § 5124; State v. Kilty, 28–421, 10+475 (unnecessary that accident should be caused); State v. Kluseman, 53–541, 55+741 (indictment held sufficient).

[1] R. L. 1905 § 5124; State v. Walsh, 43–444, 45+721. See R. L. 1905 § 5147.

[2] R. L. 1905 § 5192; State v. Raney, 98–537, 107+1134.

[3] Duluth v. Mallett, 43–204, 45+154.

[4] R. L. 1905 § 2911; State v. G. N. Ry., 100–445, 474, 111+289.