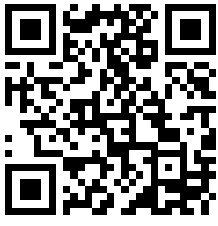

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PREFACE

By Laws 1903 c. 372 the Supreme Court was authorized to select a person to prepare a digest of all its decisions. In December, 1903, I was selected by the Court and this digest is the result. The act authorizing the digest provided that it should be prepared "in such manner as the Supreme Court shall direct." The Court gave me a free hand except that it directed me to follow substantially the so-called American Digest Classification. To the main titles of this classification I have added the following: Conflict of Laws, Duress, Election, Equitable Conversion, Foreign Laws, Implied or Quasi Contracts, Incompetents, Interstate Commerce, Laches, Maxims, Merger, Mistake, Municipal Courts, Photographers, Probate Court, Recording Act, Relation, Restraint of Trade, Roads, Service of Notices and Papers, Stare Decisis, Stay of Proceedings, Supreme Court, Trade Secrets, Undue Influence, Unfair Competition, Wagers, and Waiver. So far as possible cases relating to "errors" have been placed under Evidence, Trial, New Trial, and other specific titles, rather than under Appeal and Error. Any classification is more or less arbitrary. Custom is a better guide than logic or the ideas of the individual digester. The law is more a result of experience than of logic or a rigid application of general principles, and one result of this fact is the absence of any logical or philosophical classification. The common-law forms of action have been abolished, but they still largely determine the classification and terminology of our law. Cases involving statutory law have been digested with reference to the sections of Revised Laws 1905, so far as possible. In the third volume will be found a table showing the sections of the text where the cases relating to the sections of the Revised Laws of 1905 are digested. My aim has been to emphasize the general rules of the law rather than the facts of particular cases. Unimportant decisions, especially those relating to pleading, the admissibility and sufficiency of evidence, and obsolete statutes, have been relegated to the notes and treated summarily, not only to save space but also to prevent general rules from being submerged in a mass of details. This digest includes all the cases reported in the first one hundred and nine volumes of the Minnesota Reports, and, so far as possible, the more important cases of the April, 1910, term, reported in the Northwestern Reporter while the digest was passing through the press. It is my present intention to issue frequent cumulative supplements to this digest.

MARK B. DUNNELL.

ABBREVIATIONS

Minus sign in titles of cases	Minnesota Reports.
Plus sign in titles of cases	Northwestern Reporter.
R. L. 1905	Revised Laws (Minn.) 1905.
G. S. 1894	General Statutes (Minn.) 1894.
Dist. Ct.	District Court.
St. P.	St. Paul.
Mpls.	Minneapolis.
Mil.	Milwaukee.
Chi.	Chicago.
Ry.	Railway or Railroad.
N. P. Ry.	Northern Pacific Railway Co.
G. N. Ry.	Great Northern Railway Co.
St. P. & D. Ry.	St. Paul & Duluth Railway Co.
St. P. C. Ry.	St. Paul City Railway Co.
Mpls. St. Ry.	Minneapolis Street Railway Co.
Harv. L. Rev.	Harvard Law Review.
Col. L. Rev.	Columbia Law Review.
Am. L. Rev.	American Law Review.
L. R. A.	Lawyers Reports Annotated.
Am. Dec.	American Decisions.
Am. Rep.	American Reports.
Am. St. Rep.	American State Reports.

In the page references to the first twenty volumes of the Minnesota Reports the first number refers to the official edition and the second number, in parentheses, to the Gilfillan edition.

In all cases where numbers are separated by a dash they are to be taken as including the two numbers given and all intervening numbers.

ABANDONMENT

Cross-References

See Easements, 2855; Eminent Domain, 3045; Homestead, 4215; Public Lands, 7932, 7946, 7968; Roads, 8449; Railroads, 8109; Vendor and Purchaser, 10043; Waters, 10194.

1. Definition—Abandonment is the relinquishment, surrender, or disclaimer of property rights.[1] It is not a mode of transfer. There cannot be an abandonment to a particular person.[2]

2. What may be abandoned—Easements and equitable rights in land may be lost by abandonment, but a legal title to land is not divested by abandonment. Title to chattels may be lost by abandonment. If an owner of a chattel throws it away with intent to relinquish his right to it, any one who finds it may appropriate it as his own.[3]

3. Evidence—Admissibility—Where the question of abandonment is one of the intent with which acts were done or omitted, or declarations made, it is proper to show a motive or reason for abandonment, as that the rights claimed to be abandoned were of no value.[4]

ABATEMENT AND REVIVAL

ANOTHER ACTION PENDING

4. Nature and object of plea—The end to be subserved by the rule which recognizes the plea of another action pending between the same parties, for the same cause of action, as a good defence, is to prevent a party from being harrassed by a multiplicity of suits for the same cause of action, and that he may not be compelled to maintain the issues on his part in any action so long as they are in possession of another tribunal competent to determine such issues, where they may be disposed of.[5]

5. When plea allowable—The pendency of a former action, for the same cause and between the same parties, may be shown in abatement where a judgment in such action would be a bar to a judgment in the second action. It is immaterial that the form of the two actions differs, or that there are additional parties defendant in the former action, if both actions are predicated upon substantially the same facts as respects the defendants.[6] But the pendency of one action is not a bar to another, where the nature of the two actions is essentially different, though they both relate to the same subject-matter.[7] The pendency of an action unauthorized by the plaintiff is not a bar.[8] Proceedings in insolvency are not an action pending.[9] If the former action is by other parties it is not a bar.[10] In an action against several, for trespass in taking personalty, the

[1] Rowe v. Minneapolis, 49–148, 157, 51+907.

[2] Smith v. Glover, 50–58, 74, 52+210, 912.

[3] Smith v. Glover, 50–58, 75, 52+210, 912. See Bausman v. Faue, 45–412, 48+13; Nauer v. Benham, 45–252, 254, 47+796; Blomberg v. Montgomery, 69–149, 72+56.

[4] Smith v. Glover, 50–58, 52+210, 912.

[5] Merriam v. Baker, 9–40(28).

[6] Beyersdorf v. Sump, 39–495, 41+101; Drea v. Cariveau, 28–280, 9+802.

[7] Coles v. Yorks, 31–213, 17+341; Mathews v. Hennepin Co. S. Bank, 44–442, 46+913; Wilson v. St. P. etc. Ry., 44–445, 46+909; Welsh v. First Div. etc. Ry., 25–314, 322; Williams v. McGrade, 18–82(65); Majerus v. Hoscheid, 11–243(160); Wetherell v. Stewart, 35–496, 29+196; Oswald v. St. Paul G. P. Co., 60–82, 61+902; Piper v. Sawyer, 82–474, 85+206.

[8] Wolf v. G. N. Ry., 72–435, 75+702.

[9] Leuthold v. Young, 32–122, 19+652.

[10] Robinson v. Hagenkamp, 52–101, 53+813; Chadbourn v. Rahilly, 34–346, 25+633. See Larsen v. Nichols, 62–256, 64+553.

pendency of an action in replevin against one of the defendants for the same taking, is no ground for a motion to dismiss on behalf of all.[11] One whose property has been taken on a writ of replevin against his agent or bailee, cannot retake it by replevin from the plaintiff in the first action during the pendency of that action.[12]

6. Former action must be still pending—It must affirmatively appear by the pleadings and proof that the former action is still pending. It is insufficient to plead or prove that it was begun. There is no presumption that an action begun is still pending.[13] An action is pending if the court has jurisdiction of the general class of cases, though there is a question still undecided by the court as to whether it has acquired jurisdiction of the particular case.[14] Where a defendant pleads the pendency of a former action which has been dismissed by the trial court, but which he claims is pending on appeal in the supreme court, it is essential to allege at least that such appeal was taken and the supersedeas bond filed prior to the commencement of the second action.[15] If it appears that the former action has been tried, the defendant may prove that at such trial and before submission of the cause he withdrew a portion of the demand.[16] After a judgment is reversed and the cause is remanded the action is pending until it is disposed of.[17]

7. Action in other state—The pendency of an action in another state between the same parties is not a bar to an action in this state.[18] The pendency of a prior action by attachment in another state, which binds the debt, may be set up by way of defence to an action by the defendant in the attachment in this state to recover the same debt.[19]

8. Action in federal court—The pendency of an action in the federal court is not a bar to an action in the state court.[20]

9. Complaint in former action insufficient—If the complaint in the former action does not state a cause of action, it will not sustain a plea of former action pending.[21]

10. As ground for stay—The pendency of another action may be a ground for a stay, though it is not a defence to the action.[22] The garnishment of a defendant by a creditor of the plaintiff is ground for a stay.[23]

11. Pleading—An answer pleading the pendency of another action must show clearly the identity of the two causes of action.[24]

12. Dismissal of former action after plea—After a defendant has served an answer pleading the pendency of a former action, the plaintiff may dismiss such former action and plead the dismissal in his reply.[25]

TRANSFER OF INTEREST

13. Action does not abate—An action does not abate by reason of a transfer of the interest of a party if the cause of action continues.[26]

[11] Williams v. McGrade, 18–82(65).
[12] Larsen v. Nichols, 62–256, 64+553.
[13] Phelps v. Winona etc. Ry., 37–485, 35+273; Thornton v. Webb, 13–498(457); Blandy v. Raguet, 14–491(368); Larson v. Shook, 68–30, 70+775.
[14] Merriam v. Baker, 9–40(28).
[15] Althen v. Tarbox, 48–18, 50+1018.
[16] Estes v. Farnham, 11–423(312).
[17] Capehart v. Van Campen, 10–158(127).
[18] Sandwich Mfg. Co. v. Earl, 56–390, 57+938.
[19] Harvey v. G. N. Ry., 50–405, 52+905.
[20] Patterson v. Barber, 94–39, 101+1064.
[21] Drea v. Cariveau, 28–280, 9+802; Piper v. Sawyer, 82–474, 85+206.
[22] Richardson v. Merritt, 74–354, 77+234.
[23] Blair v. Hilgedick, 45–23, 47+310; Harvey v. G. N. Ry., 50–405, 52+905; Am. H. L. Co. v. Joannin, 99–305, 109+403.
[24] Wilson v. St. P. etc. Ry., 44–445, 46+909; Majerus v. Hoscheid, 11–243(160). See West v. Hennessey, 58–133, 59+984.
[25] Page v. Mitchell, 37–368, 34+896; Nichols v. State Bank, 45–102, 47+462; Althen v. Tarbox, 48–18, 50+1018. See Peterson v. Alden, 49–428, 52+39; Wolf v. G. N. Ry., 72–435, 439, 75+702.
[26] R. L. 1905 § 4064. See § 7330.

DEATH OF PARTY

14. What causes of action survive—The statute prescribes what causes of action survive the death of a party.[27] Causes of action which are assignable survive.[28] Causes of action for a tort survive if they have passed into verdict.[29] Cases are cited below holding particular causes of action to survive,[30] or the reverse.[31]

15. Action does not abate—An action does not abate by reason of the death of a party if the cause of action survives.[32] After a verdict fixing the amount of damages for a wrong an action does not abate by the death of any party thereto.[33]

16. Effect on jurisdiction—The death of a party does not deprive the court of jurisdiction, and if it proceeds to judgment against a party after his death the judgment is voidable, but it is not void or subject to collateral attack.[34] Where a party dies pending publication of summons against him, the court cannot authorize a substitution of his executor.[35]

WAIVER

17. In general—If matters in abatement are not taken advantage of by demurrer or answer they are waived.[36]

ABBREVIATIONS—See Taxation, 9299.

ABDUCTION

18. What constitutes—To constitute abduction under Penal Code § 240, sub. 2 (R. L. 1905 § 4930) the place into which the female is inveigled or enticed must be a house of ill fame or of assignation or a place of similar character.[37] In order to constitute a "taking" within the meaning of the statute it is unnecessary that it should appear that force or violence was used. It may be

[27] R. L. 1905 § 4502. See Webber v. St. P. C. Ry., 97 Fed. 140 (applicable to all causes of action whether ex contractu or ex delicto).

[28] See § 564.

[29] Cooper v. St. P. C. Ry., 55–134, 56+588; Kent v. Chapel, 67–420, 70+2; Clay v. Chi. etc. Ry., 104–1, 115+949.

[30] Tuttle v. Howe, 14–145(113) (mechanic's lien); Lowry v. Tilleny, 31–500, 18+452 (breach of covenant of seizin); Jordan v. Secombe, 33–220, 22+383 (right of ward to an estate); Sloggy v. Dilworth, 38–179, 36+451 (liability for nuisance); Cooper v. St. P. C. Ry., 55–134, 56+588 (liability for injury to the person after a verdict therefor); Billson v. Linderberg, 66–66, 68+771 (fraud in exchange of property); Willoughby v. St. Paul G. Ins. Co., 80–432, 83+377 (liability of stockholder); Portner v. Wilfahrt, 85–73, 88+418 (liability on bond for maintenance of parents); Hansen v. Wyman, 105–491, 117+926 (cause of action for malicious attachment of corporate property).

[31] Green v. Thompson, 26–500, 5+376 (cause of action for personal tort resulting in death); Scheffler v. Mpls. etc. Ry., 32–125, 19+656 (id.); Anderson v. Fielding, 92–42, 99+357 (id.); Weber v. St. P. C. Ry., 97 Fed. 140 (id.); Bryant v. Am. S. Co., 69–30, 71+826 (causes of action for libel, slander, malicious prosecution and the like); Gilman v. Maxwell, 79–377, 82+669 (injury to the person). See, as to the survivability of a cause of action for assault, Staloch v. Holm, 100–276, 111+264.

[32] R. L. 1905 § 4064. See § 7331.

[33] R. L. 1905 § 4064; Cooper v. St. P. C. Ry., 55–134, 56+588; Kent v. Chapel, 67–420, 70+2; Clay v. Chi. etc. Ry., 104–1, 115+949.

[34] Hayes v. Shaw, 20–405(355); Stocking v. Hanson, 22–542; Berkey v. Judd, 27–475, 8+383.

[35] Auerbach v. Maynard, 26–421, 4+816.

[36] Gerrish v. Pratt, 6–53(14); Williams v. McGrade, 18–82(65, 71); Fitterling v. Welch, 76–441, 79+500; Somers v. Dawson, 86–42, 90+119.

[37] State v. McCrum, 38–154, 36+102.

accomplished by persuasion, enticement, or device.[38] But it must not only appear that the female was taken away or induced to leave through the active influence or persuasion of the accused, but it must also appear that it was done for the purpose forbidden by the statute.[39] Sexual intercourse is not an element of the crime.[40] The consent of the female is no defence.[41]

19. Indictment—Cases are cited below involving the sufficiency of particular indictments.[42]

20. Corroboration—A conviction cannot be had on the unsupported testimony of the female. The corroborating evidence must extend to every essential ingredient of the offence, but need not be sufficient in itself to establish the guilt of the accused.[43]

21. Evidence—Admissibility—The fact that the accused had or attempted to have sexual intercourse with the female at the time alleged is relevant and may be proved by the results of a medical examination of the female made eight months thereafter. Evidence that the accused procured the female and her mother, who was an important witness, to be sent out of the state, and cared for the mother during her absence, has been held admissible.[44]

22. Evidence—Sufficiency—Evidence held insufficient to show a "taking" for the unlawful purpose alleged.[45]

ABIDE—See Appeal and Error, 331.

ABORTION

23. What constitutes—It is unnecessary, under Laws 1873 c. 9 § 2 (R. L. 1905 § 4942), that the attempt should have the result intended, or that the thing administered should be calculated to produce such result.[46]

24. Indictment—The means used may be alleged in the alternative. Under Laws 1873 c. 9 § 1 (R. L. 1905 § 4942), it is sufficient to allege that the accused procured the woman to "take" a drug without alleging that she "swallowed" it.[47] An indictment has been sustained which alleged the use of "certain instruments and other means, a more particular description of * * * said instruments and other means being to the grand jurors unknown."[48]

25. Corroboration—In the absence of a case containing all the evidence it will be presumed that there was sufficient corroboration.[49]

26. Woman not an accomplice—The woman upon whom an abortion is committed is not deemed an accomplice.[50]

27. Evidence—Admissibility—Cases are cited below involving the admissibility of evidence.[51]

[38] State v. Jamison, 38–21, 35+712; State v. Keith, 47–559, 50+691.

[39] State v. Jamison, 38–21, 35+712.

[40] State v. Keith, 47–559, 50+691.

[41] State v. Sager, 99–54, 108+812.

[42] State v. Jamison, 38–21, 35+712 (unnecessary to allege that the taking was without the consent of the parent or guardian—"proper" to state from whose custody female was taken); State v. Keith, 47–559, 50+691 (unnecessary to specify means by which taking was effected or to state from what place or from whose custody female was taken—allegation as to purpose of taking sustained); State v. Sager, 99–54, 108+812 (indictment for taking a child fifteen years old for the purpose of marriage without consent of parents sustained).

[43] State v. Keith, 47–559, 50+691.

[44] Id.

[45] State v. Jamison, 38–21, 35+712.

[46] State v. Owens, 22–238.

[47] Id.

[48] State v. Bly, 99–74, 108+833.

[49] State v. Owens, 22–238.

[50] State v. Owens, 22–238; State v. Pearce, 56–226, 57+652, 1065.

[51] State v. Pierce, 85–101, 88+417 (woman cannot testify as to the intent with

28. Evidence—Sufficiency—Evidence held sufficient to support a verdict of guilty, though it did not appear what particular kind of instrument was used or in what manner the defendant operated in and upon the body to accomplish the result.[52]

29. Verdict—Whether, under Laws 1873 c. 9 § 2 (R. L. 1905 § 4942) it is necessary for the jury to find the absence of any necessity to preserve the life of the mother or child, is an open question. It is unnecessary, under that section, for the jury to find that the drug or medicine administered was likely to produce abortion, or the character of such drug or medicine.[53]

30. Conviction of lesser offence—Under an indictment for the offence specified in Laws 1873 c. 9 § 1 (R. L. 1905 § 4942) a conviction may be had for the offence specified in section 2 of said act.[54]

ABOUT—See note 55.
ABSOLUTE OWNERSHIP—See note 56.

ABSTRACTS OF TITLE

Cross-References

See Vendor and Purchaser, 10041, 10102.

31. Definition—An abstract of title is an abstract or summary of the most important part of the deeds and other instruments composing the evidences of a title to real estate, arranged usually in chronological order, and intended to show the origin, course, and incidents, of the title, without the necessity of referring to the deeds themselves. It also contains a statement of all charges, incumbrances, liens, and liabilities to which the property may be subjected, and of which it is in any way material for purchasers to be apprised.[57]

32. Reliance on abstract—The common practice of relying on an abstract of title is not favored by the law. Such reliance is not enough to make one a bona fide purchaser.[58]

33. Liability of abstracter—Negligence—An abstracter is ordinarily bound to make a full and true search and examination of the records relating to the title of the land, and to note on the abstract accurately every transfer, conveyance, or other instrument of record in any way affecting the title; and for negligence in failing to do so he is liable.[59] An agreement to make and furnish a correct record abstract of title to certain lands, from and after a specified date, creates no obligation to note upon the abstract an unsatisfied judgment against one of the grantees of the title, which only appears of record prior to that date, though the same becomes a lien upon the premises after that time.[60]

ABUSE OF PROCESS—See Garnishment, 3977; Process, 7837.
ABUSIVE LANGUAGE—See Breach of the Peace, 1101.
ABUSE OF CHILD—See Rape, 8240.
ABUSE OF CONFIDENCE—See Fraud, 3833.

which the accused used instruments upon her or administered drugs to her); State v. Bly, 99–74, 108+833 (statements of the woman as to her pregnant condition and the means of relief held properly excluded).

[52] State v. Bly, 99–74, 108+833.

[53] State v. Owens, 22–238.

[54] Id.

[55] Colter v. Greenhagen, 3–126(74).

[56] Caldwell v. Bruggerman, 4–270(190, 194).

[57] Banker v. Caldwell, 3–94(46).

[58] Daughaday v. Paine, 6–443(304, 315).

[59] Waeck v. Frink, 51–282, 53+633.

[60] Wakefield v. Chowen, 26–379, 4+618.

ABUTTING OWNERS—See Highways, 4182; Municipal Corporations, 6845.

ACADEMIES—See Schools and School Districts.

ACCESSORY—See Assault and Battery, 545; Criminal Law, 2415; Indictment, 4402, 4403.

ACCIDENT—See note 61.

ACCIDENTAL—See note 62.

ACCIDENT INSURANCE—See Insurance, 4869.

ACCOMMODATION PAPER—See Bills and Notes, 969.

ACCOMPLICE—See Abortion, 26; Criminal Law, 2457.

ACCORD AND SATISFACTION

34. Definition—Accord and satisfaction is the discharge of a contract, or cause of action, or disputed claim, arising either in contract or tort, by the substitution of an agreement between the parties in satisfaction of such contract, cause of action, or disputed claim, and the execution of that agreement.[63] It is a contract executed. It consists of an agreement of the parties that some new consideration shall be accepted in satisfaction of an existing demand or cause of action, and the carrying of the agreement into effect by a delivery and acceptance of the new consideration. It is obviously not essential in such a contract, more than in other contracts, that the agreement be expressed. It may be implied from circumstances, clearly and unequivocally indicating the intention of the parties.[64]

35. Accord executory—An unexecuted offer, or accord executory, does not constitute an accord and satisfaction.[65] An action will lie for the breach of an accord executory.[66]

36. Necessity of agreement—In a contract of accord and satisfaction there must be, as in other contracts, a meeting of minds.[67] There must be an agreement or understanding that the debt or liability shall be discharged.[68] But this may be implied from the circumstances.[69] A promise to pay a sum of money for a tort is not binding unless made in consideration of a release of the cause of action for the tort.[70]

37. Consideration—The new cause of action arising from the receipt of a note or bill of exchange for a precedent debt is a sufficient consideration to sustain an accord and satisfaction, even where the parties are liable upon the new and old note.[71]

38. Effect—An accord and satisfaction extinguishes the debt or claim for which it is substituted,[72] and is a complete defence to a subsequent action for the balance.[73] If for a tort, it relieves all who might otherwise be held liable.[74]

[61] Hardwick v. Chi. etc. Ry., 124+819.

[62] Gardner v. United S. Co., 125+264.

[63] Hennessy v. St. P. etc. Ry., 65–13, 67+635. See Note, 100 Am. St. Rep. 390.

[64] Hinkle v. Mpls. etc. Ry., 31–434, 436, 18+275.

[65] Hoxsie v. Empire L. Co., 41–548, 43+476; Cannon River etc. Assn. v. Rogers, 46–376, 49+128. See Fitzgerald v. English, 73–266, 270, 76+27; Hanley v. Noyes, 35–174, 28+189.

[66] Schweider v. Lang, 29–254, 13+33. See Hanley v. Noyes, 35–174, 28+189.

[67] Hennessy v. St. P. etc. Ry., 65–13, 15, 67+635; Lake Superior etc. Co. v. Concordia etc. Co., 95–492, 104+560. See Demars v. Musser, 37–418, 35+1.

[68] Washburn v. Winslow, 16–33(19); Marion v. Heimbach, 62–214, 64+386; Johnson v. Simmons, 76–34, 78+863; Christianson v. Chi. etc. Ry., 67–94, 69+640; Byrnes v. Byrnes, 92–73, 99+426.

[69] Hinkle v. Mpls. etc. Ry., 31–434, 436, 18+275.

[70] Steinhart v. Pitcher, 20–102(86).

[71] Keough v. McNitt, 6–513(357).

[72] Mason v. Campbell, 27–54, 6+405; Higgins v. Dale, 28–126, 9+583; Heavenrich v. Steele, 57–221, 58+982. See Schweider v. Lang, 29–254, 255, 13+33.

[73] Truax v. Miller, 48–62, 50+935.

[74] Hartigan v. Dickson, 81–284, 83+1091.

39. Part payment of liquidated claim—The part payment of a liquidated claim past due is not a bar to a subsequent action for the balance, though the parties agreed that it should be deemed a full satisfaction. Such an agreement is without consideration and non-enforceable.[75] As this rule is purely technical and may be urged in violation of good faith, it is not to be extended.[76] It is inapplicable where there is a release under seal;[77] where the payment is made by a third party;[78] where the creditor accepts the undertaking of a third party;[79] where the payment is made before the claim is due;[80] where the payment is made at another place;[81] where a new note is taken, with sureties;[82] and where the payment is made in pursuance of a composition agreement.[83] The payment of a part of a debt will in no case discharge the whole, without an agreement to release the balance, and an acceptance of the payment as an accord and satisfaction.[84] Where an agreement is made to take a lesser sum in satisfaction of a greater the mere securing of such lesser sum by a mortgage or pledge of the debtor's own non-exempt property is not a sufficient consideration for the promise.[85] An agreement between a purchaser of land and the holder of a mortgage, for payment of a less sum by instalments from time to time, has been held not an accord and satisfaction.[86] Where a certain sum is indisputably due, and the creditor agrees with the debtor to take, in full satisfaction thereof, a less sum to be secured, and to be paid on a specified day, but that, if not so paid, the creditor shall be entitled to recover the whole of the original debt, such provision for restoring to the creditor his original rights, on the default of the debtor, is not a stipulation for the payment of a penalty, and is enforceable.[87] A mere promise of a creditor to receive, and of the debtor to pay, a sum less than the debt in full satisfaction of it, is without consideration, and binds neither party.[88]

40. Compromise of unliquidated, disputed, or contingent claims—Where there is an actual bona fide dispute between the parties as to the amount due, and they compromise the matter, and the creditor agrees to and does accept a less sum than is actually due in satisfaction of his entire claim, there is a valid consideration to support the accord and satisfaction.[89] But the mere fact that there is a dispute as to the amount due is insufficient, for it is the mutual agreement of the parties to the terms of the compromise, and not the dispute, which furnishes the consideration for the release.[90] An agreement to accept a less

[75] Sonnenberg v. Riedel, 16–83(72); Sage v. Valentine, 23–102; Schmidt v. Ludwig, 26–85, 1+803; Clark v. Abbott, 53–88, 55+542; Scase v. Gillette, 55–349, 352, 57+58; Marion v. Heimbach, 62–214, 64+386; Brown v. Penn. Co., 63–546, 65+961; Rice v. London etc. Co., 70–77, 72+826; Walsh v. Curtis, 73–254, 76+52; Byrnes v. Byrnes, 92–73, 99+426; Hoidale v. Wood, 93–190, 100+1100; Tillinghast v. U. S. etc. Co., 99–62, 66, 108+472; Demeules v. Jewel Tea Co., 103–150, 114+733; Wherley v. Rowe, 106–494, 119+222. See 12 Harv. L. Rev. 521; 21 L. R. A. (N. S.) 1005; Stewart v. Hidden, 13–43(29, 38).

[76] Stewart v. Hidden, 13–43(29, 38); Sonnenberg v. Riedel, 16–83(72). See, for possible exceptions, Dalby v. Lauritzen, 98–75, 107+826.

[77] Sonnenberg v. Riedel, 16–83(72).

[78] Clark v. Abbott, 53–88, 55+542.

[79] Schmidt v. Ludwig, 26–85, 1+803.

[80] Sonnenberg v. Riedel, 16–83(72); Schweider v. Lang, 29–254, 13+33.

[81] Sonnenberg v. Riedel, 16–83(72).

[82] Mason v. Campbell, 27–54, 6+405.

[83] Sage v. Valentine, 23–102; Murchie v. McIntire, 40–331, 42+348.

[84] Marion v. Heimbach, 62–214, 64+386; Duluth Ch. of Com. v. Knowlton, 42–229, 44+2; Johnson v. Simmons, 76–34, 78+863; Byrnes v. Byrnes, 92–73, 99+426; Wherley v. Rowe, 106–494, 119+222.

[85] Walsh v. Curtis, 73–254, 258, 76+52.

[86] Lankton v. Stewart, 27–346, 7+360.

[87] Walsh v. Curtis, 73–254, 76+52.

[88] Trunkey v. Crosby, 33–464, 23+846. See Van Hoesen v. Minn. B. S. Con., 16–96(86).

[89] Stearns v. Johnson, 17–142(116); Hinkle v. Mpls. etc. Ry., 31–434, 18+275; Demars v. Musser, 37–418, 35+1; Truax v. Miller, 48–62, 50+935; Marion v. Heimbach, 62–214, 64+386; Fidelity & C. Co. v. Gillette, 92–274, 99+1123.

[90] Marion v. Heimbach, 62–214, 64+386.

sum in satisfaction of a contingent or uncertain claim for a greater sum is valid.[91] There can be no accord and satisfaction of a disputed claim unless something of legal value has been received in full payment thereof, to which the creditor had no previous right.[92] A demand and receipt of a certain sum, on account of a personal injury, has been held an accord and satisfaction.[93] A voluntary payment and receipt of money as "wages," during the disability of an employee injured by the negligence of the defendant, has been held not an accord and satisfaction.[94] The presentation of a bill for professional services and payment thereof, has been held an accord and satisfaction.[95]

41. Retention of money—The mere retention by a creditor of money to which he is absolutely entitled does not constitute an accord and satisfaction, though tendered or transmitted to him as payment in full of his demand.[96] But where a claim is unliquidated, or in dispute, if the creditor is tendered a sum less than his claim, upon the condition that, if it is accepted, it must be in full satisfaction of his whole claim, his acceptance is an accord and satisfaction.[97]

42. Acceptance of check—The acceptance by a creditor of a check for a part of his disputed claim will not operate as an accord and satisfaction unless the check recites, in effect, that it is in full payment of the claim, or it be so declared, expressly, or by necessary implication, when the check is tendered.[98]

43. Giving of note—The giving of a note is prima facie evidence of a settlement between the parties, and that upon the settlement the maker was indebted to the payee to the amount of the note. The presumption, however, may be rebutted.[99]

44. Receipts in full—A mere receipt for money, which by its terms purports to be in full of all claims and demands and nothing more, is not alone an accord and satisfaction, though it is evidence thereof.[1]

45. Mistake of law—An accord and satisfaction has been held not voidable for ignorance or mistake of law.[2]

46. Rescission by parties—The parties to an accord and satisfaction may, by subsequent agreement, rescind the same, and restore the debt to its original status.[3]

47. Pleading—A plea of an accord and satisfaction held insufficient.[4]

48. Law and fact—The effect of an accord and satisfaction is a question for the court.[5] Cases are cited below holding it proper,[6] or improper,[7] to direct a

[91] Rice v. London etc. Co., 70–77, 72+826.
[92] Ness v. Minn. etc. Co., 87–413, 92+333; Demeules v. Jewel Tea Co., 103–150, 114+733.
[93] Hinkle v. Mpls. etc. Ry., 31–434, 18+275.
[94] Sobieski v. St. P. etc. Ry., 41–169, 42+863.
[95] Wilkinson v. Crookston, 75–184, 77+797.
[96] Duluth Ch. of Com. v. Knowlton, 42–229, 44+2; Marion v. Heimbach, 62–214, 64+386; Ness v. Minn. etc. Co., 87–413, 92+333.
[97] Marion v. Heimbach, 62–214, 64+386; Hillestad v. Lee, 91–335, 97+1055; Weber v. Ramsey County, 93–320, 101+296; Truax v. Miller, 48–62, 50+935.
[98] Hillestad v. Lee, 91–335, 97+1055; Truax v. Miller, 48–62, 50+935; Marion v. Heimbach, 62–214, 64+386; Wright v. Lynch, 102–96, 112+892; Demeules v. Jewel Tea Co., 103–150, 114+733.
[99] Wakefield v. Spencer, 8–376(336).
[1] Cummings v. Baars, 36–350, 31+449; Truax v. Miller, 48–62, 50+935; Clark v. Abbott, 53–88, 55+542; Hennessy v. St. P. C. Ry., 65–13, 67+635; Johnson v. Simmons, 76–34, 78+863; Jordan v. G. N. Ry., 80–405, 83+391; Cappis v. Wiedemann, 86–156, 90+368; Marshall v. Moody, 92–66, 99+356.
[2] Fidelity & C. Co. v. Gillette, 92–274, 99+1123.
[3] Heavenrich v. Steele, 57–221, 58+982.
[4] Wilson v. N. W. etc. Co., 103–35; 114+251.
[5] Washburn v. Winslow, 16–33(19, 22); Hinkle v. Mpls. etc. Ry., 31–434, 437, 18+275.
[6] Jordan v. G. N. Ry., 80–405, 83+391.
[7] Marshall v. Moody, 92–66, 99+356.

verdict for the defendant, and holding the defence of accord and satisfaction a question for the jury.[8]

49. Evidence—Sufficiency—Cases are cited below involving the sufficiency of evidence to justify findings as to an accord and satisfaction.[9]

ACCORD EXECUTORY—See Accord and Satisfaction, 35.
ACCOUNTABLE RECEIPT—See note 10.
ACCOUNT BOOKS—See Evidence, 3345.
ACCOUNTING—See Accounts, 64; Mortgages, 6468; Partnership, 7403; Specific Performance, 8817; Trusts, 9945.

ACCOUNTS

Cross-References
See Evidence, 3329; Limitation of Actions, 5631, 5649, 5650, 5651.

ACCOUNT STATED

50. What constitutes—An account stated is an agreement, express or implied, between persons having business relations, that a statement of account between them is correct.[11] A bill rendered, wherein the items and charges are stated, will constitute an account stated if it is retained by the debtor without question for more than a reasonable time.[12] Cases are cited below holding various transactions accounts stated,[13] or the reverse.[14]

51. Consideration—Where an account stated is based on a compromise of disputed items there is a new consideration for the promise to pay the balance agreed upon.[15]

52. Parties—An attorney and his client may state an account between them.[16] A partner may bind his firm by the statement of an account. So one joint agent may bind the other by a statement.[17]

53. Effect—Impeaching—An account stated is a new and independent contract between the parties.[18] Ordinarily it is only prima facie evidence of the correctness of the items and balance struck,[19] but it is conclusive evidence thereof, if there has been a compromise between the parties as to disputed items, or if the elements of an estoppel in pais are present.[20] Generally an account

[8] Hillestad v. Lee, 91–335, 97+1055; Christianson v. Chi. etc. Ry., 67–94, 69+640.
[9] Truax v. Miller, 48–62, 50+935; Ripley v. Demars, 51–268, 53+543; Marion v. Heimbach, 62–214, 64+386; Brown v. Penn. Co., 63–546, 65+961; Hennessy v. St. P. C. Ry., 65–13, 67+635; Johnson v. Simmons, 76–34, 78+863; Weber v. Ramsey County, 93–320, 101+296; Lake Superior etc. Co. v. Concordia etc. Co., 95–492, 104+560; Balch v. Grove, 98–259, 108+807.
[10] State v. Riebe, 27–315, 317, 7+262.
[11] See Swain v. Knapp, 34–232, 25+397.
[12] Robson v. Bohn, 22–410; Elwood v. Betcher, 72–103, 75+113; Reeves v. Sawyer, 88–218, 223, 92+962. See Allis v. Day, 14–516(388); Beals v. Wagener, 47–489, 50+535; Allen v. Uplinger, 98–242, 107+1131.
[13] Swain v. Knapp, 34–232, 25+397; Hanley v. Noyes, 35–174, 28+189; Moody v. Thwing, 46–511, 49+229; Beals v. Wagener, 47–489, 50+535. See Fitzgerald v. English, 73–266, 270, 76+27; McCarthy v. Weare, 87–11, 91+33; Clarkin v. Brown, 80–361, 83+351.
[14] Scase v. Gillette, 55–349, 57+58; Broderick v. Beaupre, 40–379, 42+83; Allis v. Day, 14–516(388). See Cappis v. Wiedemann, 86–156, 90+368; Black v. Berg, 101–9, 111+386.
[15] Wharton v. Anderson, 28–301, 9+860; Hanley v. Noyes, 35–174, 28+189.
[16] Beals v. Wagener, 47–489, 50+535.
[17] Milwaukee H. Co. v. Finnegan, 43–183, 45+9.
[18] Hanley v. Noyes, 35–174, 28+189.
[19] Wharton v. Anderson, 28–301, 9+860; Warner v. Myrick, 16–91(81); Mower County v. Smith, 22–97, 115. See Christofferson v. Howe, 57–67, 58+830.
[20] Wharton v. Anderson, 28–301, 9+860; Hanley v. Noyes, 35–174, 28+189.

stated is a mere admission that the account is correct. It is not an estoppel. The account is still open to impeachment for mistakes or errors.[21] When an account is stated the balance struck becomes an original demand. If there is no express promise to pay the balance struck the law implies one.[22] The mere stating of an account between the actually contracting parties does not impose a liability upon another who, after the dealings in question, may be discovered to have been held out as a partner.[23]

54. Opening—Restatement—Though parties may have agreed upon a statement of account, they may, by mutual consent, waive this, and agree to a reopening and restatement of the account; and if, after such statement, the creditor accepts the amount as thus stated as full payment of the account, without exception or reservation, this will constitute a full settlement of his whole claim, though the amount received is less than the sum agreed on as his due at the first settlement.[24]

55. Limitation of actions—The statement of an account does not stop the running of the statute of limitations against the items thereof, in the absence of a writing signed by the party to be charged.[25]

56. Pleading—To enable one to recover as upon an account stated, he must declare upon it as such. If, in his pleading, he relies on the original transactions or the items in the account, they are open to proof by either party.[26] In an action on an account stated it is unnecessary to allege a promise to pay the balance found due. It is sufficient to allege the facts from which the duty to pay arises.[27] The account cannot be impeached under a general denial. Mistake or error must be specially pleaded.[28] An "account stated" as a defence must be specially pleaded.[29] Cases are cited below involving the sufficiency of particular pleadings.[30]

57. Evidence—Admissibility—An account stated may be proved by oral evidence.[31] Cases are cited below involving the admissibility of evidence.[32]

VARIOUS KINDS OF ACCOUNTS

58. Definition of an ordinary account—An "account" means an unsettled claim or demand, not evidenced by written contract signed by the parties. It is usually disclosed by the account books of the owner of the demand and does not include express contract obligations which have been reduced to writing, such as bonds, bills of exchange, and promissory notes.[33]

59. Outstanding and open account—An "outstanding and open account" is an unsettled debt arising from items of work and labor, goods sold and delivered,

[21] Mower County v. Smith, 22–97, 115; Wharton v. Anderson, 28–301, 9+860.

[22] Christofferson v. Howe, 57–67, 58+830.

[23] Brown v. Grant, 39–404, 40+268.

[24] Horn v. St. P. etc. Ry., 37–375, 34+593.

[25] Erpelding v. Ludwig, 39–518, 40+829.

[26] Northern L. P. Co. v. Platt, 22–413; McCormick v. Wilson, 39–467, 40+571.

[27] Heinrich v. Englund, 34–395, 26+122.

[28] Warner v. Myrick, 16–91(81); Moody v. Thwing, 46–511, 49+229.

[29] Mower County v. Smith, 22–97, 114.

[30] Reed v. Pixley, 25–482 (an answer pleading an account stated sustained); Heinrich v. Englund, 34–395, 26+122 (complaint held sufficient); Black v. Berg, 101–9, 111+386 (a complaint in justice court held not to show an account stated).

[31] Erpelding v. Ludwig, 39–518, 40+829.

[32] Madigan v. DeGraff, 17–52(34) (memoranda used by parties in settlement held admissible as part of res gestae); Reed v. Pixley, 25–482 (admission of deed from a stranger to one of the parties held error); Reeves v. Sawyer, 88–218, 92+962 (testimony of a party that a deceased person made no objection to an account held inadmissible); Miller v. Carnes, 95–179, 103–877 (issue as to whether an accounting had been had and its correctness-evidence as to general business transactions in which the parties had been engaged held admissible); Allen v. Uplinger, 98–242, 107–1131 (A and B rendered services to C-held error to exclude statements made by C to B in relation to a bill rendered by A).

[33] Kramer v. Gardner, 104–370, 116–925.

and other open transactions, not reduced to writing, and subject to future settlement and adjustment. It does not include bills of exchange, promissory notes, or other written evidences of indebtedness.[34]

60. Running account—The items of a running account do not constitute separate causes of action. The contract is entire and gives rise to a single cause of action.[35] It is competent for the parties to a running account to agree that an order of a third party drawn on one of the parties to the account and given to the other shall be charged in the account to the drawee.[36]

61. Book accounts—A book account is a detailed statement, kept in a book, in the nature of debit and credit, between persons, arising out of contract or some fiduciary relation.[37]

62. Balance sheet—A balance sheet is a summation and balance of accounts. It does not purport to be a true statement of the actual condition of affairs in a mercantile house, but a summary of what the books disclose the condition to be.[38]

63. Effect—An account rendered for services, if not paid or agreed upon as correct, is not conclusive as to the value of the services.[39] Entries in a merchant's account books are not conclusive against him.[40]

ACCOUNTING

64. Pleading—In an action for an accounting it is unnecessary to allege a willingness to pay the amount found due.[41]

ACCRETIONS—See Navigable Waters, 6953.
ACCUSED AS WITNESS—See Witnesses, 10307.

ACKNOWLEDGMENT

Cross-References

See Conflict of Laws, 1560; Evidence, 3350.

65. In general—Taking an acknowledgment is a ministerial act,[42] and private business.[43] An acknowledgment by a person that he executed an instrument implies that he executed it voluntarily.[44] An acknowledgment must always be a personal act.[45] It is an adoption of the signature to the instrument acknowledged.[46] An acknowledgment includes the due certificate of the fact by the officer taking it.[47] A certificate is no part of the instrument acknowledged and is not the act of either party thereto, but is only evidence in regard to its execution and acknowledgment.[48]

66. Necessity—As between the parties an acknowledgment is not essential to the validity of a deed or mortgage,[49] or contract to convey.[50] It is essential to

[34] Kramer v. Gardner, 104–370, 116+925. See Taylor v. Parker, 17–469(447); Johnson v. Evanson, 105–519, 117+1125.
[35] Memmer v. Carey, 30–458, 15+877; Frankoviz v. Smith, 34–403, 26+225.
[36] Gordon v. Ven, 55–105, 56+581.
[37] Taylor v. Horst, 52–300, 54+734.
[38] Maxfield v. Seabury, 75–93, 77+555.
[39] Allis v. Day, 14–516(388); Wilson v. Mpls. etc. Ry., 31–481, 18+291; Wilkinson v. Crookston, 75–184, 77+797.
[40] Culver v. Scott, 53–360, 55+552.
[41] Coolbaugh v. Roemer, 32–445, 21+472.
[42] Bank of Benson v. Hove, 45–40, 43, 47+449; Piper v. Chippewa I. Co., 51–495, 498, 53–870; Barnard v. Schuler, 100–289, 110+966.
[43] Slater v. Schack, 41–269, 43+7.
[44] Brunswick etc. Co. v. Brackett, 37–58, 33+214.
[45] Williams v. Frost, 27–255, 6+793.
[46] Lennon v. White, 61–150, 152, 63+620.
[47] Thompson v. Scheid, 39–102, 38+801.
[48] Wells v. Atkinson, 24–161, 165; Wheeler v. Paterson, 64–231, 66+964.
[49] Tidd v. Rines, 26–201, 2+497; Morton v. Leland, 27–35, 6+378; Johnson v. Sandhoff, 30–197, 14–889; Schwab v. Rigby, 38–

the validity of an assignment for the benefit of creditors,[51] and of an agreement for arbitration.[52] It is a prerequisite to the recording of instruments.[53]

67. Essentials—There are two essential elements to a valid certificate—the identity of the party executing the instrument and his acknowledgment or admission that he executed it.[54] A notary public or other officer cannot legally or honestly certify to the acknowledgment of a party, unless he personally knows him or has satisfactory evidence of the fact that he is the identical person described in and who executed the instrument.[55] The identity of the party may appear by reference to the instrument acknowledged.[56] It is not essential that the officer expressly assert in his certificate that he has actual knowledge of the identity of the person appearing before him and the person who executed the instrument.[57]

68. Object—One object of an acknowledgment is to entitle the instrument to record,[58] but the primary object is to make it competent evidence without further proof of its execution.[59]

69. Statutory forms—The statutory forms [60] are not mandatory.[61]

70. Venue—If an officer's authority extends throughout the state it is sufficient to name the state in the venue to the certificate; adding a wrong or nonexisting county is not fatal.[62] A form of venue held sufficient.[63]

71. Seal—A certificate of a notary without a seal is a nullity.[64] The defect may be cured by legislative act.[65] No seal is necessary if not required by statute.[66] A seal on the opposite side of a paper from the certificate has been held sufficient.[67]

72. Misnomer—A misnomer of the party making the acknowledgment has been held not fatal.[68] A misnomer of the instrument acknowledged is to be disregarded.[69]

73. Who may take—One who takes an interest under a deed cannot. An agent, attorney, bank cashier or relative can. Whether a stockholder can is undetermined.[70] A deputy clerk of court can.[71] Formerly a judge of probate could not.[72]

74. Official character of officer—If the certificate shows that the officer is of a class authorized to take acknowledgments, it is prima facie evidence of his authority.[73]

75. In another state—The statute prescribes the mode of authenticating certificates of acknowledgments taken in another state.[74]

395, 38+101; Holbrook v. Sims, 39–122, 39+74, 140; Lydiard v. Chute, 45–277, 47+967; Bank of Benson v. Hove, 45–40, 43, 47+449; Roberts v. Nelson, 65–240, 68+14.

50 Kingsley v. Gilman, 15–59(40).

51 See § 590.

52 See § 502.

53 See § 8280.

54 Bennett v. Knowles, 66–4, 68+111; Barnard v. Schuler, 100–289, 110+966.

55 Barnard v. Schuler, 100–289, 110+966.

56 Larson v. Elsner, 93–303, 101+307.

57 Brunswick v. Brackett, 37–58, 33+214; Cone v. Nimocks, 78–249, 80+1056.

58 See § 8280.

59 Bennett v. Knowles, 66–4, 6, 68+111. See § 3350.

60 R. L. 1905 § 2684.

61 Bennett v. Knowles, 66–4, 7, 68+111; Cone v. Nimocks, 78–249, 80+1056.

62 Roussain v. Norton, 53–560, 55+747.

63 Moreland v. Lawrence, 23–84, 88.

64 DeGraw v. King, 28 118, 9+636; Thompson v. Scheid, 39–102, 38+801. See, under former statute, Thompson v. Morgan, 6–292(199).

65 Tidd v. Rines, 26 201, 2+497. See Bigelow v. Livingston, 28–57, 9+31.

66 Baze v. Arper, 6 220(142); Thompson v. Morgan, 6 292(199). See R. L. 1905 § 2684.

67 Evans v. Smith, 43 59, 44+880.

68 Rodes v. St. Anthony etc. Co., 49 370, 52+27. See Rogers v. Manley, 46 403, 49+194.

69 Wells v. Atkinson, 24 161, 165.

70 Bank of Benson v. Hove, 45 40, 43, 47+449.

71 Piper v. Chippewa I. Co., 51–495, 53+870.

72 Baze v. Arper, 6 220(142).

73 Baze v. Arper, 6 220(142, 149); Thompson v. Morgan, 6 292(199, 202).

74 R. L. 1905 § 2689. See Wells v. Atkin

76. Before execution—An acknowledgment before execution, as when the name of the grantee or the description of the property is left blank, is improper.[75]

77. Construction—A certificate is to be liberally construed and sustained if it is substantially sufficient. Resort may be had to the instrument acknowledged. Obvious clerical errors, misnomers of the instrument certified to, and all purely technical omissions and defects are to be disregarded.[76] An acknowledgment is the proof of its execution; and where the certificate identifies the party who alone executed the deed, and affirms that he personally acknowledged its execution, it must be interpreted to be for the uses and purposes disclosed by the instrument itself, and the omission of matter of description is not fatal.[77]

78. Conclusiveness—A certificate is prima facie evidence of the facts recited.[78] A certificate is not conclusive. It is only prima facie evidence of the facts recited and may be contradicted by parol.[79] But it imports verity and is not to be overcome except by very clear proof.[80]

79. By married women—Formerly the statute required a separate acknowledgment by a wife to a deed of her husband.[81]

80. By corporation—It must be by some officer or representative who has authority to execute it for the corporation and such authority must appear on the face of the certificate, or by reference to the instrument.[82]

81. By partnership—It should be by the subscribing parties individually. An acknowledgment of a deed of assignment by one partner has been held sufficient.[83]

82. By attorney in fact—An acknowledgment by an attorney in fact has been held sufficient.[84]

83. Liability of officer for negligence—A notary public in this state is not a guarantor of the absolute correctness of his certificate of acknowledgment. Nor does he undertake to certify that the person acknowledging the instrument owns or has any interest in the land therein described, but he does undertake to certify that the person personally appearing before him is known to him to be the person described in and who executed the instrument. 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 liable for all damages proximately resulting therefrom.[85]

son, 24–161; Piper v. Chippewa I. Co., 51–495, 53+870; Lowry v. Mayo, 41–388, 390, 43+78; Tweto v. Horton, 90–451, 97+128.

[75] Roussain v. Norton, 53–560, 564, 55+747.

[76] Wells v. Atkinson, 24–161; Brunswick v. Brackett, 37–58, 33+214; Rodes v. St. Anthony etc. Co., 49–370, 52+27; Bennett v. Knowles, 66–4, 68+111; Larson v. Elsner, 93–303, 101+307; Lloyd v. Simons, 97–315, 105+902. See Note, 108 Am. St. Rep. 525.

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

[78] Blomberg v. Montgomery, 69–149, 152, 72+56.

[79] Dodge v. Hollinshead, 6–25(1); Annan v. Folsom, 6–500(347); Edgerton v. Jones, 10–427(341).

[80] Morrison v. Porter, 35–425, 29+54; Hall v. Lamb, 50–33, 52+267; Lennon v. White, 61–150, 63+620; Goulet v. Dubreuille, 84–72, 86+779; Skajewski v. Zantarski, 103–27, 114+247.

[81] Dodge v. Hollinshead, 6–25(1); Edgerton v. Jones, 10–427(341) Merrill v. Nelson, 18–366(335).

[82] Bennett v. Knowles, 66–4, 68+111; Bowers v. Hechtman, 45–238, 47+792; Morris v. Keil, 20–531(474). See R. L. 1905 §§ 2684, 2685.

[83] Williams v. Frost, 27–255, 6+793. See Hanson v. Metcalf, 46–25, 48+441.

[84] Bigelow v. Livingston, 28–57, 9+31. See Berkey v. Judd, 22–287, 302.

[85] Barnard v. Schuler, 100–289, 110+966.

ACTION

Cross-References

See Judgments, 5148–5153; Limitation of Actions, 5604; Municipal Corporations, 6779; Quieting Title.

IN GENERAL

84. Definition—An action is a proceeding instituted in court by one or more parties against another or others to enforce a right, or punish or redress a wrong; distinguished from judicial proceedings which are not controversial in form.[86]

85. Remedy—Definition—A remedy is the means employed to enforce a right or redress an injury.[87] It includes pleading and evidence.[88] Judicial remedy necessarily includes the right to apply to a court and show reasons why the remedy should be made available.[89]

86. Remedies for new statutory rights—Whenever a statute creates a new right, but omits to prescribe a remedy for its enforcement, the common law affords a remedy.[90]

87. Statutory actions—When exclusive—If a statute creates a right not existing at common law and prescribes a specific and adequate remedy for its enforcement, such remedy is exclusive.[91] But where the common law gives a remedy and another is provided by statute, the latter is cumulative unless it is expressly made exclusive.[92] Where by statute a right of action is given which did not exist at common law, and the statute giving the right also fixes the time within which the right may be enforced, the time so fixed becomes a limitation or condition upon the right, and will control, no matter in what forum the action is brought.[93]

88. Ex contractu, ex delicto, and ex quasi contractu—An action ex contractu is one in which the liability arises from contract. An action ex delicto is one in which the liability arises from a tort or crime. An action ex quasi contractu is one in which the liability arises from a tort involving the breach of a contract.[94] The technical common-law forms of actions are abolished in this state, and actions which would be denominated debt, covenant, or assumpsit at common law, all fall under the general designation of "actions upon contracts."[95]

89. How and when commenced—An action is commenced in the district court by the service of a summons as prescribed by statute.[96]

[86] Century Dict. See Neff v. Lamm, 99–115, 118, 108+849.

[87] Warren v. First Div etc. Ry., 18–384 (345, 357).

[88] Kaufman v. Barbour, 98–158, 107+1128.

[89] State v. Young, 29–474, 548, 9+737.

[90] McCarthy v. St. Paul, 22–527; Bott v. Pratt, 33–323, 326, 23+237.

[91] Montour v. Purdy, 11–384(278, 300); Faribault v. Misener, 20–396(347); Allen v. Walsh, 25–543, 556; Johnson v. Fischer, 30–173, 14+799; Griffin v. Chadbourne, 32–126, 19+647; State Bank v. Heney, 40–144, 41+548; Abel v. Minneapolis, 68–89, 70+851; Buffum v. Hale, 71–190, 73+856; Negaubauer v. G. N. Ry., 92–184, 99+620.

[92] Daniels v. Palmer, 41–116, 42+855; Miller v. Chatterton, 46–338, 48+1109; State v. Educational E. Assn., 49–158, 51+908; Eliason v. Sidle, 61–285, 63+730; State v. Am. S. & L. Assn., 64–349, 67+1; Wacholz v. Griesgraber, 70–220, 73+7; Somers v. Dawson, 86–42, 90+119.

[93] Negaubauer v. G. N. Ry., 92–184, 99+620.

[94] Mpls. H. Works v. Smith, 30–399, 16+462; Whittaker v. Collins, 34–299, 25+632; Serwe v. N. P. Ry., 48–78, 50+1021.

[95] Midland Co. v. Broat, 50–562, 567, 52+972.

[96] R. L. 1905 § 4102; Crombie v. Little, 47–581, 587, 50–823; Kimball v. Brown, 73–167, 75+1043; Spencer v. Koell, 91–226, 97+974. See Webster v. Penrod, 103–69, 71, 74, 114+257.

90. Creation of new procedure by courts—Where jurisdiction over a certain subject-matter is conferred upon a court, and no procedure is provided by the statute, the court may proceed under its general powers, and adopt such procedure as is necessary to enable it to exercise and make effective the jurisdiction thus granted.[97]

91. Consolidation—Two or more actions pending at one time between the same parties and in the same court, upon causes of action which might have been joined, may be consolidated by order of court.[98]

92. Prior exhaustion of security—Under an early statute, long since repealed, a creditor with a secured claim could not maintain an action thereon without first exhausting his security.[99]

93. Duty to prosecute with diligence—A party bringing an action is bound to prosecute it with reasonable diligence.[1]

ONE FORM OF ACTION

94. Forms of actions abolished—Statute—It is provided by statute that there shall be but a single form of civil action in this state. The common-law forms of actions are abolished and so is the distinction between actions at law and suits in equity.[2] The statute does not change the character of the relief to which a party is entitled, but only the form and manner of obtaining it.[3] It merely affects the form of actions and does not confer any new rights of action, or make any state of facts a cause of action which, before the statute, would have been insufficient to sustain any form of action.[4] Nor has it enlarged or restricted the defences which a party may invoke, but has simply changed the mode of invoking them.[5] The distinction in the forms of actions—in the modes of commencing them, in the number, names, and forms of the pleadings, and in those matters of practice necessary for presenting causes to the court for its determination—has been abolished. But the statute does not change the tribunal by which causes are to be tried.[6]

95. Legal and equitable actions—The statute provides a single form of action for the enforcement of all rights and remedies regardless of whether they are legal or equitable in their nature. The same court administers both law and equity.[7] The question in an action is not whether the plaintiff has a legal right or an equitable right, or the defendant a legal or equitable defence against the plaintiff's claim; but whether, according to the whole law of the land applicable to the case, the plaintiff makes out the right he seeks to establish, or the defendant shows that the plaintiff ought not to have the relief sought.[8] Both

[97] Whaley v. Bayer, 99–397, 109+596, 820.

[98] R. L. 1905 § 4141. See Miller v. Condit, 52–455, 55+47; Pioneer F. Co. v. St. Peter S. I. Co., 64–386, 67+217; Schuler v. Mpls. St. Ry., 76–48, 78+881.

[99] Laws 1860 c. 48; Schalck v. Harmon, 6–265(176); Swift v. Fletcher, 6–550 (386); Sanborn v. School Dist., 12–17(1).

[1] Coleman v. Akers, 87–492, 92+408.

[2] R. L. 1905 § 4052. See, as to the effect of the abolition of common-law forms of action, Folsom v. Carli, 6–420(284); Stout v. Stoppel, 30–56, 58, 14+268; Midland Co. v. Broat, 50–562, 52+972; Adams v. Castle, 64–505, 508, 67+637; Breault v. Merrill, 72–143, 75+122; Palmer v. Yorks, 77–20, 79+587; Disbrow v. Creamery P. M. Co., 104–17, 115+751.

[3] Russell v. Minn. Outfit, 1–162(136).

[4] Banning v. Bradford, 21–308, 312; Disbrow v. Creamery P. M. Co., 104–17, 115+751.

[5] Folsom v. Carli, 6–420(284).

[6] Berkey v. Judd, 14–394(300).

[7] First Div. etc. Ry. v. Rice, 25–278, 292; Holmes v. Campbell, 12–221(141, 150); Berkey v. Judd, 14–394(300); Allen v. Walsh, 25–543, 556; McKinney v. Bode, 33–450, 454, 23+851; Klatt v. Dummert, 70–467, 470, 73+404; Bell v. Mendenhall, 71–331, 73+1086; Gilbert v. Boak, 86–365, 368, 90+767; Todd v. Bettingen, 109–493, 124+443.

[8] Merrill v. Dearing, 47–137, 140, 49+693. See Todd v. Bettingen, 109–493, 124+443.

legal and equitable relief may be awarded in the same action.[9] If, upon the same state of facts, the legal and equitable rules of substantive law are different the equitable rules may be applied.[10]

ACT OF GOD—This expression has no fixed, inflexible meaning in the law. It refers to the operation of natural forces. It generally means a sudden and overwhelming action of natural forces which could not reasonably have been anticipated, and if anticipated, could not have been avoided or resisted by the exercise of reasonable care.[11]

ACTUAL—The word "actual" is commonly used in opposition to "virtual" or "constructive." [12]

ACTUAL OCCUPANCY—Actual occupancy is an open, visible occupancy, as distinguished from the constructive possession which follows the legal title.[13]

ADEQUATE—The words "adequate" and "suitable" are not synonymous.[14]

ADEQUATE REMEDY AT LAW—See Equity, 3137.

ADJACENT—See note 15.

ADJECTIVE LAW—That part of the law relating to procedure.[16] It is subservient to the substantive law.[17]

ADJOINING LANDOWNERS

LATERAL SUPPORT

96. Nature of right—The owner of realty has a natural right to the lateral support of the adjoining soil and is entitled to damages for its removal. It is an absolute right of property not depending on negligence.[18] The actionable wrong is not in excavating, but in causing the adjoining land to fall.[19] An owner is entitled to this right in a street,[20] and in the right of way of a railroad.[21] This absolute right applies only to the land itself and not to the buildings or other artificial structures thereon.[22] The owner cannot escape liability by employing a contractor to excavate.[23]

97. Damages—The measure of damages is the diminution of the value of the land by reason of the fall.[24] Evidence of the cost of retaining walls, and of the value of the land subsequent to the injury, has been held admissible in relation to damages.[25]

[9] Montgomery v. McEwen, 7–351(276, 280); Flanigan v. Sable, 44–417, 46+854; Erickson v. Fisher, 51–300, 53+638; Gilbert v. Boak, 86–365, 90+767; Bell v. Mendenhall, 71–331, 73+1086.

[10] Flanigan v. Sable, 44–417, 46+854.

[11] Dorman v. Ames, 12–451(347, 362); Board of Ed. v. Jewell, 44–427, 429, 46+914; Jones v. Mpls. etc. Ry., 91–229, 97+893; Bibb v. Atchison etc. Ry., 94–269, 102+709; Vincent v. Lake Erie T. Co., 124+221. See Carriers, 1331, 1338, 1360.

[12] Cutting v. Patterson, 82–375, 380, 85+172.

[13] Clark v. Dewey, 71–108, 73+639; Cutting v. Patterson, 82–375, 380, 85+172.

[14] St. Anthony Falls W. P. Co. v. Eastman, 20–277(249).

[15] Olson v. St. Paul etc. Co., 35–432, 433, 29+125; State v. Gilbert, 107–364, 120+528.

[16] Holland, Jurisprudence, (10 ed.) 347.

[17] Rees v. Storms, 101–381, 384, 112+419.

[18] Nichols v. Duluth, 40–389, 42+84; Dyer v. St. Paul, 27–457, 8+272; Schultz v. Bower, 57–493, 59+631; McCullough v. St. P. etc. Ry., 52–12, 53+802. See O'Brien v. St. Paul, 25–331; Rau v. Minn. Valley Ry., 13–442(407); Cahill v. Eastman, 18–324 (292).

[19] Schultz v. Bower, 57–493, 59+631; Id., 64–123, 66+139.

[20] See § 4187.

[21] McCullough v. St. P. etc. Ry., 52–12, 53+802.

[22] Id.

[23] Kopp v. N. P. Ry., 41–310, 43+73.

[24] Schultz v. Bower, 57–493, 59+631; Id., 64–123, 66+139; Kopp v. N. P. Ry., 41–310, 43+73 (damages held not excessive).

[25] Kopp v. N. P. Ry., 41–310, 43+73.

ADJOURNED TERMS—See District Court, 2765.
ADJUSTER—An adjuster is one who determines the amount of a claim.[26]
ADMINISTER—See note 27.
ADMINISTRATION—See Executors and Administrators.
ADMINISTRATIVE POWERS—See Constitutional Law, 1587, 1600.
ADMINISTRATOR DE BONIS NON—See Executors and Administrators, 3583.
ADMINISTRATORS—See Executors and Administrators.

ADMIRALTY

98. Jurisdiction of federal courts—How far exclusive—A proceeding against a vessel by name for breach of a contract of affreightment, is an attempt to exercise admiralty jurisdiction, which, in respect to the navigable waters of the United States, is conferred on the district courts of the United States. A state court has no jurisdiction to entertain such a proceeding.[28] 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.[29] An action for an accounting between the owners of a vessel, a sale of the vessel, and the appointment of a receiver to effect the same has been held not within the jurisdiction of the district courts of the United States.[30]

ADMISSIONS—See Criminal Law, 2463; Evidence, 3408.
ADOPTED—See note 31.

ADOPTION

99. Procedure—Statute—The adoption of children is regulated by statute. The district court has jurisdiction of the proceedings.[32]

ADULTERATION

100. Meats—Preservatives—The amendment of 1901 to the pure food law did not prohibit the use of preservatives in meats. It covered only such articles of food as may be made from milk or cream.[33]

101. Oils—The statute forbids the adulteration of linseed oil, whether boiled or raw. It is a proper exercise of the police power.[34] Laws 1909 c. 502 does not prohibit the sale of kerosene oil, which has been colored red, unless such coloring in some substantial degree renders the oil impure, or affects its illuminating qualities, or renders it less safe. The question of adulteration is one of fact.[35]

[26] First Nat. Bank v. Manchester etc. Co., 64–96, 100, 66+136.
[27] Lanier v. Irvine, 21–447; Balch v. Hooper, 32–158, 20+124.
[28] Griswold v. St. Otter, 12–465(364). See Reynolds v. St. Favorite, 10–242(190); Morin v. St. F. Sigel, 10–250(195).
[29] Stapp v. St. Clyde, 43–192, 45+430.
[30] Swain v. Knapp, 32–429, 21+414.
[31] State v. Mpls. etc. Ry., 39–219, 39+153.
[32] R. L. 1905 §§ 3612–3621; Laws 1909 c. 457. See Atwell v. Parker, 93–462, 101+946 (sufficiency of title of act); State v. Bryant, 99–49, 108+880 (vacation of decree of adoption–habeas corpus for recovery of child–sufficiency of record–findings of trial court sustained).
[33] State v. Rumberg, 86–399, 90+1055, 1133. See R. L. 1905 §§ 1756, 1771.
[34] R. L. 1905 § 1772; State v. Williams, 93–155, 100+641.
[35] Bartles v. Lynch, 109–487, 124+1.

ADULTERY

102. What constitutes—Sexual intercourse between a married man and an unmarried woman does not constitute adultery.[36]

103. Indictment—It is unnecessary to allege that the prosecution was commenced on the complaint of the husband or wife.[37]

104. Proof of marriage—Prior to G. S. 1866 c. 73 § 89, it was necessary to prove marriage in fact by direct evidence and the admission of the accused was insufficient.[38]

105. Evidence—Admissibility—Evidence of the relation of the parties, their situation, and opportunities to commit the offence, is admissible.[39]

106. Variance—The offence need not be proved as of the day named in the indictment.[40]

ADVERSE CLAIMS—See Quieting Title, 8039.
ADVERSE PARTY—See note 41.
ADVERSE PARTY AS WITNESS—See Witnesses, 10327.

ADVERSE POSSESSION

107. The statute—It is provided by statute that "no action for the recovery of real estate, or the possession thereof, shall be maintained unless it appears that the plaintiff, his ancestor, predecessor, or grantor, was seized or possessed of the premises in question within fifteen years before the beginning of the action." [42] The statute is a statute of limitations, and does not prevent one from maintaining ejectment, though he has not been in possession within fifteen years.[43]

108. Definition of "seized" and "seizin"—The term "seized" in the statute is not used in contradistinction to "possessed," so as to admit of an interpretation that the legal title or ownership only would be sufficient to prevent the statute running as against the true owner, though a stranger be in the actual occupancy, pedis possessione, of the land in dispute. The title of the owner of a freehold estate is described by the terms "seizin" or "seizin in fee;" yet, in a proper legal sense, the holder of the legal title is not seized until he is fully invested with the possession, actual or constructive. When there is no adverse possession, the title draws to it the possession. There can be but one actual seizin, and this necessarily includes possession; and hence an actual possession in hostility to the true owner works a disseizin, and, if the disseizor is suffered to remain continuously in possession for the statutory period, the remedy of the former is extinguished.[44] The term "seizin" means, ex vi termini, the whole legal title. A covenant of seizin is broken when the coventor has not the possession, the right of possession, and the complete legal title.[45] A disseizor is one who enters intending to usurp the possession and to oust another of his freehold.[46]

[36] State v. Armstrong, 4–335(251); Pickett v. Pickett, 27–299, 7+144.
[37] State v. Brecht, 41–50, 42+602.
[38] State v. Armstrong, 4–335(251); State v. Johnson, 12–476(378).
[39] State v. Brecht, 41–50, 42+602.
[40] Id.
[41] Frost v. St. Paul B. & I. Co., 57–325, 59+308; Kells v. Nelson, 74–8, 76+790.
[42] R. L. 1905 § 4073.
[43] Norton v. Frederick, 107–36, 119+492.
[44] Seymour v. Carli, 31–81, 16+495. See, for definition of seizin, Allen v. Allen, 48–462, 51+473.
[45] Allen v. Allen, 48–462, 51+473.
[46] Carpenter v. Coles, 75–9, 77+424.

109. Object and policy of statute—The object of the statute is to quiet titles and end disputes. It is the policy of the law that parties should assert their claims to the possession of land and rectify their boundaries within the statutory period.[47] The highest considerations of public policy demand that land should be occupied and made productive and the taxes promptly paid to the end that all governmental functions be maintained and the country made prosperous. The statutes upon the subject of adverse possession are properly called "statutes of repose" and are intended to prevent litigation, and to quiet the titles to land which has remained unoccupied by the actual owner for a long period of time. The statute, which the actual owner is presumed to know, is a continual warning to him; and if, through his negligence or selfishness, he allows others to occupy, use, and improve his land for a long period of time, he must be deemed to have acquiesced in the possession of his premises by his adversary.[48] The doctrine of adverse possession proceeds upon the theory of the acquiescence of the true owner in the disseizin for the statutory period.[49] The adverse possessor "must keep his flag flying," yet it is no less essential that the actual owner should keep his own banner unfurled.[50]

110. Public lands excepted—Title to public lands, state or federal, cannot be acquired by adverse possession.[51] A person who takes possession of land in the erroneous belief that it is public land, with the intention of holding and claiming it under the federal homestead law, may acquire title thereto by adverse possession as against the true owner.[52] One who enters land under the homestead laws within a congressional grant to a railroad cannot acquire title against the railroad by adverse possession.[53]

111. Public streets, parks, etc., excepted—Title to public streets, parks, etc. cannot now be acquired by adverse possession.[54] Prior to Laws 1899 c. 65, the rule was otherwise.[55] Rights acquired before the change of the statute were not affected thereby.[56]

112. Registered land excepted—Title to registered land cannot be acquired by adverse possession.[57]

113. Essentials of adverse possession—There are five essentials of adverse possession. It must be hostile and under a claim of right, actual, open, continuous, and exclusive.[58]

114. The possession must be hostile and under claim of right—*a. In general*—The possession must be hostile to the title of the true owner and under a claim of right. Claim of right means claim of exclusive ownership. The claimant must have intended to occupy the land as owner in fee against the world. It is of course not necessary that he should have known of other claims.

[47] Seymour v. Carli, 31–81, 16+495.

[48] Dean v. Goddard, 55–290, 56+1060.

[49] Bausman v. Kelley, 38–197, 36+333; Wood v. Springer, 45–299, 47+811; Dean v. Goddard, 55–290, 56+1060.

[50] Dean v. Goddard, 55–290, 56+1060.

[51] Maas v. Burdetzke, 93–295, 101+182; Murtaugh v. Chi. etc. Ry., 102–52, 112+860; Scofield v. Scheaffer, 104–123, 116+210; Kinney v. Munch, 107–378, 120+374.

[52] Maas v. Burdetzke, 93–295, 101+182.

[53] N. P. Ry. v. Townsend, 190 U. S. 267 (overruling N. P. Ry. v. Townsend, 84–152, 86+1007).

[54] R. L. 1905 § 4072.

[55] St. Paul v. Chi. etc. Ry., 45–387, 48+17; Wayzata v. G. N. Ry., 46–505, 49+205; Glencoe v. Wadsworth, 48–402, 51+377; St. Paul etc. Ry. v. Hinckley, 53–398, 55+560; Bice v. Walcott, 64–459, 67+360; St. Paul etc. Ry. v. Duluth, 73–270, 76+35; Hastings v. Gillitt, 85–331, 88+987; Haramon v. Krause, 93–455, 101+791; Murtaugh v. Chi. etc. Ry., 102–52, 112+860.

[56] Hastings v. Gillitt, 85–331, 88+987.

[57] R. L. 1905 § 3371.

[58] Washburn v. Cutter, 17–361(335); Sherin v. Brackett, 36–152, 30+551; Costello v. Edson, 44–135, 46+299; Dean v. Goddard, 55–290, 56+1060; Brown v. Kohout, 61–113, 63+248; Butler v. Drake, 62–229, 64+559; McRoberts v. McArthur, 62–310, 64+903; Todd v. Weed, 84–4, 86+756; Glover v. Sage, 87–526, 92+471; Maas v. Burdetzke, 93–295, 101+182; Young v. Grieb, 95–396, 104+131; Kistner v. Beseke, 96–137, 104+759.

He may think that there are no other claimants. The only question is, did he hold the land with the intent of exercising exclusive dominion over it? Hostility, in this connection, does not mean ill-will or conscious opposition to a particular claim, but merely the assertion of exclusive ownership.[59] There must be an actual entry upon the land, and ouster of the owner with intention to claim the possession as his own, by the adverse claimant, and this claim of possession must be, not the assertion of a previously-existing right to the land, but the assuming of a right to the land from that time, and a subsequent holding with assertion of right. This intention to claim and possess the land is one of the qualities indispensable to constitute a disseizin as distinguished from a trespass.[60] Mere possession by a trespasser, even though continuous and however long continued, is not enough to constitute adverse possession. The holding must be hostile to the lawful title, with intent to claim and hold the land as against that title.[61] But adverse possession is always a trespass.[62] The intent to hold adversely need not be expressed in words. It may be proved by circumstantial evidence, and is inferable from the nature of the occupancy. Continued acts of ownership, occupying, using, and controlling the property as owner, constitute the usual and natural modes of asserting a claim of title.[63] A recognition of the title of the owner by the disseizor breaks the continuity of claim as well as the continuity of possession and in such case he must begin de novo if he wishes to claim the benefit of the statute.[64] But after the statute has run in favor of a disseizor, no acknowledgment of the former owner's title, except by deed sufficient to pass title to land, will divest the title acquired by adverse possession.[65] One in adverse possession of land may purchase the title of a person against whom he is holding adversely, without abandoning his adverse holding as to the title of another person.[66] A finding that a possession was adverse is a finding that it was hostile. The greater includes the less. If it was adverse it was hostile. It is tautology to say that adverse possession must be hostile.[67]

b. Mistake as to boundary lines—Where one of two adjoining owners takes and holds actual possession of land beyond the boundary of his own lot or tract, under a claim of title thereto as being a part of his own land, though under a mistake as to the location of the boundary line, such possession, for the purposes of the statute, is to be deemed adverse to the true owner and a disseizin; and if the disseizor or his grantee is suffered to remain continuously in possession for the statutory period, the remedy of the former is extinguished.[68] The rule is

[59] Washburn v. Cutter, 17–361(335); Seymour v. Carli, 31–81, 16+495; Lowry v. Tilleny, 31–500, 18+452; Brown v. Morgan, 44–432, 46+913; Wayzata v. G. N. Ry., 46–505, 49+205; St. Paul & D. Ry. v. Hinckley, 53–398, 55+560; Dean v. Goddard, 55–290, 56+1060; Mpls. M. Co. v. Mpls. etc. Ry., 55–371, 57+64; Swan v. Munch, 65–500, 67+1022; Sage v. Rudnick, 67–362, 69+1096; Carpenter v. Coles, 75–9, 77+424; Cool v. Kelly, 78–102, 80+861; Todd v. Weed, 84–4, 86+756; McGovern v. McGovern, 84–143, 86+1102; Collins v. Colleran, 86–199, 90+364; Glover v. Sage, 87–526, 92+471; Maas v. Burdetzke, 93–295, 101+182; Kistner v. Beseke, 96–137, 104+759; Sawbridge v. Fergus Falls, 101–378, 112+385.

[60] Washburn v. Cutter, 17–361(335); Glencoe v. Wadsworth, 48–402, 51+377; Carpenter v. Coles, 75–9, 77+424.

[61] Wayzata v. G. N. Ry., 46–505, 49+205.

[62] Costello v. Edson, 44–135, 46+299.

[63] Sawbridge v. Fergus Falls, 101–378, 112+385; Seymour v. Carli, 31–81, 16+495; Costello v. Edson, 44–135, 46+299; Glenco v. Wadsworth, 48–402, 51+377; Dean v. Goddard, 55–290, 56+1060; Brown v. Kohout, 61–113, 63+248; Swan v. Munch, 65–500, 67+1022; Cool v. Kelly, 78–102, 80+861; Wheeler v. Gorman, 80–462, 83+442; Todd v. Weed, 84–4, 86+756.

[64] St. Paul v. Chi. etc. Ry., 63–330, 63+267, 65+649, 68–458.

[65] Sage v. Rudnick, 67–362, 69+1096.

[66] St. Paul v. Chi. etc. Ry., 45–387, 48+17.

[67] Dean v. Goddard, 55–290, 56+1060.

[68] Seymour v. Carli, 31–81, 16+495; Brown v. Morgan, 44–432, 46+913; Ramsey v. Gleuny, 45–401, 48+322; Beardsley v. Crane, 52–537, 54+740; Butler v. Drake, 62–229, 64+559; Bice v. Walcott, 64–459, 67+360; Diers v. Ward, 87–475, 92+402; Benz v. St. Paul, 89–31, 93+1038; Weeks v. Upton, 99–410, 109+828.

otherwise where parties are permitted to inclose, by consent, lands adjoining their own, or, for temporary convenience, to extend fences or improvements beyond boundary lines. In such cases possession is taken in amity, and in recognition of the owner's title, and the occupancy, not being adverse in its inception, does not become so until notice or an assertion of an adverse claim.[69]

c. Permissive possession—Licensee—It is a well settled principle of law that the statute of limitations does not run in favor of an occupant of land in possession by the license or consent of the owner. To make such possession adverse there must be some open assertion of hostile title and knowledge thereof brought home to the owner of the land.[70] If permissive possession of land, with parol executory conditions attached, do not constitute adverse possession, as between the parties, yet it might be so as against third persons or strangers.[71] Adverse user of land, which is in its inception permissive and subservient to the title of the true owner, and not hostile or under claim or color of right, is presumed to so continue until the contrary is affirmatively shown, and does not ripen into title, however long it may continue.[72]

d. As between tenants in common—The entry and possession of one tenant in common is regarded in law as the entry and possession of all the cotenants and not as a disseizin. Such possession is not adverse until there is an ouster. To constitute an ouster between cotenants there must be overt and unequivocal acts of exclusive ownership or a clear and explicit assertion of adverse right brought home to the knowledge of the other cotenants.[73] Exclusive possession and reception and retention of the rents and profits for a long series of years justify the jury in finding an ouster.[74] Where one tenant in common attempts to convey by warranty deed the whole estate in fee, and his grantee records his deed, and by virtue thereof enters upon the estate, and claims and holds exclusive possession of the whole thereof, the possession and claim are adverse to the title and possession of his cotenant, and amount to a disseizin.[75]

e. As between mortgagor and mortgagee—The possession of the mortgagor after foreclosure is presumed amicable and in subordination to the title of the purchaser until the contrary appears.[76] Where, after a default in a mortgage, the mortgagee in apparent good faith makes a void foreclosure and, after the year to redeem, the purchaser at the foreclosure sale takes possession under color of the foreclosure proceedings, he is a mortgagee in possession, and entitled to all the rights of such a mortgagee, whether he took possession with or without the consent, either express or implied, of the mortgagor. The statute of limitations commences to run in favor of such a purchaser from the time he so takes possession.[77]

f. As between life tenant and remainderman—The possession of a life tenant is never deemed to be adverse to the remainderman, for the latter has no right of entry.[78]

g. As between railway company and homesteader—One who enters land un-

[69] Seymour v. Carli, 31–81, 16+495.

[70] Cameron v. Chi. etc. Ry., 60–100, 61+814; Backus v. Burke, 63–272, 65+459; O'Boyle v. McHugh, 66–390, 69+37.

[71] Dean v. Goddard, 55–290, 56+1060.

[72] Omodt v. Chi. etc. Ry., 106–205, 118+798.

[73] Berthold v. Fox, 13–501(462); Holmes v. Williams, 16–164(146); Lowry v. Tilleny, 31–500, 18+452; Lindley v. Groff, 37–338, 34+26; Ricker v. Butler, 45–545, 48+407; Cameron v. Chi. etc. Ry., 60–100, 61+814; Blomberg v. Montgomery, 69–149, 72+56; Hanson v. Ingwaldson, 77–533, 80+702. See 109 Am. St. Rep. 609.

[74] Lowry v. Tilleny, 31–500, 18+452.

[75] Ricker v. Butler, 45–545, 48+407; Hanson v. Ingwaldson, 77–533, 80+702; Sanford v. Safford, 99–380, 109+819.

[76] Lowry v. Tilleny, 31–500, 18+452; Neilson v. Grignon, 85 Wis. 550.

[77] Backus v. Burke, 63–272, 65+459.

[78] Lindley v. Groff, 37–338, 34+26; Hanson v. Ingwaldson, 77–533, 80+702.

der the homestead laws within a grant to a railway company cannot acquire title against the company by adverse possession.[79]

h. As between husband and wife—Adverse possession cannot exist between husband and wife so long as coverture continues.[80]

i. As between parent and child—As between parent and child, the possession of the land of one by the other is presumed to be permissive, and not adverse. To make such possession adverse, there must be some open assertion of hostile title, other than mere possession, and knowledge thereof brought home to the owner of the land.[81]

j. As between vendor and vendee—Where a grantor remains in possession of land after a valid conveyance thereof, his possession, as well as that of those occupying the land under him, is presumed to be permissive. The presumption, however, is not conclusive, for, if the party so in possession asserts claim to title in himself, and his claim is made known to the grantee, his possession is hostile and adverse. Notice of such hostile claim need not be given to the grantee directly or in words. It may be brought home to him by acts of the occupant so open, notorious, and hostile as to show clearly that he is claiming adversely.[82] The possession of a vendee under an executory contract of purchase is not adverse to the vendor so long as the purchase money is not paid or until the vendee is entitled to demand a deed,[83] though it may be adverse as to third parties.[84] The vendee bears somewhat the relation of a tenant of the vendor and is estopped from denying his title.[85] A mistake in a deed, whereby a portion of the premises intended to be conveyed have been omitted in the description, does not prevent the grantee from acquiring title by prescription to the land so intended to be conveyed.[86]

k. As between landlord and tenant—The possession of a tenant is not ordinarily adverse to his landlord.[87] Possession by a tenant may become adverse to his landlord when the tenant, without collusion, attorns to a third person claiming under an adverse legal title, and pays him rent for years without objection by the landlord, who has for that time practically abandoned his claim of title, especially when circumstances in addition to open and unmistakable possession naturally tend to give the landlord notice of the attornment.[88]

115. The possession must be actual—The owner of lands is presumptively in possession and the acts of a wrongdoer infringing upon the rights of the owner are to be construed strictly against the invader. Clear proof of actual adverse possession will be required to place the wrongdoer in a position to avail himself, in defence of his possession, of the limitation barring the right of the owner to recover. To determine whether particular acts or a course of conduct constitute adverse possession which, if continued, will bar the title of the original owner, regard must be had to the nature or quality of the acts, and to the situation of the property, as well as to the theory upon which the doctrine of adverse possession rests. The owner becomes barred of his right by reason of his acquiescence in the hostile possession of another under a claim of right,

[79] N. P. Ry. v. Townsend, 190 U. S. 267 (overruling N. P. Ry. v. Townsend, 84–152, 86+1007). See St. P. etc. Ry. v. Olson, 87–117, 91+294; Murtaugh v. Chi. etc. Ry., 102–52, 112+860; 17 Harv. L. Rev. 57.

[80] First Nat. Bank v. Guerra, 61 Cal. 109; Hendricks v. Rasson, 53 Mich. 575; Vandevort v. Gould, 36 N. Y. 639. See Blomberg v. Montgomery, 69–149, 72+56.

[81] O'Boyle v. McHugh, 66–390, 69+37; Collins v. Colleran, 86–199, 90+364; Malone v. Malone, 88–418, 93+605. See McGovern v. McGovern, 84–143, 86+1102 (as between widow and heirs).

[82] Kelly v. Palmer, 91–133, 97+578.

[83] Dean v. Goddard, 55–290, 56+1060; Madson v. Madson, 80–501, 83+396; Johnson v. Peterson, 90–503, 97+384.

[84] Dean v. Goddard, 55–290, 56+1060.

[85] Mitchell v. Chisholm, 57–148, 58+873; Thompson v. Ellenz, 58–301, 59+1023.

[86] Vandall v. St. Martin, 42–163, 44+525.

[87] See § 5363.

[88] Hanson v. Sommers, 105–434, 117+842.

maintained for the statutory period, and of which he has notice, or which is maintained under such circumstances that he is presumed to have notice. Hence the possession must be actual, for otherwise there is no disseizin, and the real owner remains in possession, actually or constructively. It must be continuous, for upon its cessation or interruption the possession, in contemplation of law, is again in the holder of the legal title. It must be hostile to the real owner, and with intention to claim the land adversely to him; and this must be manifest from the nature or circumstances of the possession, so that the owner may be informed of it, and that he shall not be misled into acquiescence in what he might reasonably suppose to be a mere trespass, when he would not have acquiesced in the assertion of a right adverse to his title. The possession of land may consist in, and be shown by, a great variety of acts, but the law prescribes no particular manner in which possession shall be maintained or made manifest, to constitute what we comprehensively term "adverse possession." It may be under various circumstances, by inclosure, by cultivation, by the erection of buildings, or by other improvements, or by any visible, open use clearly indicating an actual appropriation of the land to the permanent and exclusive dominion and benefit of the invader; such a use as is calculated to inform the real owner of the fact of occupancy, and that it is adverse or hostile to his own title.[89] The doctrine proceeds upon the theory of the acquiescence of the true owner in his disseizin for the full statutory period; hence, the possession which affects him is what appears on the ground itself. It must be such as would operate as unambiguous and unequivocal notice to him that some one is in possession in hostility to his title under claim of right; and, while much will depend on the nature and situation of the property and the uses to which it is adapted, yet in all cases it must be a possession which is accompanied with the real and effectual enjoyment of the property,—the possession which follows the subjection of the property to the will and dominion of the claimant to the exclusion of others. The acts must be such as indicate that a permanent occupation and appropriation of the premises is intended, as distinguished from a casual trespass for some temporary purpose. And, inasmuch as it is only the possession which appears on the ground which affects the true owner, it follows that, while such acts as paying taxes or surveying lines may characterize a possession, if it exists, as hostile, yet they do not themselves constitute the possession which the law requires to toll the right of the true owner.[90] Possessory acts, to constitute adverse possession, must necessarily depend upon the character of the property, its location, and the purposes for which it is ordinarily fitted or adapted.[91] So much depends on the situation and nature of the property, the uses to which it can be applied, or to which the owner or claimant may choose to apply it, that it is impossible to lay down any precise rule adapted to all cases.[92] The possessory acts must be such as to indicate and serve as notice of an intention to appropriate the land itself, and not the mere products of it, to the dominion and use of the party entering.[93] Actual residence on the land is

[89] Costello v. Edson, 44–135, 46+299. Cited in Ricker v. Butler, 45–545, 48+407; Lambert v. Stees, 47–141, 49+662; Wheeler v. Gorman, 80–462, 83+442; Holmgren v. Isaacson, 104–84, 116+205.

[90] Wood v. Springer, 45–299, 47+811. Cited in Brown v. Kohout, 61–113, 63+248; Glover v. Sage, 87–526, 92+471; Young v. Grieb, 95–396, 104+131.

[91] Murphy v. Doyle, 37–113, 33+220; Costello v. Edson, 44–135, 46+299; Wood v. Springer, 45–299, 47+811; Ricker v. Butler, 45–545, 48+407; Dean v. Goddard, 55–290, 56+1000; Butler v. Drake, 62–229, 64+559; Backus v. Burke, 63–272, 65+459; Sage v. Morosick, 69–167, 71+930; Wheeler v. Gorman, 80–462, 83+442; Holmgren v. Isaacson, 104–84, 116+205.

[92] Washburn v. Cutter, 17–361(335); Murphy v. Doyle, 37–113, 33+220; Sage v. Morosick, 69–167, 71+930.

[93] Bazille v. Murray, 40–48, 41+238; Costello v. Edson, 44–135, 46+299; Wood v. Springer, 45–299, 47+811; Lambert v.

not always necessary to constitute adverse possession.[94] "If the land is not susceptible of any permanent useful improvement, actual occupancy, cultivation, or residence may not be necessary in order to constitute adverse possession. But if the land will admit of such improvement, the possessory acts must be such as to show permanent possession for the purpose of such improvement; for instance, actual occupancy and cultivation or enclosure; and this, whether the adverse possession is relied on to raise the bar of the statute of limitations or to bar an action of trespass or trover." [95] But it is not ordinarily necessary that a farm should be fenced.[96] In the case of a farm, if the possession is open and notorious, comporting with the ordinary management of farms, it is unnecessary that the whole farm be either improved or inclosed, at least where the unimproved part, as woodland, is subservient to one connected with that which is improved; and, for the same reason, the rule requiring actual and visible occupancy will be more strictly construed in an old and populous country, where land is usually improved and inclosed, than in a new country recently settled, in which the land is only partially improved.[97] It is necessary to constitute adverse possession that there be at all times some person in an action against whom the real owner may recover the possession of the land.[98] When there is no adverse possession the title draws to it the possession; that is, the owner is constructively in possession.[99]

116. The possession must be open—The possession must be open and notorious, that is, it must be such as would naturally charge the true owner with knowledge of the adverse holding. It is perhaps better to say that the possession must be visible.[1] The divesture of title by adverse possession rests upon the presumption of notice to the true owner of an open and hostile possession.[2]

117. The possession must be continuous—*a. In general*—In order that adverse possession may ripen into title it must be continuous for the statutory period, for, upon its cessation or interruption, the possession, in contemplation of law, is again in the person who holds the legal title; and upon any resumption of the adverse possession a new time is thereby fixed for the running of the statute, the intruder not being permitted to tack a former adverse possession. An acknowledgment of the owner's title before the statute has run breaks the continuity of the adverse possession. An acknowledgment may be made in many ways,—among others, by the acceptance of a lease or contract for the purchase of the land from the owner thereof.[3] The possession of a tenant is the possession of his landlord for the purposes of the statute.[4] The continuity of adverse possession is not broken by the party in possession taking written conveyances of the premises from other parties claiming an interest therein, as this

Stees, 47–141, 49+662; Sage v. Larson, 69–122, 71+923; Wheeler v. Gorman, 80–462, 83+442.

[94] Washburn v. Cutter, 17–361(335); Murphy v. Doyle, 37–113, 33+220; Costello v. Edson, 44–135, 46+299; Dean v. Goddard, 55–290, 56+1060; Sage v. Morosick, 69–167, 71+930; Wheeler v. Gorman, 80–462, 83+442.

[95] Washburn v. Cutter, 17–361(335).

[96] Sage v. Morosick, 69–167, 71+930.

[97] Murphy v. Doyle, 37–113, 33+220.

[98] St. Paul v. Chi. etc. Ry., 45–387, 48+17.

[99] Washburn v. Cutter, 17–361(335); Seymour v. Carli, 31–81, 16+495; Bradley v. Norris, 63–156, 65+357.

[1] Bazille v. Murray, 40–48, 41+238; Costello v. Edson, 44–135, 46+299; Lambert v. Stees, 47–141, 49+662.

[2] Bausman v. Kelley, 38–197, 36+333.

[3] Olson v. Burk, 94–456, 103+335; Sherin v. Brackett, 36–152, 30+551; Witt v. St. P. etc. Ry., 38–122, 35+862; Vandall v. St. Martin, 42–163, 44+525; Morris v. McClary, 43–346, 46+238; Costello v. Edson, 44–135, 46+299; St. Paul v. Chi. etc. Ry., 45–387, 48+17; Ramsey v. Glenny, 45–401, 48+322; Ricker v. Butler, 45–545, 48+407; Dean v. Goddard, 55–290, 56+1060; St. Paul v. Chi. etc. Ry., 63–330, 63+267, 65+649, 68+458; Swan v. Munch, 65–500, 67+1022; Sage v. Rudnick, 67–362, 69+1096; Blomberg v. Montgomery, 69–149, 72+56; Hall v. Conn. etc. Co., 76–401, 79+497; Johnson v. Peterson, 90–503, 97+384.

[4] Sherin v. Brackett, 36–152, 30+551; St. Paul v. Chi. etc. Ry., 45–387, 48+17; Ramsey v. Glenny, 45–401, 48+322.

may give him color of title, and perhaps define the boundaries of the premises claimed.[5] An action to determine adverse claims dismissed by consent, has been held not to break the continuity of an adverse possession.[6] After the statutory period has run any interruption in the possession is immaterial.[7] The entry into actual possession of land by the holder of the legal title, or person claiming under him, before the expiration of the statutory period for acquiring title by adverse possession, arrests the running of the statute.[8]

b. Tacking—Successive disseizins cannot be tacked together for the purpose of constituting a continuous adverse possession unless there is privity between the successive disseizors.[9] Privity exists between two successive disseizors when one takes under the other, as by descent, will, grant, or voluntary transfer of possession.[10] Such continuity and connection may be effected by any conveyance or understanding which has for its object a transfer of the rights of the possessor or of his possession, when accompanied by an actual transfer of possession.[11] No conveyance or assignment in writing is necessary.[12]

118. The possession must be exclusive—The possession must be exclusive not only as to the true owner but as to all persons.[13] But a person who takes possession of land in the erroneous belief that it is public land, with the intention of holding and claiming it under the federal homestead law, may acquire title thereto by adverse possession as against the true owner.[14]

119. Color of title—*a. Nature and necessity*—All that is necessary to render possession of lands adverse, so as to set the statute of limitations in motion, is that the disseizor enter and take possession with the intention of holding the lands for himself to the exclusion of all others. It is unnecessary that he should enter under color of title or under a claim that he has a legal right to enter.[15] A tortious entry upon and possession of land without color or pretence of paper title, but under a claim of right thereto, in opposition to and inconsistent with the title of the true owner, may ripen into title by adverse possession.[16] But the disseizor must enter with "claim of right." "Color of title" and "claim of right" are not synonymous.[17] A person is properly said to have color of title to lands when he has an apparent though not real title to the same, founded upon a deed which purports to convey them to him.[18] It is not necessary that the deed be valid or recorded.[19] "Claim of right," "claim of title," "claim of ownership," when used in this connection, mean nothing more than the intention of the disseizor to appropriate and use the land as his own to the exclusion of all others.[20]

[5] Dean v. Goddard, 55–290, 56+1060.
[6] Holmgren v. Isaacson, 104–84, 116+205.
[7] Dean v. Goddard, 55–290, 56+1060. See Sage v. Rudnick, 67–362, 69+1096.
[8] Kipp v. Hagan, 108–384, 122+317.
[9] Sherin v. Brackett, 36–152, 30+551; Witt v. St. P. etc. Ry., 38–122, 35+862; Ramsey v. Glenny, 45–401, 48+322.
[10] Sherin v. Brackett, 36–152, 30+551; Vandall v. St. Martin, 42–163, 44+525; St. Paul v. Chi. etc. Ry., 45–387, 48+17; Ramsey v. Glenny, 45–401, 48+322; Ricker v. Butler, 45–545, 48+407; Barber v. Robinson, 78–193, 80+968; McGovern v. McGovern, 84–143, 86+1102; Hanson v. Sommers, 105–434, 439, 117+842.
[11] Vandall v. St. Martin, 42–163, 44+525; Ramsey v. Glenny, 45–401, 48+322.
[12] Hall v. Conn. etc. Co., 76–401, 79+497.
[13] Dean v. Goddard, 55–290, 56+1060; Maas v. Burdetzke, 93–295, 101+182.
[14] Maas v. Burdetzke, 93–295, 101+182.
[15] Carpenter v. Coles, 75–9, 77+424; Cool v. Kelly, 78–102, 80+861.
[16] Glencoe v. Wadsworth, 48–402, 51+377; Swan v. Munch, 65–500, 67+1022; Carpenter v. Coles, 75–9, 77+424; Markusen v. Mortensen, 105–10, 116+1021.
[17] Carpenter v. Coles, 75–9, 77+424; Pfaender v. Chi. etc. Ry., 86–218, 90+393; Ross v. Calc, 94–513, 103+561; Markusen v. Mortensen, 105–10, 116+1021; Hamilton v. Wright, 30 Iowa 480.
[18] Seigneuret v. Fahey, 27–60, 6+403. See further as to what constitutes color of title: O'Mulcahy v. Florer, 27–449, 8+166; Wheeler v. Merriman, 30–372, 15+665; Hall v. Torrens, 32–527, 21+717; McLellan v. Omodt, 37–157, 33+326. See 88 Am. St. Rep. 701.
[19] Murphy v. Doyle, 37–113, 33+220; Costello v. Edson, 44–135, 46+299; Miesen v. Canfield, 64–513, 67+632.
[20] Carpenter v. Coles, 75–9, 77+424.

b. Effect—Color of title, in connection with adverse possession, is only important in determining the extent of the possession.[21] Where the disseizor entered without color of title there must be an actual occupancy—a pedis possessio—to constitute adverse possession and the adverse possession in such a case is only coextensive with such occupancy. An actual possession of a part of a tract does not, in the absence of color of title, give constructive possession of the whole.[22] On the other hand, where the occupant enters under a claim of title founded upon a deed or other written muniment of title, and has been in the continuous actual occupancy of some part of the premises for the statutory period, he will be deemed to have been in possession of the entire premises described in the deed not in the adverse possession of any one else, though unenclosed and unimproved, provided the premises consist of a single tract of proper size, to be managed and used as one body according to the usual manner of business. Otherwise expressed, an entry under a deed containing specific metes and bounds will give constructive possession of the whole tract described in the deed not in any adverse possession, although not all inclosed or improved. He is presumed to have intended his entry to be coextensive with the description in his deed, though his improvements are only on a part of the tract. Such a person occupies a different position from a mere naked trespasser or intruder, whose possession will be only coextensive with his actual occupancy. And any instrument, however defective or ineffectual to convey title in fact, and even if void on its face, will be sufficient to bring a case within this rule if by sufficient description it purports to convey title. Whether valid or void on its face, it characterizes the entry of the occupant by showing the nature and extent of his claim.[23] But the adverse possession of one distinct piece of land will not draw to it the constructive possession of another vacant and distinct piece owned by another person, although the adverse occupant holds a paper title by an instrument wherein the described boundaries are coextensive with both pieces of land.[24] One who enters without color of title cannot extend his possession merely by obtaining color of title subsequent to his entry.[25]

120. Nature of title acquired by adverse possession—A title acquired by adverse possession is a title in fee simple and is as perfect as a title by deed. Its legal effect is not only to bar the remedy of the owner of the paper title but to divest his estate and vest it in the party holding adversely for the statutory period of limitation. Adverse possession ripens into a perfect title. This title the adverse possessor can transfer by conveyance and when he does so he is conveying his own title and not a piece of land the title to which is in some other person who is simply barred by the statute from recovering it by action.[26] The holder of a title by adverse possession may bring ejectment against the holder of the paper title by whom he has been dispossessed.[27]

121. Easements—When there has been a continuous use of an easement for

[21] Washburn v. Cutter, 17–361(335); St. Paul v. Chi. etc. Ry., 45–387, 48+17; Carpenter v. Coles, 75–9, 77+424.

[22] Coleman v. N. P. Ry., 36–525, 32+859; Brown v. Kohout, 61–113, 63+248; Sage v. Larson, 69–122, 71+923; Cool v. Kelly, 78–102, 80+861; Barber v. Robinson, 78–193, 80+968.

[23] Miesen v. Canfield, 64–513, 67+632. See also, Murphy v. Doyle, 37–113, 33+220; Morris v. McClary, 43–346, 46+238; St. Paul v. Chi. etc. Ry., 45–387, 48+17; Barber v. Robinson, 78–193, 80+968; Id., 82–112, 84+732.

[24] Morris v. McClary, 43–346, 46+238; McRoberts v. McArthur, 62–310, 64+903.

[25] Barber v. Robinson, 78–193, 80+968.

[26] Seymour v. Carli, 31–81, 16+495; Kipp v. Johnson, 31–360, 17+957; Jellison v. Halloran, 44–199, 46+332; Brown v. Morgan, 44–432, 46+913; Flynn v. Lemieux, 46–458, 49+238; Dean v. Goddard, 55–290, 56+1060; Sage v. Rudnick, 67–362, 69+1096; Ross v. Cale, 94–513, 103+561.

[27] Sherin v. Brackett, 36–152, 30+551; McArthur v. Clark, 86–165, 90+369; Langford v. Pappe, 56 Cal. 73; Barnes v. Light, 116 N. Y. 34.

fifteen years, unexplained, it will be presumed to have been under a claim of right and adverse, and will be sufficient to establish a right by prescription and authorize the presumption of a grant, unless contradicted or explained. Where the claimant needs the use of the easement only from time to time and so uses it, there is a sufficiently continuous use to be adverse, though it is not constant.[28] Where an easement is acquired by prescription, the extent of the right is fixed and determined by the user in which it originated. The use of an easement by prescription is limited, both as to its character and its extent, by the use of which the right was established. Where an easement in land has been acquired for a public use, and that use has been abandoned, the easement is at an end, and the owner is restored to his original rights in the land.[29]

122. Nuisance—Whether it is possible to acquire a prescriptive right to maintain a nuisance is unsettled in this state.[30]

123. By submerging land—Title to lands by adverse possession may be acquired by the construction and maintenance of a dam across a stream, thereby causing the lands to be continuously submerged for the statutory period.[31]

124. When statute begins to run—As against a railway company having a congressional land grant, the statute begins to run in favor of an adverse occupant from the filing of the map of definite location.[32]

125. Pleading—Title by adverse possession may always be proved under a general allegation of ownership or title in fee.[33]

126. Evidence—Admissibility—The deed under which the disseizor entered is admissible to show the nature and extent of his claim though void on its face.[34] The fact of payment or non-payment of taxes is always admissible.[35] An acknowledgment by the disseizor of the record or paper title, as by accepting a lease from the owner of it, is in the nature of an admission that he had no title and is competent evidence tending to prove that his possession was not adverse.[36] Declaration of a prior deceased disseizor characterizing his possession are admissible in favor of a party claiming under him.[37] Conduct and admissions subsequent to the expiration of the statutory period are competent evidence to explain and characterize the antecedent possession.[38] A judgment roll in an action between strangers has been held admissible to controvert the claim of continuous possession.[39]

127. Evidence must be clear and convincing—The evidence to establish a title by prescription must be clear and convincing. Every presumption is to be indulged against the disseizor.[40]

128. Law and fact—The question of adverse possession is for the jury, unless the evidence is conclusive.[41]

[28] Mueller v. Fruen, 36–273, 30+886; Swan v. Munch, 65–500, 67+1022; Schulenberg v. Zimmerman, 86–70, 90+156. See 16 Harv. L. Rev. 438.

[29] Simons v. Munch, 107–370, 120+373.

[30] See Eastman v. St. Anthony etc. Co., 12–137(77); Cook v. Kendall, 13–324 (297); Thornton v. Webb, 13–498(457); Matthews v. Stillwater etc. Co., 63–493, 65+947.

[31] Simons v. Munch, 107–370, 120+373.

[32] Sage v. Rudnick, 91–325, 98+89, 100+106.

[33] McArthur v. Clark, 86–165, 90+369; Sawbridge v. Fergus Falls, 101–378, 112+385.

[34] Washburn v. Cutter, 17–361(335); Murphy v. Doyle, 37–113, 33+220; Ricker v. Butler, 45–545, 48+407.

[35] Murphy v. Doyle, 37–113, 33+220; Costello v. Edson, 44–135, 46+299; Dean v. Goddard, 55–290, 56+1060; Sage v. Morosick, 69–167, 71+930; Wheeler v. Gorman, 80–462, 83+442; Todd v. Weed, 84–4, 86+756; Holmgren v. Isaacson, 104–84, 116+205.

[36] Sage v. Rudnick, 67–362, 69+1096; Todd v. Weed, 84–4, 86+756.

[37] Brown v. Kohout, 61–113, 63+248.

[38] Todd v. Weed, 84–4, 86+756; Kistner v. Beseke, 96–137, 104+759.

[39] Kipp v. Hagan, 108–384, 122+317.

[40] Washburn v. Cutter, 17–361(335); Costello v. Edson, 44–135, 46+299; St. P. & D. Ry. v. Duluth, 73–270, 76+35; Todd v. Weed, 84–4, 86+756; Baxter v. Newell, 88–110, 92+525.

[41] Washburn v. Cutter, 17–361(335);

129. Burden of proof—The burden of proving the essential facts which create title by prescription rests upon him who asserts it.[42]

130. Facts held sufficient to constitute adverse possession—Building a house on the property of another through mistake as to the boundary line;[43] clearing, grubbing and fencing a portion of a farm, putting in crops, tapping trees, cutting grass and draining land—no buildings being built on the farm, the claimant living near by;[44] cutting trees on a lot, grubbing and burning the brush, digging out the stumps of trees, leaving tools on the land from year to year, camping on the land at intervals, paying taxes and finally building a house;[45] extensive ditching of the land and using it as a hay farm for which it was alone adapted;[46] building a warehouse on an alley in a village;[47] living on the land and cropping it annually though no fences were built around it;[48] building a fence around land and using it as a pasture;[49] cutting wood, pasturing cattle, cutting hay, fencing a portion and living at intervals and for a short time in a shanty, the land being bottom land along the Mississippi;[50] piling lumber on a city lot, building a barn and shed, keeping and stabling horses, paying taxes;[51] setting out trees along a boundary line;[52] enclosing tract by brush fence, cutting hay and pasturing cattle.[53]

131. Facts held insufficient to constitute adverse possession—Cutting timber without actual occupancy or cultivation or inclosure where the land is capable of such improvement;[54] cutting natural hay on and letting cattle run over and feed upon wild and uninclosed land adjoining land actually occupied by the trespasser:[55] camping in a tent on vacant and unoccupied land and cooking, preparing food and sleeping on it for a few days or a week and watching it for several weeks for the purpose of keeping off trespassers and asserting title to the land but doing and intending to do nothing else to improve the land or subject it to any proper use.[56]

AFFECTED—Persons and things are "affected" by steps taken which act favorably or unfavorably upon them.[57]

AFFIDAVIT OF MERITS—See Judgments, 5020; Pleading, 7703.

AFFIDAVITS

132. Definition—An affidavit is a statement or declaration reduced to writing and sworn or affirmed to before some officer who has authority to administer an oath or affirmation.[58]

Glencoe v. Wadsworth, 48–402, 51+377; Brown v. Kohout, 61–113, 63+248; Butler v. Drake, 62–229, 64+559; Sage v. Morosick, 69–167, 71+930; Todd v. Weed, 84–4, 86+756; Glover v. Sage, 87–526, 92+471; Kelly v. Palmer, 91–133, 97+578; Kistner v. Beseke, 96–137, 104+759; Sawbridge v. Fergus Falls, 101–378, 112+385; Kipp v. Hagan, 108–384, 122+317.

[42] Bazille v. Murray, 40–48, 41+238; St. P. & D. Ry. v. Hinckley, 53–398, 55+560; Brown v. Kohout, 61–113, 63+248; St. P. & D. Ry. v. Duluth, 73–270, 76+35.

[43] Seymour v. Carli, 31–81, 16+495.

[44] Murphy v. Doyle, 37–113, 33+220.

[45] Costello v. Edson, 44–135, 46+299.

[46] Ricker v. Butler, 45–545, 48+407.

[47] Glencoe v. Wadsworth, 48–402, 51+377.

[48] Sage v. Morosick, 69–167, 71+930.

[49] Barber v. Robinson, 78–193, 80+968.

[50] Wheeler v. Gorman, 80–462, 83+442.

[51] Dean v. Goddard, 55–290, 56+1060.

[52] Butler v. Drake, 62–229, 64+559.

[53] Wood v. Springer, 45–299, 47+811.

[54] Washburn v. Cutter, 17–361(335). See Glover v. Sage, 87–526, 92+471.

[55] Bazille v. Murray, 40–48, 41+238; Lambert v. Stees, 47–141, 49+662; Sage v. Larson, 69–122, 71+923. But see, Ricker v. Butler, 45–545, 48+407; Sage v. Morosick, 69–167, 71+930; Markusen v. Mortensen, 105–10, 116+1021.

[56] Musser v. Tozer, 56–443, 57+1072.

[57] Steenerson v. G. N. Ry., 60–461, 473, 62+826.

[58] Norton v. Hauge, 47–405, 50+368. See State v. Richardson, 34–115, 24+354.

133. Jurat—A jurat is a certificate of an officer to the effect that an affidavit was sworn or affirmed to before him, including the date and sometimes the place.[59] Formal defects in a jurat will be disregarded.[60]

134. Venue—It is desirable, but not essential, that an affidavit should have a venue prefixed.[61]

135. Seal—If the officer be a notary,[62] or register of deeds,[63] it is essential that his official seal be attached.

136. Signature of officer—The signature and official designation of the officer are essential.[64] The designation of an officer as "Recorder" has been held sufficient.[65] If the official character of the officer appears on the face of an affidavit, it is immaterial that it is not affixed to his signature.[66]

137. Signature of affiant—In the absence of statute, or rule of court, it is not essential that the affiant sign an affidavit.[67]

138. Foreign—Proof—An affidavit authenticated by the seal of a notary of another state is admissible without further proof.[68] An affidavit taken before a clerk of a court in another state has been held not sufficiently authenticated.[69]

139. As evidence—Sufficiency—To be admissible in evidence an affidavit must appear on its face to be complete, and to satisfy the legal requirements of an affidavit.[70]

AFFRAY

140. Definition—An affray is a fighting of two or more persons, in a public place, to the terror of others.[71]

AGE—See Evidence, 3296; Infants, 4431.

[59] State v. Richardson, 34–115, 24+354.
[60] Crombie v. Little, 47–581, 586, 50+823.
[61] Young v. Young, 18–90(72). See Rahilly v. Lane, 15–447(360).
[62] See § 7226.
[63] Colman v. Goodnow, 36–9, 29+338.
[64] Knight v. Elliott, 22–551; Norton v. Hauge, 47–405, 50+368.
[65] Camp v. Murphy, 68–378, 71+1.
[66] Bandy v. Chi. etc. Ry., 33–380, 23+547.
[67] Norton v. Hauge, 47–405, 50+368.
[68] Wood v. St. P. etc. Ry., 42–411, 44+308.
[69] Hickey v. Collom, 47–565, 50+918.
[70] Knight v. Elliott, 22–551; Colman v. Goodnow, 36–9, 29+338; Hickey v. Collom, 47–565, 50+918.
[71] Century Dict. See State v. Dineen, 10–407(325).

AGENCY.

IN GENERAL

PROOF OF AGENCY

POWERS OF AGENT

EXECUTION OF POWERS

RATIFICATION OF UNAUTHORIZED ACTS OF AGENT

RIGHTS AND LIABILITIES INTER SE

LIABILITY OF PRINCIPAL TO THIRD PARTIES

LIABILITY OF AGENT TO THIRD PARTIES

Cross-References

See Malicious Prosecution, 5726; Mortgages, 6262; Sales, 8567; Usury.

IN GENERAL

141. Definition—The relation of principal and agent arises whenever one authorizes another to do acts or make engagements in his name.[72]

142. General agents—A general agent is one who has power to transact all the business of his principal of a particular kind or in a particular place.[73] The mere fact that an agent's authority is limited to a particular business does not make his agency special, if the authority is general and gives him power to perform all acts necessary for the transaction of that business, and he is so held out to the world. Locality or extent of territory is not the test.[74] In determining whether an agency is general or special, the acts of the agent known to and acted on by the principal may be considered, at least where the direct evidence is conflicting.[75]

143. Special agents—A special agent is one who is authorized to act for his principal only in a specific transaction.[76]

144. Exclusive agents—Contracts of agency for the sale of goods frequently give the agent the exclusive right to sell the goods of the principal within a particular territory.[77]

145. Existence of agency—Miscellaneous cases—Miscellaneous cases are cited below holding that the relation of principal and agent existed,[78] or did not exist,[79] between the parties.

[72] Mason v. Taylor, 38–32, 35+474.

[73] Kilborn v. Prud. Ins. Co., 99–176, 182, 108+861; Mason v. Taylor, 38–32, 35+474. See Pulliam v. Adamson, 43–511, 45+1132; Springfield Sav. Bank v. Kjaer, 82–180, 84+752; Van Santvoord v. Smith, 79–316, 82+642; Stewart v. Cowles, 67–184, 69+694; Turnbull v. N. W. T. C. Co., 46–513, 49+229; St. Paul v. Clark, 84–138, 86+893; Stein v. Swenson, 44–218, 46+360; Id., 46–360, 49+55; Roeller v. Hall, 62–241, 64+559.

[74] Kilborn v. Prud. Ins. Co., 99–176, 182, 108+861.

[75] Turnbull v. N. W. T. C. Co., 46–513, 49+229.

[76] Kilborn v. Prud. Ins. Co., 99–176, 182, 108+861. See Ahern v. Baker, 34–98, 24+341; Davies v. Lyon, 36–427, 31+688; Van Doren v. Wright, 54–455, 56+51; Dispatch P. Co. v. Nat. Bank of Com., 109–440, 124+236.

[77] See Norris v. Clark, 33–476, 24+128; Turnbull v. N. W. T. C. Co., 46–513, 49+229; Sutton v. Baker, 91–12, 97+420.

[78] Wykoff v. Irvine, 6–496(344) (agency to loan money evidenced by receipt of money); Simonton v. First Nat. Bank, 24–216 (when a debtor delivers to a third person money to pay his creditor, the relation between the debtor and third person is that of principal and agent, until the creditor assents to the transaction). Friesenhahn v. Bushnell, 47–443, 50+597 (agency to purchase realty); Larson v. Lombard Invest. Co., 51–141, 53+179 (loan agency); McMullen v. People's S. & L. Assn., 57–33, 58+820 (bank held agent in receiving money and remitting draft); Davis v. Peterson, 59–165, 60+1007 (evidence held to show an agency to buy land and not a joint purchase); Rice v. Longfellow, 78–394, 81+207 (correspondence held to show agency to buy and ship certain fruit); State v. Fel-

146. Modification of contract—A contract of agency or power of attorney is subject to modification.[80]

147. Right to act through agent—It is the general rule that what a party may do in person in regard to his property he may do by his agent duly authorized thereto.[81]

148. Agencies to sell farm machinery—Cases are cited below involving the construction of particular contracts of agency for the sale of farm machinery.[82]

PROOF OF AGENCY

149. In general—A single act of an assumed agent, and a single recognition of his authority by the principal may be so unequivocal, positive, and comprehensive, as to prove agency to do other similar acts.[83] Agency may be inferred from the course of dealing between the parties.[84] It cannot be proved by the acts or declarations of the assumed agent,[85] or by reputation,[86] or by the mere fact that the assumed agent was "acting" for the principal.[87] It is competent to call an alleged agent, and prove by him facts within his personal knowledge tending to establish his agency. Such evidence is not hearsay, but original, and not within the rule that agency cannot be proved by the admissions or declarations of the alleged agent.[88] Agency to do a particular act is not to be inferred from the mere fact that the principal employed the assumed agent at another time to do another and different act.[89] As a general rule, the fact of agency cannot be established by proof of the acts of a pretended agent, in the absence of evidence tending to show the principal's knowledge of such acts or assent to them; yet, when the acts are of such a character and so continued as to justify a reasonable inference that the principal had knowledge of them, and would not have permitted the same if unauthorized, the acts themselves are competent evidence of agency.[90] It is unnecessary to prove agency by direct evi-

lows, 98–179, 107+542, 108+825 (agency for sale of coal).

[79] First Nat. Bank v. Bentley, 27–87, 6+422 (renewal of note at bank); Prentiss v. Nelson, 69–496, 72+831 (sale of realty); Flanigan v. Phelps, 42–186, 43+1113 (no agency between several joint makers of a note is implied from their relation as co-signers); Armstrong v. St. P. etc. Co., 48–113, 49+233, 50+1029 (contract held one of sale and not of agency); Blexrud v. Kuster, 62–455, 64+1140 (evidence held not to justify finding that son bidding at execution sale was agent of his father); Burgess v. Graff, 72–96, 75+113 (owner of building held not to be the agent of the party holding the legal title as security–contract for services and materials in connection with building); Seymour v. Burton, 78–79, 80+846 (evidence held to justify finding that defendant was principal on note).

[80] Gray v. Barge, 47–498, 50+1014; Dayton v. Nell, 43–246, 45+231. See Gates v. Nat. etc. Union, 46–419, 49+232.

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

[82] Mpls. H. Works v. Smith, 30–399, 16+462; Plano Mfg. Co. v. Buxton, 36–203; 30+668; St. Paul H. Co. v. Nicolin, 36–232, 30+763; Nichols v. Wadsworth, 40–547, 42+541; McCormick v. Thompson, 46–15, 48+415; N. W. Imp. Co. v. Rowell, 52–326, 54+186; Clark v. Gaar, 78–492, 81+530; Deering v. Hamilton, 80–162, 83+44; Plano Mfg. Co. v. Klatt, 87–27, 91+22; Gaar v. Brundage, 89–412, 94+1091; Osborne v. Josselyn, 92–266, 99+890; Eggleston v. Advance T. Co., 96–241, 104+891.

[83] Wilcox v. Chi. etc. Ry., 24–269; Anderson v. Johnson, 74–171, 77+26. See State v. Mahoney, 23–181.

[84] Graves v. Horton, 38–66, 35+568; Neibles v. Mpls. etc. Ry., 37–151, 33+332; Dennis v. Knight, 39–149, 39+304; Jensen v. Weide, 42–59, 43+688; Pulliam v. Adamson, 43–511, 45+1132; Eisenberg v. Matthews, 84–76, 86+870.

[85] Sencerbox v. McGrade, 6–484(334); Graves v. Horton, 38–66, 35+568; Larson v. Lombard Invest. Co., 51–141, 53+179; Gude v. Exchange F. Ins. Co., 53–220, 54+1117; Halverson v. Chi. etc. Ry., 57–142, 58+871; Fowlds v. Evans, 60–513, 63+102; Roeller v. Hall, 62–241, 64+559; Blexrud v. Kuster, 62–455, 64+1140; First Nat. Bank v. St. Anthony etc. Co., 103–82, 114+265.

[86] Graves v. Horton, 38–66, 35+568.

[87] Walsh v. St. P. T. Co., 39–23, 38+631.

[88] First Nat. Bank v. St. Anthony etc. Co., 103–82, 114+265.

[89] Graves v. Horton, 38–66, 35+568.

[90] Fowlds v. Evans, 52–551, 54+743.

dence. It may be proved by circumstances such as the relation of the parties to each other and their conduct with reference to the subject-matter.[91] The fact that A is a relative of B is inadmissible to prove that he is an agent of B.[92] The fact that A is insolvent is inadmissible to prove that he is not the agent of B.[93]

150. Inferable from conduct of principal—Scope—When an agency is to be inferred from the conduct of the principal, that conduct furnishes the only evidence of its extent as well as of its existence. Authority of an agent to do a particular act cannot be inferred from the fact that another act of an entirely different character, done by the agent in the name of the principal, was acquiesced in by the latter.[94]

151. Not inferable from agent's acts alone—A's authority to act for B may be inferred from the course of dealing of A and B, but not from the acts of A alone, even though they are done in B's name.[95] An agent cannot create in himself an authority to do a particular act merely by its performance.[96]

POWERS OF AGENT

152. In general—The extent of the authority of an agent depends upon the will of the principal, and a principal is bound by the acts of his agent only to the extent of the authority, actual or apparent, with which he has clothed him. An agent cannot create in himself an authority to do a particular act merely by its performance.[97] When an agent is appointed for a particular purpose and authorized to do certain acts the liability of the principal for such acts depends upon (1) the power actually conferred; (2) the power reasonably necessary for the execution of those actually conferred; (3) the powers annexed by custom or usage; and (4) the powers in addition thereto which the principal by his words or conduct leads third persons reasonably to believe that the agent possesses. The second and third of these elements may be referred either to the doctrine of implied authority or to estoppel. Implied authority is actual authority. It arises out of the authority expressly conferred. A principal will be presumed to have conferred all auxiliary authority reasonably necessary to make the express authority effective. But it may be necessary at times to invoke the doctrine of estoppel to prevent the principal from showing that the fact is contrary to this reasonable presumption. The fourth element rests entirely upon the doctrine of estoppel. The principal has held the agent out as one having the authority which to a reasonably prudent person he appears to have. We are here dealing with matters as they appear, not necessarily as they are in fact. The point of view is that of the third person who is dealing with the agent. The principal being responsible for the conditions must bear the risks which attach thereto. Having made it appear that his agent has authority, the law raises a bar which prevents him from proving that appearance is not reality. The estoppel then arises out of the act of holding the agent out with what appears to be authority to do certain acts, and it is unnecessary to show that the principal had knowledge of the fact that the agent was actually exercising authority beyond the scope of his actual authority.[98]

153. Implied authority—An agent has implied authority to do whatever is reasonably necessary to carry out his express authority. Implied authority is

[91] Lindquist v. Dickson, 98–369, 107+958; Stewart v. Cowles, 67–184, 69+694.
[92] Janney v. Boyd, 30–319, 15+308.
[93] Haro v. Bailey, 73–409, 76+213.
[94] Humphrey v. Havens, 12–298(196).
[95] Lawrence v. Winona etc. Ry., 15–390 (313); Newman v. Springfield etc. Ins. Co., 17–123(98, 103).
[96] Burchard v. Hull, 71–430, 74+163; Graves v. Horton, 38–66, 35+568.
[97] Burchard v. Hull, 71–430, 435, 74+163.
[98] Kilborn v. Prud. Ins. Co., 99–176, 184, 108+861; Dispatch P. Co. v. Nat. Bank of Com., 109–440, 124+236.

actual authority, as distinguished from apparent authority. It arises out of the authority expressly conferred. A principal is presumed to have conferred all auxiliary authority reasonably necessary to make the express authority effective.[99] The term "implied authority" is sometimes used to denote such authority as the principal in fact intends the agent to have, where such intention is shown by his conduct rather than by his words.[1] The extent of implied power depends on the nature of the business in hand. Implied authority is never to be extended beyond its legitimate scope. The intention of the parties is the cardinal test.[2]

154. Inferable from course of dealing between principal and agent—Authority of an agent to do an act may be inferred from a course of dealing between the principal and agent;[3] and this is true even as to third parties dealing with the agent in ignorance of such course of dealing.[4]

155. Inferable from acquiescence or consent of principal—Authority of an agent to do an act may be inferred from the fact that the principal knowingly acquiesced in or assented to the act.[5]

156. Apparent or ostensible authority—A principal is bound by the acts of his agent within the apparent authority which he knowingly or negligently permits the agent to assume, or which he holds the agent out as possessing. Where one has reasonably and in good faith been led to believe from the appearance of authority which a principal permits his agent to have, and because of such belief has in good faith dealt with the agent, the principal will not be allowed to deny the agency to the prejudice of the one so dealing.[6] By creating an agency the principal bestows upon the agent a certain character, and his authority in a given case is an attribute of this character. If the principal by his express acts, or as the lawful and legal result of his words or conduct, impresses upon the agent the character of one authorized to speak or act for him in a given capacity, the authority results as a necessary attribute of the character and the principal will not be heard to assert as against third persons who have relied thereon in good faith, that he did not intent to confer so much authority or that he had given the agent express instructions not to exercise it. The principal has the right to impose lawful restrictions and limitations upon the

[99] Kilborn v. Prud. Ins. Co., 99–176, 184, 108+861; Burchard v. Hull, 71–430, 435, 74+163; Watts v. Howard, 70–122, 72+840; Gillis v. Duluth etc. Ry., 34–301, 25+603; In re Grundysen, 53–346, 55+557; Winter v. Atlantic El. Co., 88–196, 92+955; Mason v. Taylor, 38–32, 35+474; Boynton F. Co. v. Clark, 42–335, 44+121; Michaud v. MacGregor, 61–198, 63+479; Armstrong v. Chi. etc. Ry., 53–183, 54+1059; Farnham v. Thompson, 34–330, 335, 26+9; Ermentrout v. Girard etc. Co., 63–305, 310, 65+635; Harrington v. Wabash Ry., 108–257, 122+14; Dispatch P. Co. v. Nat. Bank of Com., 109–440, 124+236.

[1] Columbia M. Co. v. Nat. Bank of Com., 52–224, 53+1061; Best v. Krey, 83–32, 85+822; Dispatch P. Co. v. Nat. Bank of Com., 109–440, 124+236.

[2] In re Grundysen, 53–346, 55+557; Ermentrout v. Girard etc. Co., 63–305, 310, 65+635.

[3] Columbia M. Co. v. Nat. Bank of Com., 52–224, 53+1061; Furber v. Barnes, 32–105, 19+728; Freeman v. Lawton, 58–546, 60+667; Dexter v. Berge, 76–216, 78+1111; Wheeler v. Benton, 67–293, 69+927; Pulliam v. Adamson, 43–511, 45+1132.

[4] Columbia M. Co. v. Nat. Bank of Com., 52–224, 53+1061.

[5] Comfort v. Sprague, 31–405, 18+108.

[6] Columbia M. Co. v. Nat. Bank of Com., 52–224, 53+1061; Tice v. Russell, 43–66, 44+886; Mason v. Taylor, 38–32, 35+474; Am. Graphic Co. v. Mpls. etc. Ry., 44–93, 46+143; Finance Co. v. Old P. C. Co., 65–442, 447, 68+70; Wheeler v. Benton, 67–293, 69+927; Am. T. & S. Bank v. Gluck, 68–129, 133, 70+1085; Hare v. Bailey, 73–409, 76+213; Buckingham v. Dafoe, 78–268, 80+974; Jackson v. Mut. B. L. Ins. Co., 79–43, 81+545, 82+366; Van Santvoord v. Smith, 79–316, 82+642; Best v. Krey, 83–32, 85+822; Dowagiac Mfg. Co. v. Watson, 90–100, 95+884; Eggleston v. Advance T. Co., 96–241, 104+891; Barton v. Wilson, 96–334, 104+968; Dispatch P. Co. v. Nat. Bank of Com., 109–440, 124+236. See Hunt v. Pitts, 69–539, 72+813; Morse v. St. Paul F. & M. Ins. Co., 21–407; Burgess v. Graff, 72–96, 75+113; Thompson v. Truesdale, 61–129, 63+259.

agent, and they are binding and conclusive upon all who have knowledge of them, provided the principal has done nothing inconsistent by which such limitations are nullified. The principal cannot be estopped unless he permitted the agent to assume the authority or placed him in the situation from which the authority became apparent. But when, by his voluntary act, he has placed his agent in such a situation that a person of ordinary prudence, conversant with business usage, is justified in assuming that the agent has authority to perform a particular act in a particular manner on behalf of his principal, he is estopped to deny the authority as against a third person who in good faith relies upon such appearance.[7] To bind a principal for an unauthorized act of his agent, on the ground that a long course of dealing and conduct on the part of the agent clothed him with apparent authority, it must appear that the principal had notice of such course of dealing and conduct, or was negligent in not having notice of it.[8] It is generally said that the doctrine of apparent or ostensible authority rests on the principle of estoppel.[9] But it seems unnecessary to invoke the principle of estoppel. The doctrine of apparent authority was established in the law of agency long before courts began to use the language of estoppel.[10] A third party cannot rely on an apparent authority against express warnings from the principal.[11] A party cannot invoke the doctrine of apparent authority unless he relied upon it in dealing with the agent.[12]

157. Authority derived from custom or usage—Where a principal confers upon his agent an authority of a kind, or empowers him to transact business of a nature, in reference to which there is a well-defined and publicly known usage, it is the presumption of the law, in the absence of anything to indicate a contrary intent, that the authority was conferred in contemplation of the usage; and therefore third persons who deal with the agent in good faith have a right to presume that the agent has been clothed with all the powers with which, according to such usage in that particular business, similar agents are clothed. But, in order to give the usage this effect, it must be known to the principal, or have existed for such a length of time, and become so widely known, as to warrant the presumption that the principal had it in view at the time he appointed the agent.[13]

158. Authority to buy or sell—In general—An agent with authority to buy or sell has authority to do so in the usual manner.[14] He may sell with a warranty or on approval.[15] He may agree to do anything ordinarily incident to a sale, as to install a furnace.[16] He has no implied authority to agree that the price shall be set off against a personal debt of his own.[17] If a power should authorize an agent to buy one hundred bales of cotton for his principal, and he should purchase fifty from one man, and fifty from another, at different times, or if he should buy fifty only, being unable to purchase any more at any price or at the price limited, the power would be well executed, as a general rule. So if A should consign a cargo of goods to B to sell, there can be no doubt that B might sell different parcels thereof to different persons and at dif-

[7] Kilborn v. Prud. Ins. Co., 99–176, 108+861; Dispatch P. Co. v. Nat. Bank of Com., 109–440, 124+236.

[8] Jackson v. Mut. B. L. Ins. Co., 79–43, 81+545, 82+366.

[9] Columbia M. Co. v. Nat. Bank of Com., 52–224, 53+1061; Brown v. Ames, 59–476, 61+448; Jackson v. Mut. B. L. Ins. Co., 79–43, 81–545, 82+366; Kilborn v. Prud. Ins. Co., 99–176, 108+861; Dispatch P. Co. v. Nat. Bank of Com., 109–440, 124+236. See 5 Col. L. Rev. 36, 354; 6 Id. 34.

[10] See 15 Harv. L. Rev. 324.

[11] Barton v. Wilson, 96–334, 104+968.

[12] Brown v. Ames, 59–476, 61+448.

[13] Burchard v. Hull, 71–430, 74+163; Kilborn v. Prud. Ins. Co., 99–176, 184, 108+861; Watts v. Howard, 70–122, 72+840.

[14] Watts v. Howard, 70–122, 72+840.

[15] See § 8567.

[16] Boynton v. Clark, 42–335, 44+121.

[17] Talboys v. Boston, 46–144, 48+688. See Stewart v. Cowles, 67–184, 69+694.

ferent times, and the sales would be held, by implication, fairly within the scope of the authority. But if the authority was to buy or sell a ship, or a plantation, it would not be well executed by the purchase or sale of a part of either.[18] The particular manner in which property is directed to be sold and conveyed, is matter of substance, and not of form merely. A power to sell at public auction does not authorize a sale by private contract, whatever may be the price offered, not even if the price is greater than that limited. Nor does an authority to sell to A for a given sum, necessarily justify a sale to B for that, or even a greater sum. A power to sell at retail does not authorize a sale at wholesale.[19]

159. Authority to sell not inferable from possession—Authority of an agent to sell property cannot be inferred from the mere fact that it is in his possession.[20]

160. Power to sell, convey, or mortgage realty—A power to sell and convey does not include a power to mortgage.[21] A power to sell on specified terms does not authorize a sale on different terms though they are more favorable.[22] The power to sell ordinarily implies the power to convey,[23] but the two powers are distinct.[24] A power which leaves the terms of the sale to the discretion of the agent authorizes a sale on credit.[25] The particular manner in which property is directed to be sold and conveyed, is matter of substance, and not of form merely. A power to sell at public auction does not authorize a sale by private contract, whatever may be the price offered, not even if the price is greater than that limited. Nor does an authority to sell to A for a given sum, necessarily justify a sale to B for that, or even a greater sum. A power to sell at retail does not authorize a sale at wholesale, nor should a power to sell a tract in town lots be construed as authorizing a sale of the whole in one body, as an entire tract.[26] A power executed by two persons authorizing an agent to convey their lands does not ordinarily cover their separate lands.[27] A power to sell is ordinarily a power to sell only for cash on delivery of the deed.[28] A power to convey realty can only be conferred by deed.[29] But a power, not under seal, to "sell" realty authorizes an agent to make an executory contract to sell.[30]

161. Authority to receive payment or collect debts—Authority to collect a debt includes authority to resort to the usual methods of enforcing payment.[31] Authority to sell and convey on such terms as to the agent may seem meet includes the authority to receive the purchase money.[32] An agent to solicit orders for goods has no implied authority to receive payment therefor.[33] Authority to collect and receive payment of a debt is not authority to collect or receive payment before it is due.[34] An agent authorized to receive or collect payment of a debt in money cannot bind his principal by collecting or receiving in payment the note, mortgage, or property of the debtor.[35] An agreement by a general agent, who possesses full power and authority to make collections and settlements of debts due his principal, entered into with a debtor of the princi-

[18] Carson v. Smith, 5-78(58).
[19] Rice v. Tavernier, 8-248(214).
[20] Greene v. Dockendorf, 13-70(66); Warder v. Rublee, 42-23, 43+569; Peerless M. Co. v. Gates, 61-124, 63+260.
[21] Morris v. Watson, 15-212(165).
[22] Dayton v. Buford, 18-126(111); Jackson v. Badger, 35-52, 26+908; Dana v. Turlay, 38-106, 35+860.
[23] Farnham v. Thompson, 34-330, 26+9.
[24] Dayton v. Nell, 43-246, 45+231; Jackson v. Badger, 35-52, 26+908.
[25] Carson v. Smith, 5-78(58).
[26] Rice v. Tavernier, 8-248(214).
[27] Gilbert v. How, 45-121, 47+643; Hersey v. Lambert, 50-373, 52+963. See Tuman v. Pillsbury, 60-520, 63+104; Snell v. Weyerhauser, 71-57, 73+633.
[28] Marble v. Bang, 54-277, 55+1131.
[29] Dayton v. Nell, 43-246, 45+231.
[30] Jackson v. Badger, 35-52, 26+908.
[31] Springfield Sav. Bank v. Kjaer, 82-180, 185, 84+752; Winter v. Atlantic El. Co., 88-196, 92+955; Schoregge v. Gordon, 29-367, 13+194.
[32] Carson v. Smith, 5-78(58).
[33] Janney v. Boyd, 30-319, 15+308; Brown v. Lally, 79-38, 81+538.
[34] Park v. Cross, 76-187, 78+1107.
[35] Trull v. Hammond, 71-172, 73+642.

pal, to accept and receive the note of a third person in payment of an indebtedness due the principal from such debtor, is valid, and will bind the principal, if founded on a valuable consideration.[36] A collecting agent has no implied authority to indorse checks in the name of his principal because he has power to collect accounts and receive money and checks payable to his principal.[37] Where A made application to a loan agent for a loan on realty, upon which a mortgage then existed, and the agent secured the loan from B, it was held that the evidence justified a holding that B's representative was justified in delivering the entire amount of the loan to the loan agent without satisfying the first mortgage.[38]

162. Authority of agent to solicit orders—An agent to solicit orders for goods has no implied authority to receive payment therefor,[39] or to agree that the price shall be set off against a debt which the agent owes to the purchaser.[40]

163. Authority to employ—Authority to employ will, in the absence of restrictive words, include authority to make a complete contract, definite as to compensation, term of service, etc. An authority to hire a servant will authorize an agent to hire a servant for such a length of time as would, under all the circumstances, be reasonable, considering the nature of the business, the season of the year in which it is prosecuted, and the length of time which it is likely to take to complete the work.[41]

164. Appropriation of principal's property to agent's use—It requires clear and specific authority to justify the appropriation of the principal's property to the use of an agent.[42]

165. Authority to do particular things—Miscellaneous cases—Cases are cited below involving the authority of an agent to borrow money;[43] to make loans;[44] to employ assistants;[45] to sell realty;[46] to modify a contract;[47] to contract for the transportation of goods;[48] to lease realty;[49] to indorse paper;[50] to contract for the fireproofing of a building;[51] to authorize the sale of grain upon which the principal had a lien and to release the lien;[52] to relinquish a claim for compensation in selling realty;[53] to sell corporate stock;[54] to sell grain;[55] to sell and indorse notes;[56] to execute notes;[57] to employ an attorney;[58] to transact business for several under a common name;[59] to employ a physician;[60] to sell goods beyond a certain limit;[61] to extend time of payment;[62] to waive conditions of a railway ticket;[63] to employ men to do

[36] Nichols v. Hackney, 78–461, 81+322.
[37] Deering v. Kelso, 74–41, 76+792. See Best v. Krey, 83–32, 85+822.
[38] Murphy v. Becker, 101–329, 112+264.
[39] Janney v. Boyd, 30–319, 15+308; Brown v. Lally, 79–38, 81+538.
[40] Talboys v. Boston, 46–144, 48+688. See Stewart v. Cowles, 67–184, 69+694.
[41] Drohan v. Merrill, 75–251, 77+957.
[42] Talboys v. Boston, 46–144, 48+688.
[43] Humphrey v. Havens, 12–298(196).
[44] Lewis v. Willoughby, 43–307, 45+439; Adamson v. Wiggins, 45–448, 48+185.
[45] Gillis v. Duluth etc. Ry., 34–301, 25+603; Church v. Chi. etc. Ry., 50–218, 52+647; Olson v. G. N. Ry., 81–402, 84+219; Drohan v. Merrill, 75–251, 77+957.
[46] Dayton v. Buford, 18–126(111); Thomas v. Joslin, 30–388, 15+675; Hornsby v. Hause, 35–369, 29+119; Payne v. Hackney, 84–195, 87+608.
[47] Michaud v. MacGregor, 61–198, 63+479; Van Santvoord v. Smith, 79–316, 82+642.
[48] Armstrong v. Chi. etc. Ry., 53–183, 54+1059.
[49] Schumacher v. Pabst, 78–50, 80+838.
[50] Deering v. Kelso, 74–41, 76+792; Best v. Krey, 83–32, 85+822; Dispatch P. Co. v. Nat. Bank of Com., 109–440, 124+236.
[51] Swanson v. Andrus, 84–168, 87+363, 88+252.
[52] Winter v. Atlantic El. Co., 88–196, 92+955.
[53] Wass v. Atwater, 33–83, 22+8.
[54] Morrissey v. Guaranty S. & L. Assn., 81–426, 84+219.
[55] Murray v. Pillsbury, 59–85, 60+844.
[56] Harris v. Johnston, 54–177, 55+970.
[57] West v. Sibley, 76–167, 78+961.
[58] Comfort v. Sprague, 31–405, 18+108.
[59] Cooper v. Breckenridge, 11–341(241).
[60] Hanscom v. Mpls. St. Ry., 53–119, 54+944.
[61] Van Doren v. Wright, 54–455, 56+51.
[62] Wheeler v. Benton, 71–456, 74+154.
[63] Thompson v. Truesdale, 61–129, 63+259.

work at a particular place;[64] to settle a claim for damages from the flooding of lands;[65] to order goods.[66]

166. Managing agent—The powers of a managing agent are necessarily broad.[67]

167. Effect of private instructions—Every agency, whether general or special, carries with it authority to do whatever is usual and necessary to carry into effect the principal power, and the principal cannot restrict his liability for acts of his agent thus within the apparent scope of his authority by private instructions not communicated to those with whom he deals.[68]

168. Presumption that agent acts with authority—An agent is presumed to be acting within the scope of his authority.[69]

169. Third parties charged with notice of powers—Third parties dealing with an agent are charged with notice of his powers. They cannot rely on his assumption of authority. They must investigate and ascertain his powers at their peril.[70] Notice that the agent executing a note in the name of his principal is one of the payees named in it is notice of his want of authority.[71]

170. Powers of attorney—Construction in general—Powers of attorney are to be construed strictly and the powers granted strictly pursued.[72] Still, the object of construction is to ascertain and carry out the intention of the parties as expressed in the language used.[73] The general rules applicable to the construction of instruments in general apply here.[74] A power to an agent to act for his principal must, in the absence of anything to show a different intention, be construed as giving authority to act in the separate individual business of his principal.[75] A recital of a fact in a power of attorney to convey land is not, as against a subsequent grantee from the grantor of the power, evidence to identify the land intended by the power with that subsequently granted.[76]

171. Blank power of attorney—Powers of attorney are sometimes executed with a blank for the name of the attorney. The effect of such powers depends upon the circumstances.[77]

172. Particular powers of attorney construed—Cases are cited below involving the construction of particular powers of attorney.[78]

[64] Williams v. Kerrick, 105–254, 116+1026.

[65] Kanne v. Mpls. etc. Ry., 104–318, 116+470.

[66] Kimball v. N. W. etc. Co., 54–199, 55+959.

[67] Robertson L. Co. v. Anderson, 96–527, 105+972. See Barton v. Wilson, 96–334, 104+968; Peterson v. Mille Lacs L. Co., 51–90, 52+1082.

[68] Watts v. Howard, 70–122, 72+840; Gillis v. Duluth etc. Ry., 34–301, 25+603; Mason v. Taylor, 38–32, 35+474; Peterson v. Mille Lacs L. Co., 51–90, 52+1082; Van Santvoord v. Smith, 79–316, 82+642; Parsons v. Haub, 83–180, 86+14; Baker v. Chi. etc. Ry., 91–118, 97+650. See Olson v. Aultman, 81–11, 83+457.

[69] Kilborn v. Prud. Ins. Co., 99–176, 108+861; Lewis v. Willoughby, 43–307, 45+439; Adamson v. Wiggins, 45–448, 48+185; Stein v. Swensen, 44–218, 46+360; Robinson v. Blaker, 85–242, 88+845.

[70] Trull v. Hammond, 71–172, 73+642; Humphrey v. Havens, 12–298(196, 205); Dayton v. Buford, 18–126(111); Davies v. Lyon, 36–427, 31+688; Gilbert v. How, 45–121, 47+643; Talboys v. Boston, 46–144, 48+688; Nye v. Swan, 49–431, 435, 52+39; Third Nat. Bank v. Marine L. Co., 44–65, 46+145; Williams v. Kerrick, 105–254, 116+1026; Gund v. Tourtelotte, 108–71, 121+417; Talboys v. Byrne, 109–412, 124+15; Dispatch P. Co. v. Nat. Bank of Com., 109–440, 124+236.

[71] Third Nat. Bank v. Marine L. Co., 44–65, 46+145.

[72] Rice v. Tavernier, 8–248(214); Gilbert v. How, 45–121, 47+643.

[73] Tuman v. Pillsbury, 60–520, 63+104; Snell v. Weyerhauser, 71–57, 73+633.

[74] See Carson v. Smith, 5–78(58).

[75] Harris v. Johnston, 54–177, 55+970.

[76] King v. Pillsbury, 50–48, 52+131.

[77] Cox v. Manvel, 50–87, 52+273; Id., 56–358, 57+1062; Pardoe v. Merritt, 75–12, 77+552.

[78] Carson v. Smith, 5–78(58) (power to sell realty–to sell on credit–to sell undivided interest–to sell unsurveyed public lands); Rice v. Tavernier, 8–248(214) (power to convey land about to be platted–no power to sell by metes and bounds);

EXECUTION OF POWERS

173. Joint agents—Execution by less than all—Where authority to perform an act of a private nature is given to two or more agents the principal is bound only when the execution is by all, unless an intention to give a several authority is manifest.[79] The general rule does not apply where authority is given to a firm,[80] or where an act is merely ministerial.[81]

174. Mode of signing instruments—A principal is not bound by a contract in his behalf by an agent unless it is in the name of the principal.[82] The word "agent" affixed to a signature is prima facie descriptive of the person and not of the character in which he is acting. If the instrument does not otherwise disclose the principal, the agent can relieve himself of liability only by proof that he acted for and intended to bind another, for whom he was agent, and that

Carson v. Smith, 12–546(458) (power to convey realty limited to existing interests); Greve v. Coffin, 14–345(263) (power to sell and convey realty held not to cover previously acquired realty); Gilbert v. Thompson, 14–544(414) (power to sell realty executed by Sioux half-breed held to cover land subsequently acquired with scrip under act of Congress, July 17, 1854); Morris v. Watson, 15–212(165) (power to sell and convey realty held not to include power to mortgage); Wilson v. Bell, 17–61(40) (power to mortgage realty as attorney "may see fit"); St. Anthony etc. Co. v. Eastman, 20–277(249) (power held general except in the execution of deeds and mortgages); Allis v. Goldsmith, 22–123 (power to sell and convey realty held not to authorize the conveyance in question); Berkey v. Judd, 22–287 (power to convey realty held to cover realty then owned and thereafter acquired); Western Land Assn. v. Ready, 24–350 (power held not sufficiently definite under the special act to incorporate the Western Land Association); Bigelow v. Livingston, 28–57, 9+31 (power to sell and convey realty and to satisfy mortgages held to cover lands and mortgages then owned and thereafter acquired); Farnham v. Thompson, 34–330, 26+9 (power to sell realty held to include power to convey); Deakin v. Underwood, 37–98, 33+318 (power to sell realty "one-half payable on or before one year"); Cooper v. Finke, 38–2, 35+469 (power to sell and convey held to authorize assignment of certificate of sale on foreclosure); Baker v. Byerly, 40–489, 42+395 (power to use realty to extricate party from financial embarrassments held to authorize sale or mortgage); Dayton v. Nell, 43–246, 45+231 (distinction between power to sell and power to convey—power to sell "for such sums and at such prices as to him might seem meet"); Gilbert v. How, 45–121, 47+643 (power executed by two persons to convey their lands held not to cover separate property); Jones v. Bliss, 48–307, 51+375 (power to wife to sell husband's realty void—estoppel); Cox v. Manvel, 50–87, 52+273 (blank power of attorney—blank improperly filled); Hersey v. Lambert, 50–373, 52+963 (power executed by two persons to convey their lands held not to cover separate property); Harris v. Johnston, 54–177, 55+970 (power held to authorize agent to bind principal separately but not jointly); Marble v. Bang, 54–277, 55+1131 (power to sell realty held to authorize sale for cash only on delivery of deed); Bradley v. Whitesides, 55–455, 57+148 (power to convey lands to be thereafter acquired held to identify the lands sufficiently); Am. L. & T. Co. v. Billings, 58–187, 59+998 (power to sell and convey real or personal property to pay a debt held to create a lien and to be irrevocable); Thompson v. Ellenz, 58–301, 59+1023 (power held to authorize sale of lands without right of redemption); Tuman v. Pillsbury, 60–520, 63+104 (power executed by two persons to sell and convey held to cover land thereafter acquired by one of them under soldier's additional homestead act); Michaud v. MacGregor, 61–198, 63+479 (power to act for principal in constructing a building–held to authorize modification of contract with builder); Snell v. Weyerhauser, 71–57, 73+633 (power executed by husband and wife to sell and convey held to cover land thereafter acquired by husband under soldier's additional homestead act); Pardoe v. Merritt, 75–12, 77+552 (blank power of attorney filled by assignee–held valid); Murphy v. Bordwell, 83–54, 85+915 (power to draw deposit from bank–effect as a gift); Finnegan v. Brown, 90–396, 97+144 (power to convey certain land acquired under the soldier's additional homestead act held to identify land sufficiently).

[79] Lewis v. Steele, 1–88(67); Rollins v. Phelps, 5–463(373); Deakin v. Underwood, 37–98, 33+318; Smith v. Glover, 50–58, 52+912.

[80] Deakin v. Underwood, 37–98, 33+318.

[81] St. Paul Div. S. of T. v. Brown, 11–356(254).

[82] Seneerbox v. McGrade, 6–484(334); Rollins v. Phelps, 5–463(373); Fowler v. Atkinson, 6–578(412).

when the contract was executed it was so understood and intended between him and the other party.[83] An agent may sign merely the name of the principal without making the agency appear.[84] When a deed on its face purports to be the indenture of a principal, made by his attorney in fact therein designated by name, it may be properly executed by such attorney by his subscribing and affixing thereto the name and seal of the principal alone.[85]

175. Sealed instruments—If a contract which need not be under seal is executed by an agent, having authority to execute simple contracts, but not sealed contracts, and has a seal affixed to it, it may be sustained as a simple contract.[86]

RATIFICATION OF UNAUTHORIZED ACTS OF AGENT

176. Definition—Ratification means confirmation. To ratify is to give sanction and validity to something done without authority. The underlying principle upon which liability for ratification attaches is that he who has commanded is legally responsible for the direct results and for the natural and probable consequences of his conduct, and that it is immaterial whether the command was given before or after the conduct.[87]

177. Distinguished from estoppel—The substance of estoppel is the inducement to another to act to his prejudice. The substance of ratification is confirmation after conduct.[88]

178. Formal requisites—Necessity of writing—An act which can be authorized only in writing cannot be ratified by parol, but the facts may give rise to an estoppel.[89] Where the adoption of any particular form or mode is necessary to confer authority upon an agent, in the first instance, there can be no valid ratification except in the same manner.[90]

179. Agent must have assumed to act for principal—Ratification is only effectual when the unauthorized act was done by a person professedly acting as the agent of the person sought to be charged as principal.[91]

180. Existence of principal—There can be no ratification by a principal who was not in existence at the time of the act.[92]

181. Necessity of full knowledge—As a general rule a ratification is not binding unless made with full knowledge of all the material facts.[93] A principal cannot be charged with such knowledge by his failure to inquire of others concerning the acts of his agent; for he may assume, until otherwise advised, that his agent will obey his instructions.[94] A principal, though without full knowledge of all the material facts, may ratify an unauthorized act of an agent in his behalf by voluntarily assuming the risk without inquiry, and upon such knowl-

[83] Deering v. Thom, 29–120, 12+350; Rollins v. Phelps, 5–463(373); Fowler v. Atkinson, 6–578(412); Sencerbox v. McGrade, 6–484(334); Pratt v. Beaupre, 13–187 (177); Bingham v. Stewart, 13–106(96); Laramee v. Tanner, 69–156, 71+1028.

[84] First Nat. Bank v. Loyhed, 28–396, 10+421; Deakin v. Underwood, 37–98, 33+318.

[85] Berkey v. Judd, 22–287, 302.

[86] Minor v. Willoughby, 3–225(154); Dickerman v. Ashton, 21–538; Schoregge v. Gordon, 29–367, 13+194; Thomas v. Joslin, 30–388, 15+675.

[87] Steffens v. Nelson, 94–365, 102+871.

[88] Id.

[89] Judd v. Arnold, 31–430, 18+151. See Goss v. Stevens, 32–472, 21+549.

[90] Western Land Assn. v. Ready, 24–350; Dayton v. Nell, 43–246, 248, 45+231.

[91] Mitchell v. Minn. F. Assn., 48–278, 51+608. See Farley v. Kittson, 27–102, 6+450, 7+267; 15 Harv. L. Rev. 221; Shuman v. Steinel, 109(Wis.)+74.

[92] McArthur v. Times P. Co., 48–319, 51+216.

[93] Woodbury v. Larned, 5–339 (271, 275); Humphrey v. Havens, 12–298(196, 206); Jackson v. Badger, 35–52, 26+908; Eckart v. Roehm, 43–271, 45+443; Talboys v. Boston, 46–144, 48+688; Ehrmanntraut v. Robinson, 52–333, 54+188; Prentiss v. Nelson, 69–496, 72+831; Hunt v. Pitts, 69–539, 72+813; Godfrey v. N. Y. Life Ins. Co., 70–224, 73+1; Johnson v. Ogren, 102–8, 112+894; Gund v. Tourtelotte, 108–71, 121+417.

[94] Johnson v. Ogren, 102–8, 112+894.

edge as he has, without caring for more.[95] Ignorance of such facts is no protection where it is intentional and deliberate, or where the circumstances are such as reasonably to put the principal upon inquiry. This general rule is intended to protect the vigilant, not to aid those who, advised by the situation and surroundings that an inquiry should be made, make none; and ignorance of the existence of facts which might have been ascertained with ordinary diligence is no protection. Where the situation naturally and reasonably suggests that some inquiry or investigation should be made, and none is made, the person failing to make it will be deemed in law possessed of such facts as the inquiry would have disclosed.[96]

182. Must be of whole act—A principal cannot ratify an unauthorized act in part. He must adopt it in whole, or not at all.[97] In other words a principal cannot repudiate an unauthorized contract of his agent in part.[98]

183. Silent acquiescence—A principal who fails to disavow an unauthorized act of an assumed agent, within a reasonable time after notice thereof, will be held to have ratified it, when the principles of equitable estoppel require it.[99] What constitutes a reasonable time depends upon the circumstances, and is a question for the jury unless the evidence is conclusive.[1] Silence or inaction may operate as a ratification as to third parties when it would not so operate as to the agent.[2] The motives of the principal for silence are immaterial.[3] It has been said, obiter, that, "a failure to disavow the acts of a mere volunteer, who meddlingly assumes to act without authority as agent of another, will not constitute ratification," [4] but this is questionable.[5] A person is not bound to disavow the criminal acts of a mere stranger.[6] The doctrine of ratification by laches cannot be invoked in favor of the party guilty of the laches.[7]

184. Accepting and retaining benefits of act—If a principal accepts and retains the benefits or profits of an unauthorized act of an agent, with full knowledge of the material facts, he thereby ratifies the act.[8] But the principal may, upon learning of the agent exceeding his authority, repudiate the unauthorized act without restoring the property, if, before he learned of the unauthorized act, he had disposed of the property, so that he could not restore it, or if its restoration would be of no practical value to the other party.[9] The mere receipt and retention, by an agent, of deposit or earnest-money paid upon a contract, does not estop the principal to deny the validity of the contract.[10]

[95] Ehrmanntraut v. Robinson, 52–333, 54+188.

[96] Bartleson v. Vanderhoff, 96–184, 104+820.

[97] Nye v. Swan, 49–431, 52+39; Fort Dearborn Nat. Bank v. Seymour, 71–81, 73+724. See Jordan v. Humphrey, 31–495, 18+450; Acheson v. Chase, 28–211, 9+734; King v. Franklin L. Co., 80–274, 83+170.

[98] Nat. Citizens' Bank v. Bowen, 109–473, 124+241.

[99] Smith v. Fletcher, 75–189, 77+800; Robbins v. Blanding, 87–246, 91+844; Stearns v. Johnson, 19–540(470); Hawkins v. Lange, 22–557; Dana v. Turlay, 38–106, 35+860; Triggs v. Jones, 46–277, 48+1113; Jones v. Bliss, 48–307, 51+375; Singer Mfg. Co. v. Flynn, 63–475, 65+923; Anderson v. Johnson, 74–171, 77+26; Hause v. Mannheimer, 67–194, 69+810; Lowe v. Benz, 107–562, 119+249.

[1] Stearns v. Johnson, 19–540(470).

[2] Triggs v. Jones, 46–277, 48+1113. See Stearns v. Johnson, 19–540(470).

[3] Stearns v. Johnson, 19–540(470).

[4] Robbins v. Blanding, 87–246, 91+844. See Simmons v. Holster, 13–249(232).

[5] See Heyn v. O'Hagen, 60 Mich. 157; Saveland v. Green, 40 Wis. 438.

[6] Simmons v. Holster, 13–249(232).

[7] Turner v. Kennedy, 57–104, 58+823.

[8] Woodbury v. Larned, 5–339(271); Melby v. Osborne, 33–492, 24+253; Albitz v. Mpls. etc. Ry., 40–476, 42+394; Willis v. St. P. S. Co., 53–370, 55+550; Anderson v. Johnson, 74–171, 77+26; Landin v. Moorhead Nat. Bank, 74–222, 77+35; Coggins v. Higbie, 83–83, 85+930; Payne v. Hackney, 84–195, 87+608; Johnson v. Ogren, 102–8, 112+894. See Eckart v. Roehm, 43–271, 45+443; Hunt v. Pitts, 69–539, 72+813.

[9] Humphrey v. Havens, 12–298(196).

[10] Jackson v. Badger, 35–52, 26+908.

185. Effort to avoid loss—A mere effort on the part of the principal, after knowledge of the unauthorized act of the agent, to avoid loss thereby, will not amount to a ratification, so as to relieve the agent of liability.[11]

186. Need not be communicated—The validity of a ratification does not, in general, depend on its being communicated.[12]

187. Void acts—There can be no ratification of an act which the principal himself could not legally have done in the first instance.[13]

188. Rescission of ratification—A ratification, when once made with full knowledge, cannot be rescinded.[14]

189. Torts—Mere silence, or neglect to disavow, has been held not to constitute a ratification of a libel.[15]

190. Evidence—Sufficiency—Cases are cited below involving the sufficiency of the evidence to show a ratification.[16]

191. Effect—Ratification of the act of another, performed in the assumed capacity of an agent, though wholly without precedent authority, creates the relation of principal and agent, and the principal becomes bound by the act to the same extent as if it had been done by his previous authorization. The ratification relates back to the act and is equivalent to prior authority.[17] By ratification the principal absolves the agent from all responsibility for loss or damages growing out of the unauthorized transaction and himself assumes the responsibility of the transaction, with all its advantages and all its burdens.[18]

RIGHTS AND LIABILITIES INTER SE

192. Good faith and loyalty—Trust relation—An agent owes to his principal the utmost good faith and loyalty.[19] The relation of an agent to his principal is often a trust relation.[20]

193. Conflict of duty and interest—An agent cannot be allowed to place himself in a position where duty and interest conflict [21]—in a position antagonistic to his principal.[22]

194. Agent cannot make profit—An agent cannot make a profit out of his agency. Any profit that may accrue belongs to the principal, whether it results from the performance of duty or a violation thereof.[23] This rule applies only when the agency is established.[24]

[11] Triggs v. Jones, 46–277, 48+1113. See Stearns v. Johnson, 19–540(470).

[12] Sheffield v. Ladue, 16–388(346, 352).

[13] Nash v. St. Paul, 8–172(143, 152); Sanford v. Johnson, 24–172; Dayton v. Nell, 43–246, 45+231. See Sanborn v. School Dist., 12–17 (1, 13); Coursolle v. Weyerhauser, 69–328, 72+697.

[14] Hunter v. Cobe, 84–187, 87+612.

[15] Simmons v. Holster, 13–249(232).

[16] Minor v. Willoughby, 3–225(154); Foreman v. Barrie, 24–349; Goss v. Stevens, 32–472, 21+549; Lineer v. Girrbach, 34–410, 26+229; Stillman v. Fitzgerald, 37–186, 33+564; Dana v. Turlay, 38–106, 35+860; Wright v. Vineyard M. E. Church, 72–78, 74+1015; Schumacher v. Pabst, 78–50, 80+838; Talboys v. Byrne, 109–412, 124+15.

[17] Hunter v. Cobe, 84–187, 87+612; Woodbury v. Larned, 5–339(271); Sanborn v. School Dist., 12–17(1, 13); Sheffield v. Ladue, 16–388(346, 351); Janney v. Boyd, 30–319, 15+308; Goss v. Stevens, 32–472, 21+549; McArthur v. Times P. Co., 48–319, 322, 51+216; Steffens v. Nelson, 94–365, 102+871.

[18] Triggs v. Jones, 46–277, 283, 48+1113; Sheffield v. Ladue, 16–388(346).

[19] Kingsley v. Wheeler, 95–360, 104+543; Friesenhahn v. Bushnell, 47–443, 446, 50+597; Hobart v. Sherburne, 66–171, 68+841; Lum v. McEwen, 56–278, 57+662; Merchants' Ins. Co. v. Prince, 50–53, 52+131; Barnett v. Block, 94–138, 102+390.

[20] Milton v. Johnson, 79–170, 81+842; Coffin v. Craig, 89–226, 94+680.

[21] Crump v. Ingersoll, 44–84, 46+141; Id., 47–179, 49+739; St. Paul T. Co. v. Strong, 85–1, 88+256; Kingsley v. Wheeler, 95–360, 104+543; Williams v. Journal P. Co., 43–537, 45+1133; Third Nat. Bank v. Marine L. Co., 44–65, 46+145; Lum v. McEwen, 56–278, 57+662; Merchants' Ins. Co. v. Prince, 50–53, 52+131; Bartleson v. Vanderhoff, 96–184, 104+820.

[22] Friesenhahn v. Bushnell, 47–443, 50+597.

[23] Tilleny v. Wolverton, 46–256, 48+908; Crump v. Ingersoll, 44–84, 46+141; Smitz

195. Duty to disclose—An agent who is authorized by his principal to sell or exchange the property of the latter, upon specified prices and terms, is bound, upon learning that a more advantageous sale or exchange can be made, the facts concerning which are unknown to the principal, to communicate the same to him before making the sale as expressly authorized, and his failure to do so amounts to a fraud in law.[25] Especially is this true where the agent purchases property from the principal.[26]

196. Duty to obey instructions—It is ordinarily the duty of an agent to obey the instructions of his principal,[27] but exceptional circumstances may justify him in disregarding them.[28]

197. Duty of agent to exercise care and skill—An agent is bound to exercise ordinary or reasonable care and skill in the business intrusted to him. He is not an insurer. He is bound to exercise the care and skill usually exercised by persons of ordinary prudence and skill engaged in the same business. He must exercise the degree of care usually exercised by persons of ordinary prudence in their own affairs.[29]

198. Acting for both parties—It is the general rule that an agent cannot act for both parties in making a contract requiring the exercise of discretion. Such double employment renders the contract voidable at the election of a party who was ignorant of it, and prevents a recovery for services.[30] The rule does not depend upon intentional fraud, or actual injury, but is an inflexible rule. founded upon the fact that the two employments are incompatible.[31] An agent may act for both parties if their interests do not conflict.[32] An agent will not be allowed to serve two masters without the intelligent consent of both.[33]

v. Leopold, 51–455, 53+719; Goodhue F. W. Co. v. Davis, 81–210, 83+531; Merriam v. Johnson, 86–61, 90+116; Snell v. Goodlander, 90–533, 97+421; Farmers' W. Assn. v. Montgomery, 92–194, 99+776; Schick v. Suttle, 94–135, 102+217; Kingsley v. Wheeler, 95–360, 104+543; Burgraf v. Byrnes, 94–418, 103+215; Bartleson v. Vanderhoff, 96–184, 104+820.

[24] Bartleson v. Vanderhoff, 96–184, 104+820.

[25] Hegenmyer v. Marks, 37–6, 32+785; Barringer v. Stoltz, 39–63, 38+808; Tillney v. Wolverton, 46–256, 48+908; Smitz v. Leopold, 51–455, 53+719; Hobart v. Sherburne, 66–171, 68+841; Holmes v. Cathcart, 88–213, 92+956; Snell v. Goodlander, 90–533, 97+421; Kingsley v. Wheeler, 95–360, 104+543.

[26] Kingsley v. Wheeler, 95–360, 104+543; Tilleny v. Wolverton, 46–256, 48+908. See Hillis v. Stout, 42–410, 44+982.

[27] Lake City etc. Co. v. McVean, 32–301, 20+233; Rice v. Longfellow, 82–154, 84+660.

[28] See Davis v. Kobe, 36–214, 30+662.

[29] Borup v. Nininger, 5–523(417) (failure to give notice to charge indorser of note); Wykoff v. Irvine, 6–496(344) (agency to loan money–requisite care in making loans–insolvency of borrower subsequent to loan); Nininger v. Knox, 8–140 (110) (failure to give notice to charge indorser of note); Burpe v. Van Eman, 11–327(231) (failure to rent land and collect rents); Milburn v. Evans, 30–89, 14+271 (failure to insure property); Furber v. Barnes, 32–105, 19+728 (money stolen without fault of agent); Lake City etc. Co. v. McVean, 32–301, 20+233 (purchase of unsound wheat by agent contrary to instructions); Jagger v. Nat. G. A. Bank, 53–386, 55+545 (failure to give notice to charge indorser of note); West v. St. P. Nat. Bank, 54–466, 56+54 (id.); Hardwick v. Ickler, 71–25, 73+519 (negligence in making loan–failure to obtain abstract and have title examined–failure to inquire as to prior incumbrance); Wheadon v. Mead, 72–372, 75+598 (requisite care in making loan on realty); Rice v. Longfellow, 82–154, 84+660 (failure to buy certain grade of fruit as directed); Eisenberg v. Matthews, 84–76, 86+870 (negligence in loaning money); Veltum v. Koehler, 85–125, 88+432 (failure to pay a mortgage); Fort Dearborn Nat. Bank v. Security Bank, 87–81, 91+257 (failure to give notice to charge indorser of note).

[30] Webb v. Paxton, 36–532, 32+749; Crump v. Ingersoll, 44–84, 46+141; Id., 47–179, 49+739; Hobart v. Sherburne, 66–171, 68+841; St. Paul T. Co. v. Strong, 85–1, 88+256; Dartt v. Sonnesyn, 86–55, 90+115.

[31] Webb v. Paxton, 36–532, 32+749; Lum v. McEwen, 56–278, 57+662.

[32] Selover v. Isle Harbor L. Co., 91–451, 459, 98+344.

[33] Lum v. McEwen, 56–278, 57+662.

199. Agent cannot contract with himself—It is the general rule that an agent cannot, by virtue of his general authority as agent, bind his principal by a contract which he makes on behalf of the principal with himself.[34]

200. Sales between principal and agent—Where an agent to sell property becomes the purchaser in fact at a sale made by himself, the sale is presumptively fraudulent and voidable at the election of the principal. The agent has the burden of proving the facts making the sale valid, as that, with full knowledge of its character and of all the facts, the principal consented to it. The fact that the agent purchased at the price at which he was authorized to sell does not take the case out of the general rule. If, while the sale is voidable, the agent resells at an increased price, the principal may require him to account for what he received on the resale.[35] An agent is not permitted to become a secret vendor or purchaser of property which he is authorized to buy or sell for his principal. If he sells to his principal his own property as the property of another, without disclosing the fact, the sale is voidable at the election of the principal, without any showing of fraud or injury.[36] A real estate agent, who induces the owner to fix a net price upon certain property, upon the supposition that a sale is to be made to a third party, cannot himself purchase the property and by such transaction, in any event, realize a greater profit than a reasonable commission in addition to the net price. If the agent is himself the purchaser, using a third party as a medium through whom to secure a deed to the premises from the owner, and then sells at an advance, he will be held accountable to the owner for the profit realized.[37]

201. Conversion by agent—Cases are cited below involving a conversion of the principal's property by an agent.[38]

202. Application of funds—Subagent—A subagent intrusted with the collection of a debt due from a third party may not apply the proceeds of the same to the payment of a claim due himself from the principal agent from whom it came, knowing that it belongs to such party, or in any way divert the funds so collected from a quick and speedy transmission to the owner thereof. Where the principal agent has forwarded collections to a subagent, and directs the latter to make any use of the funds other than the usual one of their application to the payment of the debt to the principal, and such subagent complies with such direction, he becomes responsible therefor to the principal.[39] The defendant was, by an instrument in writing, authorized by the owner of real property to collect rents and make a certain disposition thereof. Subsequently he accepted an order drawn by such owner directing him to pay a specified portion of the accruing rents to the payee therein. This was held a modification of the original agreement, and binding upon the defendant, though he might

[34] Williams v. Journal P. Co., 43–537, 45+1133; Third Nat. Bank v. Marine L. Co., 44–65, 46+145.

[35] Tilleny v. Wolverton, 46–256, 48+908; Id., 50–419, 52+909; Id., 54–75, 55+822; Merriam v. Johnson, 86–61, 90+116; St. Paul T. Co. v. Strong, 85–1, 88+256; Kingsley v. Wheeler, 95–360, 104+543. See Smitz v. Leopold, 51–455, 53+719; Hillis v. Stout, 42–410, 44+982.

[36] Donnelly v. Cunningham, 58–376, 59+1052; Id., 61–110, 63+246; Friesenhahn v. Bushnell, 47–443, 50+597.

[37] Merriam v. Johnson, 86–61, 90+116.

[38] Farrand v. Hurlburt, 7–477(383) (loaning in his own name money of principal); Cock v. Van Etten, 12–522(431) (id.); Greenleaf v. Egan, 30–316, 15+254 (relief allowable-accounting); Milton v. Johnson, 79–170, 81+842 (application of funds of principal by subagent to pay debt due to him from principal agent); Lahr v. Kraemer, 91–26, 97+418 (burden of proof); Chase v. Baskerville, 93–402, 101+950 (sale of goods contrary to instructions-waiver); Mpls. T. M. Co. v. Burton, 94–467, 103+335 (conversion of property received in exchange by agent for sale of farm machinery); Johnson v. Dun, 75–533, 78+98 (surrender of a bond to pay judgment).

[39] Milton v. Johnson, 79–170, 81+842.

otherwise have been entitled to apply such rent to the satisfaction of claims held by him.[40]

203. Compensation of agent—In the absence of special agreement, an agent is entitled to reasonable compensation for his services, unless it was mutually understood that they were to be rendered gratuitously.[41] Cases are cited below involving the compensation of agents under special agreements.[42]

204. Agent's lien—An agent has a lien on property in his possession, intrusted to him by the principal, to secure his expenses reasonably incurred in the care of the property.[43]

205. Fraud—Waiver—An owner of land, which his agent has sold, cannot recover damages from that agent for fraud, where such owner, knowing of a resale by the vendee and suspecting his agent of connivance in such resale at an advanced price, refuses, when the contract is still executory, to avail himself of easy means of ascertaining the truth, and nevertheless executes the contract.[44]

206. Accounting in equity—An agent may sometimes be required to account in equity.[45]

207. Duty of principal to reimburse agent—As a general rule, an agent is entitled to reimbursement for all advances and expenditures made in the course of his agency for the benefit of his principal, when the same have been properly and in good faith paid. But he cannot claim such reimbursement when the advances and expenditures were rendered necessary by his own failure to exercise reasonable care and diligence in the performance of the duties of his agency.[46]

208. Duty of principal to idemnify agent—A principal is bound to indemnify his agent against the consequences of all acts done by him in the discharge of his duties, when such acts are not illegal or the agent is justifiably ignorant of their illegality.[47]

LIABILITY OF PRINCIPAL TO THIRD PARTIES

209. Act of agent act of principal—In contemplation of law an act of an agent is the act of the principal if it is authorized.[48]

[40] Gray v. Barge, 47–498, 50+1014.

[41] Annabil v. Traverse Land Co., 108–37, 121+233.

[42] Plano Mfg. Co. v. Buxton, 36–203, 30+668 (contract for sale of farm machinery on commission construed–time agent entitled to commission); Gates v. Nat. etc. Union, 46–419, 49+232 (agency for sale of shares of stock held to refer to kind of stock which principal was then issuing); Turnbull v. N. W. T. C. Co., 46–513, 49+229 (agency for sale of goods on commission within certain territory–right of agent to commission on sales by principal within such territory); Dougan v. Turner, 51–330, 53+650 (agency for sale of goods on commission–effect of order taken by agent being countermanded by principal); N. W. etc. Co. v. Rowell, 52–326, 54+186 (agency for sale of farm machinery on commission–termination of agency–right to commissions–contract construed); Clark v. Gaar, 78–492, 81+530 (agency for sale of farm machinery on commission–commission on payments on notes–foreclosure of mortgage–commission on amounts bid); Rice v. Longfellow, 82–154, 84+660 (agency for purchase of fruit–effect of failure to follow instructions on right to compensation); Urquhart v. Scottish etc. Co., 85–69, 88+264 (loan agency–percentage of gross revenue from loans–termination of agency–effect of discharge for cause); Veltum v. Koehler, 85–125, 88+432 (agency to procure loan to pay off certain mortgages–no right to compensation until mortgages paid); Gaar v. Brundage, 89–412, 94+1091 (agency for sale of farm machinery on commission–right of agent to commission on sale by principal); Peet v. Sherwood, 47–347, 50+241 (agency to obtain loan); Flint v. Ellison, 106–536, 118+1118 (agency for sale of goods on commission).

[43] Deering v. Hamilton, 80–162, 83+44.

[44] Bartleson v. Vanderhoff, 96–184, 104+820.

[45] Coffin v. Craig, 89–226, 94+680.

[46] Veltum v. Koehler, 85–125, 88+432.

[47] See Lesher v. Getman, 30–321, 15+309; Guirney v. St. P. etc. Ry., 43–496, 46+78; 22 Harv. L. Rev. 131.

[48] Hause v. Mannheimer, 67–194, 69+810;

210. Authorized contracts—A principal is liable on all contracts made by his agent acting as such, within the scope of his authority.[49]

211. Unauthorized contracts—As a general rule a principal is not liable on the unauthorized contracts of an agent.[50]

212. Torts of agent—A principal is liable to third persons for the torts of his agent committed in the course, and within the scope, of the agency, though the principal did not authorize, participate in, or ratify them.[51] The amount of recovery is not limited to the amount of benefit received by the principal from the tort.[52] As a general rule a principal is not liable where the tort is not committed in furtherance of his business,[53] but an exception is made when the agent is in the discharge of duties which the principal owes to the public or third persons.[54] A principal, while insisting upon retaining the benefit of a contract, cannot deny the authority of his agent to make the representations by which he procured the other party to execute it.[55]

213. Principal charged with notice of agent's business methods—A principal is charged with notice of the general manner in which his general agent transacts his business.[56]

214. Possession of agent possession of principal—In contemplation of law the possession of an agent is possession of the principal.[57]

215. Notice to agent notice to principal—As a general rule notice to an agent is, in contemplation of law, notice to the principal.[58] To charge a principal with notice or knowledge possessed by his agent, the facts of which the agent has notice or knowledge must be within the scope of his agency, so that it is his duty to act upon them or to communicate them to his principal.[59] A principal is not chargeable with notice of facts learned by an agent in the course of an employment in no way connected with his agency.[60] Knowledge of an agent acquired previous to the agency, but actually present in his mind during the agency and while acting for his principal in a particular transaction, is

Weide v. Porter, 22–429; Lee v. Mpls. etc. Ry., 34–225, 25+399.

[49] Adamson v. Wiggins, 45–448, 48+185; Sherwood v. Wilkins, 50–152, 52+394.

[50] Acheson v. Chase, 28–211, 9+734 (usury); Thomas v. Joslin, 30–388, 15+675 (contract to convey realty); Eckart v. Roehm, 43–271, 45+443 (purchase of goods on credit of principal); Warder v. Rublee, 42–23, 43+569 (sale of commission extras by agent for sale of farm machinery); Finance Co. v. Old P. C. Co., 65–442, 68+70 (purchase of coal by sales-agent of coal company); Com. etc. Co. v. Dakko, 89–386, 94+1088 (usury); Barton v. Wilson, 96–334, 104+968 (purchase of goods by salesman in general store); Van Doren v. Wright, 54–455, 56+51 (sale of goods in excess of authority).

[51] Larson v. Fidelity M. L. Assn., 71–101, 73+711 (general rule stated–malicious prosecution); Davies v. Lyon, 36–427, 31+688 (deceit); Knappen v. Freeman, 47–491, 50+533 (deceit); Rich v. Minneapolis, 37–423, 35+2 (contractor removing earth from street); Anderson v. International H. Co., 104–49, 116+101(assault); Note, 88 Ann. St. Rep. 779; 4 Mich. L. Rev. 199. See, as to deceit, 16 Harv. L. Rev. 61. See § 5833.

[52] Larson v. Fidelity M. L. Assn., 71–101, 73+711.

[53] Larson v. Fidelity M. L. Assn., 71–101, 73+711 (malicious prosecution). See Simmons v. Holster, 13–249(232) (libel).

[54] McCord v. W. U. Tel. Co., 39–181, 39+315. See 14 Harv. L. Rev. 297.

[55] Albitz v. Mpls. etc. Ry., 40–476, 42+394.

[56] Stein v. Swensen, 46–360, 49+55.

[57] Peerless M. Co. v. Gates, 61–124, 63+260. See Ames v. Brown, 22–257, 260.

[58] Bates v. Johnson, 79–354, 82+649; Second Nat. Bank v. Howe, 40–390, 42+200; Jefferson v. Leithauser, 60–251, 62+277; King v. Griggs, 82–387, 85+162; Benton v. Mpls. etc. Co., 73–498, 76+265; Tilleny v. Wolverton, 50–419, 52+909. See First Nat. Bank v. Loyhed, 28–396, 399, 10+421; Pepard v. Lewis, 37–280, 33+790; St. Paul etc. Co. v. Howell, 59–295, 61+141; Marshall v. Gilman, 52–88, 53+811.

[59] Trentor v. Pothen, 46–298, 49+129; St. Paul etc. Ins. Co. v. Parsons, 47–352, 50+240; Sandberg v. Palm, 53–252, 54+1109; Jefferson v. Leithauser, 60–251, 62+277; Jackson v. Mut. B. L. Ins. Co., 79–43, 81+545, 82+366; Strauch v. May, 80–343, 83+156; Haines v. Starkey, 82–230, 84+910; Robertson v. Anderson, 96–527, 105+972. See Bergenthal v. Security S. Bank, 102–138, 112+892.

[60] St. Paul etc. Ins. Co. v. Parsons, 47–352, 50+240.

chargeable to the principal.[61] A principal is not charged where the character or circumstances of the agent's knowledge are such as to make it intrinsically improbable that he will inform his principal.[62] The general rule has been held not to justify a legal imputation of actual malice in the conduct of a principal merely because of facts known only to his agent.[63] It does not apply to knowledge of a confidential and privileged nature which the agent could not properly communicate.[64] The rule works both ways. A principal is entitled to the benefit of knowledge of his agent.[65]

216. Undisclosed principal—It is the general rule that where a contract is made by a duly authorized agent, without disclosing his principal, and the other contracting party subsequently discovers the real party, he may abandon his right to look to the agent personally and resort to the principal. Parol evidence is admissible to disclose the principal in the case of written contracts.[66] This rule applies to private contracts under seal.[67] If the owner of goods intrusts them to an agent, with authority to sell in his own name without disclosing the name of his principal, and the agent sells in his own name to one who knows nothing of any principal, but honestly believes that the agent is selling on his own account, the purchaser may set off against the demand of the principal for the price of the goods any demand which he may have against the agent which arose before notice of the actual ownership of the goods.[68] If a person contracts with another, who is in fact an agent of an undiscovered principal, and, after learning all the facts, brings an action on the contract and recovers judgment against the agent, such judgment will be a bar to an action against the principal. But an unsatisfied judgment against the agent is not a bar to an action against the undiscovered principal when discovered, if the plaintiff was ignorant of the facts as to the agency when he prosecuted his action against the agent.[69] Where the undisclosed principal denies that he is the principal, the party who seeks to enforce the contract may sue both principal and agent to determine the facts. In such a case a dismissal of the action at the close of plaintiff's case, in response to a motion to elect, is equivalent to an election to hold the other defendant.[70]

LIABILITY OF AGENT TO THIRD PARTIES

217. Acting with authority for known principal—As a general rule, an agent who, acting within the scope of his authority, enters into a contract for a known principal, is not personally liable thereon.[71]

218. Unauthorized acts—One who acts as an agent, but without authority, is liable in damages to a person dealing with him in reliance upon the assumed authority.[72] But when the agent, acting in good faith, fully discloses to the other party, at the time, all the facts touching the authority under which he

[61] Lebanon S. Bank v. Hollenbeck, 29–322, 13+145; Campion v. Whitney, 30–177, 14+806; Bowers v. Mayo, 32–241, 20+186; Wilson v. Minn. etc. Assn., 36–112, 30+401. Trentor v. Pothen, 46–298, 49+129; Haines v. Starkey, 82–230, 84+910. See First Nat. Bank v. Loyhed, 28–396, 10+421; Bergenthal v. Security S. Bank, 102–138, 112+892.

[62] Benton v. Mpls. etc. Co., 73–498, 76+265; Woodworth v. Carroll, 104–65, 112+1054. See Ames v. Brown, 22–257; 15 Harv. L. Rev. 489; 18 Id. 617.

[63] Reisan v. Mott, 42–49, 43+691.

[64] Trentor v. Pothen, 46–298, 301, 49+129; Bergenthal v. Security S. Bank, 102–138, 112+892.

[65] Haines v. Starkey, 82–230, 84+910.

[66] Lindeke v. Levy, 76–364, 79+314 (overruling Rowell v. Oleson, 32–288, 20+227); Pleins v. Wachenheimer, 108–342, 122+166. See 18 Yale L. Rev. 443; 23 Harv. L. Rev. 513.

[67] Streeter v. Janu, 90–393, 96+1128. Formerly the rule was otherwise, Mahoney v. McLean, 26–415, 4+784.

[68] Baxter v. Sherman, 73–434, 76+211.

[69] Lindquist v. Dickson, 98–369, 107+958.

[70] Gay v. Kelley, 109–101, 123+295.

[71] Moran v. Clarke, 59–456, 61+556.

[72] Newport v. Smith, 61–277, 63+734; Skaaraas v. Finnegan, 31–48, 16+456; Id., 32–107, 19+729; Pratt v. Beaupre, 13–187 (177, 179).

assumes to act, he is not personally liable.[73] One who, without authority, executes a contract for and in the name of another, adding his name as agent to the name of the assumed principal in the signature, cannot be sued on the contract, but he is liable for damages in an action in the nature of an action on the case.[74] He is liable on the contract if it contains apt words to charge him as a principal.[75]

219. Failure to disclose agency—One who enters into a contract as an agent, but without disclosing the fact of agency (including, at least in some cases, the name of the principal), is liable thereon personally, to the same extent as if he were the principal in interest.[76] In order to confine the credit to the principal it is generally necessary that he should be known as the responsible person.[77] A written contract by an agent must, to relieve him from liability on it, appear from the instrument itself to be made on behalf of the principal. It is not enough that the agent describes himself as agent in signing it.[78] Where one party to a contract deals with another as principal, and afterwards discovers that such party was in fact an agent for an undisclosed principal, he may enforce the contract against such agent, or against the principal, but, where the undisclosed principal denies that he is the principal, the party who seeks to enforce the contract may commence an action against both, in order to ascertain the facts.[79]

220. Failure to bind principal—As a general rule, where an agent so executes his authority as not to bind his principal he is personally liable for his acts.[80]

221. Irresponsible principal—If an agent contracts for and on behalf of a principal who cannot be sued, such as an unincorporated club or association, he is personally liable.[81]

222. Money paid by mistake—An agent to whom money is paid for his principal by mistake is not liable to the party paying it, if he has paid it over to the principal before notice of the mistake and that he is required not to pay it over. The notice need not be formal, but it must apprise him of the mistake, and that the party intends by reason of it to reclaim the money. One having no interest or authority in the matter cannot give such notice.[82]

223. Pledging credit of agent—An agent is liable where he expressly pledges his own credit.[83]

224. Torts—An agent may be liable to a third party for conversion,[84] false representations,[85] or trespass.[86]

TERMINATION OF AGENCY

225. Principal may revoke agency at will—General rule—A power of attorney may be revoked at any time by the principal at his pleasure, though the agency is expressly declared to be irrevocable, unless it is coupled with an inter-

[73] Newport v. Smith, 61–277, 63+734; Lilly v. Smales, (1892) 1 Q. B. 456.
[74] Sheffield v. Ladue, 16–388(346).
[75] See Rollins v. Phelps, 5–463(373).
[76] Amans v. Campbell, 70–493, 73+506; Bacon v. Rupert, 39–512, 40+832; Brown v. Ames, 59–476, 61+448.
[77] Rollins v. Phelps, 5–463(373).
[78] Fowler v. Atkinson, 6–578(412); Pratt v. Beaupre, 13–187(177).
[79] Gay v. Kelley, 109–101, 123+295.
[80] Rollins v. Phelps, 5–463(373).
[81] Spencer v. Tozer, 15–146(112). See Germania Bank v. Michaud, 62–459, 465, 65+70.
[82] Shepard v. Sherin, 43–382, 45+718.
[83] Rondquist v. Higham, 33–490, 24+199 (personal warranty of agent selling farm machinery).
[84] Leuthold v. Fairchild, 35–99, 27+503, 28+218; McLennan v. Mpls. etc. Co., 57–317, 59+628.
[85] Clark v. Lovering, 37–120, 33+776; Hedin v. Mpls. M. & S. Institute, 62–146, 64+158.
[86] Strong v. Colter, 13–82(77).

est, or given for a valuable consideration, or for security.[87] In dealing with an agent a third party generally takes the risk of a revocation of the agency.[88]

226. Power and right to revoke distinguished—A principal may have the power as distinguished from the right to revoke an agency. If an agency is revoked without right the agent has an action for damages for breach of contract.[89]

227. Power coupled with an interest—A power coupled with an interest cannot be revoked at the will of the principal and is not revoked by the death of the principal. It is not enough to constitute a power coupled with an interest that the agent is to have an interest in the proceeds arising from the execution of the agency. There must be an interest in the thing itself which is the subject of the power, and not merely in that which is produced by the exercise of the power. A power "coupled with an interest" is one ingrafted on an estate, or on the thing itself; and the power and the estate must be united and coexist.[90]

228. Power given as security—A power given as security for the payment of money, or for the performance of any act which is deemed valuable, is not revocable at the will of the principal.[91]

229. Death of principal—The death of the principal terminates an agency not coupled with an interest.[92]

230. Bankruptcy of principal—The bankruptcy of the principal generally terminates an agency.[93]

231. Destruction of subject-matter—An agency may be terminated by a destruction of the subject-matter.[94]

232. Resignation of agent—An agency may be terminated by the resignation of the agent.[95]

233. Sale of subject-matter—A landowner may employ several different agents to act for him in the sale of the same tract of land, and a sale of one will operate as a revocation of the authority of the others.[96]

234. Stipulations for notice—A contract of agency, which leaves the agent free to terminate his relations with the principal on reasonable or specified notice, must be construed to confer the same right upon the principal, unless provisions to the contrary are stipulated.[97]

235. Miscellaneous cases—Cases are cited below involving questions relating to the termination of agencies.[98]

[87] Buffalo L. & E. Co. v. Strong, 91–84, 97+575; Stensgaard v. Smith, 43–11, 44+669.

[88] Ahern v. Baker, 34–98, 24+341.

[89] Alworth v. Seymour, 42–526, 44+1030.

[90] Alworth v. Seymour, 42–526, 44+1030; Ferman v. Lombard Invest. Co., 56–166, 57+309; Am. L. & T. Co. v. Billings, 58–187, 59+998; Buffalo L. & E. Co. v. Strong, 91–84, 97+575. See 12 Harv. L. Rev. 262; 19 Id. 287.

[91] Am. L. & T. Co. v. Billings, 58–187, 59+998; Ferman v. Lombard Invest. Co., 56–166, 169, 57–309. See Van Dusen v. Piper, 42–43, 43+684.

[92] McLaughlin v. Betcher, 87–1, 91+14; Dexter v. Berge, 76–216, 78+1111; Ahern v. Baker, 34–98, 24+341; Varley v. Sims, 100–331, 337, 111+269.

[93] Miller v. State Bank, 57–319, 59+309.

[94] Ahern v. Baker, 34–98, 24+341.

[95] See Ganser v. Fireman's F. Ins. Co., 38–74, 35+584.

[96] Ahern v. Baker, 34–98, 24+341.

[97] Newhall v. Journal P. Co., 105–44, 117+228.

[98] See Deering v. Hamilton, 80–162, 83+44 (contract for sale of farm machinery held not terminable by principal without reasonable cause); Urquhart v. Scottish etc. Co., 85–69, 88+264 (agent may be discharged at any time for sufficient cause); Kingsley v. Wheeler, 95–360, 104+543 (a letter held not to constitute a revocation of authority to sell land); Hoover v. Perkins, 41–143, 42+866 (contract held to authorize either party to terminate agency at any time); Hillis v. Stout, 42–410, 44+982 (facts held to show an extension of an agency beyond the original term).

ACTIONS

236. Parties—By virtue of statute an agent in whose name a contract is made for his principal may sue thereon in his own name without joining the principal.[99] An agent depositing money of his principal in his own name, as agent, cannot sue therefor in his own name after his agency ceases.[1] If an agent by mistake pays to a third party money in his possession belonging to his principal, he may sue in his own name to recover it back.[2]

237. Undisclosed principal—An undisclosed principal may enforce a contract made in his behalf by an agent.[3] Where A purchased goods from B with an agreement that the price should be set off against a debt which B owed A, and the goods were delivered by C, who was then first disclosed as the principal of B, it was held that by accepting the goods with knowledge of the agency A became liable therefor to C, without regard to the unauthorized agreement as to setting off the debt of B.[4] Where an agent contracts as a principal with one who has no notice of the agency, the latter, in an action by the principal on the contract, is entitled to the benefit of all payments made by him to the agent before notice of plaintiff's rights.[5] An undisclosed principal is entitled to the benefit of the knowledge of his agent.[6]

238. Demand—Whether a demand is necessary before suit by a principal against his agent to recover money in his hands belonging to the principal depends upon the question whether or not, by the nature of the agency, it is the duty of the agent to pay over immediately on receipt of the money.[7] An agent employed to collect a debt and to remit the amount collected, after deducting his charges, is liable to an action by his principal for the recovery of the money without previous demand, if the agent neglects to make remittance within a reasonable time after collecting.[8]

239. Pleading—In pleading an act of a principal done through an agent the agency may be ignored and the act alleged as the act of the principal.[9] An allegation of authority in an agent to do an act may be established by proof of ratification.[10] An allegation of notice to a person may be sustained by proof of notice to his agent, though the agency is not pleaded.[11] 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 alleged, and disclosed his principal to the plaintiff.[12] An allegation that by a lease the plaintiff "demised, leased and let" the premises, includes the authority of an agent by whom the lease appears to have been executed on the part of the plaintiff.[13] A complaint by a principal against his agent for fraud held sufficient.[14] A complaint by a principal against his agent for failure to disclose the name of purchasers held sufficient.[15] An answer held not to allege agency sufficiently.[16] An answer alleging payment to an agent, without alleging the authority of the agent to receive the payment, held insufficient.[17] An answer held to admit the authority of an agent.[18]

[99] R. L. 1905 § 4055.
[1] Miller v. State Bank, 57–319, 59+309.
[2] Parks v. Fogleman, 97–157, 105+560.
[3] Ames v. First Div. etc. Ry., 12–412 (295). See 2 Mich. L. Rev. 25.
[4] Talboys v. Boston, 46–144, 48+688. See Baxter v. Sherman, 73–434, 76+211.
[5] Lough v. Thornton, 17–253(230).
[6] Haines v. Starkey, 82–230, 84+910.
[7] Ford v. Brownell, 13–184(174).
[8] Mast v. Easton, 33–161, 22+253.
[9] Weide v. Porter, 22–429; Stees v. Kranz, 32–313, 20+241; Lee v. Mpls. etc. Ry., 34–225, 25+399; Todd v. Mpls. etc. Ry., 37–358, 35+5.
[10] Janney v. Boyd, 30–319, 15+308.
[11] Marshall v. Gilman, 52–88, 53+811.
[12] Scone v. Amos, 38–79, 35+575.
[13] Stees v. Kranz, 32–313, 20+241.
[14] Hillis v. Stout, 42–410, 44+982.
[15] Mobile F. & T. Co. v. Potter, 78–487, 81+392.
[16] Davenport v. Ladd, 38–545, 38+622.
[17] Cooper v. Stinson, 5–201(160).
[18] Horn v. Western L. Assn., 22–233.

240. Counterclaim—A claim on the part of a principal against his agent for a profit alleged to have been made by him in the course of his employment, founded on the rule of law that all such profits, whether resulting from the performance or a violation of the agent's duties, belong to the principal, may be interposed as a counterclaim in an action by the agent against the principal to recover for services rendered in a transaction other than that in which the profit was made. If the profit was the result of a fraudulent violation of the agent's duties, the tort may be waived and a recovery had upon the counterclaim as upon an implied contract, or for money had and received.[19]

241. Evidence—Admissibility—The admissibility of evidence to prove an agency is considered elsewhere.[20] A principal appointing a special agent may show his instructions to the agent in order to prove what the agent was authorized to do.[21]

242. Burden of proof—Cases are cited below involving questions as to the burden of proof.[22]

243. Law and fact—Whether an agency exists is a question for the jury, unless the evidence is conclusive, or the question is to be determined solely from writings.[23] And the same is true as to whether acts of an agent were within the scope of his authority,[24] or have been ratified by the principal.[25] The nature, effect and interpretation of instructions by letter from a principal to his agent have been held questions of fact for the jury.[26]

CRIMINAL LIABILITY

244. Liability of principal for act of agent—The owner of a drug store, has been held not liable under a statute regulating the practice of pharmacy, for a sale by one in his employ, not a registered pharmacist or assistant, made without his knowledge or assent.[27]

AGGRIEVED—See note 28.

AGRICULTURE

245. State agricultural society—The state agricultural society is a department of the state. It cannot be sued without the consent of the legislature. Its officers are also exempt. The act of 1903, providing for the reorganization of the society, is constitutional. The validity of the reorganization is not open to question in a private action.[29] A contract for the conduct of a vaudeville

[19] Schick v. Suttle, 94–135, 102+217.
[20] See § 149.
[21] Nininger v. Knox, 8–140(110).
[22] Allis v. Goldsmith, 22–123 (ratification); Jackson v. Badger, 35–52, 26+908 (id); Triggs v. Jones, 46–277, 284, 48+1113 (id.); Farmers' W. Assn. v. Montgomery, 92–194, 99+776 (disposition of funds by agent); Stewart v. Cowles, 67–184, 69+694 (authority of agent); Eisenberg v. Matthews, 84–76, 86+870 (existence of agency); Dispatch P. Co. v. Nat. Bank of Com., 109–440, 124+236 (authority of agent).
[23] Larson v. Lombard Invest. Co., 51–141, 53+179; Pinney v. First Div. etc. Ry., 19–251(211); Comfort v. Sprague, 31–405, 18+108; Peerless Machine Co. v. Gates, 61–124, 63+260; Bartleson v. Vanderhoff, 96–184, 104+820; Roeller v. Hall, 62–241, 64+559; Lemon v. De Wolf, 89–465, 95+316; Mpls. T. M. Co. v. Christianson, 92–40, 99+1134.
[24] Robertson v. Anderson, 96–527, 530, 105+972; Drohan v. Merrill, 75–251, 77+957; Peterson v. Rogers, 105–523, 117+1126.
[25] Wright v. Vineyard M. E. Church, 72–78, 74+1015; Mpls. T. M. Co. v. Christianson, 92–40, 99+1134.
[26] Dayton v. Buford, 18–126(111).
[27] State v. Robinson, 55–169, 56+594.
[28] Schuster v. Lemond, 27–253, 6+802.
[29] Berman v. Minn. S. A. Soc., 93–125 100+732; Berman v. Cosgrove, 95–353, 104+534. See, under former statute, Lane v. Minn. S. A. Soc., 62–175, 64+382.

show on the state fair grounds has been held to give a mere privilege or license, subject to cancelation for a violation of the conditions named therein.[30]

246. Lien for threshing grain—The statute gives a person threshing grain a lien thereon for his services. It is constitutional. The rules applicable to the foreclosure of chattel mortgages apply to proceedings for the foreclosure of the lien. One who has perfected a lien under the statute may maintain replevin for the grain covered thereby against a person wrongfully detaining it from him.[31]

247. Lien for seed grain—The statute gives a lien on grain to one furnishing the seed therefor, under certain conditions.[32] The lien is purely statutory.[33] It is superior to the lien of a prior chattel mortgage.[34] The transaction must be bona fide and not a mere device to secure a prior debt. The grain must be actually furnished, and the debt represented by the note must be actually incurred on account of such furnishing.[35] It is not essential that the grain be furnished at the time of the execution of the note or contract,[36] or that the party furnishing it have actual visible possession of it, or that he make a manual delivery of it.[37] There can be no lien on grain not grown from the seed furnished.[38] If the transaction is bona fide, the fact that part of the grain furnished is not sown will not defeat a lien for the part which is sown.[39] The burden is on the claimant to show a substantial compliance with all the requirements of the statute.[40] Where the land on which the seed is sown is partly within a village and partly in the town outside the village, and the borrower resides in the village, but the contract is filed only in the office of the town clerk, such filing is insufficient to constitute a lien on the grain raised on the land within the village.[41] A seed-grain note or contract is not a conditional sale. No title passes to the holder upon default. The title of the maker to the grain can be divested only by proper legal proceedings.[42] The statute authorizes the holder of a seed-grain note, upon condition broken, to take possession of the crop raised from the seed for which it is given, and the holder thereof may in such case enforce his lien as against the holder of a subordinate lien thereon, who has taken possession, and may maintain an action against him for the conversion thereof.[43] In a complaint by a lienor for conversion he should allege the facts giving rise to his lien and not rely on a general allegation of ownership.[44]

248. State loan for seed grain—Laws 1893 cc. 225, 226, providing for a loan of state money to certain farmers whose crops had been destroyed by storms, were unconstitutional, but those who received loans thereunder were estopped from asserting their invalidity.[45]

249. Noxious weeds—Provision is made by statute for the suppression of noxious weeds.[46]

[30] Mackay v. Minn. S. A. Soc., 88–154, 92+539.

[31] R. L. 1905 § 3546; Phelan v. Terry, 101–454, 112+872.

[32] R. L. 1905 §§ 3479-3482.

[33] Kelly v. Seely, 27–385, 7+821; Scofield v. Nat. El. Co., 64–527, 530, 67+645.

[34] McMahan v. Lundin, 57–84, 58+827.

[35] Warder v. Minn. etc. Co., 44–390, 46+773. See Kelly v. Seely, 27–385, 7+821; Wallace v. Palmer, 36–126, 30+445; Nash v. Brewster, 39–530, 41+105; Ambuehl v. Matthews, 41–537, 43+477; Smith v. Roberts, 43–342, 46+336; O'Brien v. Findeisen, 48–213, 50+1035.

[36] Endreson v. Larson, 101–417, 112+628 (overruling Kelly v. Seely, 27–385, 7+821).

[37] Warder v. Minn. etc. Co., 44–390, 46+773.

[38] Wallace v. Palmer, 36–126, 30+445.

[39] Nash v. Brewster, 39–530, 41+105.

[40] Minn. Agr. Co. v. N. W. El. Co., 58–536, 60+671.

[41] Id.

[42] Scofield v. Nat. El. Co., 64–527, 67+645.

[43] Nash v. Brewster, 39–530, 41+105.

[44] Scofield v. Nat. El. Co., 64–527, 67+645.

[45] Deering v. Peterson, 75–118, 77+568.

[46] R. L. 1905 §§ 2375–2381; State v. Boehm, 92–374, 100+95 (Laws 1895 c. 273 sustained—complaint for violation of statute sustained).

AID—See note 47.
AIDER BY ANSWER—See Pleading, 7727.
AIDER BY REPLY—See Pleading, 7728.
AIDER BY VERDICT—See Pleading, 7729.
ALIBI—See Criminal Law, 2448.
ALIENATION OF AFFECTIONS—See Husband and Wife, 4294, 4295.

ALIENS

Cross-References

See Corporations, 2002.

IN GENERAL

250. Power to exclude—It has been said that the state may exclude any persons, not citizens of the United States, that it may deem detrimental to its well-being.[48]

251. Right to acquire land—As to every one but the state a conveyance to or by an alien is valid.[49] It will be presumed that a sufficient percentage of the stockholders of a domestic corporation are citizens to take it out of the operation of R. L. 1905 § 3236.[50]

252. Actions by and against—The objection that a plaintiff is an alien enemy is waived unless taken by answer or demurrer. An alien enemy may be sued and he may employ attorneys to conduct his defence.[51] An alien friend may be sued in the state courts.[52]

NATURALIZATION

253. Necessity—Upon the naturalization of a father his minor children, living with him in this country, become citizens without any act on their part.[53]

254. Jurisdiction—A court of a sister state has been held to be a "court of record having common-law jurisdiction," with power to naturalize aliens.[54]

255. Declaration of intention—If the application is under U. S. Rev. St. § 2167, it is unnecessary to make the declaration prescribed by the first subdivision of § 2165.[55] A declaration by a minor has been held ratified after majority.[56]

256. Qualifications—While great caution should be exercised in the examination of applicants for citizenship, yet no hard and fast rule can be laid down. Each case must depend largely upon its special facts. The practical test is whether the evidence, considered as a whole, justifies the conclusion that the applicant will make a good citizen. An applicant otherwise entitled to citizenship, should not necessarily be denied the right because the evidence shows that he has no accurate knowledge of the federal constitution and form of government.[57]

257. Judgment—A judgment of naturalization has been held sufficient in form.[58]

[47] State v. Hastings, 24–78, 83.
[48] Foster v. Blue Earth County, 7–140 (84).
[49] Crolley v. Mpls. etc. Ry., 30–541, 16–422.
[50] N. W. etc. Co. v. Chi. etc. Ry., 76–334, 79+315.
[51] McNair v. Toler, 21–175.
[52] Stinson v. St. P. etc. Ry., 20–492(446).
[53] State v. Mims, 26–183, 2+494, 683.
[54] State v. Weber, 96–422, 105+490.
[55] State v. Macdonald, 24–48.
[56] State v. Streukens, 60–325, 62+259.
[57] State v. Dist. Ct., 107–444, 120+898. See 22 L. R. A. (N. S.) 1041.
[58] State v. Weber, 96–422, 105+490.

258. Proof on voir dire—Evidence of a declaration of intention submitted on the voir dire of a witness has been held competent and sufficient.[59]

ALIMONY—See Divorce, 2802, 2811.
ALLEY—A narrow passage or way in a city, as distinct from a public street.[60]
ALLODIAL LANDS—See Estates, 3155.
ALLOWANCE TO WIDOW—See Descent and Distribution, 2732.
ALMANAC—See note 61.
ALREADY—See note 62.

ALTERATION OF INSTRUMENTS

Cross-References

See Bills and Notes, 1014; Wills, 10222.

259. Effect—The material alteration of an instrument, after its execution, by the party seeking to enforce it, or with his privity, prevents a recovery.[63] An alteration by one of several obligors without the consent of the others, and without the privity of the obligee, discharges the other obligors.[64] An alteration of a note by the payee, after it is delivered to him, renders it void even in the hands of a bona fide holder.[65] An alteration of an instrument by a principal will release his surety.[66] An alteration will release an obligor though it is favorable to him.[67] An alteration avoids an instrument, though it was done without fraudulent intent.[68] The fraudulent alteration of a written security or evidence of debt extinguishes the debt. The guilty party cannot recover in any form of action, either upon the instrument, or upon the contract of which the instrument is evidence.[69] The doctrine that an alteration avoids the instrument is not to be extended.[70] The use of the word "forgery" in an instruction as to the effect of an alteration, has been held not fatal.[71] An instrument to which there are several parties will not be avoided as to a party by an alteration which relates solely to other parties.[72]

260. Test of materiality—To be material an alteration must in some way affect the rights or obligations of the party to be charged.[73] If it enlarges his liability it is material.[74] An alteration which destroys the identity of a contract is material.[75]

261. Held material—The addition of words to a bond given to secure the payment of an account;[76] an addition to a mortgage of a provision for attor-

[59] State v. Barrett, 40–65, 41+459. See R. L. 1905 § 5396.
[60] Winston v. Johnson, 42–398, 401, 45+958.
[61] Finney v. Callendar, 8–41(23).
[62] Evenson v. Demann, 109–328, 123+930.
[63] Russell v. Reed, 36–376, 31+452; Flanigan v. Phelps, 42–186, 43+1113; Warder v. Willyard, 46–531, 49+300; Thomas v. Thomas, 76–237, 79+104. See 18 Harv. L. Rev. 105, 165.
[64] Renville County v. Gray, 61–242, 63+635.
[65] Seebold v. Tatlie, 76–131, 78+967; Commercial Bank v. Maguire, 89–394, 95+212; Yellow Medicine Co. Bank v. Tagley, 57–391, 59+486.
[66] Fillmore County v. Greenleaf, 80–242, 83+157; Wager v. Brooks, 37–392, 34+745.
[67] Fillmore County v. Greenleaf, 80–242, 83+157; Commercial Bank v. Maguire, 89–394, 95+212.
[68] Fletcher v. Mpls. etc. Co., 80–152, 83+29.
[69] Warder v. Willyard, 46–531, 49+300.
[70] Ward v. Hackett, 30–150, 154, 14+578.
[71] Swindells v. Dupont, 88–9, 92+468.
[72] Herrick v. Baldwin, 17–209(183).
[73] Herrick v. Baldwin, 17–209(183); Renville County v. Gray, 61–242, 63+635; Bull v. Boyer, 109–396, 124+20.
[74] White v. Johns, 24–387, 390; Coles v. Yorks, 28–464, 466, 10+775.
[75] Renville County v. Gray, 61–242, 63+635; Theopold v. Deike, 76–121, 78+977.
[76] White v. Johns, 24–387.

ney's fees on foreclosure;[77] the addition to a note of the words "privilege of extension for thirty days given;"[78] a change in the amount of a note;[79] a change in the amount of a bond;[80] a change in the date of maturity of a note;[81] a change in the terms of an insurance policy;[82] a change in the bond of a depositary of public funds, as to the amount of interest payable on the funds;[83] a change in the rate of interest and date of maturity of a note;[84] a change increasing the amount secured by a mortgage;[85] a cross-marking of a material provision.[86]

262. Held not material—An addition to the body of a note of the words, "payable before maturity, and interest on unexpired term refunded, if I so elect;"[87] the addition of another surety to a note;[88] the addition of parties to a note;[89] and the erasure of a memorandum of partial payment on a note.[90]

263. Presumption of time—Burden of proof—Where an interlineation or erasure is apparent upon the face of an instrument, the presumption of law is that it is a legitimate part of the instrument, and was made prior to its execution, and the burden is upon the maker to show that it was altered after delivery. The proof or admission of the signature of the maker is prima facie evidence that the instrument written over it is his act, and this will stand as binding proof, unless the maker can rebut it by evidence that the alteration was made after delivery.[91] It would seem that this rule must necessarily be affected by the issues formed by the pleadings.[92]

264. Filling blanks—Where one executes a written instrument, with blank spaces in it, and intrusts it to another to fill in the blanks, he may be estopped as to third parties from asserting that the blanks were improperly filled.[93] Authority to fill blanks in a sealed instrument may be given by parol.[94]

265. Ratification—Estoppel—It has been held that a fraudulent alteration amounting to a forgery cannot be ratified in favor of the guilty party, at least without a new consideration.[95] An innocent alteration may be ratified.[96] A party may be estopped by his conduct from taking advantage of an alteration.[97]

266. Notation as to alteration—A notation on a bond that certain words were inserted before execution has been held no part of the bond.[98]

267. Presumption of fraud—If it appears that a material alteration was made in an instrument after its execution, the presumption is that it was made fraudulently and the burden of proving the contrary is on the party seeking to enforce it,[99] at least if the pleadings do not throw the burden elsewhere.[1]

268. By stranger—An alteration of an instrument by a stranger, though material, without the privity, knowledge, or consent of the party interested, will not avoid it.[2] If the change is made by an agent having no authority to do so, it does not avoid the contract, unless ratified by the principal.[3]

[77] Coles v. Yorks, 28–464, 10+775.
[78] Flanigan v. Phelps, 42–186, 43+1113.
[79] Warder v. Willyard, 46–531, 49+300.
[80] Renville County v. Gray, 61–242, 63+635.
[81] Seebold v. Tatlie, 76–131, 78+967.
[82] Fletcher v. Mpls. etc. Co., 80–152, 83+29.
[83] Fillmore County v. Greenleaf, 80–242, 83+157.
[84] Comercial Bank v. Maguire, 89–394, 95+212.
[85] Russell v. Reed, 36–376, 31+452.
[86] Bull v. Boyer, 109–396, 124+20.
[87] Herrick v. Baldwin, 17–209(183).
[88] Ward v. Hackett, 30–150, 14+578.
[89] Babcock v. Murray, 58–385, 59+1038.
[90] Theopold v. Deike, 76–121, 78+977.
[91] Wilson v. Hayes, 40–531, 42+467.
[92] See 13 Harv. L. Rev. 57; 18 Id. 181.
[93] Pence v. Arbuckle, 22–417.
[94] State v. Young, 23–551; Janney v. Goehringer, 52–428, 433, 54+481.
[95] Wilson v. Hayes, 40–531, 42+467. The reasoning of this case seems forced. See, contra, Marks v. Schram, 109 Wis. 452.
[96] Janney v. Goehringer, 52–428, 54+481; Fletcher v. Mpls. etc. Co., 80–152, 83+29; Renville County v. Gray, 61–242, 63+635.
[97] Renville County v. Gray, 61–242, 63+635.
[98] White v. Johns, 24–387.
[99] Warder v. Willyard, 46–531, 49+300; Russell v. Reed, 36–376, 31+452.
[1] See 13 Harv. L. Rev. 409; 18 Id. 181.
[2] Ames v. Brown, 22–257; Russell v. Reed,

269. Pleading—Cases are cited below involving questions of pleading.[4]

270. Evidence—Admissibility—Oral evidence is admissible to prove the alteration of an instrument, and, when the issue is whether an instrument has been altered after execution, it is, generally speaking, competent to introduce the testimony of those who read and examined it at the time of its execution, or at any time when it was in a condition different from its present one. The fact that the witness has the instrument before him for inspection at the time he is giving his testimony may refresh his memory, and thus add weight to his evidence; but this, as a general rule, goes to the weight, and not to the competency, of his testimony.[5] Upon an issue as to an alteration of the punctuation of an insurance policy other similar policies have been held inadmissible.[6]

271. Evidence—Sufficiency—Cases are cited below involving the sufficiency of evidence.[7]

272. Law and fact—Whether there has been an alteration is a question for the jury, unless the evidence is conclusive.[8] When, by whom, and with what intent, an alteration was made, should be submitted to the jury, as questions of fact, upon all the evidence, both intrinsic and extrinsic.[9]

AMBIGUITIES—See Evidence, 3406; Wills, 10262.
AMENDMENT—See Indictment, 4430; Judgments, 5091-5107; Pleading, 7695; Process, 7818, 7820, 7833.
AMOUNT IN CONTROVERSY—See Courts, 2349.
ANCIENT DOCUMENTS—See Evidence, 3362.
ANCILLARY ADMINISTRATION—See Executors and Administrators, 3679.
AND—See Statutes, 8976.

ANIMALS

273. Definition—Within the statute relating to cruelty to animals, the word "animal" includes every living creature except human beings.[10] The word "beast" has been held not to include dogs.[11]

274. Dogs personal property—In this state dogs are regarded as personal property, and an action will lie in favor of the owner of one of substantial money value for its loss through the negligence of another.[12] At common law

36-376, 31+452; Thomas v. Thomas, 76-237, 243, 79+104; Spreng v. Juni, 109-85, 122+1015.

[3] Spreng v. Juni, 109-85, 122+1015.

[4] White v. Johns, 24-387 (held unnecessary for defendant to deny that he made a notation on the instrument); Howlett v. Bell, 52-257, 53+1154 (held that under an allegation that an indorsement of a note was without recourse the defendant might prove that an attempted alteration by drawing pen and ink through the words "without recourse" was made after the indorsement); Babcock v. Murray, 58-385, 392, 59+1038 (held that an answer would not admit proof of an alteration); Roberts v. Nelson, 65-240, 68+14 (fact that a lease was altered by adding the name of a second witness and a certificate of acknowledgment inadmissible under a mere denial of the execution of the instrument).

[5] Clark v. Butts, 78-373, 81+11.

[6] Boright v. Springfield etc. Co., 34-352, 25+796.

[7] White v. Johns, 24-387; Boston Block Co. v. Buffington, 39-385, 40+361; Yellow Medicine Co. Bank v. Tagley, 57-391, 59+486; Fletcher v. Mpls. etc. Co., 80-152, 83+29; Larson v. Brockmann, 98-526, 106+1133.

[8] Yellow Medicine Co. Bank v. Tagley, 57-391, 59+486; Bull v. Boyer, 109-396, 124+20.

[9] Wilson v. Hayes, 40-531, 42+467.

[10] R. L. 1905 § 5151.

[11] U. S. v. Gideon, 1-292(226).

[12] Smith v. St. P. C. Ry., 79-254, 82+577. See U. S. v. Gideon, 1-292(226).

dogs were not regarded as having any value and were not the subject of larceny.[13]

275. Injuries by vicious dogs and other animals—The gravamen of an action for injuries caused by a vicious dog or other domestic animal is the neglect of the owner to restrain him after notice of his vicious propensity.[14] The notice must be such as to put a prudent man on his guard.[15] If the owner has seen or heard enough to convince a person of ordinary prudence of the dog's inclination to bite people, or if he has knowledge of a single attempt upon a person, he is charged with notice.[16] Evidence of the reputation of the dog in the vicinity for viciousness is admissible to charge the owner with notice.[17] A witness who has heard only one person speak of the matter is qualified to testify as to such reputation.[18] There must be proof of the vicious character of the dog, but it is unnecessary to prove frequent attacks upon persons, or even one attack. It is enough to prove that he is inclined to be vicious.[19] This may be done by proof of his propensity to attack other dogs.[20] Where a person voluntarily provokes a vicious animal, and thus invites or induces the injury, knowing the consequences, he is not entitled to recover; but an accidental interference with him, as where a person inadvertently steps upon a dog, which interference or provocation arouses and becomes merely the occasion for the exhibition of such propensity, will constitute no defence.[21] If an attack is caused solely by the misuse or abuse of an animal the owner is not liable.[22] It is not quite clear from our cases whether the owner who knowingly keeps a vicious dog is bound to restrain him at his peril, or is only liable for a failure to exercise due care in restraining him.[23] Where several dogs owned by different persons unite in killing sheep, or doing other damage together, a joint action will not lie against the owners of the dogs. Each owner is liable only for the damage done by his dog.[24] One who keeps animals ferae naturæ (of a wild nature), keeps them at his peril. He is an insurer of safety. If they escape and do injury he is liable absolutely, without regard to negligence.[25]

276. Running at large—The common-law rule that every one is bound to keep his cattle on his own land is in force in this state, except as modified by statute or ordinance.[26] The running at large of certain animals is specially prohibited by statute.[27] The words "at large" in the statute mean without restraint or confinement.[28]

277. Estrays—Beasts doing damage—Taking up and impounding—Provision is made by statute for taking up estrays and for distraining and impounding beasts doing damage.[29] One claiming title to an animal under a poundmaster's sale must show that it was liable to be impounded and that the proceedings to divest the owner's title were according to law.[30] The damages

[13] U. S. v. Gideon, 1–292(226).
[14] Fake v. Addicks, 45–37, 47+450; Cuney v. Campbell, 76–59, 78+878.
[15] Id.
[16] Rowe v. Ehrmanntraut, 92–17, 99+211.
[17] Fake v. Addicks, 45–37, 47+450; Cuney v. Campbell, 76–59, 78+878; Fisher v. Weinholzer, 91–22, 97+426.
[18] Fisher v. Weinholzer, 91–22, 97+426.
[19] Cuney v. Campbell, 76–59, 78+878.
[20] Rowe v. Ehrmanntraut, 92–17, 99+211.
[21] Fake v. Addicks, 45–37, 47+450. See Erickson v. Bronson, 81–258, 83+988.
[22] Erickson v. Bronson, 81–258, 83+988.
[23] See 22 Harv. L. Rev. 465, 527.
[24] Nohre v. Wright, 98–477, 108+865.
[25] Gould v. Winona G. Co., 100–258, 262, 111+254.
[26] Locke v. First Div. etc. Ry., 15–350 (283); Gowan v. St. P. etc. Ry., 25–328, 330; Watier v. Chi. etc. Ry., 31–91, 16+537. See Fritz v. First Div. etc. Ry., 22–404 (ordinance of St. Paul allowing cattle to run at large under certain conditions).
[27] R. L. 1905 §§ 2793–2796; Goener v. Woll, 26–154, 2+163 (application of statute).
[28] Goener v. Woll, 26–154, 2+163.
[29] R. L. 1905 §§ 2769–2785. See Johnston v. Kirchoff, 31–451, 18+315 (application and construction of statutes–fees and duties of poundmaster).
[30] Johnston v. Kirchoff, 31–451, 18+315.

to which a landowner is entitled for animals taken up by him as estrays, are limited to such as were committed by them at the time of or immediately preceding the trespass for which they were distrained. Where the plaintiff refused a legal tender of damages, it was held that his retention of cows after the tender was wrongful, and that he was bound to exercise reasonable care of them and to make reasonable effort to sell their milk and account to the defendant for the proceeds.[31]

278. Inspection—Diseased animals—Laws 1907 c. 355, providing for the inspection of animals imported into the state, is not an unlawful interference with interstate commerce.[32] Ordinances sometimes provide for the inspection of diseased animals.[33]

279. Cruelty to animals—Criminal liability—Various forms of cruelty to animals are made a criminal offence by statute.[34]

ANOTHER ACTION PENDING—See Abatement and Revival. 4.

ANSWER—See Pleading, 7563.

ANTENUPTIAL CONTRACTS—See Constitutional Law, 1564; Husband and Wife, 4285.

ANY—See note 35.

APOTHECARIES—See Druggists.

APPEAL—See Appeal and Error; Criminal Law; Justices of the Peace; Municipal Courts; Probate Court; Supreme Court.

[31] Fleetham v. Therres, 92–500, 100+377.

[32] Evans v. Chi. etc. Ry., 109–64, 122+876.

[33] St. Paul v. Keough, 109–204, 123+476 (ordinance of St. Paul for inspection of diseased cattle construed—report to health department—criminal prosecution—sufficiency of evidence—whether "foot rot" within ordinance a question of fact).

[34] R. L. 1905 §§ 5151–5158. See U. S. v. Gideon, 1–292(226) (killing a dog held not indictable under former statute); State v. Comfort, 22–271 (indictment under Laws 1871 c. 34 § 1 for overdriving horses sustained).

[35] Hardwick v. Chi. etc. Ry., 124+819.

APPEAL AND ERROR

IN GENERAL

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IN GENERAL

280. Writs of error and appeals distinguished—A writ of error is the beginning of a new action, but an appeal is a continuation of the original action in a superior court.[36]

281. Nature of appellate jurisdiction—Appellate jurisdiction may be defined as the authority vested in a superior court to review and revise the judicial action of an inferior court. It is the essential criterion of appellate jurisdiction that it revises and corrects the proceedings in a cause already instituted and does not create the cause.[37] The very nature of the jurisdiction confines the appellate court to a consideration of such questions as, originating in another court, have been there actually or presumably considered and passed upon in the first instance. Its most obvious purpose in our judicial system is to secure to parties litigant in respect to any controverted question, properly a subject for review, after one determination upon the merits, the benefits of another

[36] Kells v. Nelson, 74-8, 76+790; State v. N. P. Ry., 99-280, 109+238.

[37] Tierney v. Dodge, 9-166(153).

consideration of the same question, in another and distinct tribunal, differently constituted, and surrounded by different influences. The beneficial tendency of such a principle in any judicial system in promoting a more safe and circumspect administration of justice can hardly be doubted.[38] Save so far as its meaning is controlled or influenced by statute, an appeal is properly defined as a proceeding by which a case is taken from an inferior to a superior tribunal, the determination of the former thereby vacated or suspended, and the case brought before the latter to be tried and determined de novo.[39]

282. Appeal—How far exclusive—Prior to the revision of 1866 the statutes of this state authorized both an appeal and a writ of error in ordinary civil actions, whether of a legal or equitable nature.[40] It was held that the two remedies were alternative and that an appellant could not pursue both at the same time.[41] Special provision was made for an appeal from the court of chancery.[42] Our present statute dates from 1866 and provides that a judgment or order, in a civil action, in any of the district courts, may be removed to the supreme court by appeal "and not otherwise."[43] The revision dropped the prior statutes authorizing a writ of error in civil cases and expressly made appeal the exclusive remedy in ordinary civil actions. The statutory appeal, however, does not supersede certiorari.[44] The primary object of the statute is to provide a single mode of appeal in all ordinary civil actions whether of a legal or equitable nature.[45] The equitable remedy of appeal was adopted and the common-law writ of error abolished. The change is one of form rather than of substance and the general principles which governed the writ of error are applicable to the statutory appeal.[46]

283. Appeal a statutory remedy—Legislative control—It is a common expression in the books that the right of appeal is purely statutory.[47] This is true at common law and it is true in this state so far as the mode of carrying a case to the supreme court is concerned. But in this state a party has a constitutional right to have his case reviewed by the supreme court in some mode.[48] Our constitution does not leave it to the legislature to define the jurisdiction of the supreme court. The mode of appeal is statutory; the right of appeal constitutional. The constitutional right is no doubt limited to appeals from the district court.[49] The legislature may withhold a right of appeal from a justice court to the district court as the constitution provides that the district court shall have "such appellate jurisdiction as may be prescribed by law."[50] The legislature has no authority to grant an appeal where none was given at the time the judgment was recovered or where the right has been lost by lapse of time. In other words, legislation granting an appeal must be prospective in its operation.[51]

[38] Johnson v. Howard, 25–558. See also, McNamara v. Minn. C. Ry., 12–388(269).

[39] Ames v. Boland, 1–365(268); Colvill v. Langdon, 22–565; Dutcher v. Culver, 23–415.

[40] Moody v. Stephenson, 1–401(289); Kern v. Chalfant, 7–487(393).

[41] Moody v. Stephenson, 1–401(289); Humphrey v. Havens, 9–318(301).

[42] Deuel v. Hawke, 2–50(37); Folsom v. Evans, 5–418(338).

[43] R. L. 1905 § 4357.

[44] See § 1391.

[45] Dutcher v. Culver, 23–415.

[46] Gormly v. McIntosh, 22 Barb. (N. Y.) 275.

[47] Tierney v. Dodge, 9–166(153); Mayall v. Burke, 10–285(224); McMahon v. Davidson, 12–357(232); Robertson v. Davidson, 14–554(422); State v. Jones, 24–86; Minneapolis v. Wilkin, 30–140, 14+581; Ross v. Evans, 30–206, 14+897; State v. Faribault W. Co., 65–345, 68+35; McMillan v. State Board, 124+828.

[48] Brown County v. Winona etc. Co., 38–397, 37+949; State v. Leftwich, 41–42, 42+598; State v. Dunn, 86–301, 90+772. See Tierney v. Dodge, 9–166(153); Kerlinger v. Barnes, 14–526(398); Minneapolis v. Wilkin, 30–140, 14+581; Sherwood v. Duluth, 40–22, 41+234.

[49] Ross v. Evans, 30–206, 14+897.

[50] Const. Minn. art. 6 § 5.

[51] Beaupre v. Hoerr, 13–366(339); Ker-

284. Review by appeal favored—It is the general policy of our law to provide for the review of proceedings in the district courts by appeal rather than any other way.[52]

285. Construction of statutes regulating appeals—Amendments—It is generally laid down in the books that statutes authorizing appeals are remedial in their nature and should receive a liberal construction.[53] There is no question as to the propriety of this rule as regards appeals from final judgments. But statutes authorizing appeals from intermediate orders ought to be strictly construed because they lend themselves so readily to vexatious and dilatory appeals and because such orders may generally be quite as well reviewed on appeal from the final judgment.[54] Statutes regulating the procedure in taking an appeal should be liberally construed.[55] Our statute provides that when a party gives, in good faith, notice of appeal from a judgment or order, and omits, through mistake, to do any other act necessary to perfect the appeal, or to stay proceedings, the court may permit an amendment on such terms as may be just.[56]

286. Jurisdiction not given by consent—The consent of parties cannot clothe the supreme court with authority to hear and determine a subject-matter not within its jurisdiction as prescribed by law.[57]

287. Waiver of right of appeal—Estoppel—A party waives his right to appeal or estops himself from raising objection in the supreme court—the distinction is not carefully preserved in the cases—by accepting costs ordered paid as a condition of a new trial;[58] by withdrawing a demurrer overruled and pleading over;[59] by amending his pleading after demurrer sustained;[60] by entering into a stipulation that there shall be no appeal;[61] by leading the court into error;[62] by entering into a settlement of the controversy and a satisfaction of the judgment;[63] by voluntarily consenting to a pro forma order;[64] by making default on a motion duly noticed;[65] by moving in the alternative under Laws 1895 c. 320 for a judgment or a new trial, the new trial being granted;[66] or by accepting the benefits of an order and proceeding on the theory that it was proper.[67] A party does not waive his right to appeal by entering into a stipulation for the allowance of costs and the entry of judgment upon a verdict without further notice;[68] by causing judgment to be entered against himself;[69] by failing to appear at the hearing of a demurrer;[70] by failing to move for a new

linger v. Barnes, 14–526(398). But see Converse v. Burrows, 2–229(191); McNamara v. Minn. C. Ry., 12–388(269).

[52] Ramsey County v. Stees, 27–14, 6+401.

[53] Converse v. Burrows, 2–229(191); Ross v. Evans, 30–206, 14+897; Witt v. St. P. etc. Ry., 35–404, 29+161; Sherwood v. Duluth, 40–22, 41+234.

[54] See Myrick v. Pierce, 5–65(47); Hulett v. Matteson, 12–349(227); Am. B. Co. v. Kingdom P. Co., 71–363, 73+1089; West Pub. Co. v. De La Mott, 104–174, 116+103.

[55] Minn. D. Co. v. Johnson, 96–91, 104+1149, 107+740; First U. Soc. v. Houliston, 96–342, 105+66. See Robertson v. Davidson, 14–554(422).

[56] R. L. 1905 § 4359; Watier v. Buth, 87–205, 91+756.

[57] Ames v. Boland, 1–365(268); Rathbun v. Moody, 4–364(273); Jones v. Minneapolis, 20–491(444); Darby v. Steele County, 109–258, 123+662. See Ames v. Miss. B. Co., 8–467(417); Am. Ins. Co. v. Schroeder, 21–331; State v. Bechdel, 38–278, 37+338.

[58] Lamprey v. Henk, 16–405(362). See Todd v. Bettingen, 102–260, 113+906.

[59] Coit v. Waples, 1–134(110); Thompson v. Ellenz, 58–301, 59+1023; Cook v. Kittson, 68–474, 71+670.

[60] Becker v. Sandusky City Bank, 1–311 (243).

[61] Daniels v. Willis, 7–374(295); State v. Sawyer, 43–202, 45+155.

[62] Poehler v. Reese, 78–71, 80+847.

[63] Babcock v. Banning, 3–191(123).

[64] Johnson v. Howard, 25–558.

[65] Dols v. Baumhoefer, 28–387, 10+420; Thompson v. Haselton, 34–12, 24+199.

[66] St. Anthony Falls Bank v. Graham, 67–318, 69+1077.

[67] Wright v. Robinson, 79–272, 82+632.

[68] Everett v. Boyington, 29–264, 13+45; Hall v. McCormick, 31–280, 17+620.

[69] Warner v. Lockerby, 28–28, 8+879.

[70] Hall v. Williams, 13–260(242).

trial before the entry of judgment;[71] by not making cross assignments of error on an appeal by the adverse party;[72] or by making personal service of a summons after a prior service had been set aside and an appeal taken.[73] By acquiescing in an appeal a party may be prevented from taking advantage of facts which might otherwise estop the adverse party from appealing.[74] Whether a convict who seeks and accepts a commutation of his sentence by the board of pardons thereby waives the right to appeal from the judgment of conviction is an open question.[75]

287a. Appeal pending another appeal—A party cannot take a second appeal from an order or judgment while a former valid appeal therefrom by him is pending.[76]

288. Jurisdiction of lower court after appeal—After an appeal is perfected the lower court, even where no stay bond is executed, cannot properly make any order or render any decision affecting the order or judgment appealed from,[77] except to amend the same to the end that it may correctly express the original intention of the court.[78] The subject-matter of the appeal passes under the exclusive control of the appellate court. But while the lower court is not authorized to act after an appeal with a stay bond, yet such action is not wholly void. The lower court is not completely ousted of jurisdiction.[79] The dismissal of an appeal reinstates the case in the lower court.[80] The trial court retains jurisdiction after an appeal to correct the record and settle and allow a case or bill of exceptions.[81]

289. Judicial notice of records—The supreme court will take judicial notice of its own records relating to prior proceedings in the same cause.[82] As a general rule it will not take notice of its records or proceedings in other causes.[83]

290. Court equally divided—When the members of the supreme court are equally divided in opinion the judgment or order will be affirmed.[84]

291. Frivolous appeals—The supreme court will not encourage appeals involving only trifling questions of pleading and practice. Pleadings should be amended to conform to the rulings of the trial court whenever possible.[85] Frivolous appeals are discouraged.[86]

292. Suspension of proceedings—Where proceedings on appeal were suspended at the request of both parties, it was held that there was no right to a suspension for a particular length of time.[87]

293. Application of statute to special proceedings—The statute, except as expressly provided, does not apply to special proceedings, but applies only to orders and judgments in ordinary civil actions.[88]

[71] Schuek v. Hagar, 24–339.
[72] State v. N. P. Ry., 99–280, 109+238, 110+975.
[73] Venner v. G. N. Ry., 108–62, 121+212.
[74] Todd v. Bettingen, 102–260, 113+906.
[75] State v. Corrivau, 93–38, 100+638.
[76] Cruzen v. Merchants S. Bank, 109–303, 123+666.
[77] McArdle v. McArdle, 12–122(70); La Crosse etc. Co. v. Reynolds, 12–213(135); McMurphy v. Walker, 20–382(334); Floberg v. Joslin, 75–75, 77+557; Bock v. Sauk Center G. Co., 100–71, 110+257.
[78] U. S. Invest. Corp. v. Ulrickson, 84–14, 86+613.
[79] State v. Young, 44–76, 46+204; Briggs v. Shea, 48–218, 50+1037.
[80] Fay v. Davidson, 13–523(491).
[81] Pratt v. Pioneer Press Co., 32–217, 18+836, 20+87; Bahnsen v. Gilbert, 55–334, 56–1117; Loveland v. Cooley, 59–259, 61+138; U. S. Invest. Corp. v. Ulrickson, 84–14, 86+613.
[82] Thornton v. Webb, 13–498(457); Rippe v. Chi. etc. Ry., 23–18; In re Rees, 39–401, 40+370 (district court); Hospes v. N. W. etc. Co., 41–256, 43+180.
[83] Caldwell v. Bruggerman, 8–286(252). But see Mankato v. Meagher, 17–265(243).
[84] Wilson v. Jamison, 36–59, 29+887; Nelson v. Mpls. etc. Ry., 41–131, 42+788; Gran v. Spangenberg, 53–42, 54+933; State v. Corrivau, 93–38, 100+638.
[85] Benton v. Schulte, 31–312, 17+621; Cordill v. Minn. El. Co., 89–442, 95+306.
[86] See Schuneman v. Tolman, 85–130, 88+1103.
[87] Rice v. First Div. etc. Ry., 24–444.
[88] McNamara v. Minn. C. Ry., 12–388 (269); Conter v. St. P. etc. Ry., 24–313;

WHAT JUDGMENTS AND ORDERS APPEALABLE

294. Appeal from a judgment in the district court in an action commenced in a lower court and appealed to the district court—Under the provision of the statute allowing appeals in this class of cases it has been held that an order of the probate court admitting a will to probate is a judgment within the meaning of the statute and that an appeal lies to the supreme court from the judgment of the district court affirming such order;[89] that a judgment in unlawful detainer proceedings is appealable;[90] that a judgment on an appeal from the award of commissioners in condemnation proceedings is appealable.[91] Where the law authorizes an appeal from a special tribunal to the district court an appeal will ordinarily be allowed from that court to the supreme court without any express authorization.[92]

295. Appeal from a judgment in an action commenced in the district court—A judgment, to be appealable under the statute, must be the final determination of the rights of the parties in the action.[93] It is unnecessary that it should be on the merits and preclude the parties from bringing another action. It is only necessary that it should be final in the sense of terminating the particular action. Judgments of dismissal are appealable as well as judgments on the merits.[94] Form is not controlling, and if an order is in effect a final judgment, it is appealable as such.[95] On the other hand a judgment which is such only in name is not appealable.[96] Any decision or adjudication, by whatever name it may be called, an order, or direction for judgment, or judgment, which leaves necessary a further judgment in order to give the parties the relief they are entitled to, and to terminate the action so far as the judgment may, is not a final judgment. In an action for partition the judgment provided for in R. L. 1905 § 4398 is the final judgment and upon appeal from it the judgment provided for in R. L. 1905 § 4395 may be reviewed.[97] In an action for the foreclosure of a mortgage the only judgment now authorized is that provided for in R. L. 1905 § 4488. There is no authority for the entry of a separate personal judgment for a deficiency.[98] It was formerly held that the "final decree" authorized by G. S. 1894 § 6066 was a final judgment and appealable, but that on an appeal from such judgment no error in the judgment directed under G. S. 1894 § 6059 could be reviewed.[99] An appeal may be taken from a part of a judgment.[1] An appeal lies from a final judgment regardless of whether the action is legal or equitable in its nature.[2] Under a special provision an appeal lies from a judgment for taxes.[3] Where condemnation proceedings are brought into the district court for the assessment of damages they are deemed, for the purpose of appeal, to have been commenced in that court and an appeal

Koochiching Co. v. Franson, 91–404, 98+98. See Ramsey County v. Stees, 27–14, 6+401; Witt v. St. P. etc. Ry., 35–404, 29+161.

[89] In re Penniman, 20–245(220).

[90] See Barker v. Walbridge, 14–469(351).

[91] Witt v. St. P. etc. Ry., 35–404, 29+161.

[92] See Ramsey County v. Stees, 27–14, 6+401; Witt v. St. P. etc. Ry., 35–404, 29+161; Moede v. Stearns County, 43–312, 45+435.

[93] Chouteau v. Rice, 1–24(8); Deuel v. Hawke, 2–50(37); Hawke v. Deuel, 2–58(46); Ayer v. Termatt, 8–96(71); Aetna Ins. Co. v. Swift, 12–437(326); In re Penniman, 20–245(220); Dodge v. Allis, 27–376, 7+732; Dobberstein v. Murphy, 44–526, 47+171; Lamprey v. St. P. etc. Ry., 86–509, 91+29.

[94] Thorp v. Lorenz, 34–350, 25+712. See Van Vlissingen v. Oliver, 102–237, 113+383.

[95] In re Penniman, 20–245(220); Lamprey v. St. P. etc. Ry., 86–509, 91+29.

[96] Deuel v. Hawke, 2–50(37); Hawke v. Deuel, 2–58(46).

[97] Dobberstein v. Murphy, 44–526, 47+171.

[98] Thompson v. Dale, 58–365, 59+1086.

[99] Dodge v. Allis, 27–376, 7+732. See Lamprey v. St. P. etc. Ry., 86–509, 91+29.

[1] Hall v. McCormick, 31–280, 17+620; St. P. T. Co. v. Kittson, 84–493, 87+1012.

[2] Kern v. Chalfant, 7–487(393).

[3] State v. Lockhart, 89–121, 94+168; State v. Dist. Ct., 93–177, 100+889. See State v. Griffith, 92–1, 98+1023.

lies from a final judgment.[4] The statute contemplates an appeal from a record. The judgment must be formally entered in the judgment book before an appeal is taken. No appeal lies from a mere opinion, decision, or finding of the court.[5] No appeal lies from an order for judgment.[6] As regards appeal a judgment ordered by the court, notwithstanding the verdict, stands on the same footing with a judgment entered upon a verdict.[7] The general statute does not apply to judgments in special proceedings.[8] An appeal lies from a judgment in mandamus proceedings.[9]

296. Default judgments—In this state an appeal lies from a default judgment without any preliminary application for relief in the trial court.[10] It is rarely advisable, however, to take such an appeal. In the ordinary course of practice an application should first be made to the trial court to open the default, and if this is not done, the appellate court will sustain the judgment if possible.[11] On an appeal from a default judgment the sufficiency of the complaint may be questioned, but every intendment will be indulged in its favor.[12] It is of course permissible on such an appeal to raise the objection that the court is without jurisdiction of the subject-matter of the action.[13] A judgment by default entered upon a void service of summons is a nullity and an appeal lies to set it aside.[14] An appeal from a default judgment carries up only the judgment roll and the review is limited to matters appearing thereon.[15] Error of the clerk in the taxation of costs cannot be reviewed unless an appeal was taken to the court below.[16] In an early case it was held that error of the clerk in entering judgment upon insufficient proof of personal service could not be reviewed on such an appeal.[17] This case has never been explicitly overruled, but it is inconsistent with later cases.[18] It is now the general rule that the action of the clerk in entering a default judgment is to be taken as the action of the court

[4] Witt v. St. P. etc. Ry., 35–404, 29+161.

[5] Von Glahn v. Sommer, 11–203(132); Hodgins v. Heaney, 15–185(142); Wilson v. Bell, 17–61(40); Thompson v. Howe, 21–1; Johnson v. N. P. etc. Ry., 39–30, 38+804; Child v. Morgan, 51–116, 52+1127; Darby v. Steele County, 109–258, 123+662.

[6] Westervelt v. King, 4–320(236); Ames v. Miss. B. Co., 8–467(417); Lamb v. McCanna, 14–513(385); Rogers v. Holyoke, 14–514(387); Hodgins v. Heaney, 15–185(142); Searles v. Thompson, 18–316(285); Ryan v. Kranz, 25–362; Langdon v. Thompson, 25–509; Chesterson v. Munson, 26–303, 3+695; Croft v. Miller, 26–317, 4+45; Felber v. Southern Minn. Ry., 28–156, 9+635; Shepard v. Pettit, 30–119, 14+511; Herrick v. Butler, 30–156, 14+794; State v. Bechdel, 38–278, 37+338; Johnson v. N. P. etc. Ry., 39–30, 38+804; U. S. etc. Co. v. Ahrens, 50–332, 52+898; Child v. Morgan, 51–116, 52+1127; St. Anthony Falls Bank v. Graham, 67–318, 69+1077; Oelschlegel v. Chi. etc. Ry., 71–50, 73+631; Fulton v. Andrea, 72–99, 75+4; Gottstein v. St. Jean, 79–232, 82+311; Sanderson v. N. P. Ry., 88–162, 92+542; Prahl v. Brown County, 104–227, 116+483; Nikannis Co. v. Duluth, 108–83, 121+212; Wolf v. State Board, 108–523, 121+395.

[7] De Blois v. G. N. Ry., 71–45, 73+637.

[8] Koochiching Co. v. Franson, 91–404, 98+98.

[9] State v. McKellar, 92–242, 99+807.

[10] Karns v. Kunkle, 2–313(268); Masterson v. Le Claire, 4–163(108); Hollinshead v. Von Glahn, 4–190(131); Reynolds v. La Crosse etc. Co., 10–178(144); Kennedy v. Williams, 11–314(219); Smith v. Dennett, 15–81(59); Skillman v. Greenwood, 15–102(77); Grant v. Schmidt, 22–1; Keegan v. Peterson, 24–1; White v. Iltis, 24–43; Brown v. Brown, 28–501, 11+64; Jensen v. Crevier, 33–372, 23+541; Dillon v. Porter, 36–341, 31+56; Hersey v. Walsh, 38–521, 38+613; Doud v. Duluth M. Co., 55–53, 56+463; Northern T. Co. v. Markell, 61–271, 63+735; Northern T. Co. v. Albert Lea College, 68–112, 71+9.

[11] Karns v. Kunkle, 2–313(268); Hollinshead v. Von Glahn, 4–190(131); Smith v. Dennett, 15–81(59).

[12] Karns v. Kunkle, 2–313(268); Kennedy v. Williams, 11–314(219); Smith v. Dennett, 15–81(59); Northern T. Co. v. Markell, 61–271, 63+735.

[13] R. L. 1905 § 4129.

[14] Sullivan v. La Crosse etc. Co., 10–386(308). See Masterson v. Le Claire, 4–163(108).

[15] Keegan v. Peterson, 24–1; Brown v. Brown, 28–501, 11+64; Northern T. Co. v. Albert Lea College, 68–112, 71+9.

[16] Jensen v. Crevier, 33–372, 23+541.

[17] Masterson v. Le Claire, 4–163(108).

[18] Kipp v. Fullerton, 4–473(366); Reynolds v. La Crosse etc. Co., 10–178(144).

and reviewable as such.[19] It has been held, overruling a long line of earlier cases, that an error of the clerk in assessing damages may be reviewed on an appeal from a default judgment.[20] Where, on a motion for judgment in the district court, the order therefor is made on default, an appeal from the judgment will not avail until an application for relief has been made to the court granting the order.[21]

297. Appeal from orders relating to provisional and ancillary remedies—The statute provides for an appeal from an order granting or refusing a provisional remedy, or which grants, refuses, dissolves, or refuses to dissolve an injunction, or an order vacating or sustaining an attachment.[22] Under this provision of the statute the following orders have been held appealable: an order vacating an attachment;[23] an order refusing to vacate an attachment;[24] an order modifying an injunction and suspending its operation in part;[25] an order refusing to appoint a receiver;[26] an order appointing a receiver;[27] an order vacating the appointment of a receiver;[28] and an order, made after a hearing, granting a temporary injunction.[29] The following orders have been held not appealable under this provision: an ex parte order granting an injunction;[30] and an order granting or refusing an inspection of documents.[31]

298. Appeal from orders involving the merits—*a. In general*—The statute provides for an appeal from an order involving the merits of the action or some part thereof.[32] This remarkably liberal provision has been made a veritable stalking-horse behind which appeals from all kinds of intermediate orders have crept into the supreme court, causing vexatious delays in the trial of actions on the merits.[33] Inasmuch as any intermediate order involving the merits may be reviewed on an appeal from the final judgment, this provision ought to be very strictly construed. An order involving the merits is one which determines "the strict legal rights of the parties as contradistinguished from those mere questions of practice which every court regulates for itself, and from all matters which depend upon the discretion or favor of the court."[34] It "must be decisive of the question involved, or of some strictly legal right of the party appealing. An order which leaves the point involved still pending before the court, and undetermined, cannot be said to involve the merits or affect a substantial right."[35] To be appealable under this provision the order should be, in its effect, in the nature of a final judgment in the action, or at least a final determination of some material question involved therein. It must be

[19] 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; Hersey v. Walsh, 38–521, 38+613.

[20] Reynolds v. La Crosse etc. Co., 10–178 (144) (overruling Babcock v. Sanborn, 3–141(86); Milwain v. Sanford, 3–147(92); Willoughby v. Stanton, 3–150(94); Slaughter v. Nininger, 3–150(95); Daniels v. Harris, 4–169(114); Daniels v. Allen, 4–170(115); Daniels v. Wainwright, 4–171, 116).

[21] Gederholm v. Davies, 59–1, 60+676.

[22] R. L. 1905 § 4365(2).

[23] Davidson v. Owens, 5–69(50); Gale v. Seifert, 39–171, 39+69. See State v. Dist. Ct., 52–283, 53+1157.

[24] Ely v. Titus, 14–125(93); Thomas v. Craig, 60–501, 62+1133.

[25] Weaver v. Miss. etc. Co., 30–477, 16+269.

[26] Grant v. Webb, 21–39.

[27] State v. Egan, 62–280, 64+813.

[28] Folsom v. Evans, 5–418(338).

[29] Fuller v. Schutz, 88–372, 93+118.

[30] State v. Dist. Ct., 52–283, 53+1157; Fuller v. Schutz, 88–372, 93+118; West P. Co. v. De La Mott, 104–174, 116+103.

[31] Harris v. Richardson, 92–353, 100+92.

[32] R. L. 1905 § 4365(3).

[33] Bond v. Welcome, 61–43, 63+3.

[34] Chouteau v. Parker, 2–118(95); Starbuck v. Dunklee, 10–168(136); Piper v. Johnston, 12–60(27); Holmes v. Campbell, 13–66(58); Chisago County v. St. P. etc. Ry., 27–109, 6+454; Nat. Albany Ex. Bank v. Cargill, 39–477, 40+570; Plano Mfg. Co. v. Kaufert, 86–13, 89+1124.

[35] McMahon v. Davidson, 12–357(232); Nat. Albany Ex. Bank v. Cargill, 39–477, 40+570; Mpls. T. Co. v. Menage, 66–447, 69+224.

something more than a mere ruling or intermediate order made in the course of the trial on a question of procedure. To allow an appeal in such cases would make the delay and expense of litigation intolerable.[36]

b. Orders held appealable—Under this provision of the statute the following orders have been held appealable: an order striking out a pleading or a portion of a pleading for any cause;[37] an order vacating a judgment on default and granting defendant leave to answer;[38] an order setting aside a stipulation of counsel for a dismissal;[39] an order setting aside a stipulation as to the facts of a case;[40] an order refusing to vacate an unauthorized judgment;[41] an order setting aside a judgment in proceedings to enforce the payment of taxes;[42] an order allowing counsel fees after judgment in a divorce case;[43] an order denying a motion to strike from the files a settled case or bill of exceptions for irregularities in the settlement thereof;[44] an order of the district court, vacating its previous order, affirming on the merits an order of the probate court refusing to vacate its order allowing the account of a guardian;[45] an order granting attorney's fees in divorce proceedings;[46] an order striking a cause from the calendar on the ground that it has been transferred to another court and the validity of the attempted removal is disputed;[47] an order of sale and an order of confirmation in proceedings winding up an insolvent corporation;[48] an order after judgment allowing an amendment of the complaint and directing certain issues to be placed on the calendar for trial;[49] an order denying the motion of the defendant, appearing specially for that purpose, to set aside the service of summons upon him;[50] an order denying a motion to modify a judgment;[51] and an order denying a motion to discharge a garnishee and to dismiss the action for want of jurisdiction.[52]

c. Orders held not appealable—The following orders have been held not appealable under this provision: an order denying a motion on the trial for judgment on the pleadings;[53] an order directing a compulsory reference;[54] an order refusing to strike out a pleading;[55] an order denying a motion to make a pleading more definite and certain;[56] an order denying a motion to change the place of trial;[57] an order vacating a prior order vacating a judgment;[58] an order denying a motion to set aside a complaint on the ground that it does not conform to the notice in the summons;[59] an order modifying a prior order

[36] Hulett v. Matteson, 12–349(227); Minn. C. Ry. v. Peterson, 31–42, 16+456; Am. B. Co. v. Kingdom P. Co., 71–363, 73+1089; State v. O'Brien, 83–6, 85+1135; Harris v. Richardson, 92–353, 100+92; West P. Co. v. De La Mott, 104–174, 116+103.

[37] Wolf v. Banning, 3–202(133); Starbuck v. Dunklee, 10–168(136); Kingsley v. Gilman, 12–515(425); Brisbin v. Am. Ex. Co., 15–43(25); Harlan v. St. P. etc. Ry., 31–427, 18+147; Vermilye v. Vermilye, 32–499, 18+832; Lovering v. Webb, 108–201, 120+688.

[38] Holmes v. Campbell, 13–66(58); People's Ice Co. v. Schlenker, 50–1, 52+219.

[39] Rogers v. Greenwood, 14–333(256).

[40] Bingham v. Winona County, 6–136 (82). But see Sunvold v. Melby, 82–544, 85+549.

[41] Piper v. Johnston, 12–60(27).

[42] Chisago County v. St. P. & D. Ry., 27–109, 6+454.

[43] Wagner v. Wagner, 34–441, 26+450. See Schuster v. Schuster, 84–403, 87+1014.

[44] Baxter v. Coughlin, 80–322, 83+190.

[45] Levi v. Longini, 82–324, 84+1017, 86+333.

[46] Schuster v. Schuster, 84–403, 87+1014.

[47] Chadbourne v. Reed, 83–447, 86+415.

[48] Hospes v. N. W. etc. Co., 41–256, 43+180.

[49] North v. Webster, 36–99, 30+429.

[50] Plano Mfg. Co. v. Kaufert, 86–13, 89+1124.

[51] Halvorsen v. Orinoco M. Co., 89–470, 95+320.

[52] Krabve v. Roy, 98–141, 107+966.

[53] McMahon v. Davidson, 12–357(232).

[54] Bond v. Welcome, 61–43, 63+3.

[55] Rice v. First Div. etc. Ry., 24–447; Vermilye v. Vermilye, 32–499, 18+832; Exley v. Berryhill, 36–117, 30+436; Nat. Albany Ex. Bank v. Cargill, 39–477, 40+570.

[56] Am. B. Co. v. Kingdom P. Co., 71–363, 73+1089; State v. O'Brien, 83–6, 85+1135.

[57] Mayall v. Burke, 10–285(224); Carpenter v. Comfort, 22–539; Allis v. White, 59–97, 60+809.

[58] State v. Crosley Park Land Co., 63–205, 65+268.

[59] Sibley County v. Young, 21–335.

granting a new trial;[60] an order denying a motion to strike out and dismiss objections filed to the allowance of the account of a trustee;[61] an order refusing an application to intervene;[62] an order refusing to dismiss an appeal;[63] an order appointing a committee in proceedings to condemn land for the purpose of enlarging a cemetery;[64] an order denying a motion to affirm an order of the probate court;[65] an order granting or denying an inspection of documents;[66] and an order denying a motion to dismiss an appeal from the award of commissioners in condemnation proceedings.[67]

299. Appeal from an order sustaining or overruling a demurrer—The statute provides for an appeal from an order sustaining or overruling a demurrer.[68] Prior to 1861 no appeal was allowed from such an order.[69] Laws 1861 c. 21 authorized an appeal from any order made on a demurrer.[70] This provision was not included in the Revision of 1866. Our present statute was enacted in 1867.[71] Of course the right to appeal from an order sustaining or overruling a demurrer does not cut off the right to appeal from a judgment entered on a demurrer. A party has an option either to appeal from the order made on the demurrer, or to wait until a judgment is entered thereon and then appeal from the judgment. On the appeal from the judgment the order made on the demurrer may be reviewed as an intermediate order involving the merits. But a party cannot appeal from the order and judgment at the same time[72] and of course if an appeal is taken from the order the decision thereon is conclusive on a subsequent appeal from the judgment. In our practice the appeal is almost uniformly taken from the order. An order striking out a demurrer as frivolous has always been treated as appealable in this state,[73] but it has apparently never been decided whether it is appealable by virtue of this or the third subdivision of the statute. The statute does not apply to a criminal action.[74] When a party by leave of court withdraws his demurrer and pleads over he is held to waive objection to the decision on demurrer.[75] So, also, by amending his pleading after demurrer a party is held to waive his objection.[76] The failure of a party demurring to appear at the hearing below does not prevent him from being heard on appeal.[77] Where a demurrer based on two grounds is sustained upon one of them, the court holding the other not good, the demurrant cannot appeal.[78] Unless the decision on demurrer is practically decisive of his cause of action under any complaint which the facts would warrant, it is ordinarily advisable for the plaintiff to amend his complaint to conform to the views of the court rather than to appeal.[79]

300. Appeal from orders granting or denying a new trial—The statute provides for an appeal from an order granting or refusing a new trial.[80] Before the enactment of this provision it was held that such orders were not appealable.[81] A new trial means a retrial of issues of facts as distinguished from

[60] Chouteau v. Parker, 2–118(95).
[61] Mpls. T. Co. v. Menage, 66–447, 69+224.
[62] Bennett v. Whitcomb, 25–148.
[63] Rabitte v. Nathan, 22–266.
[64] Forest C. Assn. v. Constans, 70–436, 73+153.
[65] McGinty v. Kelley, 85–117, 88+430.
[66] Harris v. Richardson, 92–353, 100+92.
[67] Minn. C. Ry. v. Peterson, 31–42, 16+456.
[68] R. L. 1905 § 4365(4).
[69] Cummings v. Heard, 2–34(25); Sons of Temperance v. Brown, 9–151(141). See Hawke v. Deuel, 2–58(46).
[70] Sons of Temperance v. Brown, 9–151(141).
[71] Laws 1867 c. 63.
[72] Hatch v. Schusler, 46–207, 48+782.
[73] Hatch v. Schusler, 46–207, 48+782; Friesenhahn v. Merrill, 52–55, 53+1024; Olsen v. Cloquet L. Co., 61–17, 63+95.
[74] State v. Abrisch, 42–202, 43+1115.
[75] Coit v. Waples, 1–134(110); Thompson v. Ellenz, 58–301, 59+1023; Cook v. Kittson, 68–474, 71+670.
[76] Becker v. Sandusky City Bank, 1–311(243).
[77] Hall v. Williams, 13–260(242).
[78] Com. Ins. Co. v. Pierro, 6–569(404).
[79] Benton v. Schulte, 31–312, 17+621.
[80] R. L. 1905 § 4365(4).
[81] Chouteau v. Rice, 1–121(97); Dufolt v. Gorman, 1–301(234).

issues of law and hence an order denying a motion to vacate an order sustaining a demurrer and for a new trial on the demurrer is not appealable as an order denying a new trial.[82] 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 the motion an appeal lies to the supreme court.[83] So also an appeal lies from an order of the district court granting or denying a motion for a new trial after a trial by a referee.[84] An order refusing to vacate an order denying a new trial is not appealable.[85] An order granting or denying a new trial is appealable though made after the entry of judgment.[86] As the law formerly stood an order of the court was necessary to give a party a second trial of right in an action of ejectment and such order was held appealable.[87] A mere pro forma order denying a new trial is not appealable.[88] An order granting or denying a new trial under R. L. 1905 § 4160 is appealable.[89] An order modifying a prior order granting a new trial is not appealable.[90] A refusal to entertain a motion for a new trial is in effect a denial of such a motion and appealable as such.[91] An order denying a blended motion for judgment notwithstanding the findings or for a new trial in a case tried by the court without a jury is appealable.[92] When a cause has been called for trial on issues of fact, any order or ruling thereafter made, such as ordering judgment on the pleadings, which it is claimed prevented a party from having a fair trial of such issues, constitutes a ground for a motion for a new trial, and an order granting or refusing such motion is appealable.[93]

301. Appeal from order determining action and preventing a judgment—The statute provides for an appeal from an order, which, in effect, determines the action, and prevents a judgment from which an appeal might be taken.[94] The following orders have been held appealable under this provision: an order vacating a prior order setting aside a judgment, the second order being made after the time to appeal from the judgment had expired;[95] an order dismissing an appeal from an order of town supervisors laying out a highway and from their award of damages;[96] an order discharging a garnishee;[97] an order in insolvency proceedings setting aside insurance money as exempt;[98] an order denying the petition of a creditor in insolvency proceedings to be permitted to file his claim for allowance after the time limited;[99] an order for judgment without proof, upon a demurrer in an equitable action being overruled;[1] an order dismissing an appeal from a justice court;[2] an order setting aside a former order dismissing an action and reinstating the case on the calendar;[3] and an order striking out a pleading.[4] The following orders have been held not appealable under this provision: an order dismissing an action before trial on the application of the plaintiff;[5] an order dismissing an appeal from a jus-

[82] Dodge v. Bell, 37-382, 34+739.
[83] Chittenden v. G. A. Bank, 27-143, 6+773; Ashton v. Thompson, 28-330, 9+876.
[84] Thayer v. Barney, 12-502(406).
[85] Little v. Leighton, 46-201, 48+778.
[86] Humphrey v. Havens, 9-318(301); Schuek v. Hagar, 24-339.
[87] Howes v. Gillett, 10-397(316).
[88] Johnson v. Howard, 25-558.
[89] Sheffield v. Mullin, 28-251, 9+756.
[90] Chouteau v. Parker, 2-118(95).
[91] Ashton v. Thompson, 28-330, 9+876; McCord v. Knowlton, 76-391, 79+397.
[92] Noble v. G. N. Ry., 89-147, 94+434; Young v. Grieb, 95-396, 104+131.
[93] Hine v. Myrick, 60-518, 62+1125.
[94] R. L. 1905 § 4365(5).
[95] Marty v. Ahl, 5-27(14).
[96] Haven v. Orton, 37-445, 35+264; Burkleo v. Baytown, 108-224, 120+526.
[97] McConnell v. Rakness, 41-3, 42+539; Cummings v. Edwards, 95-118, 103+709.
[98] In re How, 59-415, 61+456.
[99] Richter v. Merchants Nat. Bank, 65-237, 67+995.
[1] Deuel v. Hawke, 2-50(37).
[2] Ross v. Evans, 30-206, 14+897 (overruled by statute). See Graham v. Conrad, 66-470, 69+215; Taylor v. Red Lake Falls L. Co., 81-492, 84+301.
[3] Picciano v. Duluth etc. Ry., 102-21, 112+885.
[4] Lovering v. Webb, 108-201, 120+688.
[5] Jones v. Rahilly, 16-177(155).

tice court;[6] an order denying a motion to dismiss an appeal from the probate court;[7] an order appointing a committee in proceedings to condemn land for the purpose of enlarging a cemetery under G. S. 1894 § 3096;[8] an order denying a motion to set aside the report of commissioners in condemnation proceedings;[9] an order denying a motion to set aside a complaint on the ground that it does not conform to the notice in the summons;[10] an order denying a motion to affirm an order of the probate court allowing the account of an executor;[11] an order refusing to strike a cause from the calendar;[12] an order denying the motion of the defendant appearing specially for that purpose, to set aside the service of summons upon him.[13]

302. Appeal from final orders in special proceedings—*a. In general*—The statute provides for an appeal from a final order affecting a substantial right, made in a special proceeding, or upon a summary application in an action after judgment.[14] A mere interlocutory or administrative order is not a "final" order.[15] A final order is one that ends a proceeding so far as the court making it is concerned.[16] The phrase "special proceeding" is a generic term for all civil remedies in courts of justice which are not ordinary actions.[17] A judgment in a special proceeding may be regarded as an "order" within the statute.[18]

b. Orders held appealable—The following orders have been held appealable under this provision: an order granting leave to issue execution after the statutory time;[19] an order made upon a disclosure in proceedings supplementary to execution, directing the assignment of certain claims belonging to the judgment debtor and appointing a receiver to collect the same;[20] an order directing a sheriff to pay over certain moneys collected by him on execution;[21] an order appointing a receiver under the insolvency law of 1881;[22] an order directing a receiver to distribute the proceeds of the estate of an insolvent equally among all his creditors and setting aside the liens of attaching and execution creditors;[23] an order in insolvency proceedings dismissing a petition;[24] an order denying a motion to correct a judgment entered by the clerk and not conforming to the findings;[25] an order in proceedings for contempt other than criminal;[26] an order vacating an execution sale of real estate, the certificate and sheriff's return;[27] an order dismissing a motion to compel an entry of satisfaction of a judgment;[28] an order discharging a person on habeas corpus;[29] an order vacating an order discharging a person on habeas corpus;[30] an order

[6] Graham v. Conrad, 66–470, 69+215.
[7] Rabitte v. Nathan, 22–266; Kelly v. Hopkins, 72–258, 75+374.
[8] Forest C. Assn. v. Constans, 70–436, 73+153.
[9] Fletcher v. Chi. etc. Ry., 67–339, 69+1085.
[10] Sibley County v. Young, 21–335.
[11] McGinty v. Kelley, 85–117, 88+430.
[12] Chadbourne v. Reed, 83–447, 86+415.
[13] Plano Mfg. Co. v. Kaufert, 86–13, 89+1124.
[14] R. L. 1905 § 4365(7).
[15] Brown v. Minn. T. M. Co., 44–322, 46+560.
[16] Rondeau v. Beaumette, 4–224(163).
[17] Schuster v. Schuster, 84–403, 87+1014.
[18] Koochiching Co. v. Franson, 91–404, 98+98.
[19] Entrop v. Williams, 11–381(276).
[20] Knight v. Nash, 22–452.
[21] Coykendall v. Way, 29–162, 12+452.
[22] In re Graeff, 30–358, 16+395; In re Jones, 33–405, 23+835. See Brown v. Minn. T. M. Co., 44–322, 46+560.
[23] State v. Severance, 29–269, 13+48. See Brown v. Minn. T. M. Co., 44–322, 46+560.
[24] In re Harrison, 46–331, 48+1132.
[25] Nell v. Dayton, 47–257, 49+981.
[26] Register v. State, 8–214(185); Semrow v. Semrow, 26–9, 46+446; Papke v. Papke, 30–260, 15+117; Menage v. Lustfield, 30–487, 16+398; In re Fanning, 40–4, 41+1076; State v. Leftwich, 41–42, 42+598; State v. Willis, 61–120, 63+169; Deppe v. Ford, 89–253, 94+679.
[27] Tillman v. Jackson, 1–183(157); Hutchins v. Carver County, 16–13(1).
[28] Ives v. Phelps, 16–451(407).
[29] State v. Buckham, 29–462, 13+902.
[30] State v. Hill, 10–63(45).

allowing a peremptory writ of mandamus;[31] an order directing a sheriff who has possession of warrants by virtue of replevin proceedings to turn them over to a receiver in another action;[32] an order denying a motion to open a tax judgment;[33] an order denying a motion to vacate a judgment of divorce and to allow defendant to answer;[34] an order denying an application to vacate a judgment rendered against a party after his decease;[35] an order made on a motion to correct a judgment entered by the clerk on insufficient evidence of personal service of summons;[36] an order appointing or refusing to appoint a receiver in proceedings supplementary to execution;[37] an order in condemnation proceedings dismissing an appeal from the award of the commissioners;[38] an order on disclosure in proceedings supplementary to execution directing the payment of money by the judgment debtor;[39] an order setting apart to the insolvent, in insolvency proceedings, insurance money exempt by law;[40] an order denying a new trial in condemnation proceedings;[41] an order setting aside a judgment in proceedings to enforce the payment of taxes;[42] an order in proceedings on certiorari quashing the proceedings of county commissioners in forming a new school district;[43] an order relating to bastardy proceedings, denying the defendant's application for his discharge;[44] an order granting attorneys' fees in divorce proceedings;[45] an order permitting creditors of an insolvent to share in his estate without filing releases of their debts;[46] an order discharging a garnishee after examination;[47] an order of sale and an order confirming a sale in proceedings winding up an insolvent corporation;[48] an order assessing stockholders in proceedings under chapter 76, G. S. 1894;[49] an order allowing claims of creditors in proceedings under chapter 76, G. S. 1894;[50] an order denying a motion to modify a judgment;[51] and a judgment vacating a plat.[52]

c. Orders held not appealable—The following orders have been held not appealable under this provision: an order to appear and answer and of reference in proceedings supplementary to execution;[53] an order refusing an application to intervene;[54] an order denying a motion to strike out and dismiss objections filed to the allowance of the account of a trustee;[55] an order denying a motion to set aside the report of commissioners in condemnation proceedings;[56] an order appointing a committee in proceedings to condemn land for the purpose of a cemetery;[57] an order denying a motion to dismiss an appeal from the probate court;[58] an order dismissing an appeal from the award of water commis-

[31] State v. Webber, 31–211, 17+339 (overruled, State v. Copeland, 74–371, 77+221).
[32] Elwell v. Goodnow, 71–390, 73+1095.
[33] Aitkin County v. Morrison, 25–295. See Chisago County v. St. P. & D. Ry., 27–109, 6+454.
[34] Young v. Young, 17–181(153).
[35] Stocking v. Hanson, 22–542.
[36] Masterson v. Le Claire, 4–163(108).
[37] Knight v. Nash, 22–452; Roeller v. Ames, 33–132, 22+177.
[38] Warren v. First Div. etc. Ry., 18–384 (345). See Conter v. St. P. etc. Ry., 24–313.
[39] Christensen v. Tostevin, 51–230, 53+461.
[40] In re How, 59–415, 61+456.
[41] Minn. Valley Ry. v. Doran, 15–230 (179).
[42] Chisago County v. St. P. & D. Ry., 27–109, 6+454.
[43] Moede v. Stearns County, 43–312, 45+435.
[44] State v. Dist. Ct., 79–27, 81+536.
[45] Schuster v. Schuster, 84–403, 87+1014.
[46] Ekberg v. Schloss, 62–427, 64+922.
[47] McConnell v. Rakness, 41–3, 42+539.
[48] Hospes v. N. W. etc. Co., 41–256, 43+180.
[49] London etc. Co. v. St. Paul etc. Co., 84–144, 86+872.
[50] Id.
[51] Halvorsen v. Orinoco M. Co., 89–470, 95+320.
[52] Koochiching Co. v. Franson, 91–404, 98+98.
[53] Rondeau v. Beaumette, 4–224(163) (overruled by statute).
[54] Bennett v. Whitcomb, 25–148.
[55] Minneapolis T. Co. v. Menage, 66–447, 69+224.
[56] Fletcher v. Chi. etc. Ry., 67–339, 69+1085.
[57] Forest C. Assn. v. Constans, 70–436, 73+153.
[58] Kelly v. Hopkins, 72–258, 75+374.

sioners;[59] an order granting a new trial in condemnation proceedings;[60] an order denying a motion to dismiss a petition under the statute relating to dams and mills;[61] an order appointing commissioners in condemnation proceedings;[62] an order refusing to dismiss an appeal from the probate court;[63] an order denying a motion to affirm an order of the probate court allowing the account of an executor;[64] an order vacating a previous order of dismissal in insolvency proceedings;[65] an order denying a motion for a new trial, after the entry of judgment in proceedings to enforce the collection of assessments for local improvements under the charter of the city of St. Paul;[66] an administrative order in an action to wind up a corporation.[67]

303. Ex parte orders—As a general rule no appeal lies from an ex parte order. To allow an appeal from such orders would violate the fundamental principle of appellate procedure that the appellate court should only review questions already considered and determined by the lower court on the merits. The law attaches much importance to the hearing of both the interested parties, not only as a matter of right to them but as an aid to courts in the determination of matters brought before them. It is ordinarily to be supposed that a court which may have acted inconsiderately or erroneously upon an ex parte application would perceive and correct its error if the adverse party were heard. It is well understood, as a matter of practice, that a judge granting an ex parte order does not ordinarily pass upon and determine the point involved. If it is considered that the order was improvidently granted, a motion is made to the court to vacate it and on such motion both parties are heard and a deliberate judgment of the court obtained, from which an appeal may lie; until such hearing and decision there is no ground for an appeal, for no question has been decided. To sooner present the question to the supreme court would not be to ask it to affirm or reverse the judgment or order of the lower court but to pass upon a question not decided in that court. Such a practice would be contrary to the obvious design of our laws. It would work injustice to the lower court, indicating error where there had been no deliberate judgment or decision of the question. It would also encourage vexatious and dilatory appeals to the injury of suitors and the community.[68]

304. Orders vacating non-appealable orders—A non-appealable order cannot be carried to the supreme court for review on the merits by means of an appeal from an order granting or refusing a motion to vacate such order. That which cannot be done directly cannot be done indirectly.[69]

305. Appeal from order as amended—Where, after an appeal is taken from an order granting a new trial, the case is remanded to the trial court in order that an application may be made to have the order amended so that it will state the ground upon which it was made, and the order is amended, and the records of the proceedings duly returned to the supreme court, the appeal is from the order as amended.[70]

306. Appeals from orders and judgments in supplementary proceedings—The statute provides for an appeal from an order or judgment in supple-

[59] Gurney v. St. Paul, 36–163, 30+661.
[60] McNamara v. Minn. C. Ry., 12–388 (269). But see Witt v. St. P. etc. Ry., 35–404, 29+161.
[61] Turner v. Holleran, 11–253(168).
[62] Duluth Transfer Ry. v. Duluth Terminal Ry., 81–62, 83+497.
[63] Kelly v. Hopkins, 72–258, 75+374.
[64] McGinty v. Kelley, 85–117, 88+430.
[65] In re Studdart, 30–553, 16+452.
[66] St. Paul v. Rogers, 22–492.
[67] Brown v. Minn. T. M. Co., 44–322, 46+560.
[68] Hoffman v. Mann, 11–364(262); Schurmeier v. First Div. etc. Ry., 12–351(228); McNamara v. Minn. C. Ry., 12–388(269); State v. Dist. Ct., 52–283, 53+1157; Fuller v. Schutz, 88–372, 93+118; Sundberg v. Goar, 92–143, 99+638; West Pub. Co. v. De La Mott, 104–174, 116+103.
[69] Brown v. Minn. T. M. Co., 44–322, 46+560; Lockwood v. Bock, 46–73, 48+458.
[70] Powers v. Delehunt, 105–334, 117+503.

mentary proceedings.[71] An order requiring a judgment debtor to appear for examination is not appealable.[72] There seems no need of this subdivision of the statute. Orders in supplementary proceedings are appealable under the seventh subdivision.[73]

307. Tax proceedings—The orders and judgments of the district court in tax proceedings are now appealable as in ordinary civil actions.[74] Formerly the exclusive mode of securing a review by the supreme court was by certifying questions to it and by certiorari.

308. General list of appealable orders—The following orders have been held appealable: granting or denying a new trial;[75] granting or denying, dissolving or refusing to dissolve, an injunction;[76] vacating or refusing to vacate an attachment;[77] sustaining or overruling a demurrer;[78] in insolvency proceedings;[79] in condemnation proceedings;[80] in civil contempt proceedings;[81] in proceedings to wind up corporations;[82] in garnishment proceedings;[83] in habeas corpus proceedings;[84] in supplementary proceedings;[85] for judgment notwithstanding the verdict under the statute;[86] opening a default judgment;[87] striking out a pleading;[88] refusing to vacate an unauthorized judgment;[89] setting aside a tax judgment;[90] denying motion to correct judgment entered by clerk;[91] appointing a receiver in foreclosure proceedings;[92] refusing to appoint a receiver;[93] vacating the appointment of a receiver;[94] directing a sheriff to deliver property levied on to a receiver in insolvency;[95] directing a sheriff to deliver property taken in replevin to a receiver;[96] refusing to strike settled case from files;[97] setting aside a stipulation for a dismissal;[98] setting aside a stipulation as to the facts of a case;[99] allowing or disallowing counsel fees in divorce proceedings;[1] directing a sheriff to pay over money;[2] refusing

[71] R. L. 1905 § 4365(6).

[72] Rondeau v. Beaumette, 4–224(163); West Pub. Co. v. De La Mott, 104–174, 116+103.

[73] See Knight v. Nash, 22–452 (order appointing receiver); Christensen v. Tostevin, 51–230, 53+461 (order directing judgment debtor to pay over money).

[74] R. L. 1905 § 921; State v. Lockhart, 89–121, 94+168; State v. Griffith, 92–1, 98+1023; State v. Dist. Ct., 93–177, 100+889.

[75] See § 300.

[76] See § 297.

[77] Id.

[78] See § 299.

[79] In re Graeff, 30–358, 16+395; In re Jones, 33–405, 23+835; In re Harrison, 46–331, 48+1132; In re How, 59–415, 61+456; Ekberg v. Schloss, 62–427, 64+922; Richter v. Merchants' Nat. Bank, 65–237, 67+995.

[80] Minn V. Ry. v. Doran, 15–230(179); Warren v. First Div. etc. Ry., 18–384(345); Conter v. St. P. etc. Ry., 24–313; In re St. P. etc. Ry., 34–227, 25+345. See Duluth T. Ry. v. Duluth Ter. Ry., 81–62, 73+497.

[81] Register v. State, 8–214(185); State v. Leftwich, 41–42, 42+598; State v. Willis, 61–120, 63+169; Deppe v. Ford, 89–253, 94+679. See Semrow v. Semrow, 26–9, 46+446; Menage v. Lustfield, 30–487, 16+398.

[82] Hospes v. N. W. etc. Co., 41–256, 43+180; London etc. Co. v. St. P. etc. Co., 84–144, 86+872.

[82] McConnell v. Rakness, 41–3, 42+539; Cummings v. Edwards, 95–118, 103+709. See § 3979.

[84] R. L. 1905 § 4601. See § 4142.

[85] Knight v. Nash, 22–452; Christensen v. Tostevin, 51–230, 53+461. See West Pub. Co. v. De La Mott, 104–174, 116+103.

[86] See § 5084.

[87] Holmes v. Campbell, 13–66(58); People's Ice Co. v. Schlenker, 50–1, 52+219.

[88] Wolf v. Banning, 3–202(133); Starbuck v. Dunklee, 10–168(136); Kingsley v. Gilman, 12–515(425); Brisbin v. Am. Ex. Co., 15–43(25); Harlan v. St. P. etc. Ry., 31–427, 18+147; Vermilye v. Vermilye, 32–499, 18+832, 21+736; Floody v. Chi. etc. Ry., 104–132, 116–111; Lovering v. Webb, 108–201, 120+688.

[89] Piper v. Johnston, 12–60(27).

[90] Chisago County v. St. P. & D. Ry., 27–109, 6+454.

[91] Nell v. Dayton, 47–257, 49+981.

[92] State v. Egan, 62–280, 64+813.

[93] Grant v. Webb, 21–39.

[94] Folsom v. Evans, 5–418(338).

[95] In re Jones, 33–405, 23+835.

[96] Elwell v. Goodnow, 71–390, 73+1095.

[97] Baxter v. Coughlin, 80–322, 83+190.

[98] Rogers v. Greenwood, 14–333(256).

[99] Bingham v. Winona County, 6–136(82). See Sunvold v. Melby, 82–544, 85+549.

[1] Wagner v. Wagner, 34–441, 26+450; Schuster v. Schuster, 84–403, 87+1014.

[2] Coykendall v. Way, 29–162, 12+452.

to compel entry of satisfaction of judgment;[3] refusing to open tax judgment;[4] granting leave to issue execution after time limited;[5] vacating an execution sale;[6] dismissing appeal from order of town supervisors laying out highway;[7] vacating previous order affirming on the merits an order of the probate court refusing to vacate its order allowing the account of a guardian;[8] striking a case from the calendar because transferred to another court;[9] allowing an amendment of a complaint after judgment and directing issues to be placed on the calendar for trial;[10] refusing to vacate a judgment of divorce and to allow defendant to answer;[11] refusing to vacate a judgment entered against a decedent;[12] quashing proceedings of county commissioners in forming new school district;[13] refusing a discharge in bastardy proceedings;[14] vacating a prior order setting aside a judgment;[15] refusing to set aside a service of summons;[16] refusing to modify a judgment;[17] refusing to vacate an ex parte order adding new parties defendant;[18] vacating a plat;[19] refusing to discharge a garnishee and to dismiss an action for want of jurisdiction;[20] refusing to open a default judgment;[21] vacating a prior order of dismissal and reinstating a case on the calendar.[22]

309. General list of non-appealable orders—No appeal lies from the following orders: dismissing an action on the trial for insufficiency of the evidence,[23] or for insufficiency of the pleadings;[24] refusing to dismiss an action on the trial for insufficiency of the evidence,[25] or for insufficiency of the pleadings,[26] or for want of jurisdiction;[27] granting a motion on the trial for judgment on the pleadings;[28] refusing a motion on the trial for judgment on the pleadings;[29] directing a compulsory reference;[30] granting or refusing an amendment of the pleadings on the trial;[31] admitting or excluding evidence on the trial;[32] refusing to strike out a pleading as sham or frivolous;[33] refusing to strike out allegations claimed to be irrelevant and redundant;[34] denying a motion to make a pleading more definite and certain;[35] refusing to strike out portions of a pleading for duplicity;[36] granting or denying a motion for a

[3] Ives v. Phelps, 16–451(407).
[4] Aitkin County v. Morrison, 25–295.
[5] Entrop v. Williams, 11–381(276).
[6] Tillman v. Jackson, 1–183(157); Hutchins v. Carver County, 16–13(1).
[7] Haven v. Orton, 37–445, 35+264.
[8] Levi v. Longini, 82–324, 84+1017.
[9] Chadbourne v. Reed, 83–447, 86+415.
[10] North v. Webster, 36–99, 30+429.
[11] Young v. Young, 17–181(153).
[12] Stocking v. Hanson, 22–542.
[13] Moede v. Stearns County, 43–312, 45+435.
[14] State v. Dist. Ct., 79–27, 81+536.
[15] Marty v. Ahl, 5–27(14).
[16] Plano Mfg. Co. v. Kaufert, 86–13, 89+1124.
[17] Halvorsen v. Orinoco M. Co., 89–470, 95+320.
[18] Sundberg v. Goar, 92–143, 99+638.
[19] Koochiching Co. v. Franson, 91–404, 98+98.
[20] Krafve v. Roy, 98–141, 107+966.
[21] Barrie v. Northern Assur. Co., 99–272, 109+248.
[22] Picciano v. Duluth etc. Co., 102–21, 112+885.
[23] Hodgins v. Heaney, 15–185(142); Searles v. Thompson, 18–316(285); Gottstein v. St. Jean, 79–232, 82+311.
[24] Thorp v. Lorenz, 34–350, 25+712.
[25] See cases under notes (26), (27) and (28).
[26] McMahon v. Davidson, 12–357(232).
[27] Pillsbury v. Foley, 61–434, 63+1027.
[28] Lamb v. McCanna, 14–513(385); Rogers v. Holyoke, 14–514(387); Hodgins v. Heaney, 15–185(142); Lockwood v. Bock, 46–73, 48+458; U. S. etc. Co. v. Ahrens, 50–332, 52+898.
[29] McMahon v. Davidson, 12–357(232); Lockwood v. Bock, 46–73, 48+458; State v. McKellar, 92–242, 99+807.
[30] Bond v. Welcome, 61–43, 63+3.
[31] Fowler v. Atkinson, 5–505(399); White v. Culver, 10–192(155); Winona v. Minn. etc. Co., 25–328; Macauley v. Ryan, 55–507, 57+151; Hanley v. Cass County, 87–209, 91+756.
[32] Hulett v. Matteson, 12–349(227).
[33] Nat. etc. Bank v. Cargill, 39–477, 40+570; Floody v. Chi. etc. Ry., 104–132, 116+111.
[34] Rice v. First Div. etc. Ry., 24–447; Vermilye v. Vermilye, 32–499, 18+832.
[35] Am. B. Co. v. Kingdom Pub. Co., 71–363, 73+1089; State v. O'Brien, 83–6, 85+1135.
[36] Exley v. Berryhill, 36–117, 30+436.

change of venue;[37] denying a motion for additional or amended findings;[38] for judgment;[39] setting aside a judgment upon a question of practice as to the service of an answer;[40] requiring a bill of particulars to be made more specific;[41] dismissing an application for the settlement of a bill of exceptions or case;[42] settling and allowing a case or bill of exceptions;[43] denying a motion to amend or change conclusions of law;[44] granting an injunction ex parte;[45] vacating a prior order vacating a judgment;[46] refusing to set aside garnishment proceedings for insufficiency of the affidavit and granting plaintiff leave to file a supplemental complaint;[47] refusing to dismiss an appeal from the probate to the district court;[48] appointing a committee in proceedings to condemn land for a cemetery;[49] denying a motion to set aside the report of commissioners in condemnation proceedings;[50] granting a receiver leave to bring action to enforce the statutory liability of stockholders;[51] denying motion for judgment on the findings after reversal on appeal;[52] denying a motion for a new trial on an issue of law;[53] denying a motion to set aside a complaint on the ground that it does not conform to the notice in the summons;[54] refusing permission to intervene;[55] dismissing an action before trial on the application of the plaintiff;[56] dismissing an appeal from a justice court;[57] refusing to dismiss an appeal from the award of commissioners in condemnation proceedings;[58] refusing to dismiss an appeal from the award of water commissioners proceeding under a city charter;[59] refusing leave to serve a case after the statutory time;[60] setting aside taxation of costs and ordering retaxation;[61] on default under rule 10 of the district court;[62] refusing an application for the removal of a cause from a state to a federal court;[63] requiring payment of costs as a condition of continuance;[64] affirming taxation of costs in justice court;[65] determining a party's right to costs;[66] in proceedings for criminal contempt;[67] granting or denying a motion to vacate a non-appealable order;[68] modifying a prior order granting

[37] Mayall v. Burke, 10–285(224); Carpenter v. Comfort, 22–539; Allis v. White, 59–97, 60+809; Taylor v. Grand Lodge, 98–36, 107+545; Antonsky v. City Dye House, 109–96, 123+56.

[38] Rogers v. Hedemark, 70–441, 73+252; Lamprey v. St. P. etc. Ry., 86–509, 91+29; Pederson v. Christofferson, 97–491, 106+958; Peterson v. Hutchinson, 98–452, 107+1124; Nikannis v. Duluth, 108–83, 121+212; Wolf v. State Board, 108–523, 121+395.

[39] See § 295.

[40] Westervelt v. King, 4–320(236).

[41] Van Zandt v. Wood, 54–202, 55+863.

[42] Richardson v. Rogers, 37–461, 35+270.

[43] Arine v. Mpls. etc. Ry., 76–201, 78+1108, 1119.

[44] Shepard v. Pettit, 30–119, 14+511; Wheadon v. Mead, 71–322, 73+975; Savings Bank v. St. P. P. Co., 76–7, 78+873; Lamprey v. St. P. etc. Ry., 86–509, 91+29, 14+511.

[45] State v. Dist. Ct., 52–283, 53+1157.

[46] State v. Crosley Park L. Co., 63–205, 65+268.

[47] Prince v. Heenan, 5–347(279).

[48] Rabitte v. Nathan, 22–266; Kelly v. Hopkins, 72–258, 75+374.

[49] Forest C. Assn. v. Constans, 70–436, 73+153.

[50] Fletcher v. Chi. etc. Ry., 67–339, 69+1085; Duluth Tr. Ry. v. Duluth Ter. Ry., 81–62, 83+497.

[51] Bank of Minn. v. Anderson, 70–414, 73+175.

[52] Fulton v. Andrea, 72–99, 75+4.

[53] St. Cloud v. Karels, 55–155, 56+592.

[54] Sibley County v. Young, 21–335.

[55] Bennett v. Whitcomb, 25–148.

[56] Fallman v. Gilman, 1–179(153); Jones v. Rahilly, 16–177(155).

[57] Graham v. Conrad, 66–470, 69+215; Taylor v. Red Lake Falls L. Co., 81–492, 84+301; Poirer v. Martin, 89–346, 94+865.

[58] Minn. C. Ry. v. Peterson, 31–42, 16+456.

[59] Gurney v. St. Paul, 36–163, 30+661.

[60] Irvine v. Myers, 6–558(394).

[61] Felber v. Southern Minn. Ry., 28–156, 9+635; Herrick v. Butler, 30–156, 14+794; Herrick v. Marotte, 30–159, 14+793.

[62] Dols v. Baumhoefer, 28–387, 10+420; Thompson v. Haselton, 34–12, 24+199.

[63] St. Anthony Falls etc. Co. v. King, 23–186.

[64] Fay v. Davidson, 13–298(275).

[65] Closen v. Allen, 29–86, 12+146.

[66] Minn. V. Ry. v. Flynn, 14–552(421); Closen v. Allen, 29–86, 12+146.

[67] Menage v. Lustfield, 30–487, 16+398; State v. Leftwich, 41–42, 42+598; State v. Willis, 61–120, 63+169.

[68] Brown v. Minn. T. Co., 44–322, 46+560; Lockwood v. Bock, 46–73, 48+458.

a new trial;[69] denying a motion to strike out and dismiss objections filed to the allowance of the account of a trustee;[70] directing judgment upon an appeal from a justice court;[71] an "opinion" of the court;[72] "findings" of the court;[73] "decision" of the court;[74] dismissing an action for want of prosecution;[75] appointing commissioners in condemnation proceedings;[76] opening a case and permitting a party to offer further evidence upon certain points;[77] denying a motion to affirm an order of the probate court allowing the account of an executor;[78] a conditional order before compliance with the condition;[79] refusing to discharge a garnishee;[80] striking a cause from the calendar for any cause which does not prevent a trial of the action at some future term;[81] refusing to strike a cause from the calendar;[82] granding or denying a peremptory writ of mandamus;[83] denying a stay of proceedings;[84] granting leave to file a claim in insolvency proceedings after the time limited;[85] vacating a previous order of dismissal and reinstating a petition in insolvency proceedings;[86] discharging an order to show cause and a restraining order;[87] denying a new trial after judgment in special proceedings for the collection of assessments for local improvements under the charter of the city of St. Paul;[88] denying, in an election contest, as a matter of strict legal right, the contestant's motion to amend his notice of contest;[89] granting or refusing an inspection of documents;[90] on a motion under the statute for judgment notwithstanding the verdict;[91] when made ex parte;[92] a refusal to entertain a motion;[93] modifying a judgment for alimony;[94] requiring a judgment debtor to appear for examination in supplementary proceedings;[95] an appeal from the assessment of damages in ditch proceedings, under Laws 1905 c. 230, assessing the appellant's damages and directing judgment to be entered accordingly;[96] removing a receiver, except when it goes beyond the fact of removal and adjudicates rights of the receiver, either in respect to the settlement of his account or the allowance of his compensation;[97] denying a motion to amend a judgment;[98] denying a motion to consolidate two actions;[99] quashing a resolution of a county board designating a newspaper as the official county newspaper for the publication of a delinquent tax list.[1]

PARTIES

310. Who may appeal—As a general rule an appeal can be taken only by a party to the record [2] or one in privity with him.[3] The statute provides that "the aggrieved party" may appeal. This clearly limits the right of appeal to

[69] Chouteau v. Parker, 2-118(95).
[70] Mpls. T. Co. v. Menage, 66-447, 69+224.
[71] Chesterson v. Munson, 26-303, 3+695.
[72] Thompson v. Howe, 21-1.
[73] Von Glahn v. Sommer, 11-203(132).
[74] Wilson v. Bell, 17-61(40); Johnson v. N. P. etc. Ry., 39-30, 38+804.
[75] Gottstein v. St. Jean, 79-232, 82+311.
[76] Duluth Tr. Ry. v. Duluth Ter. Ry., 81-62, 83+497.
[77] Sunvold v. Melby, 82-544, 85+549.
[78] McGinty v. Kelley, 85-117, 88+430.
[79] Swanson v Andrus, 84-168, 87+363.
[80] Duxbury v. Shanahan, 84-353, 87+944; Krafve v. Roy, 98-141, 107+966.
[81] Chadbourne v. Reed, 83-447, 86+415.
[82] Id.
[83] State v. Copeland, 74-371, 77+221; State v. McKellar, 92-242, 99+807.
[84] Graves v. Backus, 69-532, 72+811.
[85] Richter v. Merchants Nat. Bank, 65-237, 67+995.
[86] In re Studdart, 30-553, 16+452.
[87] Baldwin v. Canfield, 26-62, 1+585 (question left open).
[88] St. Paul v. Rogers, 22-492.
[89] Hanley v. Cass County, 87-209, 91+756.
[90] Harris v. Richardson, 92-353, 100+92.
[91] See § 5084.
[92] See § 303.
[93] Mayall v. Burke, 10-285(224).
[94] Smith v. Smith, 77-67, 79+648; Bowlby v. Bowlby, 91-193, 97+669 (question open but order probably not appealable).
[95] West Pub. Co. v. De La Mott, 104-174, 116+103.
[96] Prahl v. Brown County, 104-227, 116+483.
[97] Young v. Irish, 104-367, 116+656.
[98] Gerish v. Johnson, 5-23(10).
[99] Webster v. Bader, 109-146, 123+289.
[1] Darby v. Steele County, 109-258, 123+662.
[2] Berthold v. Fox, 21-51; In re Allen, 25-

parties to the record and their privies. The definite article "the" and the word "party" can have no other significance.[4] The mere fact that a person not a party has a direct and material interest in the result of the action does not give him a right of appeal.[5] When a demurrer on several grounds is sustained as to any of them the demurrant cannot appeal.[6] A stranger to an action cannot appeal.[7] The fact that a person is a party to the record is not decisive of his right to appeal. One who has no beneficial interest in the subject of the action cannot appeal.[8] An assignee under the insolvency law cannot appeal from an order removing him. And this is true generally of receivers.[9] An appeal from a judgment against a county board, rendered in an action involving its official powers and duties, can only be taken or authorized by the action of the board. Individual members thereof cannot appeal.[10]

311. Joinder of parties appellant—It has been held that all the parties against whom a judgment is rendered must join in a writ of error thereon.[11]

312. Who must be made respondents—Where the order or judgment appealed from is indivisible and must necessarily be affirmed, reversed, or modified as to all the parties to the action, all the adverse parties who have a substantial interest in the maintenance of the order or judgment and will be affected by its modification or reversal must be made respondents.[12] The parties to the record are not always necessary parties to the appeal. On the other hand a person who was not a party to the action in the trial court may be a necessary party on appeal.[13] Where the rights of several parties defendant, as related to the subject of the action, are conflicting, and the judgment is in favor of some and against others, a defeated party may serve his notice of appeal upon his co-defendants as well as upon the plaintiff, and have the rights of the defendants as between themselves passed upon by the supreme court.[14]

313. Death of respondent—Substitution of parties—The matter of substituting parties upon the death of a respondent is regulated by statute.[15]

314. Right to appeal after appeal by adverse party—Where a plaintiff recovers a judgment in his favor, but not for all of the relief claimed, and his adversary appeals from the judgment and assigns errors only as to the part of the judgment unfavorable to him and the judgment is affirmed on his appeal, the plaintiff thereafter, and within the time limited for taking an appeal, may appeal from that part of the judgment which is to his disadvantage.[16]

315. Parties appearing specially—Where a non-resident appears in the trial court specially to question the jurisdiction of the court he has no standing on appeal to question the validity of the judgment in other respects.[17]

39; Hospes v. N. W. etc. Co., 41–256, 43+180 (intervening creditor in proceedings to wind up an insolvent corporation may appeal); Reeves v. Hastings, 61–254, 63+633 (an insolvent may appeal from order allowing receiver compensation); Kells v. Webster, 71–276, 73+962 (id.); Davis v. Swedish-Am. Nat. Bank, 78–408, 80+953, 81+210. See Hollinshead v. Banning, 4–116(77).

[3] See Kells v. Nelson, 74–8, 76+790.

[4] Stewart v. Duncan, 40–410, 42+89.

[5] See Reeves v. Hastings, 61–254, 63+633; Kells v. Nelson, 74–8, 76+790.

[6] Com. Ins. Co. v. Pierro, 6–569(404).

[7] Hunt v. O'Leary, 78–281, 80+1120.

[8] Burns v. Phinney, 53–431, 55+540. See Cornish v. West, 89–360, 94+1082.

[9] Gunn v. Smith, 71–281, 73+842.

[10] State v. Johnson, 98–17, 107+404.

[11] Babcock v. Sanborn, 3–141(86).

[12] Frost v. St. P. etc. Co., 57–325, 59+308; Oswald v. St. P. etc. Co., 60–82, 61+902; Lambert v. Scandinavian-Am. Bank, 66–185, 68+834; Kells v. Nelson, 74–8, 76+790; Greenman v. Melbye, 78–361, 81+21; Davis v. Swedish-Am. Nat. Bank, 78–408, 80+953.

[13] Kells v. Nelson, 74–8, 76+790. See Peterson v. Knuutila, 94–114, 102+368; State v. Flaherty, 98–526, 106+1133.

[14] Atwater v. Russell, 49–57, 52+26.

[15] R. L. 1905 § 4378; Baldwin v. Rogers, 28–68, 9+79 (dismissal for failure to make substitution–reinstatement); Anderson v. Fielding, 92–42, 49, 99+357 (statute cited as to duty to have administrator substituted).

[16] State v. N. P. Ry., 99–280, 109+238.

[17] Fowler v. Jenks, 90–74, 95+887, 96+914, 97+127.

TIME WITHIN WHICH TO APPEAL

316. Appeal from judgment—The statute provides that "an appeal from a judgment may be taken within six months after the entry thereof." [18] The judgment must be made a matter of record in order to limit the time for taking an appeal and the time does not commence to run until the entry of the judgment, that is, the entry of the judgment by the clerk in the judgment book.[19] Until this is done it matters not that the party is entitled to judgment, either by default or upon a decision or direction of the court.[20] An appeal cannot be taken from an order for judgment or from a decision or opinion of the court.[21] The law contemplates an appeal from a record and there is no record until the entry is made in the judgment book.[22] An appeal taken before the entry of judgment will be dismissed,[23] but such dismissal will not preclude the party from taking another appeal after the entry of judgment.[24] It is held that a judgment is not perfected, for the purpose of limiting the time for taking an appeal, until costs have been taxed and inserted therein,[25] unless the prevailing party has waived them.[26] The running of the statute is not interrupted by the pendency of an appeal from the clerk's taxation of costs.[27] The statute is inapplicable to judgments in special proceedings.[28] An appeal lies from a judgment modifying a former judgment in the same case, though the time for appealing from the original judgment has expired.[29]

317. Appeal from order—The statute provides that an appeal may be taken from an order "within thirty days after written notice of the same from the adverse party." [30] Actual notice does not take the place of written notice. The obligation to give written notice rests upon both parties and each must be served with notice to set the statute running as to him.[31] Notice cannot be given to a party for the purpose of limiting the time for appealing from a conditional order until the order becomes as to him a final order and therefore appealable. The correct practice requires the party upon whom the condition is imposed to perform it, and then to give written notice of the making of the order and of his compliance with its terms. The adverse party must then, if he desires to appeal from the order, do so within thirty days after receiving such notice.[32] The time within which to appeal cannot be extended by a second entry of the same order.[33] It is not in the power of a party by his own act to extend the statutory period for appealing from an order, nor has the court power, by an order made for that purpose, to grant an extension of such period. It may, however, result from the exercise of the authority of the court to review, set aside, or modify its own orders that on an appeal from an order re-

[18] R. L. 1905 § 4364; State v. N. P. Ry., 99–280, 109+238 (effect of appeal by adverse party); Kearney v. Chi. etc. Ry., 101–65, 111+923 (limitation absolute). See, under former statute, as to writs of error, Gerish v. Johnson, 5–23(10); Haines v. Paxton, 5–442(361).

[19] Humphrey v. Havens, 9–318(301); Hodgins v. Heaney, 15–185(142); Hostetter v. Alexander, 22–559; Exley v. Berryhill, 36–117, 30+436. See, under former statute, Furlong v. Griffin, 3–207(138); Haines v. Paxton, 5–442(361); Ayer v. Termatt, 8–96(71).

[20] Rockwood v. Davenport, 37–533, 35+377.

[21] See § 295.

[22] Hodgins v. Heaney, 15–185(142).

[23] Exley v. Berryhill, 36–117, 30+436.

[24] R. L. 1905 § 4377.

[25] Richardson v. Rogers, 37–461, 35+270; Fall v. Moore, 45–517, 48+404; Maurin v. Carnes, 80–524, 83+415. See Kearney v. Chi. etc. Ry. 101–65, 111+923.

[26] Mielke v. Nelson, 81–228, 83+836.

[27] Kearney v. Chi. etc. Ry., 101–65, 111+923.

[28] Brown v. Cook County, 82–542, 85+550; Koochiching Co. v. Franson, 91–404, 98+98.

[29] Malmgren v. Phinney, 65–25, 67+649.

[30] R. L. 1905 § 4364; Spencer v. Koell, 91–226, 97+974 (statute merely cited).

[31] Levine v. Barrett, 83–145, 85+942.

[32] Swanson v. Andrus, 84–168, 87+363, 88+252.

[33] Carli v. Jackman, 9–249(235).

determining a matter once passed upon by a former order, made more than thirty days before such appeal was taken, there may be brought up for review the same questions involved in the former order. Where a court has once made an appealable order, but before the time for appeal therefrom has expired, indicates by proper order its purpose to reconsider the question thus passed upon and thereafter does reconsider and by final order redetermine the matter affirming the former decision, an appeal may be taken from such final order, though the time for appeal from the former order has passed.[34] Though no notice of the filing thereof is given, no appeal lies from an order for judgment notwithstanding the verdict, pursuant to which judgment is formally entered, after the expiration of the time for appeal from the judgment, and more than a year from its entry. The order in such case becomes, after the time stated, completely merged in the judgment, and is not subject to further attack by appeal or otherwise.[01]

318. Extension of time—The statutory limitation of time within which an appeal may be taken is jurisdictional. The supreme court has no authority to do more than dismiss an appeal taken after the statutory time.[35] Neither the supreme or district court can extend the time for an appeal.[36] The limitation of time is so far jurisdictional that the parties cannot waive the objection or by stipulation clothe the supreme court with authority to determine a belated appeal.[37]

NOTICE OF APPEAL

319. Contents—The notice should contain a description of the order or judgment.[38] It need not show that the appellant is the party aggrieved;[39] or that he is acting as a guardian ad litem;[40] or, in case of an appeal by a creditor, devisee or heir from the allowance of a claim against the estate, that the executor has refused to appeal.[41] A single notice may contain notices of appeal from several orders.[42]

320. Upon whom served—The statute provides that an appeal shall be made by service of a notice in writing on the adverse party and the clerk of court. While an appeal is the continuation of the original action or proceeding in another jurisdiction, yet it is analogous in many respects to a writ of error, which is regarded as the beginning of a new action; and the supreme court will consider only questions between the appellant and the parties upon whom the notice of appeal has been served. Therefore the notice of appeal must be served on each adverse party as to whom it is sought to review, in the supreme court, any order or judgment, though he did not appear in the proceeding or action in the district court.[43] It necessarily follows that where the order or judgment appealed from is indivisible and must necessarily be affirmed, reversed, or modi-

[34] First Nat. Bank v. Briggs, 34–266, 26+6. See Billson v. Lardner, 67–35, 69+477.

[01] Lawver v. G. N. Ry., 125+1017.

[35] Furlong v. Griffin, 3–207(138); Folsom v. Evans, 5–418(338); Haines v. Paxton, 5–442(361); Ayer v. Termatt, 8–96(71); Beaupre v. Hoerr, 13–366(339).

[36] R. L. 1905 § 4120; First Nat. Bank v. Briggs, 34–266, 26+6; Burns v. Phinney, 53–431, 55+540; Gallagher v. Irish-Am. Bank, 79–226, 81+1057.

[37] Deering v. Johnson, 33–97, 22+174; First Nat. Bank v. Briggs, 34–266, 26+6; Richardson v. Rogers, 37–461, 35+270; Brown v. Cook County, 82–542, 85+550.

[38] Galloway v. Litchfield, 8–188(160); Gregg v. Uhless, 25–272; Haven v. Orton, 37–445, 35+264; Anderson v. Meeker County, 46–237, 48+1022.

[39] Anderson v. Meeker County, 46–237, 48+1022.

[40] In re Allen, 25–39.

[41] Schultz v. Brown, 47–255, 49+982.

[42] Sundberg v. Goar, 92–143, 99+638.

[43] Frost v. St. P. etc. Co., 57–325, 59+308; Oswald v. St. P. etc. Co., 60–82, 61+902; Lambert v. Scandinavian-Am. Bank, 66–185, 68+834; Kells v. Nelson, 74–8, 76+790. But see Davis v. Swedish-Am. Nat. Bank, 78–408, 80+953.

fied as to all parties to the action or proceeding, the appeal must be dismissed if they are not all made parties to the appeal by service of notice upon them individually.[44] The adverse party, within the intent of the statute, means the party whose interest in relation to the subject of the appeal is in direct conflict with a reversal or modification of the order or judgment appealed from. The parties to the record are not always necessary parties to the appeal. On the other hand a person who was not a party to the action in the lower court may be a necessary party on appeal. A purchaser at a sale made by an assignee in insolvency, subject to the approval of the court, is a party to the proceedings resulting in an order confirming the sale, and a necessary and adverse party to an appeal from such order.[45] A party not served with notice is not before the supreme court.[46] An appeal may be taken against a coplaintiff or codefendant and notice of appeal should be served upon them as well as on the adverse parties.[47]

321. Service on clerk—A notice of appeal having been served on the adverse party, a filing of such notice with the clerk of the court, with proof of such service, is a sufficient compliance with the statutory requirement of service upon the clerk, though such notice is not specifically directed to the clerk.[48] The primary object of the service on the clerk is to supply the files with the notice served on the adverse party so that its sufficiency may be determined when questioned.[49] The statute authorizing the service of notices by mail has no application to service on the clerk. Consequently such a service on the clerk is unavailing unless the notice actually reaches him within the proper time.[50]

322. Service on attorney—Service of notice on the attorney of record in the trial court is sufficient, if there has been no formal substitution.[51] Notice of appeal by a contestant of a will may properly be served upon the attorney of the proponent.[52]

323. Construed liberally—A notice of appeal is to be construed liberally. Mere formal defects should be disregarded.[53]

BONDS

324. Bond for costs—By statute a bond or deposit for costs is necessary to render an appeal effectual for any purpose.[54] A bond for costs does not operate as a stay.[55]

325. Appeal from money judgment—Supersedeas—The statute provides for a supersedeas bond on appeal from a money judgment.[56] It is inapplicable to appeals in bastardy proceedings.[57]

326. General nature and object of appeal bonds—An appeal bond, in our practice, is a voluntary obligation entered into by the appellant and his sureties, as obligors, and the respondents, as obligees, conditioned to answer to the lia-

[44] Kells v. Nelson, 74–8, 76+790. But see Oswald v. St. P. etc. Co., 60–82, 61+902.

[45] Kells v. Nelson, 74–8, 76+790. See State v. Flaherty, 98–526, 106+1133.

[46] Adams v. Thief River Falls, 84–30, 86+767; Peterson v. Red Wing, 101–62, 111+840.

[47] Atwater v. Russell, 49–57, 52+26.

[48] Baberick v. Magner, 9–232(217); State v. Klitzke, 46–343, 49+54.

[49] Baberick v. Magner, 9–232(217).

[50] Thorson v. St. Paul etc. Co., 32–434, 21+471; Steinbach v. Frevel, 104–57, 115+947.

[51] In re Brown, 32–443, 21+474; Rule 7, Supreme Court.

[52] In re Brown, 32–443, 21+474.

[53] Minn. D. Co. v. Johnson, 96–91, 104+1149; First U. Soc. v. Houliston, 96–342, 105+66; Venner v. G. N. Ry., 108–62, 121+212.

[54] R. L. 1905 § 4366. Statute cited, Hennepin County v. Robinson, 16–381(340); Dutcher v. Culver, 23–415; Erickson v. Elder, 34–370, 25+804.

[55] Cummings v. Edwards, 95–118, 103+709; Reichel v. Mooney, 97–536, 106+1133; Bock v. Sauk Center G. Co., 100–71, 110+257; Scofield v. Scheaffer, 104–127, 116+211.

[56] R. L. 1905 § 4368. Statute cited, Allen v. Robinson, 17–113(90); Dutcher v. Culver, 23–415; Erickson v. Elder, 34–370, 25+804.

[57] State v. Allrick, 63–328, 65+639.

bility created by the bond.[58] The condition varies with the nature of the appeal. It may be merely to pay the costs of the appeal and when of that nature it does not operate as a stay.[59] Our statutes do not make necessary a bond "to prosecute the appeal with effect," such as is required in many jurisdictions. The purposes of an appeal bond are to prevent vexatious appeals and to indemnify the respondent, in part, for the expenses and losses of an unsuccessful appeal. The obligation to execute an appeal bond is wholly statutory. In the absence of express statutory authority no court or judge can require a bond as a condition of the right to appeal.[60]

327. Sufficiency of bond—If the condition of an appeal 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.[61]

328. Amendment—New bond—The supreme court may allow a defective bond to be corrected or a new one to be substituted therefor.[62] It has jurisdiction after an appeal has been perfected to direct the appellant to give a new supersedeas bond in place of an insufficient bond, and in case of his default to vacate the stay.[63]

329. Attorneys as sureties—An attorney in a case is not authorized to become a surety on an appeal bond therein except where his client is a nonresident.[64]

330. Justification of sureties—The court has no authority to compel ordinary sureties to justify upon exception of the respondent. Their obligation is purely voluntary.[65] The rule is otherwise as respects surety companies.[66] The failure of sureties to justify is not fatal to an appeal. The supreme court may authorize an amendment or the giving of a new bond.[67]

331. Liability on bonds—The condition of the statutory supersedeas bond upon an appeal from an order denying a new trial does not render the appellant liable to pay the judgment thereafter entered on the verdict or findings unless the benefit of the judgment is lost to the respondent in consequence of the appeal and stay.[68] Where an order of the district court requiring the payment of money is appealed to the supreme court and a statutory supersedeas bond executed, "conditioned to abide and satisfy the judgment or order which the appellate court may give therein," and the order appealed from is affirmed, an action may be maintained upon the bond for the sum of money required to be paid by the order appealed from, with interest thereon.[69] To "abide" a judgment or order is to perform, execute, conform to, and to satisfy it; that is to say, to carry it into complete effect. The policy of our law is to indemnify a respondent, and to prevent a stay from operating to his disadvantage, by requiring security for carrying into effect the action of the appellate court with respect to appeals from orders.[70] Payment to the clerk of his fees included in the judgment, unless authorized or sanctioned by the adverse party, is not a

[58] See Dutcher v. Culver, 23–415; Erickson v. Elder, 34–370, 25+804; Esch v. White, 76–220, 78+1114.

[59] See § 324.

[60] Woolfolk v. Bruns, 45–96, 47+460.

[61] Riley v. Mitchell, 38–9, 35+472; Anderson v. Meeker County, 46–237, 48+1022.

[62] Watier v. Buth, 87–205, 91+756.

[63] Bock v. Sauk Center G. Co., 100–71, 110+257.

[64] Schuek v. Hagar, 24–339; Rule 1, District Court.

[65] Esch v. White, 76–220, 78+1114.

[66] State v. Dist. Ct., 58–351, 59+1055.

[67] Watier v. Buth, 87–205, 91+756.

[68] Reitan v. Goebel, 35–384, 29+6; Id., 40–408, 42+394; Friesenhahn v. Merrill, 52–55, 53+1024; Estes v. Roberts, 63–265, 65+445; Vent v. Duluth T. Co., 77–523, 80+640. See Kimball v. Southern etc. Co., 57–37, 58+868 (bond containing extra-statutory language).

[69] Erickson v. Elder, 34–370, 25+804. See Reitan v. Goebel, 35–384, 29+6.

[70] Erickson v. Elder, 34–370, 25+804.

defence.[71] The sureties may set up any defence that is available to the principal.[72] If, on an appeal from an order, a bond is given as upon appeal from a judgment, the non-payment of the judgment is not a breach of the bond.[73]

STAY OF PROCEEDINGS

332. Rule at common law—Under the old practice in chancery an appeal did not stay proceedings under the decree appealed from without a special order of court, which was not readily granted. Though a writ of error at common law operated as a stay of execution from the date of its allowance, yet, like an appeal, it was so far from having any further or greater effect, that after writ of error allowed, an action might be brought on the judgment, though plaintiff would not be allowed to sue out execution on the second judgment till the writ of error was determined; and if the first judgment was finally reversed, the second must necessarily be so too.[74]

333. Extent and effect of stay—Upon the perfection of a judgment subject to revision by appeal, the party in whose favor it is rendered is not compelled to await the expiration of the period allowed for such appeal, but may, in the absence of such appeal, proceed to the execution of the judgment. The effect of an appeal with a supersedeas is to stay or suspend the proceedings which may have been taken at the time the appeal is perfected in the condition in which they then exist, and to prevent any further step or proceeding on the judgment or matter embraced therein. The stay operates until the determination of the appeal.[75] An appeal with a stay bond does not have the effect of vacating a levy made prior thereto. It only prevents further proceeding on the execution until the determination of the appeal. The sheriff may retain possession of property levied upon until the decision of the appellate court.[76] An appeal with a stay bond does not have the effect of destroying the force of a judgment as a lien.[77] An appeal to the supreme court with a supersedeas bond does not oust the district court of jurisdiction to the extent of making its proceedings in the action during the stay absolutely void.[78] In an early case [79] it was questioned whether the provision of the statute that the trial court "may proceed upon any other matter included in the action, and not affected by the judgment appealed from" applies to legal as distinguished from equitable proceedings. This distinction is not well founded. The lower court always has authority, pending an appeal, to proceed in regard to matters collateral to the subject-matter of the appeal.[80]

334. Same—Appeal from order—*a. In general*—A supersedeas is a statutory remedy, and is only obtained by a strict compliance with all the required conditions, one of which, in case of an appeal from an order, is that the supersedeas bond shall be filed in the office of the clerk of the court where the order is filed. Hence, proceedings on the order are stayed, and rights under it are saved, as of the date of the filing of the bond. The supersedeas does not relate back to the date of the order, so as to annul proceedings already had, or restore rights under it already lost. The stay simply leaves the proceedings on the order, and

[71] Menage v. Newcomb, 33–143, 22+182.
[72] First Nat. Bank v. Rogers, 13–407 (376).
[73] Galloway v. Yates, 10–75(53).
[74] Allen v. Robinson, 17–113(90).
[75] N. W. Ex. Co. v. Landes, 6–564(400); First Nat. Bank v. Rogers, 13–407(376); Robertson v. Davidson, 14–554(422); Allen v. Robinson, 17–113(90); State v. Young, 44–76, 46+204; Floberg v. Joslin, 75–75, 77+557.
[76] N. W. Ex. Co. v. Landes, 6–564(400); First Nat. Bank v. Rogers, 13–407(376).
[77] Allen v. Robinson, 17–113(90).
[78] McArdle v. McArdle, 12–122(70); State v. Webber, 31–211, 17+339; State v. Young, 44–76, 46+204; Briggs v. Shea, 48–218, 50+1037. See § 288.
[79] McArdle v. McArdle, 12–122(70).
[80] Hinson v. Adrian, 91 N. C. 372; Allen v. Allen, 80 Ala. 155. See State v. Young, 44–76, 46+204.

the rights of the appellant under it, just as they are when it takes effect on the date of filing the bond.[81] When an appeal is taken from an interlocutory order, that part of the case which is appealed is completely removed from the jurisdiction of the district court and wholly transferred to that of the supreme court. The supreme court has inherent power to make any order necessary to effectuate the spirit and intent of the statute authorizing a supersedeas.[82] The stay is strictly limited to the order from which the appeal is taken. Thus a clause, granting a party ten days to answer, in an order denying his motion to set aside the summons, is not affected by his appeal from the order and the filing of a stay bond; the extension of time to answer not being an essential part of the order.[83]

b. Order denying new trial—An appeal from an order denying a new trial, and the filing of a supersedeas bond, operates as a stay and suspends the right to enter judgment.[84]

c. Orders relating to injunctions—An ex parte order granting an injunction is not appealable. Hence an appeal from such an order and the filing of a supersedeas bond, is not effectual to stay or suspend the operation of the order.[85] But an appeal from an order dissolving a temporary writ of injunction, if a proper supersedeas bond is filed, operates to revive and continue the writ in force pending the appeal.[86] A stay of proceedings until a motion for an injunction may be heard and determined is not revived or continued by an appeal, with a supersedeas bond, from the order denying the injunction.[87]

d. Order dissolving attachment—An appeal from an order dissolving a writ of attachment and the filing of a supersedeas bond suspend the operation of the order and the suspension relates back to the date of the order, so that, if the officer still has the property his right to hold it is restored; and it may also be, as between the parties to the writ, that, if between the date of the order and the appeal with a stay the officer has returned the property to the defendant, the appeal and stay reinstates the lien so that the plaintiff may require the sheriff to retake the property.[88]

e. Order appointing receiver—When an appeal is taken from an order appointing a receiver pendente lite and a supersedeas bond is executed and filed in accordance with the statute, the power of the receiver is suspended in reference to the order appealed from and the order remains inoperative pending the appeal. It is the duty of the receiver when the bond is duly executed and filed and he is duly notified thereof, to restore to the appellant possession of such property as he may have taken from him by virtue of the order.[89]

f. Order striking out answer—Where an appeal with a supersedeas bond is taken from an order striking out portions of an answer, the cause cannot be noticed for trial during the pendency of the appeal.[90]

g. Order granting writ of mandamus—An appeal, with a statutory supersedeas bond, from an order allowing a peremptory writ of mandamus, relieves the party from complying with the command in the writ and precludes the district court from enforcing it.[91]

[81] Robertson v. Davidson, 14-554(422); Woolfolk v. Bruns, 45-96, 47+460; Althen v. Tarbox, 48-18, 50+1018. But see Farmers Nat. Bank v. Backus, 63-115, 65+255.

[82] Farmers Nat. Bank v. Backus, 63-115, 65+255.

[83] Yale v. Edgerton, 11-271(184).

[84] St. P. & D. Ry. v. Hinckley, 53-102, 54+940.

[85] State v. Dist. Ct., 52-283, 53+1157.

[86] State v. Duluth St. Ry., 47-369, 50+332; State v. Dist. Ct., 78-464, 81+323.

[87] Sullivan v. Weibeler, 37-10, 32+787. See Graves v. Backus, 69-532, 72+811.

[88] Ryan v. Peacock, 40-470, 42+298.

[89] Farmers Nat. Bank v. Backus, 63-115, 65+255.

[90] Starbuck v. Dunklee, 12-161(97).

[91] State v. Webber, 31-211, 17+339.

h. Order setting aside judgment—An appeal, with a stay bond, from an order setting aside a judgment does not operate to reinstate the judgment as an estoppel.[92]

i. Order refusing to open default judgment—An appeal from an order refusing, except upon terms, to open a default and allow an answer to be made, with a statutory supersedeas bond, is not effectual to stay the entry of judgment upon the default.[93]

j. Order sustaining a demurrer—An appeal, with a stay bond, from an order sustaining a demurrer, but allowing the adverse party twenty days in which to plead over, extends the time for answering until after the determination of the appeal.[94]

k. Order relating to railway crossings—In proceedings under the statute for the location of railway crossings the proceedings cannot be stayed by appealing from an order appointing commissioners and executing a supersedeas bond under the general law. The matter is subject to a special provision.[95]

335. Enforcement of supersedeas by supreme court—When an appeal with a supersedeas bond is taken from an interlocutory order, that part of the case which is appealed is completely removed from the jurisdiction of the district court and wholly transferred to that of the supreme court, and the latter court has full authority to enforce the supersedeas by appropriate remedies.[96]

THE RETURN

336. Necessity of a return—The jurisdiction of the supreme court over a cause is not complete until a return is filed. Prior to the filing of a return it is premature to file a note of issue, or notice the appeal for hearing, and the court will only entertain a motion to dismiss the appeal or compel a return.[97] In the absence of a return there can be no competent evidence before the supreme court of the proceedings below. The deficiency cannot be supplied by stipulation of the parties.[98] An order on appeal based on what purports to be a return from the district court, no return in fact having been made, will be set aside for want of jurisdiction.[99]

337. What included—Statute—The papers to be returned on an appeal to the supreme court are defined by statute [1] and rules of court.[2] When an appeal is taken from an order granting or denying a motion for a new trial, the record on appeal must in all cases contain the notice of motion;[3] the affidavits and other papers used on the motion;[4] and the order granting or denying the mo-

[92] Hershey v. Meeker Co. Bank, 71–255, 73+967.

[93] Exley v. Berryhill, 37–182, 33+567. But see St. P. & D. Ry. v. Hinckley, 53–102, 54+940.

[94] Stickney v. Jordain, 50–258, 52+861.

[95] State v. Dist. Ct., 35–461, 29+60.

[96] Farmers Nat. Bank v. Backus, 63–115, 65+255.

[97] Com. Ins. Co. v. Pierro, 6–569(404); Reynolds v. St. Favorite, 9–148(138); Briggs v. Shea, 48–218, 50+1037; State v. Fellows, 98–179, 107+542.

[98] Am. Ins. Co. v. Schroeder, 21–331.

[99] Page v. Mille Lacs L. Co., 53–492, 55+608.

[1] R. L. 1905 §§ 4271, 4360. See Morrison v. March, 4–422(325) (findings of fact, conclusions of law, and judgment are included); Farnham v. Thompson, 34–330, 26+9 (unnecessary to include findings of fact and conclusions of law in a case or bill of exceptions); Anderson v. Kittell, 37–125, 33+330 (return held defective in not including verdict or judgment); Pabst v. Butchart, 68–303, 71+273 (necessity of returning judgment roll); Chase v. Carter, 76–367, 79+307 (necessity of returning verdict or decision and judgment); Pieper v. Lind, 86–436, 86+415 (necessity of returning judgment roll); Cohues v. Finholt, 101–180, 182, 112–12 (id.).

[2] See Rules 3, 5, 6, 9, Supreme Court; Guiterman v. Saterlie, 76–19, 78+863 (Rule 9 requires judgment to be returned); Pearson v. G. N. Ry., 90–227, 95+1113 (Rule 9 requires memorandum of trial judge to be returned).

[3] Spencer v. Stanley, 74–35, 76+953.

[4] Tierney v. Mpls. etc. Ry., 33–311, 23+229. See Hospes v. N. W. etc. Co., 41–256, 43+180; Murphy v. Holterhoff, 72–98, 75+4.

tion.[5] These constitute the "papers" upon which the order was made and copies of which the clerk certifies to the supreme court at the expense of the appellant when the appeal is perfected.[6] If the motion is based on an error of law or irregularity occurring on the trial, the return must include a case or bill of exceptions sufficiently full and explicit to enable the court to pass on the alleged error or irregularity.[7] Depositions[8] and stenographer's notes[9] are not included in the return, unless there is a case or bill of exception. Security for judgment is not a necessary part of the return on an appeal from a default judgment.[10]

338. Memorandum of trial judge—A memorandum of a trial judge, filed in connection with his decision, is required to be returned.[11] It may be referred to on appeal to explain the decision;[12] but unless it is expressly made a part of an order or finding, it cannot be allowed to contradict or impeach the order or finding.[13] It may be referred to for the purpose of determining the ground upon which a new trial was granted,[14] if the order does not explicitly state the grounds.[15] A formal order of the court granting a new trial, which is responsive to the one ground laid in the motion therefor, cannot be impeached by a discussion of the case found in the memorandum of the court attached to the order.[16] It cannot take the place of a case or bill of exceptions.[17]

339. Certificate of judge or clerk on appeal from orders—When an appeal is taken from an order made on affidavits or other documentary evidence not introduced in the course of a trial no case or bill of exceptions is necessary. The statute provides that in such cases the clerk shall transmit to the supreme court a certified copy of the order and the papers upon which the order was granted.[18] This statute is imperfect in that it makes no provision for a certificate that the record as returned contains everything upon which the order was based. The statute has been supplemented by a decision of the supreme court which holds that in such cases there must be attached to the return either a certificate of the judge that the record contains all that was offered or considered on the motion, or a certificate of the clerk that the return contains all the records and files in the case.[19] It is always the better practice to obtain

[5] Granite etc. Co. v. Weinberg, 62–202, 64+380.

[6] R. L. 1905 § 4360.

[7] See §§ 342–352.

[8] Wintermute v. Stinson, 16–468(420).

[9] Thompson v. Lamb, 33–196, 22+443.

[10] Brown v. Brown, 28–501, 11+64.

[11] Rule 9, Supreme Court; Pearson v. G. N. Ry., 90–227, 95+1113; Johnson v. Johnson, 92–167, 99+803.

[12] Johnson v. Johnson, 92–167, 99+803; Peterson v. Storm, 96–247, 104+894; Bradley v. Bradley, 97–130, 106+338; Kipp v. Clinger, 97–135, 106+108; Hess v. G. N. Ry., 98–198, 108+7, 803; Dart v. Russell, 99–364, 109+702; Prahl v. Brown County, 104–227, 116+483. Formerly it could not be referred to unless made a part of the order or finding. Myers v. Chi. etc. Ry., 69–476, 72+694; Boen v. Evans, 72–169, 75+116; Kertson v. G. N. Ex. Co., 72–378, 75+600; Helm v. Smith, 79–297, 82+639.

[13] Holland v. G. N. Ry., 93–373, 101+608; Kipp v. Clinger, 97–135, 106+108; Alton v. Chi. etc. Ry., 107–457, 120+749. See Hall v. Leland, 64–71, 66+202.

[14] Taylor v. Grand Lodge, 98–36, 107+545; Hess v. G. N. Ry., 98–198, 108+7; Dart v. Russell, 99–364, 109+702; Gay v. Kelley, 109–101, 123+295. Formerly the rule was otherwise. Morrow v. St. P. C. Ry., 65–382, 67+1002; Myers v. Chi. etc. Ry., 69–476, 72+694; Kertson v. G. N. Ex. Co., 72–378, 75+600; Jenkinson v. Koester, 86–155, 90+382.

[15] Holland v. G. N. Ry., 93–373, 101+608.

[16] Pinkerton v. Wis. S. Co., 109–117, 123+60.

[17] See § 1369.

[18] R. L. 1905 § 4360. See Lyman v. Spencer, 70–183, 72+1066.

[19] Hospes v. N. W. etc. Co., 41–256, 43+180. To same effect: Downs v. Nourse, 30–552, 16+412; Dow v. Northern etc. Co., 51–326, 53+649; Prouty v. Hallowell, 53–488, 55+623; Duncan v. Everitt, 55–151, 56+591; Du Toit v. Fergestad, 55–462, 57+204; Seibert v. Mpls. etc. Ry., 58–69, 59+829; State v. Egan, 62–280, 64+813; Vaughan v. McCarthy, 63–221, 65+249; Firth v. Brack, 64–242, 66+987; Schultz v. Bower, 66–281, 68+1080; Gardner v. Fidelity etc. Assn., 67–207, 69+895; Aure v. Becker County, 68–85, 70+791; Parker v. Bradford, 68–437, 71+619; Lyman v. Spencer, 70–183, 72+1066; Fallgatter v. Lammers, 71–238, 73+860; Murphy v. Holterhoff, 72–98, 75+4; Jourdain v. Luchsinger,

the certificate of the judge, and it is often indispensable, for the clerk cannot certify as to what was offered, received, or considered on the hearing.[20] An appeal from an order disposing of an interlocutory motion is well taken when it affirmatively appears by the certificate of the clerk of the proper court that his return contains correct copies of all the records and files in the case, though certain exhibits attached to certain affidavits were detached at the suggestion of the trial court.[21] Where judgment has been ordered by the trial court upon the pleadings, it must appear by the return on appeal, either by the certificate of the judge or of the clerk of the district court, that all the records and files are returned.[22] Where the certificate of the clerk is technically defective in not showing that copies of all papers are returned, but it appears as a matter of fact that they are returned, the defect in the certificate will be disregarded.[23] Where the record contains no bill of exceptions, or certificate that it contains everything offered on the hearing of the motion appealed from, or certificate of the clerk that the return contains a true transcript of all the records and files in the case, the order appealed from will be affirmed.[24] When an order is based on oral evidence, or on both oral and documentary evidence, a case or certified statement should be prepared containing everything offered or considered on the motion.[25] When a motion is based on facts occurring at a regular trial a case or bill of exceptions is necessary.[26]

340. Jurisdiction to compel a return—When an appeal has been perfected the supreme court has exclusive jurisdiction to compel a return.[27]

341. Failure of appellant to cause return to be made—Rule of court—It is provided by rule of court that "the appellant or plaintiff in error shall cause the proper return to be made and filed with the clerk of this court within sixty days after the appeal is perfected or the writ of error served. If he fails to do so, the respondent or defendant in error may, by notice in writing, require such return to be filed within twenty days after the service of such notice, and, if the return is not filed in pursuance of such notice, the appellant or plaintiff in error shall be deemed to have abandoned the appeal or writ of error, and on an affidavit proving when the appeal was perfected or writ of error served, and the service of such notice, and a certificate of the clerk of this court that no return has been filed, the respondent or defendant in error may enter an order with the clerk dismissing the appeal or writ of error for want of prosecution, with costs, and the court below may thereupon proceed as though there had been no appeal or writ of error." [28] This rule is intended to speed the prosecution of a cause, and it enables the respondent, if he so elects, to secure a dismissal of the appeal, either in vacation or term time, without an application to the court. If notice to make the return is not given, it in no manner affects the right of the respondent to move the court for a dismissal of the appeal, or to affirm for a non-compliance with its rules.[29]

SUFFICIENCY OF RECORD

342. General rule as to completeness of return—The judgment or order of a court cannot be declared erroneous on appeal when the whole case upon

91–111, 97+740; McElrath v. Lakeville, 92–248, 99+895; Purvis v. Roholt, 95–502, 104+551; McAllen v. McAllen, 97–76, 106+100.

[20] Hospes v. N. W. etc. Co., 41–256, 43+180; Peterson v. Storm, 96–247, 104+894.

[21] McAllen v. McAllen, 97–76, 106+100.

[22] Purvis v. Roholt, 95–502, 104+551.

[23] Jourdain v. Luchsinger, 91–111, 97+740.

[24] Spurr v. Spurr, 108–521, 121+121.

[25] State v. Egan, 62–280, 64+813.

[26] See § 1368.

[27] State v. Fellows, 98–179, 107+542.

[28] Rule 4, Supreme Court.

[29] Guerin v. St. P. etc. Ry., 32–409, 21+470; Plymouth C. House v. Seymour, 74–425, 77–239; West Pub. Co. v. De La Mott, 104–174, 116+103.

which the judgment or order was founded, or all of the same which is material, does not appear to have been returned to the appellate court.[30] The supreme court will not review the action of the trial court upon a matter lying in the discretion of the latter, unless all the facts and circumstances which may have actuated the court in its act is presented by the record.[31]

343. To review any question of fact—The supreme court will not review the decision of a lower court upon any question of fact unless the record contains all of the evidence introduced on the trial pertaining to such question.[32]

344. Necessity of a bill of exceptions or case on appeal from a judgment—On appeal from a judgment without a case or bill of exceptions the supreme court can only consider questions appearing on the judgment roll.[33] Ordinarily in such cases the only question that the court can consider is whether the conclusions of law embodied in the judgment are warranted by the findings of fact, or the verdict.[34] The sufficiency of the pleadings to sustain the judgment cannot ordinarily be considered, except on appeal from a default judgment.[35] It is true that the judgment roll includes "all orders involving the merits of the action and affecting the judgment," [36] but the statute makes no provision for incorporating in the judgment roll the evidence upon which such orders are based. The practical consequence is that it is rare indeed that on an appeal from a final judgment without a case or bill of exceptions an intermediate order can be reviewed. Obviously the only orders that may be so reviewed are such as are based solely on the record. Thus no case or bill of exceptions is necessary in order to review an order granting or denying a motion for judgment on the pleadings.[37]

345. In what cases record must contain all the evidence—In the following cases, in order to secure a full review on appeal, it must affirmatively appear, either in the body of the case or the certificate of the trial judge, that the record contains all the evidence introduced on the trial: on appeal from an order granting or denying a motion for a new trial on the ground that the verdict is not justified by the evidence,[38] or on the ground of newly-discovered evidence,[39] or for error in dismissing or refusing to dismiss the action on the trial for insufficiency of evidence,[40] or in directing or refusing to direct a verdict at the close of the testimony,[41] or on the ground that the damages are excessive,[42]

[30] In re Post, 33–478, 24+184; Hospes v. N. W. etc. Co., 41–256, 43+180; Gibson v. Brennan, 46–92, 48+460; Dow v. Northern etc. Co., 51–326, 53+649; Duncan v. Everitt, 55–151, 56+591; Spriesterbach v. Schmidt, 64–211, 66+721; Barbaras v. Barbaras, 88–105, 92+522; Bryant v. Nelson, 94–305, 102+859.

[31] Gibson v. Brennan, 46–92, 48+460.

[32] Cotterell v. Dill, 29–114, 12+355; Downs v. Nourse, 30–552, 16+412; Brackett v. Cunningham, 44–498, 47+157; Spriesterbach v. Schmidt, 64–211, 66+721; Board of Trustees v. Brown, 66–179, 68+837; Hardwick v. Chi. etc. Ry., 124+819.

[33] Bazille v. Ullman, 2–134(110); Morrison v. March, 4–422(325); Keegan v. Peterson, 24–1; Jones v. Wilder, 28–238, 9+707; Johnson v. Deforge, 61–72, 63+174; Conron v. Hoerr, 83–183, 85+1012.

[34] Peach v. Reed, 87–375, 92+229. See § 392.

[35] Peach v. Reed, 87–375, 92+229; Conklin v. Conklin, 93–188, 101+70.

[36] R. L. 1905 § 4271.

[37] Robinson v. Bartlett, 11–410(302); Smith v. Minneapolis, 95–431, 104+227. See Dunnell, Minn. Pr., § 1754.

[38] Williams v. McGrade, 13–46(39); Butler v. Fitzpatrick, 21–59; Koethe v. O'Brien, 32–78, 19+388; Chesley v. Miss. etc. Co., 39–83, 38+769; Mead v. Billings, 40–505, 42+472; Brackett v. Cunningham, 44–498, 47+157; Thomas v. West Duluth etc. Co., 51–398, 53+710.

[39] State v. Lautenschlager, 23–290; Scofield v. Walrath, 35–356, 28+926; Gardner v. Fidelity etc. Assn., 67–207, 69+895.

[40] Rhoades v. Siman, 24–192; Craver v. Christian, 32–525, 21+716; Densmore v. Shepard, 46–54, 48+528, 681; Mickelson v. Duluth etc. Assn., 68–535, 71+703; Klein v. Funk, 82–3, 84+460 (the record need only contain all the evidence introduced up to the time of the order).

[41] Board of Trustees v. Brown, 66–179, 68+837; Gardner v. Fidelity etc. Assn., 67–207, 69+895; Klein v. Funk, 82–3, 84+460.

[42] St. Paul v. Kuby, 8–154(125); Moran v. Mackey, 32–266, 20+159; Davis v. Tribune Job-Printing Co., 70–95, 72+808.

or on the ground that the findings of the court [43] or referee [44] are not justified by the evidence, or on the ground that the findings are without the issues; [45] on appeal from a judgment in an action tried by the court without a jury and the sufficiency of the evidence to justify the findings is questioned; [46] on appeal from a judgment where error is assigned in refusing to dismiss the action on the trial for insufficiency of the evidence [47] or in directing or refusing to direct a verdict at the close of the case; [48] on appeal from a judgment and it is assigned for error that the findings are without the issues; [49] on appeal from a judgment and it is assigned for error that the court erred in granting or denying an application for additional or amended findings; [50] on appeal from a judgment ordered by the court on special findings, notwithstanding the general verdict, and it is assigned as error that the general verdict was not justified by the evidence; [51] on appeal involving the judgment of a justice of the peace, and it is assigned as error that the judgment is not justified by the evidence; [52] on appeal from a judgment, and it is assigned for error that a special verdict of the jury was not justified by the evidence.[53]

346. To review rulings on evidence—In order to secure a review on appeal of a ruling of the trial court in admitting or excluding evidence it is indispensable in all cases that there should be a bill of exceptions or case containing the evidence erroneously admitted or excluded, the objection of counsel, the ruling of the court upon the objection, and so much of the other evidence in the case as may be necessary to enable the supreme court to review intelligently the action of the trial court.[54] When it is claimed that the court erred in admitting evidence it is almost always necessary that the record contain all the evidence introduced on the trial, because, in the absence of such a record, it will be presumed on appeal that the evidence was rightly admitted, if it was admissible for any conceivable purpose within the issues or upon any conceivable state of facts.[55] When the objection to a question propounded a witness is that it assumes a fact not proved the record must contain all the evidence.[56] If the materiality and admissibility of the evidence sought to be introduced is not apparent from the question propounded the witness, the record must contain an offer sufficiently full and explicit to make the materiality and admissibility obvious, when considered in connection with the pleadings and the other evidence in the record.[57]

[43] Dickerman v. Ashton, 21–538; Boright v. Springfield etc. Co., 34–352, 25+796; State v. St. P. etc. Ry., 38–246, 36+870; Mickelson v. Duluth etc. Assn., 68–535, 71+703; Grout v. Stewart, 96–230, 104+966.

[44] St. Paul v. Kuby, 8–154(125); Teller v. Bishop, 8–226(195); Brown v. Gurney, 20–527(473); Thompson v. Howe, 21–98; Madigan v. Mead, 31–94, 16+539; Lundell v. Cheney, 50–470, 52+918.

[45] St. Paul T. Co. v. St. Paul C. of C., 64–439, 67+350.

[46] Downer v. Foulhuber, 19–179(142); First Nat. Bank v. Parsons, 19–289(246); McDermid v. McGregor, 21–111; Albee v. Hayden, 25–267; Thompson v. Lamb, 33–196, 22+443; Woodbridge v. Sellwood, 65–135, 67+799; Lee v. Kratka, 94–524, 102+1134; Farmers etc. Assn. v. Dally, 98–13, 107+555.

[47] See cases under note (40) supra.

[48] See cases under note (41) supra.

[49] Jones v. Wilder, 28–238, 9+707; Olson v. St. P. etc. Ry., 38–479, 38+490; Abbott v. Morrissette, 46–10, 48+416.

[50] School Dist. v. Wrabeck, 31–77, 16+493; Baker v. Byerly, 40–489, 42+395; Groomes v. Waterman, 59–258, 61+139; Levine v. Lancashire Ins. Co., 66–138, 68+855; Stevens v. Stevens, 82–1, 84+457; Bryant v. Nelson, 94–305, 102+859.

[51] Awde v. Cole, 99–357, 109+812.

[52] Enright v. Theysen, 87–391, 92+1130.

[53] Hardwick v. Chi. etc. Ry., 124+819.

[54] St. Anthony M. Co. v. Vandall, 1–246(195); Claflin v. Lawler, 1–297(231); Bazille v. Ullman, 2–134(110); Roehl v. Baasen, 8–26(9); Wintermute v. Stinson, 16–468(420); Dartnell v. Davidson, 16–530(477); St. P. etc. Ry. v. Murphy, 19–500(433); Acker Post v. Carver, 23–567; Stone v. Johnson, 30–16, 13+920; Sanborn v. Mueler, 38–27, 35+666; Johnson v. Howard, 51–170, 53+363; Hewetson v. Dossett, 71–358, 73+1089; Le May v. Brett, 81–506, 84+339.

[55] See § 378.

[56] St. P. etc. Ry. v. Murphy, 19–500(433).

[57] Le May v. Brett, 81–506, 84+339.

347. To review instructions—In all cases the instructions given and objected to and the instructions refused must be included in the record by a bill of exceptions or case. They are not a part of the record in this state.[58] If instructions objected to are an imperfect and misleading statement of the law applicable to the case, it is necessary that the record should contain the entire charge, for otherwise it will be presumed that additional instructions essential to a full and accurate presentation of the law of the case were given.[59] When instructions are abstractly correct, but are erroneous as applied to the evidence, the record must contain all the evidence introduced on the trial.[60]

348. To review refusal to give requested instructions—In order to secure a review on appeal of a refusal to give requested instructions it is necessary in all cases that the record should contain the charge in full,[61] and all the evidence introduced on the trial.[62]

349. To review orders—To review orders not made on the trial the record must contain all of the evidence on which the order was based.[63]

350. Miscellaneous cases—In the absence of a case or bill of exceptions sufficiently full for the particular purpose, the supreme court will not review rulings of the trial court in connection with the impaneling of a jury;[64] or improper remarks of counsel;[65] or improper remarks[66] or conduct[67] of the judge; or error in denying a jury trial;[68] or error in refusing to allow an amendment;[69] or the misconduct of jurors;[70] or error in receiving additional affidavits on an appeal from the taxation of costs by the clerk;[71] or error in dismissing a complaint for insufficiency;[72] or misconduct of a party on the trial;[73] or the sufficiency of an affidavit in garnishment proceedings;[74] or error in submitting depositions to a jury;[75] or an alleged variance;[76] or the refusal of a continuance and an attachment for a witness;[77] or error in excluding evidence to impeach the credibility of a witness;[78] or rulings on objections reserved;[79] or the sufficiency of an affidavit in replevin;[80] or the granting of an amendment to the pleadings on the trial;[81] or an order modifying an allowance of alimony;[82] or an order denying relief on the ground of laches;[83] or error in allowing counsel to read to the jury a complaint which had been superseded by an amended complaint.[84]

351. Affirmance when record insufficient—When the record is insufficient

[58] State v. Sackett, 39–69, 38+773; Hendrickson v. Back, 74–90, 76+1019.
[59] State v. Taunt, 16–109(99); Cogley v. Cushman, 16–397(354); Stearns v. Johnson, 17–142(116).
[60] Desnoyer v. L'Hereux, 1–17(1); State v. Brown, 12–538(448); Blackman v. Wheaton, 13–326(299); Day v. Raguet, 14–273(203); State v. Taunt, 16–109(99); Sheffield v. Ladue, 16–388(346); State v. Owens, 22–238.
[61] Stearns v. Johnson, 17–142(116); State v. Sackett, 39–69, 38+773.
[62] Coles v. Yorks, 28–464, 10+775; State v. Sackett, 39–69, 38+773.
[63] See § 1368.
[64] State v. Brecht, 41–50, 42+602; Ham v. Wheaton, 61–212, 63+495.
[65] St. Martin v. Desnoyer, 1–156(131); Smith v. Wilson, 36–334, 31+176; State v. Adamson, 43–196, 45+152; Haug v. Haugan, 51–558, 53+874.
[66] Smith v. Kingman, 70–453, 73+253.
[67] State v. Nichols, 29–357, 13+153.
[68] Coolbaugh v. Roemer, 32–445, 21+472; McGeagh v. Nordberg, 53–235, 55+117.
[69] Schumann v. Mark, 35–379, 28+927; Harris v. Kerr, 37–537, 35+379.
[70] Edlund v. St. P. C. Ry., 78–434, 81+214.
[71] Schultz v. Bower, 66–281, 68+1080.
[72] Flibotte v. Mullen, 36–144, 30+448.
[73] Ham v. Wheaton, 61–212, 63+495.
[74] Hinkley v. St. Anthony Falls etc. Co., 9–55(44).
[75] Conron v. Hoerr, 83–183, 85+1012.
[76] Cushman v. Carver County, 19–295 (252).
[77] Barnes v. Christofferson, 62–318, 64+821.
[78] Aske v. Duluth etc. Ry., 83–197, 85+1011.
[79] Nat. Invest. Co. v. Schickling, 56–283, 57+663.
[80] Goodell v. Ward, 17–17(1).
[81] Macauley v. Ryan, 55–507, 57+151.
[82] Barbaras v. Barbaras, 88–105, 92+522.
[83] Schmitt v. Hager, 88–413, 93+110.
[84] Loftus v. Smith, 90–418, 97+125.

for a review of the errors assigned, the order or judgment will ordinarily be affirmed.[85]

352. Certificate of judge as to completeness of record—In all cases where it is necessary that the record on appeal should contain all the evidence, it must affirmatively and unequivocally appear, either in the body of the case or the certificate of the judge, that the case contains all the evidence introduced on the trial, or at least all the evidence introduced on the issue of fact raised in the appellate court.[86] Good practice requires that the completeness of the case should be certified by the judge, but this is not indispensable, if the case purports on its face to contain all of the evidence.[87] The certificate of the judge is not conclusive.[88]

PAPER BOOKS AND BRIEFS

353. Contents of paper books—The rule of court requiring the printing in the paper book of so much of the return as will clearly and fully present the questions arising on a review must be observed, unless application is first made for its modification. In proper cases the rule will be modified so as to render the printing of portions of the return unnecessary.[89]

354. Failure to serve—Dismissal, affirmance, or reversal—Either party may apply to the court for judgment of affirmance or reversal, or for a dismissal, as the case may be, if the other party neglects to appear and argue the case, or to furnish and deliver cases and points.[90]

355. Filing paper books and briefs—Paper books and briefs must be filed at least three days before the argument.[91]

356. Stipulations—The rule of court requiring the paper book and briefs to be filed three days before the day of argument cannot be waived by stipulation of the parties.[92]

ASSIGNMENT OF ERRORS

357. Rule of court—Prefixed to the brief of the appellant, but stated separately, shall be an assignment of errors intended to be urged. Each specifi-

[85] Duncan v. Everitt, 55–151, 56+591; Spurr v. Spurr, 108–521, 121+121. See Calderwood v. Schlitz, 107–465, 121+221.

[86] Dorman v. Ames, 12–451(347); Cowley v. Davidson, 13–92(86); Young v. Young, 18–90(72); Butler v. Fitzpatrick, 21–59; Dickerman v. Ashton, 21–538; State v. Lautenschlager, 23–290; St. P. H. Works v. Langin, 23–462; Koethe v. O'Brien, 32–78, 19+388; Craver v. Christian, 32–525, 21+716; Boright v. Springfield etc. Co., 34–352, 25+796; Scofield v. Walrath, 35–356, 28+926; Chesley v. Miss. etc. Co., 39–83, 38+769; Mead v. Billings, 40–505, 42+472; Brackett v. Cunningham, 44–498, 47+157; Kohn v. Tedford, 46–146, 48+686; Board of Trustees v. Brown, 66–179, 68+837; Gardner v. Fidelity etc. Assn., 67–207, 69+895.

[87] Coleman v. Reierson, 36–222, 30+811; Brackett v. Cunningham, 44–498, 47+157; Vassau v. Campbell, 79–167, 81+829.

[88] Acker Post v. Carver, 23–567; Coleman v. Reierson, 36–222, 30+811; Lundell v. Cheney, 50–470, 52+918; Sage v. Rudnick, 67–362, 69+1096; Vassau v. Campbell, 79–167, 81+829; Jourdain v. Luchsinger, 91–111, 97+740.

[89] Gardner v. Leck, 52–522, 54+746.

[90] Rule 14, Supreme Court; Merrill v. Dearing, 24–179 (necessity of application); Schleuder v. Corey, 30–501, 16+401 (effect of affirmance under rule–res judicata); Guerin v. St. P. etc. Ry., 32–409, 21+470 (order affirmed under rule); Maxwell v. Schwartz, 55–414, 57+141 (effect of affirmance under rule–res judicata); Kimball v. Southern etc. Co., 57–37, 58+868 (appeal dismissed under rule); Plymouth C. House v. Seymour, 74–425, 77+239 (rule 4 does not affect right under rule 14 to move for dismissal for non-compliance with rule 11); Brown v. Potter, 81–4, 83+457 (effect of appeal being perfected too late to render a compliance with rule 11 possible); Smith v. Ricker, 84–210, 87+615 (order reversed under rule on court's own motion); State v. Dennis, 87–407, 92+1131 (order reversed and judgment ordered under rule); Manwaring v. Drake, 93–497, 101+1134, 102+1134 (judgment reversed under rule).

[91] Lehigh C. & I. Co. v. Scallen, 61–63, 63+245.

[92] Id.

cation of error shall be separately, distinctly, and concisely stated, without repetition, and they shall be numbered consecutively. When the error specified is that the finding of the court below or referee is not sustained by the evidence, it shall specify particularly the finding complained of. No error not affecting the jurisdiction over the subject-matter will be considered unless stated in the assignment of errors.[93]

358. Necessity—Effect of failure to make—If the appellant fails to make any assignments of error the order or judgment appealed from will ordinarily be affirmed.[94] Generally the court will refuse to consider errors not assigned,[95] but it may do so in its discretion.[96]

359. Function—The primary object of assignments of error is to apprise the appellate court and the respondent, in a concise and convenient manner, of the specific questions presented for determination. They enable opposing counsel to ascertain readily and certainly just what points he has to meet in the preparation of his brief, and the court to see just what points it is to consider, and to confine discussion to them.[97] They do not take the place of objections and exceptions in the trial court.[98]

360. General rules—Cross-assignments—Mode of stating—Only the appellant can assign errors. Cross-assignments by a respondent are not authorized. In this state it is the rule that a party waives all objections to a verdict, finding, judgment or order by failing to appeal.[99] An appellant can only assign errors which were prejudicial to himself; he cannot take advantage of errors as to other parties.[1] When there are several parties uniting in an appeal there should be separate assignments of error unless the errors were common to all.[2] Two or more distinct allegations of error cannot be included in one assignment; otherwise all the rulings during the trial might be grouped under one assignment and the purpose of the rule defeated.[3] An omnibus assignment is unavailing; counsel must put his finger on the specific error.[4] But a single assignment may embrace several rulings involving the same error.[5] An assignment so general and indefinite as not to indicate the specific error asserted is a

[93] Rule 9, Supreme Court.

[94] Freeman v. Rhodes, 36–297, 30+891; Rushfeldt v. Shave, 37–282, 33+791; Day v. Eibert, 68–499, 71+615; Guiterman v. Saterlie, 76–19, 78+863.

[95] James v. St. Paul, 72–138, 75+5; Thiel v. Kennedy, 82–142, 84+657; Adams v. Thief River Falls, 84–30, 86+767; Schmitt v. Murray, 87–250, 91+1116; Isherwood v. Jenkins, 87–388, 92+230; Uldrickson v. Samdahl, 92–297, 100+5; Forman v. Saunders, 92–369, 100+93; Ranta v. Supreme Tent, 97–454, 107+156; Nye v. Kahlow, 98–81, 107+733; First Nat. Bank v. Hodapp, 98–534, 107+957; Ellering v. Mpls. etc. Ry., 107–46, 119+507.

[96] Clavin v. Semple, 90–491, 97+1117.

[97] Duncan v. Kohler, 37–379, 34+594; Adams v. Thief River Falls, 84–30, 86+767.

[98] American E. Co. v. Crowley, 105–233, 117+428; Moneyweight S. Co. v. Hjerpe, 106–47, 118+62.

[99] State v. N. P. Ry., 99–280, 109+238; Winona etc. Ry. v. Denman, 10–267(208); Edgerton v. Jones, 10–427(341); Kelly v. Clow Reaper Mfg. Co., 20–88(74); New v. Wheaton, 24–406; Watson v. Ward, 27–29, 6+407; Wheeler v. Merriman, 30–372, 15+665; Whitely v. Miss. etc. Co., 38–523, 38+753; In re Allen, 41–430, 43+382; Henderson v. Kendrick, 72–253, 75+127; Clarkin v. Brown, 80–361, 83+351. It is not necessary for a party to appeal and make assignments of error to raise points showing that he was entitled to the order or judgment rendered in his favor. Mather v. Curley, 75–248, 77+957.

[1] Clark v. Stanton, 24–232; Seibert v. Mpls. etc. Ry., 58–39, 59+822; Borman v. Baker, 68–213, 70+1075; Marshall & I. Bank v. Cady, 76–112, 78+978; Cornish v. West, 89–360, 94+1082; Fowler v. Jenks, 90–74, 97+127.

[2] Nelson v. Munch, 28–314, 9+863. See McKasy v. Huber, 65–9, 67+650; Baer v. Kloos, 81–218, 83+980.

[3] Woodbury v. Day, 24–463; Christian v. Bowman, 49–99, 51+663; Columbia M. Co. v. Nat. Bank of Com., 52–224, 53+1061; Seibert v. Mpls. etc. Ry., 58–39, 59+822.

[4] Malmgren v. Phinney, 65–25, 67+649; London etc. Co. v. McMillan, 78–53, 80+841.

[5] Columbia M. Co. v. Nat. Bank of Com., 52–224, 53+1061.

mere evasion of the rule. On the other hand the practice of multiplying assignments by repetition and unnecessary subdivision is a perversion of the rule which defeats the very purposes for which it was adopted.[6] Argument and the citation of authorities have no place in an assignment of errors.[7] At the end of each assignment the number of the folio of the paperbook where the error may be found should be given.[8] Assignments cannot be predicted on rulings in a justice court.[9]

361. As to findings and conclusions—To question on appeal the sufficiency of evidence to justify findings of fact by a court or referee, there must be an assignment of errors specifying particularly the finding complained of.[10] An assignment must show whether it is taken to the findings of fact or to the conclusions of law.[11] The particular error in a finding must be pointed out.[12] If the court makes a general finding that all the allegations of a particular pleading are true it is incumbent on an appellant to specify the fact or facts the finding of which he deems erroneous.[13] The following assignments have been held insufficient: that "the decision was not justified by the evidence and is contrary to law;"[14] that "the evidence does not sustain the findings of fact;"[15] that "the court below erred in finding the affirmative allegations of the answer to be true;"[16] that "the court erred in finding that the material facts alleged in the answer are true;"[17] that "the court erred in its findings and order for judgment;"[18] that "the findings of fact and conclusions of law of the trial court are not justified by the evidence, and are contrary to law;"[19] that "the finding of the court is not justified by the evidence and is contrary to law;"[20] that the court erred "in granting order for judgment for plaintiffs in any sum whatever;"[21] that "the decision of the court herein is not justified by the evidence;"[22] that "the findings are not supported by the evidence."[23] An assignment that the court erred in denying a motion for a new trial is not sufficient to raise the objection that the court erred in refusing to amend its findings.[24] An assignment that "the conclusions of law are not justified or supported by the findings of fact" is sufficient.[25] An assignment that the court erred in denying a motion for a new trial is insufficient to raise the point that the findings are not justified by the evidence.[26]

362. As to rulings on evidence—A single assignment may cover several rulings involving the same error, but when the rulings involve different points they cannot be included in a single assignment.[27] A general assignment that

[6] Duncan v. Kohler, 37–379, 34+594; Carpenter v. Eastern Ry., 67–188, 69+720.
[7] Duncan v. Kohler, 37–379, 34+594.
[8] St. Barnabas Hospital v. Mpls. etc. Co., 68–254, 70+1126; Fidelity etc. Co. v. Crays, 76–450, 79+531.
[9] Chamberlain v. Bradley, 79–232, 82+311.
[10] Neils v. Hines, 93–505, 101+959; Bryant v. Nelson, 94–305, 102+859.
[11] Lytle v. Prescott, 57–129, 58+688.
[12] Albrecht v. St. Paul, 56–99, 57+330; Clark v. Richards, 72–397, 75+605.
[13] Moody v. Tschabold, 52–51, 53+1023; Albrecht v. St. Paul, 56–99, 57+330; Adolph v. Mpls. etc. Ry., 58–178, 59+959.
[14] Smith v. Kipp, 49–119, 51+656; Butler v. Silvey, 70–507, 73+406, 510; Parish v. St. Paul, 84–426, 87+1124; Nye v. Kahlow, 98–81, 107+733. See also, Thiele v. Berge, 81–505, 84+320.
[15] Union Cash Register Co. v. John, 49–481, 52+48.
[16] Albrecht v. St. Paul, 56–99, 57+330.
[17] Moody v. Tschabold, 52–51, 53+1023.
[18] Dallemand v. Swensen, 54–32, 55+815; Cook v. Kittson, 68–474, 71+670.
[19] Mahler v. Merchants Nat. Bank, 65–37, 67+655.
[20] Lytle v. Prescott, 57–129, 58+688.
[21] Mickelson v. Duluth etc. Assn., 68–535, 71+703.
[22] Petzenka v. Dallimore, 64–472, 67+365; Hunt v. O'Leary, 84–200, 87+611.
[23] Hughes v. Meehan, 84–226, 87+768.
[24] Owatonna v. Christianson, 83–52, 85+909. See Bryant v. Nelson, 94–305, 102+859.
[25] Mahler v. Merchants Nat. Bank, 65–37, 67+655.
[26] Neils v. Hines, 93–505, 101+959.
[27] Christian v. Bowman, 49–99, 51+663; Columbia M. Co. v. Nat. Bank of Com., 52–224, 53+1061.

the court erred in admitting or excluding evidence is unavailing. The particular evidence must be pointed out by apt reference.[28] It is proper practice to give the name of the witness, and the question asked, in full. The following assignments have been held insufficient: that "the court erred in overruling plaintiff's objections to the evidence of divers defendants to the effect that subsequent to the execution of the note sued upon they settled their liability by the execution of their individual notes;"[29] that "the court erred in overruling defendants' objections to the introduction of evidence;"[30] that "the court erred admitting improper and in excluding proper evidence;"[31] that "the decision of the court is not supported by the findings of fact, and is contrary to law;"[32] that the court erred in finding certain facts.[33]

363. As to new trials—An assignment that the court erred in denying a motion for a new trial is too general, if the motion was made on more than one ground.[34] If the motion was made exclusively on one ground, such a general assignment might in some cases sufficiently indicate the error complained of; as, for example, when the motion was made exclusively on the ground of newly discovered evidence, or that the evidence did not justify the verdict. On the other hand, if the motion was made on the ground of errors of law occurring at the trial, an assignment would not be sufficient unless it specified the particular errors relied on.[35] A general assignment that the court erred in granting a new trial is always sufficient.[36] An assignment that the court erred in denying a new trial does not raise the objection that the damages are excessive.[37] An assignment that the verdict was not justified by the evidence has been held sufficient to raise the objection that the verdict was larger than the evidence warranted.[38]

364. As to instructions—An assignment of error, "that the court erred in its instructions to the jury, to which the defendant excepted" and one "that the court erred in refusing the instructions requested by the defendant," where there are several exceptions and requests, are insufficient.[39] The particular instruction must be pointed out.[40] A single assignment as to several different parts of a charge, relating to entirely different and distinct propositions is unavailing.[41] Good practice requires that the alleged erroneous instructions should be given in hæc verba. There should be a separate assignment for each

[28] Fredericksen v. Singer Mfg. Co., 38–356, 37+453; In re Granstrand, 49–438, 52+41; Am. Ex. Co. v. Piatt, 51–568, 53+877; Hall v. St. Paul, 56–428, 57+928; Cook v. Kittson, 68–474, 71+670.

[29] Yellow Medicine Co. Bank v. Wiger, 59–384, 61+452.

[30] Am. Ex. Co. v. Piatt, 51–568, 53+877.

[31] Kretzschmar v. Meehan, 81–432, 84+220.

[32] Hewetson v. Dossett, 71–358, 73+1089.

[33] Ellison v. Fox, 38–454, 38+358.

[34] Wilson v. Minn. etc. Assn., 36–112, 30+401; State v. Hays, 38–475, 38+365; Stevens v. Minneapolis, 42–136, 43+842; In re Granstrand, 49–438, 52+41; Moody v. Tschabold, 52–51, 53+1023; Selover v. Bryant, 54–434, 56+58; Bates v. Richards, 56–14, 57+218; First Nat. Bank v. Holan, 63–525, 65+952; Mahler v. Merchants Nat. Bank, 65–37, 67+655; Carpenter v. Eastern Ry., 67–188, 69+720; Sharpe v. Larson, 67–428; 70+1, 554; Cook v. Kittson, 68–474, 71+670; Ingalls v. Oberg, 70–102, 72+841; Larson v. Kelly, 72–116, 75+13; Keough v. Wendelschafer, 73–352, 76+46; Ingalls v. Holmgren, 81–278, 83+980; Chisago County v. Nelson, 81–443, 84+301; Thiele v. Berge, 81–505, 84+320; Adams v. Thief River Falls, 84–30, 86+767; Hughes v. Meehan, 84–226, 87+768; Parish v. St. Paul, 84–426, 87+1124; Case v. Huffman, 86–30, 90+5; Shea v. Cloquet L. Co., 97–41, 105+552; Vanderburgh v. Minneapolis, 103–515, 114+1134.

[35] Stevens v. Minneapolis, 42–136, 43+842.

[36] Wilcox v. Mutual F. Ins. Co., 81–478, 84+334; Central etc. Co. v. Royal Ins. Co., 92–223, 99+1120; Ecker v. Isaacs, 98–146, 107+1053.

[37] Sharpe v. Larson, 67–428, 70+1, 554; Adams v. Thief River Falls, 84–30, 86+767.

[38] Bates v. Reynolds, 92–392, 100+1123.

[39] Carpenter v. Eastern Ry., 67–188, 69+720.

[40] Hansen v. Gaar, 68–68, 70+853; Stevens v. Sandnes, 108–271, 121+902.

[41] Watts v. Howard, 70–122, 72+840.

request erroneously refused, and the only safe course is to give each request in hæc verba.[42]

365. As to miscellaneous matters—The following assignments have been held sufficient: that "the court below erred in granting the order vacating the judgment entered in said cause, and allowing the defendant to file his answer and defend therein;" [43] that "the court erred in granting defendant's motion to dismiss the action;" [44] and that "the court erred in directing a verdict for plaintiff."[45]

366. Waiver—An assignment of error not urged by the appellant in his points and authorities is deemed waived; [46] and this is true though it was urged on the oral argument,[47] unless it is voluntarily discussed and submitted to the court by counsel for the respondent.[48] Where the appellant does nothing more in his brief than reiterate his assignment it will be deemed waived.[49] It is discretionary with the court to consider assignments not discussed.[50]

367. Amendment—An appellant has no right to amend his assignments of error after the time for serving them has passed, except by consent of the respondent or by leave of court.[51] When objection to the sufficiency of assignments is made on the argument a party should ask leave to amend them, for an amendment is sometimes allowed even then.[52]

PRESUMPTIONS AND BURDEN OF PROOF

368. In general—On appeal error will never be presumed; it must be made to appear affirmatively on the face of the record. It is always presumed that the trial court acted regularly and in accordance with the law unless the record affirmatively shows the contrary.[53] The burden of showing error affirmatively

[42] Larson v. Kelly, 72–116, 75+13.

[43] Fitzpatrick v. Campbell, 58–20, 59+629.

[44] Ermentrout v. Am. Fire Ins. Co., 60–418, 62+543.

[45] Am. Ex. Co. v. Piatt, 51–568, 53+877.

[46] Smith v. Bean, 46–138, 48+687; Mpls. Co-op. Co. v. Williamson, 51–53, 52+986; Moody v. Tschabold, 52–51, 53+1023; Romer v. Conter, 53–171, 54+1052; Bates v. Richards, 56–14, 57+218; Johnson v. Johnson, 57–100, 58+824; Dodge v. McMahan, 61–175, 63+487; Mpls. etc. Ry. v. Firemen's Ins. Co., 62–315, 64+902; Boe v. Irish, 69–493, 72+842; Keigher v. St. Paul, 73–21, 75+732; State v. Hulder, 78–524, 81+532; Dennis v. Pabst, 80–15, 82–978; Hahn v. Bettingen, 81–91, 83+467; White v. Collins, 90–165, 95+765; Scott v. Hay, 90–304, 97+106; Price v. Wash. etc. Co., 92–251, 99+810; Gallagher v. N. P. Ry., 94–64, 101+942; Olson v. Burk, 94–456, 103+335; Pitz v. Kentucky etc. Co., 94–519, 101–797; Cochran v. Cochran, 96–523, 105+183; Atwood v. Lammers, 97–214, 106+310; State v. Marciniak, 97–355, 105+965; Peterson v. Red Wing, 101–62, 111+840; Mears v. Petruschke, 101–411, 112+390; Rand v. Rand, 103–5, 114+87; Anderson v. International H. Co., 104–49, 116+101; Wickstrom v. Swanson, 107–482, 120+1090; Northwest T. Co. v. Anderson, 107–575, 120+1134; Naeseth v. Hommedal, 109–153, 123+287.

[47] Dodge v. McMahan, 61–175, 63+487; Mpls. etc. Ry. v. Firemen's Ins. Co., 62–315, 64+902; Cutting v. Weber, 77–53, 79+595.

[48] Cutting v. Weber, 77–53, 79+595.

[49] Romer v. Conter, 53–171, 54+1052; Peterson v. Red Wing, 101–62, 111+840; Casey v. Miss. etc. Co., 108–497, 122+376.

[50] State v. Holden, 42–350, 44+123.

[51] Green v. Dwyer, 33–403, 23+546; Mpls. etc. Ry. v. Home Ins. Co., 64–61, 66+132; Carpenter v. Eastern Ry., 67–188, 69+720; Swanson v. Mendenhall, 80–56, 82+1093.

[52] See Campbell v. Loeb, 72–76, 74+1024; Adams v. Thief River Falls, 84–30, 86+767; Neils v. Hines, 93–505, 101+959.

[53] Teller v. Bishop, 8–226(195); Davidson v. Farrell, 8–258(225); Andrews v. Stone, 10–72(52); Phoenix v. Gardner, 13–294(272); State v. Staley, 14–105(75); State v. Lessing, 16–75(64); White v. Balch, 24–264; Nudd v. Home etc. Co., 25–100; Jones v. Wilder, 28–238, 9+707; Papke v. Papke, 30–260, 15+117; Tune v. Sweeny, 34–295, 25+628; Pearce v. McGowan, 35–507, 29+176; Chesley v. Miss. etc. Co., 39–83, 38+769; In re Rees, 39–401, 40+370; Mead v. Billings, 40–505, 42+472; State v. Brecht, 41–50, 42+602; State v. Brown, 41–319, 43+69; State v. Adamson, 43–196, 45+152; Graves v. Am. etc. Co., 46–130, 48+684; Hempsted v. Cargill, 46–141, 48+686; Davis v. Severance, 49–528, 52+140; Thomas v. West Duluth etc. Co., 51–398, 53+710; Adamson v. Sundby, 51–460, 53+761; McGeagh v. Nordberg, 53–235, 55+117; Coons v. Lemieu, 58–99, 59+

by the record rests on the appellant.[54] When a party appeals from an order granting a new trial the burden rests on him to show that the order could not properly have been made on any ground specified in the notice of motion,[55] but it has been held that if the new trial was granted on account of an error of law or fact prejudicial to respondent and not referred to by the appellant it is the duty of the respondent to point it out.[56] If the record shows error and the respondent claims that it is incomplete, it is his duty to secure an amendment or supplementary return.[57]

369. As to returns—Where a return on appeal from a judgment of dismissal fails to show what became of a motion made by defendant to strike out a reply as sham, it cannot be assumed that the motion was granted. If, in fact, the reply was stricken out, it is the defendant's duty to cause the return to be amended in conformity with the fact.[58]

370. As to judgments—In the absence of a return to the supreme court from which the contrary is made to appear, it will be presumed on appeal from a judgment, that it was duly authorized and regularly entered. That the judgment was irregularly entered, or was unauthorized or unwarranted, cannot be made to appear by a return which does not purport to contain a copy of the judgment roll, or of all the papers and files which should be made a part of such roll.[59] To justify a reversal the error in the judgment must appear affirmatively of record and cannot be found by inference or intendment. Every reasonable presumption will be indulged in favor of the validity of a judgment.[60] It is presumed that a proper judgment will be entered.[61]

371. As to verdicts—On appeal a verdict is presumed to be correct. In the absence of a record containing all the evidence introduced on the trial it is presumed that sufficient evidence was properly admitted to justify the verdict.[62] If the facts found by a verdict are not within the issues made by the pleadings it will be presumed, the record not showing the contrary, that they were litigated by consent.[63] A general verdict is supported by the presumption that all the issues or facts essential to support it were found by the

977; Vaughan v. McCarthy, 63–221, 65+249; Bowers v. Miss. etc. Co., 64–474, 67+362; Pabst v. Butchart, 68–303, 71+273; Von Hemert v. Taylor, 76–386, 79+319; Barbaras v. Barbaras, 88–105, 92+522; State v. Ronk, 91–419, 98+334.

[54] Marsh v. Webber, 13–109(99); Phoenix v. Gardner, 13–294(272); Blackman v. Wheaton, 13–326(299); State v. Ryan, 13–370(343); Lake Superior etc. Co. v. Greve, 17–322(299); Ryder v. Neitge, 21–70; Mead v. Billings, 40–505, 42+472; McGeagh v. Nordberg, 53–235, 55+117; Floberg v. Joslin, 75–75, 77+557; Stitt v. Rat Portage L. Co., 98–52, 107+824.

[55] Marsh v. Webber, 13–109(99); Adams v. Hastings etc. Ry., 18–260(236); Langan v. Iverson, 78–299, 80+1051.

[56] Wilcox v. Mutual Fire Ins. Co., 81–478, 84+334.

[57] Floberg v. Joslin, 75–75, 77+557.

[58] Id.

[59] Pabst v. Butchart, 68–303, 71+273. See Hempsted v. Cargill, 46–141, 48+686.

[60] Teller v. Bishop, 8–226(195); Siman v. Rhoades, 24–25; Floberg v. Joslin, 75–75, 77+557; Eklund v. Martin, 87–441, 92+406; Phelps v. Powers, 90–440, 97+136.

[61] Finch v. Green, 16–355(315).

[62] Lynd v. Picket, 7–184(128); Barnsback v. Reiner, 8–59(37); Dorman v. Ames, 12–451(347); Cowley v. Davidson, 13–92(86); Rau v. Minn. V. Ry., 13–442(407); Warner v. Myrick, 16–91(81); State v. Taunt, 16–109(99); Jaspers v. Lano, 17–296(273); Lake Superior etc. Ry. v. Greve, 17–322(299); Young v. Young, 18–90(72); Daly v. Proetz, 20–411(363); Butler v. Fitzpatrick, 21–59; Plummer v. Mold, 22–15; Hocum v. Weitherick, 22–152; Trogden v. Winona etc. Ry., 22–198; State v. Owens, 22–238; Anderson v. Morrison, 22–274; St. Paul H. Works v. Langin, 23–462, Benz v. Geissell, 24–169; Geer v. Smith, 25–472; Koethe v. O'Brien, 32–78, 19+388; Boright v. Springfield etc. Co., 34–352, 25+796; Chesley v. Miss. etc. Co., 39–83, 38+769; Brackett v. Cunningham, 44–498, 47+157; Kohn v. Tedford, 46–146, 48+686; Anderson v. St. Croix L. Co., 47–24, 49+407; Thomas v. West Duluth etc. Co., 51–398, 53+710; Lawrence v. Dalrymple, 59–463, 61+559; Brigham v. Paul, 64–95, 66+203; Krumdick v. Chi. etc. Ry., 90–260, 95+1122.

[63] Peach v. Reed, 87–375, 92+229.

jury in favor of the party for whom it was returned. Where the jury return a general verdict, together with answers to specific questions or issues submitted to them by the court, such specific questions not being sufficiently full and complete to authorize a judgment thereon, the general verdict is presumed, there being no conflict or inconsistency between them, to cover all the facts essential to support a judgment on the special findings.[64] A cause having been submitted to a jury without objection to find upon several alleged causes of action the verdict will not be presumed to have been found upon one of such causes of action which was unsupported by sufficient evidence, but, unless it is apparent that such is not the case, will be deemed to have been made with regard to those causes of action which were sufficiently proved.[65] Where it is apparent that, of two items, the jury have allowed one and disallowed one, and there is sufficient evidence to justify them in disallowing one of them, the presumption is that that is the one which they disallowed.[66]

372. As to findings—On appeal findings of fact by the trial court are presumed to be correct. In the absence of a record containing all the evidence introduced on the trial, it is presumed that sufficient evidence was properly admitted to justify the findings.[67] The same presumptions are entertained in favor of findings of fact by a referee.[68] Where a cause is tried by the court without a jury and there is neither a settled case nor bill of exceptions it is presumed on appeal that on the trial the parties voluntarily litigated all matters of fact in the findings though some of the facts were not within the issues made by the pleadings.[69] Upon a review in the supreme court of findings of fact and conclusions of law, where the evidence upon which the decision rests is before it solely upon a bill of exceptions, every reasonable inference must be indulged in favor of the material conclusions of the trial court, not inconsistent with the statements in the bill of exceptions. Where the trial court has found ultimate and decisive facts, but has added thereto a statement that it would, but for certain conditions, have reached a different conclusion, to give value to such qualifying inference the facts to support the same should be embraced in the bill of exceptions; and the findings should also contain the essential facts, or they will be disregarded.[70] Where evidence was improperly admitted on the trial, and the court finds against such evidence, the presumption is that it was disregarded.[71] The presumption is that findings are as favorable to the successful party as any reasonable view of the evidence would warrant.[72] The presump-

[64] Eklund v. Martin, 87–441, 92+406; Krumdick v. Chi. etc. Ry., 90–260, 95+1122.

[65] Pevey v. Schulenburg, 33–45, 21+844.

[66] Newell v. Houlton, 22–19.

[67] Downer v. Foulhuber, 19–179(142); McDermid v. McGregor, 21–111; Dickerman v. Ashton, 21–538; Albee v. Hayden, 25–267; Thompson v. Lamb, 33–196; 22+443; Boright v. Springfield etc. Ins. Co., 34–352, 25+796; State v. St. Paul etc. Ry., 38–246, 36+870; Olson v. St. P. etc. Ry., 38–479, 38+490; Coons v. Lemieu, 58–99, 59+977; Brigham v. Paul, 64–95, 66+203; Bowers v. Miss. etc. Co., 64–474, 67+362; Woodbridge v. Sellwood, 65–135, 67+799; Mickelson v. Duluth etc. Assn., 68–535, 71+703; Peach v. Reed, 87–375, 92+229; Reeves v. Sawyer, 88–218, 92+962; Phelps v. Powers, 90–440, 97+136; Wellcome v. Berkner, 108–189, 121+882.

[68] St. Paul v. Kuby, 8–154(125); Teller v. Bishop, 8–226(195); Brown v. Gurney, 20–527(473); Bisbee v. Torinus, 26–165, 2+168.

[69] Butler v. Winona M. Co., 28–205, 9+697; Jones v. Wilder, 28–238, 9+707; Wyvell v. Jones, 37–68, 33+43; Olson v. St. P. etc. Ry., 38–479, 38+490; Salisbury v. Bartleson, 39–365, 40+265; Baker v. Byerly, 40–489, 42+395; St. P. etc. Ry. v. Bradbury, 42–222, 44+1; Deiber v. Loehr, 44–451, 47+50; Abbott v. Morrissette, 46–10, 48+416; Ahlberg v. Swedish-Am. Bank, 51–162, 53+196; Coons v. Lemieu, 58–99, 59+977; Yorks v. St. Paul, 62–250, 64+565; Stevens v. Stevens, 82–1, 84+457; Thomas v. Murphy, 87–358, 91+1097; Peach v. Reed, 87–375, 92+229; Johnson v. Spear, 102–516, 113+1134.

[70] St. Paul T. Co. v. Kittson, 88–38, 92+500.

[71] Reeves v. Sawyer, 88–218, 92+962.

[72] Brown v. Fitcher, 91–41, 97+416.

tion in favor of findings applies not only to conclusions from disputed facts, but also to inferences reasonably to be drawn from undisputed facts.[73]

373. As to damages—The presumption on appeal that the verdict or finding is correct includes the assessment of damages. In the absence of a record containing all the evidence introduced on the trial, or at least all the evidence bearing on the question of damages, it is presumed on appeal that sufficient evidence was properly admitted to justify the damages assessed.[74] It is presumed that the jury followed the instructions in assessing damages.[75]

374. As to orders—In the absence of a record affirmatively showing the contrary it will be presumed on appeal that orders of the court were properly made.[76]

375. As to instructions—On appeal it is presumed that the trial court fully and accurately instructed the jury as to the law applicable to the case, unless the contrary affirmatively appears on the face of the record.[77] If instructions are abstractly correct, it will be presumed that there was evidence introduced at the trial to which they were applicable, in the absence of a record containing all of the evidence.[78] If the record does not affirmatively show that it contains all the instructions given and the instructions in the record constitute an imperfect or misleading statement of the law applicable to the case, it will be presumed that additional instructions essential to a full and accurate presentation of the law of the case were given.[79] When an instruction is given which is open to two constructions, one of which is correct and the other incorrect as a proposition of law, the former will be presumed to have been the sense in which it was given and understood, unless the ambiguity was particularly called to the attention of the court with a request for a correction.[80] When contradictory instructions are given it is presumed that those of practical application to the evidence were more effective than others of an abstract nature.[81] It is presumed that the jury follow instructions in assessing damages.[82] When a request for instructions is refused and objection is raised on appeal it will be presumed that the court in its general charge properly instructed the jury on the point involved in the request, in the absence of a record purporting to contain the entire charge.[83]

376. As to withdrawn instructions—Where the court gives an erroneous instruction, but subsequently withdraws it and explicitly instructs the jury to disregard it, it will be presumed on appeal that the jury accepted and acted on the correction. The withdrawal must be absolute and in such explicit and unequivocal terms that there is no danger of the jury being confused or misled by contradictory instructions.[84]

377. As to issues tried—It is presumed on appeal, unless the record affirmatively shows the contrary, that the issues tried were those made by the pleadings.[85]

[73] N. W. etc. Co. v. Conn. etc. Co., 105–483, 117+825.

[74] St. Paul v. Kuby, 8–154(125); Moran v. Mackey, 32–266, 20+159.

[75] Pierce v. Wagner, 29–355, 13+170.

[76] Chesley v. Miss. etc. Co., 39–83, 38+769; In re Rees, 39–401, 40+370; Vaughan v. McCarthy, 63–221, 65+249; Eklund v. Martin, 87–441, 92+406; Barbaras v. Barbaras, 88–105, 92+522.

[77] State v. Brown, 12–538(448); State v. Taunt, 16–109(99); Sheffield v. Ladue, 16–388(346); Cogley v. Cushman, 16–397(354); Stearns v. Johnson, 17–142(116); State v. Owens, 22–238.

[78] Desnoyer v. L'Hereux, 1–17(1); State v. Brown, 12–538(448); Blackman v. Wheaton, 13–326(299); Day v. Raguet, 14–273(203); State v. Taunt, 16–109(99); Sheffield v. Ladue, 16–388(346); State v. Owens, 22–238; Reed v. Pixley, 22–540.

[79] Connolly v. Davidson, 15–519(428); State v. Taunt, 16–109(99); Cogley v. Cushman, 16–397(354); Stearns v. Johnson, 17–142(116).

[80] Siebert v. Leonard, 21–442; Erd v. St. Paul, 22–443.

[81] Gorstz v. Pinske, 82–456, 85+215.

[82] Pierce v. Wagner, 29–355, 13+170.

[83] Stearns v. Johnson, 17–142(116).

[84] Goodsell v. Taylor, 41–207, 42+873; Dugan v. St. P. etc. Ry., 43–414, 45+851.

[85] See § 7675.

378. As to rulings on evidence—Rulings of the trial court in admitting or excluding evidence are presumed correct on appeal unless the record affirmatively shows error.[86] If evidence admitted was admissible for any conceivable purpose within the issues, it will be presumed to have been rightly admitted, in the absence of a record purporting to contain all the evidence introduced on the trial.[87] Evidence omitted from the record is presumed to have been properly admitted.[88] If evidence is offered for two purposes at the same time, for one of which it is competent and for the other not, and it is received generally it will be presumed that it was received for the proper purpose.[89] If evidence is admissible only on condition of other evidence being admitted, it will be presumed on appeal that the proper foundation was laid.[90] It will be presumed that the testimony of the defendant in a criminal action was voluntary.[91] When evidence is erroneously admitted on a trial by a court, without a jury, and the court finds against such evidence, it is presumed that the court disregarded it.[92]

379. As to pleadings—Unless the record on appeal affirmatively shows the contrary it will be presumed that there were proper pleadings;[93] that the issues litigated were the issues made by the pleadings;[94] that the evidence was in accordance with the pleadings;[95] that no facts were proved which were not justified by the issues formed by the pleadings;[96] that omissions in the complaint were remedied by proof on the trial, if the verdict for the plaintiff could not reasonably have been reached except on such proof.[97]

380. As to jury following instructions—It is generally presumed that a jury follow instructions.[98]

381. As to jury following instructions to disregard evidence—Where evidence is erroneously admitted, and the jury are subsequently instructed to disregard it, there is apparently no presumption in this state that they followed the instructions.[99]

382. As to grounds on which new trial granted—It will not be presumed on appeal that an order granting a new trial was granted on the ground that the verdict, decision, or report, was not justified by the evidence. On the contrary it will be presumed, in the absence of a statement in the order to the contrary, that it was not granted on that ground.[1]

383. Miscellaneous presumptions—Our supreme court has indulged the following presumptions in the absence of a record showing error: that a challenge to the panel was tried and determined on legal and sufficient evidence;[2] that a referee was duly sworn;[3] that there were proper pleadings;[4] that an

[86] Blackman v. Wheaton, 13–326(299); Sheffield v. Ladue, 16–388(346); Wintermute v. Stinson, 16–468(420); Acker Post v. Carver, 23–567; White v. Balch, 24–264; Conlan v. Grace, 36–276, 30+880; Olson v. St. P. etc. Ry., 38–479, 38+490; Hewetson v. Dossett, 71–358, 73+1089.

[87] State v. Shettleworth, 18–208(191); St. P. etc. Ry. v. Murphy, 19–500(433); Conlan v. Grace, 36–276, 30+880.

[88] Sumner v. Sawtelle, 8–309(272).

[89] State v. Shettleworth, 18–208(191); Van Brunt v. Greaves, 32–68, 19+345.

[90] Blackman v. Wheaton, 13–326(299); State v. Shettleworth, 18–208(191).

[91] State v. Lessing, 16–75(64).

[92] Reeves v. Sawyer, 88–218, 92+962. See State v. Mpls. etc. Ry., 90–88, 95+581.

[93] Davidson v. Farrell, 8–258(225).

[94] See § 7675.

[95] Sumner v. Sawtelle, 8–309(272).

[96] Id.

[97] Coit v. Waples, 1–134(110); Daniels v. Winslow, 2–113(93); Lee v. Emery, 10–187(151); Hurd v. Simonton, 10–423 (340); Smith v. Dennett, 15–81(59); Chesterson v. Munson, 27–498, 8+593; Thomas v. West Duluth etc. Co., 51–398, 53+710.

[98] Pierce v. Wagner, 29–355, 13+170. See §§ 9795, 9796.

[99] See § 7207.

[1] R. L. 1905 § 4198(7); Berg v. Olson, 88–392, 93+309; Fitger v. Guthrie, 89–330, 94+888; Hillestad v. Lee, 91–335, 97+1055; Independent B. Assn. v. Burt, 109–323, 123+932; Nat. Citizens Bank v. Bowen, 109–473, 124+241; and cases under § 7084.

[2] State v. Brecht, 41–50, 42+602.

[3] Leyde v. Martin, 16–38(24); Young v. Young, 18–90(72).

[4] Davidson v. Farrell, 8–258(225). See Libby v. Husby, 28–40, 8+903.

attachment was issued at a proper time;[5] that the records of the cause were brought to the attention of the court on a motion to vacate a judgment;[6] that the trial court was right in holding that issues submitted to the jury did not cover the whole case;[7] that interest was allowed on sufficient evidence;[8] that a grand juror excused by the court was in fact over age;[9] that special findings in answer to interrogatories were consistent with the general verdict;[10] that a complaint in a justice court was verified;[11] that the evidence established a several liability where a several judgment was entered against one of two defendants;[12] that counsel appearing "for the defendants" appeared for all the defendants who answered;[13] that the plaintiff elected to proceed upon the cause of action on which the findings and decision of the court were made, where the complaint contained inconsistent causes;[14] that the facts established by the evidence at the trial were fully litigated so that an amendment, conforming the pleadings to the facts proved, might be allowed without opening the case for the introduction of further evidence;[15] that attorney's fees allowed by the court were such only as were authorized by the mortgage;[16] that upon judgment by default whatever proofs were necessary were taken;[17] that in excusing a juror without a challenge the court acted within the provisions of the statute;[18] that the district court had jurisdiction of an appeal in condemnation proceedings;[19] that an indictment found and properly filed was presented to the court;[20] that the officer in charge of a jury was duly sworn.[21]

NECESSITY OF DETERMINATION BY TRIAL COURT

384. In general—Except in such remedial cases as may be prescribed by law our supreme court is only invested with an appellate jurisdiction. In the exercise of such jurisdiction it can only rightfully act as a court of review. The very nature of its jurisdiction confines the court to a consideration of such questions as, originating in another court, have been there actually or presumably considered and determined in the first instance.[22] The theory of the judicial system in this state is that the parties shall first have a decision of the district court and then a review of that decision in the supreme court.[23] The rule applies whether the question is one of fact or of law.[24] In accordance with the general rule that the supreme court will refuse to consider questions not passed upon by the trial court it has been held that the following objections cannot be raised for the first time on appeal: that the verdict is not justified by

[5] Blake v. Sherman, 12–420(305); Blackman v. Wheaton, 13–326(299).
[6] Dow v. Northern etc. Co., 51–326, 53+649.
[7] Piper v. Packer, 20–274(245).
[8] Woodbridge v. Sellwood, 65–135, 67+799.
[9] State v. Brown, 12–538(448).
[10] Dempsey v. Cogswell, 29–100, 12+148.
[11] Burt v. Bailey, 21–403.
[12] Tune v. Sweeney, 34–295, 25+628.
[13] Adamson v. Sundby, 51–460, 53+761.
[14] Davis v. Severance, 49–528, 52+140.
[15] Dougan v. Turner, 51–330, 53+650.
[16] Seibert v. Mpls. etc. Ry., 58–65, 59+826.
[17] Hotchkiss v. Cutting, 14–537(408).
[18] Hill v. Winston, 73–80, 75+1030.
[19] Hempsted v. Cargill, 46–141, 48+686.
[20] State v. Beebe, 17–241(218).
[21] State v. Ryan, 13–370(343).
[22] Hawke v. Banning, 3–67(30); Babcock v. Sanborn, 3–141(86); Masterson v. Le Claire, 4–163(108); Holmes v. Campbell, 12–221(141); State v. Byrud, 23–29; Johnson v. Howard, 25–558; Keyes v. Clare, 40–84, 41+453; Smith v. Kipp, 49–119, 51+656; State v. Dist. Ct., 52–283, 53+1157; White v. Western Assur. Co., 52–352, 54+195; N. W. Railroader v. Prior, 68–95, 70+869; Western R. Co. v. Phelps, 86–52, 90+11, 793; Cornish v. Coates, 91–108, 97+579; Bock v. Sauk Center G. Co., 100–71, 110+257; State v. Germania Bank, 103–129, 114+651; Roach v. Aetna Ins. Co., 108–127, 121+613. See Gilman v. Holyoke, 14–138 (104) (holding that authority or jurisdiction of district court to make an order might be questioned for first time on appeal).
[23] Colvill v. Langdon, 22–565.
[24] White v. Western Assur. Co., 52–352, 54+195.

the evidence;[25] that the damages assessed by the jury are excessive or inadequate;[26] that the judgment is not justified by the order or verdict or the clerk has otherwise entered judgment irregularly;[27] that the findings of the court are informal, indefinite, incomplete, or broader than authorized by the issues actually tried;[28] that there is a variance between the pleadings and the proof or that evidence is inadmissible under the pleadings;[29] that allegations of a pleading are not put in issue by a denial;[30] that there is a departure in the pleadings;[31] that a default should be opened and the defendant be allowed to answer;[32] that the action is barred by the statute of limitations;[33] that an intervener had no right to intervene;[34] that a notice of motion for a new trial is insufficient;[35] that a motion for a new trial ought not to be entertained on certain papers;[36] that costs were improperly taxed by the clerk;[37] that a case of an equitable nature was improperly submitted to a jury;[38] that there was no formal order making a claimant a party to garnishment proceedings;[39] that there was an improper blank in a writ of attachment;[40] that there was a defect in the affidavit upon which a justice issued a writ of replevin;[41] that a default judgment was entered upon insufficient proof of service;[42] that the record does not show an order of reference where the cause was tried by a referee;[43] that the allegations of an answer were not put in issue by a reply;[44] that a judgment was improperly ordered on default at a postponed hearing of a motion to strike out defendant's answer as sham and for judgment;[45] that the verdict was for a greater amount than was claimed in the complaint;[46] that a demurrer was heard at an improper time and place;[47] that judgment, in an action tried by the court, was directed without findings of fact;[48] that the jury have made a miscalculation in arriving at their verdict;[49] that the court made a slight miscalculation in its findings;[50] that in an action to foreclose a mortgage one of the parties defendant was described by his full name in the pleadings, but in the report of sale and order of confirmation by his initials only;[51] that the court abused its discretion in overruling a demurrer without giving the demurrant the right to answer;[52] that the return of a justice on appeal to the district court is not complete;[53] that a bond upon which an attachment was discharged is defective;[54] that in an action to enforce a mechanic's lien there was no proof

[25] See § 7073b.
[26] Id.
[27] See § 5050.
[28] See §§ 9864–9874.
[29] See § 7676.
[30] Taylor v. Parker, 17–469(447); Matthews v. Torinus, 22–132; Merchants Nat. Bank v. Barlow, 79–234, 82+364; Lyford v. Martin, 79–243, 82+479.
[31] Abraham v. Holloway, 41–163, 42+870; Whitney v. Nat. M. A. Assn., 57–472, 59+943.
[32] Keyes v. Clare, 40–84, 41+453.
[33] Hardwick v. Ickler, 71–25, 73+519; Gilbert v. Hewetson, 79–326, 82+655.
[34] Holcomb v. Stretch, 74–234, 76+1132.
[35] Nudd v. Home Ins. etc. Co., 25–100; Chesley v. Miss. etc. Co., 39–83, 38+769.
[36] Nudd v. Home Ins. etc. Co., 25–100.
[37] Kent v. Bown, 3–347(246); Hurd v. Simonton, 10–423(340); Fay v. Davidson, 13–298(275); Barry v. McGrade, 14–286 (214); Hennepin County v. Jones, 18–199 (182); Jensen v. Crevier, 33–372, 23+541; Coles v. Berryhill, 37–56, 33+213; Stevens v. McMillin, 37–509, 35+372; State v. Dist. Ct., 52–283, 53+1157.
[38] Davis v. Smith, 7–414(328); Finch v. Green, 16–355(315).
[39] Williams v. Pomeroy, 27–85, 6+445.
[40] Brown v. Mpls. L. Co., 25–461.
[41] Goodell v. Ward, 17–17(1).
[42] Masterson v. Le Claire, 4–163(108).
[43] Spencer v. Levering, 8–461(410).
[44] Matthews v. Torinus, 22–132; Merchants Nat. Bank v. Barlow, 79–234, 82+364; Lyford v. Martin, 79–243, 82+479.
[45] Gederholm v. Davies, 59–1, 60+676.
[46] Amort v. Christofferson, 57–234, 59+304.
[47] Fallgatter v. Lammers, 71–238, 73+860.
[48] Williams v. Schembri, 44–250, 46+403.
[49] Bank of Com. v. Smith, 57–374, 59+311; Fletcher v. German-Am. Ins. Co., 79–337, 82+647.
[50] Fithian v. Weidenborner, 72–331, 75+380.
[51] Piper v. Sawyer, 82–474, 85+206.
[52] Potter v. Holmes, 72–153, 75+591.
[53] Davies v. Von Berg, 79–233, 82+311.
[54] Gale v. Seifert, 39–171, 39+69.

on the trial that the land did not exceed one acre in area;[55] that the return of an officer as to the service of a summons is insufficient;[56] that the verdict, in condemnation proceedings involving several tracts, is for a gross sum for all;[57] that a stipulation for judgment was not authorized;[58] that a levy under execution was excessive;[59] that a creditor was not authorized to appeal from an order of the probate court allowing the account of an administrator;[60] that a petition in highway proceedings was insufficient;[61] that an order for judgment was erroneous;[62] that a receiver was guilty of negligence in the discharge of his trust;[63] that a proper mechanic's lien statement was not filed;[64] that a notice of appeal from a municipal court to the district court was not served in due time.[65]

385. Necessity of motion for new trial—A motion for a new trial is sometimes necessary in order to secure a review on appeal.[66]

SCOPE OF REVIEW ON APPEAL FROM JUDGMENTS

386. Review limited to the return—It is fundamental that the review on appeal must be limited to the record.[67] To justify a reversal of a judgment the record must show affirmatively material error.[68]

387. When review limited to the judgment roll—When the record on appeal does not contain a bill of exceptions or case, or its equivalent, the supreme court can review only such questions as appear upon the judgment roll.[69]

388. Review of verdict or findings—Sufficiency of the evidence—If the record contains all the evidence introduced on the trial, the supreme court may review the sufficiency of the evidence to justify the findings of a court or referee, on an appeal from the judgment entered thereon, though no motion for a new trial was made below.[70] When the trial is by jury the sufficiency of the evidence to justify the verdict cannot be reviewed on appeal from the judgment, unless a motion was made in the trial court for a new trial, and the motion was denied,[71] or there was a motion under the statute for judgment notwithstanding the verdict.[72]

389. Review of intermediate orders—*a. In general*—Our statute provides that upon an appeal from a judgment the supreme court may review any intermediate order involving the merits or necessarily affecting the judgment.[73] This, of course, is subject to the proviso that the record is sufficiently full in the particular case to warrant the review.[74] An intermediate order, within the meaning of this provision, is one which is intermediate the commencement of the action and the entry of judgment. Orders made subsequent to the entry of judgment cannot be reviewed on an appeal from the judgment.[75] It is the general policy of the law that intermediate orders shall be reviewed on appeal from a final judgment or an order granting or refusing a new trial rather than by direct appeal. Any other policy would result in vexatious and dilatory ap-

[55] Egan v. Menard, 32–273, 20+197.
[56] Johnson v. Lough, 22–203.
[57] Lake Superior etc. Ry. v. Greve, 17–322 (299).
[58] Western R. Co. v. Phelps, 86–52, 90+11, 793.
[59] Glaucke v. Gerlich, 91–282, 98+94.
[60] McAlpine v. Kratka, 92–411, 100+233.
[61] Krenik v. Cordova, 95–372, 104+130.
[62] Beck v. Knoblauch, 96–532, 104+1149.
[63] State v. Germania Bank, 103–129, 114+651.
[64] Schmoll v. Lucht, 106–188, 118+555.
[65] Cordello v. Deponte, 107–573, 120+902.
[66] See § 7073.
[67] Lundberg v. Single Men's E. Assn., 41–508, 43+394. See §§ 342–352.
[68] Teller v. Bishop, 8–226(195); State v. Staley, 14–105(75). See §§ 368–383.
[69] Keegan v. Peterson, 24–1; Brown v. Brown, 28–501, 11+64. See § 344.
[70] See § 7073.
[71] See § 7073.
[72] Borgerson v. Cook, 91–91, 97+734.
[73] R. L. 1905 § 4365. See, as to review on a writ of error, Wakefield v. Spencer, 8–376(336).
[74] See §§ 342–352.
[75] Halvorsen v. Orinoco M. Co., 89–470, 95+320. But see, Fall v. Moore, 45–517, 48+404.

peals.[76] In many jurisdictions no appeal is allowed from an intermediate order. Our statute authorizes an appeal from certain classes of such orders with the result of much confusion and uncertainty in the cases. Any distinction in intermediate orders made for the purpose of determining appealability must inevitably be more or less arbitrary. Of course any order which is itself appealable may be reviewed on an appeal from the final judgment, and it matters not that the time for appealing from the order expired before the appeal from the judgment.[77] Our statute defines an order as a direction of a court or judge, made or entered in writing, and not included in a judgment.[78] This is not broad enough to define what may be reviewed on an appeal from a final judgment for it does not include mere rulings on the trial. Of course it is unquestioned law that every ruling on the trial on a question of law,[79] as, for example, a ruling admitting or excluding evidence, is reviewable on an appeal from the final judgment.[80]

b. Orders held reviewable—The following intermediate orders have been held reviewable on appeal from a final judgment: an order denying a new trial;[81] an order allowing an amendment of the pleadings before trial;[82] an order for judgment notwithstanding a demurrer, the demurrer not being stricken out;[83] an order assessing damages where the defendant withdrew his answer and submitted the assessment of damages to the court;[84] an order submitting a case to arbitrators;[85] an order directing a delivery to the sheriff for sale, of property involved in the action;[86] an order of reference;[87] an order granting or denying a motion for a change of venue;[88] an order denying a motion to have a complaint made more definite and certain;[89] an order made on an appeal to the trial court from a taxation of costs by the clerk;[90] an order striking out an answer;[91] an order refusing to strike out a bill of exceptions;[92] an order before trial refusing to strike out irrelevant matter in a pleading;[93] an order affirming the clerk's refusal to allow and insert costs in the judgment after the entry of judgment;[94] an order allowing an amendment of the pleadings on the trial;[95] an order appointing commissioners in condemnation proceedings;[96] an order denying a motion to set aside the service of summons;[97] an order dismissing an action on the trial;[98] an order refusing to strike a case from the calendar;[99] an order sustaining a demurrer and denying leave to amend.[1]

390. Review on appeal from a part of a judgment—On an appeal from a part of a judgment the review is strictly limited to the part from which the appeal is taken.[2]

[76] See Myrick v. Pierce, 5–65(47); Hulett v. Matteson, 12–349(227); Am. B. Co. v. Kingdom Pub. Co., 71–363, 73+1089.
[77] Mower v. Hanford, 6–535(372).
[78] R. L. 1905 § 4123.
[79] Teick v. Carver County, 11–292(201).
[80] Sanborn v. Mueller, 38–27, 35+666; De Blois v. G. N. Ry., 71–45, 73+637.
[81] Mower v. Hanford, 6–535(372).
[82] Winona v. Minn. etc. Co., 29–68, 11+228; Mpls. etc. Ry. v. Home Ins. Co., 64–61, 66+132; Hanley v. Cass County, 87–209, 91+756.
[83] Keegan v. Peterson, 24–1.
[84] Kent v. Bown, 3–347(246).
[85] Heglund v. Allen, 30–38, 14+57.
[86] Mower v. Hanford, 6–535(372).
[87] Bond v. Welcome, 61–43, 63+3.
[88] Carpenter v. Comfort, 22–539; Hinds v. Backus, 45–170, 47+655; Jones v. Swank, 54–259, 55+1126; Schoch v. Winona etc. Ry., 55–479, 57+208; State v. Dist. Ct., 77–302, 79+960; Taylor v. Grand Lodge, 98–36, 107+545.
[89] State v. O'Brien, 83–6, 85+1135.
[90] Felber v. Southern Minn. Ry., 28–156, 9+635; Herrick v. Butler, 30–156, 14+794.
[91] Harlan v. St. P. etc. Ry., 31–427, 18+147.
[92] Baxter v. Coughlin, 80–322, 83+190.
[93] Haug v. Haugan, 51–558, 53+874.
[94] Fall v. Moore, 45–517, 48+404.
[95] Macauley v. Ryan, 55–507, 57+151.
[96] Duluth Tr. Ry. v. Duluth Ter. Ry., 81–62, 83+497.
[97] State v. Dist. Ct., 26–233, 2+698.
[98] Thorp v. Lorenz, 34–350, 25+712.
[99] Chadbourn v. Reed, 83–447, 86+415.
[1] Disbrow v. Creamery P. M. Co., 125+115.
[2] Hall v. McCormick, 31–280, 17+620. See Dodge v. Allis, 27–376, 7+732.

391. Review limited to the particular judgment—While an appeal from a judgment carries up for review prior rulings or orders it does not carry up for review a prior judgment. Thus, upon an appeal from the final "decree" in foreclosure proceedings, it was held that error in the judgment adjudging the amount due and directing the sale, could not be reviewed.[3]

392. Review of conclusions of law—On appeal from a judgment the supreme court will consider whether the conclusions of law are justified by the findings of fact. It is not necessary that the record should include a case or bill of exceptions or that a motion should have been made in the trial court for a new trial or an amendment. The supreme court may determine the question on the judgment roll alone.[4]

393. Judgment notwithstanding the verdict—On an appeal from a judgment ordered by the court notwithstanding a verdict under the statute, any action of the trial court when admitting or rejecting evidence, and assigned as error by appellant, may be reviewed. As regards appeal such a judgment stands on the same footing as a judgment entered upon a verdict.[5] On appeal from a judgment entered on a verdict, a motion for a judgment notwithstanding the verdict having been denied, and a new trial not having been sought, the court will only consider the sufficiency of the evidence to justify the verdict.[6]

SCOPE OF REVIEW ON APPEAL FROM ORDERS

394. Order granting a new trial—*a. General rule*—Any question that may be properly raised on a motion for a new trial in the trial court may be considered by the supreme court on an appeal from an order granting the motion.[7]

b. Subsequent orders—An order made subsequent to an order granting a new trial cannot be reviewed on an appeal from the latter.[8]

c. Limited by grounds stated in order—Unless an order granting a new trial states specifically that it is made on the ground that the verdict or decision is not justified by the evidence, the supreme court cannot consider that ground, if the motion for a new trial was made on that and other grounds.[9] Prior to Laws 1901 c. 46 the supreme court was not thus limited.[10]

d. Limited to exceptions or assignment of errors below—Errors of law occurring on the trial cannot be reviewed unless proper exceptions were taken or the errors were specifically assigned in the notice of motion for a new trial.[11]

e. Not limited by erroneous reasons—An order granting a new trial will not be reversed on appeal if it was justified on any of the grounds on which the motion was made, though it was not justified on the ground stated by the trial court.[12] This general rule is somewhat limited by statute.[13] When the court, in setting aside a verdict and granting a new trial, states in the order that it

[3] Dodge v. Allis, 27–376, 7+732.

[4] Morrison v. March, 4–422(325); St. Paul v. Kuby, 8–154(125); Teller v. Bishop, 8–226(195); Burpe v. Van Eman, 11–327(231); Rich v. Rich, 12–468(369); First Nat. Bank v. Parsons, 19–289(246); Thompson v. Howe, 21–98; Jones v. Wilder, 28–238, 9+707; Brigham v. Paul, 64–95, 66+203; Wheadon v. Mead, 71–322, 73+975; Stevens v. Stevens, 82–1, 84+457; Peach v. Reed, 87–375, 92+229.

[5] De Blois v. G. N. Ry., 71–45, 73+637. See, as to the necessity of a record containing all the evidence, Awde v. Cole, 99–357, 363, 109+812.

[6] Borgerson v. Cook, 91–91, 97+734.

[7] See Macauley v. Ryan, 55–507, 57+151; Hine v. Myrick, 60–518, 62+1125.

[8] Baxter v. Coughlin, 80–322, 83+190.

[9] Fitger v. Guthrie, 89–330, 94+888, and cases under § 7084.

[10] Marsh v. Webber, 13–109(99); Langan v. Iverson, 78–299, 80+1051; Jenkinson v. Koester, 86–155, 90+382; Fitger v. Guthrie, 89–330, 94+888; Mpls. T. M. Co. v. Christianson, 92–40, 99+1134.

[11] Cappis v. Wiedemann, 86–156, 90+368; Olson v. Berg, 87–277, 91+1103. See § 7091.

[12] Morrow v. St. P. C. Ry., 65–382, 67+1002; Poirier v. Griffin, 104–239, 116+576.

[13] See § 7084.

does so because the evidence does not justify the verdict, and that it erroneously instructed the jury on a question of law, the order will not be reversed, unless the evidence was manifestly and palpably in favor of the verdict, though the supreme court is of the opinion that the instruction as given was correct.[14]

f. Estoppel of appellant—A party who appeals from an order setting aside a verdict and granting a new trial cannot impeach the verdict in the appellate court or be heard there on exceptions taken by him to rulings on the trial which terminated in such verdict.[15]

395. Order denying a new trial—*a. Review limited to grounds stated in notice*—On an appeal from an order denying a new trial the supreme court is limited in its review to the grounds or errors assigned in the notice of motion.[16]

b. Limited to exceptions or assignment of errors below—Errors of law occurring on the trial cannot be reviewed unless proper exceptions were taken or the errors were specifically assigned in the notice of motion for a new trial.[17]

c. Orders made prior to the trial—As observed elsewhere the cases are in a state of confusion as to whether an order made prior to the trial is a ground for a new trial.[18] There is a corresponding confusion as to whether such orders may be reviewed on an appeal from an order denying a new trial. Thus it has been held that on such an appeal the supreme court may review an order of reference[19] and also an order granting or denying a motion for a change of venue.[20] On the other hand it has been held that an order made prior to the trial allowing an amendment of the pleadings cannot be reviewed on such an appeal,[21] nor an order sustaining a demurrer.[22]

d. Orders made on the trial—An order granting or refusing an amendment of pleadings is reviewable,[23] and so is an order denying a motion for a jury trial made when the cause is called for trial.[24]

e. Orders made subsequent to the trial—An order made subsequent to the trial is no ground for a new trial and consequently cannot be reviewed on an appeal from an order denying a new trial.[25]

f. Conclusions of law—Whether the conclusions of law of a court or referee are justified by the findings of fact may be raised on a motion for a new trial and reviewed on an appeal from the order made thereon.[26]

g. Rulings favorable to prevailing party—If, upon an appeal from an order denying a new trial, the supreme court determines to affirm the order it will not consider exceptions of the respondent to rulings that were favorable to the appellant.[27]

396. Intermediate orders—In general—It is a general principle that on an appeal from an intermediate order the review is strictly limited to the matters directly involved in the order or upon which it is based. An appeal from an

[14] Avery v. Holliston, 104–178, 116+354.
[15] Whitely v. Miss. etc. Co., 38–523, 38+753.
[16] Searles v. Thompson, 18–316(285).
[17] Cappis v. Wiedemann, 86–156, 90+368; Olson v. Berg, 91–277, 91+1103.
[18] See § 7097.
[19] Bond v. Welcome, 61–43, 63+3.
[20] Lehmicke v. St. P. etc. Ry., 19–464 (406) (overruled); Carpenter v. Comfort, 22–539; Wilson v. Richards, 28–337, 9+872; State v. Dist. Ct., 77–302, 79+960; Taylor v. Grand Lodge, 98–36, 107+545.
[21] Winona v. Minn. etc. Co., 27–415, 6+795, 8+148; Mpls. etc. Ry. v. Home Ins. Co., 64–61, 66+132; Manwaring v. O'Brien, 75–542, 78+1.
[22] Grimes v. Ericson, 94–461, 103+334.
[23] Hanley v. Cass County, 87–209, 91+756.
[24] Hasey v. McMullen, 109–332, 123+1078.
[25] See Schumann v. Mark, 35–379, 28+927; Baxter v. Coughlin, 80–322, 83+190.
[26] Griffin v. Jorgenson, 22–92; Wilson v. Richards, 28–337, 9+872; Ames v. Richardson, 29–330, 13+137; Coolbaugh v. Roemer, 32–445, 21+472; Farnham v. Thompson, 34–330, 26+9; Tilleny v. Wolverton, 54–75, 55+822; Lumbermen's Ins. Co. v. St. Paul, 82–497, 85+525; Hibbs v. Marpe, 84–178, 87+363.
[27] Winona etc. Ry. v. Denman, 10–267 (208).

order does not, like an appeal from a judgment, carry up for review the regularity of prior orders or rulings of the court.[28]

397. Orders subsequent to judgment—Upon an appeal from an order subsequent to judgment the judgment cannot be reviewed.[29]

LAW OF CASE

398. Res judicata—Law of case—Except by way of re-argument the supreme court has no authority to review its decisions and judgments. On a second appeal in the same cause all questions, both of law and fact, which were or might have been determined on the first appeal are res judicata.[30] When the evidence is different on a second trial, the opinion on a former appeal, reviewing the former trial, is the law of the case only so far as applicable.[31] Where an appeal is taken from an order denying a new trial and the order is affirmed either after argument on the merits or under the rules of court no questions which were or might have been determined on such appeal can be raised on a subsequent appeal from the final judgment entered in the same cause on the verdict of findings. This rule applies where the order is affirmed on the ground that the appellant failed to serve paper-books and points as required by the rules of the supreme court.[32] But the judgment of affirmance on the first appeal is no ground for dismissing the subsequent appeal as the latter may involve questions arising subsequent to the order on the motion for a new trial or other questions which could not be raised on such a motion. The proper practice is to object at the hearing or in the brief to the consideration of questions which are res judicata.[33] A mere dismissal of an appeal from an order denying a new trial does not have the effect of an estoppel.[34] The court will take notice of its records in order to determine what was considered on the former appeal.[35] An order of the district court, where it has jurisdiction of the person and subject-matter, is conclusive unless set aside upon review, by the appellate court.

[28] Lehmicke v. St. P. etc. Ry., 19–464 (406); Curtis v. St. P. etc. Ry., 20–28 (19); Griffin v. Jorgenson, 22–92; State v. Probate Ct., 28–381, 10+209; Papke v. Papke, 30–260, 15+117; Menage v. Lustfeld, 30–487, 16+398; Hospes v. N. W. etc. Co., 41 256, 43+180; Flowers v. Bartlett, 66–213, 68+976; Potter v. Holmes, 72–153, 75+591; Baxter v. Coughlin, 80–322, 83+190.

[29] Papke v. Papke, 30–260, 15+117. See Dodge v. Allis, 27–376, 7+732.

[30] La Crosse etc. Co. v. Reynolds, 12–213 (135); Ayer v. Stewart, 16–89(77); Schleuder v. Corey, 30–501, 16+401; Smith v. Glover, 50–58, 52+210, 912; Adamson v. Sundby, 51–460, 53+761; Johnson v. N. W. T. E. Co., 54–37, 55+829; Tilleny v. Wolverton, 54–75, 55+822; Maxwell v. Schwartz, 55–414, 57+141; Cochran v. Stewart, 57–499, 509, 59+543; Malmgren v. Phinney, 65–25, 67+649; Bradley v. Norris, 67–48, 69+624; St. Paul T. Co. v. Kittson, 67–59, 69+625; Commercial Bank v. Azotine Mfg. Co., 69–232, 72+108; Vaule v. Miller, 69–440, 72+452; Clark v. Richards, 72–397, 75+605; Phelps v. Sargent, 73–260, 76+25; Piper v. Sawyer, 78–221, 80+970; Conn. etc. Co. v. King, 80–76, 82+1103; King v. Duluth, 81–182, 83+526; Esch v. White, 82–462, 85+238, 718; Hibbs v. Marpe, 84–178, 87+363; Terryll v. Faribault, 84–341, 87+917; Sours v. G. N. Ry., 88–504, 93+517; Nelson v. Betcher, 96–76, 104+833; Braucht v. Graves, 96–387, 104+1089; Raasch v. Elite L. Co., 102–507, 112+1141; International B. Co. v. Rainy Lake River B. Corp., 104–152, 116+221; Anderson v. Pitt, 108–261, 121+915; Webber v. Axtell, 124+453. It has been said that the doctrine of the law of the case "applies to such questions only as are decided. Questions which are raised, but not determined, may be considered on the second appeal." Kramer v. N. W. El. Co., 97–44, 106+86.

[31] McNamara v. Pengilly, 64–543, 67+661; Kray v. Muggli, 84–90, 86+882; Nelson v. Betcher, 96–76, 104+833; Dickson v. St. Paul, 105–165, 169, 117+426. See Hamm Realty Co. v. New Hampshire etc. Co., 84–336, 87+933.

[32] Schleuder v. Corey, 30–501, 16+401; Adamson v. Sundby, 51–460, 53+761; Tilleny v. Wolverton, 54–75, 55+822; Maxwell v. Schwartz, 55–414, 57+141; Hibbs v. Marpe, 84–178, 87+363. See Taylor v. Grand Lodge, 98–36, 107+545.

[33] Schleuder v. Corey, 30–501, 16+401.

[34] Adamson v. Sundby, 51–460, 53+761.

[35] Rippe v. Chi. etc. Ry., 23–18.

If such order is not reviewed, but acquiesced in by the parties, it is to be treated as the law of that case and final.[36] An order made by the district court in accordance with the mandate of the supreme court will not be reversed on appeal.[37]

REVIEW OF DISCRETIONARY ORDERS

399. In general—It is a fundamental rule of appellate procedure that the determination of a trial court of a matter resting in its discretion will not be reversed on appeal except for a clear abuse of discretion.[38] This discretionary power of the trial court must be exercised judicially, with close regard to all the facts of the particular case and in furtherance of justice. If it is clear that the court has acted wilfully, arbitrarily, capriciously, or contrary to well established legal usage, its action may be reversed on appeal, for the power is not absolute, but judicial.[39] The abuse of discretion does not necessarily involve moral obliquity in the court.[40] It may result from a misapprehension of a rule of law or from a failure to weigh evidence properly or from an unwarranted departure from established legal usage. The term "discretion" is applied to many different matters and an appellate court will reverse in some cases far more readily than in others. The order of proof on the trial and the granting of a new trial are both said to rest in the discretion of the trial court and yet its action in the two cases is not supervised to the same degree by the appellate court. There are degrees of discretion, varying with the subject-matter. The matter of allowing leading questions to be put to a witness rests in the discretion of the trial court and also the matter of granting a new trial, and yet the two questions are treated very differently on appeal. Our supreme court has never granted a new trial for an alleged abuse of discretion in allowing leading questions. Practically the control of the trial court over the matter is absolute.[41]

400. Refusal of trial court to exercise discretion—If relief lying within the discretion of the trial court is refused on the ground of want of power to grant it, or upon any other ground that proves the non-exercise of that discretion, such decision is erroneous and will be reversed on appeal and the case remanded with directions to the trial court to exercise its discretion.[42]

THEORY OF CASE—SHIFTING POSITION ON APPEAL

401. In general—A party cannot shift his position on appeal. To permit him to do so would be unfair to the adverse party and turn the appellate court into a court of first instance. It is a general rule of wide and frequent application that a case will be considered on appeal in accordance with the theory on which the action was conducted on the trial, both as regards the law and the facts.[43] A party cannot try a cause as arising ex delicto and then, on appeal,

[36] Esch v. White, 82–462, 85+238.
[37] State v. St. P. & D. Ry., 79–57, 81+544.
[38] Myrick v. Pierce, 5–65(47); Fowler v. Atkinson, 5–505(399); Sheldon v. Risedorph, 23–518; Le Mere v. McHale, 30–410, 15+682; Haug v. Haugan, 51–558, 53+874; Olson v. State Bank, 72–320, 75+378.
[39] Potter v. Holmes, 74–508, 77+416; Rice v. Longfellow, 78–394, 81+207; McClure v. Clarke, 94–37, 101+951; Watkins v. Bigelow, 96–53, 104+683.
[40] Voge v. Penney, 74–525, 77+422; Martin v. Courtney, 75–255, 77+813.
[41] Couch v. Steele, 63–504, 65+946.
[42] Ashton v. Thompson, 28–330, 9+876; Leonard v. Green, 30–496, 16+399; Seibert v. Mpls. etc. Ry., 58–58, 57+1068; State v. Dist. Ct., 68–147, 70+1088; Nornberg v. Larson, 69–344, 72+564.
[43] Thoreson v. Mpls. H. Works, 29–341, 13+156; Humphrey v. Merriam, 32–197, 20+138; Redmond v. St. P. etc. Ry., 39–248, 40+64; Kraemer v. Deustermann, 40–469, 42+297; Ambuehl v. Matthews, 41–537, 43+477 (action for conversion tried as an action for accounting); Johnson v. Sherwood, 45–9, 47+262; Powell v. Heisler, 45–549, 48+411; Densmore v. Shepard, 46–54, 48+528, 681; Perkins v. Thorson, 50–85, 52+272; Stensgaard v. St. Paul etc.

contend that it was properly a cause ex contractu.[44] So where a party tries an action in accordance with equitable principles it is too late on appeal to object that there was an adequate remedy at law.[45]

402. Appeal from order granting new trial—When a party appeals from an order setting aside a verdict and granting a new trial he cannot impeach the verdict or be heard on objections to rulings of the court on the trial.[46]

403. Grounds of motion—Where a motion in the trial court is made and determined on special grounds stated in the notice of motion the moving party will not be heard in the appellate court upon new or additional grounds.[47]

404. As to the law of the case—Where parties consent to try their cause below upon a particular theory of what the law of the case is, they cannot complain on appeal if the result is correct according to that theory, however incorrect the theory may be.[48] This is the general rule, but it is not applicable where the record shows conclusively that the party recovering is not entitled to recover under any view of the law, as where a complaint shows conclusively, so that it cannot be helped by proof or amendment, that there is no cause of action, or where it appears by evidence incapable of being rebutted or explained away that there is no cause of action, or that there is a defence.[49] A party cannot object on appeal to an instruction given at his own request [50] or in accordance with the theory upon which he conducted his case.[51] An instruction unobjected to becomes the law of the case, however erroneous it may be; the jury are bound to accept the law as given to them by the court and by not objecting to the charge a party consents that the weight and sufficiency of the evidence and the issues in the case shall be determined by the jury in accordance with the law as given by the court; and whether the charge is right or wrong it must, for the purposes of an appeal, be taken as the law of the case. There are, however, ill-defined limitations to this rule.[52]

405. As to evidence—The doctrine that a party cannot shift his position on appeal is constantly applied to rulings on evidence. It is a general rule that where evidence is offered for a specific purpose and it is objected to, the court, in ruling on its admissibility, is not obliged to take into consideration any other view than the one advanced by the party offering it. Further or different grounds for the admission of the evidence cannot be urged on appeal.[53] The appellate court will place itself, so far as possible, in the exact position of the trial court. The same principle is applied to objections. On appeal a party

Co., 50–429, 52+910; White v. Western Assur. Co., 52–352, 54+195; Davis v. Jacoby, 54–144, 55+908; Green v. St. P. etc. Ry., 55–192, 56+752; Pfefferle v. Wieland, 55–202, 56+824; Bates v. Richards, 56–14, 57+218; Anchor Invest. Co. v. Kirkpatrick, 59–378, 61+29; Earl v. Thurston, 60–351, 62+439; Moquist v. Chapel, 62–258, 64+567; Pound v. Pound, 64–428, 67+200; Woodbridge v. Sellwood, 65–135, 67+799; Shea v. Chi. etc. Ry., 66–102, 68+608; Engler v. Schneider, 66–388, 69+139; N. W. Railroader v. Prior, 68–95, 70+869; James v. St. Paul, 72–138, 75+5; Engstad v. Syverson, 72–188, 75+125; Hove v. Bankers' Ex. Bank, 75–286, 77+967; Cumbey v. Lovett, 76–227, 79+99; Haslam v. First Nat. Bank, 79–1, 81+535; Urquhart v. Scottish-Am. M. Co., 85–69, 88+264; Obst v. Covell, 93–30, 100+650; Webb v. Downes, 93–457, 101+966; Wessel v. Gigrich, 106–467, 119+242; Laverne Citrus Assn. v. Chi. etc. Ry., 107–94, 119+795.

[44] Peteler v. N. W. etc. Co., 60–127, 61+1024.

[45] St. P. etc. Ry. v. Robinson, 41–394, 43+75; Newton v. Newton, 46–33, 48+450.

[46] Whitely v. Miss. etc. Co., 38–523, 38+753.

[47] Johnson v. Lough, 22–203; State v. Dist. Ct., 56–56, 57+319.

[48] White v. Western Assur. Co., 52–352, 54+195; Davis v. Jacoby, 54–144, 55+908; Engler v. Schneider, 66–388, 69+139; Burgraf v. Byrnes, 104–343, 116+838.

[49] White v. Western Assur. Co., 52–352, 54+195.

[50] See § 9793.

[51] See § 7169.

[52] See § 9792.

[53] Bond v. Corbett, 2–248(209); Rhodes v. Pray, 36–392, 32+86; Meyer v. Berlandi, 53–59, 54+937.

cannot take advantage of any objection to the admission of evidence which he did not clearly and specifically raise on the trial. A party is not only bound to make specific objections at the time the evidence is offered, but he is also limited on appeal to the objections he raised below.[54]

406. As to the pleadings—Where a case is 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 followed on appeal.[55]

407. As to the issues—Where the trial is conducted on the theory that allegations of the answer are in issue without a formal reply, that theory will be followed in the appellate court.[56] If the parties on the trial voluntarily consent to the trial of issues not made by the pleadings the appellate court will consider such issues as properly in the case.[57] Where the court charges the jury without objection that certain questions are the only ones in the case, the supreme court will adopt that theory.[58] Where in an action triable by the court without a jury the court submits certain issues to the jury, such issues will be considered on appeal as they were considered by the court, counsel and jury at the trial, without arbitrarily applying technical legal rules of interpretation.[59]

408. As to the facts—Where it is manifest that a general verdict was rendered upon a particular theory of the facts, rulings and exceptions which could not in any way affect that theory will not be considered on appeal.[60]

409. How theory of case disclosed—The theory on which the action was conducted may be disclosed by requests for instructions;[61] by instructions to which no objections were made;[62] by statements of counsel on the trial;[63] by objections to evidence;[64] by the nature of the evidence introduced;[65] or by admissions of the parties on the trial.[66]

WEIGHT GIVEN FINDINGS OF FACT BY TRIAL COURT

410. Findings on motions, etc.—When a trial court has passed upon a question of fact on a motion, order to show cause, or other interlocutory proceeding, either upon oral or written evidence, its determination will not be reversed on appeal, unless it is palpably contrary to the evidence. In other words, when the evidence is such that it might reasonably induce different conclusions in different minds, the determination of the trial court thereon will be affirmed on ap-

[54] Bond v. Corbett, 2–248(209); Levering v. Langley, 8–107(82); Gilbert v. Thompson, 14–544(414); Cannady v. Lynch, 27–435, 8+164; Craig v. Cook, 28–232, 9+712; Bedal v. Spurr, 33–207, 22+390; Stillman v. N. P. etc. Ry., 34–420, 26+399; Nelson v. Chi. etc. Ry., 35–170, 28+215; Mousseau v. Mousseau, 42–212, 44+193; Smith v. Bean, 46–138, 48+687; Triggs v. Jones, 46–277, 48+1113; Union Cash Reg. Co. v. John, 49–481, 52+48; King v. Nichols, 53–453, 55+604; Vaughan v. McCarthy, 63–221, 65+249; Klotz v. Winona etc. Ry., 68–341, 71+257; Johnson v. Okerstrom, 70–303, 73+147; Towle v. Sherer, 70–312, 73+180; Stahl v. Duluth, 71–341, 74+143; Hall v. Conn. etc. Co., 76–401, 79+497; Merchants Nat. Bank v. Barlow, 79–234, 82+364; Le May v. Brett, 81–506, 84+339; Obst v. Covell, 93–30, 100+650.

[55] Lough v. Thornton, 17–253(230); Merriam v. Pine City L. Co., 23–314; Fritz v. McGill, 31–536, 18+753; Keyes v. Mpls. etc. Ry., 36–290, 30+888; Peteler v. N. W. etc. Co., 60–127, 61+1024; Wessel v. Gigrich, 106–467, 119+242.

[56] Matthews v. Torinus, 22–132; Merchants Nat. Bank v. Barlow, 79–234, 82+364; Lyford v. Martin, 79–243, 82+479.

[57] See § 7675.

[58] Bates v. Richards, 56–14, 57+218; Engstad v. Syverson, 72–188, 75+125.

[59] McAlpine v. Resch, 82–523, 85+545.

[60] Kraemer v. Deustermann, 40–469, 42+297.

[61] Davis v. Jacoby, 54–144, 55+908.

[62] See § 9792.

[63] Moquist v. Chapel, 62–258, 64+567. But see Stewart v. Cooley, 23–347.

[64] Obst v. Covell, 93–30, 100+650; Agne v. Skewis, 98–32, 107+415.

[65] Taylor v. Parker, 17–469(447); Davis v. Jacoby, 54–144, 55+908.

[66] Moquist v. Chapel, 62–258, 64+567.

peal.[67] This rule applies to the determination of the trial court as to the competency of witnesses,[68] and jurors.[69]

411. Findings on trial by court without jury—When an action is tried by a court without a jury its findings of fact are entitled to the same weight as the verdict of a jury and will not be reversed on appeal unless they are manifestly and palpably contrary to the evidence. This rule applies whether the appeal is from a judgment, or from an order granting or denying a new trial,[70] and whether the evidence is oral or documentary.[71] It applies to inferences from undisputed facts.[72] In many of our cases the rule is laid down that findings will not be disturbed on appeal if there is any evidence reasonably tending to support them.[73] This is not accurate. There may be some evidence reasonably tending to support the finding, and yet the evidence as a whole may be manifestly and palpably contrary to the findings. Of course in such a case it is the duty of the supreme court to reverse.[74] Where the evidence fairly tends to support findings they should not be disturbed on appeal,[75] though the evidence slightly preponderates against them.[76] If different persons might reasonably draw different conclusions from the evidence the findings should not be disturbed.[77] The question for the appellate court is whether the evidence as a whole reasonably tends to support the findings. If it does they should not be disturbed.[78] If the evidence would justify findings for either party, the findings of the court should not be disturbed.[79]

412. Findings of a referee—The findings of a referee upon questions of fact are entitled to the same weight as the verdict of a jury and will not be disturbed on appeal unless they are manifestly and palpably contrary to the evidence.[80]

[67] Brown v. Mpls. L. Co., 25–461; Tierney v. Mpls. etc. Ry., 33–311, 23+229; First Nat. Bank v. Randall, 38–382, 37+799; Olmstead v. Olmstead, 41–297, 43+67; Lee v. Macfee, 45–33, 47+309; Bausman v. Tilley, 46–66, 48+459; Finance Co. v. Hursey, 60–17, 61+672; Rosenberg v. Burnstein, 60–18, 61+684; Missouri etc. Co. v. Norris, 61–256, 63+634; Robinson v. Smith, 62–62, 64+90; State v. Madigan, 66–10, 68+179; First Nat. Bank v. Buchan, 76–54, 78+878; Mpls. T. Co. v. Menage, 86–1, 90+3; Stai v. Selden, 87–271, 92+6; Gray v. Building T. Council, 91–171, 97+663; Schoeneman v. Sowle, 102–466, 113+1061; Glauber v. Wallace, 104–128, 116+107; Ascher v. Lanyon, 104–307, 116+581; First S. Bank v. Schatz, 104–425, 116+917; Perkins v. Gibbs, 108–151, 121+605.

[68] See § 10303.

[69] State v. Levy, 23–104.

[70] Knappen v. Swenson, 40–171, 41+948; Basting v. Northern T. Co., 65–495, 67+1017; Moran v. Small, 68–101, 70+850; Campbell v. Waite, 84–254, 87+782; Carpenter v. Germania F. Ins. Co., 86–371, 90+766; Veum v. Sheeran, 88–257, 92+965.

[71] Humphrey v. Havens, 12–298(196) (overruling Martin v. Brown, 4–282(201); Dayton v. Buford, 18–126(111); Berkey v. Judd, 22–287; McLachlan v. Branch, 39–101, 38+703; Cornish v. Antrim, 82–215, 84+724 (evidence taken by referee); Treat v. Kellogg, 104–54, 115+947.

[72] N. W. etc. Co. v. Conn. etc. Co., 105–483, 487, 117+825.

[73] Humphrey v. Havens, 12–298(196); Knoblauch v. Kronschnabel, 18–300(272); Webb v. Kennedy, 20–419(374); James v. Jordan, 37–43, 33+5; Mpls. T. Co. v. Menage, 86–1, 90+3; State v. McMahon, 94–532; 103+1133; Mpls. T. M. Co. v. Jones, 95–127, 130, 103+1017; Stitt v. Rat Portage L. Co., 96–27, 104+561; McCaffery v. Burkhardt, 97–1, 105+971; Lloyd v. Simons, 97–315, 105+902; Cook v. Koochiching Co., 99–472, 109+1120; Tew v. Webster, 103–110, 114+647; Treat v. Kellogg, 104–54, 115+947; Christians v. Christians, 108–157, 121+633; Barnum v. Jefferson, 109–1, 122+453.

[74] Dayton v. Buford, 18–126(111). See Rheiner v. Stillwater etc. Co., 29–147, 150, 12+449; Voge v. Penney, 74–525, 77+422; Martin v. Courtney, 75–255, 77+813.

[75] Torinus v. Thornton, 26–103, 1+1056; Irvine v. Armstrong, 31–216, 17+343; Noyes v. Gill, 35–289, 28+711; Barry v. Paranto, 97–265, 106+911; Graves v. Bonness, 97–278, 107+163; Maxfield v. Seabury, 81–327, 84+42; Cornish v. Antrim, 82–215, 84+724.

[76] Greenleaf v. Egan, 30–316, 15+254; Moran v. Small, 68–101, 70+850; Foot v. Miss. etc. Co., 70–57, 72+732; Graves v. Bonness, 97–278, 107+163.

[77] Altman v. Graham, 22–531; St. Paul etc. Co. v. Allis, 24–75.

[78] Carver v. Bagley, 79–114, 81+757; Ware v. Squyer, 81–388, 84+126; State v. Union T. L. Co., 94–320, 102+721.

[79] Bond v. Stryker, 73–265, 76+26.

[80] Dayton v. Buford, 18–126(111). See also Kumler v. Ferguson, 7–442(351).

The findings of a referee are treated on appeal the same as the findings of a court and what was said in the preceding paragraph is applicable here. Some of our cases lay down the rule that the findings of a referee will not be disturbed on appeal if there is any evidence reasonably tending to support them.[81] But if the evidence as a whole is manifestly and palpably contrary to the findings, the judgment should be reversed though there is some evidence reasonably tending to support the findings.[82]

413. Facts not controverted—Allowance of counsel fees—The general rule that an appellate court will not disturb the findings of a trial court unless they are manifestly and palpably contrary to the evidence has been held inapplicable in its full force to an allowance of counsel fees where the facts are not controverted.[83]

414. Discussion of evidence unnecessary—Upon an appeal involving the determination of a question of fact by the trial court, it is not the duty of the appellate court to review and discuss the evidence, for the purpose of demonstrating the correctness of the decision of the trial court.[84]

WEIGHT GIVEN VERDICT

415. In general—When objection is made on appeal that a verdict is not justified by the evidence, it is the duty of the appellate court to sustain the verdict, if it is possible to do so on any reasonable theory of the evidence. It should not be disturbed unless it is manifestly contrary to the evidence. It should not be set aside merely because it is contrary to a slight preponderance of the evidence, or because the appellate court would have found differently, or would have been better satisfied with a contrary verdict, or would have sustained an order of the trial court setting it aside. Various forms of expression are used to state the rule. Thus it is said that a verdict should not be disturbed on appeal if the evidence reasonably tends to sustain it; or if the evidence fairly tends to sustain it; or if different persons might reasonably draw different conclusions from the evidence; or if the evidence would justify a verdict for either party. It is sometimes said that a verdict should not be disturbed on appeal if there is any evidence reasonably tending to support it, but this is inaccurate. A verdict should be set aside if it is manifestly and decidedly contrary to the evidence as a whole, though there is some evidence reasonably tending to support it.[85] This question is generally raised in the supreme court on an appeal from an order granting or denying a new trial. The rules which govern the review of such orders are stated elsewhere.[86]

HARMLESS ERROR

416. In general—The supreme court will not reverse a case for an error which obviously did not materially prejudice the appellant.[87] Various applica-

[81] Bidwell v. Coleman, 11–78(45); Winona v. Huff, 11–119(75); Humphrey v. Havens, 12–298(196); Bryant v. Lord, 19–396(342); Berkey v. Judd, 22–287; Sheffield v. Mullin, 27–374, 7+687.

[82] Douglas v. First Nat. Bank, 17–35 (18); Dayton v. Buford, 18–126(111).

[83] Watkins v. Bigelow, 96–53, 104+683.

[84] Carver v. Bagley, 79–114, 81+757; Minn. L. & T. Co. v. St. Anthony Falls etc. Co., 82–505, 85+520; Price v. Churchill, 84–519, 88+11; Sharood v. Jordan, 90–249, 95+1108; Cook v. Koochiching Co., 99–472, 109+1120; Prahl v. Brown County, 104–227, 116+483; Powers v. Johnson, 107–476, 120+1021; Barnum v. Jefferson, 109–1, 122–453.

[85] Johnson v. Winona etc. Ry., 11–296 (204); Benz v. Geissell, 24–169; Ohlson v. Manderfeld, 28–390, 10+418; Nichols v. Hackney, 78–461, 81+322.

[86] See §§ 7154–7157.

[87] Coit v. Waples, 1–134(110, 120); Lynd v. Picket, 7–184(128); Cole v. Maxfield, 13–235(220); Bixby v. Wilkinson, 27–262, 6+801; Osborne v. Johnson, 35–300,

tions of this general rule will be found in connection with the subject of new trials.[88]

417. De minimis non curat lex—The supreme court often applies the maxim, de minimis non curat lex.[89] In the administration of the law mere trifles and technicalities must yield to practical common sense and substantial justice. A case is not to be reversed or a new trial granted for errors involving trifling pecuniary loss, where no important principle of law or personal right is involved.[90]

418. Error favorable to the appellant—An appellant cannot complain that a judgment or order was more favorable to him than the case warranted.[91] An appellant must be an "aggrieved party," [92] and he cannot complain of errors that operated to his own advantage,[93] or did not operate to his disadvantage.[94] A party who appeals from an order setting aside a verdict and granting a new trial cannot impeach the verdict in the appellate court or be heard there on exceptions taken by him to rulings on the trial which terminated in such verdict.[95] The findings of fact, conclusions of law, and order for judgment are merged in the judgment, and are immaterial, so far as they awarded the prevailing party any greater relief than the judgment awards him.[96]

419. Error caused by the appellant—An appellant cannot complain of the consequences of his own acts.[97] He cannot take advantage of errors into which he himself led the court.[98] Thus it is held that an erroneous instruction given at the request of the appellant [99] or in accordance with the theory on which the trial was conducted is no ground for a new trial.[1] A party cannot object to the admission or exclusion of evidence on the trial and then, if his objection is sustained, complain of the ruling on appeal.[2]

28+510; Prosser v. Hartley, 35–340, 29+156; Lundberg v. Single Men's Endow. Assn., 41–508, 43+394; Menzel v. Tubbs, 51–364, 53+653, 1017; Friesenhahn v. Merrill, 52–55, 53+1024; Fithian v. Weidenborner, 72–331, 75+380; Anderson v. Burlington etc. Ry., 82–293, 84+145; Crowley v. Burns, 100–178, 110+969; Goulding v. Ferrell, 106–44, 117+1046; Smith v. Lydick, 124–637.

[88] See §§ 7068–7224.

[89] Robbins v. St. P. etc. Ry., 22–286; Van Norman v. N. W. etc. Co., 51–57, 52+988; Palmer v. Degan, 58–505, 60+342; Singer Mfg. Co. v. Potts, 59–240, 61+23; Dobbin v. McDonald, 60–380, 62+437; Marion v. Heimbach, 62–214, 64+386; Bass v. Rollins, 63–226, 65+348; Smith v. Nat. etc. Co., 65–283, 68+28; Flint v. Luhrs, 66–57, 68+514; Mannheim v. Carleton College, 68–531, 71+705; Nickerson v. Wells, 71–230, 73+959; Sloggy v. Crescent C. Co., 72–316, 75+225; London etc. Co. v. Gibson, 77–394, 80+205; Miller v. Ganser, 87–345, 92+3; Maloney v. Warner, 91–364, 98+1102; Diamon v. Taylor, 99–527, 109+1133; Goulding v. Ferrell, 106–44, 117+1046; Gatz v. Diessner, 106–117, 118+255.

[90] Goulding v. Ferrell, 106–44, 117+1046.

[91] Bausman v. Faue, 45–412, 48+13; Mealey v. Finnegan, 46–507, 49+207; Johnson v. Deforge, 61–72, 63+174; Borman v. Baker, 68–213, 70+1075; McLaughlin v. Nicholson, 70–71, 72+827, 73+1.

[92] Seibert v. Mpls. etc. Ry., 58–39, 59+822; Rogers v. Gross, 75–441, 78+12; Hoey v. Ellis, 78–1, 80+693 (judgment satisfied).

[93] Fallman v. Gilman, 1–179(153); Com. Ins. Co. v. Pierro, 6–569(404); Torinus v. Matthews, 21–99; State v. Grear, 29–221, 13+140; Huntsman v. Hendricks, 44–423, 46+910; Nichols v. St. Paul, 44–494, 47+168; Welch v. N. P. Ry., 96–211, 104+894.

[94] Menzel v. Tubbs, 51–364, 53+653, 1017; Adamson v. Sundby, 51–460, 53+761; Jones v. Snow, 56–214, 57+478; Clark v. Richards, 72–397, 75+605; Marshall & I. Bank v. Cady, 76–112, 78+978; Poehler v. Reese, 78–71, 80+847; Hunt v. O'Leary, 78–281, 80+1120; Cornish v. West, 89–360, 94+1082.

[95] Whitely v. Miss. etc. Co., 38–523, 38+753.

[96] Johnson v. Deforge, 61–72, 63+174.

[97] Poehler v. Reese, 78–71, 80+847.

[98] Simmons v. St. P. etc. Ry., 18–184 (168); Bennett v. Synd. Ins. Co., 43–45, 44+794; Mealey v. Finnegan, 46–507, 49+207; McCarvel v. Phenix Ins. Co., 64–193, 66+367; Gale v. Birmingham, 64–555, 67+659; Poehler v. Reese, 78–71, 80+847; Sours v. G. N. Ry., 81–337, 84+114; Agne v. Skewis, 98–32, 107+415; Quinn v. Mpls. T. M. Co., 102–256, 113+689.

[99] Cummings v. Baars, 36–350, 31+449. See § 9793.

[1] See § 7169.

[2] Earl v. Thurston, 60–351, 62+439; Sours v. G. N. Ry., 81–337, 84+114.

420. Estoppel—A party may by stipulation [3] or by his conduct on the trial [4] estop himself from assigning errors on appeal.

421. Wrong reasons for right decision—It is the function of an appellate court to review the judicial acts of lower courts and not their judicial opinions. It follows that a correct decision of a trial court will not be reversed on appeal merely because it was based on wrong reasons.[5] The application of this rule to orders granting new trials is stated elsewhere.[6]

422. Miscellaneous cases—An appellate court will not reverse for harmless error in admitting or excluding evidence;[7] in granting or refusing requests for instructions;[8] in the charge;[9] in refusing to dismiss for insufficiency of the evidence;[10] in the findings of fact;[11] in the submission of questions to the jury;[12] or in the entry of judgment.[13]

423. Error cured by instructions—Errors may be rendered harmless where the court instructs the jury to disregard evidence erroneously admitted;[14] or remarks of counsel [15] or the court;[16] or prior instructions.[17]

424. Unimportant defects disregarded—Statute—It is provided by statute that "in every stage of an action, the court shall disregard all errors or defects in the pleadings and proceedings which do not affect the substantial rights of the adverse party, and no judgment shall be reversed or affected by reason thereof.[18]

DISPOSITION OF CASE—POWERS OF SUPREME COURT

425. Disposition on merits when possible—A case will be disposed of fully, and on the merits, so far as possible. Especially is this true in cases involving public interests. A case will not be remanded for unimportant amendments.[19]

426. As to different parties—Upon a joint appeal by several parties the supreme court may reverse, affirm, or modify the judgment or order as to any one or more of the parties.[20] In an action against joint defendants, if only

[3] Ames v. Miss. B. Co., 8–467(417).

[4] Allis v. Day, 14–516(388); St. P. etc. Ry. v. Gardner, 19–132(99); McArthur v. Craigie, 22–351; Bennett v. Synd. Ins. Co., 43–45, 44+794; Burns v. Maltby, 43–161, 45+3; Poehler v. Reese, 78–71, 80+847; Twaddle v. Mendenhall, 80–177, 83+135; Church v. Odell, 100–98, 110+346.

[5] Bunday v. Dunbar, 5–444(362); Zimmerman v. Lamb, 7–421(336); Wieland v. Shillock, 23–227; Moquist v. Chapel, 62–258, 64+567; Morrow v. St. P. C. Ry., 65–382, 67+1002; Porter v. Baxter, 71–195, 73+856; Voge v. Penney, 74–525, 77+422; Ackerson v. Svea Assur. Co., 75–135, 77+419; McCord v. Knowlton, 76–391, 79+397; Nat. Fire Ins. Co. v. Broadbent, 77–175, 79+676; State v. Probate Ct., 79–257, 82+580; Sartell v. Royal Neighbors, 85–369, 88+985; Cornish v. Coates, 91–108, 97+579; Byronville C. Assn. v. Ivers, 93–8, 100+387; Kipp v. Clinger, 97–135, 106+108; Avery v. Holliston, 104–178, 116+354. See N. W. Railroader v. Prior, 68–95, 70+869.

[6] See § 394e.

[7] See §§ 7180–7208.

[8] See § 9774.

[9] See §§ 7165–7179.

[10] Berkey v. Judd, 22–287; Deakin v. Chi. etc. Ry., 27–303, 7+268; Keith v. Briggs, 32–185, 20+91.

[11] Leonard v. Green, 34–137, 24+915; Quinn v. Olson, 34–422, 26+230; Snell v. Snell, 54–285; 55+1131; Giertsen v. Giertsen, 58–213, 59+1004; Donnelly v. Cunningham, 61–110, 63+246.

[12] McArthur v. Craigie, 22–351; Hooper v. Webb, 27–485, 8+589; Gross v. Diller, 33–424, 23+837.

[13] Bixby v. Wilkinson, 27–262, 6+801; Libby v. Mikelborg, 28–38, 8+903; Osborne v. Johnson, 35–300, 28+510; Hoey v. Ellis, 78–1, 80+693.

[14] See § 7207.

[15] See § 9800.

[16] See § 7098.

[17] See § 9796.

[18] R. L. 1905 § 4161. Statute applied: Hurd v. Simonton, 10–423(340) (defective pleading); Aetna Ins. Co. v. Swift, 12–437(326) (defective judgment); Jorgensen v. Griffin, 14–464(346)(id.); Pfefferkorn v. Haywood, 65–429, 68+68 (defective pleading); St. Louis County v. Am. L. & T. Co., 75–489, 78+113(variance).

[19] Gordon v. Doran, 100–343, 111+272.

[20] Nelson v. Munch, 28–314, 9+863. See

one appeals and he is entitled to a reversal, if the judgment cannot be reversed as to him alone without prejudicing the rights of the others it will be reversed as to all.[21] Those parties who have not appealed and assigned errors cannot, as a matter of right, ask the court to modify or reverse the judgment as to them.[22]

427. Modification of judgment—It is everyday practice for the supreme court to remand a cause with directions to the trial court to modify its judgment in certain specified particulars;[23] but where an error goes to the whole judgment or order and not to a distinct and severable part thereof a new trial should be granted.[24] If a judgment cannot stand on account of error upon the trial affecting the amount of the recovery, the right to recover substantial damages upon a future trial should not be barred by reducing the judgment to nominal damages instead of reversing it.[25] A judgment may be modified on appeal as to costs improperly taxed in the district court on appeal from a justice court.[26] Where findings of fact would support a judgment for limited divorce, and the trial court decrees an absolute divorce, the supreme court cannot modify the judgment so as to grant a limited divorce.[27]

428. Directing judgment—The supreme court will not direct the entry of judgment unless such disposition of the case is manifestly just.[28]

429. Granting a new trial—Where there is material error in the record a new trial is ordinarily granted as a matter of course, unless the error may be corrected by a modification of the judgment.[29] A new trial will not be granted if the complaint does not state a cause of action and the verdict is for the defendant.[30] This general subject is considered under the head of new trials

430. Granting a new trial of part of the issues—The supreme court may, under its general power to modify as well as affirm or reverse, grant a new trial of a part only of the issues in a cause.[31]

431. On appeal from order on demurrer—On appeal from an order sustaining or overruling a demurrer the supreme court has power, upon affirming or reversing the order appealed from, to grant leave to answer or amend. But it will rarely exercise such power, as it is more just to leave it to the court below to grant or refuse leave to amend, after the case is remanded.[32]

432. Remitting parties to trial court for relief—Ordinarily the supreme court, on reversal, affirmance, or modification of the judgment or order ap-

Brazil v. Moran, 8–236(205); Burns v. Phinney, 53–431, 55+540.

[21] Wood v. Cullen, 13–394(365).

[22] Winona etc. Ry. v. Denman, 10–267 (208); Edgerton v. Jones, 10–427(341); New v. Wheaton, 24–406; Whitely v. Miss. etc. Co., 38–523, 38+753; Clarkin v. Brown, 80–361, 83+351.

[23] Dodge v. Chandler, 13–114(105); Coolbaugh v. Roemer, 32–445, 21+472; Dorr v. McDonald, 43–458, 45+864; Merritt v. Byers, 46–74, 48+417; Carlton v. Hulett, 49–308, 51+1053; Mpls. etc. Ry. v. Chisholm, 55–374, 57+63; Carlton v. Carey, 61–318, 63+611; Crane v. Knauf, 65–447, 68+79; Ramaley v. Ramaley, 69–491, 72+694; Salzbrum v. Salzbrum, 81–287, 83+1088; Selover v. Isle Harbor L. Co., 91–451, 98+344.

[24] Sanborn v. Webster, 2–323(277); Kelly v. Rogers, 21–146.

[25] Stout v. McMasters, 37–185, 33+558.

[26] Anderson v. Hanson, 28–400, 10+429.

[27] Salzbrun v. Salzbrun, 81–287, 83+1088.

[28] Sanborn v. Webster, 2–323(277); State v. Galusha, 26–238, 2+939, 59+1052; Lesher v. Getman, 28–93, 9+585; Winona etc. Ry. v. Randall, 29–283, 13+127; Coolbaugh v. Roemer, 30–424, 15+869; Knudson v. Curley, 30–433, 15+873; Donnelly v. Cunningham, 58–376, 59+1052; Radke v. Kolbe, 79–440, 82+977; Robinson v. Blaker, 85–242, 88+845; Reider v. Walz, 93–399, 101+601; Burnap v. Chi. etc. Ry., 101–542, 112+1141.

[29] See Burnap v. Chi. etc. Ry., 101–542, 112+1141 and cases under § 427.

[30] Jenness v. School Dist., 12–448(337).

[31] Chicago etc. Ry. v. Porter, 43–527, 46+75; Crich v. Williamsburg etc. Co., 45–441, 48+198; Williams v. Wood, 55–323, 56+1066; Sauer v. Traeger, 56–364, 57+935. See also Coolbaugh v. Roemer, 32–445, 21+472; Cobb v. Cole, 44–278, 46+364.

[32] Farley v. Kittson, 27–102, 6+450, 7+267; Haven v. Place, 28–551, 11+117.

pealed from, will remit the parties to the court below for the affirmative relief to which, under the decision, they may be entitled.[33]

433. Directing judgment notwithstanding the verdict—Statute—Where a motion for a directed verdict on the trial is erroneously denied the supreme court is authorized by statute to direct a judgment notwithstanding the verdict.[34]

434. Cannot make findings of fact—The supreme court has no power to make findings of fact in a case on appeal. It is bound to assume the facts to be as found by the trial court, except that it may review the findings.[35] It cannot go into the evidence to find the facts.[36]

435. Remanding with directions to amend findings—When findings of fact should be amended as a matter of law, the facts not being in dispute, a case may be remanded with directions to the trial court to make the required findings.[37]

436. Findings of fact assumed—Where the trial court fails to find facts conclusively proved, the supreme court may treat such facts as if found, without remanding the case for formal findings.[38]

437. Remanding for correction of record—A case may be remanded with leave to apply to the trial court for a correction or amendment of the record.[39]

438. Remanding to permit motion for new trial—A case may be remanded to enable the appellant to renew a motion for a new trial on the ground of newly discovered evidence arising after the filing of the return in the supreme court.[40]

439. Remanding to change nature of action—Where, in an action for the recovery of a deed, the defendant was entitled to the judgment rendered, it was held that the supreme court had no right to reverse the case and send it back merely for the purpose of permitting the plaintiff to move for an amendment of his complaint so as to convert the action into one to determine adverse claims.[41]

440. Directing trial court to hold case open—The supreme court may remand a case with directions to the trial court to retain jurisdiction and hold the case open for future proceedings in accordance with the decision on appeal.[42]

EFFECT OF REVERSAL

441. Reversal of judgment without directions—As, under Rule 18 of the supreme court, a remittitur to the district court follows a reversal, as of course, unless otherwise ordered, the inquiry is, what is the effect of the reversal upon the case after the remittitur? The answer to this question depends upon the grounds upon which the reversal is based, as expressed in the opinion of the court. A judgment may be reversed upon grounds which show that it is impossible for plaintiff to recover. In such case a new trial would be useless, and the reversal is in its effect an end of the case, though some formal action of the court below may be necessary to finally dispose of it. So a judgment may be reversed because not in due form, because it does not pursue the verdict or finding, and for analogous grounds, which show not any necessity for a new

[33] Everest v. Ferris, 17–466(445).
[34] See §§ 5076–5087.
[35] Smith v. Kipp, 49–119, 51+656; Dwinnell v. Mpls. etc. Co., 97–340, 106+312.
[36] Kinney v. Mathias, 81–64, 83+497; Flanigan v. Pomeroy, 85–264, 88+761.
[37] Dwinnell v. Mpls. etc. Co., 97–340, 106+312.
[38] Menzel v. Tubbs, 51–364, 53+653, Lovejoy v. Howe, 55–353, 57+57.
[39] Phoenix v. Gardner, 13–294(272); Chesley v. Miss. etc. Co., 39–83, 38+769; Kroning v. St. P. C. Ry., 96–128, 104+888.
[40] Kroning v. St. P. C. Ry., 96–128, 104+888.
[41] Barkey v. Johnson, 90–33, 95+583.
[42] Selover v. Isle Harbor L. Co., 91–451, 98+344.

trial, but one for correction or modification of the judgment, so that it shall answer the familiar definition of a judgment as the sentence of the law upon the record. In other cases a judgment is reversed upon grounds which show that there has been a mistrial, and that the party in whose favor it is reversed is entitled to a new trial. In such cases it is quite usual formally to direct a new trial. But in case such formal direction is omitted, the opinion of the court is to be consulted for the purpose of determining the effect of the reversal.[43] Where a case was remanded "for further proceedings" it was held that a new trial was properly granted by the trial court.[44] Where a judgment is reversed solely upon the ground that it is not the one which should have been rendered upon the verdict or findings of fact, the effect of a simple reversal is to send the case back, not for a new trial, but merely for the correction of the judgment.[45] Where a judgment is reversed on the ground that the findings of fact or verdict are not justified by the evidence a new trial must inevitably follow.[46] A reversal of a judgment without directions must be given the least effect consistent with the opinion and the grounds upon which the reversal is placed.[47]

442. Benefits to parties not appealing—While it is the general rule that parties not appealing are held to waive objections to a verdict, finding, or decision,[48] yet the benefits of a reversal are sometimes shared by such parties.[49]

443. Reversal of order for judgment—It does not follow that because an order of the trial court directing judgment for the plaintiff upon the pleadings is reversed that the defendant is entitled to a like judgment.[50] Upon the reversal of an order directing the entry of judgment the judgment entered pursuant to the order falls with it.[51]

444. Reversal of order denying new trial—Vacation of judgment—Where there is an appeal from an order denying a new trial, and another from the judgment subsequently entered, and the former is reversed, the latter will be vacated.[52]

445. Suggestions that other relief would be appropriate—A decision of the supreme court reversing an 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 of 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. In such cases the second application is to be deemed a continuation of the original proceeding, if necessary to save the rights of the respondent in the appeal.[53]

446. Effect of granting a new trial without restriction—Where the supreme court grants a new trial without restrictions, either party is entitled to a retrial of all the controverted issues contained in the pleadings.[54]

[43] Jordan v. Humphrey, 32–522, 21+713; Gerdtzen v. Cockrell, 52–501, 55+58; Mpls. M. Co. v. Mpls. etc. Ry., 58–512, 60+341; Kurtz v. St. P. & D. Ry., 65–60, 67+808; Cool v. Kelly, 85–359, 88+988; Canosia v. Grand Lake, 87–347, 92+215; State v. Dist. Ct., 91–161, 97+581. See Note, 96 Am. St. Rep. 124.

[44] Canosia v. Grand Lake, 87–347, 92+215.

[45] Nat. Invest. Co. v. Nat. etc. Assn., 51–198, 53+546; Cool v. Kelly, 85–359, 88+988.

[46] Backus v. Burke, 52–109, 53+1013; Cool v. Kelly, 85–359, 88+988; State v. Ames, 93–187, 100+889.

[47] Babcock v. Murray, 61–408, 63+1076; Cool v. Kelly, 85–359, 88+988.

[48] See § 360.

[49] Smith v. Nat. C. Ins. Co., 79–486, 82+976.

[50] Conway v. Elgin, 38–469, 38+370.

[51] Frazer v. Sherrerd, 6–576(410).

[52] Minn. V. Ry. v. Doran, 15–240(186).

[53] Gerdtzen v. Cockrell, 52–501, 55+58.

[54] Mpls. M. Co. v. Mpls. etc. Ry., 58–512, 60+341.

447. Effect of granting a new trial with restrictions as to the issues to be tried—Where the supreme court grants a new trial with restrictions as to the issues to be retried, the district court has no discretion, but is bound to restrict the new trial to such issues.[55]

REMITTITUR

448. Definition—To remit a cause is to send it back to the same court from which it was removed by appeal or otherwise for further proceedings in accordance with the opinion of the appellate court.[56] "Remittitur" and "mandate" are used interchangeably in this state to designate the order of the supreme court sending a cause back to the lower court upon determination of the appellate proceedings.[57] A remittitur contains a certified copy of the judgment of the supreme court, sealed with the seal thereof and signed by the clerk.[58] The filing and docketing of a transcript of a judgment of the supreme court in pursuance of Rule 25 is not a remittitur.[59]

449. Necessity of remittitur—Waiver—As the remittitur is the only official mode of transmitting the determination of the appellate court to the lower court no proceeding should be had in the latter court intermediate the appeal and the filing of the remittitur.[60] The parties may waive a remittitur.[61]

450. To what court directed—The remittitur should be directed to the court from which the appeal was taken,[62] except in the case of an improper change of venue.[63]

451. Time of issuance—The remittitur is transmitted to the clerk of the court below as soon as may be after judgment is entered.[64] But unless otherwise ordered there is no remittitur until after the costs and disbursements of the prevailing party and the fees of the clerk are paid.[65]

452. Stay for writ of error from federal supreme court—A remittitur will be stayed for a reasonable time, upon the order of any justice of the supreme court, to afford an opportunity to sue out a writ of error from the federal supreme court. A formal stay is unnecessary.[66]

453. Recalling—After an appellate court has pronounced its judgment or decree in a cause, and has remitted it to the court below for enforcement, and such remittitur has been filed in the lower court, the jurisdiction of the appellate court is completely divested, and it has no authority to recall the remittitur, unless there has been some irregularity or error in issuing it, as where it is issued contrary to the rules of the court, or where, by reason of a clerical mistake, it does not correctly express the judgment of the appellate court.[67]

PROCEEDINGS IN LOWER COURT AFTER REMAND

454. Law of the case—The decision of the supreme court becomes the law of the case in all subsequent proceedings in the district court.[68]

455. Compliance with mandate—The district court is bound to comply with the mandate of the supreme court however erroneous or irregular it may be.

[55] See § 430.
[56] Irvine v. Marshall, 3–72(33).
[57] Caldwell v. Bruggerman, 8–286(252).
[58] Rule 17, Supreme Court.
[59] La Crosse etc. Co. v. Reynolds, 12–213 (135).
[60] See McArdle v. McArdle, 12–122(70); La Crosse etc. Co. v. Reynolds, 12–213 (135).
[61] Courtney v. Mpls. etc. Ry., 100–434, 111+399.
[62] Irvine v. Marshall, 3–72(33).
[63] McCracken v. Webb, 36 Iowa 551.
[64] Rule 17, Supreme Court. See Caldwell v. Bruggerman, 8–286(252).
[65] See § 2231.
[66] Todd v. Bettingen, 98–170, 177, 107+ 1049.
[67] Rud v. Pope County, 66–358, 68+1062, 69+886.
[68] Commercial Bank v. Azotine Mfg. Co., 69–232, 72+108; Block v. G. N. Ry., 106–285, 118+1019.

The district court cannot vary the mandate or examine it for any other purpose than execution; or give any other or further relief; or review it even for apparent error upon any matter decided on appeal; or intermeddle with it, further than to settle so much as has been remanded.[69] A substantial compliance, however, is sufficient.[70] The mandate should be construed with reference to the opinion of the supreme court.[71] The remedy for a failure of the district court to comply with the mandate is either a new appeal or a writ of mandamus.[72]

456. Granting a new trial—Where a judgment is reversed, and the case remanded, without directions, but it is apparent from the opinion that upon the record before the supreme court the plaintiff is entitled to judgment, the trial court may for cause allow a supplemental answer and grant a new trial; and, unless it is apparent that such action is a mere pretext to defeat the entry of judgment for the plaintiff, mandamus will not lie to compel the entry of such judgment in accordance with the opinion.[73]

457. Matters undetermined by appeal—The district court is free to proceed as to any matter undetermined by the appeal and to make any order not inconsistent with the decision on appeal or the terms of the mandate.[74] A decision of the supreme court reversing an 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.[75]

458. Amendment of pleadings—The district court may, when not precluded by the mandate, allow pleadings to be amended so as to raise new issues after the cause has been disposed of in the supreme court on findings of fact and conclusions of law, and, as a necessary result of its power to permit such amendments, may grant a new trial. It should act with great caution, however, on an application for such an amendment.[76] When the supreme court remands the cause with directions to enter judgment the district court has no authority to allow an amendment, but must enter judgment as directed.[77]

JURISDICTION OF SUPREME COURT AFTER REMAND

459. In general—Except for the purpose of enforcing its mandate,[78] the supreme court loses jurisdiction of a case when it has rendered judgment and the remittitur has been filed in the lower court.[79]

460. Enforcement of mandate—The supreme court has the power, by a writ of mandamus, to compel compliance with its orders and directions on a remand of a case to the trial court.[80]

[69] Caldwell v. Bruggerman, 8–286(252); Merchants' Nat. Bank v. Stanton, 59–532, 61+680 (findings not responsive to question set down for trial); Carlton v. Carey, 61–318, 63+611; McRoberts v. McArthur, 66–74, 68+770; Piper v. Sawyer, 78–221, 80+970; In re Sanford etc. Co., 160 U. S. 247.

[70] Benz v. St. Paul, 77–375, 79+1024, 82+1118; Patten v. Green Bay etc. Co., 93 Wis. 283.

[71] See § 441 and In re Sanford etc. Co., 160 U. S. 247.

[72] State v. Dist. Ct., 91–161, 97+581; In re Sanford etc. Co., 160 U. S. 247. See Carlton v. Carey, 61–318, 63+611; McRoberts v. McArthur, 66–74, 68+770.

[73] State v. Dist. Ct., 91–161, 97+581.

[74] Commercial Bank v. Azotine Mfg. Co., 69–232, 72+108; In re Sanford etc. Co., 160 U. S. 247.

[75] Gerdtzen v. Cockrell, 52–501, 55+58.

[76] Winona v. Minn. etc. Co., 29–68, 11+228; Burke v. Baldwin, 54–514, 56+173; Reeves v. Cress, 80–466, 83+443.

[77] Keller v. Lewis, 56 Cal. 466; Patten v. Green Bay etc. Co., 93 Wis. 283.

[78] See § 460.

[79] Gerish v. Pratt, 8–106(81); Rud v. Pope County, 66–358, 68+1062, 69+886; Fonda v. St. P. C. Ry., 72–1, 80+366.

[80] State v. Dist. Ct., 91–161, 97+581.

DISMISSAL OF APPEAL

461. For defective return—The supreme court on its own motion will dismiss an appeal when the return does not include a copy of the order or judgment from which the appeal is taken.[81]

462. For want of merit—Frivolous appeals—The supreme court has power to dismiss an appeal which is manifestly frivolous and without merit; but this will only be done where it is apparent, without argument, that the appeal is frivolous.[82]

463. For want of real controversy—Academic questions—Courts do not sit for the purpose of determining purely academic questions. There must be a substantial and real controversy between the parties. The supreme court will not entertain a case and review a judgment where it appears satisfactorily that the subject-matter of the action has been settled by the parties, and the judgment satisfied.[83] It will not ordinarily review a case where the only practical effect would be to determine which party should pay the costs. But there are ill-defined exceptions to this general rule.[84]

464. Appellant cannot dismiss as of right—The appellant has no absolute right to dismiss an appeal. Where an appellate court has once acquired jurisdiction of a cause it cannot be deprived of that jurisdiction, and the respondent of a decision, at the mere will of the appellant. He should make application to the court for leave to dismiss. A mere notice that he dismisses is a nullity.[85]

465. Appeal from non-appealable order or judgment—Where an appeal is taken from a non-appealable order or judgment, it will be dismissed by the court, notwithstanding the failure of the respondent to move for a dismissal.[86]

466. Reinstatement of appeal—The supreme court has statutory authority to reinstate an appeal which has been dismissed.[87]

467. Effect of dismissal on status of case below—When a cause was called for trial in the district court the defendant, objecting to the trial, moved to strike it from the calendar on the ground that the action had, by appeal, been removed to and was pending in the supreme court. The appeal referred to had already been dismissed. It was held proper to refuse to strike the cause from the calendar in the district court.[88]

468. Practice—Affidavits—Notice—Facts constituting a ground for dismissal may be shown by affidavit.[89] A motion for a dismissal has been held not too late though it was not noticed for the first day of the term, the return not being filed in time to pursue that course.[90]

REHEARINGS

469. Rule of Derby v. Gallup—When granted—The judgments of a court of final appeal have the strongest presumption in their favor and cannot

[81] Granite etc. Co. v. Weinberg, 62–202, 64+380. See Pabst v. Butchart, 68–303, 71+273.

[82] Johnson v. St. P. C. Ry., 68–408, 71+619; Kennedy v. Fidelity & C. Co., 100–144, 110+624; Floody v. Chi. etc. Ry., 104–132, 116+111.

[83] Babcock v. Banning, 3–191(123); Johnson v. Dosland, 103–147, 114+465. See James v. Wilder, 25–305; Cornish v. West, 89–360, 94+1082.

[84] James v. Wilder, 25–305; Harrington v. Plainview, 27–224, 6+777; Thomas v. Craig, 60–501, 62+1133.

[85] Merrill v. Dearing, 24–179; Schleuder v. Corey, 30–501, 16+401; Briggs v. Shea, 48–218, 50+1037; Cruzen v. Merchants S. Bank, 109–303, 123+666.

[86] Croft v. Miller, 26–317, 4+45; Johnson v. N. P. etc. Ry., 39–30, 38+804; U. S. Sav. etc. Co. v. Ahrens, 50–332, 52+898; Thomas v. Craig, 60–501, 62+1133; Gottstein v. St. Jean, 79–232, 82+311.

[87] Baldwin v. Rogers, 28–68, 9+79.

[88] Fay v. Davidson, 13–523(491).

[89] Babcock v. Banning, 3–191(123).

[90] Com. Ins. Co. v. Pierro, 6–569(404).

be freely reconsidered without unreasonably protracting litigation, disregarding the claims of other litigants to the attention of the court, and impairing popular confidence and respect.[91] But the demands of justice override every consideration of expediency, and an appellate court will grant a reargument for the correction of palpable error of a serious nature. It is obviously impossible to lay down a general rule that shall be applicable to every case that may arise.[92] "The applicant must be able to show some manifest error of fact, into which counsel or the court have fallen in the argument or decision of the case; as, for example, that a provision of statute decisive of the case has, by mistake, been entirely overlooked by counsel and the court; or, perhaps, that a case has been decided upon a point not raised at all on the argument, and there is strong reason to believe that the court has erred in its decision; or, unless, in a case where great public interests are involved, and the case has either not been fully argued, or strong additional reasons may be urged, to show that the court has erred in its ruling. But where a question of law has once been fully discussed on the argument, and considered by the court, we cannot admit that a party is entitled to a reargument, on the ground that there is manifest error in the decision. We are not aware that any court has sanctioned such a practice, and it would be attended with inconveniences and evils far overbalancing the advantage accruing in the particular case." [93] It is a rule of the United States Supreme Court that "no reargument will be granted unless some member of the court who concurred in the judgment doubts the correctness of the opinion and desires a further argument on the subject, and not then unless the proposition receives the support of the majority of the court; but under these conditions the court will order a reargument without waiting for the application of counsel." [94] This rule has been approved by our supreme court.[95] In New York the rule is laid down that "motions for reargument should be founded on papers showing clearly that some question, decisive of the case, and duly submitted by counsel, has been overlooked by the court; or, that the decision is in conflict with an express statute or with a controlling decision to which the attention of the court was not drawn, through the neglect or inadvertence of counsel." [96] This rule has met the approval of our supreme court.[97] A reargument is sometimes ordered by the court on its own motion.[98]

470. Exclusive remedy—A motion for a reargument, and not a second appeal, in the same action, is the proper mode of obtaining a rehearing in the supreme court of questions in the case already decided by it.[99]

471. Cases where rehearing will be allowed—A rehearing will generally be granted in a case where great public interests are involved and the question was not fully argued and strong additional reasons may be urged;[1] where the court has fallen into some manifest error as to a fact appearing in the record

[91] Winchester v. Winchester, 121 Mass. 127.

[92] Derby v. Gallup, 5–119(85).

[93] Derby v. Gallup, 5–119(85). Followed with approval in Weller v. St. Paul, 5–95 (70); Bradley v. Gamelle, 7–331(260); Fish v. Heinlin, 8–540(483); Woodbury v. Dorman, 15–341(274); Warner v. Lockerby, 31–421, 18+145; Densmore v. Shepard, 46–54, 48+528, 681; Fajder v. Aitkin, 87–445, 92+332, 934; Kelly v. Liverpool etc. Co., 102–178, 112+1019.

[94] Scott v. Austin, 36–460, 32+89, 864; U. S. v. Knight, 1 Black (U. S.) 488; Washington B. Co. v. Stewart, 3 How. (U. S.) 413; Brown v. Aspden, 14 How. (U. S.) 25.

[95] Woodbury v. Dorman, 15–341(274). See also Winchester v. Winchester, 121 Mass. 127; Kent v. Waters, 18 Md. 53; Johns v. Johns, 20 Md. 59.

[96] Mount v. Mitchell, 32 N. Y. 702; Fosdick v. Hemstead, 126 N. Y. 651; O'Brien v. Mayor, 142 N. Y. 671.

[97] Woodbury v. Dorman, 15–341(274).

[98] Scott v. Austin, 36–460, 32+89, 864.

[99] Lough v. Bragg, 19–357(309).

[1] Derby v. Gallup, 5–119(85); Hanford v. St. P. & D. Ry., 43–104, 42+596, 44+1144; State v. Cooley, 56–540, 58+150.

and materially affecting the decision;[2] where a provision of statute decisive of the case has been overlooked;[3] where the decision is in conflict with a controlling case to which the attention of the court was not called;[4] where important constitutional questions are involved and the decision was rendered by a divided court;[5] where, upon the argument of a particular point, the court intimate or state to counsel that they are so well satisfied with the correctness of his view that no further argument is desired, but nevertheless decide the case adversely to counsel on that very point;[6] and where the court overlooked an important aspect of the case.[7]

472. Cases where a rehearing will not be allowed—A rehearing will not be granted merely because there has been a change in the personnel of the court and the new members do not approve the judgment;[8] where the application presents no new and decisive facts but merely reiterates or amplifies the points made on the argument and is, in effect, nothing more than an appeal to the court to review its decision on points already discussed by counsel and considered and determined by the court;[9] where the court has been led into error because of omissions in the paper-book properly chargeable to the applicant;[10] where a statute applicable to the subject-matter is enacted after the submission of a case on appeal, but which does not necessarily affect the validity of the judgment;[11] where counsel made admissions on the argument which he claims were misunderstood by the court, the trial court having found the facts as admitted;[12] where the affirmance was placed on two grounds and it is claimed that counsel did not argue one of them, no objection being made to the sufficiency of the other ground to sustain the judgment of the court;[13] where the applicant can secure a second trial as of right;[14] where it is claimed that the court has made a mistake as to a fact not appearing in the record;[15] where the court failed to refer in its opinion to a point urged by the applicant on the argument, that fact alone being no evidence that the point was not considered;[16] where the facts upon which the application is based do not appear, as they ought, in the return, but are presented by affidavits in connection with the petition;[17] or where the application contains matter clearly frivolous and impertinent.[18]

473. Form of application—Applications for rehearing are made ex parte, on petition setting forth the grounds on which they are made, and filed within ten days after notice of the decision.[19] The application should distinctly specify the grounds upon which it rests, and, so far as it involves matter of fact,

[2] Derby v. Gallup, 5–119(85); Lough v. Bragg, 19–357(309); Mpls. T. Co. v. Eastman, 47–301, 50+82, 930; Smith v. Glover, 50–58, 52+210, 912; Rud v. Pope County, 66–358, 68+1062; 69+886; Fowler v. Jenks, 90–74, 97+127; Weathersbee v. Farrar, 98 N. C. 255.

[3] Edson v. Child, 18–351(323); State v. Judges of Dist. Ct., 51–539, 53+800, 55+122; Kirby v. W. U. T. Co., 4 S. D. 439.

[4] Butler v. Silvey, 70–507, 73+406, 510; Mount v. Mitchell, 32 N. Y. 702.

[5] Shreveport v. Holmes, 125 U. S. 694.

[6] Derby v. Gallup, 5–119(85).

[7] State v. Gut, 13–341(315); Redwood County v. Winona etc. Co., 40–512, 41+465, 42+473; Peet v. Sherwood, 47–347, 50+241, 929; Armstrong v. St. P. etc. Co., 48–113, 49+233, 50+1029; Fowler v. Jenks, 90–74, 97+127.

[8] Woodbury v. Dorman, 15–341(274); Ayer v. Stewart, 16–89(77).

[9] Weller v. St. Paul, 5–95(70); Derby v. Gallup, 5–119(85); Bradley v. Gamelle, 7–331(260); Fish v. Heinlin, 8–540(483); Warner v. Lockerby, 31–421, 18+145; Densmore v. Shepard, 46–54, 48+528, 681; Kelly v. Liverpool etc. Co., 102–178, 112+1019.

[10] Fowler v. Atkinson, 6–578(412).

[11] Dutcher v. Culver, 24–584.

[12] Smith v. St. Paul, 69–276, 72+104, 210.

[13] Butler v. Silvey, 70–507, 73+406, 510.

[14] G. N. Ry. v. Stewart, 65–514, 68+1102.

[15] Mpls. T. Co. v. Eastman, 47–301, 50+82, 930; Weathersbee v. Farrar, 98 N. C. 255.

[16] Mpls. T. Co. v. Eastman, 47–301, 50+82, 930.

[17] Smith v. St. Paul, 69–276, 72+104, 210. See Western R. Co. v. Phelps, 86–52, 90+11, 793.

[18] Kelly v. Liverpool etc. Co., 102–178, 112+1019.

[19] Rule 37, Supreme Court.

be supported by affidavits, in order to show to the satisfaction of the court, upon the face of the petition, and of the whole record and files in the case, probable cause for a rehearing.[20] An extended argument is improper. It is customary in this state to cite authorities. The petition need not be printed.

474. Time of making application—It is provided by rule of court that the application for a reargument must be made and filed within ten days after notice of the decision.[21] Doubtless, in an extraordinary case, the court would entertain an application any time before the case is remanded. It is too late after the case has been remanded.[22]

APPEARANCE

Cross-References

See Justices of the Peace, 5293; Criminal Law, 2433.

475. Definition—To appear in an action means to come into court as a party to the action.[23] A defendant appears in an action when he answers, demurs, or gives the plaintiff written notice of his appearance.[24]

476. Effect of general appearance—A voluntary general appearance by a defendant is equivalent to a personal service of the summons upon him.[25] Such an appearance gives the court jurisdiction over the person,[26] but not over the subject-matter.[27] Though the action is in rem a general appearance gives the court jurisdiction so far as the party's interest in the property is concerned.[28] A court may acquire jurisdiction over a non-resident by a general appearance.[29] A general appearance waives all defects in the summons, in its service, and in the proof of service.[30] An appearance by an answer which merely sets up facts

[20] Winchester v. Winchester, 121 Mass. 127. See Smith v. St. Paul, 69-276, 72+104, 210.

[21] Rule 37, Supreme Court.

[22] Caldwell v. Bruggerman, 8-286(252). See Humphrey v. Havens, 13-150(135); Rud v. Pope County, 66-358, 68+1062, 69+886.

[23] Schroeder v. Lahrman, 26-87, 1+801.

[24] R. L. 1905 § 4116.

[25] R. L. 1905 § 4115. This statute is scarcely more than embodiment, in the written law, of a principle which has generally been recognized as applicable without the aid of such a statute. Since the object of a summons is only to bring the party defendant into court, and since the same object is accomplished when he appears voluntarily without process, and submits himself to its jurisdiction, or when, the process or service being irregular, he appears and makes no objection to the irregularity, it follows that when the subject-matter is one within the jurisdiction of the court, jurisdiction over the person may be conferred by consent. Anderson v. Hanson, 28-400, 10+429.

[26] Chouteau v. Rice, 1-192(166); Hinkley v. St. Anthony Falls etc. Co., 9-55(44); Reynolds v. La Crosse etc. Co., 10-178 (144); Williams v. McGrade, 13-174(165); Johnson v. Knoblauch, 14-16(4); Tyrell v. Jones, 18-312(281); Steinhart v. Pitcher, 20-102(86); Anderson v. Southern Minn. Ry., 21-30; Burt v. Bailey, 21-403; Houston County v. Jessup, 22-552; Curtis v. Jackson, 23-268; Craighead v. Martin, 25-41; Lee v. Parrett, 25-128; Anderson v. Hanson, 28-400, 10+429; Allen v. Coates, 29-46, 11+132; Rheiner v. Union Depot etc. Co., 31-289, 17+623; McKee v. Metraw, 31-429, 18+148; Seurer v. Horst, 31-479, 18+283; Frear v. Heichert, 34-96, 24+319; Whitely v. Miss. etc. Co., 38-523, 38+753; Johnson v. Hagberg, 48-221, 50+1037; State v. Dist. Ct., 51-401, 53+714; Farmers' Nat. Bank. v. Backus, 64-43, 66+5; Kieckenapp v. Wheeling, 64-547, 67+662; Farmers' Nat. Bank v. Backus, 74-264, 77+142; McCubrey v. Lankis, 74-302, 77+144; Anderson v. Decoria, 74-339, 77+229; Hurst v. Martinsburg, 80-40, 82+1099; Slater v. Olson, 83-35, 85+825.

[27] Chandler v. Kent, 8-536(479); Rahilly v. Lane, 15-447(360); McGinty v. Warner, 17-41(23); Chauncey v. Wass, 35-1, 15, 25+457, 30+826.

[28] State v. Dist. Ct., 51-401, 53+714. See Chauncey v. Wass, 35-1, 15, 25+457, 30+826.

[29] Reynolds v. La Crosse etc. Co., 10-178 (144).

[30] Chouteau v. Rice, 1-192(166); John-

showing want of jurisdiction, and protests against its exercise, and claims no other right, does not waive objection to jurisdiction obtained by fraud.[31]

477. Effect of general appearance in foreign court—Where, in an action in the court of another state for divorce, both parties voluntarily appear, and submit to the jurisdiction, they are bound by the judgment, and cannot avoid it in a collateral proceeding in this state by proof that when the action was brought and judgment rendered neither of them was a resident in that state and that both were residents in this state.[32]

478. Validating a void judgment by an appearance—The mere making of a motion to set aside a judgment void for want of jurisdiction over the person does not validate the judgment and confer jurisdiction retrospectively. Nor is such a judgment validated because the moving party, in such case, also urges in his application additional reasons not inconsistent with the alleged want of jurisdiction; or because, by asking to be allowed to file an answer as in a pending cause, he indicates his present willingness to submit himself to the jurisdiction of the court, in order that, after a hearing upon the issues thus presented, the court may proceed to judgment.[33]

479. General appearance—What constitutes—An appearance for any other purpose than to question the jurisdiction of the court is general and gives the court jurisdiction over the person.[34] No special appearance can be made except to raise jurisdictional questions. If a party so far appears as to call into action the powers of the court for any purpose, except to decide upon its own jurisdiction, it is a full appearance.[35] A party cannot at the same time object to and ask the court to exercise its jurisdiction.[36] In determining whether an appearance is general or special, the purposes for which it was made should be considered rather than what the party has labeled it.[37] A party appears generally when he takes or consents to any step in the cause which assumes that the jurisdiction exists or continues.[38] The following have been held to constitute a general appearance: demurring to the complaint for want of jurisdiction over the person;[39] an application for an extension of time to answer, though a motion is pending to set aside the summons;[40] a motion to set aside a judgment upon grounds not expressly limited to the jurisdiction of the court;[41] a motion objecting to the jurisdiction but at the same time asking a decision on the merits;[42] interpleading and consenting to an adjournment;[43] opposing a motion on the merits and offering to submit to an order of the court;[44] a stipulation for an adjournment;[45] an objection to the jurisdiction coupled with an objection to the appointment of a receiver.[46] An appeal from an inferior to a superior court for the purpose of securing a retrial on the merits in the latter

son v. Knoblauch, 14–16(4); Tyrrell v. Jones, 18–312(281); Steinhart v. Pitcher, 20–102(86); Anderson v. Southern Minn. Ry., 21–30, Allen v. Coates, 29–46, 11+132; Howland v. Jeuel, 55–102, 56+581; Slater v. Olson, 83–35, 85+825. See Houlton v. Gallow, 55–443, 57+141.

[31] Chubbuck v. Cleveland, 37–466, 35+362.

[32] In re Ellis, 55–401, 56+1056.

[33] Godfrey v. Valentine, 39–336, 40+163; Roberts v. Chi. etc. Ry., 48–521, 51+478. See Kanne v. Mpls. etc. Ry., 33–419, 23+854.

[34] St. Louis Car Co. v. Stillwater St. Ry., 53–129, 54+1064.

[35] Curtis v. Jackson, 23–268. See Kanne v. Mpls. etc. Ry., 33–419, 23+854; Fowler v. Jenks, 90–74, 95+887, 96+914, 97+127.

[36] Papke v. Papke, 30–260, 15+117.

[37] Houlton v. Gallow, 55–443, 57+141.

[38] Burt v. Bailey, 21–403; Johnson v. Hagberg, 48–221, 50+1037.

[39] Reynolds v. La Crosse etc. Co., 10–178 (144).

[40] Yale v. Edgerton, 11–271(184). See also, Frear v. Heichert, 34–96, 24+319.

[41] Curtis v. Jackson, 23–268.

[42] Papke v. Pakke, 30–260, 15+117.

[43] Anderson v. Hanson, 28–400, 10+429.

[44] Farmers' Nat. Bank v. Backus, 64–43, 66+5.

[45] Johnson v. Hagberg, 48–221, 50+1037.

[46] St. Louis Car Co. v. Stillwater St. Ry., 53–129, 54+1064.

court constitutes a general appearance and gives the court jurisdiction over the person which was before wanting.[47]

480. Withdrawal—A general appearance cannot be withdrawn except by leave of court on a showing of fraud or mistake of fact.[48]

481. Special appearance—What constitutes—A special appearance is one made solely for the purpose of urging jurisdictional objections.[49] Such appearances are not favored.[50] A party cannot be deemed to submit to the jurisdiction of a court by the mere act of denying its jurisdiction.[51] The following have been held special appearances: a motion to vacate a judgment upon grounds taken solely with reference to their supposed bearing upon the jurisdiction of the court to render the judgment and solely for the purpose of attacking said jurisdiction, the attorney appearing "for the purposes of the motion only;" [52] a motion to dismiss—after stating the objections to the jurisdiction of the court the motion proceeded as follows: "If such objection to the jurisdiction be overruled, the undersigned further, as a separate defence in said matter, objects," etc., setting up a defence on the merits; [53] an answer setting forth objections to the jurisdiction; [54] an answer which simply protests against the exercise of jurisdiction and claims no other right; [55] a motion to set aside the service of a summons on the ground that the complaint was not filed, and no copy of it served with the summons, though the moving party did not state that his appearance was special; [56] a stipulation for an extension of time in which to answer.[57]

482. Proceeding to trial after special appearance—Waiver—When a party appears specially and objects to the jurisdiction of the court over his person and his objection is overruled he does not waive the objection by answering to the merits and proceeding to trial.[58]

483. Mode of appearing specially—Objection to the jurisdiction of the court over the person is properly raised by motion, before answer or demurrer, in writing stating that the party appears specially to object to the jurisdiction of the court and specifying the grounds of objection; [59] by answer, when the objection does not appear on the face of the complaint; [60] by demurrer, when the objection appears on the face of the complaint.[61]

484. Special appearance—Appeal—Where non-resident defendants took part in the trial merely for the purpose of litigating the question as to whether the court had acquired jurisdiction by the service, it was held that they had no standing on appeal to attack the validity of the judgment in any other respects.[62]

[47] Craighead v. Martin, 25–41; Lee v. Parrett, 25–128; Seurer v. Horst, 31–479, 18+283; Whitely v. Miss. etc. Co., 38–523, 38+753; Wrolson v. Anderson, 53–508, 55+597; McCubrey v. Lankis, 74–302, 77+144.

[48] Anderson v. Hanson, 28–400, 10+429; Allen v. Coates, 29–46, 11+132.

[49] St. Louis Car Co. v. Stillwater St. Ry., 53–129, 54+1064; Clark v. Blackwell, 4 Greene (Iowa) 441.

[50] Yale v. Edgerton, 11–271(184).

[51] Higgins v. Beveridge, 35–285, 28+506.

[52] Covert v. Clark, 23–539.

[53] Stearns County v. Smith, 25–131. See also, Perkins v. Meilicke, 66–409, 69+220.

[54] Higgins v. Beveridge, 35–285, 28+506.

[55] Chubbuck v. Cleveland, 37–466, 35+362.

[56] Houlton v. Gallow, 55–443, 57+141.

[57] Columbia P. Co. v. Bucyrus etc. Co., 60–142, 62+115.

[58] Stearns County v. Smith, 25–131; State v. Dist. Ct., 26–233, 2+698; Hess v. Adamant Mfg. Co., 66–79, 68+774; Perkins v. Meilicke, 66–409, 69+220; May v. Grawerth, 86–210, 90+383.

[59] Williams v. McGrade, 13–174(165); Houston County v. Jessup, 22–552; Covert v. Clark, 23–539; Stearns County v. Smith, 25–131; Hooper v. Chi. etc. Ry., 37–52, 33+314; Houlton v. Gallow, 55–443, 57+141.

[60] Higgins v. Beveridge, 35–285, 28+506; Chubbuck v. Cleveland, 37–466, 35+362. See Williams v. McGrade, 13–174(165).

[61] Reynolds v. La Crosse etc. Co., 10–178 (144).

[62] Fowler v. Jenks, 90–74, 95+887, 96+914, 97+127.

485. Vacation—An unauthorized appearance by an attorney may be vacated on motion.[63]

486. Effect of failure to appear—A party waives no objection by a failure to appear.[64] He simply suffers a judgment to be entered against him as authorized by the summons and complaint.[65] When a defendant has not appeared, service of notices or papers, in the ordinary proceedings in an action, need not be made upon him. A written admission of service indorsed on a summons is not an appearance entitling defendant to notice of subsequent proceedings.[67]

APPLICATION OF PAYMENTS—See Mortgages, 6259; Payment, 7457.

APPURTENANCE—A right, privilege, or improvement belonging to a principal property.[68] Land never passes as appurtenant to land.[69]

ARBITRATION AND AWARD

Cross-References

See Insurance.

IN GENERAL

487. Favored in the law—Arbitration is a proceeding favored in the law—encouraged by liberal construction and presumptions of validity.[70]

488. Conclusiveness—Fraud—Mistake—As a general rule an award is conclusive, in the absence of fraud or of such gross mistake as necessarily implies bad faith or a failure to exercise an honest judgment.[71] Where the parties have by their agreement made the arbitrators judges between them of the law and the fact, they are bound by the decision, if fairly and honestly made, even though the arbitrators have erred in their conclusions of fact, or in the law which they have applied to them.[72] But an action will lie to set aside an award for fraud,[73] and in such an action one of the arbitrators who refused to join in the award may testify as to acts of partiality and misconduct on the part of the others.[74] Every presumption will be entertained in favor of the validity of an award. The burden of proof is on the party attacking it, and it will not be set aside except on clear and strong evidence.[75] The rule that an award is conclusive applies more particularly to disputes and controversies in the determination of which the arbitrator exercises both ministerial and judicial functions, and not to cases involving the exercise of ministerial acts alone, such as valuations, calculations, and measurements. As to the latter the decision of the arbitrator is not final or conclusive, unless the agreement of submission contains

[63] Stai v. Selden, 87–271, 92+6.
[64] Holgate v. Broome, 8–243(209).
[65] See § 4996.
[66] See § 6497.
[67] First Nat. Bank v. Rogers, 12–529 (437).
[68] Century Dict.; Carpenter v. Leonard, 5–155(119, 132); McDonald v. Mpls. L. Co., 28–262, 9+765; Winston v. Johnson, 42–398, 45+958. See Easements, 2858; Mechanics' Liens, 6040.
[69] McDonald v. Mpls. L. Co., 28–262, 9+765; White v. Jefferson, 124+573.
[70] Daniels v. Willis, 7–374(295).
[71] Daniels v. Willis, 7–374(295); Haubrick v. Johnston, 23–237; Goddard v. King, 40–164, 41+659; Nelson v. Betcher, 88–517, 93+661. See Boyd v. Hallowell, 60–225, 230, 62+125; Merchants Nat. Bank v. East Grand Forks, 94–246, 102+703.
[72] Goddard v. King, 40–164, 41+659.
[73] Dewey v. Leonard, 14–153(120).
[74] Levine v. Lanchashire Ins. Co., 66–138, 68+855.
[75] Daniels v. Willis, 7–374(295); Mosness v. German etc. Co., 50–341, 52+932; Hoit v. Berger, 81–356, 84+48; Christianson v. Norwich etc. Soc., 84–526, 88+16.

a stipulation to that effect, or an intention to be conclusively bound is fairly inferable therefrom.[76]

489. Award—What constitutes—An award must be final and certain, and so determine the matter submitted that an action between the same parties in regard to it will not afterwards lie. Every reasonable intendment will be made in favor of its finality and validity.[77] The admissions and declarations of common-law arbitrators, made during the course of an attempted arbitration, do not constitute an award; and, in the absence of any evidence that a final award was made by the arbitrators, it will be conclusively presumed that none was made.[78]

490. Who is an arbitrator—A person acting in the capacity of an appraiser under a lease has been held to be an arbitrator.[79]

491. Arbitrators must be impartial—An arbitration is a judicial proceeding, and the arbitrators, being alike the agents of both parties, and not of one party alone, are bound to exercise a high degree of judicial impartiality, without the slightest regard to the manner in which the duty has been devolved upon them. Arbitrators not avowedly selected as partisans are, indeed, bound, as in the execution of a joint trust, to look impartially at the true merits of the matter submitted to their judgment. It is the general rule that a person is disqualified to act as arbitrator who has any secret interest in the result or decision of the controversy, or if there exists any relationship or family connection between the arbitrator and a party to the submission, or if he had formed an opinion or is otherwise prejudiced in respect to the subject-matter.[80]

492. Hearing—Notice—An arbitration is void unless both parties have due notice of the time and place of meeting of the arbitrators and an opportunity to be heard.[81] But a fair opportunity to present a claim to arbitrators, which a party is entitled to, and to be present to meet the claim of his adversary, does not include the right to be present when the arbitrators are making up their award.[82] Arbitrators and witnesses need not be sworn unless the agreement requires it. The parties must be heard in the presence of each other.[83]

493. Repudiation of award—By mutual consent the parties may waive or repudiate the award.[84]

494. Enforcement of award—The only way to enforce the award is by an ordinary action.[85]

495. Submission by rule of court—Whether submission to arbitration "by rule of court" can be made in this state is an open question. The mere fact that the controversy agreed to be submitted is the subject of a pending action will not make a submission one "by rule of court."[86]

496. Effect on pending action—A submission to arbitration does not operate as a discontinuance or dismissal of a pending action involving the same matter.[87]

497. Bond—An arbitration bond should be so construed as to encourage the submission of disputes to arbitration.[88]

498. Revocation of submission—Either party may revoke a submission any time before the award is made.[89]

[76] Nelson v. Betcher, 88–517, 93+661.
[77] Hoit v. Berger, 81–356, 84+48.
[78] Miller v. Carnes, 95–179, 103+877.
[79] Earle v. Johnson, 81–472, 84+332.
[80] Produce R. Co. v. Norwich etc. Soc., 91–210, 97+875.
[81] Janney v. Goehringer, 52–428, 54+481.
[82] Segal v. Fred, 105–126, 117+225.
[83] Holdridge v. Stowell, 39–360, 40+259.
[84] Id.
[85] Id.
[86] Mpls. etc. Ry. v. Cooper, 59–290, 61+143.
[87] Hunsden v. Churchill, 20–408(360).
[88] Washburne v. Lufkin, 4–466(362) (bond held to require principal to perform award); Daniels v. Willis, 7–383(304) (conversion of property involved held a breach of a bond).
[89] Holdridge v. Stowell, 39–360, 40+259; Mpls. etc. Ry. v. Cooper, 59–290, 61+143.

AT COMMON LAW

499. In general—Either party may revoke the submission any time before the award is made. Arbitrators and witnesses need not be sworn unless the agreement requires it. The arbitrators must hear the parties in the presence of each other. When the award is made the authority of the arbitrators is terminated, and the only way to enforce the award is in an ordinary action subsequently brought.[90] It is competent for the parties, by mutual consent, to waive or repudiate an award. The waiver may be by oral agreement.[91] An award must be final and certain, and so determine the matters submitted that an action between the same parties in regard to it will not afterwards lie. Every reasonable intendment will be made in favor of its finality and validity.[92] An award is invalid if made without notice or opportunity to one of the parties to be heard.[93] If arbitrators decide the matter submitted to them honestly and fairly according to their judgments, the award will not be set aside because they decided the facts erroneously, or were mistaken in the law they applied to them or decided on an erroneous theory.[94] An action will lie to set aside an award for fraud,[95] and in such an action one of the arbitrators who refused to join in the award may testify as to acts of partiality and misconduct on the part of the others.[96] An agreement to arbitrate a definite legal obligation cannot oust the courts of jurisdiction.[97] An arbitration bond should be liberally construed so as to encourage the settlement of disputes by arbitration.[98] A person acting in the capacity of an appraiser under a lease is to all intents and purposes an arbitrator at common law.[99]

UNDER STATUTE

500. Statute not exclusive—The statute providing for arbitration is not exclusive. It does not abrogate common-law arbitration.[1]

501. Compliance with statute—The jurisdiction of the arbitrators under the statute over the matter referred to them depends on a compliance with the statute. It is a special jurisdiction, which can be created only in the manner prescribed by the statute. Every material requirement of the statute must be complied with.[2]

502. Agreement for submission—Under a former statute it was held essential that the agreement be acknowledged before a justice of the peace.[3] It is indispensable that the agreement name the arbitrators[4] and their names must be inserted before the acknowledgment.[5] The description of the subject-matter submitted need not be as specific as would be required in a pleading.[6] The agreement may stipulate against an appeal,[7] and it is advisable to make provision as to costs.[8] Where parties to a controversy execute an agreement to submit it to arbitration and it is clear that it was intended to be a statutory arbitration, but it is not valid as such, by reason of failing to comply with some es-

[90] Holdridge v. Stowell, 39–360, 40+259; Mpls. etc. Ry. v. Cooper, 59–290, 61+143.
[91] Georges v. Niess, 70–248, 73+644.
[92] Hoit v. Berger, 81–356, 84+48.
[93] Janney v. Goehringer, 52–428, 54+481.
[94] Goddard v. King, 40–164, 41+659.
[95] Dewey v. Leonard, 14–153(120).
[96] Levine v. Lancashire Ins. Co., 66–138, 68+855.
[97] Whitney v. Nat. Masonic A. Assn., 52–378, 54+184.
[98] Washburne v. Lufkin, 4–466(362); Daniels v. Willis, 7–383(304).
[99] Earle v. Johnson, 81–472, 84+332.
[1] R. L. 1905 § 4380; Earle v. Johnson, 81–472, 84+332.
[2] Barney v. Flower, 27–403, 7+823.
[3] Id.
[4] Holdridge v. Stowell, 39–360, 40+259.
[5] N. W. etc. Co. v. Channell, 53–269, 55+121.
[6] Heglund v. Allen, 30–38, 14+57.
[7] Daniels v. Willis, 7–374(295).
[8] Washburne v. Lufkin, 4–466(362).

sential requirement of the statute, it cannot have effect as a common-law submission.[9]

503. Time of making award—Extension—The parties may extend the time for making the award, and without the formalities required in the agreement for submission.[10]

504. Formal requisites of award—A former statute required the award to be attested by a subscribing witness, but it was held that a defect in this regard was not fatal.[11]

505. Scope of award—The award must cover all the matters submitted and be confined to those matters.[12]

506. Filing award—The court acquires jurisdiction of the proceeding by the filing of the award.[13] The award must be filed as soon as made,[14] and it may of course be filed in vacation.[15]

507. Confirmation by court—All objections to the award must be made on the motion to confirm or sooner.[16] The statute gives to the court authority to send the matter back to the arbitrators and to require them to go over the whole matter again, including the making of a new award if necessary. The court may also recommit with directions to the arbitrators to make their findings more specific.[17] The section, authorizing the court to recommit for a rehearing is enabling, not restrictive, and does not forbid a recommitment where a rehearing is unnecessary.[18] The motion to confirm may be brought on in vacation.[19] The filing of the award with the clerk gives the court jurisdiction and it is competent for the parties to waive all objections to the award on account of formal errors and irregularities and to authorize the clerk to enter judgment thereon at once, without confirmation by the court.[20]

508. Judgment—The judgment must conform to the award.[21] A judgment duly rendered upon an award has the same final and conclusive effect, in all respects, as judgments in civil actions, and it can only be impeached, reviewed, or set aside in the same manner that such judgments may be and for like cause.[22]

509. Vacating award on motion—The statute provides for the vacation of awards on motion.[23] The motion must be made prior to, or at the time of, the motion for confirmation.[24] An award may be set aside on the ground that it was procured by false testimony and fraudulent practices.[25] An award will not be set aside on the ground that the arbitrators did not act on all matters submitted to them, or that they exceeded their powers, unless the party complaining was prejudiced thereby.[26] An award may be set aside in part.[27]

510. Appeal—A judgment on an award is appealable the same as a judgment in an ordinary civil action.[28] The parties may stipulate against an appeal.[29] The appellant may make any objection to the validity of the submission, though not raised in the court below; but the supreme court will not hear any matter of error or irregularity in the proceedings after a valid submission, —as that, of three arbitrators, only two acted,—unless the objection was made in the trial court.[30]

[9] Holdridge v. Stowell, 39–360, 40+259.
[10] Heglund v. Allen, 30–38, 14+57.
[11] Lovell v. Wheaton, 11–92(57).
[12] Johnston v. Paul, 22–17.
[13] Lovell v. Wheaton, 11–92(57); Holdridge v. Stowell, 39–360, 40+259.
[14] R. L. 1905 § 4382.
[15] Lovell v. Wheaton, 11–92(57).
[16] Gaines v. Clark, 23–64.
[17] Johnston v. Paul, 22–17.
[18] Lovell v. Wheaton, 11–92(57).
[19] Id.; Heglund v. Allen, 30–38, 14+57.
[20] Lovell v. Wheaton, 11–92(57).
[21] Bouck v. Bouck, 57–490, 59+547.
[22] Johnston v. Paul, 23–46.
[23] R. L. 1905 § 4384.
[24] Gaines v. Clark, 23–64.
[25] Johnston v. Paul, 23–46.
[26] Daniels v. Willis, 7–374(295).
[27] Bouck v. Bouck, 57–490, 59+547.
[28] R. L. 1905 § 4386.
[29] Daniels v. Willis, 7–374(295).
[30] Gaines v. Clark, 23–64; Barney v. Flower, 27–403, 7+823; Heglund v. Allen, 30–38, 14+57.

ARCHITECT—See Contracts, 1853.
ARGUMENT OF COUNSEL—See Criminal Law, 2478; Trial, 9799.
ARRAIGNMENT—See Criminal Law, 2440.

ARREST

511. Definition—An arrest is defined by statute as the taking of a person into custody that he may be held to answer for a public offence.[31]

512. Without warrant—The statute prescribes the conditions under which an officer may make an arrest without a warrant.[32] He may do so for a public offence committed or attempted in his presence, whether the offence is a felony, misdemeanor, or infraction of a municipal ordinance.[33] He may arrest a person for the commission of a felony, though not committed in his presence, if he has reasonable cause for believing that such person committed it.[34] To authorize him to arrest without a warrant for an offence other than a felony committed in his presence, he must make it at the time; that is, he must at once set about the arrest and follow up the effort until the arrest is made. Where an officer allowed five hours to intervene without making an effort to make an arrest, it was held that his authority lapsed.[35] A village marshal has no right to arrest and take into his custody a person who has been found guilty of a violation of a village ordinance unless a writ of commitment is in his hands at the time he seeks to make such arrest. The fact that a commitment has been issued and delivered to him, which he has surrendered to the village attorney, will not justify taking defendant into his custody.[36] A private person may make an arrest without a warrant, under conditions prescribed by statute.[37] The power to arrest without a warrant is capable of great abuse and is therefore to be kept strictly within prescribed limits.[38] In making an arrest without a warrant the officer acts in his official capacity, and for an illegal arrest his sureties are liable.[39]

513. How made—Exhibiting warrant—The statute prescribes the manner of making an arrest.[40] The person to be arrested should be first notified of the purpose of the officer. No particular form of words is necessary. It is enough that the officer and his business is known. The expression "You are my prisoner," has been held sufficient. It is unnecessary to exhibit the warrant before making the arrest.[41] Generally the official character of the officer is presumed to be known by the party arrested, but, whether known or unknown, the officer must show his authority, if requested by the person arrested.[42]

514. Use of force—In making an arrest an officer is justified in using only such force as is reasonably necessary.[43] Handcuffing a prisoner is justified only when reasonably necessary. In passing upon the necessity, it has been held

[31] R. L. 1905 § 5225; Rhodes v. Walsh, 55–542, 552, 57+212; Steenerson v. Polk County, 68–509, 516, 71+687.
[32] R. L. 1905 § 5229.
[33] Wahl v. Walton, 30–506, 16+397; State v. Cantieny, 34–1, 9, 24+458; Seitner v. Ransom, 82–404, 85+158; State v. Leindecker, 91–277, 97+972.
[34] Cochran v. Toher, 14–385(293); Warner v. Grace, 14–487(364); Steenerson v. Polk County, 68–509, 516, 71+687.
[35] Wahl v. Walton, 30–506, 16+397.
[36] State v. Leindecker, 91–277, 97+972.
[37] R. L. 1905 § 5232; Warner v. Grace, 14–487(364); Judson v. Reardon, 16–431 (387); Steenerson v. Polk County, 68–509, 516, 71+687.
[38] Wahl v. Walton, 30–506, 16+397.
[39] Warner v. Grace, 14–487(364); Hall v. Tierney, 89–407, 95+219.
[40] R. L. 1905 § 5227.
[41] State v. Spaulding, 34–361, 25+793.
[42] Steenerson v. Polk County, 68–509, 516, 71+687.
[43] Rauma v. Lamont, 82–477, 481, 85+236.

proper for a jury to consider threats made by the prisoner's brother, and the fact that there was no prison at hand.[44]

515. Waiver of objections to arrest—Unless a person seasonably raises objections to the sufficiency of the warrant under which he was arrested, he will be deemed to have waived them.[45] Where a person pleads to an indictment or complaint, without objecting to his arrest without a warrant, he waives the objection.[46]

516. Resisting arrest—One may resist being arrested unlawfully and he may use force within reasonable bounds.[47]

517. Taking before magistrate—A private person making an arrest must promptly take the prisoner before a magistrate or deliver him to an officer.[48] An officer making an arrest without a warrant must promptly take the prisoner before a magistrate.[49]

517a. Second arrest for same offence—A second arrest for the same offence while the prisoner was in the custody of a committing magistrate to await the action of the grand jury has been held unauthorized and ground for discharge on habeas corpus.[50]

ARREST OF JUDGMENT—See Criminal Law, 2488; Judgments, 4988.

ARSON

518. Indictment—An indictment has been held sufficient for arson in the second degree, though it alleged essential matters under a videlicet and attempted to charge arson in both the first and second degrees. To charge arson in the first degree it is necessary to allege that there was a person in the building.[51]

519. Variance—A variance as to the possession of the property burned has been held immaterial.[52]

520. Evidence—Admissibility—Cases are cited below involving the admissibility of evidence.[53]

ARTICLE—See note 54.
AS—See note 55.

ASSAULT AND BATTERY

Cross-References

See Limitation of Actions, 5655.

CIVIL LIABILITY

521. Definitions—An assault is an attempt unlawfully to apply any actual force to the person of another, directly or indirectly. It may consist of the act

[44] Cochran v. Toher, 14–385(293).
[45] Rochester v. Upman, 19–108(78).
[46] State v. Fitzgerald, 51–534, 53+799.
[47] State v. Cantieny, 34–1, 4, 24+458; State v. Spaulding, 34–361, 25+793.
[48] Judson v. Reardon, 16–431(387).
[49] Cochran v. Toher, 14–385(293).
[50] State v. Riley, 109–437, 124+13.
[51] State v. Grimes, 50–123, 52+275.
[52] Id.
[53] State v. Grimes, 50–123, 52+275 (fact that a dwelling house took fire from a burning barn held admissible to prove that it was "endangered" within the meaning of the statute); State v. Yates, 99–461, 109+1070 (conversations of the defendant suggesting to another the burning of other property to secure the insurance held inadmissible).
[54] State v. Williams, 32–537, 21+746.
[55] Conehan v. Crosby, 15–13(1, 5); Haven v. Place, 28–551, 11+117; Noon v. Finnegan, 29–418, 13+197; Hayes v. Crane, 48–39, 50+925.

of using gestures toward another, giving him reasonable ground to believe that the assailant intends to apply actual force to his person. The term "assault" is often used as synonymous with "battery." It has been said that "the least or slightest wrongful and unlawful touching of the person of another is an assault." [56] An instruction defining assault as a wrongful threat to do bodily violence to another, with the present ability of the one who threatens to carry such threat into effect, has been sustained.[57] Mere words do not constitute an assault.[58] A battery is "an intentionally administered injury to the person" [59]—"an actual infliction of violence on the person." It includes assault.[60] An intent to injure is not an essential element of the wrong; it is sufficient if the act is unlawful.[61]

522. Who liable—A minor drank liquor furnished by the defendants. He became intoxicated, and while in that condition assaulted the plaintiff. There was no evidence that the defendants incited or aided the assault. It was held that they were not liable.[62] The plaintiff was injured in the saloon of the defendant by a third party pouring alcohol on his foot, while he was asleep, and then setting it on fire. The defendant was held liable.[63] Each of several joint wrongdoers is liable for the entire damages suffered.[64]

523. Self-defence—The rule as to self-defence is the same in civil and criminal actions. The rule is that "an act otherwise criminal is justifiable when done to protect the doer, or another whom he is bound to protect, from imminent personal injury, whenever such act appears to be only what is reasonably necessary to prevent the injury." [65] The necessity of using force in self-defence may be either real or apparent. But the mere belief of a person that it is necessary to use force to prevent an injury to himself is not alone sufficient to make out a case of self-defence, for the facts as they appear to him at the time must be such as reasonably to justify such belief.[66]

524. Forms of assault considered—Beating, kicking, bruising and the like; [67] shaking fist in face of a woman in a threatening manner; [68] taking possession of property during a temporary absence of the person in possession and forcibly resisting his return; [69] taking possession forcibly of a sewing machine upon default in payments on a conditional sale thereof; [70] pushing a woman out of her house and away from the place where men were attempting to construct a railway track on land which she claimed; [71] pouring alcohol on a person's foot and igniting it; [72] inciting a vicious dog to bite a person; [73] unnecessary force used in making an arrest; [74] and a surgical operation without the consent of the patient.[75]

[56] Mailand v. Mailand, 83–453, 86+445.
[57] Cressy v. Republic C. Co., 108–349, 122+484.
[58] Bucknam v. G. N. Ry., 76–373, 376, 79+98.
[59] Ott v. G. N. Ry., 70–50, 72+833.
[60] Greenman v. Smith, 20–418(370).
[61] Mohr v. Williams, 95–261, 104+12.
[62] Swinfin v. Lowry, 37–345, 34+22.
[63] Curran v. Olson, 88–307, 92+1124.
[64] Warren v. Westrup, 44–237, 46+347; Hirschman v. Emme, 81–99, 83+482; Colvill v. Langdon, 22–565.
[65] R. L. 1905 § 4751. See R. L. 1905 §§ 4895, 4906.
[66] Germolus v. Sausser, 83–141, 85+946; Mailand v. Mailand, 83–453, 86+445; Beck v. Mpls. U. Ry., 95–73, 103+746.
[67] Swinfin v. Lowry, 37–345, 34+22; Cofield v. McCabe, 58–218, 59+1005; Crosby v. Humphreys, 59–92, 60+843; Johanson v. Pioneer F. Co., 72–405, 75+719; Foran v. Levin, 76–178, 78+1047; Hirschman v. Emme, 81–99, 83+482; Watson v. Rinderknecht, 82–235, 84+798; Germolus v. Sausser, 83–141, 85+946; Mailand v. Mailand, 83–453, 86+445; McKenzie v. Banks, 94–496, 103+497; Ford v. Mpls. St. Ry., 98–96, 107+817.
[68] Mitchell v. Mitchell, 45–50, 47+308; Id., 60–12, 61+682; Plonty v. Murphy, 82–268, 84+1005.
[69] Jacobs v. Hoover, 9–204(189); Lobdell v. Keene, 85–90, 88+426.
[70] Fredericksen v. Singer Mfg. Co., 38–356, 37+453.
[71] Colvill v. Langdon, 22–565.
[72] Curran v. Olson, 88–307, 92+1124.
[73] Foran v. Levin, 76–178, 78+1047.
[74] Rauma v. Lamont, 82–477, 85+236.
[75] Mohr v. Williams, 95–261, 104+12.

525. Indecent assault—Cases are cited below involving indecent assaults upon women.[76]

526. Limitation of actions—An action for a battery which, under G. S. 1894 § 5138 (R. L. 1905 § 4078) must be brought within two years, is an action founded on an intentionally administered injury to the person.[77]

527. Pleading—It is sufficient to allege that the defendant "assaulted" the plaintiff without specifying the acts constituting the assault.[78] In an action for a simple assault and battery it is unnecessary to allege that it was wilful or malicious.[79] A complaint which shows actual violence inflicted on the person need not state that it was "with force" or "with force and arms."[80] Cases are cited below involving the sufficiency of complaints against masters for assaults committed by their servants.[81]

528. Variance—Cases are cited below involving questions of variance.[82]

529. Evidence—Sufficiency—Cases are cited below holding evidence sufficient,[83] or insufficient,[84] to justify a verdict for the plaintiff, and sufficient to require a submission of the question whether the plaintiff assaulted the defendant to the jury.[85]

530. Law and fact—Where the evidence is not conclusive, it is for the jury to determine whether the plaintiff assaulted the defendant;[86] and what are the proximate consequences of the wrongful act.[87] The question whether a person assaulted by another and threatened with bodily harm is justified in using force to repel the same, and whether he employs greater force than is reasonably necessary for that purpose, are questions for the jury to determine. The mere belief of the person using force under such circumstances is not alone sufficient to make out a case of self-defence, for the facts must be such as to justify that belief.[88] Where the evidence is conclusive the court may instruct the jury that they must return a verdict for the plaintiff for at least nominal damages;[89] or that the defendant was not justified in using force in self-defence.[90]

531. Damages—In general—Damages are recoverable for all the direct and proximate consequences of the wrong without regard to whether they are "natural" or "probable," or were or might have been anticipated by the wrongdoer.[91]

[76] Gardner v. Kellogg, 23–463 (fact that woman makes immediate complaint after assault and her condition and appearance at the time may be shown—exemplary damages recoverable); Schuck v. Hager, 24–339 (fact that plaintiff's conduct toward defendant during time of alleged assaults was friendly held admissible—chastity and good moral character of defendant admissible); Witzka or Moudry, 83–78, 85+911 (fact that woman fails to make outcry or to complain afterwards is an item of evidence against her but raises no legal presumption—whether sexual intercourse with child under age of consent constitutes an assault regardless of her consent is an open question—evidence held not to show that plaintiff consented to an assault on her person followed by sexual intercourse); Beardmore v. Barton, 108–28, 121+228 (assault of driver of hack upon passenger—verdict for $2,000 against owner of hack held not excessive).

[77] Ott v. G. N. Ry., 70–50, 72+833.

[78] Mitchell v. Mitchell, 45–50, 47+308.

[79] Andrews v. Stone, 10–72(52). See Mohr v. Williams, 95–261, 104+12.

[80] Greenman v. Smith, 20–418(370).

[81] 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.

[82] Ward v. Haws, 5–440(359); Jacobs v. Hoover, 9–204(189).

[83] Hirschman v. Emme, 81–99, 83+482; Plonty v. Murphy, 82–268, 84+1005; Rauma v. Lamont, 82–477, 85–236; Witzka v. Moudry, 83–78, 85+911; Curran v. Olson, 88–307, 92+1124; Erickson v. Sorby, 90–327, 96+791; Hedlund v. Cresien, 90–354, 96+1131; Faber v. Schiwek, 93–417, 101+1133; McKenzie v. Banks, 94–496, 103+497; Beck v. Mpls. U. Ry., 95–73, 103+746; Gulbertson v. Hanson, 95–338, 104+2.

[84] Cofield v. McCabe, 58–218, 59+1005; Rector v. Anderson, 96–123, 104+884.

[85] Mailand v. Mailand, 83–453, 86+445.

[86] Mailand v. Mailand, 83–453, 86+445; Plonty v. Murphy, 82–268, 84+1005.

[87] Plonty v. Murphy, 82–268, 84+1005.

[88] Beck v. Mpls. U. Ry., 95–73, 103+746.

[89] Crosby v. Humphreys, 59–92, 60+843.

[90] Germolus v. Sausser, 83–141, 85+946.

[91] Crosby v. Humphreys, 59–92, 60+843 (charge that plaintiff was entitled to at

General damages are recoverable without being specially pleaded.[92] In an action against several joint wrongdoers damages are to be assessed according to what the jury think the most culpable should pay.[93] Cases are cited below holding damages excessive,[94] or not excessive,[95] or inadequate.[96]

532. Exemplary damages—Where the wrongful act was done wilfully, wantonly, or maliciously, it is discretionary with the jury to award exemplary damages to a reasonable amount.[97] The rule applies though the act is punishable criminally.[98]

533. Mitigation of damages—It seems to be the rule in this state that mitigating circumstances may be considered in reduction of compensatory as well as exemplary damages.[99] Facts tending to disprove actual malice may be considered in mitigation of damages.[1]

CRIMINAL LIABILITY

534. What constitutes—In general—The forcible ejection of a passenger from a train in motion is an assault.[2]

535. What constitutes assault armed with dangerous weapon—A dangerous weapon is one likely to produce death or great bodily harm. A large stone may be a dangerous weapon. The place of arming is immaterial. The arming must have occurred prior to the encounter, but if a general disturbance exists it is unnecessary that it should have taken place prior to the disturbance.[3] The accused pointed a loaded pistol at H, saying "I want you to get right out of this yard, or I'll kill you," and then shot and wounded him. There was no evidence of facts constituting a justification or legal excuse. Held, an assault.[4]

least nominal damages held proper); Plonty v. Murphy, 82–268, 84+1005 (miscarriage); Watson v. Rinderknecht, 82–235, 84+798 (held error to exclude evidence to prove that certain injuries received by plaintiff in the army had been aggravated by the assault); Gorstz v. Pinske, 82–456, 85+215 (damages recoverable for pain and loss of time); Ford v. Mpls. St. Ry., 98–96, 107+817 (defendant struck plaintiff under mistaken notion that the latter had struck him—plaintiff held entitled to substantial damages).

[92] Andrews v. Stone, 10–72(52).

[93] Warren v. Westrup, 44–237, 46+347.

[94] Mitchell v. Mitchell, 60–12, 61+682 (verdict for $1,000).

[95] Hirschman v. Emme, 81–99, 83+482 (verdict for $1,000); Plonty v. Murphy, 82–268, 84+1005 (verdict for $300—miscarriage); Rauma v. Lamont, 82–477, 85+236 (verdict for $450); Hedlund v. Cresien, 90–354, 96+1131 (verdict for $800); Faber v. Schiwek, 93–417, 101+1133 (verdict for $1,500); Gulbertson v. Hanson, 95–338, 104+2 (verdict for $300); Baumgartner v. Hodgdon, 105–22, 116+1030 (verdict for $1,063); Beardmore v. Barton, 108–28, 121+228 (indecent assault—verdict for $2,000).

[96] Ford v. Mpls. St. Ry., 98–96, 107+817 (verdict for one dollar).

[97] Jacobs v. Hoover, 9–204(189); Boetcher v. Staples, 27–308, 7+263; Crosby v. Humphreys, 59–92, 60+843; Mitchell v. Mitchell, 60–12, 61+682; Gorstz v. Pinske, 82–456, 85+215; Rauma v. Lamont, 82–477, 85+236; Germolus v. Sausser, 83–141, 85+946; Faber v. Schiwek, 93–417, 101+1133; Anderson v. International H. Co., 104–49, 116+101; Baumgartner v. Hodgdon, 105–22, 116+1030.

[98] Boetcher v. Staples, 27–308, 7+263.

[99] Crosby v. Humphreys, 59–92, 60+843. See Jacobs v. Hoover, 9–204(189); Gorstz v. Pinske, 82–456, 85+215.

[1] Crosby v. Humphreys, 59–92, 60+843 (insulting language); Fredericksen v. Singer Mfg. Co., 38–356, 37+453 (contract authorizing vendor to seize sewing machine); Gorstz v. Pinske, 82–456, 85+215 (driving over portion of highway seeded by defendant); Jacobs v. Hoover, 9–204 (189) (action for assault on wife—prior misconduct of husband held inadmissible in mitigation); Colvill v. Langdon, 22–565 (assault on occupant of land—fact that defendant was acting under authority of a railway company and that there were condemnation proceedings pending for the land held inadmissible); Baumgartner v. Hodgdon, 105–22, 116+1030 (ridicule of a horse of the defendant held not a ground for mitigation of damages).

[2] State v. Kinney, 34–311, 25+705.

[3] State v. Dineen, 10–407(325).

[4] State v. Tripp, 34–25, 24+290.

Premeditation, except as implied in the intent to do great bodily harm, is not an essential element.[5] Intent to do great bodily harm is essential.[6]

536. Breach of peace—Assault and battery, however privately committed, is a breach of the public peace.[7]

537. Self-defence—Justification—A party who is assaulted, may, without retreating at all, use sufficient force to prevent the assault; but he must use no more force than may be necessary to prevent the violence. A mere assault will not justify a battery by the person assaulted unless the battery is necessary to prevent injury to himself. The necessity of using force to repel an assault and the amount of force required are questions for the jury.[8] A man has no right to commit an assault with intent to do great bodily harm to another for a wrong that he has not reasonable ground to believe to be dangerous to himself. If the evidence shows no reasonable ground for the use of force in self-defence the court may refuse to charge on the subject.[9] A parent has no right to protect his child in the commission of an assault.[10]

538. Drunkenness—Since an actual intent to do great bodily harm is an essential element of the offence, drunkenness which deprives a person of the capacity to have such an intent, is a defence, if it was not voluntarily induced with a view to the commission of the offence.[11]

539. Indictment—An indictment under Laws 1864 c. 41, which designated the offence only as "an assault with intent to do great bodily harm," but which, in specifying the acts done, alleged that the assault was with a dangerous weapon, with intent to do great bodily harm, held sufficient. If such an indictment shows that the assault was made with intent to do great bodily harm, the words "feloniously" or "criminally" need not be used to characterize it. The words "deliberately," "premeditatedly" and "with malice aforethought" are unnecessary.[12] An allegation of "beating and wounding" held surplusage.[13] A description of the weapon as "a dangerous weapon, to-wit, a large heavy stone," held sufficient.[14] A description, "with a weapon, to-wit, a knife," "the said knife being then and there a weapon and instrument likely to produce grievous bodily harm," held sufficient.[15] An indictment under G. S. 1866 c. 94 § 33 charged that the accused being "armed with dangerous weapons (describing them), did feloniously assault one A. with intent to do him, the said A. great bodily harm," etc. Held, that the description of the offence was sufficiently certain.[16] An indictment is sufficient if it directly charges the accused with acts coming fully within the statutory description of the offence, substantially in the words of the statute, without any further expansion of the matter.[17] An indictment held not to charge two offences.[18]

540. Complaint for simple assault—A complaint for simple assault alleging that the defendant "did wilfully and unlawfully assault the complainant with a revolver," has been held sufficient where objection was first raised on appeal.[19]

541. Evidence—Admissibility—Cases are cited below involving the admissibility of evidence.[20]

[5] State v. Garvey, 11–154(95).
[6] State v. Garvey, 11–154(95); State v. Welch, 21–22.
[7] State v. Bruckhauser, 26–301, 3+695.
[8] Gallagher v. State, 3–270(185).
[9] State v. Tripp, 34–25, 24+290.
[10] State v. Herdina, 25–161.
[11] State v. Garvey, 11–154(95); State v. Herdina, 25–161; State v. Grear, 28–426, 10+472.
[12] State v. Garvey, 11–154(95).
[13] State v. Dineen, 10–407(325).
[14] Id.
[15] State v. Henn, 39–476, 40+572.
[16] State v. Shenton, 22–311.
[17] State v. Garvey, 11–154(95); State v. Shenton, 22–311.
[18] State v. Dineen, 10–407(325).
[19] State v. Bell, 26–388, 5+970.
[20] State v. Henn, 39–476, 40+572 (threats to commit the assault uttered by the accused a few hours before the assault held

542. Accomplice—Corroboration—Testimony of an accomplice held sufficiently corroborated.[21]

543. Law and fact—It is for the jury to determine the question of intent to do great bodily harm, but such intent may be inferred from the doing of the act and the character of the weapon used.[22] It is for the jury to determine the necessity of using force in self-defence.[23]

544. Conviction for lesser offence—A person indicted for an assault with intent to do great bodily harm, being armed with a dangerous weapon, may be convicted for a simple assault.[24]

545. Accessory—To convict of an assault with a dangerous weapon, with intent to do great bodily harm, one who comes to the assistance of the person holding the weapon, it is unnecessary that he should have aided in the previous arming of such person.[25]

546. Assault with intent to kill—Under R. S. 1851 c. 100 § 32 an intention to murder the party assaulted was necessary. A charge defining murder in a prosecution under that section held erroneous.[26]

547. Evidence—Sufficiency—Evidence held sufficient to warrant a conviction.[27]

548. Variance—A variance as to the person assaulted is fatal.[28]

INDECENT ASSAULT

549. Nature of offence—The crime defined by section 245 of the Penal Code (R. L. 1905 § 4932) is in its legal tenor and import, an indecent assault. "Indecent liberties" with or on the person of a female without her consent, and an "indecent assault" upon her, are in effect convertible expressions. The term "indecent assault" is but the statutory definition of the crime epitomized.[29] Only such indecent liberties are within the purview of the statute as did not constitute a felony before its enactment. The words "such indecent liberties," in the last clause of the section, refer to the indecent liberties mentioned in the first clause thereof.[30]

550. Indictment—The particular acts constituting the indecent liberties need not be alleged; but it is necessary to allege that such acts did not amount to a rape or an assault or attempt to commit rape.[31]

551. Conviction of lesser offence—Under an indictment for an assault with intent to carnally know and abuse a child, the accused may be convicted of taking indecent liberties with her person, if within the allegations of the indictment.[32]

552. Verdict—Sufficiency—A verdict of "guilty of an indecent assault" sufficiently describes the offence.[33]

ASSENT—See note 34.

ASSESSMENTS FOR LOCAL IMPROVEMENTS—See Drains; Municipal Corporations, 6850.

admissible); State v. Sauer, 42–258, 44+115 (evidence of conversation between the defendant's wife and the police officer arresting him held admissible).

[21] State v. Adamson, 73–282, 76+34.

[22] State v. Dineen, 10–407(325); State v. Garvey, 11–154(95).

[23] Gallagher v. State, 3–270(185).

[24] State v. Gummell, 22–51.

[25] State v. Herdina, 25–161.

[26] Bonfanti v. State, 2–123(99).

[27] State v. Herdina, 25–161; State v. Tripp, 34–25, 24+290; State v. Kinney, 34–311, 25+705; State v. Bragg, 90–7, 95+578.

[28] State v. Bolyson, 3–438(325).

[29] State v. West, 39–321, 40+249.

[30] State v. Kunz, 90–526, 97+131.

[31] Id.

[32] State v. West, 39–321, 40+249.

[33] Id.

[34] Patterson v. Stewart, 41–84, 93, 42+926.

ASSESSORS—See Counties, 2304; Taxation, 9194.
ASSETS—See note 35.
ASSIGNATION—See Disorderly House.
ASSIGNMENT OF ERRORS—See Appeal and Error, 357–367; Criminal Law, 2498; New Trial, 7091.

ASSIGNMENTS

Cross-References

See Bills and Notes, 930; Judgments, 5089, 5090; Mortgages, 6276.

IN GENERAL

553. Definition—In its general sense an assignment is a transfer of property. To assign is to make over a right to another.[36] An assignment is a transfer or making over to another of the whole of any property, real or personal, in possession or in action, or of any estate or right therein.[37]

554. What constitutes—An order on a debtor by his creditor directing him to pay his indebtedness to the person named therein, and an acceptance thereof by the debtor, operate as an assignment of the debt.[38] An order attached to an account, directing its payment to the party named in the order, and delivered to him, operates as an assignment of the debt or account, though the order is not accepted by the debtor, and is valid as against a subsequent garnishment.[39] A promise by a debtor to pay his creditor out of a certain fund is not ordinarily an assignment of the fund.[40] An order or draft on a fund is sometimes an assignment of the fund.[41] An agreement between an attorney and client has been held not an assignment of a cause of action.[42]

555. Equitable assignment—There may be an equitable assignment where the owner of property, intending to transfer it to another, does all that is in his power to give effect to such intention, or where, by mistake or inadvertence, some formality to a legal transfer is omitted, but there can be none except to carry into effect the actual intention.[43]

556. A contract—An assignment is a contract between the assignor and assignee.[44] It is a transfer by contract or act of the parties, rather than by operation of law.[45]

557. Consideration—A pre-existing indebtedness has been held a sufficient consideration for an assignment.[46]

558. Mode of assigning things in action—No particular form of words is necessary in making an assignment of things in action. The delivery of the written evidence of a debt with intent to assign is sufficient.[47] Except as pro-

[35] Hutchins v. St. P. etc. Ry., 44–5, 46+79; Minn. etc. Co. v. Langdon, 44–37, 46+310.

[36] Guile v. McNanny, 14–520(391); Hoag v. Mendenhall, 19–335(289); Banning v. Sibley, 3–389(282); Paine v. Smith, 33–195, 499, 24+305; Burke v. Backus, 51–174, 178, 53+458.

[37] Brown v. Crookston Agr. Assn., 34–545, 26+907.

[38] Baylor v. Butterfass, 82–21, 84+640. See Conroy v. Ferree, 68–325, 71+383; Laramee v. Tanner, 69–156, 71+1028.

[39] Union etc. Co. v. Kilgore, 65–497, 67+1017.

[40] Hale v. Dressen, 76–183, 78+1045. See Canty v. Latterner, 31–239, 17+385; Second Nat. Bank v. Sproat, 55–14, 56+254.

[41] Lewis v. Traders' Bank, 30–134, 14+587; Griggs v. St. Paul, 56–150, 57+461; Brady v. Chadbourne, 68–117, 70+981. See § 982.

[42] Herrick v. Mpls. etc. Ry., 32–435, 21+471.

[43] Simonton v. First Nat. Bank, 24–216, 219.

[44] St. Anthony M. Co. v. Vandall, 1–246 (195).

[45] Burke v. Backus, 51–174, 178, 53+458.

[46] Bradley v. Thorne, 67–281, 69+909.

[47] Hurley v. Bendel, 67–41, 69+477; Crone v. Braum, 23–239; MacDonald v. Knee-

vided by R. L. 1905 § 3502 [48] and the statute of frauds [49] an oral assignment is sufficient.[50] The words "right, title, and interest" are often employed.[51]

559. Duty of assignor to assignee—An assignor occupies a position of trust toward his assignee and is not allowed to thwart him in realizing on the claim.[52]

560. Partial assignments—An assignment of a part of an entire thing in action may be made and the equitable interests of the assignee will be protected. But the assignee cannot maintain a separate and independent action for his share, unless the debtor recognizes the assignment. The proper practice is for the assignee and assignor to join as plaintiffs. If the assignor refuses to join as a plaintiff, he may be made a defendant, the reasons being stated in the complaint.[53] An assignment of a judgment in part is not valid unless recorded as provided by statute.[54]

561. Notice—Notice to the obligor is not essential to the validity of an assignment, as between the assignor and the assignee, or as between the assignee and creditors of the assignor.[55] But until receiving notice of an assignment the obligor may regard the assignor as owner and pay the debt to him, or acquire a claim against him which may be used as a setoff against the assignee.[56] Until the obligor receives such notice he may deal with the assignor as if no assignment had been made. The general rule applies between attorney and client.[57] A cashier has been held not authorized to receive notice of an assignment of wages by an employee.[58] Notice fixes the rights of the parties and protects the assignee. Payment to the assignor after notice will not prejudice the assignee.[59] Knowledge of facts sufficient to put the obligor upon inquiry may possibly be equivalent to notice.[60] A notice of an assignment may protect an assignee under a subsequent assignment.[61]

562. Who may contest—One having no interest in property cannot question an assignment of it by the owner.[62] If the assignor admits an assignment, and the rights of third parties are not involved, the debtor cannot question it, when he has no defence to the claim as against the assignor.[63] A provision in a contract for the purchase of land to the effect that no assignment shall be binding on the vendor, unless approved, cannot be taken advantage of by a subsequent assignee of the contract, as against a prior assignee.[64]

WHAT ASSIGNABLE

563. Common-law rule—At common law a thing in action was not assignable so as to authorize an assignee to sue thereon in his own name.[65] In equity

land, 5–352(283); Blakely v. LeDuc, 22–476; Jackson v. Sevatson, 79–275, 82+634; Smith v. Meyer, 84–455, 87+1122; State v. Hastings, 24–78; Lord v. Dearing, 24–110; Chemedlin v. Prince, 15–331(263, 269).

[48] Baylor v. Butterfass, 82–21, 84+640; Burton v. Gage, 85–355, 88+997.

[49] Burton v. Gage, 85–355, 88+997. See Shove v. Martine, 85–29, 88+254, 412.

[50] Hurley v. Bendel, 67–41, 69+477. See Shove v. Martine, 85–29, 88+254, 412.

[51] Comfort v. Creelman, 52–280, 53+1157.

[52] Sherwood v. O'Brien, 58–76, 59+957.

[53] Canty v. Latterner, 31–239, 17+385; Dean v. St. P. etc. Ry., 53–504, 55+628; Schilling v. Mullen, 55–122, 56+586.

[54] Wheaton v. Spooner, 52–417, 54+372.

[55] MacDonald v. Kneeland, 5–352(283); Williams v. Pomeroy, 27–85, 6+445; Lewis v. Bush, 30–244, 15+113; Riley v. Mitchell, 36–3, 29+588; Quigley v. Welter, 95–383, 104+236.

[56] Dodd v. Brott, 1–270(205); Chisholm v. Clitherall, 12–375(251); Linn v. Rugg, 19–181(145); Martin v. Pillsbury, 23–175; Olson v. N. W. etc. Co., 65–475, 68+100; Nielsen v. Albert Lea, 91–388, 98+195; Graham v. Evans, 39–382, 40+368.

[57] Nielsen v. Albert Lea, 91–388, 98+195.

[58] Strauch v. May, 80–343, 83+156.

[59] Schilling v. Mullen, 55–122, 56+586; Brady v. Chadbourne, 68–117, 70+981.

[60] Nielsen v. Albert Lea, 91–388, 98+195.

[61] Linn v. Rugg, 19–181(145).

[62] Haubrick v. Johnston, 23–237.

[63] Cornish v. Marty, 76–493, 79+507.

[64] McPheeters v. Ronning, 95–164, 103+889.

[65] Spencer v. Woodbury, 1–105(82); Chisholm v. Clitherall, 12–375(251); Anchor I. Co. v. Kirkpatrick, 59–378, 383, 61+29.

the rule was otherwise,[66] and the assignor held the legal title in trust for the assignee.[67]

564. Test of assignability—If a cause of action survives to the personal representatives of a decedent it is assignable; otherwise not.[68]

565. Rights of action ex delicto—It is the general rule that a right of action for a personal tort is not assignable,[69] but a verdict in an action for a personal tort may be assigned.[70] A right of action for an injury to property is assignable.[71]

566. Wages—An assignment of wages to be earned in the future under an existing contract of employment, if made in good faith and for a valuable consideration, is valid, even though the employment is for no definite period and terminable at any time by either party. And such an assignment may be made as security for either present indebtedness or future advances.[72] But an assignment of wages to become due, without limit as to amount or time, and without acceptance by the employer, and without notice to an attaching creditor, is void as to such creditor.[73]

567. Official fees—It is the general rule that official salaries and fees cannot be assigned,[74] but it has been held that a sheriff may assign to a deputy all the fees pertaining to the services to be rendered by such deputy.[75]

568. Liens—A mechanic's lien,[76] and the lien of an attorney on a judgment,[77] are assignable.

569. Held assignable—A beneficial interest in a contract for work and labor;[78] a right of action for breach of covenant of seizin;[79] a right of action for breach of a covenant against incumbrances;[80] a right of action on a public contractor's bond;[81] an indorsement of a note, including a contract guaranteeing its payment;[82] a guaranty of payment;[83] a right of action against a carrier for failure to carry safely;[84] a claim for rents to accrue;[85] a claim against a mortgagee for money misappropriated on foreclosure;[86] a claim of a contractor against a city;[87] a claim of a landlord for his share of a crop;[88] a right to a soldier's additional homestead;[89] an account for the services of a threshing machine outfit;[90] the right of a ward to recover his estate;[91] a consummate right of dower;[92] a right of action on an obligation in favor of joint payees;[93]

[66] Id.
[67] Sherwood v. O'Brien, 58–76, 59+957.
[68] Tuttle v. Howe, 14–145(113); Harbord v. Cooper, 43–466, 45+860; Haugen v. Sundseth, 106–129, 134, 118+666; State v. G. N. Ry., 106–303, 327, 119+202. But see Hammond v. Peyton, 34–529, 27+72; Law v. Butler, 44–482, 47+53.
[69] Hunt v. Conrad, 47–557, 50+614 (false imprisonment); Hammons v. G. N. Ry., 53–249, 54+1108 (assault); Boogren v. St. P. C. Ry., 97–51, 106+104 (personal injury resulting from negligence).
[70] Kent v. Chapel, 67–420, 70+2.
[71] Hansen v. Wyman, 105–491, 117+926.
[72] O'Connor v. Meehan, 47–247, 49+982; Quigley v. Welter, 95–383, 104+236. See 14 Harv. L. Rev. 378.
[73] Steinbach v. Brant, 79–383, 82+651; Leitch v. N. P. Ry., 95–35, 103+704. See Baylor v. Butterfass, 82–21, 23, 84+640; Dyer v. Schneider, 106–271, 118+1011.
[74] 10 Harv. L. Rev. 315.
[75] Pioneer P. Co. v. Sanborn, 3–413(304).
[76] Tuttle v. Howe, 14–145(113); Kinney v. Duluth Ore Co., 58–455, 60+23.
[77] Sibley v. Pine County, 31–201, 17+337.
[78] Bates v. Richards, 56–14, 57+218; Burton v. Gage, 85–355, 88+997.
[79] Kimball v. Bryant, 25–496; Lowry v. Tilleny, 31–500, 18+452.
[80] Randall v. Macbeth, 81–376, 84+119.
[81] Sepp v. McCann, 47–364, 50+246; Salisbury v. Keigher, 47–367, 50+246.
[82] Harbord v. Cooper, 43–466, 45+860; Phelps v. Sargent, 69–118, 71+927; Wood v. Bragg, 75–527, 78+93.
[83] Anchor L. Co. v. Kirkpatrick, 59–378, 61+29.
[84] Blakely v. LeDuc, 22–476.
[85] Farmers T. Co. v. Prudden, 84–126, 86+887. See Potts v. Newell, 22–561.
[86] Lynott v. Dickerman, 65–471, 67+1143.
[87] Dickson v. St. Paul, 97–258, 106+1053.
[88] Potts v. Newell, 22–561.
[89] Webster v. Luther, 50–77, 52+271; Tuman v. Pillsbury, 60–520, 63+104; Rogers v. Clark, 104–198, 116+739.
[90] Hurley v. Bendel, 67–41, 69+477. See Baylor v. Butterfass, 82–21, 84+640; Shove v. Martine, 85–29, 88+254, 412.
[91] Jordan v. Secombe, 33–220, 22+383.
[92] Dobberstein v. Murphy, 64–127, 66+204.
[93] Semper v. Coates, 93–76, 100+662.

a time check issued to an employee;[94] a cause of action for malicious attachment of property;[95] the good will of a business.[96]

570. Held not assignable—A right of re-entry for a breach of a condition subsequent;[97] a vendor's lien;[98] a license to maintain a sluice-dam[99] and an exemption from taxation, have been held not assignable.[1] Possibly a cause of action for negligence in not notifying an indorser is not assignable.[2] A right of action to set aside a fraudulent conveyance is probably not assignable by an assignee in insolvency.[3] At common law no interest could vest by an assignment of chattels not in esse, but this rule did not apply to crops to be raised by the assignor on land then owned by him or in his possession.[4]

EFFECT

571. In general—An assignee of a non-negotiable thing in action stands in the shoes of his assignor. He acquires equal, but no greater rights, than his assignor. The purchaser of a thing in action must always abide by the case of the person from whom he buys.[5] An assignee of a thing in action subject to a lien takes subject to the lien.[6]

572. Assignee takes subject to equities—It is the general rule that an assignee of a non-negotiable thing in action takes it subject to all equities existing against it in the hands of his assignor at the time of the assignment or before notice thereof. The term "equities" in this connection means any defence, legal or equitable, or setoff.[7] But such an assignee does not take subject to the equities of third parties of which he had no notice.[8] The doctrine of "latent equities" does not prevail in this state. If A assigns to B a right of action against C, and B assigns the same to D, the latter takes it subject to any equities in A against B, in absence of an estoppel.[9] A counterclaim can only be used against an assignee as a setoff and not as the basis of an affirmative judgment.[10] The statute saving the right of defence and setoff in case of assignment was intended solely for the benefit of the debtor. Where a third party stood in the position of the debtor it was held that he could not interpose a claim of his own.[11] A right of action under a covenant against incumbrances is not an ordinary thing in action within the rule allowing a setoff or defence by the covenantor.[12]

573. Same—Successive assignees—As between successive assignees of a thing in action by express assignment from the same person, the one prior in point of time will be protected, though neither the debtor nor the subsequent assignee has notice.[13]

[94] Citizens S. Bank v. Bonnes, 76–45, 78+875.
[95] Hansen v. Wyman, 105–491, 117+926.
[96] Haugen v. Sundseth, 106–129, 118+666.
[97] Ohio I. Co. v. Auburn I. Co., 64–404, 67+221.
[98] Hammond v. Peyton, 34–529, 27+72; Law v. Butler, 44–482, 47+53.
[99] Mille Lacs I. Co. v. Bassett, 32–375, 20+363.
[1] State v. G. N. Ry., 106–303, 327, 119+202.
[2] Borup v. Nininger, 5–523(417).
[3] Minn. T. M. Co. v. Langdon, 44–37, 44, 46+310.
[4] Minn. L. O. Co. v. Maginnis, 32–193, 20+85.
[5] MacDonald v. Kneeland, 5–352(283).
[6] Comfort v. Creelman, 52–280, 53+1157.
[7] R. L. 1905 § 4054; Brisbin v. Newhall, 5–273(217); State v. Lake City, 25–404; Martin v. Pillsbury, 23–175; Way v. Colyer, 54–14, 55+744; Wyvell v. Barwise, 43–171, 45+11; Webb v. Michener, 32–48, 19+82; Ames v. Richardson, 29–330, 13+137.
[8] Newton v. Newton, 46–33, 48+450; Plymouth C. Co. v. Seymour, 67–311, 69+1079; Moffett v. Parker, 71–139, 73+850. See Quigley v. Welter, 95–383, 104+236.
[9] Brown v. Equitable L. A. Soc., 75–412, 78+103, 671, 79+968. See MacDonald v. Kneeland, 5–352(283).
[10] Davis v. Sutton, 23–307; Webb v. Michener, 32–48, 19+82; Lynch v. Free, 64–277, 66+973.
[11] Quigley v. Welter, 95–383, 104+236.
[12] Randall v. Macbeth, 81–376, 84+119.
[13] MacDonald v. Kneeland, 5–352(283); Burton v. Gage, 85–355, 88+997; Fairbanks v. Sargent, 104 N. Y. 108.

574. Implied warranty of title, etc.—An assignor of a claim impliedly warrants that it is a valid obligation of the obligor and that his own title is good, but there is no implied warranty as to the value of the claim.[14] One who purchases from the owner thereof an order from the manufacturer for the delivery of personalty is justified in assuming that the order is valid and free from defences, in the absence of any representations to the contrary.[15]

575. Assignment carries securities and remedies—The assignment of a thing in action carries with it, unless expressly reserved, every assignable remedy, lien or security available by the assignor.[16] An assignment of a debt secured by mortgage carries the mortgage as an incident of the debt.[17] An assignment of a note has been held not to carry a cause of action for negligence in not notifying the indorser.[18] An assignment of a debt carries a security, though the debt and security are in a different form from what the parties supposed.[19]

576. Estoppel—The obligor may be estopped from asserting equities against an assignee.[20]

ACTIONS

577. Pleading—Cases are cited below involving questions of pleading.[21]

ASSIGNMENTS FOR BENEFIT OF CREDITORS

Cross-References

See Conflict of Laws, 1559; Fraudulent Conveyances, 3876; Insolvency.

IN GENERAL

578. Right to make—The right to make an assignment for the benefit of creditors exists independent of statute.[22] The existence of a bankrupt act does not suspend the right.[23]

[14] Paine v. Smith, 33–495, 24+305. See § 8571.

[15] Riley v. Galarneault, 103–165, 114+755.

[16] Schlieman v. Bowlin, 36–198, 30+879 (bond in replevin); Anchor I. Co. v. Kirkpatrick, 59–378, 61+29 (a guaranty of payment); Bennett v. McGrade, 15–132(99) (appeal bond); Lahmers v. Schmidt, 35–434, 29+169 (promise to pay a debt); Blakeley v. LeDuc, 22–476 (rights growing out of a judgment); Harbord v. Cooper, 43–466, 45+860 (a guaranty of payment); Clifford v. N. P. Ry., 55–150, 56+590 (a right to costs); Kinney v. Duluth Ore Co., 58–455, 60+23 (right to file lien statement); Bovey v. Tucker, 48–223, 50+1038 (right to redeem); Wood v. Bragg, 75–527, 78+93 (guaranty of payment); Abrahamson v. Lamberson, 72–308, 75+226 (damages for waste); Spoon v. Frambach, 83–301, 86+106 (right to take possession of property under a conditional sale note); Woodland Co. v. Mendenhall, 82–483, 85+164 (vendor's lien); Abrahamson v. Lamberson, 79–135, 81+768 (right of vendee to offset his damages); Longfellow v. McGregor, 61–494, 63+1032 (bond to rebuild a house); Anderson v. Minn. L. & T. Co., 68–491, 71+665, 819 (right to surplus on sales); Kent v. Chapel, 67–420, 70+2 (judgment subsequently recovered); Longfellow v. McGregor, 56–312, 57+926 (bond for security of debt); Sepp v. McCann, 47–364, 50+246 (right of action on public contractor's bond); Farmers T. Co. v. Prudden, 84–126, 86+887 (remedies for collection of rent).

[17] See § 6276.

[18] Borup v. Nininger, 5–523(417).

[19] Meeker Co. Bank v. Young, 51–254, 53+630.

[20] Cochran v. Stewart, 21–435; Id., 57–499, 59+543; Brown v. Equitable L. A. Soc., 75–412, 78+103, 671, 79+968.

[21] Russell v. Minn. Outfit, 1–162(136) (general allegation of consideration); Hoag v. Mendenhall, 19–335(289) (note—"duly assigned"); Foster v. Johnson, 39–378, 40+255 (assignment of mortgage and note); Topping v. Clay, 65–346, 68+34 (assignment of note); Morley v. Liverpool etc. Co., 76–285, 79+103 (assignment of insurance policy); Isakson v. Nelson, 94–522, 102+1133 (assignment admitted by answer).

[22] See § 581.

[23] In re Bird, 39–520, 40+827.

579. Not favored—Assignments for creditors are not regarded with favor by the law.[24] They are tolerated though there is incidental to them the delay necessary to the conversion of the property into money and its distribution among the creditors.[25]

580. What constitutes—A bill of sale and an agreement have been held to constitute an assignment for the benefit of creditors though based on a consideration.[26] There must be a transfer of title. The assignor must part with his whole interest in the thing assigned. The ordinary form is that of an absolute transfer to sell and pay at all events.[27]

581. Nature of statute and proceedings—The statute is not a bankrupt act.[28] Its object is to secure an equal distribution of the debtor's property without preferences and to insure a faithful administration of the trust by placing the estate and the assignee under the control of the court.[29] It is not a grant of power, but a regulation of common-law assignments for the benefit of creditors. Such assignments are the voluntary acts of the debtor and cannot be exacted by a statute. They partake of the nature of a contract. Except as provided by statute their validity and effect are to be determined by the rules of the common law.[30] The proceeding is of a judicial nature,[31] and under the general supervision and control of the court.[32] The assignee is an officer of the court and the estate is in custodia legis.[33] The scope and purpose of the proceeding, and the rights of the parties affected, differ materially from those under the insolvency law of 1881,[34] but the assets are distributed among the creditors in the same way under the two laws.[35]

582. Construction—The statute is of a remedial nature and is to be liberally construed to carry out its purpose.[36]

583. What assignments within statute—An assignment not good under the insolvency law of 1881 may be held good as a statutory assignment for the benefit of creditors.[37] If an assignment does not affirmatively appear on its face to be under the insolvency law of 1881 it will be held to be a common-law assignment under the act of 1876.[38]

584. By agent—An assignment may be made through a duly authorized agent.[39]

585. Non-residents—The statute does not regulate assignments by non-residents who have no property or place of business in this state.[40]

586. Revocation—An assignment, when executed by the assignor and accepted by the assignee, creates a valid trust, which cannot be changed or revoked by the assignor, or by the joint action of both assignor and assignee, or by the court on their application.[41]

[24] Greenleaf v. Edes, 2–264(226, 234); Burt v. McKinstry, 4–204(146).

[25] Bennett v. Ellison, 23–242, 252.

[26] Truitt v. Caldwell, 3–364(257).

[27] Banning v. Sibley, 3–389(282).

[28] In re Mann, 32–60, 64, 19+347; Simon v. Mann, 33–412, 414, 23+856.

[29] Strong v. Brown, 41–304, 43+67; Lucy v. Freeman, 93–274, 277, 101+167; Leuthold v. Young, 32–122, 19+652.

[30] Lesher v. Getman, 28–93, 9+585; Simon v. Mann, 33–412, 414, 23+856; In re Bird, 39–520, 522, 40+827; Lanpher v. Burns, 77–407, 409, 80+361; Lucy v. Freeman, 93–274, 101+167.

[31] Clark v. Stanton, 24–232; Kingman v. Barton, 24–295; Swart v. Thomas, 26–141, 1+830; Leuthold v. Young, 32–122, 19+652.

[32] See § 608.

[33] Thomas v. Drew, 69–69, 74, 71+921. But see, Lanpher v. Burns, 77–407, 410, 80+361.

[34] Lanpher v. Burns, 77–407, 409, 80+361; Simon v. Mann, 33–412, 23+856; In re Mann, 32–60, 19+347.

[35] International T. Co. v. Am. L. & T. Co., 62–501, 505, 65+78, 632.

[36] Clark v. Stanton, 24–232, 240; Strong v. Brown, 41–304, 43+67. See Greenleaf v. Edes, 2–264(226, 234).

[37] McConnell v. Rakness, 41–3, 42+539.

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

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

[40] McKibbin v. Ellingson, 58–205, 59–1003.

[41] Mackellar v. Pillsbury, 48–396, 51+222.

587. Collateral attack—If an assignment is void, creditors may proceed as if no assignment had been made. They may seize the property under legal process and attack the assignment collaterally in an action by the assignee.[42]

588. Effect on attachments—An assignment does not vacate or supersede a prior attachment or garnishment.[43]

589. Payment to assignor—A payment to the assignor, after an assignment of a debtor, without notice of the assignment, discharges the debt.[44]

DEED OF ASSIGNMENT

590. Formal requisites—A failure to comply with the provisions of R. L. 1905 § 4611 does not render an assignment void, but merely voidable at the instance of creditors and subsequent purchasers in good faith. It is good between the parties.[45] The statutory requirements are inapplicable to foreign assignments.[46] The provisions as to the execution and acknowledgment of the deed are mandatory.[47] An acknowledgment by a corporation has been held insufficient.[48] The absence of a notary's seal to an acknowledgment has been held fatal.[49] An acknowledgment by a surviving partner has been held sufficient.[50] The subscription and acknowledgment of a partnership assignment have been held sufficient.[51] Prior to Laws 1876 c. 44 an assignment of personalty was not required to be in writing.[52]

591. Contents of deed—Every assignment in trust may be considered as composed of two parts—a transfer and a trust or trusts. The trusts indicate the object of the transfer; they designate the purposes to which the assigned property is to be applied, and they are expressed, for the most part, in the form of directions to the assignee.[53] One of the most obvious and essential requisites of an assignment is the granting of power to the assignee to dispose of the property assigned for cash and apply the proceeds to the payment of debts.[54]

592. Consideration—The debts due to the creditors are a sufficient consideration for the assignment. So far as the assignee is concerned his obligation to perform the trust is a sufficient consideration.[55]

593. Filing—An assignment does not take effect or become operative for any purpose until filed as required by statute.[56] By the filing of the assignment the assignor initiates the proceedings, and submits himself and the property to the jurisdiction of the court for the purposes of the trust.[57]

594. Recording deed—If an assignment includes realty, the statute requires a copy to be recorded with the register of deeds of the county where the land lies.[58] The statute is a mere registry law and an unrecorded deed is good as between the parties and those with notice.[59] Under G. S. 1894 § 4228 the record of an order appointing a receiver in insolvency operated as notice.[60] The effect of a record has been held not impaired by the absence of the schedule.[61]

42 Lanpher v. Burns, 77–407, 80+361; May v. Walker, 35–194, 28+252.
43 Fairbanks v. Whitney, 36–305, 30+812.
44 Graham v. Evans, 39–382, 40+368.
45 Lucy v. Freeman, 93–274, 101+167.
46 In re Paige, 31–136, 16+700.
47 De Graw v. King, 28–118, 9+636; Bennett v. Knowles, 66–4, 68+111; Mpls. T. Co. v. School Dist., 68–414, 71+679.
48 Bennett v. Knowles, 66–4, 68+111.
49 De Graw v. King, 28–118, 9+636.
50 Hanson v. Metcalf, 46–25, 48+441.
51 Williams v. Frost, 27–255, 6+793.
52 Conrad v. Marcotte, 23–55.
53 Truitt v. Caldwell, 3–364(257).
54 Banning v. Sibley, 3–389(282).
55 Truitt v. Caldwell, 3–364(257).
56 R. L. 1905 § 4611; Gridley v. Myers, 73–308, 76+41; Fairbanks v. Whitney, 36–305, 30+812.
57 Kingman v. Barton, 24–295; Swart v. Thomas, 26–141, 1+830.
58 R. L. 1905 § 4612.
59 Paulson v. Clough, 40–494, 42+398; Thompson v. Ellenz, 58–301, 59+1023; Mead v. Randall, 68–233, 71+31; Noyes v. Am. etc. Co., 97–38, 105+1125.
60 Noyes v. Am. etc. Co., 97–38, 105+1125.
61 Strong v. Lynn, 38–315, 37+448.

595. Indorsement and record—The indorsement and record of an assignment by the clerk, required by the statute,[62] are not essential to the validity of an assignment.[63]

596. What passes—General words of transfer are limited by a schedule referred to as containing a particular description of the property intended to be assigned.[64]

597. Controlling effect of deed—An assignment must be executed if at all, in accordance with the terms of the trust as declared in the deed of assignment.[65]

ASSIGNEES

598. In general—An assignee is bound to exercise due diligence, and good faith, in the administration of his trust.[66] He represents the creditors, not the assignor.[67] It is his duty to protect, so far as possible, the estate and make it available for the payment of claims.[68] It is his duty to convert the insolvent estate into money, to recognize valid and subsisting contracts of his assignor, to institute proceedings to set aside fraudulent conveyances, and to pay the debts of the insolvent by an equal proportional distribution among the creditors.[69] He has a reasonable discretion as to the time in which to convert the property into cash and execute the trust.[70] He is not authorized to sell on credit.[71]

599. Qualifications of assignee—He must be a resident freeholder of the state,[72] and be competent to protect the rights of all parties interested in the assignment.[73] The selection of an improper person by the assignor for a fraudulent purpose renders the assignment voidable. The selection of an improper, but legally competent person, without any fraudulent purpose, does not render the assignment voidable, but is a ground for removal.[74]

600. Title of assignee—The assignee holds the legal title and all the equitable interest of the assignor in respect to the property covered by the assignment.[75] He succeeds to all the personalty of the assignor wherever it may be situated.[76] He is not a bona fide purchaser,[77] and, except as otherwise provided by statute in regard to fraudulent conveyances and unlawful preferences, he stands in the shoes of his assignor and takes the title subject to all defences and setoffs which might be asserted against his assignor.[78] He takes free from

[62] R. L. 1905 § 4613.

[63] Perkins v. Zarracher, 32–71, 19+385.

[64] Guerin v. Hunt, 6–375(260). See Strong v. Lynn, 38–315, 37+448.

[65] In re Bird, 39–520, 40+827; In re Fuller, 42–22, 43+486.

[66] Clark v. Stanton, 24–232; In re Robbins, 36–66, 30+304.

[67] Swedish etc. Bank v. First Nat. Bank, 89–98, 94+218; Walsh v. St. Paul S. F. Co., 60–397, 62+383; Thomas v. Drew, 69–69, 71+921; Kellogg v. Kelley, 69–124, 71+924.

[68] Hunter v. Cleveland C. S. Co., 31–505, 18+645.

[69] Swedish etc. Bank v. First Nat. 89–98, 108, 94+218. See, as to conversion of property into cash, Banning v. Sibley, 3–389 (282, 291).

[70] McClung v. Bergfeld, 4–148(99). See Bennett v. Ellison, 23–242, 252.

[71] Greenleaf v. Edes, 2–264(226); Bennett v. Ellison, 23–242, 252.

[72] R. L. 1905 § 4611; Lanpher v. Burns, 77–407, 80+361.

[73] Guerin v. Hunt, 6–375(260).

[74] Guerin v. Hunt, 6–375(260); McKibbin v. Ellingson, 58–205, 59+1003; In re Mast, 58–313, 59+1044.

[75] Donohue v. Ladd, 31–244, 246, 17+381; Caldwell v. Bruggerman, 4–270(190); Ryan v. Ruff, 90–169, 95+1114. See N. W. etc. Co. v. Murphy, 103–104, 114+360.

[76] In re Paige, 31–136, 16+700; Covey v. Cutler, 55–18, 56+255.

[77] Gere v. Murray, 6–305(213); Lesher v. Getman, 28–93, 96, 9+585; Bennett v. Ellison, 23–242, 254; Strong v. Lynn, 38–315, 37+448; Arnold v. Wainwright, 6–358 (241); Mann v. Flower, 25–500.

[78] Dickson v. Kittson, 75–168, 77+820; Swedish etc. Bank v. First Nat. Bank, 89–98, 108, 94+218; Flower v. Cornish, 25–473; Walsh v. St. P. S. F. Co., 60–397, 62+383; Martin v. Pillsbury, 23–175. Baker v. Terrell, 8–195(165).

the statutory interest of the wife of the assignor.[79] As against all but the beneficiaries of the trust his title is absolute.[80]

601. Investment of funds—Interest—The assignee is not bound to invest the trust funds so that they may earn interest, or return a profit, and he is not ordinarily chargeable with interest.[81]

602. Agents and attorneys—Delegation of trust—While an assignee cannot delegate his trust, he may employ agents and attorneys to assist him. The use of the words "successors in trust" in the granting and habendum clauses of an assignment has been held unobjectionable.[82]

603. Commingling of property—Where an assignee of a stock of merchandise purchased additional stock and commingled it with the assigned stock, it was held that the additional stock became a part of the trust property, at least so far as creditors consenting to the purchase were concerned, and that the assignee was entitled to reimbursement for the purchase.[83]

604. Fraudulent conveyances—Authority of assignee to avoid—The assignee is authorized by statute to set aside conveyances fraudulent as to the creditors whom he represents.[84] He may sue in his own name without joining the creditors.[85] He may maintain an action to determine adverse claims for the purpose of freeing his title from the lien of a fraudulent confessed judgment.[86] He may avoid a chattel mortgage executed before but not filed until after the assignment;[87] or a conditional contract for the sale of personalty;[88] or any fraudulent conveyance,[89] whether within or without the state.[90] He may replevy personalty transferred in fraud of creditors or sue the vendee for the value.[91] An assignee is presumed to represent creditors who are entitled to attack the transfer. The burden of proving the contrary rests on the defendant.[92] It is not a prerequisite to an action by the assignee that the claims of the creditors be first reduced to judgment.[93] The statute gives the same authority to assignees and receivers under the insolvency law of 1881.[94]

605. Bond—The statutory bond may be filed before the schedule is filed.[95] If no schedule is filed the bond must be filed within fifteen days of the assignment, if the trust is not otherwise accepted.[96] An assignee may formally accept the trust, and take possession of the assigned property, before the execution of his bond, but he cannot dispose of any part of the property until the filing of his bond. After such an acceptance the assignee and estate are subject to the jurisdiction of the court and the estate is not subject to attachment.[97] If

[79] Merrill v. Security T. Co., 71–61, 73+640.

[80] Weide v. Porter, 22–429. See Richards v. White, 7–345(271, 274).

[81] In re Shotwell, 49–170, 51+909.

[82] Langdon v. Thompson, 25–509.

[83] Noyes v. Beaupre, 32–496, 21+728; Id., 36–49, 30+126.

[84] R. L. 1905 § 4617. He had no such authority prior to statute. Flower v. Cornish, 25–473.

[85] Langdon v. Thompson, 25–509.

[86] Hunter v. Cleveland C. S. Co., 31–505, 18+645.

[87] See § 1447.

[88] See § 8655.

[89] Merrill v. Ressler, 37–82, 33+117; Chamberlain v. O'Brien, 46–80, 48+447; Thomas v. Foote, 46–240, 48+1019; Gallagher v. Rosenfield, 47–507, 50+696; Mackellar v. Pillsbury, 48–396, 51+222; Clark v. Richards, 68–282, 71+389; New Prague M. Co. v. Schreiner, 70–125, 72+963; Rossman v. Mitchell, 73–198, 75+1053; Dickson v. Kittson, 75–168, 77+820.

[90] Swedish etc. Bank v. First Nat. Bank, 89–98, 94+218.

[91] Rossman v. Mitchell, 73–198, 75+1053; Davies v. Dow, 80–223, 83+50.

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

[93] Chamberlain v. O'Brien, 46–80, 48+447; Kellogg v. Kelley, 69–124, 71+924.

[94] Merrill v. Ressler, 37–82, 33+117; Chamberlain v. O'Brien, 46–80, 48+447; Kellogg v. Kelley, 69–124, 71+924; Baker v. Pottle, 48–479, 51+383; Shay v. Security Bank, 67–287, 69+920; Clark v. Richards, 68–282, 71+389.

[95] Swart v. Thomas, 26–141, 1+830.

[96] Perkins v. Zarracher, 32–71, 19+385.

[97] Strong v. Brown, 41–304, 43+67; Thomas v. Drew, 69–69, 75, 71+921.

no bond is filed within the required time, and there is no other acceptance of the trust, the trust will be deemed refused and the rights of the assignee will terminate.[98] A retention of a bond by the judge until after the time for filing it, has been held not fatal.[99] Where an assignee was removed and a receiver appointed in his place, it was held that the latter might sue on the bond of the former for a wrongful disposition of the trust property.[1] A right of action on a bond has been held not lost by laches.[2] Failure to obtain leave of court before action on a bond is not a ground for demurrer. A complaint on a bond has been held sufficient as against a surety.[3]

606. Accounting—One of two assignors might petition for a report by the assignee under Laws 1876 c. 44 § 10.[4]

607. Removal—The court is authorized by statute to remove an assignee for cause and appoint another in his place.[5] He may be removed if he makes an improper disposition of the trust funds;[6] if he is illiterate and incompetent;[7] if he speculates in claims against the estate and deceives the creditors as to the condition of the estate;[8] if he sustains such relations to the assignor or some of the creditors that he cannot be impartial;[9] or if he fails to furnish a new bond as required.[10] The procedure is summary and largely within the discretion of the court. Any of the creditors may be allowed to participate in the investigation at any stage.[11] Prior to the statute it was held that any person interested in the execution of the trust, including a simple contract creditor, might bring an action in equity on behalf of himself and other interested parties, for the removal of an assignee.[12] A court of equity may remove an assignee and appoint another though the assignment is void as to creditors.[13] An assignee is not entitled to be reimbursed for the expenses of his appeal from an order removing him.[14] An order appointing A as assignee in place of B, is an implied discharge of B.[15]

ADMINISTRATION

608. Powers of court—The court is clothed with general supervision and control of the proceedings.[16] It may remove an assignee for cause and appoint another in his place.[17] It may marshal the assets;[18] disallow unauthorized claims without reference to an agreement between the assignor and assignee;[19] allow a claimant to sell collateral instead of surrendering it to the assignee;[20] or do whatever may be necessary to the full execution of the trust.[21] It cannot, however, revoke or modify the assignment.[22] Under Laws 1876 c. 44 it was held that the jurisdiction of the court ended with the final decree of distribution.[23]

98 Kingman v. Barton, 24–295.
99 Johnson v. Bray, 35–248, 28+504.
1 Prosser v. Hartley, 35–340, 29+156.
2 Berryhill v. Peabody, 77–59, 79+651.
3 McCollister v. Bishop, 78–228, 80+1118.
4 Clark v. Stanton, 24–232.
5 R. L. 1905 § 4620; Strong v. Brown, 41–304, 306, 43+67. See, under Laws 1876 c. 44, Clark v. Stanton, 24–232.
6 Goncelier v. Foret, 4–13(1).
7 Guerin v. Hunt, 6–375(260); McKibbin v. Ellingson, 58–205, 59+1003.
8 Clark v. Stanton, 24–232.
9 In re Mast, 58–313, 59+1044.
10 Am. Surety Co. v. Nelson, 77–402, 80+300.
11 Clark v. Stanton, 24–232.
12 Goncelier v. Foret, 4–13(1).
13 Mpls. T. Co. v. School Dist., 68–414, 419, 71+679.
14 In re Nicolin, 59–323, 61+330.
15 Stahl v. Mitchell, 41–325, 43+385.
16 R. L. 1905 § 4620; Clark v. Stanton, 24–232, 241; Kingman v. Barton, 24–295, 297; Swart v. Thomas, 26–141, 143, 1+830; Strong v. Brown, 41–304, 306, 43+67; Hanson v. Metcalf, 46–25, 29, 48+441.
17 See § 607.
18 Hanson v. Metcalf, 46–25, 48+441.
19 Clark v. Stanton, 24–232.
20 Swedish etc. Bank v. Davis, 64–250, 66+986.
21 Swart v. Thomas, 26–141, 1+830.
22 Mackellar v. Pillsbury, 48–396, 51+222.
23 Clark v. Stanton, 24–232.

609. Defaults of assignee—Effect on jurisdiction—After the court has acquired jurisdiction of the proceedings by the filing of a proper assignment, no default of the assignee will affect the validity of the trust or the jurisdiction of the court.[24]

610. Notice to creditors—The notice to creditors provided by statute is not notice to the debtors of the assignor.[25]

611. Schedule of debts and estate—The failure of the assignee to file the schedule as required by statute [26] is not fatal to the proceedings. The court may require the assignee to file a schedule or correct an imperfect one at any time.[27] A schedule has been held not to limit the property conveyed by the deed of assignment.[28] A schedule has been held inadmissible in an action for fraud.[29] A schedule has been held imperfect in not stating the value of the items of the estate.[30] A schedule has been held to limit general words of transfer.[31] A schedule is not conclusive as to the value of the property on an issue of fraud.[32]

612. Proof and payment of claims—Preferences—The state is made a preferred creditor by statute.[33] A creditor holding security for his claim cannot share in the distribution of assets until he has exhausted his security or surrendered it to the assignee, but he is entitled to file his claim and have its amount and validity determined before exhausting or surrendering it.[34] A claimant waives his security by accepting a dividend and executing a release without disclosing the existence of the security.[35] Where the language of an assignment embracing partnership and individual assets follows the language of the statute in respect to the distribution thereof, it will be construed in connection with the general rules of law applicable to the marshaling of such assets.[36] Where an agent conducted the business of a company in his own name, it was held that a creditor of the company was not entitled to a preference over the creditors of the agent.[37] Where a partnership, being insolvent, obtained new capital and formed a corporation, and the corporation subsequently became insolvent, it was held, in an action to determine the respective rights of the partnership and corporation creditors, that the creditors of the corporation were entitled to full payment of their claims before the creditors of the partnership were entitled to participate in the fund.[38]

613. Preferences—An assignment is not void merely because it was designed to give a preference to a creditor,[39] but the statute requires a distribution of the assets without preference except as expressly authorized.[40]

614. Releases—An assignment in favor of only those creditors who will file releases is void.[41]

[24] Strong v. Brown, 41–304, 43+67; Perkins v. Zarracher, 32–71, 19+385.
[25] Graham v. Evans, 39–382, 40+368.
[26] R. L. 1905 § 4614.
[27] Swart v. Thomas, 26–141, 1+830; Perkins v. Zarracher, 32–71, 19+385.
[28] Strong v. Lynn, 38–315, 37+448.
[29] Redding v. Wright, 49–322, 51+1056.
[30] Perkins v. Zarracher, 32–71, 19+385.
[31] Guerin v. Hunt, 6–375(260).
[32] Guerin v. Hunt, 8–477(427).
[33] R. L. 1905 § 4618; State v. Bell, 64–400, 67+212; State v. Northern T. Co., 70–393, 397, 73+151.
[34] Swedish etc. Bank v. Davis, 64–250, 66+986; First Nat. Bank v. Pope, 85–433, 89+318.
[35] First Nat. Bank v. Pope, 85–433, 89+318.
[36] Hanson v. Metcalf, 46–25, 48+441.
[37] Mackellar v. Anchor Mfg. Co., 48–549, 51+616.
[38] Thorpe v. Penock, 99–22, 108+940.
[39] Mackellar v. Pillsbury, 48–396, 51+222.
[40] Strong v. Brown, 41–304, 43+67.
[41] Bennett v. Ellison, 23–242, 252; May v. Walker, 35–194, 28+252; McConnell v. Rakness, 41–3, 42+539; Lanpher v. Burns, 77–407, 80+361. See, for assignments held not to require releases, In re Bird, 39–520, 40+827; In re Fuller, 42–22, 43+486; Mullen v. Ellington, 70–290, 73+146.

615. Surplus—Any surplus remaining after the payment of claims is held in trust by the assignee for the assignor.[42] It reverts by operation of law without any provision for it in the instrument of assignment.[43]

ASSIGNS—Those who take, either immediately or remotely, from or under the assignor, whether by conveyance, devise, descent, or act of law.[44]

ASSOCIATES—See note 45.

ASSOCIATIONS

616. Liability on contracts—Members of an association are liable on the contracts of the association on the ground of agency, if at all.[46]

617. Liability for tort—A member of an association has been held not entitled to sue the association for negligent treatment while a patient in the hospital of the association.[47] An athletic association of the state university has been held not subject to an action for tort.[48]

618. Capacity to hold realty—An unincorporated association of persons cannot take, or hold, in the associate name, realty, or by such name be a cestui que trust in a trust in realty.[49]

ASSUMED NAME—See Contracts, 1732; Names, 6915.

ASSUMPSIT

Cross-References

See Implied or Quasi Contracts; Money Had and Received; Money Lent; Money Paid; Use and Occupation; Work and Labor.

619. Definition—Assumpsit was a common-law form of action which was the appropriate remedy for the recovery of unliquidated damages for the breach of an express contract not under seal, or of a promise implied by law from an executed consideration or from a legal duty.[50] There were two forms—special assumpsit and general assumpsit. The former was brought on an express contract; the latter on an implied or fictitious promise.

620. History—The action of assumpsit had a wonderful development. In its origin an action of tort, it was soon transformed into an action of contract, becoming afterwards a remedy where there was neither tort nor contract.

[42] In re Mann, 32–60, 19+347.

[43] King v. Remington, 36–15, 32, 29+352; Smith v. Bean, 46–138, 48+687; Kinney v. Sharvey, 48–93, 50+1025. See First Nat. Bank v. Randall, 38–382, 37+799; N. W. etc. Co. v. Murphy, 103–104, 114+360.

[44] Brown v. Crookston Agr. Assn., 34–545, 26+907; Fuller v. Langum, 37–74, 33+122; Cuilerier v. Brunelle, 37–71, 33+123; Buchanan v. Reid, 43–172, 45+11; Bovey v. Tucker, 48–223, 50+1038; Law v. Citizens' Bank, 85–411, 89+320.

[45] State v. Sibley, 25–387, 399. See Parties, 7320.

[46] Ehrmanntraut v. Robinson, 52–333, 54+188; St. Paul Typo. v. St. P. B. Union, 94–351, 359, 102+725. See Spencer v. Tozer, 15–146(112).

[47] Martin v. N. P. etc. Assn., 68–521, 71+701.

[48] George v. University etc. Assn., 107–424, 120+750.

[49] German L. Assn. v. Scholler, 10–331 (260); Woodson v. Mil. etc. Ry., 21–60, 62; Gille v. Hunt, 35–357, 359, 29+2.

[50] Chitty Pl. 85–97; Cutter v. Powell, 2 Smith, Leading Cases (8 ed). 48, notes; Perry, Common-Law Pleading, 86; Bidwell v. Madison, 10–13(1).

Based at first only upon an express contract, it was afterwards supported upon an implied promise, and even upon a fictitious promise. Introduced as a special manifestation of the action on the case, it soon acquired the dignity of a distinct form of action, which superseded debt, became concurrent with account, with case upon a bailment, a warranty, and bills of exchange, and competed with equity in the essentially equitable quasi contracts growing out of the principle of unjust enrichment.[51]

621. Pleading—Where the plaintiff in an action has fully performed an express contract on his part, he may state his cause of action for a balance due him substantially in form of the indebitatus assumpsit count under the old practice.[52]

ASSUMPTION OF RISK—See Master and Servant.
AT LARGE—See note 53.
ATTACHED—See note 54.

ATTACHMENT

Cross-References

See Banks and Banking, 822; Chattel Mortgages, 1471; Conflict of Laws, 1551; Execution, 3528; Judgments, 5002; Justices of the Peace, 5307; Malicious Prosecution, 5751; Witnesses, 10359.

IN GENERAL

622. Nature—Attachment is a provisional remedy prosecuted not as an independent proceeding, but in aid of the main action to which it is ancillary, and as security for the satisfaction of such judgment as the plaintiff may recover therein.[55] It is purely statutory.[56] When the defendant is not served with summons except by publication the proceeding is in rem.[57]

623. Issues as of right—If the plaintiff complies with the statutory prerequisites, the writ is allowed as a matter of right. The court has no discretion and cannot investigate the truth of the facts alleged in the affidavit.[58] Under a former statute the rule was otherwise.[59]

624. Construction of statutes—The statutes regulating attachment are remedial and should be liberally construed to advance the remedy.[60] In relation to the property of non-residents they are to be substantially, if not strictly, complied with.[61]

625. Jurisdiction—How acquired—The action is not commenced by the attachment, but by the service of summons, and the failure to make such service,

[51] Prof. Ames, 2 Harv. L. Rev. 1, 53.

[52] Larson v. Schmaus, 31–410, 18+273. See Guthrie v. Olson, 32–465, 21+557; Danahey v. Pagett, 74–20, 76+949; Mead v. Rat Portage L. Co., 93–343, 347, 101+299.

[53] Goener v. Woll, 26–154, 2+163.

[54] Reynolds v. Atlas etc. Co., 69–93, 71+831.

[55] Heffner v. Gunz, 29–108, 12+342; Barber v. Morris, 37–194, 33+559; Cleland v. Tavernier, 11-194(126); Day v. McQuillan, 13–205(192); Atwater v. Manchester S. Bank, 45–341, 346, 48+187.

[56] Davidson v. Owens, 5–69(50); Day v. McQuillan, 13–205(192); Duxbury v. Dahle, 78–427, 81+198.

[57] Lewis v. Bush, 30–244, 15+113; Harvey v. G. N. Ry., 50–405, 52+905.

[58] Duxbury v. Dahle, 78–427, 81+198; Nelson v. Gibbs, 18–541(485); Braley v. Byrnes, 20–435(389).

[59] Morrison v. Lovejoy, 6–183(117); Zimmerman v. Lamb, 7–421(336); Guerin v. Hunt, 8–477(427); Merritt v. St. Paul, 11 223(145).

[60] Cole v. Aune, 40–80, 41-934, Baxter v. Nash, 70–20, 72+799. Contra, Caldwell v. Sibley, 3–406(300); Davidson v. Owens, 5–69(50).

[61] Duxbury v. Dahle, 78–427, 81+198.

actual or constructive, as is authorized by statute, leaves the court without jurisdiction.[62] An action against a non-resident, though in form in personam, is in effect in rem, as it is only by attaching property that the court acquires jurisdiction to proceed further, and then only to the extent of the property attached.[63] To give the court jurisdiction the res must be within the state.[64]

626. In what actions allowed—Except as limited by statute,[65] the writ may issue in any action for the recovery of money, whether ex contractu or ex delicto.[66]

627. What may be attached—All forms of property which are subject to levy on execution are subject to attachment.[67]

GROUNDS

628. Debt fraudulently contracted—The statute authorizing attachment when "the debt was fraudulently contracted" [68] is to be liberally construed, and includes debts or liabilities fraudulently created or incurred.[69] It does not include liabilities ex delicto.[70]

629. Fraudulent disposition of property—The statute authorizes attachment against the property of debtors who have assigned, secreted, or disposed of their property, or are about to do so, with intent to delay or defraud their creditors.[71]

630. Absconding debtors—The statute authorizes attachment against the property of absconding debtors.[72]

631. Concealment in state—It is a ground for an attachment that the defendant keeps himself concealed within the state with intent to defraud or delay his creditors, or to avoid the service of a summons.[73]

632. Non-residents—A debtor may reside or remain out of the state so long and under such circumstances as to be a non-resident, within the meaning of the statute relating to attachments, though by reason of his intention to return his political domicil continues to be in the state. It is a question of actual residence, and not of domicil merely; and this is a question of fact to be determined by the ordinary and obvious indicia of residence. But a mere casual or temporary absence of a debtor from the state on business or pleasure will not render him a non-resident, even though he may not have a house of usual abode here, at which a summons against him might be served during such absence.[74]

PROCEDURE

633. Who may allow—The writ may be allowed by a court commissioner; [75] but not by a clerk of court.[76]

[62] Heffner v. Gunz, 29–108, 12+342; Barber v. Morris, 37–194, 33+559.

[63] Kenney v. Goergen, 36–190, 31+210; Frost v. Jordan, 37–544, 36+713; Cousins v. Alworth, 44–505, 47+169; Lydiard v. Chute, 45–277, 47+967; Daly v. Bradbury, 46–396, 49+190; Plummer v. Hatton, 51–181, 53+460; Cabanne v. Graf, 87–510, 92+461. See Cleland v. Tavernier, 11–194 (126) (overruled).

[64] Lewis v. Bush, 30–244, 15+113.

[65] R. L. 1905 § 4215.

[66] Davidson v. Owens, 5–69(50); Morrison v. Lovejoy, 6–183(117); Cummings v. Edwards, 95–118, 103+709, 106+304.

[67] See §§ 3508–3511.

[68] R. L. 1905 § 4216; Lewis v. Pratt, 11–57(31).

[69] Cole v. Aune, 40–80, 41+934.

[70] Baxter v. Nash, 70–20, 72+799.

[71] R. L. 1905 § 4216. See Hinds v. Fagebank, 9–68(57); Keigher v. McCormick, 11–545(420); Blake v. Sherman, 12–420 (305); Eaton v. Wells, 18–410(369).

[72] R. L. 1905 § 4216. See Pierse v. Smith, 1–82(60).

[73] R. L. 1905 § 4216; Ascher v. Lanyon, 104–307, 116+581.

[74] Keller v. Carr, 40–428, 42+292; Lawson v. Adlard, 46–243, 48+1019; Fitzgerald v. McMurran, 57–312, 59+199. See § 2812.

[75] Clements v. Utley, 91–352, 98+188.

[76] Morrison v. Lovejoy, 6–183(117); Zim-

634. At what time issued—The writ may issue simultaneously with the summons, or at any time thereafter.[77]

635. Venue—An action against a non-resident for the recovery of money may be brought in any county of the state, and a writ of attachment may issue therein directed to the sheriff of any other county for service.[78]

636. Affidavit—An affidavit, substantially conforming to the statute, is jurisdictional. If the affidavit is defective, the writ issued thereon and all subsequent proceedings are void and subject to collateral attack, the defendant not appearing. An affidavit which wholly fails to state the grounds of plaintiff's claim is fatally defective.[79] The allegations of an affidavit must be positive and not on information and belief. Except as expressly authorized, it is insufficient to allege facts "as deponent verily believes."[80] Several grounds may be joined if they are consistent[81] and are alleged conjunctively.[82] An allegation "that the defendant has assigned, secreted, or disposed of his property, with intent to delay or defraud his creditors," is sufficient.[83] An allegation "that the defendant is about to assign, secrete, or dispose of his property, with intent to delay or defraud his creditors," is sufficient.[84] An allegation "that the defendant has disposed of a part of his property, with intent thereby to delay and defraud the plaintiff, and is about to dispose of the rest of his property with the same intent," is sufficient.[85] It is unnecessary to allege that summons has issued or suit commenced,[86] or that a non-resident has property in this state subject to attachment.[87] It is proper but not essential that the affiant sign the affidavit.[88] When made by an agent or attorney it should state or recite that affiant is such agent or attorney.[89] It may be dated prior to the commencement of the action.[90] Formerly it was not sufficient to follow the language of the statute as to the intent of the debtor. It was necessary to set out the facts.[91]

637. Return of sheriff—The return of a sheriff to a writ of attachment is conclusive upon him as to the truth of all matters stated in it, concerning which it was his duty to make a return, so far as to estop him from contradicting the same in any action between him and the attaching creditor, involving the question of his liability to such creditor in respect to property attached under the writ, or its proceeds. The legal representatives of the sheriff, in case of his death, are affected by the same rule.[92] A return of a sheriff, to the effect that he had attached certain described land "as the property of" the defendant, has been held sufficient.[93] The failure of the sheriff to state whether or not he served the writ on the defendant is not a jurisdictional defect.[94] A return has

merman v. Lamb, 7–421(336); Guerin v. Hunt, 8–477(427); Merritt v. St. Paul, 11–223(145); Jacoby v. Drew, 11–408 (301).

[77] R. L. 1905 § 4215; Blake v. Sherman, 12–420(305); Blackman v. Wheaton, 13–326(299); Clements v. Utley, 91–352, 98+188. See Spencer v. Koell, 91–226, 97+974; Breckke v. Duluth L. Co., 101–110, 111+949.

[78] Clements v. Utley, 91–352, 98+188.

[79] Duxbury v. Dahle, 78–427, 81+198.

[80] Morrison v. Lovejoy, 6–183(117); Murphy v. Purdy, 13–422(390); Ely v. Titus, 14–125(93); Feikert v. Wilson, 38–341, 37+585.

[81] Hinds v. Fagebank, 9–68(57); Nelson v. Munch, 23–229.

[82] Guile v. McNanny, 14–520(391); Auerbach v. Hitchcock, 28–73, 9+79.

[83] See Guile v. McNanny, 14–520(391); Brown v. Mpls. L. Co., 25–461.

[84] Id.

[85] Auerbach v. Hitchcock, 28–73, 9+79; Nelson v. Munch, 23–229.

[86] Blake v. Sherman, 12–420(305).

[87] Kenney v. Goergen, 36–190, 31+210; Bigelow v. Chatterton, 51 Fed. 614.

[88] Norton v. Hauge, 47–405, 50+368.

[89] State v. Madigan, 57–425, 59+490. See West v. Berg, 66–287, 68+1077.

[90] Crombie v. Little, 47–581, 50+823.

[91] Pierse v. Smith, 1–82(60); Morrison v. Lovejoy, 6–183(117); Hinds v. Fagebank, 9–68(57); Curtis v. Moore, 3–29(7); Keigher v. McCormick, 11–545(420).

[92] State v. Penner, 27–269, 6+790; Ryan v. Peacock, 40–470, 42+298.

[93] Cousins v. Alworth, 44–505, 47+169.

[94] Schweigel v. Shakman, 78–142, 80+871, 81+529.

been held not to cover a debt due a firm of which the defendant was a member.[95] A return "no property found," has been held to constitute an abandonment by the plaintiff in the execution of the lien acquired by the levy of the attachment.[96]

638. Bond—An undertaking may be given in lieu of a bond. A defect in a bond or undertaking is not jurisdictional. A sufficient bond may be filed nunc pro tunc or a defective bond remedied by amendment.[97] A principal obligor is not essential to a bond.[98] The obligors are liable for all costs that may be awarded to the defendant, and not merely such as may result from the attachment.[99] They are not liable for attorney's fees expended in defending the main action.[1] Their liability is dependent upon recovery of judgment by the defendant.[2]

639. Form of writ—The writ must be under seal of the court, dated, signed by the clerk, and tested in the name of the presiding judge.[3] It need not show by what officer it was allowed. A slight variance in the amount between the writ and the complaint is not a jurisdictional defect.[4] The signature of a clerk "by" another has been held sufficient.[5]

640. Levy on realty—The statute prescribes the mode of levying on realty.[6] Aside from statute, to make a valid attachment of land, the officer need not go on the land, or near it, or see it, or do anything but return that he has attached it.[7] The record of an attachment on realty is admissible on an issue of title to the property.[8]

641. Levy on personalty—Personalty is attached in the manner prescribed by law for the levy of an execution thereon.[9]

642. Sale of perishable property—The statute authorizes the sheriff to sell perishable property.[10]

643. Discharge on bond—Provision is made by statute for a discharge of an attachment upon the execution of a bond by the defendant.[11] Notice of an application under the statute must be given the adverse party.[12]

644. Discharge by amendment—An attachment is discharged, as to an assignee in a general assignment for the benefit of creditors, by an amendment to the complaint and affidavit for attachment, made after the execution of the assignment, substituting an entirely different and distinct cause of action for the one set up in the original complaint and affidavit.[13]

[95] Allis v. Day, 13–199(189).
[96] Butler v. White, 25–432.
[97] Schweigel v. Shakman, 78–142, 80+871, 81+529; Blake v. Sherman, 12–420(305); Duxbury v. Dahle, 78–427, 81+198.
[98] Howard v. Manderfield, 31–337, 17+946.
[99] Greaves v. Newport, 41–240, 42+1059.
[1] Frost v. Jordan, 37–544, 36+713.
[2] Crandall v. Rickley, 25–119.
[3] R. L. 1905 § 93; Wheaton v. Thompson, 20–196(175); O'Farrell v. Heard, 22–189.
[4] Shaubhut v. Hilton, 7–506(412).
[5] Clements v. Utley, 91–352, 98+188.
[6] R. L. 1905 § 4219; Corson v. Shoemaker, 55–386, 397, 57+134.
[7] Chauncey v. Wass, 35–1, 24, 25+457, 30+826.
[8] Cousins v. Alworth, 44–505, 47+169.
[9] R. L. 1905 § 4219. See §§ 3514–3517.
[10] R. L. 1905 § 4221; Wheaton v. Thompson, 20–196(175).
[11] R. L. 1905 § 4256; Scanlan v. O'Brien, 21–434 (obligors cannot object that bond has no sureties or question validity of levy); Kling v. Childs, 30–366, 15+673 (stranger to action cannot secure discharge under statute); Slosson v. Ferguson, 31–448, 18+281 (bond held sufficient—obligors held liable to assignee of plaintiff—bond a substitute for the attached property); Gale v. Seifert, 39–171, 39+69 (judge of district court has discretionary power to excuse compliance with rule of court requiring bond to be acknowledged by sureties); Rachelman v. Skinner, 46–196, 48+776 (defendant securing discharge on bond cannot subsequently move to vacate attachment); Greengard v. Fretz, 64–10, 65+949 (estoppel of obligors by admissions in bond); Johnson v. Dun, 75–533, 78+98 (bond under Connecticut statute held a common-law bond).
[12] Rule 3, District Court.
[13] Heidel v. Benedict, 61–170, 63+490.

645. Retaking after replevin—If property taken by an officer under a writ of attachment is replevied, it cannot be retaken under the same writ of attachment pending the replevin suit.[14]

646. Special property of sheriff—A levy on personalty gives the sheriff a special property therein.[15]

647. Collection of credits—The statute authorizes the sheriff to sue for credits which he has attached.[16]

648. Delivery to receiptor—A receiptor to whom the attached property is delivered by the sheriff cannot move to vacate the attachment, or attack the judgment in the action in which the attachment is levied, to the prejudice of the sheriff.[17]

LIEN

649. Nature—Attachment is a statutory lien constituting a hold on the property of the defendant for the payment of such judgment as the plaintiff may recover.[18] It is a specific lien on the property attached and in this regard differs from garnishment.[19]

650. On realty—An attachment of realty gives the plaintiff a lien thereon.[20] Where jurisdiction is obtained, in an action against a non-resident by attaching his property and publishing the summons, the attachment lien is not waived or lost by entering a general money judgment and issuing a general execution, where the attached property is sold on the execution.[21]

651. Merger—The attachment lien is merged in a judgment entered for the plaintiff.[22]

652. Abandonment—A sheriff levied an attachment on certain property. Thereafter his successor, with the consent of the plaintiff, made return to an execution on the property "No property found." Held, an abandonment of the attachment lien.[23]

VACATION

653. Grounds—A writ may be vacated either because the statute has not been complied with in its allowance and issuance, or because the statements of the affidavit for its allowance are untrue.[24] It is not a ground for vacation that the officer has levied on property not subject to levy. The question on a motion to vacate is the validity of the writ, and its validity cannot be vitiated by any error of the officer in executing it.[25] The court cannot try the question whether the plaintiff has or has not a cause of action or the defendant a valid defence.[26] A non-resident cannot vacate an attachment on the ground that he has no interest in the property.[27]

654. Who may move—An assignee for the benefit of creditors may move.[28] A defendant who has answered may move so long as the answer stands, though it may be insufficient.[29] A trustee may probably move, if the attachment em-

[14] Vanderburgh v. Bassett, 4-242(171).
[15] Wheaton v. Thompson, 20-196(175); Ryan v. Peacock, 40-470, 42+298.
[16] R. L. 1905 § 4221; Caldwell v. Sibley, 3-406(300); Rohrer v. Turrill, 4-407(309).
[17] Easton v. Goodwin, 22-426; Holcomb v. Nelson, 39-342, 40+354.
[18] Atwater v. Manchester S. Bank, 45-341, 346, 48+187.
[19] See § 3949.
[20] R. L. 1905 § 4219; Cousins v. Alworth, 44-505, 47+169.
[21] Hencke v. Twomey, 58-550, 60+667.
[22] McDonald v. Clark, 53-230, 54+1118.
[23] Butler v. White, 25-432.
[24] Nelson v. Gibbs, 18-541(485). See Note, 123 Am. St. Rep. 1028.
[25] Davidson v. Owens, 5-69(50); Rosenberg v. Burnstein, 60-18, 61+684.
[26] Davidson v. Owens, 5-69(50). See Richards v. White, 7-345(271); Rosenberg v. Burnstein, 60-18, 61+684.
[27] Whitney v. Sherin, 74-4, 76+787.
[28] Richards v. White, 7-345(271); First Nat. Bank v. Randall, 38-382, 37+799.
[29] First Nat. Bank v. Randall, 38-382, 37+799.

barrasses his trust.[30] A defendant who has obtained a discharge of the writ by executing the statutory bond cannot move.[31]

655. Notice of motion—The statute requires the motion to be made on notice.[32]

656. Time—A motion to vacate may be made before any levy has been made under the writ.[33] It cannot be made after the entry of judgment.[34]

657. Practice on hearing—The court may determine the truth or falsity of the allegations of the affidavit on which the writ issued.[35] Counter affidavits are admissible if there are moving affidavits.[36] What affidavits may be received, and in what order, and whether a continuance shall be granted to give a party opportunity to procure further affidavits, are matters of discretion with the trial court.[37] The defendant may use his verified answer as an affidavit.[38] Where counter affidavits show that the moving party is entitled to the relief sought, though not on a ground stated in the moving papers, he may take advantage of the ground thus shown.[39] Where the defendant traverses the facts alleged as grounds for the writ, the burden is on the plaintiff to prove their truth, and this he must do by competent evidence. A mere reiteration of the general statement of his original affidavit in the language of the statute, or a statement of mere opinion or belief, is insufficient.[40] Where counter affidavits clearly and specifically state a badge of fraud, they are not overcome or sufficiently contradicted by general statements in the moving affidavits denying fraud.[41]

658. Effect of failure to move—Objection to a void writ is not waived by a failure to move to vacate it.[42]

659. Possession of officer after vacation—Upon the vacation of an attachment the special property of the officer in the property is at an end, and he is bound to restore it to the defendant, if he is still the owner, or, if not, to the owner. He is not bound to retain it to enable the plaintiff to appeal from the order of vacation.[43]

660. Abandonment of action—The statute authorizes the vacation of an attachment when the action is abandoned or no judgment entered for three years. It is inapplicable where a final judgment is in fact entered.[44]

661. Appeal—Effect—An appeal from an order refusing to dissolve an attachment cannot be prosecuted after the attachment has been released by executing and filing the statutory bond for that purpose.[45] An appeal from an order vacating a writ has been held to revive and keep in force the writ until such appeal was dismissed.[46]

662. Question on appeal—The determination of the trial court, based on the evidence, will not be reversed on appeal, unless it is manifestly contrary to the evidence. Especially is this true when it is based on conflicting affidavits.[47]

[30] See Merriam v. Wagener, 74-215, 77+44.
[31] Rachelman v. Skinner, 46-196, 48+776.
[32] R. L. 1905 § 4223. See Blake v. Sherman, 12-420(305).
[33] First Nat. Bank v. Randall, 38-382, 37+799.
[34] McDonald v. Clark, 53-230, 54+1118.
[35] Nelson v. Gibbs, 18-541(485); Drought v. Collins, 20-374(325).
[36] R. L. 1905 § 4223; Nelson v. Munch, 23-229; Carson v. Getchell, 23-571.
[37] Carson v. Getchell, 23-571.
[38] Nelson v. Munch, 23-229.
[39] Richards v. White, 7-345(271).
[40] Jones v. Swank, 51-285, 53+634. See Schoeneman v. Sowle, 102-466, 113+1061.
[41] Rosenberg v. Burnstein, 60-18, 61+684. See Schoeneman v. Sowle, 102-466, 113+1061.
[42] Merritt v. St. Paul, 11-223(145).
[43] Ryan v. Peacock, 40-470, 42+298.
[44] McDonald v. Clark, 53-230, 54+1118.
[45] Thomas v. Craig, 60-501, 62+1133.
[46] McNeal v. Rider, 79-153, 81+830.
[47] Blandy v. Raguet, 14-243(179); Rand v. Getchell, 24-319; Brown v. Mpls. L. Co., 25-461; Cohen v. Kroell, 26-308, 3+978; First Nat. Bank v. Randall, 38-382, 37+799; Jones v. Swank, 51-285, 53+634; Finance Co. v. Hursey, 60-17, 61+672; Ros-

WRONGFUL ATTACHMENT

663. Liability of plaintiff and sheriff—A plaintiff who buys at execution sale exempt property wrongfully seized under his attachment, and thereafter sells it, knowing it to be exempt, is liable to the owner.[48] If property is wrongfully attached the owner may replevy it from the sheriff,[49] or sue him as for conversion.[50]

ATTAINDER—See note 51.
ATTEMPT—See Criminal Law, 2414.

ATTORNEY AND CLIENT

Cross-References

See Evidence, 3412; Execution, 3504; Witnesses, 10313.

IN GENERAL

664. Officer of court—Control of court—An attorney is an officer of the court. It is his duty to act as a minister of justice and not as a quasi principal in litigation. A court has general authority to control and protect its attorneys, so far as their professional character and duties, and their relations to suitors, to the court, and to the administration of justice, are concerned.[52]

665. Duty to court—It is the duty of attorneys to show courtesy and respect to the court.[53] This subject is considered in connection with contempt [54] and new trials.[55]

666. Summary jurisdiction over attorneys—Courts are invested by statute with summary jurisdiction over attorneys who refuse to deliver money or papers due their clients.[56] A proceeding under the statute has been held not to bar a subsequent action by a client against his attorney.[57]

667. When relation exists—Where an attorney at law is, as such, called upon for "legal advice" by a person acting for himself, and he thereupon assumes to give a professional opinion, the relation of attorney and client arises between the parties.[58]

668. Contract of employment—Evidence held to show an employment of an attorney.[59]

669. Retainer—Change of firm—The retainer of one member of a law firm is a retainer of the firm, and no subsequent dissolution of the firm will affect the client's rights or relieve the retiring members of the firm from responsibility. This rule is established entirely for the protection of the client.[60]

enberg v. Burnstein, 60–18, 61+684; First Nat. Bank v. Buchan, 76–54, 78+878; First Nat. Bank v. Anderson, 101–107, 111+947; Schoeneman v. Sowle, 102–466, 113+1061; Ascher v. Lanyon, 104–307, 116+581; First State Bank v. Schatz, 104–425, 116+917.

[48] Murphy v. Sherman, 25–196.

[49] Caldwell v. Arnold, 8–265(231); Livingstone v. Brown, 18–308(278); Braley v. Byrnes, 20–435(389).

[50] See § 8747.

[51] Wellner v. Eckstein, 105–444, 468, 117+830.

[52] Schuck v. Hagar, 24–339.

[53] R. L. 1905 § 2281; Wood v. Chi. etc. Ry., 66–49, 68+462; Martin v. Courtney, 81–112, 83+503.

[54] See § 1703.

[55] See § 7103.

[56] R. L. 1905 § 2289; Weicher v. Cargill, 86–271, 90+402.

[57] Burgraf v. Byrnes, 94–418, 103+215.

[58] Ryan v. Long, 35–394, 29+51.

[59] Horn v. Western L. Assn., 22–233.

[60] Davis v. Chouteau, 32–548, 21+748.

670. Notice to attorney notice to client—The rule that notice to an agent is notice to his principal [61] is applicable to attorney and client.[62]

671. Good faith—Fiduciary relation—The relation between an attorney and his client is confidential and fiduciary. The law requires absolute good faith upon the part of an attorney toward his client.[63] If an attorney is guilty of fraud or bad faith he is not entitled to any compensation for his services,[64] and is answerable to his client in damages.[65] The obligation of fidelity which an attorney owes to his client is a continuing one, and he cannot make use of any knowledge acquired through his client, or through his professional relations, for his own advantage, adverse to the interest of his client or those claiming through him, even after the confidential relations have ceased. This rule has been held to prevent an attorney from acquiring title by adverse possession.[66]

672. Contracts—Good faith—Burden of proof—In all contracts and transfers of property between an attorney and his client, the attorney is bound to exercise perfect fairness and good faith. Courts scrutinize such transactions very closely. The attorney has the burden of proving the perfect fairness, adequacy of consideration, and good faith of the transaction.[67] These rules are not restricted to contracts or dealings with respect to the rights or property in controversy in the particular suit in which the attorney is acting for or advising the client, but extends to other transactions, where the relationship may be presumed to give the attorney some advantage over the client. These rules do not apply where the relation of attorney and client has ceased between the parties and they are dealing at arms length.[68]

673. Purchasing against client—The attorney of the administrator of an estate cannot purchase an outstanding life estate in realty of which the administrator is trustee, for his personal use and profit by a sale thereof.[69] A purchase by an attorney, after he had ceased to be such, of an outstanding half interest in realty, of which the client supposed himself the sole owner, has been sustained, where the attorney acted in good faith.[70]

674. Liability to client—An attorney is answerable to his client in damages for any abuse of his trust or for the consequences of his culpable ignorance, negligence, indiscretion, or fraud.[71]

675. Liability to third parties—An attorney is liable to third parties only where he institutes proceedings without authority from his client, or where he and his client fraudulently conspire to do an illegal act, or where he acts dishonestly, with some sinister view or for some improper purpose of his own which the law considers malicious.[72]

ADMISSION OF ATTORNEYS

676. Without examination—Non-residents—Under Rule 1 the applicant must be an attorney of the state from which he came at the time of his applica-

[61] See § 215.
[62] Lebanon S. Bank v. Hollenbeck, 29–322, 13+145; Trentor v. Pothen, 46–298, 49+129; Bates v. Johnson, 79–354, 82+649.
[63] Struckmeyer v. Lamb, 64–57, 65+930; Rogers v. Gaston, 43–189, 45+427; Beals v. Wagener, 47–489, 50+535; Mille Lacs L. Co. v. Keith, 78–350, 81+13, 548.
[64] Davis v. Swedish etc. Bank, 78–408, 80+953, 81+210.
[65] See § 674.
[66] Sanford v. Flint, 108–399, 122+315.
[67] Tancre v. Reynolds, 35–476, 29+171; Klein v. Borchert, 89–377, 95+215.
[68] Tancre v. Reynolds, 35–476, 29+171; Mille Lacs L. Co. v. Keith, 78–350, 81+13, 548.
[69] Turner v. Fryberger, 94–433, 103+217.
[70] Rogers v. Gaston, 43–189, 45+427.
[71] Schoregge v. Gordon, 29–367, 13+194; Joy v. Morgan, 35–184, 28+237; Ryan v. Long, 35–394, 29+51; Struckmeyer v. Lamb, 64–57, 65+930; Burgraf v. Byrnes, 94–418, 103+215.
[72] Farmer v. Crosby, 43–459, 45+866. See Barry v. McGrade, 14–163(126).

tion and have been such continuously for five years immediately preceding such application. The fact that he has been an attorney of the federal courts in such state does not bring him within the rule. A disbarment interrupts the five-year period, though the attorney is re-admitted.[73]

REMOVAL AND SUSPENSION OF ATTORNEYS

677. Preliminary investigation—The accused attorney need not be given an opportunity to be heard before the board of law examiners, or the officer thereof who conducts the preliminary examination.[74]

678. Causes—An attorney may be removed or suspended upon conviction of a felony,[75] or for "any deceit or wilful misconduct in his profession;" [76] or for insulting language addressed to the court.[77]

679. Criticism of court—Insulting language—Every citizen has the right to comment upon and criticise without any restriction the rulings of a judicial officer in an action which has been finally determined, and not be answerable therefor otherwise than in an action triable by a jury. An attorney has such right, and can be disbarred for such comment or criticism, if at all, only when it is so base and vile as to establish clearly his bad character and his unfitness to remain a member of an honorable profession. An attorney may not, however, insult the judicial officer by words written or spoken addressed to such officer personally because of the latter's official act, though in a matter fully ended; and, if he does so, it may constitute a sufficient cause for his disbarment.[78]

680. Sufficiency of evidence—To justify a disbarment proof of the charge need not be made out beyond a reasonable doubt, but the evidence must be full, clear and convincing—something more than a preponderance of evidence.[79] Evidence held insufficient to sustain a charge.[80]

681. Motives of prosecutor—The motive of those instrumental in the conduct of the proceedings is a proper matter for consideration in connection with the evidence offered of the respondent's guilt.[81]

682. Res judicata—The failure of the prosecutor to include in a particular proceeding all acts of misconduct will not bar a subsequent proceeding for misconduct not included therein.[82]

CHANGE AND ADDITION OF ATTORNEYS

683. Notice—Statute—The statute [83] requiring notice of a change of attorneys applies only to changes during the progress of an action and prior to judgment. After judgment either party may change attorneys without notice or formal substitution.[84] When notice is required the adverse party is bound to recognize the former attorney until notice.[85]

[73] In re Crum, 72–401, 75+385, 79+967.
[74] State Board v. Byrnes, 97–534, 105+965.
[75] In re Madigan, 66–9, 68+1102.
[76] In re Aretander, 26–25, 1+43; In re Temple, 33–343, 23+463; In re Nunn, 73–292, 76+38; Southworth v. Bearnes, 88–31, 92+466; State Board v. Byrnes, 93–131, 100+645; State Board v. Lane, 93–425, 101+613; State Board v. Reynolds, 98–44, 107+144; State Board v. Byrnes, 100–76, 110+341; State Board v. Davis, 108–87, 121+1133.
[77] State Board v. Hart, 104–88, 116+212.
[78] Id.
[79] State Board v. Dodge, 93–160, 100+684.
[80] In re Searles, 59–196, 60+1008; In re Gail, 59–198, 60+1008; Higby v. McMahon, 63–373, 65+640; Minn. S. B. Assn. v. Boughton, 64–427, 67+350; Johnson v. Elmquist, 81–290, 83+1082; State Board v. Dodge, 93–160, 100+684; State Board v. Palmer, 103–522, 114+1133.
[81] State Board v. Byrnes, 97–534, 105+965.
[82] Id.
[83] R. L. 1905 § 2286.
[84] Hinkley v. St. Anthony etc. Co., 9–55

683a. Additional counsel during trial—After a jury is impaneled additional counsel may be retained for the purpose of participating in the trial, and in the absence of a request to examine the jurors further as to their qualifications it is error to refuse to permit such additional counsel.[86]

AUTHORITY OF ATTORNEYS

684. Statute—The foreclosure of a mortgage is not a "proceeding" within the statute [87] defining the authority of attorneys.[88]

685. Authority to appear—Proof—Stay—The statute authorizes a court, on motion, to require an attorney to prove his authority to appear and to stay proceedings pending proof.[89] An ex parte order requiring an attorney to file proof of his authority is not authorized by the statute.[90] The authority of an attorney to appear is presumed unless challenged, as provided by statute.[91] After the recovery of a judgment, the attorney who procured it or another attorney may appear for and act for the judgment creditor in ulterior proceedings, and the court will not presume that he acts without authority, in the absence of any showing or finding to that effect.[92] The fact of authority may be proved by the testimony of the attorney.[93] It cannot be presumed that the attorney of a party sued in his individual capacity has authority to stipulate for the substitution of the party in a representative capacity and to appear for him in such new capacity.[94] Various cases involving the authority of attorneys to appear are cited below.[95]

686. To bring suit—Where a note and conditional sale agreement were sent to an attorney out of the state by a collection agency, it was held that the attorney presumptively had authority to bring suit on the note.[96] An attorney has been held not to have been authorized to bring an action in another state.[97]

687. To employ associate counsel—An attorney has no general authority to employ associate counsel at the expense of his client.[98]

688. In the conduct of litigation—It is for the interest not only of courts, but of parties, that the powers of attorneys in the prosecution and defence of actions should be well defined and extensive. In the conduct of litigation the attorney stands for his client. The court and adverse party look to him and not to his client, and his authority ought to be such that they can do so with safety.[99]

689. In making collections—When employed to collect a debt an attorney has no implied authority in excess of an ordinary agent. He has no such general authority as he has in the conduct of litigation. He has no implied authority to extend the time of payment.[1]

(44); Berthold v. Fox, 21–51, 54; Knox v. Randall, 24–479; Schoregge v. Gordon, 29–367, 370, 13+194; Gill v. Truelsen, 39–373, 40+254; West v. St. P. etc. Ry., 40–189, 41+1031.

[85] McFarland v. Butler, 11–72(42).

[86] Kerling v. Van Dusen, 109–481, 124–235.

[87] R. L. 1905 § 2283.

[88] In re Grundysen, 53–346, 55+557.

[89] R. L. 1905 § 2284; Davis v. Woodward, 19+174(137).

[90] Farrington v. Wright, 1–241(191).

[91] Conrad v. Swanke, 80–438, 83+383; Gemmell v. Rice, 13–400(371); St. Paul etc. Co. v. Thomas, 60–140, 61+1134.

[92] Nelson v. Jenks, 51–108, 52+1081.

[93] Eickman v. Troll, 29–124, 12+347.

[94] Erskine v. McIlrath, 60–485, 62+1130.

[95] Eickman v. Troll, 29–124, 12+347; Wilson v. Mpls. etc. Ry., 31–481, 18+291; Stocking v. Hanson, 35–207, 28+507; Holden v. Greve, 41–173, 42+861; Olmstead v. Firth, 60–126, 61+1017; Schaefer v. Schoenborn, 94–490, 103+501; Stai v. Selden, 87–271, 92+6.

[96] Alden v. Dyer, 92–134, 99+784.

[97] Franklin v. Warden, 9–124(114).

[98] See White v. Esch, 78–264, 80+976; Calhoun v. Akeley, 82–354, 85+170.

[99] Bray v. Doheny, 39–355, 40+262.

[1] Mason v. Thompson, 94–472, 103+507.

690. Compromise of claims—An attorney has no implied authority to compromise a claim of his client,[2] but he may have express authority.[3] Where an attorney accepted part payment of a note and took security running to himself for the balance, it was held that the client might accept the money in payment pro tanto, repudiate the security, and sue for the balance on the note.[4]

691. Compromise of judgment—An attorney who recovers a judgment has no implied authority to compromise or discharge it for a less sum than its value, and if he does so the client may recover the sum received by the attorney and also sue the latter for damages.[5]

692. In collecting a judgment—There is a distinction between the authority of an attorney before and after judgment, but this distinction is less marked than formerly, in view of the remedies which may be employed after judgment, such as garnishment, supplementary proceedings, etc., and the extent and variety of the services which may be required to secure and collect the same. If he is employed for such purpose he must be deemed vested with reasonable discretion in the selection and use of remedies to accomplish the object in view.[6]

693. Ratification—If a client ratifies the unauthorized acts of his attorney he is bound thereby.[7]

694. Duration—The authority of an attorney by virtue of his general retainer to prosecute or defend ends upon the entry of judgment against his client. If the judgment is in favor of his client, his authority continues for two years for the purpose of collecting and enforcing the judgment,[8] but this authority may possibly be terminated by an assignment of the judgment.[9] After the recovery of a judgment, the attorney who procured it, or another attorney, may appear for and act for the judgment creditor in ulterior proceedings, and the court will not presume that he acts without authority, in the absence of any showing or finding to that effect.[10]

695. Infant clients—A stipulation by an attorney that the action shall abide the event of another action pending, binds his adult clients, unless it is improvidently, fraudulently, or collusively made. But such stipulation does not bind an infant party unless approved and ratified by the court upon a showing that it is for the interest, or, at least, not prejudicial to the interest, of the infant. It must appear that the matters in controversy in the two actions, so far as affected the infant, are precisely the same, and that he is represented in the two actions by the same guardian ad litem.[11]

696. Necessity of writing—A stipulation made out of court must be in writing and be signed by the attorney.[12]

697. Held to have authority—To stipulate for judgment against client;[13] to satisfy a judgment within two years of its entry;[14] to stipulate that an action shall abide the event of another action;[15] to waive the verification of a pleading;[16] to waive defences;[17] to waive the right to a second trial in ejectment;[18]

[2] Nelson v. Nelson, 126+731. See Davis v. Severance, 49–528, 52+140; Ruggles v. Swanwick, 6–526(365).

[3] Albee v. Hayden, 25–267.

[4] Davis v. Severance, 49–528, 52+140.

[5] Burgraf v. Byrnes, 94–418, 103+215; Bryant v. Robinson, 97–533, 105+1134.

[6] Schoregge v. Gordon, 29–367, 13+194; Sheldon v. Risedorph, 23–518.

[7] Hodgins v. Heaney, 17–45(27); Ruggles v. Swanwick, 6–526(365); Gill v. Truelsen, 39–373, 40+254; Backus v. Burke, 63–272, 65+459. See Albee v. Hayden, 25–267.

[8] Berthold v. Fox, 21–51; Kronschnable v. Knoblauch, 21–56; Sheldon v. Risedorph, 23–518.

[9] Gill v. Truelsen, 39–373, 40+254.

[10] Nelson v. Jenks, 51–108, 52+1081.

[11] Eidam v. Finnegan, 48–53, 50+933.

[12] R. L. 1905 § 2283; Waldron v. St. Paul, 33–87, 22+4.

[13] Wells v. Penfield, 70–66, 72+816; Bates v. Bates, 66–131, 68+845; Ramsland v. Roste, 66–129, 68+847.

[14] Berthold v. Fox, 21–51; Burgraf v. Byrnes, 94–418, 103+215.

[15] Eidam v. Finnegan, 48–53, 50+933.

[16] Smith v. Mulliken, 2–319(273).

[17] Bingham v. Winona County, 6–136(82).

[18] Bray v. Doheny, 39–355, 40+262.

to issue execution and receive money paid thereon within two years after judgment;[19] to make admissions in the conduct of litigation;[20] to protect a judgment in favor of his client from proceedings to avoid it;[21] to stipulate for the dismissal of an action;[22] to make an affidavit of merits;[23] to waive the placing of a cause on the calendar;[24] to stipulate that costs shall abide the event of an action;[25] to execute a bond, in the name of a non-resident client, to indemnify a sheriff after judgment.[26]

698. Held not to have authority—To stipulate for a private sale on execution;[27] to consent to an amendment of a complaint whereby a client sued in an individual capacity is rendered liable in a representative capacity;[28] to admit service of summons;[29] to receive money in redemption of a foreclosure sale;[30] to release a judgment.[31]

COMPENSATION

699. Allowance by court—Discretion—Proof—The question of the allowance of counsel fees is ordinarily a matter lying in the discretion of the court to which it is presented. But it is discretionary only in the sense that there are no fixed rules to determine the proper allowance, and is not discretionary in the sense that courts are at liberty to give anything more than a fair and reasonable compensation.[32] Where counsel fees are to be allowed in a proceeding had before the court formal proof of their value is not indispensable. The court may determine the matter from its own experience and knowledge of the circumstances of the case.[33]

700. Fraud or bad faith—If an attorney is guilty of fraud or bad faith toward his client he is not entitled to any compensation.[34]

701. Value of services—Evidence—The value of the services of an attorney is necessarily to be determined by many considerations besides the mere time visibly employed in the conduct of a suit. The importance of the case to the client and the results achieved may be considered.[35] Their value may be shown by the opinions of practicing attorneys, including the plaintiff,[36] but such evidence is not conclusive, as a matter of law, upon a jury.[37] Such witnesses may testify as to the total value of the services, though a bill of particulars was rendered.[38] A bill rendered for the services is not conclusive as to their value. if it was not paid or agreed upon as correct.[39] The value of services rendered by associate counsel may sometimes be considered.[40] The plaintiff cannot be allowed to show, for the purpose of establishing the value of his services, that, after he was employed by defendants, an attempt was made to secure his services on the other side of the litigation; or to show what a reasonable fee would

[19] Gill v. Truelsen, 39–373, 40+254; Schoregge v. Gordon, 29–367, 13+194.
[20] Rogers v. Greenwood, 14–333(256).
[21] Sheldon v. Risedorph, 23–518; Schoregge v. Gordon, 29–367, 13+194.
[22] Rogers v. Greenwood, 14–333(256). See Albee v. Hayden, 25–267; Davis v. Severance, 49–528, 52+140; Wells v. Penfield, 70–66, 72+816; Schaefer v. Schoenborn, 94–490, 103+501.
[23] Frankoviz v. Smith, 35–278, 28+508.
[24] Hintermeister v. Brady, 70–437, 73+145.
[25] Dorr v. Steichen, 18–26(10).
[26] Schoregge v. Gordon, 29–367, 13+194.
[27] Kronschnable v. Knoblauch, 21–56.
[28] Erskine v. McIlrath, 60–485, 62+1130.
[29] Masterson v. Le Claire, 4–163(108). See Stocking v. Hanson, 35–207, 28+507; Backus v. Burke, 63–272, 65+459.
[30] In re Grundysen, 53–346, 55+557.
[31] Bray v. Doheny, 39–355, 40+262.
[32] Watkins v. Bigelow, 96–53, 104+683.
[33] Cochran v. Cochran, 93–284, 101+179; Kingsley v. Anderson, 103–510, 116+112.
[34] Davis v. Swedish etc. Bank, 78–408, 80+953, 81+210.
[35] Selover v. Bryant, 54–434, 56+58.
[36] Allis v. Day, 14–516(388); Calhoun v. Akeley, 82–354, 85+170.
[37] Olson v. Gjertsen, 42–407, 44+306; Schmitt v. Murray, 87–250, 91+1116.
[38] Calhoun v. Akeley, 82–354, 85+170.
[39] Allis v. Day, 14–516(388); Wilson v. Mpls. etc. Ry., 31–481, 18+291; Wilkinson v. Crookston, 75–184, 77+797.
[40] Calhoun v. Akeley, 82–354, 85+170.

have been had his services been secured, and had he conducted the other side.[41] An attorney and client may agree to an account between them so as to make it an account stated.[42]

702. Actions to recover—Cases are cited below involving various questions in actions by attorneys for their services.[43]

LIEN OF ATTORNEYS

703. At common law—It was said in an early case at common law that "the party should not run away with the fruits of the cause without satisfying the legal demand of his attorney, by whose industry, and in many cases, at whose expense, those fruits were obtained."[44] At common law an attorney had a possessory lien on all property in his possession with respect to which he rendered services to the owner.[45]

704. Statutory—The right to a lien is purely statutory.[46] A statute giving a lien is of a remedial nature and to be construed liberally.[47]

705. On papers and money in hand—An attorney has a lien on papers and moneys of his client in his possession for services rendered in connection therewith.[48] An attorney has been held to have an equitable lien on delinquent taxes in his hands collected by him for a county.[49] Where an attorney holds deeds his lien is not a charge upon the estate.[50]

706. On cause of action—Prior to Revised Laws 1905 an attorney had no lien on his client's cause of action before judgment. It was held that no lien could be created on a mere right of action for a personal tort.[51] But it was held that the rendition of a verdict in favor of his client gave an attorney a lien, even before judgment was entered thereon.[52] The provision of R. L. 1905

[41] Steenerson v. Waterbury, 52–211, 53+1146.

[42] Beals v. Wagener, 47–489, 50+535.

[43] Cooper v. Stinson, 5–201(160) (answer alleging payment to an agent of plaintiff held not to state a defence); Allis v. Lash, 23–261 (fact that attorney had agreed to pay a mortgage held not to preclude his recovery for foreclosing it); Lamprey v. Langevin, 25–122 (evidence as to value of services held immaterial); Wilson v. Mpls. etc. Ry., 31–481, 18+291 (finding as to value of services sustained); Humphreys v. Jacoby, 41–226, 42+1059 (held that services rendered in the organization of a corporation of which one member of a firm was to be a director, were intended to be gratuitous); Moyer v. Cantieny, 41–242, 42+1060 (right to recover agreed sum unaffected by employment of others or by a discharge of plaintiff); Olson v. Gjertsen, 42–407, 44+306 (evidence as to collection of fees for third parties admissible); Akers v. Thwing, 52–395, 54+194 (evidence held to justify verdict as to value of services and as to whether there had been a special agreement as to compensation); Berryhill v. Resser, 64–479, 67+542 (settlement—novation—estoppel); Baxter v. Gale, 74–36, 76+954 (services rendered stepdaughter held gratuitous); Wilkinson v. Crookston, 75–184, 77+797 (accord and satisfaction—question as to a charge held for jury); White v. Esch, 78–264, 80+976 (employment of associate counsel—verdict justified by evidence—no error in charge or in rulings on evidence); Schmitt v. Murray, 87–250, 91+1116 (defence that services were rendered to another who was principal debtor—payment—statute of frauds—verdict sustained); Lind v. Jones, 104–302, 116+579 (verdict for plaintiff sustained); Dwyer v. Hurley, 109–415, 124+4 (finding as to reasonable value of services sustained).

[44] Lindholm v. Itasca L. Co., 64–46, 65+931.

[45] Northrup v. Hayward, 102–307, 113+701.

[46] Forbush v. Leonard, 8–303(267); Crowley v. Le Duc, 21–412; Nielsen v. Albert Lea, 91–388, 98+195. See Washington County v. Clapp, 83–512, 86+775.

[47] Crowley v. Le Duc, 21–412; Farmer v Stillwater W. Co., 108–41, 121+418.

[48] R. L. 1905 § 2288; First State Bank v. Sibley Co. Bank, 96–456, 105+485, 489.

[49] Washington County v. Clapp, 83–512, 86+775.

[50] Gardner v. McClure, 6–250(167).

[51] Hammons v. G. N. Ry., 53–249, 54+1108; Anderson v. Itasca L. Co., 86–480, 91+12; Boogren v. St. P. C. Ry., 97–51, 106+104; Northrup v. Hayward, 102–307, 113+701. See Comfort v. Creelman, 52–280, 53+1157.

[52] Crowley v. Le Duc, 21–412; Farmer v. Stillwater W. Co., 108–41, 121+418.

§ 2288 for a lien on the cause of action is inapplicable to actions begun prior to its enactment.[53]

707. On money in hands of adverse party—The section of the statute which gives a lien on money in the hands of the adverse party implies that the cause of action shall ripen into judgment. If the lien is fixed by notice pending the litigation, it cannot be destroyed by a settlement or dismissal without the consent of the attorney.[54] A notice under this section need not state the amount of the claim. It is sufficient if it fairly informs the party that a lien is claimed, its nature, for what it is claimed, and on what it is sought to be enforced.[55] The lien may be enforced by summary proceedings in the action in which the services are rendered.[56] It is limited to services rendered in the particular action or proceeding.[57]

708. On a judgment—The present statute gives an attorney a lien upon a judgment, procured as a result of his services, to the extent of his agreed compensation, from the time notice thereof is given to the judgment debtor. No special form or service of notice is required. Actual notice to the judgment debtor of the claim of the attorney, whether verbal or in writing, answers every purpose of the statute. The payment by the judgment debtor to the judgment creditor of a judgment upon which the attorney has such a lien, with actual notice of the attorney's claim, is void as to the attorney to the extent of his lien, and the satisfaction of the judgment may be set aside and the judgment reinstated, to enable the attorney to proceed by execution to satisfy his claim.[58] Under the statute as it read prior to Revised Laws 1905, it was held that an attorney could not have a lien on a judgment even to the extent of the costs, without giving notice of his claim to the judgment debtor.[59] There can be no lien upon a judgment except upon notice as required by statute. The notice must specify the amount of the claim. An attorney has no lien on a judgment other than for costs, unless there was a special agreement for his compensation. He has a lien on a judgment only for services in the action in which it is rendered.[60] When an attorney takes an assignment of a judgment on which he has a lien his lien is merged.[61] His lien on a judgment is assignable.[62] It is superior to the rights of creditors of the judgment debtor levying on the judgment, though no notice of claim was served upon them.[63] By statute the assignment of a judgment does not affect the lien of an attorney thereon.[64] When a judgment has been collected by a sheriff an attorney with a lien thereon may require him to pay the amount of the lien as against an assignee of the judgment.[65] A judgment for costs is the property of the party recovering it, and not of his attorney, subject, however, to the lien of the latter for his services.[66] The lien on a judgment is subordinate to the rights existing between the parties to the action or proceeding.[67]

709. On trust estate—As a general rule an attorney employed by a trustee has no lien on the trust estate.[68]

[53] Northrup v. Hayward, 102–307, 113+701.
[54] Anderson v. Itasca L. Co., 86–480, 91+12.
[55] Crowley v. Le Duc, 21–412.
[56] Weicher v. Cargill, 86–271, 90+402.
[57] Forbush v. Leonard, 8–303(267).
[58] Northrup v. Hayward, 102–307, 113+701.
[59] Dodd v. Brott, 1–270(205).
[60] Forbush v. Leonard, 8–303(267); Morton v. Urquhart, 79–390, 82+653.
[61] Dodd v. Brott, 1–270(205). See Morton v. Urquhart, 79–390, 82+653.
[62] Sibley v. Pine County, 31–201, 17+337.
[63] Henry v. Traynor, 42–234, 44+11.
[64] R. L. 1905 § 4276. See Dodd v. Brott, 1–270(205); Wetherby v. Weaver, 51–73, 52+970.
[65] Gill v. Truelson, 39–373, 40+254.
[66] Davis v. Swedish etc. Bank, 78–408, 80+953, 81+210.
[67] Lundberg v. Davidson, 68–328, 333, 71+395, 72+71; Weicher v. Cargill, 86–271, 90+402.
[68] Truesdale v. Philadelphia etc. Co., 63–49, 65+133.

710. Settlement and dismissal—Prior to R. L. 1905 it was held that a party might, before judgment, dismiss an action or settle a claim so as to cut off the prospective lien of his attorney without the latter's consent, if it was done without fraud or collusion.[69]

711. Setting off of judgments—Judgments will not be set off so as to defeat unjustly the lien of an attorney.[70] But a judgment debtor may have the judgment against him set off without regard to an attorney's lien of which he had no notice.[71]

712. Enforcement—A lien on funds in the hands of the adverse party or on a judgment may be enforced summarily in the action in which the services were rendered.[72] It has been held that the district court might enforce a lien in an equitable proceeding, though the action in which the services had been rendered had been settled and dismissed.[73]

713. Waiver—It has been held that an attorney did not waive his lien by agreeing that his client should collect the money due on a verdict and pay him after the collection.[74]

ATTORNEY GENERAL—See State, 8845.
ATTORNMENT—See Landlord and Tenant, 5362, 5428.
AT WILL—See Estates, 3161.

AUCTIONS AND AUCTIONEERS

714. Nature of auction—A sale at public auction implies a sale in a public place, after reasonable notice of the time and place of sale, so as to secure the presence of bidders and the best possible price for the property.[75]

715. Offer of property—Bid—Withdrawal of bid—An announcement or advertisement that certain property will be sold at auction to the highest bidder is a mere declaration of intention to hold an auction at which bids will be received. It is not an offer to sell, which becomes binding, even conditionally, on the owner when a bid is made. An auctioneer asks for bids for the property, and a bid is an offer to purchase at the price named. Until the offer is accepted, no contract relations exist. At any time before the bid is accepted, the bidder may withdraw his offer to purchase or the owner his offer to sell.[76]

716. License—The business of an auctioneer is a legitimate one. It can be regulated, but not suppressed. An unreasonably large license fee cannot be charged for the privilege of conducting the business.[77] A note given by a purchaser at an auction sale is not void because the auctioneer acted without a license.[78]

AUDITING FALSE CLAIMS—See Public Officers, 8028.
AUTHORIZE—See note 79.
AUTOMATIC COUPLERS—See Master and Servant, 5898.

[69] Anderson v. Itasca L. Co., 86–480, 91+12; Nielsen v. Albert Lea, 91–388, 98+195; Boogren v. St. P. C. Ry., 97–51, 106+104. See Weicher v. Cargill, 86–271, 90+402.
[70] Lindholm v. Itasca L. Co., 64–46, 65+931; Lundberg v. Davidson, 68–328, 71+395, 72+71.
[71] Morton v. Urquhart, 79–390, 82+653.
[72] Weicher v. Cargill, 86–271, 90+402.
[73] Farmer v. Stillwater W. Co., 108–41, 121+418.
[74] Id.
[75] Webb v. Lewis, 45–285, 288, 47+803.
[76] Anderson v. Wis. C. Ry., 107–296, 120+39.
[77] Mankato v. Fowler, 32–364, 20+361. See State v. Bates, 101–301, 112+67.
[78] Gunnaldson v. Nyhus, 27–440, 8+147.
[79] State v. Minneapolis, 65–298, 68+31.

AUTOMOBILES—See Highways, 4167.
AWARDED—See note 80.
AWNINGS—See note 81.
BAGGAGE—See Carriers, 1240.

BAIL

717. Definitions—Bail is security given to obtain the release of a prisoner from custody pending final decision in the action against him.[82] A bail bond is an obligation under seal given by a prisoner, with one or more sureties, to obtain his release from custody pending final decision in the action against him.[83] A recognizance is an obligation of record, entered into before a court of record or magistrate duly authorized, conditioned to do some particular act, as to appear at court, to keep the peace, or pay a debt.[84] A recognizance differs from a bail bond merely in the nature of the obligation created. The former is an acknowledgment of record of an existing debt; the latter, which is attested by the signature and seal of the obligor, creates a new obligation.[85]

718. Constitutional right—The constitution provides that "all persons shall before conviction be bailable by sufficient sureties, except for capital offences when the proof is evident or the presumption great." [86]

719. Pending adjournment of preliminary examination—Provision is made by statute for bail pending an adjournment of a preliminary examination.[87] A justice of the peace has no authority to admit to bail pending an adjournment, where the accused is charged with an offence punishable with death or imprisonment in the state prison for a term exceeding seven years.[88] A justice of the peace is not authorized to receive a deposit of money in lieu of a recognizance.[89]

720. After conviction and before sentence—After a person is convicted of a crime the district court may allow him to give bail to appear before it for sentence.[90]

721. Pending appeal—Provision is made for bail pending an appeal or writ of error in all cases where the offence is not punishable with death.[91]

722. Application for bail—A person charged with an offence may waive a formal arrest and examination and give bail at once.[92] If the officer in charge brings before a magistrate, having general jurisdiction to admit to bail, a prisoner, who is there permitted to make his application to be admitted to bail, all the substantial purposes of the statutory provisions as to the mode of bringing him up are accomplished, and, so far as they are concerned, any recognizance which the prisoner may enter into is well taken.[93]

723. Sufficiency—It is unnecessary that a recognizance should be a written instrument formally signed by the recognizors. It is enough—indeed, it is technically the proper practice—for the magistrate to repeat to the proposed recognizors a form of words to the effect that they acknowledge themselves to be indebted to the state in a sum named, the condition being that the prisoner shall appear at a time and place named to answer an indictment, etc. What has become a more common practice, where persons are admitted to bail out of

[80] Starkey v. Minneapolis, 19–203(166).
[81] Fox v. Winona, 23–10.
[82] Century Dict.
[83] See State v. McGuire, 42–27, 43+687.
[84] Century Dict.; State v. Grant, 10–39 (22, 30); In re Brown, 35–307, 29+131; State v. McGuire, 42–27, 43+687; State v. Bongard, 89–426, 429, 94+1093.
[85] In re Brown, 35–307, 29+131; State v. McGuire, 42–27, 43+687.
[86] Const. art. 1 § 7; State v. Levy, 24–362, 368.
[87] R. L. 1905 § 5241.
[88] State v. Bartlett, 70–199, 72+1067.
[89] Cressey v. Gierman, 7–398(316).
[90] State v. Levy, 24–362.
[91] R. L. 1905 § 5406; Mims v. State, 26–494, 496, 5+369.
[92] State v. Grant, 10–39(22, 30).
[93] State v. Perry, 28–455, 10+778.

court, is that the recognizors sign and deliver to the magistrate a written instrument, in which they acknowledge themselves indebted to the state in the named sum, with a condition as above. There can be no essential or important difference between the effects of these two modes of entering into a recognizance. In either case the recognizance is acknowledged before the magistrate. The form of words by which a deed is acknowledged may as well be repeated by the acknowledging party as by the acknowledging officer. The form of oath may as effectually be repeated by the party who takes it as by the administering officer.[94] A recognizance taken before a justice of the supreme court is sufficient if it appears upon it, that it was taken in a case in which he might take a recognizance, and if it is conditioned to do some act for the performance of which one may be properly taken.[95] A recognizance "approved" by a court commissioner has been held sufficient, though informal.[96]

724. Filing—A recognizance is not a complete obligation until it is made a matter of record by filing in the proper court.[97] If a recognizance is of record in the proper court, at the time when the parties who entered into it are called upon to perform its conditions, it is in time as respects filing. The provision of the statute requiring a recognizance to be filed on or before the first day of the term of the district court before which the prisoner is bound to appear, is, as to time, directory.[98]

725. In supreme court—Justices of the supreme court have power to take recognizances in habeas corpus proceedings.[99]

726. Forfeiture—Payment of penalty—Remission—In declaring a forfeiture it is unnecessary for the court to call a surety.[1] Provision is made by statute for payment by a surety of the penalty of a forfeited recognizance, and for his discharge.[2] Provision is also made for a remission of the penalty under certain conditions.[3]

727. Pleading—Cases are cited below involving questions of pleading.[4]

BAILMENT

Cross-References

See Banks and Banking; Carriers; Depositaries; Factors; Innkeepers; Pledge; Sales, 8597; Warehousemen.

728. Definition—A bailment is the contract or legal relation which is constituted by the delivery of goods without a transference of ownership, on an agreement, expressed or implied, that they be returned or accounted for, as, for example, a loan, a consignment, a delivery to a carrier, a pledge, a deposit for safe keeping, or a letting on hire.[5]

94 State v. Perry, 28–455, 10+778.
95 State v. Grant, 10–39(22).
96 State v. Perry, 28–455, 10+778.
97 State v. Grant, 10–39(22).
98 State v. Perry, 28–455, 10+778.
99 State v. Grant, 10–39(22).
1 Id.
2 R. L. 1905 § 5252; Flanigan v. Minneapolis, 36–406, 31+359; N. P. Ry. v. Owens, 86–188, 195, 90+371.
3 R. L. 1905 § 5253; State v. Bongard, 89–426, 94+1093.
4 State v. Grant, 10–39(22) (unnecessary in action on recognizance to plead non-payment of penalty); State v. McGuire, 42–27, 43+687 (complaint on recognizance sustained); State v. Bongard, 89–426, 94+1093.
5 Century Dict. See, as to what constitutes a bailment, Williams v. McGrade, 13–174(165) (transaction held a bailment not a sale); Streeter v. Smith, 31–52, 16+460 (contract to hold property and deliver on demand or pay a certain sum held a bailment); Fishback v. Van Dusen, 33–111, 22+244 (effect of deposit of grain); Nat. Exch. Bank v. Wilder, 34–149, 24+699 (id.); Mason v. Aldrich, 36–283, 30+884 (contract of receipt or of personalty levied upon held one of bailment); Weiland v. Krejnick, 63–314, 65+631 (delivery of grain to elevator held a sale and not a

729. Fiduciary relation—It is sometimes said, with questionable accuracy, that the relation between bailor and bailee is of a fiduciary nature.[6]

730. Consideration—All bailments, whether with or without compensation to the bailee, are contracts founded on a sufficient consideration. It is unnecessary to constitute a sufficient consideration to support the contract that the bailee should derive some benefit from it. It is sufficient if the bailor on the faith of the promise parts with some present right, or delays the present use of some right, or suffers some immediate prejudice or detriment, or does some act at the bailee's request.[7]

731. Hiring—A person who hires a thing is bound to use it well, take care of it, return it, and pay the price of hire. If his bad usage or want of due care causes the death of a hired horse, he is liable for its value. If the horse is taken sick through the fault of the hirer the letter is bound to make reasonable efforts to cure it, and may recover from the hirer for his expenses and trouble. One who is not a hirer is not liable on the contract of hiring though the injury was due to his carelessness.[8]

732. Liability of bailee for negligence—Where a bailment is reciprocally beneficial to both parties, the bailee is liable to the bailor for a failure to exercise ordinary or reasonable care, in the absence of a special agreement to the contrary.[9] It is generally laid down that a gratuitous bailee is liable only for "gross" negligence, whatever that may mean.[10] To what extent a bailee may limit his liability by contract is not well settled in this state.[11] While the burden of proving negligence is on the plaintiff, proof of injury or loss, or refusal to return on demand, makes out a prima facie case against the bailee.[12] An action for the neglect of a bailee may be either ex contractu or ex delicto.[13]

733. Liability of bailee for conversion—There are many cases holding that any unauthorized use of the property by the bailee constitutes a conversion, but it seems objectionable to treat any unauthorized act of the bailee as a conversion unless it results in depriving the bailor of the property permanently.[14] In an action for conversion proof by the bailor that the bailee failed or refused to deliver the property on demand makes out a prima facie case.[15]

734. Excuses for non-delivery—A bailee may excuse his failure to redeliver the property to the bailor by showing that it belonged to a third party into whose possession it has gone,[16] or that it was taken from him under due process against the bailor.[17]

bailment); Weiland v. Sunwall, 63–320, 65+628 (id.).

[6] State v. Barry, 77–128, 136, 79+656; State v. Cowdery, 79–94, 98, 81+750.

[7] McCauley v. Davidson, 10–418(335).

[8] Graves v. Moses, 13–335(307). See St. Paul etc. Ry. v. Mpls. etc. Ry., 26–243, 2+700 (liability of railway for destruction by fire of hired cars).

[9] St. Paul etc. Ry. v. Mpls. etc. Ry., 26–243, 246, 2+700; Cannon River M. Assn. v. First Nat. Bank, 37–394, 34+741; Chesley v. Miss. etc. Co., 39–83, 38+769; Armstrong v. Chi. etc. Ry., 45–85, 47+459; Johnson v. Smith, 54–319, 56+37; Smith v. Library Board, 58–108, 59+979. See Noble v. G. N. Ry., 89–147, 94+434; Miller v. Dayton, 94–340, 102+862.

[10] McCauley v. Davidson, 10–418(335); Davis v. Tribune J. P. Co., 70–95, 97, 72+808. See Miller v. Dayton, 94–340, 102+862; 5 Harv. L. Rev. 226; 17 Id. 126, 501.

[11] See McCauley v. Davidson, 10–418 (335); Smith v. Library Board, 58–108, 59+979.

[12] Davis v. Tribune J. P. Co., 70–95, 72+808; Wickstrom v. Swanson, 107–482, 120+1090. See Johnson v. Smith, 54–319, 56+37.

[13] Wickstrom v. Swanson, 107–482, 120+1090.

[14] McCurdy v. Wallblom, 94–326, 102+873. See 21 Harv. L. Rev. 409.

[15] Davis v. Tribune J. P. Co., 70–95, 72+808; Wickstrom v. Swanson, 107–482, 120+1090.

[16] Mason v. Aldrich, 36–283, 285, 30+884; Thomas v. N. P. Ex. Co., 73–185, 75+1120.

[17] Thomas v. N. P. Ex. Co., 73–185, 75+1120.

735. Duty of bailor to reduce damages—A bailor who knows that the bailee has exposed his property to injury is bound to use reasonable care to protect himself against additional injury.[18]

736. Actions by bailee—A bailee in possession may maintain an action against a third person for an injury to the property.[19] A mere naked bailee cannot recover against a third person for the conversion of the bailed property when the bailor or owner has intervened and asserted his rights to the property. But a bailee entitled to the possession of the goods for a specific time and purpose may, notwithstanding such intervention on the part of the general owner, recover to the extent of the value of his special interest in the property.[20]

BAKING POWDER—See Food, 3780.

BALANCE SHEET—A balance sheet is nothing more or less than a summation and balance of accounts.[21]

BALLOTS—See Elections, 2934–2959.

BANK NOTE DETECTORS—See Evidence, 3358.

BANKRUPTCY

Cross-References

See Agency, 230; Insolvency; Limitation of Actions, 5620.

ACT OF 1898

737. Effect on state statute—The federal bankruptcy act of 1898 superseded our insolvency law of 1881 from the date of its passage, July 1, 1898, except as to proceedings commenced prior to that date.[22] But an assignment under the insolvency law of 1881 made after July 1, 1898, is valid, except as against proceedings in bankruptcy under the act of 1898.[23] Proceedings commenced by the assignment of the insolvent under the state law before the enactment of the federal law were unaffected by the latter.[24]

738. Jurisdiction of state courts—The provision authorizing the trustee to bring suits in the state courts is valid.[25] The subsequent filing of a petition in bankruptcy, the administration of the estate in that court, and the insolvent's discharge as a bankrupt, do not deprive the state court of jurisdiction to entertain a suit by the assignee or receiver previously appointed by it to recover property fraudulently conveyed or concealed.[26]

739. Insolvent defined—A person is insolvent, within the meaning of the act, whenever the aggregate of his property, exclusive of any property which he may have conveyed, transferred, concealed, or removed, with intent to defraud, hinder, or delay his creditors, is not, at a fair valuation, sufficient to pay his debts.[27]

740. Collateral attack—The appointment of a trustee by the court upon the opening of an estate after a discharge, without prior action on the part of the creditors, is not subject to collateral attack.[28]

741. Dissolution of attachments, etc.—The provision as to the dissolution of attachments, etc., upon the adjudication of bankruptcy, applies to voluntary

[18] Graves v. Moses, 13–335(307); Rettner v. Minn. C. S. Co., 88–352, 93+120.

[19] Chamberlain v. West, 37–54, 33+114; Laing v. Nelson, 41–521, 43+476; Brown v. Shaw, 51–266, 53+633.

[20] Engel v. Scott, 60–39, 61+825.

[21] Maxfield v. Seabury, 75–93, 99, 77+555. See Accounts.

[22] Foley v. Sawyer, 76–118, 78+1038; Aretz v. Kloos, 89–432, 95+216, 769. See 22 Harv. L. Rev. 547.

[23] Armour v. Brown, 76–465, 79+522.

[24] Osborn v. Fender, 88–309, 92+1114.

[25] French v. Smith, 81–341, 84+44.

[26] Osborn v. Fender, 88–309, 92+1114.

[27] First S. Bank v. Sibley Co. Bank, 96–456, 105+485, 489.

[28] Fowler v. Jenks, 90–74, 95+887.

as well as involuntary proceedings, and though the bankrupt does not refer to the attachment in his schedule.[29] The trustee may retain the attachment for the benefit of the estate by an order of court.[30]

742. By firm—An assignment by a firm must ordinarily be executed by all the partners. But one partner may be authorized, expressly or impliedly, to make an assignment of all the firm property.[31] Where an assignment by one partner is not authorized a non-concurring partner cannot, by a subsequent ratification thereof, destroy rights of others accruing between the assignment and the ratification.[32]

743. Preferences—When a preference consists of a transfer, the four-months' period begins to run from the recording of the instrument of transfer, if a recording is required by law. Whether a transaction in the form of a recordable instrument constitutes a preference must be determined by the facts existing at the time the instrument is executed, and not at the time of its record. If it is not originally a preference, a failure to record it until the maker becomes insolvent does not make it one.[33] Money deposited in a bank in the due course of business by an insolvent, within four months of the time he is adjudged a bankrupt, is not a transfer of property constituting a preference, and the bank may apply the amount of such deposit upon a debt due from the insolvent.[34] No further evidence is required to show that a creditor had reasonable cause to believe that payment of his claim by an insolvent debtor was made with the intention of creating a preference, when it appears from the circumstances connected with the payment that a preference was a necessary result thereof.[35] Cases are cited below involving charges of preference.[36]

744. Schedule—A discharge releases the bankrupt from a debt not scheduled in the name of the creditor, if the creditor knew of the proceedings in bankruptcy in time to present his claim for allowance.[37] A schedule of a debt in the name of the creditors, instead of in the name of a receiver representing them, held sufficient to release the bankrupt.[38] A debt held properly scheduled.[39] A schedule held admissible on the cross-examination of a bankrupt to test his credibility.[40] A schedule held inadmissible to prove insolvency.[41]

745. Title—Effect of bankruptcy—Upon the adjudication of a bankrupt, title to his property passes from him at once, and is conditionally vested in the court, pending the appointment of a trustee, or until the estate is finally closed or abandoned by the creditors.[42]

746. Title of trustee—Under the federal bankruptcy act a trustee in bankruptcy is vested with all property which, prior to the filing of the petition,

[29] Cavanaugh v. Fenley, 94–505, 103+711.

[30] Watschke v. Thompson, 85–105, 88+263 (complaint held insufficient in not alleging procurement of order).

[31] Stein v. La Dow, 13–412(381); Williams v. Frost, 27–255, 6+793.

[32] Stein v. La Dow, 13–412(381).

[33] Seager v. Lamm, 95–325, 104+1; Bradley v. Benson, 93–91, 100+670; First S. Bank v. Sibley Co. Bank, 96–456, 105+485, 489. See, as to when recording is "required" within the act, 20 Harv. L. Rev. 645.

[34] Habegger v. First N. Bank, 94–445, 103+216. See Tripp v. N. W. Nat. Bank, 45–383, 48+4; 17 Harv. L. Rev. 354.

[35] Hess v. Hamm, 108–22, 121+232.

[36] Peru P. & I. Co. v. King, 90–517, 97+373 (evidence held not to show that a judgment constituted a preference); Bradley v. Benson, 93–91, 100+670 (a conditional sale held not to constitute a preference); Lamm v. Armstrong, 95–434, 104+304 (whether an assignment of a contract for the sale of realty was a preference held not within the issues made by the pleadings); Sharp v. Simonitsch, 107–133, 119+790 (deposit of money pending settlement of a controversy held not a preference); Hess v. Hamm, 108–22, 121+232 (payment held a preference); Citizens' State Bank v. Brown, 124+990 (chattel mortgage).

[37] Fider v. Mannheim, 78–309, 81+2. See 16 Harv. L. Rev. 595.

[38] Longfield v. Minn. S. Bank, 95–54, 103+706.

[39] Loomis v. Wallblom, 94–392, 102+1114.

[40] Rand v. Sage, 94–344, 102+864.

[41] Hibbs v. Marpe, 84–10, 86+612; Halbert v. Pranke, 91–204, 97+976.

[42] Rand v. Sage, 94–344, 102+864.

the bankrupt could by any means have transferred, and with all rights of action arising upon contracts, or for the unlawful taking or detention of, or injury to, his property.[43]

747. Powers of trustee—Fraudulent transfers—The trustee is authorized to maintain actions to set aside fraudulent transfers.[44] The bankrupt is not a necessary party to such an action.[45] The complaint must allege that the assets of the estate are not sufficient to discharge the liabilities; and that the creditors existing at the commencement of the action were such at the time of the fraudulent transfer, or, if subsequent creditors, that they were fraudulently affected thereby.[46] The trustee is presumed to represent the creditors.[47]

748. Revival of debt discharged—To revive a debt which has been discharged by judgment in bankruptcy an oral promise is sufficient, but evidence of the promise must be clear and unequivocal. If the promise is conditional, compliance with the condition must be shown.[48] The old debt is a sufficient consideration for the new promise.[49]

749. Discharge of bankrupt—A discharge does not pay or extinguish the debts of the bankrupt. It merely relieves him from all legal obligation to pay them, leaving all liens or trusts securing them unimpaired.[50] A judgment entered against an insolvent person after he is adjudged a bankrupt, and before his final discharge in the bankruptcy proceedings, upon a provable claim existing at the time he was adjudged a bankrupt, and from liability for the payment of which he was relieved by his discharge, is canceled and annulled by such discharge, and the bankrupt has the absolute legal right, after obtaining his discharge, if he proceeds with reasonable diligence, to have execution upon the same perpetually stayed.[51] If a partner is individually adjudged a bankrupt and discharged he is released from both his individual and firm debts.[52] An assignment of future wages cannot be enforced against a debtor, after his discharge in bankruptcy as to wages thereafter earned by him.[53] A bankrupt has been held discharged from a note executed by him and listed in his schedule of indebtedness, though the middle initial of his name on the note differed from that given by him in the bankruptcy proceedings.[54]

750. Exceptions from discharge—The exception in the act relating to fraud in a fiduciary capacity does not generally apply to a misappropriation of money by a partner while engaged in firm business.[55] A judgment in bastardy proceedings is not excepted.[56]

751. Opening estate after discharge—The court may vacate its order closing the estate and discharging the bankrupt for fraud, or when it is shown that the estate has not been fully and properly administered.[57]

ACT OF 1867

752. Jurisdiction of state courts—The ordinary tribunals are not deprived, by mere force of an adjudication of bankruptcy, of jurisdiction over suits

[43] Watkins v. Bigelow, 93–361, 101+497; Hansen v. Wyman, 105–491, 117+926; Remley v. Travelers' Ins. Co., 108–31, 121+230.

[44] Hibbs v. Marpe, 84–10, 86+612; Oliver v. Hilgers, 88–35, 92+511; Schmitt v. Dahl, 88–506, 93+665; Keith v. Albrecht, 89–247, 94+677; Fowler v. Jenks, 90–74, 95+887; Sharood v. Jordan, 90–249, 95+1108.

[45] French v. Smith, 81–341, 84+44.

[46] Seager v. Armstrong, 95–414, 104+479.

[47] Oliver v. Hilgers, 88–35, 92+511.

[48] Smith v. Stanchfield, 84–343, 87+917; International H. Co. v. Lyman, 90–275, 96+87; Pearsall v. Tabour, 98–248, 108+808.

[49] Higgins v. Dale, 28–126, 9+583.

[50] Evans v. Staalle, 88–253, 92+951; Leitch v. N. P. Ry., 95–35, 103+704. See Ward v. Huhn, 16–159(142).

[51] Cavanaugh v. Fenley, 94–505, 103+711.

[52] Loomis v. Wallblom, 94–392, 102+1114.

[53] Leitch v. N. P. Ry., 95–35, 103+704.

[54] Northern C. Co. v. Hartke, 125+508.

[55] Gee v. Gee, 84–384, 87+1116. See Strauch v. Flynn, 108–313, 122+320 (fraud—failure to schedule—pleading).

[56] McKittrick v. Cahoon, 89–383, 95+223.

[57] Fowler v. Jenks, 90–74, 95+887.

against the bankrupt. The proceedings in other courts may, when necessary, be arrested or controlled by the bankruptcy court,—not by acting upon the courts but upon the parties; but in the absence of any such interference the jurisdiction of other courts remains unimpaired, and their judgments are valid.[58] They have jurisdiction of an action by an assignee in bankruptcy to set aside a fraudulent conveyance;[59] of an ordinary action by an assignee in bankruptcy to recover the assets of the bankrupt;[60] of an action for trespass by a United States marshal in taking property under a warrant in bankruptcy;[61] to determine that a purchaser at a sale by an assignee in bankruptcy stands in such relation to the bankrupt and the property that he will be charged as trustee for the latter in making the purchase.[62]

753. Parties—An application to a bankruptcy court for a stay has been held not to make the applicant a party to the bankruptcy proceedings, or to authorize the court to pass upon his title.[63] A non-proving creditor, where judgment was recovered before the commencement of bankruptcy proceedings, has been held not bound by the action of the court in setting aside a homestead.[64]

754. Action pending bankruptcy—An action may be begun on a provable claim against a person who has been adjudged a bankrupt, but it cannot proceed to judgment, over objection, until the question of discharge has been determined in the bankruptcy court.[65]

755. Preferences—Preferences forbidden by section 35 of the act are voidable only under and in aid of the bankruptcy proceedings.[66]

756. Title of assignee—The assignee succeeds to the title and interest of the bankrupt.[67] An agreement, and the money thereby secured, has been held not to pass to an assignee.[68]

757. Composition—New promise—A composition under the act is not a voluntary discharge by act of the creditors, and a new promise by the debtor to pay the residue of the debt is upon a sufficient consideration.[69]

758. Fraudulent conveyances—Under section 35 of the act of 1867 fraudulent conveyances, as against bankruptcy proceedings, are void and not merely voidable and the property so transferred may be taken by the marshal under a provisional warrant issued in such proceedings.[70] The assignee may recover the property so conveyed by action.[71]

759. Marshal taking property from sheriff—A United States marshal cannot, under the warrant in bankruptcy, take personalty from a sheriff in his possession under a levy of execution made before the commencement of the bankruptcy proceedings.[72]

760. Actions by assignee—Proof—The assignee need not prove his acceptance or that he gave notice of his appointment. A duly certified copy of the assignment is admissible, though made during the trial.[73]

761. Notice before suit—A notice of twenty days was required before suit against an assignee in certain cases.[74]

762. Limitation of actions—A limitation of two years was placed on certain actions against assignees.[75]

[58] Brackett v. Dayton, 34–219, 25+348.
[59] Lane v. Innes, 43–137, 45+4.
[60] Mann v. Flower, 25–500.
[61] Marsh v. Armstrong, 20–81(66).
[62] King v. Remington, 36–15, 29+352.
[63] Marsh v. Armstrong, 20–81(66).
[64] Ward v. Huhn, 16–159(142).
[65] Davidson v. Fisher, 41–363, 43+79.
[66] Smith v. Deidrick, 30–60, 14+262.
[67] Mann v. Flower, 25–500; Haven v. Place, 28–551, 11+117.
[68] Cullen v. Dawson, 24–66.
[69] Higgins v. Dale, 28–126, 9+583.
[70] Stevenson v. McLaren, 23–111. See Lane v. Innes, 43–137, 45+4.
[71] Mann v. Flower, 25–500. See Lane v. Innes, 43–137, 45+4.
[72] Mollison v. Eaton, 16–426(383).
[73] Rogers v. Stevenson, 16–68(56).
[74] Haven v. Place, 28–551, 11+117.
[75] Haven v. Place, 28–551, 11+117; Lewis v. Prendergast, 45–533, 48+439.

BANKS AND BANKING

IN GENERAL

POWERS AND LIABILITIES

OFFICERS

DEPOSITS

RECEIVING DEPOSITS WHEN INSOLVENT

COLLECTIONS

STOCKHOLDERS' LIABILITY

SAVINGS BANKS

NATIONAL BANKS

TRUST COMPANIES

Cross-References

See Bill and Notes, 981–1010; Taxation, 9206, 9207.

IN GENERAL

763. Definition—A bank is defined by statute as "a corporation under public control, having a place of business where credits are opened by the deposit or collection of money and currency, subject to be paid or remitted upon draft, check, or order, and where money is advanced, loaned on stocks, bonds, bullion, bills of exchange, and promissory notes, and where the same are received for discount or sale." [76]

764. Payment at banking house—The engagement of a bank is to pay depositors at its banking house, upon demand there. It is not bound, like an ordinary debtor, to seek its creditors and pay them where found.[77]

765. Reserve fund—A bank is required by statute to keep on hand a reserve equal to one-fifth of all its matured or demandable liabilities.[78]

766. Reorganization after insolvency—Statute—Cases are cited below involving questions relating to the reorganization of insolvent banks, as authorized by Laws 1897 c. 89.[79]

POWERS AND LIABILITIES

767. Powers—In general—The general powers of a bank are prescribed by statute.[80] As a corporation a bank, like other corporations, has only such powers as are expressly granted, or are incidental to its very existence, or are reasonably necessary to carry out the powers expressly granted.[81] It may issue interest-bearing time certificates of deposit.[82] It is now expressly authorized to buy and sell commercial paper.[83] Formerly the rule was otherwise.[84]

768. Power to issue notes—Since Laws 1895 c. 145 banks have had no power to issue notes.[85] Prior thereto they had the power whether they exercised it or not.[86]

769. Mode of making contracts—Statute—The statute prescribes certain formalities in the execution of contracts, but it does not apply to contracts in

[76] R. L. 1905 § 2967. See Farmers etc. Bank v. Baldwin, 23–198; State v. Leland, 91–321, 98+92.

[77] Branch v. Dawson, 33–399, 23+552.

[78] R. L. 1905 § 2996; Mahoney v. Hale, 66–463, 69+334.

[79] Abel v. Allemannia Bank, 79–419, 82+680 (effect of reorganization scheme on composition with creditors—authority of agent—petition for reorganization—dismissal—subsequent judgment on petition—retention of new certificates of deposit as acceptance of reorganization scheme—judgment of reorganization held not a bar to a claim); Hunt v. Roosen, 87–68, 91+259 (findings that all the creditors acquiesced in reorganization scheme sustained—creditors estopped from questioning validity of reorganization—effect of reorganization on liability of transferrer of stock—partial payment by stockholders); State v. Germania Bank, 90–150, 95+1116 (depositor receiving stock for his claim estopped from questioning validity of reorganization); Willius v. Mann, 91–494, 98+341, 867 (bank becoming insolvent after reorganization—issuance of new certificates of deposit to creditors not a payment of their claims—liabilities of new and old stockholders defined—judgment of reorganization not binding on stockholders not participating in reorganization scheme—effect of judgment on stockholder's liability); Hunt v. Hauser, 95–206, 103+1032 (person participating in reorganization estopped to deny stockholder's liability); State v. Germania Bank, 106–446, 119+61 (order directing the distribution to creditors of a fund paid into court to abide its determination of the amount due from stockholders secondarily liable for the debts of the bank sustained).

[80] R. L. 1905 § 2984; Farmers etc. Bank v. Baldwin, 23–198; Francois v. Lewis, 68–409, 71+621.

[81] Farmers etc. Bank v. Baldwin, 23–198. See Dana v. Bank of St. Paul, 4–385(291).

[82] Francois v. Lewis, 68–409, 71+621.

[83] R. L. 1905 § 2984.

[84] Farmers etc. Bank v. Baldwin, 23–198. See First Nat. Bank v. Pierson, 24–140; Becker's Invest. Agency v. Rea, 63–459, 464, 65+928.

[85] Seymour v. Bank of Minn., 79–211, 81+1059.

[86] Palmer v. Bank of Zumbrota, 72–266, 75+380.

the ordinary course of business.[87] A bank may make contracts through other agents than its president or cashier.[88]

770. Increase and reduction of capital—The increase and reduction of stock is regulated by statute. It provides that an increase of capital shall not be valid until the entire new capital is paid in cash. The statute was taken from the national banking act and was designed to prevent watered stock.[89]

771. Loaning on or holding its own stock—A bank is forbidden to loan on its own stock and to purchase or hold it, except when necessary to prevent a loss on a debt previously contracted in good faith.[90]

772. Lien on stock—A bank has no lien on its stock for loans to a stockholder.[91]

773. Loan—Fraud—Rescission—A, fraudulently, and by means of false pretences, procured a loan from the defendant bank, and requested it to credit the amount to its correspondent bank for his benefit. This defendant did, by notifying the correspondent bank accordingly. Thereupon the latter bank credited the amount on the antecedent debt of A. It was held that defendant was not by reason thereof estopped, as against the latter bank, from rescinding the loan, and canceling the credit so extended to the latter bank for the benefit of A.[92]

774. Fraud of stockholder—A bank is not ordinarily liable for the fraud of a stockholder in selling his stock.[93]

775. Actions in behalf of stockholders—A bank cannot maintain an action to restrain the collector of taxes from levying upon and selling the shares of individual stockholders for taxes upon such shares.[94]

OFFICERS

776. Dealing with bank—Cases are cited below involving the effect and validity of contracts between a bank and its officers.[95] The governing principles are stated elsewhere.[96]

777. Notice to officers notice to bank—Cases are cited below involving the effect of notice to an officer of a bank as notice to the bank.[97] The governing principles are stated elsewhere.[98]

778. Authority of cashier—Cases are cited below involving the authority of a cashier to indorse a note and secure another bank to discount it;[99] to trans-

[87] R. L. 1905 § 2994; Dana v. Bank of St. Paul, 4–385(291); St. Louis County v. Manufacturers' Bank, 69–421, 72+701.

[88] Dana v. Bank of St. Paul, 4–385(291).

[89] R. L. 1905 § 3003; Olson v. State Bank, 67–267, 276, 69+904; Tourtelot v. Bushnell, 66–1, 4, 68+104; Dunn v. State Bank, 59–221, 61+27. See, as to increase of stock under G. S. 1878 c. 33 § 18, Palmer v. Bank of Zumbrota, 72–266, 75+380.

[90] R. L. 1905 § 2992; Nicollet Nat. Bank v. City Bank, 38–85, 35+577 (statute prevents bank from having lien on stock for loan to stockholder—statute taken from federal banking law); St. Paul etc. Co. v. Jenks, 57–248, 59+299 (bank cannot purchase its own stock indirectly).

[91] Nicollet Nat. Bank v. City Bank, 38–85, 35+577.

[92] Selover v. First Nat. Bank, 77–140, 79+666.

[93] Dunn v. State Bank, 59–221, 61+27.

[94] Waseca Co. Bank v. McKenna, 32–468, 21+556.

[95] Rhodes v. Webb, 24–292; St. Paul etc. Co. v. Howell, 59–295, 61+141; Atwater v. Smith, 73–507, 76+253; Atwater v. Stromberg, 75–277, 77+963; Forster v. Columbia Nat. Bank, 77–119, 79+605; Klein v. Funk, 82–3, 84+460; Skordal v. Stanton, 89–511, 95+449.

[96] See §§ 2110–2121.

[97] First Nat. Bank v. Loyhed, 28–396, 10+421; Second Nat. Bank v. Howe, 40–390, 42+200; St. Paul etc. Co. v. Howell, 59–295, 61+141; Fort Dearborn Nat. Bank v. Seymour, 71–81, 73+724; First Nat. Bank v. Strait, 75–396, 78+101; First Nat. Bank v. Persall, 125+506.

[98] See § 2119.

[99] Merchants' Nat. Bank v. McNeir, 51–123, 53+178.

fer commercial paper and securities of the bank; [1] to make a usurious loan; [2] to pledge a bank's credit; [3] and to ship wheat for sale on account of a third party.[4]

779. Fraud—Liability of bank—Cases are cited below involving the liability of banks for the fraud of their officers.[5]

DEPOSITS

780. Relation of bank and depositor—Debtor and creditor—Upon a general deposit the money becomes the property of the bank and the relation between the bank and the depositor is that of debtor and creditor.[6]

781. Passbook—Effect of entry—Balancing—Duty of depositor to inspect—An entry by a bank in a passbook of a depositor, in the usual form, crediting him with a certain sum as deposited, does not constitute a written contract between the parties, but is merely evidence in the nature of a receipt for a deposit, and may be explained or contradicted by parol.[7] It is within common knowledge that the object of a bank pass or deposit book, is to inform the depositor from time to time what the condition of his account is as appears upon the books of the bank. When such a book is sent to the bank to be written up and returned with canceled vouchers, it is, in effect, a demand on the part of the depositor to know what the bank claims to be a statement of his account, and a return of the book with the vouchers is an answer to that demand.[8]

782. Title to checks and drafts deposited—Upon a deposit being made by a customer of a bank, in the ordinary course of business, of checks, drafts, or other negotiable paper, received and credited on his account as money, the title to the checks, drafts, or other paper immediately becomes the property of the bank, unless a different understanding affirmatively appears. But the question is one of the agreement of the parties, and neither the fact that the indorsement of the paper by the customer was unrestricted, or that he was, before collection, credited with the amount on his account, with the privilege of drawing against it, is conclusive on the question of the ownership of the paper. If it was in fact delivered to the bank for collection, or for "collection and credit," a credit to the customer before collection will be deemed merely provisional, which the bank may cancel if the paper is not paid by the maker or drawer.[9] A person kept an account at a bank, and it received his deposit, consisting of checks, under an agreement that they should be credited to that account, and, if not paid on presentation, they should be charged back against his account. It was held that the title to the checks passed to the bank, subject to the condition, intended for its protection, that, if the checks were not paid on presentation, it could rescind the act of giving credit, and its title would thereupon be divested. The failure of the bank after it had received the checks, and before the same were collected, did not divest its title.[10]

[1] Haugan v. Sunwall, 60–367, 62+398.
[2] Stephens v. Olson, 62–295, 64+898; Balch v. Grove, 98–259, 108+807.
[3] Fort Dearborn Nat. Bank v. Seymour, 71–81, 73+724; Id., 75–100, 77+543.
[4] Landin v. Moorhead Nat. Bank, 74–222, 77+35.
[5] Second Nat. Bank v. Howe, 40–390, 42+200; Fort Dearborn Nat. Bank v. Seymour, 71–81, 73+724; Id., 75–100, 77+543. See McCord v. W. U. Tel. Co., 39–181, 39+315.
[6] Davis v. Smith, 29–201, 12+531; Branch v. Dawson, 33–399, 23+552; Third Nat. Bank v. Stillwater G. Co., 36–75, 30+440; Tripp v. N. W. Nat. Bank, 45–383, 386, 48+4; Reynolds v. St. Paul T. Co., 51–236, 53+457; In re State Bank, 56–119, 57+336; Security Bank v. N. W. Fuel Co., 58–141, 59+987; Francois v. Lewis, 68–409, 71+621.
[7] Branch v. Dawson, 36–193, 30+545.
[8] Scanlon v. Germania Bank, 90–478, 97+380.
[9] Security Bank v. N. W. Fuel Co., 58–141, 59+987; In re State Bank, 56–119, 57+336; South Park etc. Co. v. Chi. etc. Ry., 75–186, 77+796.
[10] Brusegaard v. Ueland, 72–283, 75+228.

783. Deposit subject to trust—If money subject to a trust is deposited, the deposit is subject to the trust.[11]

784. Deposit as collateral security—A deposit may be made as collateral security for loans made by the bank.[12]

785. Deposit of note—Discount or purchase by bank—Bona fide purchaser—A bank, by purchasing or discounting a note for a depositor and giving him credit for the proceeds, becomes a bona fide purchaser of the note for value, if a substantial amount of the deposit is drawn out or the deposit account is reduced by the payment of checks drawn thereon to an amount less than the proceeds of the discounted note, before it acquires knowledge of infirmities in the paper.[13] The rule is otherwise where no part of the deposit is drawn out or the balance of the account exceeds the amount of the proceeds of the discount.[14]

786. Deposit under assumed name—Where A deposited money under the name of B, without disclosing to the bank that he was not B, and B drew out the money, it was held that A could not recover from the bank.[15] The mere deposit of money in the name of another, not a party to the transaction, will not pass the title to him.[16] A kept in the name of B, a deposit account with a bank, the bank supposing it to belong to B. The bank held an overdue note against B, taken before the account was opened. It was held that the bank could not pay the note out of the account, or charge it as a debit in the account, without the consent of A, unless there was an estoppel of A, to claim the account as his own.[17]

787. Application of deposit by bank—Setoff—Cases are cited below involving the right of setoff in this connection, and the application of deposits.[18]

788. Demand before action for deposit—The right to sue a bank on a general deposit does not accrue, or the statute of limitations upon it begin to run, until a demand of payment, unless the demand of payment is in some way dispensed with.[19]

RECEIVING DEPOSITS WHEN INSOLVENT

789. Civil liability—Directors are civilly liable under the statute for receiving deposits, knowing the bank to be insolvent.[20]

790. Criminal liability—It is made a criminal offence by statute to receive a deposit knowing, or having good reason to know, the bank to be insolvent.[21]

[11] Third Nat. Bank v. Stillwater G. Co., 36–75, 30+440. See Bishop v. Mahoney, 70–238, 73+6.

[12] Fidelity etc. Assn. v. Germania Bank, 74–154, 76+968.

[13] Security Bank v. Petruschke, 101–478, 112+1000; First Nat. Bank v. Persall, 125+506, 675.

[14] Union Nat. Bank v. Winsor, 101–470, 112+999.

[15] Arkofsky v. State Sav. Bank, 91–440, 98+326.

[16] Branch v. Dawson, 36–193, 30+545. See Murphy v. Bordwell, 83–54, 85+915.

[17] Douglas v. First Nat. Bank, 17–35(18).

[18] Balch v. Wilson, 25–299 (setoff against receiver of insolvent bank); Tripp v. N. W. Nat. Bank, 45–383, 48+4 (application of deposit to note due bank—securing a preference over other creditors); St. Paul etc. Co. v. Leck, 57–87, 58+826 (right to set off certificate of deposit); Fitzgerald v. State Bank, 64–469, 67+361 (estoppel to set off claims); Stolze v. Bank of Minn., 67–172, 69+813 (insolvency of depositor—right of bank to set off loan against deposit); Sweetser v. People's Bank, 69–196, 71+934 (id.); Becker v. Seymour, 71–394, 73+1096 (pledge of depositor's note—setoff by maker); Habegger v. First Nat. Bank, 94–445, 103+216 (deposit in bank not a transfer of property within bankruptcy act of 1898—bank may apply deposit upon debt due from insolvent—waiver of right of setoff by delay); Douglas v. First Nat. Bank, 17–35(18) (A kept an account in name of B—bank supposed account belonged to B—right of bank to charge account with overdue note of B held by bank).

[19] Branch v. Dawson, 33–399, 23+552.

[20] R. L. 1905 § 5118; Baxter v. Coughlin, 70–1, 72+797 (complaint held to state a cause of action); Id., 80–322, 83+190 (knowledge of director question for jury—all officers not necessarily on same footing as to knowledge).

[21] R. L. 1905 § 5118; State v. Smith, 62–

COLLECTIONS

791. Liability for default of subagent—A bank collecting commercial paper through a correspondent at another place, is liable for the default of the correspondent, the latter being deemed the subagent of the forwarding bank.[22]

792. Negligence in selecting subagent—For the purpose of collecting a check or draft deposited or left for collection, a bank must employ a suitable subagent, if an agent is necessary. It must not transmit checks or drafts directly to the bank or party by whom payment is to be made. No party upon whom rests the obligation to pay upon presentation can be deemed a suitable agent, in contemplation of law, to enforce, on behalf of another, a claim against itself. This rule is not affected by notice to a depositor that the bank attempting a collection limits its liability so that it acts as agent only for the depositor, and in forwarding items for collection is only bound to select agents who are responsible according to its judgment and means of knowledge, and assumes no risk or responsibility on account of the omission, negligence, or failure of such agents. Nor will an established usage and custom existing among banks to send checks or drafts payable by other banks, at distant points, to the drawee directly, and by mail, in case there is no other bank of good standing in the same town, excuse or justify such a course of procedure. In case of loss through the bad conduct of the drawee, the sender of the check or draft must bear it.[23]

793. Duty to charge prior parties on dishonor—A bank receiving commercial paper for collection is bound to take the proper steps to charge all the prior parties thereto in case of its dishonor—or at least to exercise reasonable care and diligence to that end. If it neglects to do so, it is liable to the depositor for the damages actually suffered in consequence. The measure of damages is prima facie the face value of the paper, subject to reduction and mitigation, however, by a showing of insolvency of the persons discharged from liability, or other facts showing no actual damages.[24]

794. Accounting for collections—Evidence held sufficient to justify a finding that the defendant bank had properly accounted to plaintiff for the amount of certain checks which had been collected by it through a clearing house, which amount undoubtedly had been received in cash from the bank by an employee of the plaintiff, who assumed to have authority to receive the money.[25]

540, 64+1022 (under the Penal Code § 467 the offence was a misdemeanor—effect of repeal of section 467 by Laws 1895, c. 219 on pending prosecution—complaint under section 467 held sufficient); State v. Clements, 82–434, 85+229 (immaterial in what capacity defendant was connected with bank—liability of former partner after sham dissolution—meaning of insolvency within statute); State v. Leland, 91–321, 98+92 (title of Laws 1895 c. 219 held sufficient—purpose of act—meaning of "bank"—"unsafe" means the same as insolvent); State v. Quackenbush, 98–515, 108+953 (indictment held sufficient—intent to defraud depositor unnecessary—actual knowledge of insolvency unnecessary—presumption of knowledge); State v. Strait, 99–327, 109+598 (evidence held insufficient to show that defendant "voluntarily, knowingly, or negligently received the money, or permitted it to be received as a deposit"—evidence held sufficient to show that defendant knew or had reason to know that the bank was insolvent—presumption of knowledge). See State v. Ames, 91–365, 377, 98+190 (receiving money from different persons distinct offences); State v. Drew, 124+1091 (charge as to knowledge of insolvency held erroneous).

[22] Streissguth v. Nat. G. A. Bank, 43–50, 44+797; Johnson v. Dun, 75–533, 538, 78+98; Fort Dearborn Nat. Bank v. Security Bank, 87–81, 91+257.

[23] Mpls. S. & D. Co. v. Met. Bank, 76–136, 78+980. See Plover Sav. Bank v. Moodie 110+(Iowa)29; 19 Harv. L. Rev. 464.

[24] Fort Dearborn Nat. Bank v. Security Bank, 87–81, 91+257; West v. St. P. Nat. Bank, 54–466, 56+54; Jagger v. Nat. G. A. Bank, 53–386, 55+545; Borup v. Nininger, 5–523(417); Nininger v. Knox, 8–140 (110).

[25] Scanlon v. Germania Bank, 90–478, 97+380.

STOCKHOLDERS' LIABILITY

795. Nature and extent—Statutes—The liability of stockholders is contractual and several.[26] It sustains the relation of surety for the corporate debts. It is not a corporate asset enforceable by the corporation, but goes directly to the creditors. It can be enforced only for the benefit of the creditors and then only to the extent of paying the corporate debts unpaid after the corporate assets have been exhausted.[27] It extends to debts incurred by the corporation before the stockholder acquired his stock.[28]

796. Constitutional provisions—The double liability prescribed by section 13 of article 9 of the constitution, applies only to banks of issue.[29] The single liability prescribed by section 3 of article 10 of the constitution applies to banks not of issue.[30]

797. Validity and application of statutes—Laws 1895 c. 145, which revised the laws relating to banking, has been held constitutional against various objections.[31] It did not reduce the liability of stockholders upon any obligation created between its passage and the time it went into effect. As to such obligations the double liability under the previous law applied.[32] It was applicable to banks existing and doing business at the time it went into effect.[33] It was applicable to certain certificates of deposit which were renewals of old certificates issued prior to its enactment.[34] The provisions of G. S. 1866 c. 33 § 21, relating to the individual liability of stockholders, applied to stockholders in all banks organizing under that chapter after its amendment by Laws 1869 c. 85. An enactment which creates and imposes upon the stockholders of a bank becoming thereafter organized, though not for the purpose of issuing notes to circulate as currency, an individual liability for the corporate debts of the bank, is not repugnant to the constitution.[35]

798. Single liability—Laws 1895 c. 145 reduced the liability from a double to a single liability.[36] This statutory provision was omitted from the revision of 1905, but was re-enacted in 1907.[37] As regards banks of issue a double liability exists under the constitution,[38] but as no banks of issue can now be created under our statute this constitutional provision is of no practical importance.[39] In the case of banks not of issue the liability was double from 1869 to 1895, by virtue of statute.[40] Cases are cited below involving the effect of a reorganization of a bank,[41] and of irregular increase of capital stock,[42] on the liability of its stockholders.

799. Increase of capital stock—Presumption—Estoppel—Where the capital stock of a corporation is irregularly increased, the holders of the new stock may be liable on the ground of estoppel to creditors who have become such on

[26] Hanson v. Davison, 73–454, 76+254; Harper v. Carroll, 66–487, 69+610, 1069.

[27] Mpls. B. Co. v. City Bank, 66–441, 444, 69+331; Hunt v. Roosen, 87–68, 79, 91+259.

[28] Olson v. Cook, 57–552, 59+635.

[29] Allen v. Walsh, 25–543; International T. Co. v. Am. L. & T. Co., 62–501, 65+78, 632; Palmer v. Bank of Zumbrota, 72–266, 275, 75+380.

[30] International T. Co. v. Am. L. & T. Co., 62–501, 65+78, 632.

[31] Anderson v. Seymour, 70–358, 73+171; Seymour v. Bank of Minn., 79–211, 81+1059.

[32] Seymour v. Bank of Minn., 79–211, 81+1059.

[33] Anderson v. Seymour, 70–358, 73+171.

[34] Seymour v. Bank of Minn., 79–211, 81+1059.

[35] Allen v. Walsh, 25–543.

[36] Seymour v. Bank of Minn., 79–211, 81+1059.

[37] Laws 1907 c. 137.

[38] Const. art. 9 § 13.

[39] See Seymour v. Bank of Minn., 79–211, 81+1059.

[40] G. S. 1894 § 2501; Allen v. Walsh, 25–543.

[41] Hunt v. Roosen, 87–68, 91+259; Willius v. Mann, 91–494, 98+341, 867; State v. Germania Bank, 106–446, 119+61. See § 766.

[42] Palmer v. Bank of Zumbrota, 72–266, 75+380.

the faith of the new stock. Creditors are presumed to have trusted the bank on the faith of the increase from the time it was voted.[43]

800. Not avoidable by contract—The stockholders of a corporation cannot directly or indirectly release themselves, or discharge their liability as such, by means of agreements with one another or with the corporation.[44]

801. Stock held as collateral—A stockholder who appears on the books as the absolute owner of stock is liable though he holds it as collateral security.[45]

802. How enforced—Prior to Laws 1895 c. 145, the liability of stockholders could only be enforced by creditors in an equitable action under G. S. 1894 c. 76.[46] It could not be enforced by a receiver of the bank appointed in proceedings under chapter 76.[47] Laws 1895 c. 145 authorized the receiver appointed thereunder to enforce it.[48] From 1895 to 1899 the liability was enforced by such receiver in an equitable action, governed by the same rules as actions by creditors for the same purpose authorized by chapter 76.[49] At the present time the procedure is prescribed by R. L. 1905 §§ 3184–3190.[50] When banks were allowed to make assignments for the benefit of creditors under the insolvency law of 1881 [51] it was held that the liability of stockholders could not be enforced in proceedings thereunder.[52] It may be enforced in the probate court as a claim against the estate of a decedent.[53]

803. Liability of transferrer of stock—Statute—The liability of a transferrer of stock is defined by statute and continues for one year after the entry of the transfer.[54] A bona fide transferrer is not liable for debts incurred after the transfer.[55] The liability terminates in a year though there is no transfer on the books, if the stockholder made a bona fide attempt to secure such transfer.[56] A transferrer is only secondarily liable during the year, and execution should not issue against him until an execution against his transferee fails to respond to execution against him for his liability for the same stock; and in such a case it is error to enter a judgment which permits the creditors to collect twice for the same block of stock, once from the transferee, and again from the transferrer. The liability of such transferrer is secondary only to the liability of the succeeding holders of the same block of stock, and not secondary to the liability of all subsequent transferrers of the same or any other stock. While such transferrer is liable only for his proper share of the indebtedness still existing, which existed at the time he transferred his stock, still he should not escape liability because this amount has been already collected from others reached before him in the order of liability. Such transferrer should, as well as the present stockholders, be allowed the benefit of any dividend realized from the corporate assets. The amounts collected from each transferrer must be put into the common fund, and distributed ratably among all the creditors.

[43] Id.

[44] Atwater v. Stromberg, 75–277, 77+963; Atwater v. Smith, 73–507, 76+253.

[45] Harper v. Carroll, 66–487, 69+610, 1069; State v. Bank of New England, 70–398, 73+153.

[46] Allen v. Walsh, 25–543; Harper v. Carroll, 62–152, 64+145; Mpls. B. Co. v. City Bank, 66–441, 69+331; Palmer v. Bank of Zumbrota, 72–266, 281, 75+380; Hanson v. Davison, 73–454, 76+254.

[47] Mpls. B. Co. v. City Bank, 66–441, 69+331.

[48] R. L. 1905 § 2998; Mpls. B. Co. v. City Bank, 66–441, 446, 69+331; Anderson v. Seymour, 70–358, 73+171.

[49] Ueland v. Haugan, 70–349, 73+169; Mercantile Nat. Bank v. Macfarlane, 71–497, 500, 74+287.

[50] See § 2163.

[51] They are now forbidden by R. L. 1905 § 2998.

[52] Olson v. Cook, 57–552, 59+635. See Walther v. Seven Corners Bank, 58–434, 59+1077; State v. Bank of New England, 55–139, 56+575.

[53] Hunt v. Burns, 90–172, 95+1110.

[54] R. L. 1905 § 2985; Laws 1907 c. 137; Hunt v. Seeger, 91–264, 98+91; Hunt v. Roosen, 87–68, 79, 91+259; State v. Germania Bank, 106–446, 119+61.

[55] Harper v. Carroll, 62–152, 64+145; Id., 66–487, 69+610, 1069.

[56] Hunt v. Seeger, 91–264, 98+91.

Such transferrer cannot be made to contribute either directly or indirectly on account of debts incurred after he made his transfer, or debts which existed at that time, and have since been paid.[57] The statute is one of limitation and the principles applicable to that subject generally apply.[58]

804. Interest—When the liability was enforced under chapter 76, G. S. 1894, it was held that interest ran on the liability only from the filing of the decision.[59]

SAVINGS BANKS

805. Statutes regulating—Application—Laws 1867 c. 23 was superseded by Laws 1875 c. 84, except as to savings banks and associations previously organized.[60]

806. Not charities—A savings bank has been held not a charity within the meaning of a statute for the incorporation of benevolent and charitable societies.[61] A savings bank has been referred to as having an essentially eleemosynary character.[62]

807. Capital stock—Liability of stockholders—The stock of the Minnesota Savings Association has been held not within the constitutional provisions imposing a double liability, and the depositors are not creditors having the right to enforce such a liability.[63]

808. Officers—Fiduciary relation—The trustees of a savings association occupy a fiduciary relation to its depositors. An agreement by a trustee, for a consideration moving to himself, to secure the election of another to the office of trustee, constitutes a breach of trust, and is void on grounds of public policy: and a note given for such a promise is void, being founded on an illegal consideration.[64]

809. Profits belong to depositors—Trustees are not permitted to have any interest in the profits. The net profits belong to the depositors.[65]

810. Loans—Real estate security—A foreign savings bank has been held authorized to make loans on real estate security.[66]

811. Insolvency—Sale of charter—An application for an order directing a receiver of an insolvent savings bank to sell its charter has been held properly denied.[67]

NATIONAL BANKS

812. Proof of incorporation—A copy of the organization certificate of a national bank, certified and sealed by the Comptroller of the Treasury, is sufficient evidence of the corporate existence of the bank.[68]

813. Expiration of charter—Continued existence—A national bank, after the expiration of the time limit of its charter, continues to exist as a person in law, capable of suing and being sued, until its affairs are completely settled.[69]

[57] Harper v. Carroll, 66–487, 69+610, 1069; Willius v. Mann, 91–494, 98+341, 867.
[58] Hunt v. Roosen, 87–68, 91+259.
[59] Palmer v. Bank of Zumbrota, 72–266, 75+380.
[60] Richards v. Minn. Sav. Bank, 75–196, 77+822.
[61] Sheren v. Mendenhall, 23–92. See, upon the general subject, Note 105 Am. St. Rep. 728.
[62] State v. Savings Bank, 102–199, 113+268.
[63] State v. Savings Bank, 87–473, 92+403.
[64] Dickson v. Kittson, 75–168, 77+820.
[65] R. L. 1905 §§ 3016, 3025. See State v. Savings Bank, 102–199, 113+268.
[66] Lebanon Sav. Bank v. Hollenbeck, 29–322, 13+145.
[67] State v. Savings Bank, 102–199, 113+268.
[68] First Nat. Bank v. Kidd, 20–234(212) First Nat. Bank v. Loyhed, 28–396, 10+421; First Nat. Bank v. Schmitz, 90–45, 95+577.
[69] Farmers Nat. Bank v. Backus, 74–264, 77+142.

814. Power to hold and convey realty—The power of a national bank to purchase, hold, and convey realty is limited to such as may be necessary for its immediate accommodation in the transaction of its business, or such as may be mortgaged to it in good faith by way of security for debts previously contracted.[70]

815. Loaning on realty—The taking, by a national bank, of the stock of a corporation as collateral security for a loan of money, is not a violation of that provision of the national banking act, making it unlawful for a national bank to loan money upon a mortgage of realty, though the property of such corporation consists wholly of realty.[71]

816. Power to deal in commercial paper—It has been held that a national bank has no authority to buy and sell commercial paper for profit—to deal in it otherwise than by discount.[72]

817. Ultra vires acts—Who may object—Estoppel—As a general rule private parties not stockholders cannot object that an act of a national bank is ultra vires.[73] A national bank is never estopped from asserting that its act is ultra vires.[74]

818. Holding its own stock—A national bank cannot purchase or hold its own stock, unless to prevent a loss on a debt previously contracted in good faith.[75]

819. Usury—Jurisdiction of state courts—State courts have jurisdiction of actions against national banks to recover the penalty prescribed by the federal statute for usury.[76] Where a national bank has received a greater rate of interest than is allowed by law, the amount of recovery, under R. S. (U. S.) § 5198, by the party who has paid the same, is twice the amount of all the interest paid, and not merely double the excess over the legal rate.[77]

820. Right to sue—Effect of resolution to wind up—A resolution by vote of two-thirds of the shareholders of a national bank to go into liquidation and close, certified to the comptroller, does not dissolve the corporation, nor affect its capacity to collect its assets and close its affairs. The appointment by the shareholders of "trustees" to close the affairs of the bank, the title to its property not being vested in them, does not affect the right of the corporation to bring suit.[78]

821. Stockholders—Liability for corporate debts—As against creditors a person may be estopped from denying that he is a stockholder.[79] An action against a stockholder to recover on his personal liability, under the statute for corporate debts, is one "arising on contract," within the meaning of our statute relating to the publication of summons.[80] The liability of a stockholder survives his death, whether the corporate indebtedness was incurred before or after

[70] U. S. R. S. § 5137. See First Nat. Bank v. Kidd, 20–234(212); Mpls. T. M. Co. v. Jones, 95–127, 103+1017.

[71] Baldwin v. Canfield, 26–43, 1+261.

[72] First Nat. Bank v. Pierson, 24–140. See Merchants' Nat. Bank v. Hanson, 33–40, 21+849; Becker's Invest. Agency v. Rea, 63–459, 65+928.

[73] Merchants' Nat. Bank v. Hanson, 33–40, 21+849 (overruling First Nat. Bank v. Pierson, 24–140); Hennessy v. St. Paul, 54–219, 55+1123; Mpls. T. M. Co. v. Jones, 95–127, 103+1017.

[74] California Bank v. Kennedy, 167 U. S. 362; First Nat. Bank v. Hawkins, 174 U. S. 364. See Hunt v. Hauser, 90–282, 96+85; Id., 95–206, 103+1032; 19 Harv. L. Rev. 608.

[75] Atwater v. Smith, 73–507, 76+253; Atwater v. Stromberg, 75–277, 77+963.

[76] Endres v. First Nat. Bank, 66–257, 68+1092; Blankenship v. First Nat. Bank, 66–256, 68+1102.

[77] Watt v. First Nat. Bank, 76–458, 79+509.

[78] Merchants' Nat. Bank v. Gaslin, 41–552, 43+483.

[79] Atwater v. Smith, 73–507, 76+253; Atwater v. Stromberg, 75–277, 77+963. See § 2063.

[80] Hencke v. Twomey, 58–550, 60+667. See McClaine v. Rankin, 197 U. S. 154 (holding liability not contractual).

his death, and whether the corporation became insolvent before or after his death. The distributees of a deceased stockholder are liable.[81]

822. Attachment—Garnishment—The federal statute prohibits the issuance of writs of attachment by state courts, before final judgment against national banks or their property. An attachment and seizure of property made by virtue of a writ so issued and served, is illegal and void, and no jurisdiction over the person or property of such a bank is obtained thereby.[82] A national bank may be garnished.[83]

823. Insolvency—Receiver—When a national bank becomes insolvent and passes into the hands of a receiver, the respective rights and liabilities then existing between it and its creditors and debtors become fixed, and all its property and assets thereupon subject, after satisfying the prior claim, if any, of the government on account of its notes, to disposal and ratable distribution among all its general creditors, upon the principle of equality. No subsequent lien can be created, or right or preference obtained, in respect to any such assets or property, after the appointment of a receiver.[84]

TRUST COMPANIES

824. Statutory restrictions—Loans to officers—The various restrictions and obligations which the statutes impose upon trust companies are designed to safeguard and protect their patrons, and not the benefit of the companies.[85] The statute forbids trust companies to make loans to its officers, directors, agents, or employees, and makes it a criminal offence for such persons to accept loans.[86]

BARBERS—See Sunday, 9062.
BARRATRY—See Champerty and Maintenance, 1416.

BASTARDY

Cross-References

See Costs, 2234.

IN GENERAL

825. Custody and support—At common law the father of an illegitimate child is not responsible for its support and, as against the mother, is not entitled to its custody. The mother is entitled to its custody and is liable for its support.[87]

826. Legitimation—The writing whereby the father of an illegitimate child acknowledges himself to be the father of such child, as provided by G. S. 1894 § 4473 (R. L. 1905 § 3650) need not be made for the express purpose of acknowledging the paternity of the child. It is sufficient compliance with the statute if the acknowledgment be made in any written instrument, collateral or otherwise, signed by the father in the presence of a competent witness, in which he clearly and specifically acknowledges that he is the father of the child.[88]

[81] Dent v. Matteson, 70–519, 73+416 (affirmed, 176 U. S. 521).
[82] First Nat. Bank v. La Due, 39–415, 40+367; Van Reed v. People's Nat. Bank, 198 U. S. 554.
[83] Earle v. Penn., 178 U. S. 449.
[84] Balch v. Wilson, 25–299.
[85] St. Paul T. Co. v. Strong, 85–1, 88+256.
[86] R. L. 1905 § 3045; State v. Barnes, 108–227, 122+4 (guilty intent inferable from mere fact of indebtedness); State v. Barnes, 108–230, 122+11 (indictment sustained).
[87] Olson v. Johnson, 23–301; State v. Nestaval, 72–415, 75+725, State v. Hausewedell, 94–177, 102+204.
[88] Pederson v. Christofferson, 97–491, 106+958.

PROCEEDINGS TO CHARGE FATHER

827. General nature of proceedings—At common law the father of a bastard was in no way responsible for its support and as against the mother was not entitled to its custody. The mother was bound to support it and was entitled to its custody.[89] The object of the bastardy act is not to punish the father for begetting a bastard, but to impose on him a duty to care for the child; to prevent the child becoming a public charge; and to protect and benefit the mother.[90] The proceeding is anomalous, partaking of the nature of both a civil and a criminal proceeding. It is not strictly a criminal proceeding, yet it is quasi criminal.[91]

828. Statute constitutional—The statute does not infringe the constitutional provision against imprisonment for debt, or the provision for indictment by grand jury.[92]

829. Scope of proceeding—The justice has no power either to acquit or convict. The proceedings before him are analogous to examinations in criminal cases, with the view to commitment or discharge on bail, the only power of the justice being to ascertain whether there is probable cause to believe that the defendant is the father of the child, and if so to require him to enter into a recognizance to answer the complaint at the next term of the district court which alone has jurisdiction to try and determine the case.[93]

830. Informalities disregarded—The omission of a justice to entitle the proceedings in his docket properly, and an informality in a verdict, have been disregarded as immaterial.[94]

831. Sufficiency of warrant—The warrant need not set forth with particularity the facts contained in the complaint.[95]

832. Discharge on bond—The discharge on bond, authorized by G. S. 1894 § 2041 (R. L. 1905 § 1569), is the only one which can be recognized as a full discharge.[96]

833. Release from bond—The father is not entitled to be released from a bond to support the child simply because the mother neglects it.[97]

834. Complaint—A complaint has been held sufficient though it did not state the time and place.[98] A complaint substantially in the language of the statute has been sustained.[99] An allegation that the child "is a bastard" implies that it is alive at the time of the complaint.[1] The date of the sexual intercourse resulting in pregnancy need not be stated.[2] In the district court the trial proceeds on the complaint filed in the justice court, but the defendant does not waive a valid objection to the complaint because taken for the first time in the district court. If the complaint is indefinite it may be made more definite in the district court.[3]

835. Variance—The state need not prove the sexual intercourse as of the exact date alleged,[4] unless the complainant testifies that she never had intercourse with the defendant except on that date.[5]

[89] State v. Nestaval, 72–415, 75+725; Olson v. Johnson, 23–301; State v. Hausewedell, 94–177, 102+204.
[90] State v. Becht, 23–1; State v. Snure, 29–132, 12+347; State v. Zeitler, 35–238, 28+501.
[91] Id.; State v. Nichols, 29–357, 13+153; State v. Brathovde, 81–501, 84+340; State v. Wenz, 41–196, 42+933.
[92] State v. Becht, 23–1.
[93] State v. Linton, 42–32, 43+571.
[94] State v. Snure, 29–132, 12+347.
[95] State v. Klitzke, 46–343, 49+54.
[96] State v. Dougher, 47–436, 50+475.
[97] Olson v. Johnson, 23–301.
[98] State v. Brathovde, 81–501, 84+340.
[99] State v. Snure, 29–132, 12+347; State v. Smith, 47–475, 50+605.
[1] State v. Snure, 29–132, 12+347.
[2] State v. Smith, 47–475, 50+605; State v. Brathovde, 81–501, 84+340.
[3] State v. Brathovde, 81–501, 84+340.
[4] State v. Smith, 47–475, 50+605.
[5] State v. Ryan, 78–218, 80+962.

836. Burden of proof—The state has the burden of proving its case by a fair preponderance of the evidence.[6] On an issue of marriage it has been held that the burden was on the state to prove that the child was born out of lawful wedlock.[7]

837. Degree of proof required—A conviction may be had on a fair preponderance of the evidence. The charge need not be proved beyond a reasonable doubt.[8]

838. Corroboration unnecessary—A conviction may be had on the uncorroborated testimony of the complainant.[9]

839. Evidence—Admissibility—The relations existing between the parties about the time the child must have been begotten may be proved. Sexual intercourse between the parties at other times than alleged in the complaint, but within the time the child might have been begotten, may be proved.[10] Where the defendant on the stand denies that he had intercourse with the complainant at the time alleged and testified to by her, he may be required on cross-examination to answer whether he had such intercourse at another time.[11] The complainant may testify as to whether the child was begotten at the time of a certain intercourse in evidence.[12] When the testimony introduced before the justice is read to the jury it may be controverted by oral testimony.[13] When the complainant testifies that she was never married to the defendant it is competent, on cross-examination, to show a course of conduct on her part and declarations inconsistent with such testimony.[14] Declarations of the complainant, out of court and not on oath, that the defendant is the father of the child, are inadmissible.[15] Evidence that the complainant had intercourse with other men about the time alleged is admissible.[16] Where the complainant testified that she had been menstruating, with more or less flow, for two days before the intercourse and that the condition continued for two days afterwards, experts were allowed to testify on behalf of defendant that it was highly improbable that pregnancy should occur under such conditions.[17]

840. Evidence—Sufficiency—Cases are cited below holding evidence sufficient,[18] or insufficient [19] to justify a conviction.

841. Testimony of complainant—Reduction to writing—The statute requires the testimony of the complainant and other witnesses before the justice to be reduced to writing. This provision is not jurisdictional. It is for the benefit of the defendant, and he may waive it, either expressly or by conduct.[20]

842. Trial—Oath to jury—Argument of counsel—The county attorney may comment on the failure of the defendant to take the stand.[21] He cannot call attention to a supposed resemblance between the child and the defendant, at least if the child is very young.[22] The oath to be administered to the jury is the one provided for civil actions generally.[23]

843. Release as a defence—A release of the defendant by the complainant is not a bar.[24] The statute does not authorize the county board to settle and release the mother's interest in such a case without her consent.[25]

[6] State v. McCullough, 102–419, 113+1059.
[7] State v. Worthingham, 23–528.
[8] State v. Nichols, 29–357, 13+153; State v. Eichmiller, 35–240, 28+503; State v. Wenz, 41–196, 42+933.
[9] State v. Nichols, 29–357, 13+153; State v. Wenz, 41–196, 42+933. See State v. McCullough, 102–419, 113+1059.
[10] State v. Smith, 47–475, 50+605.
[11] State v. Klitzke, 46–343, 49+54.
[12] State v. Snure, 29–132, 12+347.
[13] State v. Klitzke, 46–343, 49+54.
[14] State v. Worthingham, 23–528.
[15] State v. Spencer, 73–101, 75+893.
[16] See State v. Eichmiller, 35–240, 28+503.
[17] State v. Ryan, 78–218, 80+962.
[18] State v. Veek, 80–221, 83+141; State v. Snure, 29–132, 12+347; State v. Brathovde, 81–501, 84+340; State v. Klitzke, 46–343, 49+54.
[19] State v. McCullough, 102–419, 113+1059.
[20] State v. Charlton, 101–535, 111+733.
[21] State v. Snure, 29–132, 12+347.
[22] State v. Brathovde, 81–501, 84+340.
[23] State v. Worthingham, 23–528.
[24] State v. Dougher, 47–436, 50+475.
[25] State v. Hausewedell, 94–177, 102+204.

844. Marriage as a defence—Direct proof of marriage is not necessary. Every presumption will be indulged in favor of matrimony and legitimacy rather than concubinage and bastardy.[26]

845. Period of gestation—Instructions—Where the undisputed evidence was that the child was fully developed at its birth, it was held that the defendant was entitled to an instruction that it must have been begotten more than two hundred and thirty-five days before that date.[27]

846. Intercourse with other men—Instructions—Where the evidence tended to prove that the complainant had intercourse with another man at or about the time the child must have been begotten, and about the time she testified to having intercourse with the defendant, the defendant was held entitled to an instruction that even if he had intercourse with complainant, as alleged, yet unless the jury found, from a preponderance of evidence, that such intercourse resulted in pregnancy, they must find the defendant not guilty.[28]

847. Credibilty of complainant and defendant—Instructions—It is error for the court to charge that, "so far as the pecuniary interest in the result of this suit is concerned, the complainant and the defendant are not equal, the defendant having a direct pecuniary interest in it, and the complainant having none."[29] An instruction to the effect that it it to be presumed that the complainant testifies truly is erroneous.[30]

848. Date of intercourse—Instructions—Where the complainant testified that the intercourse occurred on a particular day, and positively denied having had intercourse with the defendant on any other day, it was held error not to charge that the jury must acquit the defendant unless they found the intercourse to have occurred on that day.[31]

849. Complainant a prostitute—Instructions—It has been held proper, in view of the evidence in a case, for the court to caution the jury not hastily to arrive at the conclusion that the complainant was a prostitute.[32]

850. Judgment—Relief allowable—A reasonable allowance may be made for the past as well as the future support and maintenance of the child, including the lying-in expenses, to be paid the mother or for her use, when not paid or incurred by the public.[33] A judgment requiring the defendant to pay for maintenance a given sum per year, without limitation of time, is not erroneous. It is subject to the future order of the court discontinuing the payments on a showing that maintenance is no longer necessary.[34] The court may take into consideration any payments voluntarily made by the defendant to the complainant.[35] The judgment is binding upon the father though the mother abandons the child.[36] It is not admissible against the accused in a subsequent prosecution for seduction.[37]

851. Discharge not a bar—A discharge by one justice is not a bar to fresh proceedings before another justice.[38]

852. Appeal—Certiorari—Habeas corpus—An appeal from the district court to the supreme court is to be effected in the same manner as in ordinary civil actions.[39] But a judgment in bastardy proceedings is not within G. S. 1894 § 6143 (R. L. 1905 § 4368) providing for a supersedeas bond.[40] An order, made under G. S. 1894 § 2046 (R. L. 1905 § 1574), denying the defend-

[26] State v. Worthingham, 23–528; Fox v. Burke, 31–319, 17+861.
[27] State v. Allrick, 61–415, 63+1085.
[28] Id.
[29] State v. Nestaval, 72–415, 75+725.
[30] State v. Halverson, 103–265, 114+957.
[31] State v. Ryan, 78–218, 80+962.
[32] State v. Eichmiller, 35–240, 28+503.
[33] State v. Zeitler, 35–238, 28+501; State v. Eichmiller, 35–240, 28+503; State v. Nestaval, 72–415, 75+725; State v. Hausewedell, 94–177, 102+204.
[34] State v. Eichmiller, 35–240, 28+503.
[35] State v. Dougher, 47–436, 50+475.
[36] Olson v. Johnson, 23–301.
[37] State v. Wenz, 41–196, 42+933.
[38] State v. Linton, 42–32, 43+571.
[39] State v. Klitzke, 46–343, 49+54.
[40] State v. Allrick, 63–328, 65+639.

ant's application for discharge, is appealable and hence cannot be reviewed by certiorari.[41] A discharge of a defendant by a justice for want of probable cause cannot be reviewed by certiorari.[42] An order on an application for discharge under G. S. 1894 § 2046 (R. L. 1905 § 1574), cannot be reviewed by habeas corpus.[43]

BAWDY HOUSE—See Disorderly House.

BEAST—See note 44.

BEASTS DOING DAMAGE—See Animals, 277.

BELIEF—See Evidence, 3231.

BELT SHIFTERS—See Master and Servant, 5897.

BENEFICIAL ASSOCIATIONS—See Insurance, 4818; Exemptions, 3692.

BENEFIT OF CLERGY—See Criminal Law, 2445.

BENEVOLENT—See note 45.

BENEVOLENT SOCIETY—See note 46.

BEQUEATH—To give property to another by will. Strictly to give personal property to another by will.[47]

BEQUESTS—See Wills, 10275.

BEST AND SECONDARY EVIDENCE—See Evidence, 3263.

BET—See Wagers.

BEYOND SEA—See note 48.

BICYCLE PATHS—See Roads, 8487.

BICYCLES—See Highways, 4172.

BIDS—See Contracts, 1745, 1843.

[41] State v. Dist. Ct., 79–27, 81+536.
[42] State v. Linton, 42–32, 43+571.
[43] State v. Matter, 78–377, 81+9.
[44] U. S. v. Gideon, 1–292(226).
[45] Walter v. Hensel, 42–204, 208, 44+57.
[46] State v. Critchett, 37–13, 32+787.
[47] Century Dict.; Leighton v. Sheldon, 16–243(214).
[48] State v. Johnson, 12–476(378, 383).

BIGAMY

853. What constitutes—A void divorce is no defence to a charge of bigamy, even though the accused relied on its validity in good faith. A criminal intent, in fact, is not an essential element of the offence.[49]

854. Indictment—An indictment in the form of the statute is sufficient. An allegation "that he had a wife then living" will admit proof of the former marriage and its validity, and it is unnecessary to state the time and place when and where it was consummated, or the maiden name of the former wife.[50]

855. Variance—An indictment gave the true name and the alias of the woman married. Proof was made of the marriage under the alias. Failure to prove the true name was held immaterial.[51]

856. Proof of marriage—The fact of marriage need not be proved by direct evidence.[52] Formerly the rule was otherwise.[53]

857. Proof that former spouse was living—The state must prove beyond a reasonable doubt that the former husband or wife was living at the time of the second marriage, but this need not be done by direct evidence. The state may rely on the presumption of the continuance of life.[54]

BILL IN EQUITY—See Creditors' Suit.

BILL OF DISCOVERY—See Discovery.

BILL OF EXCEPTIONS—See Cases and Bills of Exceptions, 1367; Criminal Law, 2496.

BILL OF EXCHANGE—See Bills and Notes.

BILL OF LADING—See Carriers, 1304.

BILL OF PARTICULARS—See Indictment, 4401; Mechanics' Liens, 6106; Pleading, 7642.

BILL OF REVIEW—See New Trial, 7070.

BILL OF SALE—See Sales.

BILL QUIA TIMET—See Quieting Title.

BILL RENDERED—See Accounts, 50.

[49] State v. Armington, 25–29.

[50] State v. Armington, 25–29. See State v. Johnson, 12–476(378) (indictment for polygamy under Pub. St., 1849–1858, c. 96 §§ 2, 3).

[51] State v. Armington, 25–29.

[52] Id.

[53] State v. Johnson, 12–476(378).

[54] State v. Plym, 43–385, 45+848.

BILLS AND NOTES

NATURE AND REQUISITES

ACCEPTANCE OF BILL OF EXCHANGE

PRESENTMENT FOR PAYMENT

PAYMENT

PROTEST

NOTICE OF DISHONOR

TRANSFERS WITHOUT INDORSEMENT.

INDORSEMENT

BONA FIDE PURCHASERS

Cross-References

See Accord and Satisfaction, 43; Evidence, 3366; Guaranty, 4076; Payment, 7444.

NATURE AND REQUISITES

858. Definition of note—A promissory note is an unconditional promise in writing for the payment of a certain sum of money.[55]

859. A form of money—Commercial paper is a form of money.[56]

860. Must be in writing—There is no such thing as an oral note.[57]

861. Date—Mistake—Antedating and postdating—A note intentionally postdated or antedated, though a valid contract from the time of its delivery, will be construed as it reads, for such is the contract. But the date is only presumptive evidence of the time of its execution, and where a note is intended to bear that date the time of its execution is its true date, and, if wrongly dated by mistake, the mistake may be corrected, except as to an innocent purchaser or indorsee, who would be prejudiced by the correction. An indorsee may, however, show the true date of the note, and, if he took it in due course before due, the defence of want of consideration will not be available.[58]

862. Must be unconditional—The promise to pay in a note must be absolute, unconditional, and not dependent on any contingency.[59] So the order in a bill of exchange must be for payment absolutely and not contingently.[60]

863. Certainty in general—A bill or note must be certain as to the amount to be paid, the time of payment, the person by whom and to whom payable, and the payment.[61] It is of great importance that the rules respecting negotiable paper should be clear and the whole story of its obligation should appear on its face.[62] Bills of exchange are governed by the same rules, with respect to certainty in their terms, as notes.[63]

864. Certainty as to time of payment—The time of payment must be certain, without the happening of any contingency.[64]

865. Certainty as to amount—The amount to be paid must be certain and must not depend upon any contingencies. This certainty must continue until the obligation is discharged.[65] It is certain when the sum to become absolutely payable upon it at any given time is ascertainable upon its face.[66] A provision for current exchange on a place other than the place of payment is not fatal.[67] A provision for exchange and collection charges is fatal.[68] So is a provision for attorney's fees.[69] A provision for a definite amount of discount, if payment is made on or before maturity, is not fatal.[70] Nor is a provision for a smaller rate of interest if the note is paid at maturity.[71] A promise to pay a stated amount, plus or minus a definite amount or discount, is sufficiently certain. A

55 Smith v. First S. Bank, 95–496, 104+369; State v. Greenwood, 76–211, 213, 78+1042.

56 Germania Bank v. Boutell, 60–189, 192, 62+327.

57 State v. Greenwood, 76–211, 213, 78+1042.

58 Almich v. Downey, 45–460, 48+197.

59 Third Nat. Bank v. Armstrong, 25–530; Mast v. Matthews, 30–441, 16+155; Cooper v. Brewster, 1–94(73); Stevens v. Johnson, 28–172, 9+677; Edwards v. Ramsey, 30–91, 14+272; Deering v. Thom, 29–120, 12+350.

60 Hillstrom v. Anderson, 46–382, 49+187.

61 Jones v. Radatz, 27–240, 6+800.

62 Farwell v. St. Paul T. Co., 45–495, 498, 48+326.

63 Smith v. First S. Bank, 95–496, 104+369.

64 Phelps v. Sargent, 69–118, 71+927. See Cassidy v. First Nat. Bank, 30–86, 14+363.

65 Jones v. Radatz, 27–240, 6+800.

66 Smith v. Crane, 33–144, 22+633. Contra, Hastings v. Thompson, 54–184, 55+968.

67 Hastings v. Thompson, 54–184, 55+968; Harris v. Johnston, 54–177, 182, 55+970; First Nat. Bank v. Slette, 67–425, 69+1148. See 14 Harv. L. Rev. 154.

68 Smith v. First S. Bank, 95–496, 104+369.

69 Jones v. Radatz, 27–240, 6+800; Deering v. Thom, 29–120, 12+350; Johnston v. Clark, 30–308, 15+252. See Harris v. Anfinson, 31–182, 17+274.

70 Loring v. Anderson, 95–101, 103+722.

71 Smith v. Crane, 33–144, 22+633.

provision to pay a stated amount, plus or minus an indefinite amount or discount, is not.[72]

866. Payment in money—The promise must be to pay money. A promise to pay in "currency" is sufficient.[73] A promise to pay in "exchange,"[74] or in bonds,[75] is not.

867. Payable out of particular fund—The order for payment in a bill or note must be general and not out of a particular fund.[76]

868. Seal—A note under seal is not negotiable,[77] unless it is the note of a corporation.[78]

869. Consideration—Presumption—As between the original parties and holders with notice, a bill or note is not binding unless it is based on a consideration.[79] A consideration is presumed [80] and it is presumed that the consideration passed from the payee to the maker.[81] Want of consideration is not a defence against bona fide purchasers.[82] A maker may be estopped to deny a consideration.[83] It is not incumbent on the maker to prove that he was not guilty of laches in making the defence of want of consideration.[84] A note of an administrator in his official capacity imports sufficient consideration to bind him personally.[85] The consideration of a note supports a guaranty of the note given at the time of the note.[86] An order drawn on a particular fund is not a note importing consideration.[87]

870. Option to declare principal due—Where, by the terms of a note, the principal becomes due and payable at once upon default in payment of the interest, without further notice, at the option of the legal holder thereof, the bringing of an action to recover the principal and interest is a sufficient exercise of the option.[88]

[72] Smith v. Crane, 33–144, 22+633; Loring v. Anderson, 95–101, 103+722; Smith v. First S. Bank, 95–496, 104+369.

[73] Butler v. Paine, 8–324(284).

[74] First Nat. Bank v. Slette, 67–425, 69+1148.

[75] Easton v. Hyde, 13–90(83).

[76] Kelly v. Bronson, 26–359, 4+607; Hillstrom v. Anderson, 46–382, 49+187; Conroy v. Ferree, 68–325, 71+383. See Griggs v. St. Paul, 56–150, 57+461.

[77] Helfer v. Alden, 3–332(232); Brown v. Jordhal, 32–135, 19+650. See R. L. 1905 § 2652.

[78] R. L. 1905 § 2740; Auerbach v. Le Sueur M. Co., 28–291, 9+799.

[79] Dunning v. Pond, 5–302(238); Id., 5–296(234); Ruggles v. Swanwick, 6–526(365); Rogers v. Stevenson, 16–68(56); Dorr v. Steichen, 18–26(10); Owsley v. Greenwood, 18–429(386); State v. Torinus, 24–332; Mason v. Campbell, 27–54, 6+405; Thompson v. Hanson, 28–484, 11+86; Security Bank v. Bell, 32–409, 21+470; Holm v. Sandberg, 32–427, 21+416; Egan v. Fuller, 35–515, 29+313; Osborne v. Doherty, 38–430, 38+111; Lundberg v. N. W. El. Co., 42–37, 43+685; Aultman v. Olson, 43–409, 45+852; Simpson v. Evans, 44–419, 46+908; Almich v. Downey, 45–460, 48+197; Gotzian v. Steinkamp, 53–462, 55+602; Wyatt v. Jackson, 55–87, 56+578; Mitchell v. Chisholm, 57–148, 58+873; Nichols v. Dedrick, 61–513, 63+1110; Turle v. Sargent, 63–211, 65+349; Cooper v. Hayward, 67–92, 69+638; Bankers' Acc. Ins. Co. v. Rogers, 73–12, 75+747; Anderson v. Lee, 73–397, 76+24; Atwater v. Smith, 73–507, 76+253; Morrison v. Morse, 75–126, 77+561; Atwater v. Stromberg, 75–277, 77+963; Mpls. L. Co. v. McMillan, 79–287, 82+591; Wildermann v. Donnelly, 86–184, 90+366; N. P. Ry. v. Holmes, 88–389, 93+606; O'Gara v. Hansing, 88–401, 93+307; Askegaard v. Dalen, 93–354, 101+503; Anderson v. Nystrom, 103–168, 114+742; Dowagiac Mfg. Co. v. Van Valkenburg, 126+119.

[80] Hayward v. Grant, 13–165(154); Priedman v. Johnson, 21–12; Pinney v. King, 21–514; Adams v. Adams, 25–72; Bisbee v. Torinus, 26–165, 171, 2+168; Nichols v. Dedrick, 61–513, 63+1110; Enneking v. Woebkenberg, 88–259, 92+932.

[81] Hayward v. Grant, 13–165(154, 159).

[82] Almich v. Downey, 45–460, 48+197; Wildermann v. Donnelly, 86–184, 186, 90+366; Daniels v. Wilson, 21–530.

[83] Skordal v. Stanton, 89–511, 95+449.

[84] Wildermann v. Donnelly, 86–184, 90+366.

[85] Germania Bank v. Michaud, 62–459, 65+70.

[86] Osborne v. Gullikson, 64–218, 66+965. See Rogers v. Stevenson, 16–68(56).

[87] Conroy v. Ferree, 68–325, 71+383.

[88] St. Paul etc. Co. v. Thomas, 60–140, 61+1134.

871. Effect of mortgage—The negotiability of a note is not impaired by the fact that it is secured by a mortgage.[89]

872. Conditional privilege of cancelation—Where, upon the execution of a note, the payee, as part of the contract, indorsed an agreement upon the note whereby it was promised and agreed that, in case the maker of the note should erect a dwelling-house upon the lot therein described on or before a certain date, the note should be canceled, it was held that the right to cancel the note in this way was a privilege or option to be exercised within the time limited, and, unless extended, the privilege would lapse, and the note become absolute. But a voluntary extension of the privilege, if acted on within the time thereby limited, and the terms thereof complied with, will from that time be binding upon the parties, and be deemed to rest upon a sufficient consideration.[90]

873. Various stipulations in notes construed—A stipulation to pay expenses of suit;[91] for attorney's fees;[92] authorizing the holder to declare the whole amount due on a certain default;[93] for an extension.[94]

874. Joint and several—A note has been construed as joint and several.[95]

875. Blanks improperly filled by agent—If one executes a note with blanks, and delivers it to another who improperly fills the blanks, the maker is liable thereon to bona fide purchasers.[96]

876. Note payable to maker's order or order of fictitious person—By statute a note payable to the order of the maker, or a fictitious person, and negotiated by the maker without indorsement, has the effect of a note payable to bearer.[97]

877. Signing in representative capacity—To relieve a person signing a note or bill from personal liability it is not enough to add after his name "agent,"[98] "trustee,"[99] "pres.,"[1] etc.

878. Delivery—A note does not become operative until delivery.[2] It must pass from the maker to the payee, with the intention on the part of the maker to transfer the title to the payee, who must accept it with the intention of receiving the title. A manual transfer and acceptance of the instrument are unnecessary. A constructive delivery is sufficient, if made with the intention of transferring the title.[3] A delivery contrary to agreement has been held not to bind a surety.[4] Want of delivery is no defence against a bona fide purchaser;[5] otherwise, between the parties.[6] The time of delivery may always be shown by parol.[7]

879. Conditional delivery—A note may be delivered to the payee on condition that it shall become operative only on the happening of a future contingent event. Parol evidence is admissible to prove the agreement.[8] An answer alleging a conditional delivery has been held to state a defence.[9]

[89] Blumenthal v. Jassoy, 29–177, 12+517.
[90] Stout v. Watson, 45–454, 48+195.
[91] Pinney v. Jorgenson, 27–26, 6+376.
[92] Campbell v. Worman, 58–561, 60+668; Johnston v. Clark, 30–308, 15+252.
[93] Lanpher v. Barnum, 57–172, 58+988; St. Paul etc. Co. v. Thomas, 60–140, 61+1134.
[94] Chapin v. Murphy, 5–474(383).
[95] Wolford v. Bowen, 57–267, 59+195.
[96] First Nat. Bank v. Compo-Board Mfg. Co., 61–274, 63+731.
[97] R. L. 1905 § 2745; Security Bank v. Lucas, 69–46, 71+822.
[98] Fowler v. Atkinson, 6–578(412).
[99] Bingham v. Stewart, 13–106(96).
[1] Brunswick etc. Co. v. Boutell, 45–21, 47+261.
[2] Stein v. Passmore, 25–256.
[3] Enneking v. Woebkenberg, 88–259, 92+932; Streissguth v. Kroll, 86–325, 90+577.
[4] Wager v. Brooks, 37–392, 34+745.
[5] Kinyon v. Wohlford, 17–239(215).
[6] Ruggles v. Swanwick, 6–526(365).
[7] Dennis v. Jackson, 57–286, 59+198.
[8] Smith v. Mussetter, 58–159, 59+995; Merchants' E. Bank v. Luckow, 37–542, 35+434; Shove v. Martine, 85–29, 33, 88+254, 412. See German etc. Bank v. People's etc. Co., 63–12, 65+90.
[9] Allen v. Swenson, 53–133, 54+1065.

880. Collateral agreements—A contemporaneous written agreement may be considered and construed in connection with a note and may control the effect of the same as between the parties.[10] Instruments executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction, are, in the eye of the law, one instrument, and will be read and construed together, as if they were as much one in form as they are in substance.[11]

881. What constitutes a demand note—If a note when delivered is by its date overdue it is deemed a demand note.[12]

882. Construction—Uniformity to be sought—The doctrine of negotiability is not to be extended.[13] Commercial usage should control.[14] The rulings of the federal courts should be followed by the state courts in the interest of uniformity.[15] The rules governing commercial paper are not to be relaxed to meet hard cases.[16]

883. Law based on commercial usage—The law of negotiable paper is based on commercial usage.[17]

884. Negotiability not essential—An instrument may be a promissory note though it is not negotiable.[18]

885. What constitutes a bill of exchange—It is essential to a bill of exchange that it be for a sum certain, payable in money absolutely, and not contingently or out of a particular fund, but generally. An order directing the payment of money out of the funds of the drawer in the hands of the drawee is not a bill of exchange. An order for the payment of a sum certain to a third person is none the less a bill of exchange because it shows on what account it is to be applied, or the consideration which has been received. An order directing the drawee to pay to payee or order "the two hundred and fifty dollars due us by you on account of cash paid for repairing engine, and this will be receipt in full of all demands of us," has been held a bill of exchange.[19] A draft for money drawn on a bank, payable at a day subsequent to its date and subsequent to the date of its issue, is a bill of exchange.[20] A time check given to an employee has been held not a bill of exchange.[21]

886. Instruments held not commercial paper—The following have been held not commercial paper: an order on a city treasurer;[22] a time check given to an employee;[23] a warehouseman's receipt;[24] a bill of lading;[25] a written agreement to cut and split rails and deliver them to bearer.[26]

ACCEPTANCE OF BILL OF EXCHANGE

887. What constitutes—The words "payable the 15th day of May, 1883," written and signed by the drawer on a bill, have been held a qualified acceptance. The word "except," so written and signed, has been held an acceptance.[27]

[10] Lebanon S. Bank v. Penney, 44–214, 46+331; Ryan v. Ryan, 58–91, 59+974; Myrick v. Purcell, 95–133, 103+902; Westacott v. Handley, 109–452, 124+226.

[11] Myrick v. Purcell, 95–133, 103+902.

[12] Almich v. Downey, 45–460, 48+197.

[13] Hastings v. Thompson, 54–184, 189, 55+968; Oster v. Mickley, 35–245, 28+710.

[14] Ward v. Hackett, 30–150, 154, 14+578; Hastings v. Thompson, 54–184, 55+968; Harrison v. Nicollet Nat. Bank, 41–488, 491, 43+336.

[15] Rosemond v. Graham, 54–323, 329, 56+38; Nat. Bank Com. v. Chi. etc. Ry., 44–224, 235, 46+560.

[16] Daniels v. Wilson, 21–530.

[17] Hastings v. Thompson, 54–184, 55+968.

[18] Smith v. First State Bank, 95–496, 104+369.

[19] Hillstrom v. Anderson, 46–382, 49+187.

[20] Harrison v. Nicollet Nat. Bank, 41–488, 43+336.

[21] Citizens S. Bank v. Bonnes, 76–45, 78+875.

[22] King v. Carroll, 74–470, 77+409.

[23] Citizens S. Bank v. Bonnes, 76–45, 78+875.

[24] See § 10145.

[25] See § 1308.

[26] Spencer v. Woodbury, 1–105(82).

[27] Vanstrum v. Liljengren, 37–191, 33+555.

888. Writing—By statute the acceptance must be in writing and signed by the acceptor or his agent.[28]

889. Who may accept—For honor—No one can accept a bill but the person on whom it is drawn, except for honor. A person other than the drawee may, after presentation, refusal, and protest, accept, for the honor of the drawer, or any of the indorsers, or of all the parties as he may see fit.[29]

890. By partner—An acceptance by a partner in his own name of a bill drawn on the firm does not bind the firm.[30]

891. Consideration—It is no defence to the acceptor that there was no consideration as between the drawer and payee. If an acceptance is given to the payee in consideration of his agreement to make certain payments, his default will not be a failure of consideration so long as he remains liable.[31]

892. Obligation—An acceptor admits the possession of funds of the drawer applicable to the payment of the bill and assumes an absolute obligation to make such payment. He becomes the principal debtor as respects the holder of the accepted bill.[32]

893. Effect as assignment of fund—If a bill is accepted, whether it is drawn on general funds or a specific fund, it amounts to an assignment of the fund. The acceptor, by his acceptance, binds and appropriates the fund for the use of the holder of the bill.[33]

894. Who may sue on acceptance—A payee for collection may sue the acceptor.[34]

895. Promise to accept—A promise in writing to accept a bill of exchange, made within a reasonable time before it is drawn, will amount to an acceptance of the bill in favor of a person to whom the promise is communicated, and who also takes the bill for a valuable consideration, on the faith and credit of the promise. It is not essential that the written promise to accept be shown or exhibited to a person who takes the bill relying upon its existence; but, if he chooses to act without personally inspecting the promise in writing, he is held to have such information as he would have acquired by reading the same.[35]

896. Unaccepted bill not assignment of fraud—A bill or draft payable generally, and not out of any particular fund or debt, does not, before acceptance, operate as an assignment to the holder, of a debt due from the drawee to the drawer.[36]

PRESENTMENT FOR PAYMENT

897. Necessity—Due presentment and demand of payment is necessary to charge an ordinary indorser;[37] or indorser after maturity;[38] or a firm indorsing the note of one of the partners.[39] It is unnecessary to charge the acceptor of a bill;[40] the maker;[41] or a guarantor[42] of a note; or the indorser of an instrument in the form of a note but not such on account of uncertainty in its terms.[43]

[28] R. L. 1905 § 2742; Heenan v. Nash, 8-407(363).
[29] Heenan v. Nash, 8-407(363).
[30] Id.
[31] Vanstrum v. Liljengren, 37-191, 33+555.
[32] Id.
[33] Lewis v. Traders' Bank, 30-134, 14+587.
[34] Vanstrum v. Liljengren, 37-191, 33+555.
[35] Woodward v. Griffiths, 43-260, 45+433; Keavy v. Thuett, 47-266, 50+126; Union Bank v. Shea, 57-180, 58+985; First S. Bank v. Thuet, 88-364, 93+1.
[36] Lewis v. Traders' Bank, 30-134, 14+587; Northern T. Co. v. Rogers, 60-208, 62+273.
[37] Herrick v. Baldwin, 17-209(183).
[38] Hart v. Eastman, 7-74(50); Moor v. Folsom, 14-340(260).
[39] Coon v. Pruden, 25-105.
[40] Freeman v. Curran, 1-169(144); Balme v. Wambaugh, 16-116(106).
[41] Balme v. Wambaugh, 16-116(106).
[42] Hungerford v. O'Brien, 37-306, 34+161.
[43] Smith v. First S. Bank, 95-496, 104+369.

898. Time—A bill, note, or check, payable on demand, must be presented for payment within a reasonable time, having in view ordinary business usages, and the purposes which paper of the class is intended to subserve.[44] For demand notes and demand certificates of deposit the statute makes sixty days the limit of a reasonable time.[45]

899. Place—It is presumed that the maker resided where the note was made. If a note is made by a resident who removes from the state before its maturity and takes up a permanent residence elsewhere, it may be presented for payment at his last place of residence in this state.[46] To charge the maker of a note or acceptor of a bill, it is unnecessary to make a demand at the place specified. The effect of a failure to make such demand is only to release the maker or acceptor from damages, if ready at the appointed place to pay and there is no one there to receive the money.[47]

PAYMENT

900. When due—Days of grace—According to the law merchant if a bill or note, without grace, fell due on a legal holiday, it was not payable until the next day; if with grace, it was payable the day preceding, and if the first or second day of grace was a holiday it was nevertheless counted as one of the days of grace. According to the Civil Code of Dakota territory a note on its face payable on Sunday, but entitled to grace, is due on the following Wednesday.[48] The time of the maturity of a note is unaffected by a default in a collateral mortgage.[49] If the maker of a note executes a chattel mortgage to secure it, he is, in the absence of a demand, entitled to the whole of the business hours of the last day of grace to pay the note.[50]

901. Before maturity—A payment to the payee before maturity will not prejudice the right of a bona fide holder to recover at maturity.[51]

902. Extension of time—An agreement for an extension may be implied. The payment and acceptance of interest in advance on a past-due note by the act and assent of the holder and maker thereof, constitute, in the absence of any contrary understanding, an implied contract to extend the time of payment for the period for which the interest is paid in advance.[52] A promise to pay the rate of interest specified in a past-due note until such indefinite time as the maker can pay the note out of his business is not a legal consideration for a promise to extend the time of payment of the note.[53] A finding that there was an extension has been held not justified by the evidence.[54] Whether an extension given by the holder to the maker was without the consent of the indorser has been held a question for the jury.[55]

903. To whom—The mere fact that a bill or 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 on behalf of the payee. To create such agency the paper must be indorsed to or lodged with him for collection.[56] A payment before maturity to one holding a note for the payee, and claiming authority to receive it, has been held unauthorized.[57] Possession of a note payable to bearer

[44] La Due v. First Nat. Bank, 31–33, 16+426; Hart v. Eastman, 7–74(50); Moor v. Folsom, 14–340(260).

[45] R. L. 1905 § 2741; Linn v. Rugg, 19–181(145, 159); Mitchell v. Easton, 37–335, 33+910; Towle v. Starz, 67–370, 69+1098.

[46] Herrick v. Baldwin, 17–209(183). See Salisbury v. Bartleson, 39–365, 40+265.

[47] Balme v. Wambaugh, 16–116(106); Freeman v. Curran, 1–169(144).

[48] Roberts v. Wold, 61–291, 63+739.

[49] White v. Miller, 52–367, 54+736.

[50] Daly v. Proetz, 20–411(363).

[51] Blumenthal v. Jassoy, 29–177, 12+517.

[52] St. Paul T. Co. v. St. Paul Ch. of Com., 64–439, 67+350; Id., 70–486, 73+408.

[53] First S. Bank v. Schatz, 104–425, 116+917.

[54] Marshall & I. Bank v. Child, 76–173, 78+1048.

[55] Souhegan Nat. Bank v. Boardman, 46–293, 48+1116.

[56] Dwight v. Lenz, 75–78, 77+546.

[57] Braithwait v. Bain, 66–325, 69+4.

is sufficient to entitle the holder to receive payment.[58] If the maker of a note or bill indorsed in blank, or payable to bearer, in good faith pays the same to the holder, though after maturity, the payment exonerates the maker from further liability, though it should turn out that such holder was not the rightful owner of the note or bill, or authorized to receive payment.[59]

904. By stranger—Recovery—The plaintiff, at the request of the defendant, paid for him notes held by third parties. It was held that his remedy was not an action on the notes, but one for money paid for the defendant's use and benefit.[60]

905. Out of funds to be raised—A collateral written agreement between the parties for payment out of funds to be raised or collected is binding between the parties.[61]

906. Estoppel of maker to deny—If one buys a note with the knowledge and consent of the maker, it is no defence for the latter that he had previously paid the note.[62]

907. Collateral agreement to pay—An agreement to pay a note at a particular place, made after its maturity, and without any new consideration is void. It is also void if made before maturity, but in consideration of a part payment of the note to be made after maturity.[63] A contract to pay with partnership funds has been sustained.[64]

908. Forged bill—Doctrine of Price v. Neal—If a drawee pays a forged bill to a bona fide holder he cannot recover the amount from such holder.[65] The drawer of a bill has been held liable to the payee after payment on a forged indorsement.[66]

909. Indorsements of payment—An indorsement of payment on a note is in the nature of a receipt, and not of a contract, and may be varied or explained by parol.[67] It is no part of the note.[68] Its fraudulent erasure by the holder does not avoid the note.[69]

910. Indorsements of payment as evidence—By statute an indorsement of money paid on a note, which appears by evidence dehors the instrument, to have been made when it was against the interest of the holder to make it, is prima facie evidence of the facts therein stated.[70]

911. Uncredited payments—Rights of purchaser—A bank, which purchases a note from another bank, paying therefor the face value, with knowledge of the fact that payments have been made and not credited on the note, can collect from the maker of the note only the amount actually due thereon.[71]

912. Discharge—What constitutes—Miscellaneous cases—A note has been held discharged by a gift thereof to the maker;[72] and by the compromise and settlement of an action.[73] Matters of account in favor of the maker of a note and which might be set off against it are not a payment of the note, without an agreement express or implied for their application to it.[74] A payment

[58] Woodbury v. Larned, 5–339(271); Sweet v. Carver County, 16–106(96).
[59] Sweet v. Carver County, 16–106(96).
[60] Powers v. Blethen, 91–339, 97+1056.
[61] Myrick v. Purcell, 95–133, 103+902.
[62] Downer v. Read, 17–493(470).
[63] Colter v. Greenhagen, 3–126(74).
[64] Black v. Oliva, 80–396, 83+386.
[65] Bernheimer v. Marshall, 2–78(61); Germania Bank v. Boutell, 60–189, 62+327. See Scott v. Edes, 3–377(271, 279); 4 Harv. L. Rev. 297; 22 Id. 141.
[66] Lennon v. Brainard, 36–330, 31+172.
[67] Sears v. Wempner, 27–351, 7+362; Theopold v. Deike, 76–121, 78+977; McCaffery v. Burkhardt, 97–1, 105+971.
[68] Turrell v. Morgan, 7–368(290). See State v. Monnier, 8–212(182).
[69] Theopold v. Deike, 76–121, 78+977.
[70] R. L. 1905 § 4731; Young v. Perkins, 29–173, 12+515; Goenen v. Schroeder, 18–66(51, 60); Atwood v. Lammers, 97–214, 106+310.
[71] Buse v. First State Bank, 105–323, 117+490.
[72] Stewart v. Hidden, 13–43(29).
[73] Southwick v. Herring, 82–302, 84+1013.
[74] Rugland v. Thompson, 48–539, 51+604.

by a stranger, not intended as a discharge, has been held not a discharge.[75] A surrender of a note to the maker, with an agreement authorizing an action thereon, has been held not a discharge.[76] A tender has been held insufficient to effect a discharge.[77] A transfer by the payee to a third person for a valuable consideration, by agreement with the maker, has been held a defence against the payee and his assignee with notice, in favor of the maker.[78] A surrender of a note to the maker is prima facie a discharge.[79] A note being payable at a specified bank, the mere deposit of money in such bank, to be applied in payment of the note, does not constitute payment, the note not having been left there by the holder for collection or payment. The bank receives the money as the agent of the person depositing it.[80] When a note is secured by a mortgage a discharge of the mortgage does not necessarily discharge the note.[81] Cases are cited below involving the sufficiency of evidence to show a discharge.[82]

PROTEST

913. Definition—Protest includes, in a popular sense, all the steps taken to fix the liability of a drawer or indorser.[83] It is a formal statement in writing that the described instrument was, on a certain day, presented for payment or acceptance, and that such payment or acceptance was refused.[84]

914. Necessity—Protest is unnecessary in the case of notes and inland bills. All that is necessary to charge indorsers is due demand, non-payment, and due notice.[85]

915. Demand and notice excused—It is an excuse that the maker has taken up a permanent residence out of the state.[86] It is not an excuse that the holder knows that the maker will not pay;[87] or that the maker has absconded;[88] or that the maker is insolvent and has removed from the state.[89]

916. Waiver of demand and notice—Parol evidence is inadmissible to prove an agreement at the time of the indorsement waiving demand and notice.[90] A promise to pay, after maturity, by an indorser, or a part payment thereon by him, with full knowledge of the laches of the holder in respect to demand and notice of non-payment, is a waiver. If it appears that no demand was made, the burden is on the plaintiff to show that the indorser had full knowledge of the laches when he made the promise or payment.[91] A waiver may be made after as well as before maturity and no new consideration is necessary. If it is indorsed the language used must be construed so as to carry out the intention of the parties. If it appears on the face of the instrument no extrinsic proof that the indorser knew that he had been previously discharged is necessary.[92] A clause in a note "the drawers and indorsers jointly and severally waive presentment for payment, protest, and notice of protest,

[75] Fogarty v. Wilson, 30–289, 15+175.
[76] Clark v. Butts, 73–361, 76+199.
[77] Balme v. Wambaugh, 16–116(106).
[78] Nunnemacker v. Johnson, 38–390, 38+351.
[79] Bishop v. Buckeye Pub. Co., 57–219, 58+872.
[80] St. Paul Nat. Bank v. Cannon, 46–95, 48+526.
[81] Blumenthal v. Jassoy, 29–177, 12+517.
[82] Cooper v. Hayward, 79–23, 81+514; Los v. Scherer, 90–455, 97+123.
[83] Wolford v. Andrews, 29–250, 13+167; Peabody v. Citizens S. Bank, 98–302, 108+272.
[84] Peabody v. Citizens S. Bank, 98–302, 108+272.
[85] Wolford v. Andrews, 29–250, 13+167; King v. Griggs, 82–387, 85+162; Bryant v. Lord, 19–396(342, 348).
[86] Salisbury v. Bartleson, 39–365, 40+265. See Herrick v. Baldwin, 17–209(183); Farwell v. St. Paul T. Co., 45–495, 48+326.
[87] Hart v. Eastman, 7–74(50).
[88] Michaud v. Lagarde, 4–43(21).
[89] Farwell v. St. Paul T. Co., 45–495, 48+326.
[90] Farwell v. St. Paul T. Co., 45–495, 48+326; Michaud v. Lagarde, 4–43(21).
[91] Amor v. Stoeckele, 76–180, 78+1046; Martin v. Lennon, 19–67(45, 48).
[92] Lockwood v. Bock, 50–142, 52+391.

and non-payment of this note," binds all indorsers.[93] An indorsement on a note "for value received I waive notice and protest, and guarantee payment," is a waiver of demand and notice.[94] The words, "but not to be paid by us in any event, within one year from date," have been held not a waiver.[95] An agreement for an extension of payment has been held not a waiver.[96]

917. Wrongful protest—Damages—Where a check is wrongfully protested, the drawer may recover temperate compensatory damages, without alleging and proving special damages. The right to recover such damages is not confined to a trader in the restricted sense in which the term is used in the bankruptcy laws, but extends to any person who is engaged in business and whose credit is thus necessarily injured.[97]

NOTICE OF DISHONOR

918. Necessity—Notice of dishonor is necessary to charge an ordinary indorser;[98] an indorser after maturity or of a non-negotiable note;[99] or a firm indorsing the note of one of the partners.[1] It is unnecessary to charge an irregular indorser;[2] or a guarantor of payment;[3] or an indorser of an instrument in the form of a note, but not such on account of uncertainty in its terms.[4]

919. Actual knowledge not a substitute—Mere knowledge of the dishonor of paper is not notice.[5]

920. Requisites—A notice of dishonor must come from one who is entitled to look to the party for payment, and must inform him that the note has been duly presented for payment; that it has been dishonored; and that the holder looks to him for payment.[6]

921. What law governs—The law of the date of service governs.[7]

922. Who may give—Notice must be given by one entitled to look to the party for payment. It cannot be given by the maker.[8]

923. To agent—An agent has been held to have implied authority to receive notice.[9]

924. Several indorsers—It is customary to notify all the indorsers, but a holder is under no obligation to his immediate indorser to notify prior indorsers or parties. The last indorser becomes liable when he alone is notified, and he in turn may fix the liability of prior parties by giving notice to them. This rule applies to a guarantor.[10]

925. Mailing—If the holder of the note and the person to be notified reside at different places, the notice must be deposited in the mail not later than the next day after the demand of payment is made.[11] At common law, and formerly in this state, notice could not be given by mail if the holder and the party to be charged resided in the same city.[12] The statute must be strictly complied with.[13]

93 Bryant v. Lord, 19–396(342).
94 Wolford v. Andrews, 29–250, 13+167.
95 Hart v. Eastman, 7–74(50).
96 Michaud v. Lagarde, 4–43(21).
97 Peabody v. Citizens S. Bank, 98–302, 108+272.
98 Herrick v. Baldwin, 17–209(183).
99 Hart v. Eastman, 7–74(50); Moor v. Folsom, 14–340(260).
1 Coon v. Pruden, 25–105.
2 See § 945.
3 Hungerford v. O'Brien, 37–306, 34+161. See Brackett v. Rich, 23–485.
4 Smith v. First S. Bank, 95–496, 104+369.
5 Jagger v. Nat. G. A. Bank, 53–386, 55+545.
6 Id.
7 Levering v. Washington, 3–323(227).
8 Jagger v. Nat. G. A. Bank, 53–386, 55+545.
9 King v. Griggs, 82–387, 85+162.
10 Hungerford v. O'Brien, 37–306, 34+161.
11 Crosby v. Patton, 76–40, 78+874.
12 Levering v. Washington, 3–323(227); Kern v. Von Phul, 7–426(341).
13 Marshall v. Baker, 3–320(224).

926. Diligence to learn address—If the holder is ignorant of the address of the party to be notified he must exercise due diligence to ascertain it—such diligence as men of business usually exercise when their interests depend upon correct information.[14]

927. Notary's instrument of protest—By statute the instrument of protest of a notary of this or another state is prima facie evidence of the facts recited.[15] A notary's certificate, reciting that he "duly notified the indorser" of a note of its dishonor, is prima facie evidence that the indorser was actually or personally served with the proper notice. If it is made to appear that he never in fact received notice, the holder must show the exercise of such diligence as the law recognizes as equivalent to actual notice. If the service was in fact made by mail at the actual or reputed place of residence of the indorser, it should be so made to appear, either by the notarial certificate or evidence aliunde.[16] The due depositing in the postoffice, properly directed, postage paid, of notice of presentment, demand, non-payment, and protest, stands as and for notice to the indorser, whether the notice be actually received or not; and it is error, for the purpose of contradicting the notary's instrument of protest accompanying the note, to admit evidence of the non-receipt of the notice, not accompanied with evidence tending to show that the notice was not in fact deposited in the postoffice, as certified by the notary, and such evidence of non-receipt of the notice, standing alone, is incompetent to go to the jury.[17] If the certificate does not show prepayment of the postage the fact may be proved aliunde.[18] The certificate is evidence, though the notary makes no record. A notice properly folded and addressed is sufficient without an envelope.[19] A statement in a certificate that "due notice was put in the postoffice" has been held sufficient.[20]

TRANSFERS WITHOUT INDORSEMENT

928. Without delivery—The title to a note may be transferred without delivery.[21]

929. By delivery—A note payable to order may be transferred by mere delivery without indorsement and the transferee may sue thereon in his own name. Such a transfer is not in due course and the transferee is not a bona fide holder,[22] and his possession of the note is not prima facie evidence of title.[23] A note payable to bearer is assignable by mere delivery and the possession of the transferee is prima facie evidence of title.[24] A note indorsed in blank is transferable by mere delivery.[25] The owner of a note, in which a third party is named as payee, may maintain an action upon it without indorsement, upon proof of such ownership by evidence other than the note.[26]

930. By assignment—An "assignment" means a transfer of the title. It neither includes or implies becoming in any way a party to the paper, or responsible for the insolvency or default of the maker.[27]

[14] King v. Griggs, 82–387, 85+162.
[15] R. L. 1905 § 2663; Kern v. Von Phul, 7–426(341); Rogers v. Stevenson, 16–68 (56); Herrick v. Baldwin, 17–209(183); Bryant v. Lord, 19–396(342, 348); Peabody v. Citizens S. Bank, 98–302, 108+272; Nelson v. First Nat. Bank, 69 Fed. 798.
[16] Bettis v. Schreiber, 31–329, 17+863.
[17] Wilson v. Richards, 28–337, 9+872; Roberts v. Wold, 61–291, 63+739.
[18] Rogers v. Stevenson, 16–68(56).
[19] Kern v. Von Puhl, 7–426(341).
[20] Wilson v. Richards, 28–337, 340, 9+872.
[21] Nininger v. Banning, 7–274(210).
[22] Pease v. Rush, 2–107(89); Foster v. Berkey, 8–351(310); Tullis v. Fridley, 9–79(68); White v. Phelps, 14–27(21); Cassidy v. First Nat. Bank, 30–86, 14+363; Merchants' Nat. Bank v. Hanson, 33–40, 21+849; Slater v. Foster, 62–150, 64+160; Fredin v. Richards, 61–490, 63+1031; Dekalb Nat. Bank v. Thompson, 79–151, 81+765.
[23] See § 1033.
[24] Robinson v. Smith, 62–62, 64+90. See § 1033.
[25] Ames v. Smith, 65–304, 67+999.
[26] Spreng v. Juni, 109–85, 122+1015.
[27] Paine v. Smith, 33–495, 499, 24+305.

931. Liability of transferrer—While a transferrer without indorsement assumes no liability for the payment of a note or bill he warrants to his transferee that it is in every respect genuine; that it is the valid instrument it purports to be; that the osensible parties were competent; and that he has good title.[28]

INDORSEMENT

932. Definition—Literally the word indorsement means merely to write on the back; but technically, as applied to a note, it means a contract to pay on certain conditions,[29] and a transfer of the title.[30]

933. What constitutes an indorsement—A writing on the back of a note by its payee, which guarantees the payment of the note at maturity, and waives notice of non-payment and demand, is an indorsement in a commercial sense, and makes the person to whom it was transferred an indorsee under the law merchant.[31] The payee of a note indorsed it, "for value received I hereby assign and transfer the within note." This was held an unqualified indorsement.[32]

934. Must be written—Ex vi termini an indorsement must be in writing. There is no such thing as an indorsement wholly or partly in parol.[33]

935. In blank—The usual form of an indorsement is in blank, that is, the payee or indorsee merely writes his name on the back of the note.[34]

936. For collection—An indorsement "for collection" merely makes the indorsee agent for the indorser to collect the note. It does not invest him with title, or authorize him to sue thereon in his own name.[35]

937. Without recourse—To limit and qualify an indorsement the indorser must clearly express his intention to exempt himself from future conditional liability. He must use the phrase "without recourse," or its equivalent.[36] An indorsement "without recourse" does not destroy the negotiable character of the paper.[37] An indorser "without recourse" assumes no responsibility for the payment of the note or bill,[38] but he warrants that it is in every respect genuine; that it is the valid instrument it purports to be; that the ostensible parties were competent; and that he has good title.[39]

938. Delivery and acceptance—An indorsement is incomplete without a delivery and acceptance.[40] An allegation that a note has been "indorsed to" a person imports that it has been delivered to him.[41]

939. Consideration—A verbal promise to pay the debt of another, on the strength of which the credit is given, is a sufficient consideration for the promisor's subsequent indorsement of a note given for the debt.[42]

See Maine etc. Co. v. Butler, 45–506, 48+333.

[28] Paine v. Smith, 33–495, 499, 24+305; Brown v. Ames, 59–476, 61+448. See Youngberg v. Nelson, 51–172, 53+629; Crosby v. Wright, 70–251, 73+162.

[29] Haas v. Sackett, 40–53, 54, 41+237; Paine v. Smith, 33–495, 24+305; Bowler v. Braun, 63–32, 65+124.

[30] Maine etc. Co. v. Butler, 45–506, 48+333.

[31] Elgin City B. Co. v. Zelch, 57–487, 59+544; Mullen v. Jones, 102–72, 112+1048.

[32] Maine etc. Co. v. Butler, 45–506, 48+333.

[33] Third Nat. Bank v. Clark, 23 263, 268. 48+333.

[34] Maine etc. Co. v. Butler, 45–506, 508,

[35] Rock Co. Nat. Bank v. Hollister, 21–385; Third Nat. Bank v. Clark, 23–263; Merchants' Nat. Bank v. Hanson, 33–40, 21+849. See Jackson v. Sevatson, 79–275, 278, 82+634.

[36] Maine etc. Co. v. Butler, 45 506, 48+333; Farwell v. St. Paul T. Co. 45–495, 48+326.

[37] Maine etc. Co. v. Butler, 45–506, 508, 48+333.

[38] Youngberg v. Nelson, 51–172, 53+629.

[39] Youngberg v. Nelson, 51–172, 53+629; Brown v. Ames, 59–476, 61+448; Paine v. Smith, 33–495, 499, 24+305.

[40] Haas v. Sackett, 40–53, 41+237.

[41] Hoag v. Mendenhall, 19–335(289).

[42] Rogers v. Stevenson, 16–68(56).

940. Obligation to indorse—A contract to transfer notes has been held not to require an indorsement.[43]

941. Nature of contract and liability assumed—When the payee or indorsee of a note merely writes his name on the back of it, the presumption is that he does it for the purpose of a double contract—a contract of transfer and a contract of conditional liability. The law implies the two contracts, because, that being the form in which, by the law merchant the two contracts are entered into, it presumes the parties intended both.[44] The mere signature is enough. The law imports the contract. It matters not what the indorser really intended. The law determines his rights and liabilities.[45] This contract runs in favor of all subsequent holders of the note.[46] An ordinary indorser engages to pay the note or bill if the maker, upon proper presentation and demand, does not, and he is given due notice of the maker's default.[47] Every indorser of a note, including an indorser "without recourse," engages unconditionally that it is in every respect genuine; that it is the valid instrument it purports to be; that the ostensible parties were competent; and that he has good title to it.[48] An indorsement is not merely a transfer of the title, but a fresh and substantive contract, by which the indorser becomes a party to the bill or note, and liable for its payment on certain conditions.[49]

942. Same effect as drawing bill—Every indorsement of a note operates, in legal contemplation, as the drawing of a bill of exchange by the indorser, in favor of the immediate indorsee. It is an authority to the indorsee to receive the money due on the note, and an undertaking that it shall be paid to him upon due presentment.[50]

943. Indorser surety to preceding parties—Release—An indorser stands in the relation of surety to all the preceding parties and his liability is secondary to theirs. He is released from liability to the holder by anything that would release an ordinary surety.[51]

944. Rights of indorser—An indorser is entitled at the maturity of the note to have it duly presented to the maker, payment duly demanded, and, in case of non-payment, to receive due notice thereof.[52] He is not entitled to have prior indorsers notified of the dishonor.[53] An indorser may, at any time after the note is due, pay the amount to the legal holder and at once proceed to enforce it against the maker, or, in case several judgments have been obtained against him and the maker, may pay the judgment against himself, take an assignment of the judgment against the maker and enforce it in his own behalf.[54]

945. Irregular indorsement before payee—When one not a party to a note signs his name in blank on the back thereof before the payee, parol evidence is admissible to show the circumstances under which the indorsement was made.[55]

[43] Paine v. Smith, 33–495, 24+305.

[44] Maine etc. Co. v. Butler, 45–506, 509, 48+333; Farwell v. St. Paul T. Co., 45–495, 48+326; Paine v. Smith, 33–495, 24+305.

[45] Kern v. Von Phul, 7–426(341, 346); Moor v. Folsom, 14–340(260, 262); Farwell v. St. Paul T. Co., 45–495, 48+326.

[46] Hart v. Eastman, 7–74(50, 52).

[47] First Nat. Bank v. Nat. Marine Bank, 20–63(49, 53); Paine v. Smith, 33–495, 498, 24+305; Bowler v. Braun, 63–32, 34, 65+124; Martin v. Lennon, 19–67(45, 48); Herrick v. Baldwin, 17–209(183); Buck v. Hutchins, 45–270, 47+808.

[48] See § 937.

[49] Paine v. Smith, 33–495, 24+305; Buck v. Hutchins, 45–270, 47+808.

[50] Helfer v. Alden, 3–332(232); Bryant v. Lord, 19–396(342).

[51] Willis v. Davis, 3–17(1); Moor v. Folsom, 14–340(260); Mercantile Nat. Bank v. Macfarlane, 71–497, 74+287; Bishop v. Buckeye Pub. Co., 57–219, 58+872.

[52] Herrick v. Baldwin, 17–209(183, 185). See § 918.

[53] Hungerford v. O'Brien, 37–306, 308, 34+161.

[54] Folsom v. Carli, 5–333(264).

[55] Pierse v. Irvine, 1–369(272); Rey v. Simpson, 1–380(282); Winslow v. Boyden,

If such evidence discloses the fact that the indorsement was made before delivery to the payee, and to give credit to the note, the law imposes the obligation of an original maker on the person so signing, and evidence of a contemporaneous oral agreement that the obligation was to be other than that of a maker is inadmissible to vary the agreement implied by law.[56] On the other hand, if such evidence discloses the fact that the indorsement was made after delivery to the payee the law does not imply any particular agreement or impose any particular obligation, as between the immediate parties, and parol evidence of the actual agreement of the parties is admissible. Such evidence may show the person so signing a maker, surety, guarantor, or indorser.[57] As regards subsequent bona fide holders the obligation of a person so signing after delivery to the payee is that of an indorser.[58] A finding that an indorsement was made after delivery to the payee has been sustained.[59] The obligation of irregular indorsers is joint and several with the obligation of the makers who subscribe the note.[60]

946. Second indorser—If a person not connected with the original consideration of a note indorses it, after a prior indorsement by the payee and below his signature, he assumes the liability if a second indorser, and parol evidence is inadmissible to vary the legal effect of the indorsement.[61]

947. Who liable as indorsers—Where, pursuant to a previous written contract to "assign" a note, no mode of assigning being indicated, the holder does so by general "indorsement," he assumes the usual liabilities of an indorser.[62] Where, for the purpose of securing a debt due to A from B, C makes a note payable to the order of B, and B and D indorse the same and the note is delivered to A, the nominal payee B is an indorser and not a maker. The name of D being signed under that of B, D is not a maker but a second indorser.[63]

948. By payee—Indorsement by the payee of a note imports a distinct, definite, and certain liability, and parol evidence is inadmissible to make his liability other than that of an indorser.[64]

949. Non-negotiable note—The indorsement of a non-negotiable note imposes on the indorser the same liabilities as an indorsement of a negotiable note, as regards his immediate indorsee, but not as regards subsequent holders. Such an indorsement is in effect the drawing of a bill of exchange on the maker in favor of the indorsee.[65] If the instrument is a note in form, but not one in fact, its indorsement creates no such liability.[66]

BONA FIDE PURCHASERS

950. Definition—A bona fide purchaser is one who purchases for value, before maturity, in due course of business, and without notice.[67] One who purchases a bill before its acceptance, in the ordinary course of business, in good faith, and for value, is a bona fide holder for value, as against the acceptor.[68]

1-383(285); McComb v. Thompson, 2-139 (114); Marienthal v. Taylor, 2-147(123).

[56] Id.; Peckham v. Gilman, 7-446(355); Robinson v. Bartlett, 11-410(302); Friedman v. Johnson, 21-12; Stein v. Passmore, 25-256; Dennis v. Jackson, 57-286, 59+198; Elmquist v. Markoe, 45-305, 47+970; People's Bank v. Rockwood, 59-420, 61+457.

[57] Peterson v. Russell, 62-220, 64+555.

[58] Buck v. Hutchins, 45-270, 47+808.

[59] Joyslin v. Kent, 47-271, 50+1110.

[60] Schultz v. Howard, 63-196, 65+363.

[61] Bowler v. Braun, 63-32, 65+124.

[62] Collom v. Bixby, 33-50, 21+855.

[63] People's Bank v. Rockwood, 59-420, 61+457.

[64] Levering v. Washington, 3-323(227); Coon v. Pruden, 25-105; People's Bank v. Rockwood, 59-420, 423, 61+457; Bowler v. Braun, 63-32, 65+124; Porter v. Winona etc. Co., 78-210, 214, 80+965.

[65] Helfer v. Alden, 3-332(232); Hart v. Eastman, 7-74(50).

[66] Smith v. First S. Bank, 95-496, 104+369.

[67] See cases under § 963.

[68] American etc. Bank v. Gluck, 68-129, 70-1085.

951. What is due course of business—The expression "usual course of business" means in accordance with the usages and customs of commercial transactions.[69] One who takes paper payable to order otherwise than by indorsement, as by personal delivery, does not take it, in due course of business.[70] The indorsement of a note making it simply payable to the order of A, who has no personal interest in the transaction, the indorsement really being for the benefit of B, is not in due course.[71] A person entering a firm and purchasing an interest in the assets is not a purchaser in due course.[72] A purchase of paper not in the possession of the transferrer is probably not in due course.[73] The subject is not one for expert testimony.[74]

952. What constitutes "value"—One is a purchaser for "value" who takes a note in payment of,[75] or as security for,[76] an antecedent debt. This rule applies where the antecedent debt is in the form of a contingent liability as indorser of discounted paper.[77] A bank, by purchasing or discounting a note for a depositor and giving him credit for the proceeds on his deposit account, does not, so long as no part of the deposit is drawn out or the balance of the account exceeds the amount of the proceeds of the discount, become a bona fide purchaser of the note for value, so as to be protected against infirmities in the paper.[78] In such a case the bank becomes a bona fide purchaser if the full amount of the deposit is drawn out, or the deposit account is reduced by the payment of checks drawn thereon to an amount less than the proceeds of the discounted note, before it acquires knowledge of infirmities in the paper.[79]

953. Good faith—Negligence—Good faith does not require an absence of negligence. One may be a bona fide purchaser though he failed to exercise the care of an ordinarily prudent man. Negligence is merely evidence of bad faith. The test is good faith and not diligence or negligence. One is an innocent purchaser unless he had notice of such facts that a failure to investigate amounted, under the circumstances, to fraud or bad faith[80]—unless the failure to investigate was due to a belief or suspicion that an inquiry would disclose a vice in the paper.[81] The rule may be said to resolve itself into a question of honesty or dishonesty, for guilty knowledge and wilful ignorance alike invoke the result of bad faith. Bad faith is inferable not alone from negligence, but from a variety of circumstances.[82] The good faith in question is the good faith of the purchaser alone.[83] Different rules apply as to notice between the parties after a purchase.[84]

[69] St. Paul G. Co. v. Sandstone, 73–225, 236, 75+1050.

[70] Stephens v. Olson, 62–295, 297, 64+898. See § 929.

[71] Elias v. Finnegan, 37–144, 33+330.

[72] Stephens v. Olson, 62–295, 64+898.

[73] O'Mulcahy v. Holley, 28–31, 8+906.

[74] Merchants etc. Bank v. Cross, 65–154, 67+1147.

[75] Stevenson v. Hyland, 11–198(128); Selover v. First Nat. Bank, 77–140, 144, 79+666; Woodworth v. Carroll, 104–65, 112+1054.

[76] Becker v. Sandusky City Bank, 1–311 (243); First Nat. Bank v. Bentley, 27–87, 6+422; St. Paul Nat. Bank v. Cannon, 46–95, 48+526; Rosemond v. Graham, 54–323, 56+38; Bank of Montreal v. Richter, 55–362, 366, 57+61; Haugan v. Sunwall, 60–367, 62+398; St. Paul G. Co. v. Sandstone, 73–225, 235, 75+1050; Selover v. First Nat. Bank, 77–140, 144, 79+666; First Nat. Bank v. Busch, 102–365, 113+898; Woodworth v. Carroll, 104–65, 112+1054.

[77] First Nat. Bank v. Busch, 102–365, 113+898.

[78] Union Nat. Bank v. Winsor, 101–470, 112+999.

[79] Security Bank v. Petruschke, 101–478, 112+1000. See First Nat. Bank v. Persall, 125+506, 675.

[80] Merchants' Nat. Bank v. Hanson, 33–40, 21+849; Merchants' Nat. Bank v. McNeir, 51–123, 53+178; Rosemond v. Graham, 54–323, 330, 56+38; Haugan v. Sunwall, 60–367, 371, 62+398; Tourtelot v. Reed, 62–384, 64+928; Gale v. Birmingham, 64–555, 67+659; Collins v. McDowell, 65–110, 67+845; Drew v. Wheelihan, 75–68; 77+558; Robbins v. Swinburne, 91–491, 98+331, 867; First Nat. Bank v. Busch, 102–365, 113+898; Pennington Co. Bank v. First State Bank, 125+119.

[81] Tourtelot v. Reed, 62–384, 64+928.

[82] Drew v. Wheelihan, 75–68, 77+558.

[83] Haugan v. Sunwall, 60–367, 62+398.

[84] Fuller v. Quesnel, 63–302, 65+634.

954. Facts appearing on face of paper—One purchasing negotiable paper must exercise ordinary prudence in respect to knowledge derived from an inspection of the paper.[85] One taking paper with overdue interest coupons attached is not a bona fide purchaser.[86] Bank marks and erasures on paper have been held not to put a purchaser on inquiry.[87] Where the name of the indorsee has been erased, and the evidence is conclusive that the erasure was a forgery, and the claim of ownership by the payee is open to question, it is the duty of prospective purchasers to make reasonable inquiry concerning the title.[88]

955. Paper fair on face—The inspection of the paper itself furnishes the only criterion by which a stranger to whom it is offered can judge of its character.[89]

956. Evidence of good faith—The fact that paper is bought before maturity in the usual course of business for a valuable consideration is strong evidence of good faith.[90]

957. Rights of bona fide purchasers—A bona fide purchaser takes free from defences and equities which might have been asserted against his transferrer.[91] The rights of a bona fide holder of a bill are the same whether he acquired it before or after its acceptance.[92]

958. Amount recoverable by bona fide purchaser—If the infirmity of a note is simply a want of consideration, a bona fide purchaser may recover the full amount of the note, though he purchased for less.[93]

959. Notice to agent—A bank discounting a note of a corporation has been held not chargeable with notice from the fact that its cashier who made the discount was a stockholder and director of the corporation. To charge a principal the notice of the agent must be actual and not merely constructive.[94] Notice to an active managing officer of a bank, given during banking hours at the usual place of business, is notice to the bank.[95]

960. Purchase from indorsee for collection—One purchasing from an indorsee "for collection" is charged with notice of the rights of the owner.[96]

961. Purchaser with notice from innocent holder—A purchaser with notice from a prior purchaser without notice takes free from equities.[97]

962. Law and fact—Good faith is a question for the jury,[98] unless the evidence is conclusive.[99]

963. Held bona fide purchasers—Cases are cited below holding persons bona fide purchasers.[1]

[85] Stein v. Rheinstrom, 47–476, 50+827; Commercial Bank v. Maguire, 89–394, 95+212; Merchants' Nat. Bank v. Hanson, 33–40, 21+849. See Guilford v. Mpls. etc. Ry., 48–560, 51+658.

[86] First Nat. Bank v. Scott County, 14–77(59).

[87] Collins v. McDowell, 65–110, 67+845. See Drew v. Wheelihan, 75–68, 77+558.

[88] Mpls. T. M. Co. v. Gilruth, 109–23, 122+466.

[89] First Nat. Bank v. Compo-Board Mfg. Co., 61–274, 277, 63+731.

[90] Tourtelot v. Reed, 62–384, 386, 64+928; Plymouth C. Co. v. Seymour, 67–311, 317, 69+1079. See § 1450.

[91] Kinyon v. Wohlford, 17–239(215); Daniels v. Wilson, 21–530, 532; Mackey v. Peterson, 29–298, 299, 13+132; Crosby v. Wright, 70–251, 73+162; Yellow Medicine Co. Bank v. Tagley, 57–391, 59+486.

[92] American etc. Bank v. Gluck, 68–129, 70+1085.

[93] Daniels v. Wilson, 21–530.

[94] First Nat. Bank v. Loyhed, 28–396, 10+421.

[95] Second Nat. Bank v. Howe, 40–390, 42+200.

[96] Merchants' Nat. Bank v. Hanson, 33–40, 21+849.

[97] Robinson v. Smith, 62–62, 64+90; Dispatch P. Co. v. Nat. Bank of Com., 109–440, 124+236.

[98] Yellow Medicine Co. Bank v. Tagley, 57–391, 59+486; Drew v. Wheelihan, 75–68, 77+558; First Nat. Bank v. Buchan, 79–322, 82+641; Mendenhall v. Ulrich, 94–100, 101+1057; Huntley v. Hutchinson, 91–244, 97+971; Ward v. Johnson, 57–301, 59+189.

[99] Mouat v. Wells, 76–438, 79+499.

[1] First Nat. Bank v. Loyhed, 28–396, 10+421; Farmers' etc. Bank v. Haug, 49–553, 52+214; Merchants' Nat. Bank v. McNeir, 51–123, 53+178; Haugan v. Sunwall, 60–367, 62+398; Robinson v. Smith, 62–62,

964. Held not bona fide purchasers—Cases are cited below holding persons not bona fide purchasers.[2]

OVERDUE PAPER

965. When paper is overdue—A bill payable on demand, which has been outstanding an unreasonable time without presentment, is overdue, so that a purchaser takes subject to defences and equities.[3] A bill or note payable at a time certain is overdue as soon as that time has passed, whether payable generally or at a specified place.[4] An overdue and unpaid instalment of interest, known to the indorsee at the time of purchase, dishonors negotiable paper, and renders it subject, in the hands of the purchaser, to existing defences between the original parties, the same as an overdue and unpaid instalment of principal.[5]

966. Not commercial paper—Notes and bills are commercial paper only when negotiated before maturity.[6]

967. Subject to what defences and setoffs—An overdue note or bill is a mere thing in action, and a purchaser takes it subject not merely to such equities or defences as are attached to the note or bill itself, but also equities and defences arising out of collateral transactions against the payee or an intermediate holder. Any equity or defence may be asserted against the purchaser that might have been asserted against his assignor.[7] Claims arising subsequent to the transfer cannot be asserted.[8] A purchaser of overdue paper does not take it subject to the equities of strangers to the paper.[9]

968. Purchaser acquires rights of assignor—The transferee of a dishonored note acquires all the rights of his transferrer.[10]

ACCOMMODATION PAPER

969. What constitutes—Accommodation paper is a bill or note made, accepted, or indorsed by one party for the benefit of another, without considera-

64+90; Tourtelot v. Reed, 62–384, 64+928; Collins v. McDowell, 65–110, 67+845; Tourtelot v. Bushnell, 66–1, 68+104; Am. etc. Bank v. Gluck, 68–129, 70+1085; Rea v. McDonald, 68–187, 71+11; Mouat v. Wells, 76–438, 79+499; First Nat. Bank v. Schmitz, 90–45, 95+577; Huntley v. Hutchinson, 91–244, 97+971; Security Bank v. Petruschke, 101–478, 112+1000; First Nat. Bank v. Busch, 102–365, 113+898; Woodworth v. Carroll, 104–65, 112+1054; Pennington Co. Bank v. First State Bank, 125+119; First Nat. Bank v. Persall, 125+506, 675.

[2] First Nat. Bank v. Scott County, 14–77 (59); Goldsmidt v. First Method. Church, 25–202; O'Mulcahy v. Holley, 28–31, 8+906; Merchants' Nat. Bank v. Hanson, 33–40, 21+849; Stein v. Rheinstrom, 47–476, 50+827; Bank of Montreal v. Richter, 55–362, 57+61; Yellow Medicine Co. Bank v. Tagley, 57–391, 59+486; Fuller v. Goodnow, 62–163, 64+161; Merchants Nat. Bank v. Sullivan, 63–468, 65+924; Drew v. Wheelihan, 75–68, 77+558; Dickson v. Kittson, 75–168, 77+820; Dekalb Nat. Bank v. Thompson, 79–151, 81+765; Nat. Citizens' Bank v. Ertz, 83–12, 85+821; Commercial Bank v. Maguire, 89–394, 95+212; Robbins v. Swinburne, 91–491, 98+331, 867; Clark v. Thompson, 93–443, 101+1133; Union Nat. Bank v. Winsor, 101–470, 112+999; Buse v. First S. Bank, 105–323, 117+490; Mpls. T. M. Co. v. Gilruth, 109–23, 122+466; Smith v. Lydick, 124+637.

[3] La Due v. First Nat. Bank, 31–33, 16+426.

[4] First Nat. Bank v. Scott County, 14–77 (59).

[5] First Nat. Bank v. Scott County, 14–77(59); First Nat. Bank v. Forsyth, 67–257, 69+909.

[6] La Due v. First Nat. Bank, 31–33, 37, 16+426.

[7] La Due v. First Nat. Bank, 31–33, 16+426; Linn v. Rugg, 19–181(145); Martin v. Pillsbury, 23–175; Tuttle v. Wilson, 33–422, 23+864; Plymouth C. Co. v. Seymour, 67–311, 69+1079; Dorr v. Steichen, 18–26 (10); Holden v. O'Brien, 86–297, 90+531; Smith v. Lydick, 124+637. See Lynch v. Free, 64–277, 66+973.

[8] Linn v. Rugg, 19–181(145).

[9] Plymouth C. Co. v. Seymour, 67–311, 69+1079.

[10] Linn v. Rugg, 19–181(145, 149).

tion. It represents and is a loan of credit to the party accommodated. It is unnecessary that the party accommodated should be a party to the paper.[11]

970. Corporation paper—While a corporation has no power to make accommodation paper, yet a bona fide purchaser for value of such paper of a corporation having general power to deal in mercantile paper in the course of its business, made by an officer having apparent power to issue it, may recover thereon from the corporation.[12]

971. Partnership paper—The mere partnership relation does not authorize a partner to execute bills or notes in the firm name for the accommodation of, or as surety for, a third person, nor will the mere fact that the partnership may obtain some indirect or incidental benefit from the transaction authorize him to do so.[13]

972. Notes secured by mortgage—One who signs a note for the accommodation of the maker, with knowledge of the fact that the debt evidenced by the note is secured by a mortgage, in the absence of an agreement to the contrary, is presumed to be surety only, and the note so signed is presumed to be collateral to the mortgage. In such case the maker has no authority to agree with the payee that the note shall be received in part payment of the mortgage debt. If the payee, under such circumstances, the security being sufficient, discharges the mortgage without exacting full payment of the mortgage debt, the surety is thereby discharged.[14]

973. Consideration—A benefit accruing to the person accommodated is a sufficient consideration to sustain the liability of the accommodation maker or indorser.[15]

974. Not binding between parties—The party accommodated cannot enforce the paper against the accommodation party,[16] and this though there was a consideration as to other joint makers.[17]

975. Not binding till negotiated—Revocation—An accommodation note is not binding until it has been negotiated and has passed into the hands of a holder for value. Until then the accommodation party is free to revoke it.[18]

976. Estoppel—Directors of a bank making a note to restore the impaired assets of the bank have been held estopped to assert that they were mere accommodation makers.[19]

977. Parol evidence—Parol evidence is admissible to show paper to be for accommodation.[20]

978. Amount of recovery by pledgee—A pledgee of accommodation paper purchasing it after notice of its character has been held entitled to recover only the amount due on the secured indebtedness at the time of his purchase.[21]

979. Rights of bona fide holders—One who takes accommodation paper in the due course of business, for value, and before maturity, may enforce it

[11] Rea v. McDonald, 68–187, 191, 71+11; Barton v. Moore, 45–98, 47+460. See Van Riper v. Rice, 37–70, 33+440 (evidence held to show note to be for accommodation and to justify a recovery by the accommodation party against the party accommodated); Pray v. Rhodes, 42–93, 43+838 (note held to be for accommodation); Long v. Gieriet, 57–278, 59+194 (note giver by a debtor to his creditor held not for accommodation); Mahoney v. Barber, 67–308, 69+886 (evidence held not to show defendant an accommodation maker).

[12] Am. T. & S. Bank v. Gluck, 68–129, 70+1085.

[13] Van Dyke v. Seelye, 49–557, 52+215.

[14] Gotzian v. Heine, 87–429, 92+398.

[15] First Nat. Bank v. Lang, 94–261, 102+700.

[16] Lebanon S. Bank v. Penney, 44–214, 46+331; Pray v. Rhodes, 42–93, 43+838; Conrad v. Clarke, 106–430, 119+214.

[17] Nat. Citizens Bank v. Bowen, 109–473, 124+241.

[18] Second Nat. Bank v. Howe, 40–390, 42+200.

[19] Skordal v. Stanton, 89–511, 95+449.

[20] Pray v. Rhodes, 42–93, 43+838; Conrad v. Clarke, 106–430, 119+214; Nat. Citizens Bank v. Bowen, 109–473, 124+241.

[21] First Nat. Bank v. Buchan, 79–322, 82+641.

against an accommodation party though he knew when he received it that it was accommodation paper.[22] This applies to a payee.[23] One to whom such paper is offered is not bound to inquire as to the particular purpose for which it was executed.[24] One who takes after maturity takes subject to the defence of want of consideration.[25]

980. Pleading—Evidence held inadmissible under a plea of accommodation.[26]

CHECKS

981. Nature—A check is a written order for money drawn on a bank or private banker or bank cashier, payable to a person named, or to his order, or to bearer.[27] It is essential that a check be drawn on a bank or banker and that it be payable on demand. A draft for money drawn on a bank, payable a day subsequent to its date and subsequent to the date of its issue, is not a "check" but a "bill of exchange," and is entitled to days of grace.[28] A check is not a bill of exchange, but it has some of the features of a bill of exchange.[29] It is a negotiable instrument.[30] Checks are a form of money.[31]

982. Effect as assignment of fund—Liability of bank to holder—It is the prevailing rule that an unaccepted check does not operate as an assignment of the drawer's fund either as between the drawer and payee or as between the payee and the drawee; and that upon a dishonor of a check by a bank the holder has no recourse against the bank but must look to the drawer. There is no privity of contract between the holder or payee and the bank. The question is still an open one in this state.[32] It is held here, however, that a check for the exact amount of a deposit operates as an equitable assignment of the fund. It is unnecessary that the check should distinctly state on its face that it covers the entire fund. The fact that it does may be shown by extrinsic evidence.[33] Whether a check for a part of a bank deposit operates as an equitable assignment between the drawer and the payee or not, the drawer, the check not having been accepted as unconditional payment, is liable to the owner where by reason of its loss presentment to the bank for payment is rendered impossible.[34]

983. What drawer represents—The drawer of a check does not necessarily represent that he has funds with the bank. He represents that the check is a valid order for its amount, and that it will be paid by the bank in the ordinary course of business. In other words, he impliedly represents that he has authority to draw the check and that it will be paid on presentation. Such authority need not be expressed, but may be inferred from the course of dealing between drawer and drawee.[35]

984. Payee must be named—A check must name or indicate a payee. Checks drawn payable to an impersonal payee, as to "bills payable" or order,

[22] Tourtelot v. Reed, 62–384, 64+928; Tourtelot v. Bushnell, 66–1, 68+104; Rea v. McDonald, 68–187, 71+11; First Nat. Bank v. Lang, 94–261, 102+700; Nat. Citizens' Bank v. Thro, 124+965.

[23] Rea v. McDonald, 68–187, 71+11.

[24] Tourtelot v. Reed, 62–384, 64+928.

[25] Holden v. O'Brien, 86–297, 90+531.

[26] Lebanon S. Bank v. Penney, 44–214, 46+331.

[27] Century Dict. See State v. Curtis, 39–357, 40+263.

[28] Harrison v. Nicollet Nat. Bank, 41–488, 43+336.

[29] Harrison v. Nicollet Nat. Bank, 41–488, 43+336; Spink v. Ryan, 72–178, 75+18; Estes v. Lovering, 59–504, 61+674. See 6 Harv. L. Rev. 138.

[30] Estes v. Lovering, 59–504, 61+674; Burrows v. W. U. Tel. Co., 86–499, 90+1111; Dispatch P. Co. v. Nat. Bank of Com., 109–440, 124+236.

[31] Germania Bank v. Boutell, 60–189, 192, 62+327.

[32] Northern T. Co. v. Rogers, 60–208, 62+273; Varley v. Sims, 100–331, 111+269; First Nat. Bank v. McConnell, 103–340, 114+1129. See 17 Harv. L. Rev. 278.

[33] Varley v. Sims, 100–331, 111+269.

[34] First Nat. Bank v. McConnell, 103–340, 114+1129.

[35] State v. Johnson, 77–267, 79+968.

or to a number or order, are held to be payable to bearer, on the ground that the use of the words "or order" indicates an intention that the paper shall be negotiable; and the mention of an impersonal payee, rendering an indorsement by the payee impossible, indicates an intention that it shall be negotiable without indorsement—that is, that it shall be payable to bearer. So when a bill, note or check is made payable to a blank or order, and actually delivered to take effect as commercial paper, the person to whom delivered may insert his name in the blank space as payee, and a bona fide holder may then recover on it.[36]

985. Presentment—What constitutes—Presentment of a check for payment is made when the holder or his agent produces and exhibits it to the proper official or agent of the bank so that he may have an opportunity to see that it is signed by the depositor, that it is so dated as to be payable at the time when it is presented, that it is properly filled out, that the party presenting it has the legal title to it by indorsement or otherwise, and that the indorsement, if any, is genuine.[37]

986. Necessity of presentment and notice of dishonor—The owner of a bank check, which was lost without his fault before presentment to the bank upon which it was drawn, may recover thereon against the drawer of the same upon filing a proper indemnity bond as provided by statute.[38] Due presentment and notice of dishonor is necessary to charge an indorser. The same rules apply as in the case of bills of exchange. But the drawer of a bill and the drawer of a check stand upon a very different footing. The drawer of a check is regarded as the principal debtor, and the check purports to be made on a fund deposited to meet it; and negligence of the holder in not making due presentment, or in not giving notice of dishonor, does not discharge the drawer, unless he has suffered some loss thereby, and then only to the extent of such loss. He is, at most, entitled only to such presentment and notice as will save him from loss.[39]

987. Time to be presented—A check must be presented within a reasonable time, having in view ordinary business usages, and the purposes which paper of that class is intended to subserve.[40] A check drawn in St. Paul and cashed six days later in Denver has been held not overdue.[41]

988. Delivery to wrong person—Innocent purchaser—A telegraph company which, upon order by telegraph, issues and delivers its check by mistake to the wrong party, is liable in the amount thereof to an innocent purchaser for value, who takes the same upon his indorsement. Prima facie such indorser is the payee intended, and a purchaser who takes the check from him in good faith, believing him to be the payee, is not called upon to inquire any further than may be necessary to establish the identity of the indorser and the party to whom the check was delivered as payee.[42]

989. Possession as evidence of indorsement—In an action on a check by an indorsee the possession of the check is, by statute, prima facie evidence that it was indorsed by the person by whom it purports to be indorsed.[43]

990. Presumption of delivery—A check in the hands of one not the drawer, the drawer's signature being genuine, is presumed to have been complete when signed and to have been then delivered to the payee.[44]

[36] McIntosh v. Lytle, 26–336, 3+983.
[37] Peabody v. Citizens S. Bank, 98–302, 108+272.
[38] First Nat. Bank v. McConnell, 103–340, 114+1129.
[39] Spink v. Ryan, 72–178, 75+18. See Fort Dearborn Nat. Bank v. Security Bank, 87–81, 91+257.
[40] La Due v. First Nat. Bank, 31–33, 38, 16+426.
[41] Estes v. Lovering, 59–504, 61+674.
[42] Burrows v. W. U. Tel. Co., 86–499, 90+1111.
[43] Estes v. Lovering, 59–504, 61+674; Burrows v. W. U. Tel. Co., 86–499, 90+1111.
[44] Hensel v. Chi. etc. Ry., 37–87, 33+329.

991. Unauthorized delivery—A party has been held not bound by an unauthorized delivery.[45]

992. Partial want or failure of consideration—A partial want or failure of consideration is a good defence pro tanto to a check in the hands of the original payee, or a party standing in his shoes.[46]

993. Death of maker—An indorsement of a check of a partner by his associates after his death has been held to be unauthorized and not to invest the indorsee with the rights of a bona fide purchaser.[47]

994. Bona fide holders—As to what constitutes a bona fide holder the rules are the same as in the case of bills and notes.[48] A holder who, in good faith and for value, takes a check several days after it is drawn, takes free from defences of which he had no notice before or at the time his title accrues.[49]

995. Fraud—Fraud in obtaining a check is a good defence to an action thereon by the payee against the maker.[50]

996. Payable to order—Duty of bank—A bank is bound to honor a check payable to order if the drawer has funds on deposit.[51]

997. Negligence of bank in paying—Payment to unauthorized agent—A bank is held to a high degree of care and skill in paying checks. A bank has been held liable for negligence in paying a check certified by another bank though the agent of the depositor stood by at the time of the payment and might easily have avoided the mistake.[52] Still, it has been held that the principle that where a loss must be borne by one of two parties it should fall on the one through whose fault the loss occurred, is applicable here.[53] Where a bank pays a check drawn upon another bank to an agent of the payee therein named, who is not authorized to receive the money, but as to the paying bank the agent's principal is estopped from denying the authority of the agent, by reason of which the paying bank acquires a valid bona fide title to the check, its title passes to the drawee bank upon its payment of the check through the clearing house, though the facts justifying the paying bank were not known to the officers of the drawee bank.[54]

998. Estoppel of bank to deny funds—A bank may be estopped by its conduct from denying that it has funds for the payment of a check.[55]

999. Forged checks—Doctrine of Price v. Neal—If a bank pays a forged check to a bona fide holder it cannot recover from him the amount so paid.[56] Certain principals forwarded to their agent a check to be used in paying their debt to a customer. The agent forged the name of the payee, and deposited the check in a bank to his own credit. Being short in his account with his principals, the agent then paid to them a sum of money which included the proceeds of the forged check. The bank on which the check was drawn paid it on the forged indorsement. In an action by the drawers of the check against the bank it was held that inasmuch as the proceeds of the check came back to the drawers, and the debt of the agent remained unpaid, they had suffered no damage by rea-

[45] Hoit v. McIntire, 50–466, 52+918.

[46] Brown v. Roberts, 90–314, 96+793. See § 1040.

[47] Dow v. State Bank, 88–355, 93+121.

[48] Drew v. Wheelihan, 75–68, 77+558; Nat. Citizens' Bank v. Ertz, 83–12, 85+821; Burrows v. W. U. Tel. Co., 86–499, 90+1111; Estes v. Lovering, 59–504, 61+674; Dow v. State Bank, 88–355, 93+121; Dispatch P. Co. v. Nat. Bank of Com., 109–440, 124+236.

[49] Estes v. Lovering, 59–504, 61+674.

[50] Thomas v. Murphy, 87–358, 91+1097.

[51] Deering v. Kelso, 74–41, 76+792.

[52] Tomlinson v. Nat. G. A. Bank, 73–117, 75+1028. See Scanlon v. Germania Bank, 90–478, 97+380.

[53] Scanlon v. Germania Bank, 90–478, 97+380.

[54] Dispatch P. Co. v. Nat. Bank of Com., 109–440, 124+236.

[55] Rostad v. Union Bank, 85–313, 88+848.

[56] Germania Bank v. Boutell, 60–189, 62+327; Pennington Co. Bank v. First State Bank, 125+119. See Burrows v. W. U. Tel. Co., 86–499, 90+1111; 16 Harv. L. Rev. 514.

son of the payment of the check, and could not recover the amount thereof from the bank.[57]

1000. Pleading—In an action against the drawer it is necessary to allege presentment and dishonor, but not notice of dishonor.[58] A general allegation of no consideration is sufficient, but in pleading a failure of consideration the facts should be set out.[59] An answer has been held to show a partial want of consideration.[60] Matter in confession and avoidance is inadmissible under a denial.[61]

CERTIFICATES OF DEPOSIT

1001. Nature—In legal effect a certificate of deposit is a promissory note [62] —negotiable paper.[63]

1002. Power to issue—A banking corporation organized under the general laws of this state is authorized to issue interest-bearing time certificates of deposit.[64]

1003. Issued without deposit—A bona fide purchaser may recover against the bank, though no deposit was in fact made.[65]

1004. Transfer without indorsement—Though payable to the depositor, or his order, certificates of deposit are transferable by mere delivery without indorsement.[66]

1005. Consideration for transfer—Evidence held not to show a want of consideration for a transfer.[67]

1006. Liability of indorser—An indorser of a certificate of deposit payable in bonds, and therefore not negotiable, is not liable thereon. His indorsement simply passes his interest.[68]

1007. Necessity of demand—Statute of limitations—A demand certificate of deposit is payable presently and no actual demand is necessary to set the statute of limitations running. It falls within the statutory sixty-day limitation for presentment.[69] To charge an indorser of a time certificate a demand is necessary before the last day of grace.[70] A demand has been held unnecessary in the case of an insolvent bank to charge the obligors on a bond covering the deposit.[71]

1008. Possession as evidence of indorsement—Possession of a certificate payable to order and unindorsed is not evidence of title.[72]

1009. Liability of party paid—If a person indorses a certificate, surrenders it to the bank, and receives the amount of the deposit, he is answerable for the validity of his title and liable to the bank in the event of its failure.[73]

1010. Burden of proof—The production of a certificate payable to the plaintiff makes out a prima facie case.[74]

[57] Andrews v. N. W. Nat. Bank, 107–196, 117+621. See 22 Harv. L. Rev. 447.
[58] Spink v. Ryan, 72–178, 75+18. See 12 Harv. L. Rev. 213.
[59] Grimes v. Ericson, 94–461, 103+334.
[60] Brown v. Roberts, 90–314, 96+793.
[61] Bank of Com. v. Selden, 1–340(251).
[62] Easton v. Hyde, 13–90(83); Cassidy v. First Nat. Bank, 30–86, 14+363; Mitchell v. Easton, 37–335, 33+910; Francois v. Lewis, 68–409, 71+621.
[63] Cassidy v. First Nat. Bank, 30–86, 14+363.
[64] Francois v. Lewis, 68–409, 71+621.
[65] Mitchell v. Easton, 37–335, 33+910.
[66] Cassidy v. First Nat. Bank, 30–86, 14+363.
[67] Sather v. Sexton, 93–480, 101+654.
[68] Easton v. Hyde, 13–90(83).
[69] Mitchell v. Easton, 37–335, 33+910. See 13 Harv. L. Rev. 304; 14 Id. 468.
[70] Towle v. Starz, 67–370, 69+1098.
[71] Board of Comrs. v. Irish-Am. Bank, 68–470, 71+674.
[72] Beard v. First Nat. Bank, 39–546, 40+842.
[73] Id.
[74] Laurel v. State Nat. Bank, 25–48. See Sather v. Sexton, 93–480, 101+654.

PAROL EVIDENCE

1011. To vary terms of contract—Parol evidence is inadmissible to prove a prior or contemporaneous oral agreement varying the terms of a bill or note, as, for example, that a certain sum of money should be indorsed on it as paid of that date;[75] that it should be paid otherwise than stipulated by its terms;[76] that it was given only as security for a prior parol agreement;[77] that it was given merely as evidence of an advancement under a contract;[78] that it was only to be performed in a certain event;[79] that if the maker should be forced to make an assignment for the benefit of creditors the payee would file his claim on the note with the assignee and execute a release;[80] that a note should be paid out of certain collections;[81] that a maker should not be bound by a note, if he failed to perform a certain agreement;[82] or as to the terms of payment.[83]

1012. To vary indorsement—An indorsement, whether in blank or otherwise, is a complete contract and cannot be varied or explained by parol.[84] It is immaterial whether the indorsement is qualified or unqualified. The rule applies to an indorsement "without recourse,"[85] or "for collection;"[86] where there is a written assignment of the note and a mortgage securing it;[87] to a second indorsement;[88] and to an indorsement by a payee.[89] Special rules apply to an irregular indorsement.[90] An indorsement of payment is not within the rule.[91] The rule is subject to exceptions as in the case of other contracts.[92]

1013. Held admissible—Parol evidence has been held admissible to prove a date;[93] a conditional delivery;[94] that paper was without consideration and for accommodation;[95] a failure of consideration;[96] that an officer executed a note in his official capacity;[97] the interest of a principal in a note indorsed by mistake or inadvertance to an agent;[98] a contract for the sale of stock in pursuance of which a note was given;[99] an agreement that a note should become operative only on the happening of a future contingent event;[1] to vary indorsement of payment;[2] to show, as between the immediate parties, that the makers bore the relation to each other of principal and surety.[3]

[75] Walters v. Armstrong, 5–448(364).
[76] Butler v. Paine, 8–324(284).
[77] Schurmeier v. Johnson, 10–319(250).
[78] Esch v. Hardy, 22–65.
[79] Curtice v. Hokanson, 38–510, 38+694.
[80] Harrison v. Morrison, 39–319, 40+66.
[81] Singer Mfg. Co. v. Potts, 59–240, 61+23.
[82] Northern T. Co. v. Hiltgen, 62–361, 64+909.
[83] Nat. Citizens' Bank v. Thro, 124+965.
[84] Levering v. Washington, 3–323(227); Borup v. Nininger, 5–523(417); Kern v. Von Phol, 7–426(341); Peckham v. Gilman, 7–446(355); First Nat. Bank v. Nat. Marine Bank, 20–63(49); Barnard v. Gaslin, 23–192; Third Nat. Bank v. Clark, 23–263; Coon v. Pruden, 25–105; Collom v. Bixby, 33–50, 52, 21+855; Knoblauch v. Foglesong, 38–352, 37+586; Farwell v. St. Paul T. Co., 45–495, 48+326; Youngberg v. Nelson, 51–172, 53+629; Dennis v. Jackson, 57–286, 59+198; People's Bank v. Rockwood, 59–420, 61+457; Clarke v. Patrick, 60–269, 62+284; Peterson v. Russell, 62–220, 64+555; Bowler v. Braun, 63–32, 65+124; Porter v. Winona etc. Co., 78–210, 80+965; Germania Bank v. Osborne, 81–272, 274 83+1084.
[85] Youngberg v. Nelson, 51–172, 53+629.
[86] Third Nat. Bank v. Clark, 23–263.
[87] Clarke v. Patrick, 60–269, 62+284.
[88] Bowler v. Braun, 63–32, 65+124.
[89] Coon v. Pruden, 25–105; People's Bank v. Rockwood, 59–420, 423, 61+457; Bowler v. Braun, 63–32, 65+124; Porter v. Winona etc. Co., 78–210, 80+965.
[90] Peterson v. Russell, 62–220, 64+555. See § 945.
[91] See § 909.
[92] First Nat. Bank v. Nat. Marine Bank, 20–63(49). See § 1013.
[93] Almich v. Downey, 45–460, 48+197.
[94] See § 879.
[95] Pray v. Rhodes, 42–93, 43+838; Nat. Citizens Bank v. Bowen, 109–473, 124+241.
[96] Warner v. Schulz, 74–252, 77+25.
[97] Souhegan Nat. Bank v. Boardman, 46–293, 48+1116; Kraniger v. People's Bldg. Soc., 60–94, 61+904.
[98] Conger v. Nesbitt, 30–436, 15+875.
[99] Germania Bank v. Osborne, 81–272, 83+1084.
[1] Mendenhall v. Ulrich, 94–100, 101+1057.
[2] See § 909.
[3] Kaufman v. Barbour, 98–158, 107+1128.

DEFENCES

1014. Alteration—A material alteration is a good defence even against a bona fide purchaser.[4]

1015. Extension of payment—An indorser of an overdue note has been held discharged by an agreement extending the time of payment, and for failure of notice of dishonor.[5]

1016. Failure of consideration—A failure of consideration is a good defense as against the original payee and those with notice.[6] Facts held not to constitute a failure of consideration.[7] A plea of failure of consideration held premature.[8]

1017. Partial want or failure of consideration—A partial want or failure of consideration is a good defence pro tanto as against the original payee or one standing in his shoes.[9] This defence is available to one of several joint and several makers.[10] It is not available where there is one consideration, not susceptible of apportionment, for several notes, and an action is brought on one of them.[11]

1017a. Renewal note—Failure to surrender old note—Where an agreement is made that a new note shall be given in renewal of an old note and that the old note shall be surrendered, and the old note is not in fact surrendered, an action will not ordinarily lie on the new note, but the terms of the agreement may take a case out of the general rule.[12]

1018. Fraud—As between the immediate parties and holders with notice, fraud is a good defence,[13] but not ordinarily as against bona fide holders.[14] A party has been held entitled to recover on a due bill where it appeared that an assignment of it by him had been procured by fraud.[15]

1019. Fraud in procuring signature—Statute—By statute, if one is induced by fraud to sign a negotiable instrument in the belief that it was not such an instrument, and he was not negligent in so signing, he is not liable thereon even in the hands of a bona fide purchaser.[16] If he was negligent the fraud

[4] Wilson v. Hayes, 40–531, 42+467; Flanigan v. Phelps, 42–186, 43+1113; Warder etc. Co. v. Willyard, 46–531, 49+300; Ward v. Johnson, 57–301, 59+189; Yellow Medicine Co. Bank v. Tagley, 57–391, 59+486; Seebold v. Tatlie, 76–131, 78+967; Commercial Bank v. Maguire, 89–394, 95+212. See Herrick v. Baldwin, 17–209 (183); Ward v. Hackett, 30–150, 14+578; Theopold v. Deike, 76–121, 78+977; Larson v. Brockmann, 98–526, 106+1133.

[5] Moor v. Folsom, 14–340(260).

[6] Powell v. Newell, 59–406, 61+335; Slater v. Foster, 62–150, 64+160; Warner v. Schulz, 74–252, 77+25; Avery v. Peck, 80–519, 83+455, 1083; Conroy v. Logue, 87–289, 91+1105; Smith v. Lydick, 124+637. See Plano Mfg. Co. v. Richards, 86–94, 90+120; Bradley v. Dinneen, 88–334, 93+116; Northwest T. Co. v. Hulbert, 103–276, 115+159.

[7] Lough v. Bragg, 18–121(106); Clark v. Smith, 21–539; Vanstrum v. Liljengren, 37–191, 33+555.

[8] N. P. Ry. v. Holmes, 88–389, 93+606.

[9] Bisbee v. Torinus, 26–165, 2+168; Stevens v. Johnson, 28–172, 9+677; Torinus v. Buckham, 29–128, 12+348; Durment v. Tuttle, 50–426, 52+909; Nichols v. Soderquist, 77–509, 80+630; Brown v. Roberts, 90–314, 96+793. See Walters v. Armstrong, 5–448(364); Whitacre v. Culver, 9–295(279).

[10] Nichols v. Soderquist, 77–509, 80+630.

[11] Leighton v. Grant, 20–345(298).

[12] Westacott v. Handley, 109–452, 124+226.

[13] Cummings v. Thompson, 18–246(228); Wilder v. De Cou, 18–470(421); Miller v. Sawbridge, 29–442, 13+671; Perkins v. Trinka, 30–241, 15+115; Jaggar v. Winslow, 30–263, 15+242; Aultman v. Olson, 34–450, 26+451; Smith v. Carlson, 36–220, 30+761; Elias v. Finnegan, 37–144, 33+330; MacLaren v. Cochran, 44–255, 46+408; Traphagen v. Sagar, 63–317, 65+633; Wallace v. Hallowell, 66–473, 69+466; Megins v. Pary, 72–113, 75+120; Boquist v. Engstrom, 101–538, 111+1132. See first Nat. Bank v. Brockmann, 100–543, 110+1133 (evidence held not to show fraud).

[14] Mackey v. Peterson, 29–298, 13+132; MacLaren v. Cochran, 44–255, 46+408; First Nat. Bank v. Busch, 102–365, 113+898.

[15] Fargo v. Nichols, 109–180, 123+298.

[16] R. L. 1905 § 2747; Bank of Glencoe v. Cain, 89–473, 95+308; Mpls. B. Co. v. Grathen, 126+827.

is no defence as against bona fide holders.[17] If he knew that he was signing a negotiable instrument, the statute is inapplicable and fraudulent representations as to the nature and effect of the instrument are no defence as against a bona fide holder.[18] Under the statute the question of negligence is one for the jury,[19] unless the evidence is conclusive.[20] Where the payee in a note induced the maker, who could not read, to sign it by fraudulently representing that it was payable to another person to whom the maker was indebted, the note was held void in the hands of the payee.[21] A note procured by fraud practiced on some of the makers has been held valid as to others who did not defend.[22] The mere promise to pay, or the procuring an extension of the time for paying, a note obtained from a party without his fault, by fraud and artifice, and which he is under no legal or moral obligation to pay, does not, as a matter of law, constitute a ratification of the note, in the absence of any facts creating an estoppel in pais.[23]

1020. Illegality—As between the immediate parties and those with notice it is a good defence that a note was given for a promise of a trustee to secure the election of another as trustee;[24] that it was given in pursuance of an agreement to secure a divorce;[25] that it was given for a gambling debt[26] or that it was given in evasion of the statute forbidding banks to purchase their own stock or make loans thereon.[27] A note has been held not void because given for goods sold by an unlicensed auctioneer.[28] Evidence held not to show that a note was given for an unlawful and fraudulent purpose in connection with the settlement of an insolvent estate.[29] When it is shown that a note is tainted with illegality the burden is on the holder to prove that he is a bona fide purchaser.[30]

1021. Want of title—The fact that the title to the note sued upon has passed from the plaintiff is a good defence.[31] A finding that the plaintiff was not the owner of the note sued on sustained.[32]

1022. Estoppel—A party who puts his paper in circulation invites the public to receive it of any one having it in his possession with apparent title, and he is estopped to urge an actual defect in the paper, when, through his own act, it ostensibly has none.[33] Cases are cited below involving questions of estoppel.[34]

1023. Mistake—That a note is given in settlement of a balance mistakenly supposed to exist in favor of the payee is a defence as against the original payee or a holder with notice.[35] A mistake in the date of a note may be corrected, but not to the prejudice of a bona fide holder.[36]

[17] Mackey v. Peterson, 29–298, 13+132; Ward v. Johnson, 51–480, 53+766; Yellow Medicine Co. Bank v. Wiger, 59–384, 61+452.

[18] Yellow Medicine Co. Bank v. Tagley, 57–391, 59+486.

[19] First Nat. Bank v. Holan, 63–525, 65+952; Yellow Medicine Co. Bank v. Wiger, 59–384, 61+452; Sibley Co. Bank v. Schaus, 104–438, 116+928.

[20] O'Gara v. Hansing, 88–401, 93+307; Johnson Co. S. Bank v. Hall, 102–414, 113+1011.

[21] Schaller v. Borger, 47–357, 50+247.

[22] Yellow Medicine Co. Bank v. Wiger, 59–384, 61+452.

[23] First Nat. Bank v. Holan, 63–525, 65+952.

[24] Dickson v. Kittson, 75–168, 77+820.

[25] Adams v. Adams, 25–72.

[26] Merchants Nat. Bank v. Sullivan, 63–468, 65+924. See Cooper v. Brewster, 1–94 (73).

[27] St. Paul etc. Co. v. Jenks, 57–248, 59+299.

[28] Gunnaldson v. Nyhus, 27–440, 8+147.

[29] Mahoney v. Barber, 67–308, 69+886.

[30] Askegaard v. Dalen, 93–354, 101+503; Drew v. Wheelihan, 75–68, 77+558.

[31] Rohrer v. Turrill, 4–407(309).

[32] Ellertson v. Roholt, 109–341, 123+811.

[33] First Nat. Bank v. Compo-Board Mfg. Co., 61–274, 63+731.

[34] Erickson v. Roehm, 33–53, 21+861; Irish-Am. Bank v. Ludlum, 49–344, 51+1046; Ward v. Johnson, 51–480, 53+766; Yellow Medicine Co. Bank v. Wiger, 59–384, 61+452; First Nat. Bank v. Compo-Board Mfg. Co., 61–274, 63+731; Skordal v. Stanton, 89–511, 95+449.

[35] Wildermann v. Donnelly, 86–184, 90+366.

[36] Almich v. Downey, 45–460, 48+197.

1024. Failure of other parties to sign—It is a good defence between the parties that a note or indorsement was made on the condition that others should sign and that they failed to do so;[37] otherwise as regards bona fide purchasers.[38] Whether a holder took with notice of such a condition has been held a question for the jury.[39]

1025. Official capacity—It is a good defence to an action against a maker individually that he made the note, to the knowledge of the payee, in an official capacity.[40]

1026. Stolen note—The fact that a note was stolen from the maker before delivery is a good defence in favor of the maker, even against bona fide purchasers.[41]

1027. Defence arising subsequent to indorsement—In an action on a note indorsed by the payee to plaintiff as security, a defence arising subsequent to the indorsement cannot be set up.[42]

1028. Breach of warranty—Evidence held to show that a note was given as security for a note of like amount executed by a third party as a purchaser of certain machinery, and was subject to the defences which existed in favor of such purchaser by reason of a breach of the warranty contained in the contract of purchase.[43]

1029. Defence requiring an accounting—A defence requiring an accounting between partners has been disallowed.[44]

PROOF OF EXECUTION, INDORSEMENT, AND TITLE

1030. Statute—Signatures presumed—By statute it is rendered unnecessary to prove the signatures of the parties to a bill or note unless they are denied on oath.[45]

1031. Possession as evidence of indorsement—By statute, in an action by an indorsee, possession of a note or bill is prima facie evidence that the same was indorsed by the person by whom it purports to be indorsed.[46] The statute is applicable to indorsements by corporations.[47] If an indorsement purports to be that of the payee, made by the hand of an agent, it is unnecessary to prove the authority of the agent.[48]

1032. In action against indorser—It is unnecessary to prove that the note was executed by the ostensible maker.[49]

1033. Possession as evidence of title—Possession of a note payable to bearer,[50] or indorsed in blank,[51] is prima facie evidence of ownership. Possession of a note payable to order and unindorsed is not prima facie evidence of ownership.[52] The payee and holder of a note is presumptively its owner,[53]

[37] German Am. Nat. Bank v. People's etc. Co., 63–12, 65+90.

[38] Yellow Medicine Co. Bank v. Tagley, 57–391, 59+486; First Nat. Bank v. Compo-Board Mfg. Co., 61–274, 63+731.

[39] Ward v. Johnson, 57–301, 59+189.

[40] Bingham v. Stewart, 14–214(153).

[41] Erickson v. Roehm, 33–53, 21+861.

[42] Becker v. Sandusky City Bank, 1–311 (243).

[43] Northwest T. Co. v. Hulburt, 103 276, 115+159.

[44] Wilcox v. Comstock, 37–65, 33+42; Little v. Simonds, 46–380, 49+186.

[45] See § 3365.

[46] R. L. 1905 § 4730; Merchants etc. Bank v. Cross, 65–154, 67+1147; Thorson v. Sauby, 68–166, 70+1083; London etc. Co. v. St. Paul etc. Co., 84–144, 86+872; Huntley v. Hutchinson, 91–244, 97+971; Mullen v. Jones, 102–72, 112+1048.

[47] First Nat. Bank v. Loyhed, 28–396, 10+421; Nat. Bank v. Mallan, 37–404, 34+901; First Nat. Bank v. Compo-Board Mfg. Co., 61–274, 63+731.

[48] Tarbox v. Gorman, 31–62, 16+466.

[49] Crosby v. Wright, 70–251, 73+162.

[50] Woodbury v. Larned, 5–339(271); Robinson v. Smith, 62–62, 64+90.

[51] Ames v. Smith, 65–304, 67+999.

[52] Van Eman v. Stanchfield, 10–255 (197); Id., 13–75(70); Bausman v. Kelley, 38–197, 36+333; Beard v. First Nat. Bank, 39–546, 40+842; Topping v. Clay,

though specially indorsed by him to a third party,[54] or indorsed in blank.[55] Mere possession by one other than the payee of a non-negotiable note is not evidence of ownership.[56] Possession of a note indorsed specially by a person other than the indorsee is not evidence of ownership.[57] Possession of a note payable to bearer is prima facie evidence of ownership, whether transferred before or after maturity.[58] In an action by an indorsee possession of the note is by statute prima facie evidence of title in the plaintiff.[59]

ACTIONS

1034. Parties plaintiff—The following persons have been held entitled to maintain an action: a holder subsequent to the payee who was the real party in interest;[60] a pledgee;[61] an owner without possession;[62] an indorsee, though others had a beneficial interest;[63] the payee of a note destroyed by a third party;[64] a next of kin of a deceased holder;[65] an owner acquiring title by mere delivery;[66] a principal, the note being indorsed to the agent;[67] the payee of a draft, though there was an agreement between him and the drawer that it was taken for collection;[68] an owner of the legal title, though he held it in trust for others;[69] a guardian;[70] a payee, though the note was taken for the benefit of another;[71] the administrator of a payee, the note being taken for the benefit of another;[72] the holder of a note held for indemnity;[73] an officer levying on a note.[74]

1035. Parties defendant—A maker and a guarantor may be joined.[75] All joint makers must be joined, unless some have been discharged.[76] Whether a pledgor of a note should be made a defendant in an action by his pledgee thereon is undetermined.[77]

1036. Complaint—*a. Pleading note according to its legal effect or by copy*—A bill or note may be pleaded according to its legal effect, or by setting it out in haec verba, or by attaching it as an exhibit.[78]

b. Consideration—It is unnecessary to allege a consideration as it is presumed,[79] and if alleged it need not be proved by affirmative evidence.[80]

c. Execution and delivery—Execution and delivery are sufficiently alleged by the word "made."[81]

62–3, 63+1038; Red River etc. Co. v. Cole, 62–457, 64+1149. See Cullman v. Bottcher, 58–381, 383, 59+971.

[53] Bahnsen v. Gilbert, 55–334, 56+1117; Hayward v. Grant, 13–165(154).

[54] Kells v. N. W. etc. Co., 64–390, 67+215, 71+5; Mpls. T. M. Co. v. Gilruth, 109–23, 122+466.

[55] Ames v. Smith, 65–304, 67+999.

[56] Cooper v. Brewster, 1–94(73).

[57] Dessaint v. Elling, 31–287, 17+480.

[58] Robinson v. Smith, 62–62, 64+90.

[59] R. L. 1905 § 4730; Tarbox v. Gorman, 31–62, 16+466; Huntley v. Hutchinson, 91–244, 97+971.

[60] Helfer v. Alden, 3–332(232); Wood v. Bragg, 75–527, 78+93.

[61] White v. Phelps, 14–27(21).

[62] Armstrong v. Lewis, 14–406(308); Hayward v. Grant, 13–165(154).

[63] Elmquist v. Markoe, 45–305, 47+970; Rosemond v. Graham, 54–323, 56+38.

[64] Homberg v. Kikhaffer, 43–205, 45+154.

[65] Pratt v. Pratt, 22–148.

[66] Pease v. Rush, 2–107(89); Cassidy v. First Nat. Bank, 30–86, 14+363. See § 929.

[67] Conger v. Nesbitt, 30–436, 15+875.

[68] Minn. etc. Co. v. Heipler, 49–395, 52+33.

[69] St. Paul etc. Co. v. Thomas, 60–140, 61+1134.

[70] McLean v. Dean, 66–369, 69+140.

[71] Cooper v. Hayward, 67–92, 69+638.

[72] Cooper v. Hayward, 67–92, 69+638; Id., 71–374, 74+152.

[73] Klein v. Funk, 82–3, 84+460.

[74] Rohrer v. Turrill, 4–407(309).

[75] Hammel v. Beardsley, 31–314, 17+858.

[76] Randahl v. Lindholm, 86–16, 89+1129.

[77] White v. Phelps, 14–27(21).

[78] Elliot v. Roche, 64–482, 67+539.

[79] Pinney v. King, 21–514; Adams v. Adams, 25–72; Hayward v. Grant, 13–165(154). See Frank v. Irgens, 27–43, 6+380; Elmquist v. Markoe, 39–494, 40+825; Campbell v. Worman, 58–561, 60+668.

[80] Priedman v. Johnson, 21–12.

[81] Hoag v. Mendenhall, 19–335(289, 291). See Romans v. Langevin, 34–312, 25+638; Holbrook v. Sims, 39–122, 39+74, 140; Topping v. Clay, 65–346, 68+34.

d. Title of plaintiff—Title once shown to exist is presumed to continue until the contrary is shown. If the complaint shows that the plaintiff is the person to whom the note is made payable it is unnecessary for him to allege that he is still the owner and holder, or make any other allegation to show title.[82] If the plaintiff is not the payee and the note is not indorsed in blank or to bearer, he must show title by alleging an indorsement, assignment, or delivery to him by the payee, or an indorsee of the payee. It is insufficient for him merely to allege that he is the owner and holder of the note.[83] If a note is indorsed in blank or to bearer, it is probably sufficient for the plaintiff to allege that he is the owner and holder thereof.[84] If a note is made payable to the plaintiff "or order," the effect is the same as if it were payable simply to the plaintiff, and it may be declared on accordingly.[85] Cases are cited below holding various allegations of title in the plaintiff sufficient,[86] or insufficient.[87]

e. Assignment—A general allegation of assignment is sufficient.[88]

f. Demand and notice of dishonor—In an action against an indorser the complaint must allege a demand and notice of dishonor.[89]

g. Date of maturity—It is unnecessary to allege the date when a note falls due.[90]

h. Irregular indorsements—A complaint has been held sufficient to charge an irregular indorser as a joint maker.[91]

i. Indorsement—An indorsement may be alleged by the single word "indorsed," which imports everything necessary to pass the title.[92] An allegation that a note was "sold, assigned, and delivered," has been held sufficient to admit evidence of an indorsement.[93] To claim the benefits of a bona fide purchaser it is unnecessary to allege that the indorsement was for value, before maturity, and in the due course of business. These things are implied in a general allegation of indorsement, or assignment.[94] If a note has passed through the hands of several successive transferees a plaintiff may ignore all intermediate transfers, not necessary to show title, and allege a transfer by the payee directly to himself.[95]

j. Mistake in date—A defect in a complaint in not alleging a mistake in the date of a note has been held waived by the reception of evidence without objection.[96]

1037. Answer—*a. Denial of execution or indorsement*—To shift the burden of proof under the statute the denial of execution or indorsement must be specific and be verified.[97] A denial insufficient under the statute may be sufficient to raise an issue.[98] Cases are cited below involving the effect of various forms of denial.[99]

b. Denial of title in plaintiff—A denial of an allegation that the plaintiff "is

[82] Jaeger v. Hartman, 13–55(50); Hayward v. Grant, 13–165(154); Cabbott v. Radford, 17–320(296).

[83] Topping v. Clay, 62–3, 63+1038; Foster v. Johnson, 39–378, 40+255; Nat. L. & T. Co. v. Gifford, 90–358, 96+919. See Welsh v. First Nat. Bank, 103–186, 114+765.

[84] Topping v. Clay, 62–3, 63+1038.

[85] Bennett v. Crowell, 7–385(306).

[86] Hayward v. Grant, 13–165(154); Frasier v. Williams, 15–288(219); Cabbott v. Radford, 17–320(296); Downer v. Read, 17–493(470); State of Wis. v. Torinus, 22–272; Perkins v. Merrill, 37–40, 33+3; Holbrook v. Sims, 39–122, 39+74, 140; Nelson v. Nugent, 62–203, 64+392; Red River etc. Co. v. Cole, 62–457, 64+1149; Topping v. Clay, 65–346, 68+34.

[87] Marine Nat. Bank v. Humphreys, 62–141, 64+148.

[88] Hoag v. Mendenhall, 19–335(289); Topping v. Clay, 65–346, 68+34. See Foster v. Johnson, 39–378, 40+255.

[89] Michaud v. Lagarde, 4–43(21).

[90] Libby v. Mikelborg, 28–38, 8+903; Campbell v. Worman, 58–561, 60+668.

[91] Stein v. Passmore, 25–256. See §§ 7525, 7526.

[92] Hoag v. Mendenhall, 19–335(289, 291). See Downer v. Read, 17–493(470).

[93] Red River etc. Co. v. Cole, 62–457, 64+1149.

[94] Hodgson v. Mather, 92–299, 100+87.

[95] Crosby v. Wright, 70–251, 73+162.

[96] Almich v. Downey, 45–460, 48+197.

[97] See § 3365.

[98] McCormick v. Doucette, 61–40, 63+95;

the owner and holder" of a note held ineffectual.[1] A general denial held to put in issue the transfer and ownership of a note.[2] A setoff for breach of warranty held not inconsistent with the denial of plaintiff's ownership.[3] A denial that the defendants ever promised "to pay the plaintiffs or their order" held to raise an issue.[4]

c. Want or failure of consideration—Cases are cited below holding a plea of want of consideration sufficient,[5] or insufficient;[6] and a plea of failure of consideration sufficient,[7] or insufficient.[8]

d. Various answers held sufficient—An answer pleading fraud;[9] a plea of a written agreement that defendant should not be held on his indorsement;[10] a plea of part payment;[11] a plea of an extension of a collateral note;[12] a plea that the defendant was a bona fide indorsee.[13]

e. Various answers held insufficient—An answer setting up a plea of fraud:[14] a plea of duress;[15] a plea of payment.[16]

1038. Issues—Evidence admissible under pleadings—Cases are cited below involving questions as to the issues formed by the pleading and the evidence admissible thereunder.[17]

1039. Evidence admissible under general denial—Under a general denial to a complaint alleging that a note was "duly assigned, transferred, and indorsed and delivered," evidence is admissible that the plaintiff received the note with knowledge of defences between the original parties or that he took it after maturity.[18]

1040. Burden of proof—*a. Good faith, etc.—Fraud*—Possession of a negotiable bill or note payable to bearer, or indorsed in blank, or to the holder specially, is prima facie evidence of title and the holder is presumed to have taken it in good faith, for value, before maturity, in the usual course of business, and without notice.[19] But if it is shown that the note was stolen, or lost, or ob-

Porter v. Winona etc. Co., 78–210, 80+965.

[99] Tarbox v. Gorman, 31–62, 16+466; Downer v. Read, 17–493(470); Morton v. Jackson, 2–219(180); Frasier v. Williams, 15–288(219); Hayward v. Grant, 13–165(154); Henry v. Hinman, 21–378.

[1] Holbrook v. Sims, 39–122, 39+74, 140; Freeman v. Curran, 1–169(144).

[2] Nunnemacker v. Johnson, 38–390, 38+351; Smith v. Lydick, 124+637.

[3] Wilson v. Reedy, 32–256, 20+153.

[4] Bennett v. Crowell, 7–385(306).

[5] Grimes v. Ericson, 94–461, 103+334; Dunning v. Pond, 5–302(238).

[6] Dunning v. Pond, 5–296(234); Parker v. Jewett, 52–514, 55+56; Lamprey v. Munch, 21–379.

[7] Conroy v. Logue, 87–289, 91+1105.

[8] Grimes v. Ericson, 94–461, 103+334.

[9] Knappen v. Freeman, 47–491, 50+533; Bank of Montreal v. Richter, 55–362, 57+61; Cummings v. Thompson, 18–246(228).

[10] Collom v. Bixby, 33–50, 21+855.

[11] Colter v. Greenhagen, 3–126(74).

[12] Harm v. Davies, 79–311, 82+585.

[13] Welsh v. First Nat. Bank, 103–186, 114+765.

[14] Parker v. Jewett, 52–514, 55+56.

[15] Mpls. L. Co. v. McMillan, 79–287, 82+591.

[16] Esch v. Hardy, 22–65.

[17] Hartshorn v. Green, 1–92(71) (under a plea that plaintiff has no title defendant may prove a transfer by plaintiff to a third party); Webb v. Michener, 32–48, 19+82 (under a denial in an answer that the note sued on was given for any consideration, defendant may show that it was given in connection with a mortgage for a fraudulent purpose, to shield his property from his creditors and that he was not in fact indebted to the plaintiff); Clark v. McNaughton, 46–8, 48+412 (a reply construed as forming an issue on a question of usury); Howlett v. Bell, 52–257, 53+1154 (a denial of unqualified indorsement held to admit proof of an alteration); Babcock v. Murray, 58–385, 59+1038 (proof of an illegal consideration held inadmissible under an allegation of no consideration); Red River etc. Co. v. Cole, 62–457, 64+1149 (evidence of an indorsement held admissible under an allegation that the note was "sold, assigned and delivered"); Klein v. Funk, 82–3, 84+460 (proof of a transfer of a note for indemnity held admissible under the issues); Kaufman v. Barbour, 103–173, 114+738 (held that there was no such variance between pleadings and proof as to prevent recovery for contribution upon the theory that the note was joint and several); Smith v. Lydick, 124+637 (answer held not to admit that plaintiff became owner of note for value before maturity).

[18] Hodgson v. Mather, 92–299, 100+87.

[19] Cummings v. Thompson, 18–246(228);

tained by duress, or procured or put in circulation by fraud, or based on an illegal consideration, the burden is on the holder to prove that he is a bona fide purchaser.[20] He must show under what circumstances and for what value he became the holder.[21] Proof of payment of a valuable consideration, in the ordinary course of business, and under circumstances free from suspicion, makes out a prima facie case of good faith and shifts the burden of proving the affirmative fact of notice, if it exists, on the opposite party.[22] Where the plaintiff was permitted in the first instance to prove that he was a bona fide purchaser of a note, and the defendant maker, without offering or intending to offer proof to rebut the same, merely offered to prove facts which would constitute a defence to the note in the hands of the original payee, it was held that the offer was properly refused.[23] Want of consideration alone between the maker and payee is not sufficient in an action by an indorsee, to whom the note has been regularly transferred, to require proof from such indorsee that he gave value.[24] A mere warranty on the sale of property, though false, does not constitute a fraud sufficient to shift the burden of proof. The fraud must be such as would justify a rescission of the contract.[25]

b. Want of consideration—It is not incumbent on a maker to prove that he was not guilty of laches in making the defence of want of consideration.[26]

c. Payment—If the answer denies an allegation of non-payment, and affirmatively alleges payment, the burden of proving payment is on the defendant.[27] Possession of a note is sufficient evidence of non-payment to shift the burden of proof.[28]

d. Partial failure of consideration—If a maker relies on a partial failure of consideration he must show to what extent, that is, to what value, consideration has failed.[29]

e. Discharge of joint maker—A party suing one of several joint makers must prove that the other has been discharged.[30]

f. To prove representative capacity—If a person signs a note, and adds after his name "trustee," he is prima facie individually liable, and he has the burden of proving that he acted in a representative capacity.[31]

g. Corporation paper—The holder of corporation paper, payable to the president of the corporation, has the burden of proving that the paper is in fact an obligation of the corporation.[32]

1041. Production of note or bill—In an action on a note or bill the plaintiff must produce and file it before he can recover on it, except when it has been

MacLaren v. Cochran, 44–255, 46+408. See Merchants etc. Bank v. Cross, 65–154, 67+1147.

[20] Cummings v. Thompson, 18–246(228); Merchants' Exch. Bank v. Luckow, 37–542, 35+434; MacLaren v. Cochran, 44–255, 46+408; Bank of Montreal v. Richter, 55–362, 57+61; First Nat. Bank v. Holan, 63–525, 65+952; Merchants etc. Bank v. Cross, 65–154, 67+1147; Wallace v. Carpenter, 70–321, 332, 73+189; Drew v. Wheelihan, 75–68, 77+558; Dekalb Nat. Bank v. Thompson, 79–151, 81+765; Robbins v. Swinburne, 91–491, 98+331, 867; Askegaard v. Dalen, 93–354, 101+503; Mendenhall v. Ulrich, 94–100, 101+1057; First Nat. Bank v. Person, 101–30, 111+730.

[21] Bank of Montreal v. Richter, 55–362, 57+61.

[22] Plymouth C. Co. v. Seymour, 67–311, 317, 69+1079; Bank of Farmington v. Ellis, 30–270, 15+243.

[23] Merchants etc. Bank v. Cross, 65–154, 67+1147.

[24] Cummings v. Thompson, 18–246(228, 231).

[25] First Nat. Bank v. Person, 101–30, 111+730.

[26] Wildermann v. Donnelly, 86–184, 90+366.

[27] Marshall & I. Bank v. Child, 76–173, 78+1048. See § 1033.

[28] Thorson v. Sauby, 68–166, 70+1083; Hogan v. Atlantic El. Co., 66–344, 349, 69+1.

[29] Bisbee v. Torinus, 26–165, 2+168.

[30] Randahl v. Lindholm, 86–16, 89+1129.

[31] Bingham v. Stewart, 13–106(96).

[32] Porter v. Winona etc. Co., 78–210, 80+965.

lost or destroyed, in which case he must file the bond required by statute.[33] In an action on interest coupons the production of the bonds is unnecessary.[34]

1042. Amount of recovery—In an action on a note held for collateral security against the maker the recovery should be limited to the amount of the principal debt, if the maker shows a good defence against the pledgor.[35] A bona fide purchaser is entitled to recover the full amount of a note according to its tenor, though he paid less than face value. The mere want of consideration between the original parties does not take a case out of this rule.[36]

MISCELLANEOUS

1043. Meaning of "to take care of"—The phrase "to take care of" matured paper has been held to mean to take it up by payment or renewal, or to secure an extension of the time of payment.[37]

1044. Unwarranted sale by payee—Remedy of maker—The remedy of the maker of notes which have been sold by the payee to an innocent purchaser for value, in direct violation of the contract of the parties, derived from a construction of the terms of the notes and of a contemporaneous written agreement, is an action for damages for the amount of the notes, with interest.[38]

BIRTH—See Evidence, 3296.
BLACKLISTING—See note 39.
BLACKMAIL—See Threats.
BLANKS—See Alteration of Instruments, 264; Bills and Notes, 875; Estoppel, 3199.
BLASTING—See Explosives, 3700.
BLIND PIGS—See Intoxicating Liquors, 4928.
BOARD OF EDUCATION—See Schools and School Districts.
BOARD OF HEALTH—See Health.
BOARD OF TRADE—See Exchanges.
BOATS—See Maritime Liens; Shipping.
BOILERS—See Steam.
BONA FIDE PURCHASERS—See Bills and Notes, 950; Chattel Mortgages, 1450; Fraudulent Conveyances, 3894; Pledge, 7742; Public Lands, 7981; Recording Act, 8302; Sales, 8594; Specific Performance, 8795; Trusts, 9914; Usury, 9988; Vendor and Purchaser, 10070.

BONDS

Cross-References

See Public Officers, and other specific heads.

1045. Necessity of principal—A bond may be sufficient though it has no principal obligor to whom the other obligors stand in the relation of sureties.[40]

1046. Joint and several—Prior to Laws 1897 c. 303, a distinction was made between joint and joint and several bonds.[41] Now the obligation on all bonds is joint and several.[42]

[33] Armstrong v. Lewis, 14–406(308); St. Paul Nat. Bank v. Cannon, 46–95, 48+526; Gray v. Blabon, 74–344, 77+234. See R. L. 1905 § 4718.

[34] Welsh v. First Div. etc. Ry., 25–314, 320.

[35] St. Paul Nat. Bank v. Cannon, 46–95, 48+526. See First Nat. Bank v. Buchan, 79–322, 82+641.

[36] Daniels v. Wilson, 21–530. See Perkins v. Trinka, 30–241, 15+115.

[37] Yale v. Watson, 54–173, 55+957.

[38] Myrick v. Purcell, 95–133, 103+902.

[39] State v. Justus, 85–279, 88+759.

[40] Howard v. Manderfield, 31–337, 17+946.

[41] O'Gorman v. Lindeke, 26–93, 1+841; Steffes v. Lemke, 40–27, 41+302; Sprague v. Wells, 47–504, 50+535; Ramsey County

1047. Requisite number of sureties—Where "sufficient sureties" are required on a bond there must be two or more.[43]

1048. Qualifications of sureties—Rules of court—Sureties must be residents and freeholders of this state, and worth the amount specified in the bond or undertaking above their debts and liabilities, and exclusive of their property exempt from execution, except where the statute otherwise provides.[44] No practicing attorney or counselor at law will be received as a surety on any bond or undertaking required in an action, whether he is the attorney of record in the action or not, except where such bond or undertaking is executed on behalf of a non-resident party.[45]

1049. Justification of sureties—Trust companies—Whenever a judge or other officer approves the security to be given in any case, or reports upon its sufficiency, he must require the sureties to justify by affidavit.[46] Laws 1885 c. 3 § 7, making it lawful for an "annuity safe deposit and trust company" to become sole surety upon any bond or undertaking "without justification or qualification," is only permissive, and does not make it compulsory on the court to accept it as surety without justification, or deprive the court of the power to require it to justify, if its sufficiency as surety is excepted to.[47]

1050. Acknowledgment—A rule of court requires all bonds to be duly proved or acknowledged in like manner as deeds of real estate, before they can be received or filed.[48]

1051. Delivery—The delivery of a bond, to be effective, must be made with the intention of passing the title to it to the obligee, and such as would pass it beyond recall by the obligors.[49] Where a sheriff's bond is "duly" approved, its delivery is implied.[50] A bond is not "executed" until delivery.[51]

1052. Approval—The approval of a bond by the proper officer involves a determination as to the amount for which the bond should be given, and it is unnecessary that the amount should be fixed by a separate order.[52]

1053. Obligor a debtor—The obligor in a penal bond is debtor to the obligee from the execution of the bond, though its condition may not have been broken.[53]

1054. Extent of liability—In a penal bond the extent of liability is generally limited by the amount of the penalty.[54] Where a bond contains a contract for the performance of certain things, and the obligor binds himself in a penalty, for the performance of the contract, the penalty is not the limit of recovery on the instrument. In an action for a breach of the contract, the obligee may recover damages as often as the breach arises, even beyond the penalty.[55]

1055. Conclusiveness of recitals—A recital in a bond, which is certain in its terms and relevant to the matter in hand, is conclusive between the parties to a controversy growing out of the instrument or the transaction in which it was executed.[56] The recitals in a bond may control its conditions.[57]

v. Elmund, 89–56, 93+1054; Sundberg v. Goar, 92–143, 99+638.

42 R. L. 1905 § 4282.

43 State v. Fitch, 30–532, 16+411.

44 Rule 2, District Court.

45 Rule 1, District Court; Schuek v. Hagar, 24–339.

46 Rule 2, District Court.

47 State v. Dist. Ct., 58–351, 59+1055.

48 Rule 1, District Court.

49 Clarke v. Williams, 61–12, 62+1125. See Nehring v. Haines, 70–233, 72+1061.

50 Ramsey County v. Brisbin, 17–451 (429). See St. Louis County v. Am. L. & T. Co., 67–112, 69+704.

51 State v. Young, 23–551.

52 Hempsted v. Cargill, 46–141, 48+686.

53 Stone v. Myers, 9–303(287).

54 Nelson v. Armstrong, 93–449, 101+968, 102+207, 731.

55 Meinert v. Bottcher, 60–204, 62+276.

56 Jefferson v. McCarthy, 44–26, 46+140; Meeker County v. Butler, 25–363; Greengard v. Fretz, 64–10, 65+949; Hennepin County v. State Bank, 64–180, 183, 66+143; St. Louis County v. Am. L. & T. Co., 75–489, 492, 78+113; Red Wing S. P. Co. v. Donnelly, 102–192, 113+1; Bell v. Kirkland, 102–213, 113+271.

57 Dunham v. Johnson, 85–268, 88+737.

1056. Statutory bonds—Defective—A condition in a statutory bond which conforms substantially to the language of the statute is sufficient.[58] Conditions which are unauthorized by statute are void.[59] A bond which is defective as a statutory bond may sometimes be sustained as a common-law obligation,[60] but not as to a stranger,[61] or where there is want of capacity.[62] It may be sufficient as an undertaking.[63] The statute is a part of a statutory bond.[64] Mere formal defects are not fatal.[65] A voluntary bond, other than an official bond, based on a valid consideration, is enforceable as a common-law bond according to its conditions, though they are more onerous than would have been required if a statutory bond had been given to effect the same purpose.[66]

1057. Action—Nominal damages—Upon the breach of the condition of a bond a right of action accrues, but only nominal damages are recoverable if no actual damage is apparent.[67]

BONUS STOCK—See Corporations, 2032, 2083.
BOOK ACCOUNTS—See Accounts, 61; Sales, 8578.
BOOKS—See Evidence, 3358.
BOOKS OF ACCOUNT—See Evidence, 3345.
BOROUGHS—See Municipal Corporations.
BOULEVARDS—See Municipal Corporations, 6608, 6617, 6819.

BOUNDARIES

Cross-References

See Adverse Possession, 114; Estoppel 3201.

1058. Government subdivisions—Reference to the government survey is the usual mode of describing rural lands.[68] When the description is by reference to a government subdivision it is to be presumed that the parties intended that the tract should be ascertained by the methods of the government survey.[69]

1059. Reference to plats—Reference to a plat is an approved mode of describing boundaries.[70] The plat becomes a part of the deed for the purposes of description.[71] It stands on the same footing as monuments and prevails over bounds, courses, and distances,[72] but it will yield to the clearly shown intention of the parties at variance therewith,[73] and to survey stakes and monuments.[74]

[58] Lanier v. Irvine, 21–447. See Waterous v. Clinton, 125+269.

[59] Anderson v. Munch, 29–414, 13+192; Johnson v. Dun, 75–533, 540, 78+98. See Kimball v. Southern etc. Co., 57–37, 58+868.

[60] Price v. Doyle, 34–400, 26+14; Anderson v. Munch, 29–414, 13+192; St. James v. Hingtgen, 47–521, 50+700; St. Louis County v. Manufacturers' Bank, 69–421, 72+701. See Waterous v. Clinton, 125+269.

[61] Union S. P. Co. v. Olson, 82–187, 84+756.

[62] Breen v. Kelly, 45–352, 47+1067.

[63] Schoregge v. Gordon, 29–367, 13+194; Buck v. Lewis, 9–314(298).

[64] Scott County v. Ring, 29–398, 13+181; Stapp v. St. Clyde, 44–510, 47+160; Combs v. Jackson, 69–336, 72+565.

[65] Redwood County v. Tower, 28–45, 8+907; Buck v. Lewis, 9–314(298).

[66] Johnson v. Dun, 75–533, 78+98.

[67] Sprague v. Wells, 47–504, 50+535.

[68] N. W. etc. Co. v. Norwegian etc. Seminary, 43–449, 452, 45+868.

[69] Cogan v. Cook, 22–137. See Owsley v. Johnson, 95–168, 103+903.

[70] Bailey v. Galpin, 40–319, 322, 41+1054; N. W. etc. Co. v. Norwegian etc. Seminary, 43–449, 452, 45+868; Gilbert v. Emerson, 60–62, 61+820; Owsley v. Johnson, 95–168, 103+903.

[71] Nicolin v. Schneiderhan, 37–63, 33+33; Owsley v. Johnson, 95–168, 103+903. See Hurley v. Mississippi etc. Co., 34–143, 24+917; Hall v. Conn. M. L. Ins. Co., 76–401, 79+497.

[72] Coles v. Yorks, 36–388, 31+353; Nicolin v. Schneiderhan, 37–63, 33+33.

[73] Owsley v. Johnson, 95–168, 103+903.

[74] Turnbull v. Schroeder, 29–49, 11+147. See Kilgore v. Frisbee, 52–519, 55+63.

It is immaterial that the plat does not conform to the statute, or is not duly certified or recorded.[75] Where a description referred to a plat on file and there were two plats on file, parol evidence was held admissible to show the plat referred to.[76] Under a description of lots eo nomine, as platted, the land in the street passes as parcel of the lots.[77] Where a description by metes and bounds is supplemented by a reference to a particular lot or subdivision of land to indicate the tract intended to be conveyed, the former, though to be preferred, by ordinary rules of construction, as the more certain expression of the intention of the grantor, will not, however, necessarily be controlling, if, under all the circumstances, the land intended to be conveyed more clearly appears by the latter description.[78] Where a tract of land is actually surveyed into blocks, lots, and streets, the effect of a conveyance to purchasers of separate lots and blocks according to such survey is to dedicate the streets therein to public use, independent of any statutory dedication. And where the plat of such survey fails to comply with the statutory directions so as to entitle it to be recorded, it may nevertheless be referred to for the purpose of describing lots or blocks, and parol evidence is admissible to apply the descriptions in the deeds to the subject-matter.[79] Where a plat is a part of a deed by reference for purposes of description, it is no more subject to variation by parol than the other parts of the deed.[80] In construing a plat no part of it is to be regarded as superfluous or meaningless.[81] The purchaser of a lot according to a plat or plan acquires a right to every advantage, privilege, or easement, which the plat or plan represents.[82]

1060. Courses and distances—Courses and distances yield to monuments.[83] If there are no monuments, or, if monuments once existing are gone and cannot be located, the courses and distances, when explicit, must govern, and cannot be controlled or affected by parol.[84] The side lines of a lot in a city are presumed to run at right angles to the street.[85] A description by metes and bounds will ordinarily, but not necessarily, prevail over a reference to the land as a lot indicated on a plat.[86]

1061. Monuments and natural boundaries—Monuments and natural boundaries prevail over courses and distances.[87]

1062. Maps—A map or plan stands on the same footing as a monument and prevails over bounds, courses, and distances.[88] If the grantor exhibits a map of the premises to his grantee he may be estopped thereby.[89]

1063. Thence to the place of beginning—A call, "thence to the place of beginning," has been held to prevail over courses and distances.[90]

1064. Reference to another deed—A reference to another deed has been held sufficiently definite;[91] to limit the grant;[92] and to render the description

[75] Ames v. Lowry, 30-283, 15+247; Reed v. Lammel, 28-306, 9+858; Sanborn v. Mueller, 38-27, 35+666; Borer v. Lange, 44-281, 46+358.

[76] Slosson v. Hall, 17-95(71).

[77] Witt v. St. Paul etc. Ry., 38-122, 35+862.

[78] Cannon v. Emmans, 44-294, 46+356.

[79] Borer v. Lange, 44-281, 46+358.

[80] Cunningham v. Willow River, 68-249, 71+532.

[81] Gilbert v. Emerson, 60-62, 61+820.

[82] Wilder v. St. Paul, 12-192(116, 127).

[83] See §§ 1061, 1072.

[84] Yanish v. Tarbox, 49-268, 276, 51+1051; Chan v. Brandt, 45-93, 47+461.

[85] Austrian v. Davidson, 21-117.

[86] Cannon v. Emmans, 44-294, 46+356.

[87] Turnbull v. Schroeder, 29-49, 11+147; Coles v. Yorks, 36-388, 31+353; Nicolin v. Schneiderhan, 37-63, 33+33; Everson v. Waseca, 44-247, 46+405; Chan v. Brandt, 45-93, 47+461; Owings v. Freeman, 48-483, 489, 51+476; Yanish v. Tarbox, 49-268, 51+1051; Beltz v. Mathiowitz, 72-443, 75+699; Kleven v. Gunderson, 95-246, 104+4.

[88] Coles v. Yorks, 36-388, 391, 31+353.

[89] Dawson v. St. Paul etc. Ins. Co., 15-136(102).

[90] Owings v. Freeman, 48-483, 51+476; Yanish v. Tarbox, 49-268, 276, 51+1051.

[91] Castle v. Elder, 57-289, 59+197.

[92] Witt v. St. P. etc. Ry., 38-122, 35+862.

sufficiently certain.[93] If one deed refers to another for a description of the premises granted or to be granted, the latter, for the purpose and to the extent of the reference, will be deemed a part of the former.[94]

1065. Highways—Lands are frequently described with reference to roads or highways.[95] It is unnecessary that the road be legally laid out and made a matter of record.[96] Where a deed conveys land bounded on a street, alley, or highway, the grantee presumptively takes to the center line. This presumption yields when a different intention is clearly manifested, or where the evidence shows there could be no foundation for it, as where the grantor at the time owned no part of the street, the same being laid wholly on the land of another.[97] Where land bordering on navigable water is platted so as to lay out a street along the shore or bank, the fee of the lots on the opposite side of the street extends to the water, subject to the public easement.[98]

1066. Quantity—Comparatively little weight is to be given to calls for quantity.[99] They are controlled by other definite calls.[1] In the description of land it is usual, after description by metes and bounds, to add a clause stating that the land described contains so many acres. But, unless there is an express covenant that there is the quantity of land mentioned, the clause as to quantity is considered simply as a part of the description, and will be rejected if it is inconsistent with the actual area, when the same is capable of being ascertained by monuments and boundaries. The mention of the quantity of land conveyed may aid in defining the premises, but it cannot control the rest of the description.[2]

1067. Rivers and lakes—Abutting owners take to the center of the stream of a non-navigable river,[3] and to the center of a non-navigable lake.[4] In the case of navigable rivers and lakes they apparently take an absolute title to ordinary high-water mark, and a qualified title to low-water mark.[5] It is well settled that they do not take beyond the water's edge.[6] Where, upon a town plat, a street is laid down, and the only boundary for part of the street on one side is a navigable lake or river, the street extends to low-water mark, and the dedication will be held to have been intended to enable the public to get to the water for the better enjoyment of the public right of navigation.[7] Where a deed conveys land bordering on a lake by a description, the calls for the eastern boundary

[93] Noyes v. French L. Co., 80–397, 83+385.

[94] Carli v. Taylor, 15–171(131).

[95] Prescott v. Beyer, 34–493, 26+732; Yanish v. Tarbox, 49–268, 51+1051; Id., 57–245, 59+300; McRoberts v. McArthur, 62–310, 64+903.

[96] McRoberts v. McArthur, 62–310, 64+903.

[97] In re Robbins, 34–99, 24+356; Hurley v. Miss. etc. Co., 34–143, 24+917; Rich v. Minneapolis, 37–423, 35+2; Witt v. St. P. etc. Ry., 38–122, 35+862; Lamm v. Chi. etc. Ry., 45–71, 47+455; Wait v. May, 48–453, 51+471; Gilbert v. Emerson, 60–62, 67, 61+820; Hall v. Conn. etc. Ins. Co., 76–401, 79+497; Owsley v. Johnson, 95–168, 103+903; White v. Jefferson, 124+373 (effect of highway having been vacated before transfer). See 23 Harv. L. Rev. 480.

[98] Wait v. May, 48–453, 51+471. See Hall v. Conn. etc. Ins. Co., 76–401, 79+497.

[99] Kleven v. Gunderson, 95–246, 104+4.

[1] Austrian v. Dean, 23–62; Sherwin v. Bitzer, 97–252, 106+1046. See Ward v. Dean, 69–466, 72+710.

[2] Sherwin v. Bitzer, 97–252, 106+1046.

[3] Schurmeier v. St. P. etc. Ry., 10–82 (59); Scheifert v. Briegel, 90–125, 129, 96+44.

[4] See § 1070.

[5] Schurmeier v. St. P. etc. Ry., 10–82 (59); Brisbine v. St. P. etc. Ry., 23–114; St. P. etc. Ry. v. First Div. etc. Ry., 26–31, 49+303; Carli v. Stillwater etc. Co., 28–373, 380, 10+205; Union Depot etc. Co. v. Brunswick, 31–297, 301, 17+626; Lake Superior L. Co. v. Emerson, 38–406, 38+200; Miller v. Mendenhall, 43–95, 101, 44+1141; Hanford v. St. P. etc. Ry., 43–104, 111, 42+596; Mpls. T. Co. v. Eastman, 47–301, 50+82; Wayzata v. G. N. Ry., 50–438, 52+913; Lamprey v. State, 52–181, 198, 53+1139; In re Minnetonka Lake Improvement, 56–513, 520, 58+295.

[6] Lamprey v. State, 52–181, 53+1139.

[7] Wayzata v. G. N. Ry., 50–438, 52+913.

of which are: "Thence east to the shore of the lake; thence north, along said lake shore, to a certain point; and thence west," etc., it conveys all the riparian rights of the grantor in the lake, in front of the land conveyed, and, as against the grantor, any land made by filling in the lake at the shore.[8] When a government lot abuts upon a lake, the shifting water line, and not the meander line, is the boundary of the lot. The transfer of such a lot by number according to the government survey, without words of restriction, conveys all the land which has become a part of the lot by the recession of the lake.[9]

1068. Meander lines about lakes—A meander line is not, as a general rule, a boundary line; yet the boundaries of fractional lots cannot be indefinitely extended where they appear by the government plat to abut on a body of water which in fact never existed at substantially the place indicated on the plat. In such exceptional cases, the supposed meander line will, if consistent with the other calls and distances indicated on the plat, mark the limits of the survey, and be held to be the boundary line of the land it delimits.[10] Where the meander line of an inland, meandered, navigable lake, is not a boundary line of the fractional lots or tracts of land abutting thereon, the title of contiguous owners extends to all land between such line and the shore of the lake, precisely as though it were the result of accretions or relictions; and the boundaries of adjoining tracts, as to land beyond the meander line, are fixed by extending their side lines on a deflected course from their intersection with the meander line toward a point in the center of the lake.[11]

1069. Meander lines along rivers—Government meander lines run along rivers are not boundaries. Owners of land abutting on a river own all the land between the meander line and the river though it was never a part of the river bed and was not formed by accretion or the recession of the river waters.[12]

1070. Non-navigable lakes—The owners of land bordering on the shore of a meandered non-navigable or dried-up lake own the bed of the lake in severalty. Their title extends to the center of the lake; the boundary lines of each abutting tract being fixed by extending, from the meander line on each side of the tract, lines converging to a point in the center of the lake.[13] The mode of dividing the bed of a dried-up lake among the abutting owners depends on the shape of the lake.[14]

1071. Construction—If there is doubt arising from the terms of the description or in its application to the subject-matter, the court may place itself in the position of the grantor, and read it in the light of the circumstances under which it was executed, and may consider the condition of the property, state of the title, boundaries, or other material matters. The description is to be so construed as to give effect if possible to the intention of the parties without reference to technical rules of construction.[15] If possible the construction should be consistent with all the terms of the description.[16] The practical location by the parties is to be considered.[17] If there are two inconsistent descriptions the grantee is entitled to hold by that which will be the more beneficial to him.[18]

[8] Castle v. Elder, 57-289, 59+197.
[9] Sherwin v. Bitzer, 97-252, 106+1046.
[10] Security L. & E. Co. v. Burns, 87-97, 91+304; Everson v. Waseca, 44-247, 46+405; Lamprey v. State, 52-181, 53+1139; Sherwin v. Bitzer, 97-252, 106+1046.
[11] Hanson v. Rice, 88-273, 92+982.
[12] Schurmeier v. St. P. etc. Ry., 10-82 (59); Olson v. Thorndike, 76-399, 79+399; Webber v. Axtell, 94-375, 379, 102+915. See § 1067.
[13] Lamprey v. State, 52-181, 53+1139; Shell v. Matteson, 81-38, 83+491; Hanson v. Rice, 88-273, 92+982; Scheifert v. Briegel, 90-125, 96+44; Markusen v. Mortensen, 105-10, 116+1021. See Huntsman v. Hendricks, 44-423, 46+910.
[14] Scheifert v. Briegel, 90-125, 96+44; Markusen v. Mortensen, 105-10, 116+1021. See 17 Harv. L. Rev. 410.
[15] Cannon v. Emmans, 44-294, 46+356.
[16] Lovejoy v. Gaskill, 30-137, 14+583.
[17] Austrian v. Davidson, 21-117. See Note, 110 Am. St. Rep. 677.
[18] Colter v. Mann, 18-96(79).

That construction should be adopted which is consistent with all the terms of description employed by the parties rather than one which is inconsistent with some of those terms; though, by applying the principle, falsa demonstratio non nocet, the latter construction would be otherwise reasonable.[19]

1072. Inconsistent calls—Relative rank—If calls are inconsistent they are to be given prevailing effect in the following order: (1) natural objects; (2) artificial marks; (3) courses and distances.[20] Effect must be given to the more certain and material elements of a description,[21] to those as to which there is the least liklihood of mistake.[22] Comparatively little weight is to be given to calls for quantity.[23] If there are two complete and irreconcilable descriptions the grantee is entitled to hold by that which is the more beneficial to him.[24]

1073. General and particular descriptions—A general description may be limited and restricted by a subsequent particular description,[25] but not if it is definite and certain in itself.[26] A particular description is not impaired by a subsequent general description.[27]

1074. Falsa demonstratio non nocet—If a description as a whole is sufficient, it is not vitiated by false particulars.[28]

1075. Parol evidence—Parol evidence is inadmissible to vary the description of a boundary in a deed,[29] but it is admissible to prove the surrounding circumstances to aid the court in applying the description to the land.[30] The application of the description to the face of the earth is a matter of evidence.[31] Parol evidence is admissible to prove the site of lost monuments, survey stakes, etc.,[32] and to prove an estoppel.[33]

1076. Reputation—Common repute is admissible to prove boundaries established by the United States surveys, where the monuments have disappeared.[34]

1077. Official plats and field notes—The government plats and field notes are conclusive as to the location of boundaries.[35] If plats and field notes are inconsistent the former controls.[36] If field notes are inconsistent those most likely to be true are to be taken.[37]

1078. Fractions of lots—A deed conveying the "east half" of a lot has been held to mean the east half according to area.[38]

1079. Government corners, surveys, etc.—The corner of a government subdivision is where the United States surveyor located it, whether right or

[19] Lovejoy v. Gaskill, 30–137, 14+583.

[20] Yanish v. Tarbox, 49–268, 51+1051; Kleven v. Gunderson, 95–246, 104+4. See Note, 129 Am. St. Rep. 990.

[21] Owings v. Freeman, 48–483, 51+476; Colter v. Mann, 18–96(79, 85); Coles v. Yorks, 36–388, 391, 31+353. See Cannon v. Emmans, 44–294, 46+356.

[22] Everett v. Cont. Ins. Co., 21–76, 78; Coles v. Yorks, 36–388, 391, 31+353.

[23] Kleven v. Gunderson, 95–246, 104+4.

[24] Colter v. Mann, 18–96(79, 86). See Coles v. Yorks, 36–388, 391, 31+353.

[25] Austrian v. Davidson, 21–117; Witt v. St. P. etc. Ry., 38–122, 128, 35+862.

[26] Middleton v. Wharton, 41–266, 43+4.

[27] Colter v. Mann, 18–96(79).

[28] Thorwarth v. Armstrong, 20–464(419); Kiefer v. Rogers, 19–32(14, 19); Middleton v. Wharton, 41–266, 268, 43+4; Colter v. Mann, 18–96(79); Roberts v. Grace, 16–126(115, 121); Slosson v. Hall, 17–95(71, 75); Austrian v. Davidson, 21–117; Lovejoy v. Gaskill, 30–137, 139, 14+583; Coles v. Yorks, 36–388, 390, 31+353; McAllister v. Welker, 39–535, 41+107; Bailey v. Galpin, 40–319, 322, 41+1054; Owings v. Freeman, 48–483, 51+476; Ambs v. Chi. etc. Ry., 44–266, 268, 46+321.

[29] Beardsley v. Crane, 52–537, 54+740; McRoberts v. McArthur, 62–310, 64+903; Yanish v. Tarbox, 49–268, 276, 51+1051; Castle v. Elder, 57–289, 59+197; Cunningham v. Willow River, 68–249, 71+532.

[30] Austrian v. Davidson, 21–117; McRoberts v. McArthur, 62–310, 64+903; Ames v. Lowry, 30–283, 15+247; Eastman v. St. Anthony Falls etc. Co., 43–60, 44+882; Borer v. Lange, 44–281, 285, 46+358; Slosson v. Hall, 17–95(71); Cannon v. Emmans, 44–294, 46+356; Witt v. St. P. etc. Ry., 38–122, 35+862.

[31] Romans v. Langevin, 34–312, 25+638.

[32] Borer v. Lange, 44–281, 46+358. See § 1081.

[33] Thompson v. Borg, 90–209, 95+896.

[34] Thoen v. Roche, 57–135, 58+686.

[35] Schurmeier v. St. P. etc. Ry., 10–82 (59); Ferch v. Konne, 78–515, 81+524.

[36] Hanson v. Rice, 88–273, 281, 92+982.

[37] Stadin v. Helin, 76–496, 79+537, 602.

[38] Cogan v. Cook, 22–137.

wrong. The monuments and boundary lines as established by the United States government survey control the description of lands patented by the United States. Mistakes in such surveys cannot be corrected by the courts.[39] A witness or bearing tree is not an established corner, but merely a designated object from which, in connection with the field notes, the location of the corner may be ascertained.[40] Where, owing to meandered lakes, but one quarter corner post was established upon the ground on the boundary lines of a certain section, which post was on the south line thereof, the division line between the southeast and southwest quarters of said section must be ascertained by running a line due north from the quarter post to the meandered lake upon the north side of the section.[41] Where, on account of the presence of a lake, a quarter-section corner on the section line could not be fixed and designated by a stake or monument at such corner, and the same was located by a witness-corner established near the margin of the lake on the section line, and the stake there fixed, together with the plat and field-notes, show the distance and direction of such mound from the section corner on the section line, such corner is thereby fixed, and its location is to be ascertained by measurement from the witness-corner.[42] The federal statute proving that "the boundary lines which have not been actually run and marked shall be ascertained by running straight lines from the established corners to the opposite or corresponding corners," prevails over an inconsistent rule of the General Land Office.[43]

1080. Lost monuments, survey stakes, etc.—Where monuments or objects or marks have been removed or obliterated, their former site or location must be fixed and established with reasonable certainty, in order that they shall prevail over the lines established by explicitly given courses and distances or to throw an evident error of description by course and distances into the second boundary line as given, which otherwise would be charged to the fourth or last line, and corrected by rejecting the given courses and distances and bringing the last line direct to the terminus definitely described in the conveyance as "the point of beginning."[44] Where lots and blocks are actually surveyed on the land, and stakes set at the corners thereof, it is competent to prove by parol the location thereof, and if lost or destroyed the places where they were set.[45]

1081. Lost corners—If the original post or monument at the corner of a government subdivision has disappeared or become obliterated, its site may be established by clear and satisfactory evidence and when so established will control.[46] The mode of re-establishing a corner is governed by the rules of the General Land Office.[47]

1082. Description fatally defective—Confirmatory deed—If a description does not afford the means of identifying the property with reasonable certainty, the deed is void and the legal title will not pass.[48] The title may be

[39] Chan v. Brandt, 45–93, 47+461; Beardsley v. Crane, 52–537, 544, 54+740; Beltz v. Mathiowitz, 72–443, 75+699; Ferch v. Konne, 78–515, 81+524; Winger v. Vaae, 82–145, 84+659; Lamprey v. Mead, 54–290, 55+1132.

[40] Stadin v. Helin, 76–496, 79+537, 602.

[41] Beardsley v. Crane, 52–537, 54+740.

[42] Chan v. Brandt, 45–93, 47+461.

[43] Moser v. Doffner, 125+275.

[44] Yanish v. Tarbox, 49–268, 51+1051; Id., 57–245, 59+300.

[45] Borer v. Lange, 44–281, 46+358.

[46] Beltz v. Mathiowitz, 72–443, 75+699; Ferch v. Konne, 78–515, 81+524; Stadin v. Helin, 76–496, 79+537, 602; Winger v. Vaae, 82–145, 84+659; Loveridge v. Omodt, 38–1, 35+564; Moser v. Doffner, 125+275.

[47] R. L. 1905 §§ 578, 580; Kleven v. Gunderson, 95–246, 104+4. See cases under note 46.

[48] McRoberts v. McArthur, 62–310, 64+903; Bailey v. Galpin, 40–319, 322, 41+1054; Reed v. Lammel, 28–306, 9+858; Maier v. Joslin, 46–228, 48+909; Roberts v. Grace, 16–126(115); Cunningham v Willow River, 68–249, 71+532.

confirmed by a subsequent deed containing a correct description.[49] If a description includes several particulars, all of which are necessary to identify the land, no estate will pass except such as agrees with every particular.[50]

1083. Practical location—The "practical location" of a boundary line can be established in one of three ways only: (1) the location relied upon must have been acquiesced in for a sufficient length of time to bar a right of action under the statute of limitations; (2) the line must have been expressly agreed upon by the interested parties, and afterwards acquiesced in; (3) the party whose rights are to be barred must, with knowledge of the true line, have silently looked on while the other party encroached thereon, and subjected himself to expense which he would not have done had the line been in dispute.[51] Evidence to establish such a location must be clear and strong.[52]

1084. Statutory action to determine boundaries—The statute [53] was not designed merely to establish the location of the original government or other line between the parties, but to establish the present boundary line between them according to their respective existing rights of property, and hence the court is required to try and determine adverse claims in respect to any portion of the land involved which it may be necessary to determine for a complete settlement of the boundary lines involved. Title by adverse possession is an admissible defence.[54] The statute is not designed to cover cases where the sole question is as to the title in fee.[55] The defeated party is not entitled to a second trial as of right.[56] Cases are cited below involving questions of pleading and practice; [57] and the sufficiency of evidence.[58]

BOUNTIES

Cross-References

See Constitutional Law, 1672.

1085. To manufacturers—Laws 1895 c. 205, as amended by Laws 1899 c. 307, providing for the payment of certain bounties to manufacturers of sugar from beets grown in this state, is unconstitutional.[59]

1086. To soldiers—Cases are cited below relating to bounties to soldiers.[60]

BOYCOTT—See Conspiracy, 1566.

[49] Greve v. Coffin, 14–345(263).

[50] Roberts v. Grace, 16–126(115, 121).

[51] Benz v. St. Paul, 89–31, 93+1038; Beardsley v. Crane, 52–537, 54+740; Thoen v. Roche, 57–135, 139, 58+686; Markusen v. Mortensen, 105–10, 116+1021; Moser v. Doffner, 125+275.

[52] Markusen v. Mortensen, 105–10, 116+1021.

[53] R. L. 1905 § 4454.

[54] Stadin v. Helin, 76–496, 79+537, 602. See Krabbenhoft v. Wright, 101–356, 112+421; Wright v. Krabbenhoft, 104–460, 116+940 (effect of judgment—res judicata).

[55] Benz v. St. Paul, 77–375, 379, 79+1024, 82+1118.

[56] Tierney v. Gondereau, 99–421, 109+821.

[57] Rock v. Donora M. Co., 91–259, 97+889 (complaint held sufficient—bringing in new parties—stay); Miller v. Hogan, 81–312, 84+40 (amendment of verdict held improper); Wright v. Krabbenhoft, 104–460, 116+940 (amendment of judgment).

[58] Ferch v. Konne, 78–515, 81+524; Kistner v. Beseke, 96–137, 104+759; Streeter v. Brown, 92–488, 100+1126; Edwards v. Morley, 100–542, 110+1133. See Hansen v. Lee, 104–232, 116+482.

[59] Minn. S. Co. v. Iverson, 91–30, 97+454.

[60] Gates v. Thatcher, 11–204(133); Kunkle v. Franklin, 13–127(119); Comer v. Folsom, 13–219(205); Wilson v. Buckman, 13–441(404); McCutcheon v. Freedom, 15–217(169).

BREACH OF PROMISE OF MARRIAGE

1087. The contract—The promise must be mutual. It is not enough that the defendant represented to third parties that he intended to marry the plaintiff. There must be a meeting of minds between the plaintiff and the defendant.[61] The promise, however, need not be express, but may be implied from the conduct of the parties.[62]

1088. Breach of promise—Time of fulfilment—Where an engagement of marriage is entered into to take place on the happening of a future event, the law implies that the promise will be fulfilled within a reasonable time thereafter, which may depend on the nature of the event.[63]

1089. Nature of action for breach—An action for the breach of a promise of marriage is sui generis. It is an action for breach of contract only in form and name and in many of its essential features has always been considered as one for a wilful tort.[64]

1090. Limitation of actions—The statute begins to run from the breach and not from the time of making the contract.[65]

1091. Demand before suit—It is unnecessary for the plaintiff to demand or request a fulfilment of the promise before bringing suit where the conduct of the defendant is such as to show unequivocally that he does not intend to fulfil it.[66]

1092. Want of chastity as a defence—One who contracts to marry another, knowing that the latter had previously been unchaste, is bound thereby. But subsequent unchastity is a defence.[67]

1093. Burden of proof—The plaintiff has the burden of proving the contract.[68] If unchaste conduct subsequent to the contract is relied upon as a defence, the burden of proving it is on the defendant.[69]

1094. Damages—In general—The law as to damages in this class of actions is exceptional, being in some respects analogous to the rules prevailing in actions for torts.[70] It is impracticable to lay down precise rules for the assessment of damages. Within reasonable limits, the measure of damages is a question for the sound discretion of the jury in each particular case. And in assessing the damages they may take into consideration the defendant's financial condition, the plaintiff's pecuniary loss, her loss of opportunities during her engagement to the defendant for contracting a suitable marriage with another, the disappointment of her reasonable expectations of material and social advantages resulting from the intended marriage, the injury to her health or feelings, the wounding of her pride, the blighting of her affections, and the marring of her prospects in life, by reason of defendant's promise and his refusal to keep it.[71] Where the plaintiff had broken her engagement with a third party at the solicitation of the defendant, it was held that her loss of opportunity to marry such third party was not an element of damages.[72]

1095. Exemplary damages—Exemplary damages are recoverable if the defendant enters into the engagement with improper motives and without intend-

[61] Tamke v. Vangsnes, 72–236, 75+217.
[62] Schmidt v. Durnham, 46–227, 49+126.
[63] Birum v. Johnson, 87–362, 92+1.
[64] Francis v. W. U. Tel. Co., 58 252, 262, 59+1078.
[65] Hanson v. Elton, 38–493, 38+614.
[66] Birum v. Johnson, 87–362, 92+1; Hill v. Jones, 109–370, 123+927.
[67] Johnson v. Travis, 33–231, 22+624; Clement v. Brown, 57–314, 59+198.
[68] Tamke v. Vangsnes, 72–236, 75+217.
[69] Johnson v. Travis, 33–231, 22+624.
[70] Johnson v. Travis, 33–231, 22+624; Beaulieu v. G. N. Ry., 103–47, 114+353.
[71] Hahn v. Bettingen, 81–91, 83+467; Johnson v. Travis, 33–231, 22+624; Tamke v. Vangsnes, 72–236, 75+217; Beaulieu v. G. N. Ry., 103–47, 114+353.
[72] Hahn v. Bettingen, 81–91, 83+467.

ing to perform it, and breaks it unjustifiably—when his conduct is wanton and ruthless, and of such a character as to manifest an intention unnecessarily to wound the woman's feelings, injure her reputation, and destroy her future prospects.[73] Whether it is necessary to plead the facts justifying an award of exemplary damages is an open question.[74] Where the conduct of the plaintiff was as bad as that of the defendant, it was held that she could not recover exemplary damages.[75] The award of exemplary damages in a proper case lies in the discretion of the jury.[76]

1096. Seduction in aggravation of damages—Seduction under promise of marriage being alleged in aggravation of damages, evidence of the sickness of the plaintiff immediately after the acts complained of has been held admissible.[77]

1097. Mitigation of damages—Evidence that the plaintiff shot the defendant has been held inadmissible in mitigation of damages.[78] The fact that the plaintiff broke her engagement with another man at the solicitation of the defendant has been held improperly considered in mitigation.[79] The defendant may prove the want of chastity of the plaintiff at the time of the engagement in mitigation of damages, though he knew of it at the time.[80]

1098. Excessive damages—Cases are cited below involving the excessiveness of damages.[81]

1099. Evidence—Admissibility—Cases are cited below involving the admissibility of evidence.[82]

1100. Evidence—Sufficiency—Cases are cited below involving the sufficiency of evidence to justify a verdict for the plaintiff.[83]

BREACH OF THE PEACE

1101. Use of abusive language—It is a misdemeanor to use in reference to and in the presence of another, or in reference to or in the presence of any member of the family of another, abusive or obscene language, intended, or naturally tending to provoke an assault or breach of the peace.[84]

[73] Johnson v. Travis, 33–231, 22+624; Clement v. Brown, 57–314, 59+198; Tamke v. Vangsnes, 72–236, 75+217; Sneve v. Lunder, 100–5, 110+99.

[74] Tamke v. Vangsnes, 72–236, 75+217. See Vine v. Casmey, 86–74, 90+158.

[75] Clement v. Brown, 57–314, 59+198.

[76] Sneve v. Lunder, 100–5, 110+99.

[77] Schmidt v. Durnham, 46–227, 49+126.

[78] Id.

[79] Hahn v. Bettingen, 81–91, 83+467.

[80] Clement v. Brown, 57–314, 59+198.

[81] Johnson v. Travis, 33–231, 22+624 (verdict for $750 sustained); Hanson v. Elton, 38–493, 38+614 (verdict for $2,500 sustained); Clement v. Brown, 57–314, 59+198 (verdict for $13,042—reduced by trial court to $7,000—new trial granted on appeal because exemplary damages were wrongly included); Hahn v. Bettingen, 84–512, 88+10 (verdict for $6,000—reduction by trial court to $4,000 sustained); Halness v. Anderson, 124+830 (held error for trial court to grant a new trial unless plaintiff would reduce her verdict for $1,500 to $500).

[82] Schmidt v. Durnham, 46–227, 49+126 (where seduction was charged evidence of plaintiff's sickness after sexual intercourse held admissible); Hahn v. Bettingen, 81–91, 83+467 (plaintiff's preparation for her marriage made in the absence of defendant and in no way connected with him held inadmissible); Hahn v. Bettingen, 84–512, 88+10 (fact that plaintiff was acquainted with defendant formerly when he was a married man held admissible); Birum v. Johnson, 87–362, 92+1 (reputation held admissible to prove defendant's financial ability); State v. Sortviet, 100–12, 110+100 (statements of plaintiff not made in presence of defendant).

[83] Hanson v. Elton, 38–493, 38+614; Schmidt v. Durnham, 46–227, 49+126; Hahn v. Bettingen, 84–512, 88+10; Hill v. Jones, 109–370, 123+927.

[84] Laws of 1907 c. 96. See State v. Clarke, 31–207, 17+344 (complaint must

1102. Recognizance to keep the peace—The statute authorizing a justice of the peace to commit a person to the county jail for six months who refuses to recognize to keep the peace is not in conflict with section 8 of article 6 of the constitution limiting the jurisdiction of justices of the peace. The offender may be required to pay the costs of prosecution or be committed until they are paid.[85]

BRIBERY

1103. What constitutes—To constitute the crime of asking for a bribe by a public officer "with the understanding or agreement that his vote," etc., "shall be influenced thereby," under G. S. 1894 § 6349 (R. L. 1905 § 4800), it is unnecessary that the party solicited for the bribe shall consent to give it, or that there shall be any meeting of minds or mutual understanding or agreement between him and the party asking for a bribe. It is sufficient if the latter is ready and willing to enter into a corrupt agreement or understanding that his vote, etc., shall be influenced by the bribe.[86] The essential elements of the crime of offering a bribe to a juror or judicial officer, under G. S. 1894 § 6348 (R. L. 1905 § 4799), include knowledge on the part of the accused of the official character or capacity of the person to whom the bribe is offered, the fact that the thing offered was something of value, and that it was offered with intent to influence his official action.[87] The bribing of a witness to absent himself from a trial to which he has been duly subpoenaed is punishable under G. S. 1894 § 6383 (R. L. 1905 § 4840).[88] Two persons must necessarily co-operate in bribery—the bribe-giver and the bribe-taker.[89] Asking for a bribe and offering or giving a bribe are distinct offences. The asking for a bribe by a member of a city council, with the understanding or agreement that he would corruptly use it to bribe or influence the votes or official action of his colleagues, constitutes a crime under G. S. 1894 § 6349 (R. L. 1905 § 4800). The influence of a member of a public body over the official action of his colleagues is itself a part of his own official action and duty.[90]

1104. Indictment for bribing juror—An indictment under G. S. 1894 § 6348 (R. L. 1905 § 4799) for offering a bribe to a juror must allege directly that the person to whom the bribe was offered was a juror; that the accused knew it; what was offered; that it was of value; and was offered with intent to influence the action of the juror as such.[91]

1105. Indictment for accepting bribe by police officer—An indictment under G. S. 1894 § 6327 (R. L. 1905 § 4800), charging a police officer with accepting a bribe from swindlers, has been held sufficient.[92] An indictment charging a mayor with accepting bribes from prostitutes has been held not double.[93]

1106. Corroboration—Accomplice—A person giving or offering a bribe is not an accomplice of the person receiving or asking for it, within the rule that a person cannot be convicted on the uncorroborated testimony of an accomplice.[94]

state the name of the person in reference to and in whose presence the language was used); State v. Shelby, 95-65, 103+725 (materiality of intent—test of the tendency of the language used to cause a breach of the peace not what the members of the jury would have done if it had been used toward them).

[85] State v. Sargent, 74-242, 76+1129.

[86] State v. Durnam, 73-150, 75+1127.

[87] State v. Howard, 66-309, 68+1096.

[88] State v. Sargent, 71-28, 73+626.

[89] Id.

[90] State v. Durnam, 73-150, 75+1127.

[91] State v. Howard, 66-309, 68+1096.

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

[93] State v. Ames, 91-365, 98+190.

[94] State v. Sargent, 71-28, 73+626; State v. Durnam, 73-150, 75+1127.

1107. Evidence—Admissibility—Cases are cited below involving the admissibility of evidence.[95]

1108. Evidence—Sufficiency—Cases are cited below holding the evidence sufficient [96] or insufficient [97] to warrant a conviction.

1109. Punishment—A sentence to the state prison for six years and six months has been held not cruel or unusual punishment.[98]

BRIDGES

Cross-References

See Navigable Waters, 6944.

1110. Part of highway—A public bridge is a part of the highway with which it is connected.[99]

1111. Legislative control—It is competent for the legislature to determine and enact that a particular bridge, a part of the public highway, shall be constructed in a prescribed manner, and within a fixed expense, by towns and counties within whose territorial limits it will lie when completed, and to determine in what proportion these several towns and counties shall contribute to defray the cost of its construction. Such determination and enactment are an exercise of legislative, and not of judicial, authority.[1]

1112. Width—A bridge has been held to be sixteen feet wide, within the statutory rule, though there were wheel guards within the sixteen feet.[2]

1113. Contracts for construction of bridges—Cases are cited below involving contracts for the construction of bridges.[3]

1114. Duty to rebuild—The duty to keep a bridge in repair ordinarily includes the duty of rebuilding it when destroyed by any means. The counties

[95] State v. Durnam, 73–150, 75+1127 (trial of member of a city council for asking a bribe—proceedings of council in relation to the matter in connection with which the bribe was sought and conversations of accused explanatory of conversation in which he asked for the bribe held admissible); State v. Gardner, 88–130, 92+529 (trial of a police officer for accepting a bribe from confidence men on condition that he would not arrest them—his acts and declarations and those of the confidence men tending to show the state of facts that would naturally follow such a corrupt agreement held admissible—acts and declarations of such confidence men and of other members of the police force concerning unrelated crimes held inadmissible); State v. Ames, 90–183, 96+330 (trial of a superintendent of police for accepting bribes from lewd women for "protection"—evidence of other similar crimes held admissible to show intent and system and to connect accused with the person making the collections).

[96] State v. Durnam, 73–150, 75+1127; State v. Ames, 90–183, 96+330.

[97] State v. Ames, 91–365, 98+190.

[98] State v. Durnam, 73–150, 75+1127.

[99] R. L. 1905 § 5514(5); Guilder v. Dayton, 22–366, 370; Willis v. Winona, 59–27, 33, 60+814.

[1] Guilder v. Dayton, 22–366.

[2] Gillette v. Aitkin County, 69–297, 72+123. See R. L. 1905 § 1195.

[3] Guilder v. Dayton, 22–366 (acceptance of bridge by county board conclusive on towns and counties in absence of fraud or mistake); Evans v. Stanton, 23–368 (the acceptance of a bridge by a committee of a county board held a valid acceptance by the board—a contract for a bridge held not void as involving an expenditure or indebtedness greater than had been voted at a town meeting); Gillette v. Aitkin County, 69–297, 72+123 (held unnecessary for county board to advertise for bids or to award a bridge contract to the lowest bidder); Le Tourneau v. Hugo, 90–420, 97+115 (the general provisions of the charter of Duluth requiring all public work to be let to the lowest bidder held applicable to the bridge authorized by Laws 1901 c. 75); Pillager v. Hewett, 98–265, 107+815 (a municipality held not entitled to recover money paid on a contract which was void because not entered into as provided by statute, the other party having performed in good faith).

of Renville and Redwood have been held bound to rebuild a bridge originally built under Laws 1889 c. 271 and destroyed by wear and decay.[4]

1115. Duty of town board—Town boards are required to keep all bridges within their towns in repair.[5]

1116. Authority of county boards to construct—The authority conferred upon county boards by Laws 1899 c. 192, to appropriate money for the building of bridges included the power to contract for their construction, and extended to bridges on town roads.[6] A contract of a county board for a bridge has been held unauthorized unless ratified by a vote of the electors of the county.[7]

1117. Duty of county board to repair—The statutes do not impose upon a county board an absolute duty to keep bridges in repair.[8]

1118. Approaches—An approach to a bridge across the Mississippi at Winona has been held not to render the city liable for damages to abutting property and not to be an additional servitude on the street.[9] A municipality is bound to exercise reasonable care to keep the approaches to its bridges in a safe condition.[10]

1119. Special assessments—The charter of Minneapolis has been held not to authorize the levy of special assessments on adjacent property to pay for paving approaches to a bridge crossing railway tracks.[11]

1120. Liability of municipalities for defective bridges—A municipality which is given exclusive control of its bridges is required to exercise reasonable care in keeping them in a safe condition and is liable to any person who is injured as a result of the want of such care.[12] It is bound to provide the approaches to its bridges with such barriers or guards as may be necessary for the safety of travelers.[13] It must keep its bridges safe for such use as may be reasonably anticipated. Whether a bridge has been maintained in a safe condition is a question for the jury, unless the evidence is conclusive.[14] If a defect is due to negligent construction, and is not latent, the municipality is liable without notice of the defect.[15] Contributory negligence will defeat recovery as in other cases.[16] The city of St. Paul has been held bound, as a result of an extension of its limits, to keep a bridge near Fort Snelling in safe condition.[17]

1121. Actions—Pleading—Cases are cited below involving questions of pleading in actions for defective bridges.[18]

1122. Various special acts—Construction—Cases are cited below involving the construction of various special acts.[19]

BRIEFS—See Appeal and Error, 353–356.
BRINGING IN PARTIES—See Parties, 7328.

[4] State v. Renville County, 83–65, 85+830.
[5] Id.
[6] Bayne v. Wright County, 90–1, 95+456.
[7] Gillette v. Aitkin County, 69–297, 72+123.
[8] State v. Renville County, 83–65, 68, 85+830.
[9] Willis v. Winona, 59–27, 60+814.
[10] Grant v. Brainerd, 86–126, 90+307.
[11] State v. Smith, 99–59, 108+822.
[12] Shartle v. Minneapolis, 17–308(284); Moore v. St. Paul, 82–494, 85+163; Lenz v. St. Paul, 87–85, 91+256; McDonald v. Duluth, 93–206, 100+1102.
[13] Grant v. Brainerd, 86–126, 90+307. See McDonald v. Duluth, 93–206, 100+1102.
[14] Anderson v. St. Cloud, 79–88, 81+746; Grant v. Brainerd, 86–126, 90+307.
[15] McDonald v. Duluth, 93–206, 100+1102.
[16] Anderson v. St. Cloud, 79–88, 81+746.
[17] Moore v. St. Paul, 82–494, 85+163.
[18] Shartle v. Minneapolis, 17–308(284) (complaint in action against municipality for damages resulting from a defective bridge sustained); Berry v. Dole, 87–471, 92–334 (complaint for injuries resulting from a defective private bridge held insufficient).
[19] Guilder v. Otsego, 20–74(59) (Sp. Laws 1870 c. 100 providing for the construction of a bridge across the Crow river near Dayton and distributing the expense between two towns and two counties); Guilder v. Dayton, 22–366 (id.); Greenman v. Mower County, 62–397, 64+1142 (Sp. Laws 1885 c. 175 authorizing the county board to construct a bridge in the city of Austin).

BROKERS

IN GENERAL

1123. Definition—A broker is a person engaged for others in the negotiation of contracts relative to property, with the custody of which he has no concern.[20]

1124. Breach of contract by principal—Damages—Evidence—An action for damages will lie for the breach of a contract of brokerage by the principal. The damages recoverable are not merely discretionary with the jury. They include such loss of profits, past and future, as are shown by the evidence to have proximately resulted from a breach of the contract, excluding from the award all uncertain and conjectural profits. Evidence of sales made subsequent to the breach and during the pendency of the contract term, though made by the principal through other agents than the plaintiffs, is admissible in evidence, and under proper direction by the court may be weighed by the jury in estimating prevented gains.[21]

1125. Brokers for miscellaneous purposes—Cases are cited below involving a brokerage to sell fish;[22] to secure a tenant;[23] to purchase and sell grain;[24] to procure a purchaser for a saloon.[25]

STOCK BROKERS

1126. Dealing in futures—A broker who makes advances for his principal and aids him in "operating in futures," with notice of the unlawful intent of the latter and of the real character of the transactions, cannot recover his commissions and advances.[26]

1127. Authority to advance margins—A broker has been held to have implied authority to advance money to pay margins for a principal.[27]

1128. Evidence of contract—Sufficiency—Evidence held sufficient to justify a finding that the defendant agreed to pay the plaintiff commissions for the sale of certain shares of its corporate stock.[28]

LOAN BROKERS

1129. Time in which to secure loan—In the absence of special agreement a broker has a reasonable time in which to secure a loan.[29]

1130. Borrower to make good title—A borrower, when employing a broker to secure a loan, does so on the implied condition, if there is no express agreement, that he has the ability and will make or tender to the lender a title free from infirmity or defect.[30]

1131. Principal securing loan—Where a broker is authorized to secure a loan for the owner of realty, as exclusive agent, for the purpose of taking up a mortgage, the owner impliedly reserves the right to obtain the loan himself, and.

[20] Bouvier, Law Dict.

[21] Emerson v. Pacific etc. Co., 96-1, 104+573.

[22] Id.

[23] Hobart v. Sherburne, 66-171, 68+841; Clark v. Dayton, 87-454, 92+327; Gallagher v. Bell, 89-291, 94+867.

[24] Robbins v. Blanding, 87-246, 91+844; Elliott v. McAllister, 106-25, 117+921.

[25] Swindells v. Dupont, 88-9, 92+468.

[26] Mohr v. Miesen, 47-228, 49+862. See Nichols v. Howe, 43-181, 45+14; Van Dusen v. Jungeblut, 75-298, 77+970; McCarthy v. Weare, 87-11, 91+33; Robbins v. Blanding, 87-246, 91+844; Braucht v. Graves, 92-116, 99+417; Askegaard v. Dalen, 93-354, 101+503.

[27] Van Dusen v. Jungeblut, 75-298, 77+970.

[28] Camp v. Minn. C. Co., 89-252, 94+687.

[29] Peterson v. Hall, 61-268, 63+733.

[30] Peet v. Sherwood, 43-447, 45+859.

if he concludes his arrangements before a person ready, willing, and able to take the loan is furnished, the broker is not entitled to commissions. Whether the loan is secured by the owner from a third party, or by a renewal through agreement with the person holding the note and mortgage, is immaterial, so far as concerns the broker's rights to commissions under the implied obligations of the latter's agency.[31]

1132. Commission when earned—The rights and duties of a broker employed to secure a loan depend upon the same principles which govern a broker employed to find a purchaser of property. He is entitled to his commission when he has procured a lender ready, willing, and able to lend the money on the authorized terms.[32]

1133. Lien—When a broker is intrusted with possession of property, in respect to which he negotiates, he is entitled to a lien thereon, or on the proceeds thereof in his possession, for his commission.[33]

1134. Evidence of agency and performance—Sufficiency—Evidence held sufficient to show an agency to procure a loan and a performance.[34]

REAL ESTATE BROKERS

1135. License—A broker negotiating a sale without first having obtained a license in accordance with a valid city ordinance, has been held not entitled to recover a commission for his services.[35]

1136. Necessity of employment—A broker cannot recover a commission unless he was employed by the owner to render the services for which a commission is sought,[36] or unless the owner has ratified his unauthorized acts.[37]

1137. Contract of employment—A mere unilateral instrument, without mutuality of obligation, has been held not a contract of employment.[38] Cases are cited below involving the construction of particular contracts.[39]

1138. Necessity of written authority—The authority of a broker to sell realty must be in writing,[40] but he may recover his commission for a sale though his authority was not in writing.[41]

1139. Application of general principles of agency—A broker is an agent, and subject to the general rules that govern the relation of principal and agent. Thus it has been held that a broker owes the utmost good faith and loyalty to his principal;[42] that all profits and benefits arising out of the agency belong to the principal;[43] that the unauthorized acts of a broker may be ratified by his principal;[44] and that a third party dealing with a broker is bound to ascertain his authority.[45]

[31] Mott v. Ferguson, 92–201, 99+804.

[32] Peet v. Sherwood, 43–447, 45+859; Id., 47–347, 50+241, 929; Scovell v. Upham, 55–267, 56+812; Peterson v. Hall, 61–268, 63+733; Bacon v. Rupert, 39–512, 40+832.

[33] Peterson v. Hall, 61–268, 63+733.

[34] Bacon v. Rupert, 39–512, 40+832.

[35] Buckley v. Humason, 50–195, 52+385.

[36] Walton v. Clark, 54–341, 56+40. See, as to the existence of an agency, Coffin v. Linxweiler, 34–320, 25+636; Stillman v. Fitzgerald, 37–186, 33+564; Fife v. Blake, 38–426, 38+202; McKinney v. Harvie, 38–18, 35+668; Harris v. McKinley, 57–198, 58+991; Crosby v. St. P. Lake Ice Co., 74–82, 76+958; Kingsley v. Wheeler, 95–360, 104+543; British etc. Co. v. Western L. & S. Co., 99–429, 109+826; Devlin v. Fox, 99–520, 109+241; Shaw v. Goldman, 109–213, 123+475.

[37] Stillman v. Fitzgerald, 37–186, 33+564.

[38] Stensgaard v. Smith, 43–11, 44+669. See Lapham v. Flint, 86–376, 90+780; Emerson v. Pacific etc. Co., 96–1, 104+573.

[39] Little v. Rees, 34–277, 26+7; Davis v. Peterson, 59–165, 60+1007; Vaughan v. McCarthy, 59–199, 60+1075; Lapham v. Flint, 86–376, 90+780; Stauff v. Bingenheimer, 94–309, 102+694.

[40] See § 8882.

[41] Vaughan v. McCarthy, 59–199, 60+1075.

[42] Kingsley v. Wheeler, 95–360, 104+543.

[43] Snell v. Goodlander, 90–533, 97+421; Schick v. Suttle, 94–135, 102+217; Remple v. Hopkins, 101–3, 111+385. See § 194.

[44] Goss v. Stevens, 32–472, 21+549; Dana v. Turlay, 38–106, 35+860; Cummings v. Newell, 86–130, 90+311. See Stillman v. Fitzgerald, 37–186, 33+564; Jackson v.

1140. Parol evidence—Where A's commission depends upon a written contract between B and C, parol evidence is inadmissible to vary the terms of the contract in an action by A against B for his commission.[46]

1141. Exclusive agency—An exclusive agency to sell merely prohibits the appointment of another agency for the sale of the property. It does not prevent the owner himself from making a sale.[47] An exclusive agency to sell is not a restraint on the power of alienation.[48]

1142. Powers—A broker employed to find a purchaser for land or to sell land has no implied authority to execute a contract of sale.[49] Authority to sell land is authority only to sell for cash on delivery of the deed, in the absence of an express contrary agreement.[50] If a broker is instructed to sell on specified terms a sale on other terms is unauthorized, even though they are more favorable,[51] but an unauthorized sale may be ratified.[52] A power not under seal to "sell" realty authorizes a broker to make an executory contract to sell.[53] An agent with authority to sell certain land of his principal has no implied authority to assign to one with whom he contracts for a sale the rent to accrue from tenants during the pendency of negotiations, or from the date of the contract to the completion of the transaction.[54]

1143. Duty to disclose facts to principal—An agent who is authorized by his principal to sell or exchange the property of the latter upon specified prices and terms is bound upon learning that a more advantageous sale or exchange can be made, the facts concerning which are unknown to the principal, to communicate the same to him before making the sale as expressly authorized, and his failure to do so amounts to a fraud in law.[55]

1144. Cannot act for himself—It is the general rule that a broker employed to sell property cannot purchase it except with the full knowledge and consent of the principal.[56] And a broker employed to purchase property cannot purchase his own property without the full knowledge and consent of his principal.[57]

1145. Fraud of broker—Cases are cited below involving liability for the fraud of a broker.[58]

1146. Acting for both parties—It is the general rule that a broker cannot act for both parties without their knowledge and consent,[59] but this does not

Badger, 35–52, 26+908; Minor v. Willoughby, 3–225(154).

[45] Dayton v. Buford, 18–126(111); Gund v. Tourtelotte, 108–71, 121+417.

[46] Current v. Muir, 99–1, 108+870.

[47] Dole v. Sherwood, 41–535, 43+569.

[48] Fairchild v. Rogers, 32–269, 20+191.

[49] Larson v. O'Hara, 98–71, 107+821; Stillman v. Fitzgerald, 37–186, 33+564. See Peterson v. O'Connor, 106–470, 119+243.

[50] Marble v. Bang, 54–277, 55+1131.

[51] Dayton v. Buford, 18–126(111); Jackson v. Badger, 35–52, 26+908; Hornsby v. Hause, 35–369, 29+119.

[52] See §§ 176, 1147.

[53] Jackson v. Badger, 35–52, 26+908; Peterson v. O'Connor, 106–470, 119+243.

[54] Gund v. Tourtelotte, 108–71, 121+417.

[55] Holmes v. Cathcart, 88–213, 92+956; Barringer v. Stoltz, 39–63, 38+808; Snell v. Goodlander, 90–533, 97+421; Kingsley v. Wheeler, 95–360, 104+543.

[56] Tilleny v. Wolverton, 46–256, 48 908; Merriam v. Johnson, 86–61, 90+116; Kingsley v. Wheeler, 95–360, 104+543. See Selover v. Isle Harbor L. Co., 91–451, 459, 98+344.

[57] Friesenhahn v. Bushnell, 47–443, 50+597.

[58] Davies v. Lyon, 36–427, 31+688 (liability of principal to purchaser); Clark v. Lovering, 37–120, 33+776 (liability of broker to purchaser); Hegenmyer v. Marks, 37–6, 32+785 (fraud of broker on principal—purchaser with notice—rescission of sale); Coe v. Ware, 40–404, 42+205 (principal negotiating an exchange of lands—broker held not liable to principal for misrepresentations made in good faith) Hillis v. Stout, 42–410, 44+982 (complaint of principal against broker for fraud held sufficient); Bartleson v. Vanderhoff, 96–184, 104+820 (principal held not entitled to recover against broker for fraud where he executed contract with knowledge of fraud).

[59] Webb v. Paxton, 36–532, 32+749;

apply where the broker is employed merely as a middleman to bring the parties together and without any discretionary power as to the terms of sale.[60] If both parties with full knowledge consent to a double employment the broker can recover from both.[61]

1147. When commission earned—A broker is entitled to his commission when he has performed all that he undertook to perform.[62] This necessarily depends on the agreement of the parties.[63] In the absence of a contrary agreement a broker to sell realty is entitled to his commission when he produces a purchaser ready, willing, and able, to purchase the property on the terms fixed by the owner,[64] or when he obtains a contract from a proposed purchaser able to buy whereby he is legally bound to buy on the authorized terms.[65] It is not enough for the broker to find a purchaser; he must produce him—bring the parties together.[66] It is unnecessary that the principal and purchaser actually be brought face to face, but the principal must be notified that such a purchaser has been found and afforded a full opportunity to make a binding contract with him for the sale of the land on the terms authorized.[67] Where a broker, employed, for a commission to be paid, to procure a purchaser for property, presents to the principal a proposed purchaser, it is for the principal then to decide whether the person presented is acceptable; and if, without any fraud, concealment, or other improper practice on the part of the broker, the principal accepts the person presented, and enters into an enforceable contract with him for the purchase of the property, the commission is fully earned. The party presented is then a purchaser within the meaning of the contract between the principal and the broker, though the sale has not been completed by the payment of the consideration to the vendor.[68] But the contract between the owner and broker may be such as to require the sale to be fully consummated before the broker is entitled to his commission.[69] Merely introducing a person who contem-

Crump v. Ingersoll, 44–84, 46+141; Id., 47–179, 49+739; Macfee v. Horan, 45–519, 48+405; Miller v. Miller, 47–546, 50+612; Hobart v. Sherburne, 66–171, 68+841; Dartt v. Sonnesyn, 86–55, 90+115; Turner v. Fryberger, 94–433, 103+217.

[60] Hobart v. Sherburne, 66–171, 175, 68+841; Dartt v. Sonnesyn, 86–55, 57, 90+115.

[61] Wasser v. Western L. S. Co., 97–460, 107+160.

[62] Goss v. Broom, 31–484, 18+290.

[63] See, for the construction of particular agreements, Goss v. Broom, 31–484, 18+290; Olsen v. Jodon, 38–466, 38+485; Flower v. Davidson, 44–46, 46+308; Forbes v. Bushnell, 47–402, 50+368; In re Harrison, 58–445, 60+24; Crosby v. St. Paul Lake Ice Co., 74–82, 76+958; Sherburne v. Eells, 92–114, 99+419; Current v. Muir, 99–1, 108+870; Anderson v. Stewart, 104–532, 116+1133; Goodwin v. Siemen, 106–368, 118+1008; Frye v. Wakefield, 107–291, 120+35.

[64] Armstrong v. Wann, 29–126, 12+345; Goss v. Broom, 31–484, 18+290; Goss v. Stevens, 32–472, 21+549; Little v. Rees, 34–277, 26+7; Hamlin v. Schulte, 34–534, 27+301; Ferguson v. Glaspie, 38–418, 38+352; Burke v. Cogswell, 39–344, 40+251; Putnam v. How, 39–363, 40+258; Crevier v. Stephen, 40–288, 41+1039; Grosse v. Cooley, 43–188, 45+15; Cullen v. Bell, 43–226, 45+428; Peet v. Sherwood, 43–447, 45+859; Francis v. Baker, 45–83, 47+452; Gauthier v. West, 45–192, 47+656; Macfee v. Horan, 45–519, 48+405; Hubachek v. Hazzard, 83–437, 86+426; Fairchild v. Cunningham, 84–521, 88+15; Clark v. Dayton, 87–454, 92+327; Sherburne v. Eells, 92–114, 99+419; Torpey v. Murray, 93–482, 101+609; Stauff v. Bingenheimer, 94–309, 102+694; McDonald v. Smith, 99–42, 108+290; Coon v. St. P. etc. Co., 101–391, 112+526, 862; Holcomb v. Stafford, 102–233, 113+449; Lowry v. Johnson, 102–510, 113+1134; Annabil v. Traverse L. Co., 108–37, 121+233.

[65] McDonald v. Smith, 99–42, 108+290; Id., 101–476, 112+627.

[66] Baars v. Hyland, 65–150, 67+1148.

[67] McDonald v. Smith, 99–42, 108+290.

[68] Francis v. Baker, 45–83, 47+452; Macfee v. Horan, 45–519, 48+405; Rothschild v. Burritt, 47–28, 49+393; Goss v. Stevens, 32–472, 21+549; Flynn v. Jordal, 100 (Iowa)+326. See, as to the effect of an inability of the purchaser to perform, Snyder v. Fidler, 101 (Iowa)+130; 18 Harv. L. Rev. 309.

[69] Crevier v. Stephen, 40–288, 41+1039; Yeager v. Kelsey, 46–402, 49+199; Cremer v. Miller, 56–52, 57+318; Harris v. McKinley, 57–198, 58+991; Flower v. Davidson, 44–46, 46+308; Gauthier v. West, 45–

plates purchasing, but who is not ready, willing, or able to make a purchase on the terms imposed by the owner, does not entitle the agent to a commission.[70] As a general rule a broker is not entitled to a commission unless he is successful in finding a purchaser. Merely trying in good faith to secure a purchaser will not entitle him to a commission in the absence of express agreement.[71]

1148. Necessity of complete performance—Where a broker was employed for a fixed amount to find a purchaser for a farm, and he found a purchaser for a portion of the farm, to whom a sale was made, it was held that he could recover nothing.[72] Where a contract is severable a broker may recover for a part performance.[73]

1149. Broker must be procuring cause of sale—A broker is not entitled to a commission unless he was the procuring cause of the sale, that is, it must have been the direct result of his efforts to bring it about. And a broker seeking to recover a commission has the burden of proving this affirmatively.[74]

1150. Sale on unauthorized terms—Where an owner authorizes a broker to sell on certain terms, a sale by the broker on different terms, though apparently more favorable to the owner, does not bind the owner.[75]

1151. Variation of terms—To entitle a broker to a commission for procuring a purchaser of property on specified terms, he must produce a person ready, willing, and able to purchase on those terms,[76] or upon such modified terms as the owner accepts and ratifies.[77] If a broker is the procuring cause of a sale he may recover his commission, though the sale was on other terms than those upon which he was authorized to negotiate. An owner cannot escape paying a commission to his broker by selling at a lower price than that named to the broker.[78] But where an owner agrees to give a broker all he can get for property above a fixed amount, and the broker procures a purchaser who is willing to pay the amount fixed, but no more, and a sale is made for that amount, the broker is not entitled to recover anything.[79] Where a broker was authorized to negotiate a sale of property, and he negotiated an exchange thereof which was assented to by the owner, it was held that he was entitled to a commission.[80]

1152. Sale by owner—An owner who has employed a broker to sell his property may himself sell it without becoming liable to the broker for a commission, if he did not give the broker the exclusive right to sell, and does not sell to a purchaser procured by the broker. He may sell to a purchaser with whom the broker has negotiated, if the negotiation has been abandoned, or he is justifiably

192, 47+656; Van Norman v. Fitchette, 100–145, 110+851; Goodwin v. Siemen, 106–368, 118+1008.

[70] Clark v. Dayton, 87–454, 92+327.

[71] Sherburne v. Eells, 92–114, 99+419. See Crosby v. St. P. Lake Ice Co., 74–82, 76+958.

[72] Weber v. Clark, 24–354. See Bates v. Reynolds, 92–392, 100+1123.

[73] Stauff v. Bingenheimer, 94–309, 102+694; Goodspeed v. Miller, 98–457, 108+817.

[74] Armstrong v. Wann, 29–126, 12+345; Francis v. Eddy, 49–447, 52+42; Hubachek v. Hazzard, 83–437, 86+426; Jaeger v. Glover, 89–490, 95+311; Steidl v. McClymonds, 90–205, 95+906; Studer v. Byson, 92–388, 100+90. See Anderson v. Olson, 109–432, 124+3.

[75] Dayton v. Buford, 18–126(111).

[76] Hamlin v. Schulte, 31–486, 18+415; Bradford v. Menard, 35–197, 28+248; Marble v. Bang, 54–277, 55+1131; Fairchild v. Cunningham, 84–521, 88+15; Rutherford v. Selover, 87–495, 92+413; Quist v. Goodfellow, 99–509, 110+65. See Hornsby v. Hause, 35–369, 29+119. The same rule applies to a lease. Buxton v. Beal, 49–230, 51+918.

[77] Goss v. Stevens, 32–472, 21+549; Harriott v. Holmes, 77–245, 79+1003. See Dana v. Turlay, 38–106, 35+860.

[78] Hubachek v. Hazzard, 83–437, 86+426; Jaeger v. Glover, 89–490, 95+311; Steidl v. McClymonds, 90–205, 95+906; Reishus v. Benner, 91–401, 98+186; Theobald v. Hopkins, 93–253, 101+170; Coon v. St. P. etc. Co., 101–391, 112+526, 862. See Quist v. Goodfellow, 99–509, 110+65; Reid v. McNerney, 103(Iowa)+1001; Oliver v. Katz, 111(Wis.)+509.

[79] Holcomb v. Stafford, 102–233, 113+449.

[80] Hewitt v. Brown, 21–163. See British etc. Co. v. Western L. & S. Co., 99–429, 109+826.

ignorant of its pendency.[81] If the owner has given the broker the exclusive right to sell, he cannot himself sell without becoming liable to the broker for a commission.[82] Where a landowner agrees with his agent, employed to take charge of and sell his lands upon commission, that he will allow the latter certain commissions on sales made by himself, he is only liable in case actual sales are made. A transfer of the lands by the owner to secure his debts will not entitle the agent to commissions.[83] If the owner has reasonable cause to believe that a purchaser was sent to him through the instrumentality of the broker, he is liable to the broker for a commission on a sale.[84] Where a real estate broker has at the request of the owner of realty secured a customer who enters into negotiations with his principal, and such owner thereupon expressly agrees with the broker that he will pay him a specified sum as commissions, if such negotiations are finally successfully completed, and a sale or exchange is finally consummated on terms agreed upon between the parties thereto, the broker is entitled to the stipulated commissions.[85] Where the owner of realty, which he has listed with an agent for sale for a definite price, sells the same to a person who was induced to purchase it by the efforts of the agent, but in good faith and in ignorance of those efforts, and for a consideration less than that given the agent, he is not, there being no exclusive agency, liable for the commission agreed to be paid for the production of a purchaser ready, able, and willing to buy.[86]

1153. Sale defeated by owner—Defective title—Where the broker has fully performed, his right to a commission is not defeated by inability or refusal of the owner to consummate a sale with the proposed purchaser.[87] This rule is applied where the owner's wife refuses to join in a conveyance,[88] and where his title is defective.[89] If a principal refuses to execute a deed pursuant to the terms of a sale made by his authorized agent, and notifies the agent that he will not execute such deed, neither the agent nor the purchaser is required to tender the purchase money before the agent can legally bring suit for his services in making sale of such land.[90]

1154. Purchaser's ability to perform—Presumption—It is presumed that the purchaser produced by the broker is solvent and financially able to perform the proposed contract.[91]

1155. Amount of compensation—The amount of compensation necessarily depends upon particular contract between the parties.[92] In the absence of agreement a broker is entitled to recover the reasonable value of his services.[93]

[81] Armstrong v. Wann, 29–126, 12+345; Putnam v. How, 39–363, 40+258; Dole v. Sherwood, 41–535, 43+569; Cullen v. Bell, 43–226, 45+428; Cathcart v. Bacon, 47–34, 49+331; Baars v. Hyland, 65–150, 67+1148; Fairchild v. Cunningham, 84–521, 88+15; Henninger v. Burch, 90–43, 95+578; Studer v. Byson, 92–388, 100+90. See Jaeger v. Glover, 89–490, 95+311.

[82] Fairchild v. Rogers, 32–269, 20+191; Lapham v. Flint, 86–376, 90+780. See Stensgaard v. Smith, 43–11, 44+669.

[83] Terry v. Wilson's Estate, 50–570, 52+973.

[84] Henninger v. Burch, 90–43, 95+578; Lemon v. De Wolf, 89–465, 95+316; Quist v. Goodfellow, 99–509, 110+65; Seeley v. Grimes, 93–331, 101+1134.

[85] Haug v. Haugen, 51–558, 53+874.

[86] Quist v. Goodfellow, 99–509, 110+65.

[87] Goss v. Stevens, 32–472, 21+549; Hamlin v. Schulte, 34–534, 27+301; Peavey v. Greer, 108–212, 121+875. See Lathrop v. O'Brien, 44–15, 46+147 (refusal to purchase land and to cut timber held not to defeat commission).

[88] Hamlin v. Schulte, 34–534, 27+301; Marlin v. Sipprell, 93–271, 101+169.

[89] Peet v. Sherwood, 43–447, 45+859; Gauthier v. West, 45–192, 47+656; Vaughan v. McCarthy, 59–199, 60+1075. See Flower v. Davidson, 44–46, 46+308; Cremer v. Miller, 56–52, 57+318.

[90] Vaughan v. McCarthy, 59–199, 60+1075.

[91] Goss v. Broom, 31–484, 18+290; Crevier v. Stephen, 40–288, 41+1039; Grosse v. Cooley, 43–188, 45+15. See Long v. Henry, 102–514, 113+1134 (evidence held to show that purchaser was ready, able, and willing, to purchase).

[92] See Bates v. Reynolds, 92–392, 100+1123; Hobart v. Stewart, 99–394, 109+704;

1156. Breach of contract by principal—Damages—Upon a breach by the principal of a contract for an exclusive agency, the broker may recover damages equal to the profit which would have accrued directly from the performance of the contract.[94]

1157. Employment of subagent—It is unnecessary that a broker should personally find a purchaser. He may act through a subagent.[95] A subagent must exercise the utmost good faith toward the owner and his principal.[96]

1158. Employment of several brokers—An owner may employ several different brokers to secure a purchaser for the same piece of property,[97] and in such a case the broker who is the procuring cause of a sale is entitled to the commission to the exclusion of the others.[98]

1159. Sale by several agents—Division of commission—Several brokers may join in the negotiation of a sale under an agreement to divide the commission.[99]

1160. Revocation and termination of authority—An owner may employ several different brokers to sell the same piece of property and a sale by one will operate as a revocation of the authority of the others.[1] As a general rule the authority of a broker is revocable at the will of the principal.[2] Efforts of a broker to sell land after his authority from the owner to do so has terminated must be deemed to be voluntary, and are ineffectual to entitle him to a commission on a sale made by the owner himself subsequent to the expiration of such authority.[3] If a broker is the procuring cause of a sale he may recover his commission, though the transfer is not completed until after the termination of the agency.[4]

1161. Action for commission—Pleading and evidence—Cases are cited below involving questions of pleading,[5] and the admissibility[6] and sufficiency[7] of evidence, in actions by brokers for commissions.

British etc. Co. v. Western L. & S. Co., 99–429, 109+826.

[93] Annabil v. Traverse L. Co., 108–37, 121+233. See Collins v. De Mars, 107–566, 119+1134.

[94] Fairchild v. Rogers, 32–269, 20+191.

[95] Henninger v. Burch, 90–43, 95+578. See Wass v. Atwater, 33–83, 22+8.

[96] Barnett v. Block, 94–138, 102+390.

[97] Ahern v. Baker, 34–98, 24+341.

[98] Francis v. Eddy, 49–447, 52+42.

[99] Smith v. Barringer, 37–94, 33+116; Hanson v. Diamond I. M. Co., 87–505, 92+447. See Theobald v. Hopkins, 93–253, 101+170.

[1] Ahern v. Baker, 34–98, 24+341.

[2] See Stensgaard v. Smith, 43–11, 44+669; Fairchild v. Cunningham, 84–521, 88+15; Reishus v. Benner, 91–401, 98+186; Kingsley v. Wheeler, 95–360, 104+543; Coon v. St. P. etc. Co., 101–391, 112+526, 862.

[3] Fairchild v. Cunningham, 84–521, 88+15.

[4] Jaeger v. Glover, 89–490, 95+311. See Harriott v. Holmes, 77–245, 79+1003.

[5] McAllister v. Welker, 39–535, 41+107 (complaint held sufficient); MacFee v. Horan, 40–30, 41+239 (defence that broker was acting double inadmissible under general denial); Rothschild v. Burritt, 47–28, 49+393 (release or waiver of commission inadmissible under a general denial); Harriott v. Holmes, 77–245, 79+1003 (complaint sufficient); Hanson v. Diamond I. M. Co., 87–505, 92+447 (fact that money received by broker was not paid as a commission admissible under general denial); Lemon v. De Wolf, 89–465, 95+316 (complaint held sufficient—variance); Reishus v. Benner, 91–401, 98+186 (complaint for reasonable value of services—defence that services were rendered under an express contract inadmissible under a general denial); Remple v. Hopkins, 101–3, 111+385 (complaint held sufficient and not to show bad faith on part of broker); Annabil v. Traverse L. Co., 108–37, 121+233 (answer a general denial—right of broker to commission from both parties not in issue).

[6] Grosse v. Cooley, 43–188, 45+15 (contract signed by broker and proposed purchaser); Rothschild v. Burritt, 47–28, 49+393 (evidence that property had been conveyed to proposed purchaser held immaterial and harmless—contract signed by proposed purchaser held admissible); Buxton v. Beal, 49–230, 51+918 (parol evidence admissible to show that contract was merely provisional); Dartt v. Sonnesyn, 86–55, 90+115 (custom of brokers to charge commissions from both parties in an exchange of property inadmissible); Davies v. Thomas, 87–301, 91+1100 (stipulation in action by broker against purchaser for re-

1162. Liability of purchaser—Where a broker is employed by each party, with notice that he is acting in the matter for the other, and with such notice each agrees to pay him his commission, he can recover from both.[8] Where a broker is employed by the owner of lands to exchange the same for other property, and a third person, having information thereof from the broker, communicates through him with the owner of the land, and effects a trade, the relation of principal and agent between the broker and the owner forbids any legal inference that there is an implied promise by such third party, based upon benefits to him, to pay the broker a commission.[9]

BROTHEL—See Contracts, 1876; Disorderly House.

BUILDING AND LOAN ASSOCIATIONS

1163. Nature and object—A building and loan association is defined by statute to be a corporation, under public control, authorized solely to accumulate funds to be loaned to members to assist in acquiring homes.[10] The general design of such an association is the accumulation, from fixed periodical contributions of its shareholders or members, and from the profits derived from the investment of the same, of a fund, to be applied from time to time in accommodating such shareholders with loans, to enable them to acquire and improve real estate by building thereon; the conditions of the loans being such that the liability incurred therefor may be gradually extinguished by means of the borrower's periodical contributions upon his stock, so that when the latter shall be fully paid up the amount paid shall be sufficient to cancel the indebtedness. Members who do not become borrowers secure the incidental benefit of a profitable investment of their contributions to the capital stock in the loans made to borrowing members.[11] Such associations have been characterized as "creatures of statute," [12] and "creatures of the state." [13] Mutuality is one of the basic ideas of such an association.[14] So-called building and loan associations are sometimes merely savings and loan associations and are not conducted in accordance with the theory of a building and loan association stated above.[15]

1164. Articles of incorporation—Contract—The articles of incorporation of an association formed under the general laws of the state are its charter, and,

fusal to carry out contract of purchase admissible); Rutherford v. Selover, 87–495, 92+413 (conversations between plaintiff and proposed purchaser in absence of defendant inadmissible); White v. Collins, 90–165, 95+765 (conversations between the parties admissible—fact that purchaser was taken to the land by a person employed by the plaintiff admissible—admissions of the defendant admissible); McDonald v. Smith, 99–42, 108+290 (conversations between broker and purchaser communicated to principal admissible); Kelly v. Hopkins, 105–155, 117+396 (evidence as to consummation of sale properly excluded); Larson v. Hortman, 108–287, 121+900 (evidence as to cancelation of contract properly excluded).

[7] Schmidt v. Baumann, 36–189, 30+765; Hall v. Hunter, 41–223, 42+1136; Wester v. Hedberg, 68–434, 71+616; Kelley v. Hopkins, 105–155, 117+396; Collins v. De Mars, 107–566, 119+1134; Macbeth v. Minn. etc. Co., 108–91, 121+425; Peavy v. Greer, 108–212, 121+875; Larson v. Hortman, 108–287, 121+900; Shaw v. Goldman, 109–213, 123+475; Anderson v. Olson, 109–432, 124+3.

[8] Wasser v. Western L. S. Co., 97–460, 107+160.

[9] Dartt v. Sonnesyn, 86–55, 90+115.

[10] R. L. 1905 § 2967. See Maudlin v. Am. S. & L. Assn., 63–358, 364, 65+645; Zenith B. & L. Assn. v. Heimbach, 77–97, 79+609.

[11] State v. Redwood etc. Assn., 45–154, 47+540.

[12] Fitzgerald v. Hennepin etc. Assn., 56–424, 57+1066.

[13] State v. Am. S. & L. Assn., 64–349, 360, 67+1.

[14] Zenith B. & L. Assn. v. Heimbach, 77–97, 79+609.

[15] Maudlin v. Am. S. & L. Assn., 63–358, 65+645; Fagan v. People's S. & L. Assn., 55–437, 57+142.

subject to the constitution and general laws of the state, its fundamental and organic law. They fix the rights of the stockholder, and are in the nature of a fundamenal contract in form between the corporators, and in practical effect between the association and its stockholders, which neither party is at liberty to violate. This can no more be done by by-laws and resolutions adopted by the stockholders than in any other way, the authority to pass by-laws being an authority to pass such only as are consistent with the articles of incorporation—rules and regulations as to the manner in which the corporate powers shall be exercised.[16]

1165. By-laws—By-laws cannot impair the rights of members fixed by the articles of incorporation.[17] If by-laws are ambiguous, the practical construction placed upon them by the corporation and its members is controlling.[18]

1166. Loans—Mortgages—Building and loan associations are forbidden by statute to loan to persons not members. A contract designed to enable them to do so indirectly is non-enforceable.[19] A person not a member who receives a loan cannot raise the objection that the contract was ultra vires.[20] Associations formed under G. S. 1878 c. 34 are not required to loan at competitive bidding and are not forbidden from adopting by-laws fixing a minimum premium.[21] Strictly and legitimately a loan to a member is merely an advanced payment to him of the par or mature value of his stock, no repayment of the loan being anticipated. In practice, however, loans often take a very different form.[22] A member has been held entitled to a loan as a matter of right under the by-laws of an association.[23] A member may join for the sole purpose of obtaining a loan.[24] Cases are cited below involving the construction of mortgages given in connection with loans.[25]

1167. Payment of loan before maturity—By-laws sometimes fix the terms on which a borrowing member may pay up the "loan" or "advance" before the maturity of his stock.[26]

1168. Power to borrow money—It seems that an association has the power to borrow money to loan to its members.[27]

1169. Exemption from usury laws—Building and loan associations are expressly exempted from the operation of our usury laws and the exemption has been held constitutional against the objection of being class legislation.[28] To entitle them to the exemption they must conduct their business in good faith and loan only to bona fide members.[29]

1170. Right of member to reduce his stock—A member has been held, under the terms of his certificate, not entitled to reduce his stock and demand a new certificate until he paid all dues and arrears on the old certificate.[30]

[16] Bergman v. St. P. etc. Assn., 29–275, 13+120.

[17] Id.

[18] McDonough v. Hennepin etc. Assn., 62–122, 64+106.

[19] Nat. Invest. Co. v. Nat. etc. Assn., 49–517, 52+138.

[20] Central B. & L. Assn. v. Lampson, 60–422, 62+544.

[21] Zenith B. & L. Assn. v. Heimbach, 77–97, 79+609.

[22] Fagan v. People's S. & L. Assn., 55–437, 440, 57+142.

[23] Bergman v. St. P. etc. Assn., 29–282, 13+122.

[24] Central B. & L. Assn. v. Lampson, 60–422, 62+544; Maudlin v. Am. S. & L. Assn., 63–358, 364, 65+645.

[25] Maudlin v. Am. S. & L. Assn., 63–358, 65+645; Fagan v. People's S. & L. Assn., 55–437, 57+142; McDonough v. Hennepin etc. Assn., 62–122, 64+106.

[26] Fitzgerald v. Hennepin etc. Assn., 56–424, 57+1066.

[27] See Zenith B. & L. Assn. v. Heimbach, 77–97, 79+609.

[28] R. L. 1905 §§ 2738, 3054; Zenith B. & L. Assn. v. Heimbach, 77–97, 79+609; Central B. & L. Assn. v. Lampson, 60–422, 62+544. See Birch v. Security S. & L. Assn., 71–112, 73+513.

[29] Central B. & L. Assn. v. Lampson, 60–422, 62+544. See Maudlin v. Am. S. & L. Assn., 63–358, 65+645.

[30] Fulton v. Am. B. & L. Assn., 46–190, 48+781; Eaton v. Am. B. & L. Assn., 47–236, 49+865.

1171. Stock dues—Default—Discount—Liquidated damages—A stipulation that the gross amount of stock dues, without any rebate or discount for the time they had run, might be recovered as "liquidated damages," has been held unenforceable.[31]

1172. Withdrawals—There is no common-law right of withdrawal. The matter is regulated by statute, charter, by-law, or agreement.[32] A member withdrawing from an insolvent association is not entitled to the remedies of a general creditor of the association, but is only entitled to share pro rata with other stockholders in the assets of the association, though he holds notes or orders of the association for the supposed withdrawal value of his stock.[33] A member cannot be forced to withdraw contrary to the articles of incorporation.[34] In the absence of a statute or by-law regulating the order of payment, members withdrawing from a solvent association are to be paid in full in the order in which they perfect their withdrawals.[35]

1173. Stockholder's liability—Surrender of stock—Organization of new corporation—Where certain stockholders made a tentative surrender of their stock to a new corporation organized to carry on the business of the old corporation on a different basis, it was held that they were stockholders of the old corporation for the purpose of enforcing the liability of stockholders for corporate debts.[36]

1174. Forfeiture of stock of defaulting members—Under G. S. 1894 §§ 3412, 3413 a building and loan association cannot, by virtue of its by-laws or contracts with its members, forfeit absolutely to its own use the shares of a member who defaults in the payment of instalments and dues on his shares, but it must sell such shares, and, after indemnifying itself out of the proceeds of such sale, pay the balance thereof, if any, to such shareholder.[37] A defaulting member may bar himself by laches from objecting to an illegal forfeiture of his shares.[38] The articles of incorporation of an association provided that "upon the termination of the corporation, the funds and assets of the same, after paying all debts and expenses, shall be divided among the stockholders in such proportion as each may be justly entitled to, in accordance with the number of shares held by each, after deducting all assessments, fines, dues, and other charges then due by such stockholders." Under this provision, a stockholder, so long as he performs his duty as a stockholder, is entitled to retain his stock and his place as a stockholder until the termination of the corporation, and to a right to a share of net funds and assets, as in such article provided. So long as he performs his duty as a stockholder, he cannot, save by his own consent, be forced out of the association, as respects the whole or any part of his stock, by any action of the association through its board of directors, or by the combined action of the other stockholders. Hence the association has no authority to retire or cancel any part of his stock against his will and without any default on his part, any such retiring or canceling being ultra vires.[39] Where a corpora-

[31] Maudlin v. Am. S. & L. Assn., 63–358, 65+645.

[32] State v. Redwood etc. Assn., 45–154, 47+540; Heinbokel v. Nat. etc. Assn., 58–340, 59+1050; Bergman v. St. P. etc. Assn., 29–275, 13+120; Fitzgerald v. Hennepin etc. Assn., 56–424, 57+1066; Scandinavian-Am. Bank v. Mechanics B. Soc., 78–483, 81+528; Tillinghast v. U. S. S. & L. Co., 99–62, 108+472.

[33] Heinbokel v. Nat. etc. Assn., 58–340, 59+1050; Tillinghast v. U. S. S. & L. Co., 99–62, 108+472.

[34] Bergman v. St. P. etc. Assn., 29–275, 13+120.

[35] Hoyt v. Interocean B. Assn., 58–345, 60+678.

[36] Scandinavian-Am. Bank v. Mechanics B. Soc., 78–483, 81+528.

[37] Henkel v. Pioneer S. & L. Co., 61–35, 63+243; Barton v. Pioneer S. & L. Co., 69–85, 71+906.

[38] Barton v. Pioneer S. & L. Co., 69–85, 71+906.

[39] Bergman v. St. P. etc. Assn., 29–275, 13+120.

tion has practically deprived a stockholder of his stock, and the advantages accruing from its ownership, by bidding it in for itself at a sale which it pretends to make under its by-laws, and on account of the failure of the stockholder to meet and pay certain prescribed monthly dues, an action for conversion of the stock, or one in the nature of an action on the case, will lie against the corporation, though such sale was irregular and illegal, having been conducted in total disregard of the requirements of the by-laws authorizing the same. At such sale a portion of the stock was sold to third parties for an amount in excess of the arrearages, and, as provided in the by-laws, this excess or surplus was sent, in the way of defendants' checks, by mail, to the stockholders, who cashed the checks in ignorance of the fact that the sales had been irregularly and illegally conducted and made. It was held that this did not amount to a ratification of the irregular and illegal sale; and that an action could be maintained without first returning, or offering to return, the money so received.[40]

1175. Insolvency—Receiver—Winding up—Setoff—Insolvency of building or loan and saving associations is inability to satisfy in full all the demands of its own members, or in other words it is such a condition of its affairs as reduces its available and collectible funds below the level of the amount of stock already paid in.[41] Where a building and loan association has no creditors or liabilities except its liability to its stockholders on account of their stock, and there is a deficiency in its assets, so that it cannot mature its stock, or pay back to its stockholders the actual money paid on their stock, it is not "insolvent," in the sense in which the word is used in G. S. 1894 c. 76, providing for the appointment of a receiver for corporations when they are insolvent. A court of equity has jurisdiction to wind up the affairs of a building and loan association, and for that purpose to appoint a receiver on the application of a minority of its stockholders, whenever the purposes for which it was organized have failed, and it is shown that such action is reasonably necessary for the protection of the interests of such stockholders.[42] Where by reason of losses, there was such a deficiency in the assets of a building and loan association that it could not mature its stock, the purposes for which it was organized could not be carried out, and the court proceeded to wind it up, it was held that this put an end to the contract between it and its members, at least so far as future performance was concerned. It was also held that in adjusting matters between it and its members, the court should proceed on the principle of rescission, as far as the same could be equitably and justly applied, and each member should, to that extent, receive back what he paid, and pay back what he received. It is the duty of each member to bear his share of the losses and expenses of the association, and the expenses of the receiver appointed by the court. Therefore the borrowing member is not entitled to set off all that he has paid against the loan or advancement which he has received; but a sufficient portion of what he has so paid should be held until final distribution, to cover such losses and expenses, and only the rest of what he has so paid should be set off against such loan or advancement, and the remainder of such loan or advancement should be collected from him.[43]

1176. Misuse of franchise—Prosecution by state—Injunction—A building and loan association doing business under the provisions of Laws 1891 c. 131 (G. S. 1894 §§ 2855–2894) is a corporation having the power to make loans on pledges, and may, in an action by the attorney general, on behalf of the

[40] Allen v. Am. B. & L. Assn., 49–544, 52+144; Carpenter v. Am. B. & L. Assn., 54–403, 56+95; Allen v. Am. B. & L. Assn., 55–86, 56+577.

[41] Tillinghast v. U. S. etc. Co., 99–62, 108+472.

[42] Sjoberg v. Security S. & L. Assn., 73–203, 75+1116; Knutson v. N. W. etc. Assn., 67–201, 69+889. See State v. Am. S. & L. Assn., 64–349, 67+1.

[43] Knutson v. N. W. etc. Assn., 67–201, 69+889.

state, under the provisions of G. S. 1894 § 5900, be restrained from exercising any of its corporate rights, whenever it violates the provisions of its acts of incorporation, or any other law binding on it. The attorney general may bring such action in his discretion, though the public examiner has not filed with him a statement, showing a violation of the law by such association, as provided by G. S. 1894 § 2874. This section is not a limitation on the discretionary power of the attorney general to prosecute such action, except that, if such statement is filed with him, he must proceed against such association as provided by law in the case of insolvent corporations, or institute such other proceedings as the occasion may require. Whenever a corporation violates the provisions of its acts of incorporation, or any other law binding on it, and so misuses its franchises in matters which concern the essence of the contract between it and the state that it no longer fulfils the purpose for which it was created, the state has an interest in restraining the further exercise of its corporate rights, and may, by the attorney general, maintain an action so to restrain the corporation, and for a receiver for its property.[44]

1177. Supervision by public examiner—Building and loan associations are subject to the supervision of the public examiner.[45]

BUILDING CONTRACTS—See Contracts, 1842.
BUILDING INSPECTOR—See Contracts, 1854.
BUILDING PERMITS—See Municipal Corporations, 6525.
BURDEN OF PROOF—See Criminal Law, 2449; Evidence, 3468; Trial, 9788.

BURGLARY

1178. Indictment—The indictment must describe with reasonable certainty the dwelling house or building entered.[46] An indictment alleging that the accused broke and entered the warehouse of the Halvorson-Richards Company, with intent to commit the crime of larceny therein, has been held sufficient, without alleging that the company was a corporation or firm. It is unnecessary to allege that there were at the time in the building any chattels which could be the subject of larceny.[47] An indictment charging burglary, but stating facts constituting only simple larceny, is good for the latter offence.[48]

1179. Intent—The criminal intent with which the entrance was effected may be inferred from the fact of the larceny committed.[49]

1180. Evidence—Sufficiency—Cases are cited below holding the evidence sufficient [50] or insufficient [51] to warrant a conviction.

BURIAL—See Implied or Quasi Contracts, 4305.
BUSINESS HOURS—See note 52.
BUTTER—See Food, 3778.
BY-LAWS—See Building and Loan Associations, 1164, 1165; Corporations, 1974; Municipal Corporations, 6748.
CALENDAR—See Evidence, 3460; Trial, 9702.
CALLS—See Boundaries.

[44] State v. Am. S. & L. Assn., 64–349, 67+1. See Buffum v. Hale, 71–190, 73+856.
[45] R. L. 1905 § 2968. See State v. Am. S. & L. Assn., 64–349, 67+1.
[46] State v. Ullman, 5–13(1).
[47] State v. Golden, 86–206, 90+398.
[48] State v. Coon, 18–518(464).
[49] State v. Johnson, 33–34, 21+843. See State v. Riggs, 74–460, 77+302.
[50] Maroney v. State, 8–218(188); State v. Johnson, 33–34, 21+843.
[51] State v. Riggs, 74–460, 77+302.
[52] Derosia v. Winona etc. Ry., 18–133 (119).

CANCELATION OF INSTRUMENTS

Cross-References

See Mortgages, 6481; Quieting Title; Reformation of Instruments; Usury, 9989; Vendor and Purchaser, 10087, 10088, 10096, 10097.

1181. Discretion of court—Cancelation rests somewhat in the discretion of the court.[53] It will not be granted where it would work injustice under the facts of the particular case.[54]

1182. Adequate remedy at law—Cancelation will not be granted where there is an adequate remedy at law.[55]

1183. To be granted cautiously—There is no part of the jurisdiction of a court of equity that requires to be exercised with more caution than that of rescinding contracts and canceling instruments.[56]

1184. As a whole—As as general rule one cannot rescind a contract in part and affirm it in part.[57] A defrauded party applying to a court of equity for relief must be compelled to exonerate himself from all imputation of ratifying, in any degree, the fraud of which he complains. He cannot be permitted to affirm as to a part of the transaction, and repudiate as to the residue, except in very special cases, where it is evident no injustice will be done.[58]

1185. Restoration of status quo—Cancelation will not be granted where the parties cannot be restored substantially to their former position.[59]

1186. For breach of contract—Equity will sometimes cancel an instrument on the ground of breach or non-performance of the contract by the defendant, where there is no adequate remedy at law.[60] Where a party to a contract brings an action to cancel it on the ground that the other party has refused to perform it, he must stand on the contract as he executed it.[61] He is not in a position to assert that the contract has failed because the other party did not literally comply with the requirements of the contract as to the deposit in escrow of the first instalment of the consideration.[62]

1187. For failure of consideration—Equity will sometimes cancel an instrument for a failure of consideration where there is no adequate remedy at law.[63]

1188. For fraud—Equity will cancel an instrument on the ground of fraud where the injured party has no adequate remedy at law. It will cancel a deed,[64]

[53] Dahl v. Pross, 6–89(38, 43); Kiefer v. Rogers, 19–32(14, 22); Buckley v. Patterson, 39–250, 252, 39+490.

[54] Laythe v. Minn. L. & I. Co., 101–152, 112+65.

[55] Miller v. Rouse, 8–124(97); Thwing v. Hall, 40–184, 41+815; Turnbull v. Crick, 63–91, 65+135. See Dahl v. Pross, 6–89 (38, 43).

[56] Brooks v. Hamilton, 15–26(10, 16).

[57] Foster v. Landon, 71–494, 74+281; Maxfield v. Seabury, 75–93, 98, 77+555.

[58] Carlton v. Hulett, 49–308, 51+1053.

[59] Eastman v. St. Anthony Falls etc. Co., 24–437; Benson v. Markoe, 37–30, 37, 33+38; Buckley v. Patterson, 39–250, 39+490; Carlton v. Hulett, 49–308, 51+1053; Hunter v. Holmes, 60–496, 62+1131; Stong v. Lane, 66–94, 98, 68+765; Whitcomb v. Hardy 73–285, 76+29; Maxfield v. Seabury, 75–93, 98, 77+555. See McCarty v. New York etc. Co., 74–530, 77+426; McAllen v. Hodge, 94–237, 240, 102+707; Reynolds v. Lynch, 98–58, 62, 107+145.

[60] Dahl v. Pross, 6–89(38); Drew v. Smith, 7–301(231); Somerdorf v. Schliep, 43–150, 44+1084; Payne v. Loan & G. Co., 54–255, 55+1128; Malmsten v. Berryhill, 63–1, 65+88; Clark v. Richards, 72–397, 75+605; Johnson v. Paulson, 103–158, 114+739.

[61] Quimby v. Shearer 56–534, 58+155; Lockwood v. Geier, 98–317, 108+877, 109+245.

[62] Lockwood v. Geier, 98–317, 108+877, 109+245.

[63] Hillside C. Assn. v. Holmes, 97–261, 105+905 (certificate of stock).

[64] Miller v. Sawbridge, 29–442, 13+671; Thwing v. Davison, 33–186, 22+293; Pinger v. Pinger, 40–417, 42+289; Albitz v. Mpls. & P. Ry., 40–476, 42+394; Knappen

mortgage,[65] release,[66] certificate of stock,[67] or an antenuptial contract.[68] It will not do so if there is an adequate remedy at law.[69]

1189. For innocent misrepresentation—A court of equity may rescind an executed contract for an innocent misrepresentation, where the rule of caveat emptor does not apply.[70]

1190. For duress—Equity will cancel a deed [71] or contract [72] obtained by duress where there is no adequate remedy at law.

1191. For undue influence—Equity will cancel a deed [73] or contract [74] obtained by undue influence where there is no adequate remedy at law.

1192. For mistake—Equity will cancel an instrument on the ground of mutual mistake of the parties,[75] or mistake of one of the parties.[76] It will not do so where the fact is equally unknown to both parties, or is doubtful from its own nature.[77] If there is a meeting of the minds of the parties upon the terms of the contract, and those terms are free from ambiguity, and there is no fraud, a mistake of one of the parties alone, resting wholly in his own mind, as to the identity of the subject-matter of the contract, is not a ground for rescission and cancelation.[78] Where parties have entered into a valid oral agreement, but in reducing it to writing, through the fraud of one party, and the mistake of the other, induced thereby, the writing fails to express the actual agreement, this may be ground for reforming the written instrument, but not for rescinding the contract. The element of fraud and mistake in such a case does not inhere in the contract itself, but only in the simulated written evidence of it.[79] Where the minds of the parties do not meet cancelation may be granted.[80]

1193. Instrument liable to improper use—Equity will sometimes cancel an instrument which is liable to be improperly used against a party, where there is no adequate remedy at law. If an instrument ought not to be used or enforced, it is against conscience for the party holding it to retain it, since he can only retain it for some sinister purpose. If it is a mere written agreement, solemn or otherwise, while it exists it is always liable to be applied to improper purposes; and it may be vexatiously litigated at a distance of time when the

v. Freeman, 47–491, 50+533; **Erickson** v. Fisher, 51–300, 53+638; Morrill v. Little Falls Mfg. Co., 53–371, 55+547; Nelson v. Carlson, 54–90, 55+821; Mpls. etc. Ry. v. Chisholm, 55–374, 57+63; Adolph v. Mpls. & P. Ry., 58–178, 59+959; Johnson v. Velve, 86–46, 90+126; Maki v. Maki, 106–357, 119+51; Slingerland v. Slingerland, 109–407, 124+19; Paulsrud v. Peterson, 109–524, 122+874.

[65] Conkey v. Dike, 17–457(434); Carlton v. Hulett, 49–308, 51+1053; Skajewski v. Zantarski, 103–27, 114+247.

[66] Peterson v. Chi. etc. Ry., 38–511, 39+485.

[67] Martin v. Hill, 41–337, 43+337; Foster v. Landon, 71–494, 74+281; Shevlin v. Shevlin, 96–398, 105+257. See Neibuhr v. Gage, 99–149, 108+884, 109+1.

[68] Slingerland v. Slingerland, 109–407, 124+19.

[69] See § 1182.

[70] Brooks v. Hamilton, 15–26(10).

[71] Tapley v. Tapley, 10–448(360).

[72] Neibuhr v. Gage, 99–149, 108+884.

[73] Pinger v. Pinger, 40–417, 42+289; Graham v. Burch, 44–33, 46+148; Ewing v. Clark, 65–71, 67+669. See, as to sufficiency of evidence, O'Neil v. O'Neil, 30–33, 14+59; Albrecht v. Albrecht, 44–70, 46+145; Graham v. Graham, 84–325, 87+923; Rader v. Rader, 108–139, 121+393; Naeseth v. Hommedal, 109–153, 123+287.

[74] Shevlin v. Shevlin, 96–398, 105+257.

[75] See Eastman v. St. Anthony Falls etc. Co., 24–437; Stong v. Lane, 66–94, 68+765; Maxfield v. Seabury, 75–93, 97, 77+555; Vallentyne v. Immigration L. Co., 95–195, 197, 103+1028; Houston v. N. P. Ry., 109–273, 123+922.

[76] Benson v. Markoe, 37–30, 33+38; Thwing v. Davison, 33–186, 22+293; Buckley v. Patterson, 39–250, 252, 39+490; Thwing v. Hall, 40–184, 41+815. See Lay v. Shaubhut, 6–273(182); Gavin v. Murphy, 25–142; Vallentyne v. Immigration L. Co., 95–195, 103+1028; Thompson v. Dupont, 100–367, 111+302.

[77] Eastman v. St. Anthony Falls etc. Co., 24–437.

[78] Stong v. Lane, 66–94, 68+765; Streissguth v. Kroll, 86–325, 90+577.

[79] Stanek v. Libera, 73–171, 75+1124.

[80] Stong v. Lane, 66–94, 68+765; Banchard v. Patterson, 64–454, 67+356.

proper evidence to repel the claim may have been lost or obscured; or when the other party may be disabled from contesting its validity with as much ability and force as he can contest it at the present moment.[81] This principle is most frequently applied to instruments constituting a cloud on title.[82]

1194. Void instruments—Equity will sometimes cancel an instrument which is void, either by statute or by the principles of the common law, and when no action can be had thereon, and the other party has a perfect defence in a court of law. It may do so either because the instrument is liable to abuse from its negotiable nature, or because the defence, not arising upon its face, is difficult or uncertain at law, or because of the peculiar circumstances of the case there is no adequate remedy at law.[83]

1195. Intervening rights of third parties—Cancelation will not be granted to the prejudice of innocent third parties acquiring rights subsequent to the execution of the instrument,[84] if they paid a valuable consideration.[85]

1196. Laches—Limitation of actions—Laches will defeat a right to have an instrument canceled.[86] If relief is sought on the ground of fraud the action must be brought within at least six years after discovering the fraud.[87]

1197. Negligence of applicant—Cancelation will not be granted to one who has not exercised reasonable prudence.[88]

1198. Disaffirmance—Bringing an action to rescind a contract is a sufficient disaffirmance of it for the purpose of the action.[89]

1199. Rescission and tender before suit—It is unnecessary that the plaintiff should have attempted a rescission before suit, or made any tender to the other party, except when a tender is necessary to put the other party in default.[90]

1200. Pleading—It is unnecessary in a complaint to allege a disaffirmance, or a previous offer to return what plaintiff received under the contract, or to offer to do what the court may require as a condition of granting relief.[91] If a conveyance was in fact the deed of a corporation, but voidable because of fraud, if stockholders desire to have it set aside on that ground, they must allege the facts constituting the alleged fraud, and ask the appropriate relief; they cannot prove the fraud under a mere denial of the execution of the deed by the corporation.[92] In an action to set aside a deed or other contract on the ground that its execution was procured by fraud, undue influence, or duress, the complaint must allege the ultimate facts from which such conclusion follows, but it is unnecessary to allege mere evidentiary facts, by proof of which such ultimate facts are to be established.[93]

[81] Tuttle v. Moore, 16–123(112). See Miller v. Rouse, 8–124(97).

[82] See § 8030.

[83] Dahl v. Pross, 6–89(38).

[84] Whitcomb v. Hardy, 73–285, 76+29. See Lay v. Shaubhut, 6–273(182); Woolson v. Kelley, 73–513, 76+258.

[85] Graham v. Burch, 44–33, 46+148.

[86] St. Croix L. Co. v. Mittlestadt, 43–91, 44+1079; Dunn v. State Bank, 59–221, 61+27; Whitcomb v. Hardy, 73–285, 76+29; McCarty v. N. Y. etc. Co., 74–530, 77+426; Dickman v. Dryden, 90–244, 95+1120; Lloyd v. Simons, 97–315, 105+902; McQueen v. Burbans, 77–382, 80+201. See § 5652.

[87] Morrill v. Little Falls Mfg. Co., 53–371, 55+547; Brasie v. Mpls. B. Co., 87–456, 92+340. See Slingerland v. Slingerland, 109–407, 124+19 (validity of an antenuptial contract procured by fraud may be questioned whenever any right claimed under it is asserted and an action to cancel it will not be barred by the statute of limitations).

[88] Brooks v. Hamilton, 15–26(10, 16); Mpls. etc. Ry. v. Chisholm, 55–374, 57+63; Vallentyne v. Immigration L. Co., 95–195, 103+1028.

[89] Knappen v. Freeman, 47–491, 50+533.

[90] Knappen v. Freeman, 47–491, 50+533; Nelson v. Carlson, 54–90, 55+821; Corse v. Minn. G. Co., 94–331, 102+728.

[91] Knappen v. Freeman, 47–491, 50+533.

[92] Morrill v. Little Falls Mfg. Co., 53–371, 55+547.

[93] Johnson v. Velve, 86–46, 90+126.

1201. Variance—It is an established doctrine of the courts of equity, that where a bill sets up a case of actual fraud, and makes that the ground of the prayer for relief, the plaintiff is not, in general, entitled to a decree, by establishing some one or more of the facts, quite independent of fraud, but which might of themselves create a case under a distinct head of equity from that which would be applicable to the case of fraud originally stated. This is not in conflict with the rule that in a bill alleging fraud the facts may be of such a character, and be so stated, that relief may be granted on the ground of a gross mistake.[94]

1202. Evidence—Sufficiency—To justify the extraordinary relief of cancelation the evidence of the essential facts must be clear and convincing.[95]

1203. Judgment—Relief allowable—It is the power and duty of the court to impose equitable terms as a condition of granting the relief. It will ordinarily require the party receiving the relief to restore to the other party whatever he has received under the contract, and otherwise to restore the status quo. It will apply the maxim, that he who seeks equity must do equity.[96] In an action to rescind an executed contract of sale, the court may order restoration in specie of so much of the property as remains in the possession of the defendant, and award compensatory damages for the remainder.[97] One cannot have a contract rescinded and at the same time recover for services rendered thereunder.[98] In an action for rescission it has been held improper to grant alternative relief by way of damages for fraud or breach of warranty upon the equitable relief sought being denied.[99]

CAPITAL PUNISHMENT—See Criminal Law, 2504.

CARBON COPIES—See Evidence, 3279.

CARELESS—Negligent, unconcerned, or heedless.[1]

CARLISLE TABLES—See Death by Wrongful Act, 2619; Evidence, 3353, 3450.

CARNAL ABUSE—See Rape, 8240.

CARRIAGE—See note 2.

[94] Leighton v. Grant, 20–345(298, 306).

[95] McCall v. Bushnell, 41–37, 42+545; Michaud v. Eisenmenger, 46–405, 49+202; Mpls. etc. Ry. v. Chisholm, 55–374, 57+63; Skajewski v. Zantarski, 103–27, 114+247. See O'Neil v. O'Neil, 30–33, 14+59; Schramm v. Haupt, 38–379, 37+798; Martin v. Hill, 41–337, 43+337; Crowley v. Nelson, 66–400, 69+321; McCarty v. N. Y. etc. Co., 74–530, 536, 77+426; Johnson v. Johnson, 92–167, 99+803.

[96] Knappen v. Freeman 47–491, 50+533; Carlton v. Hulett, 49–308, 51+1053; Nelson v. Carlson, 54–90, 55+821; Payne v. Loan & G. Co., 54–255, 55+1128; Johnson v. Paulson, 103–158, 114+739. See Thwing v. Hall, 40–184, 41+815.

[97] Erickson v. Fisher, 51–300, 53+638.

[98] Foster v. Landon, 71–494, 74+281.

[99] Marshall v. Gilman, 47–131, 49+688.

[1] Jenson v. G. N. Ry., 72–175, 75+3.

[2] Duluth v. Mallett, 43–204, 45+154.

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IN GENERAL

1204. Who are common carriers—A common carrier is one who undertakes, for hire, to transport from place to place the goods or persons of such as choose to employ him.[3] An express company,[4] a street railway company,[5] an owner of a passenger elevator,[6] a suburban electric passenger railway,[7] and a ferry company [8] have been held common carriers.

1205. Rights of hackmen in and about depots—A common carrier has, by virtue of its right of ownership in its property, the control of its depots, subject only to the rights of the public having business relations with it. It may make such rules and regulations as it deems necessary for the control of its business within such building, and may grant special and exclusive privileges to hackmen to solicit business, provided such rules and regulations are reasonable, and conduce to the comfort, convenience, and interest of its patrons. G. S. 1894 § 380, subd. b. (R. L. 1905 § 2009) applies only to those persons or parties having contractual relations with a common carrier. A hackman or private carrier for hire is not a party having such relations with a common carrier as will permit him to enter a depot to solicit business from passengers. Such hackmen and private carriers, in common with all others in that business, have the right and privilege of soliciting public patronage, without being discriminated against, at all points without the depot, when such points or places have been properly designated. All hackmen and persons engaged in the business of conveying passengers and baggage for hire have the right of entry, without discrimination, to the depots of a common carrier, to deliver or receive passengers or baggage, in pursuance of a contract or order, subject to proper rules and regulations, for the interest of the traveling public.[9]

CARRIERS OF PASSENGERS

IN GENERAL

1206. Who are passengers—Trespassers—If a street car stops at a usual place for passengers, and a person in the exercise of due care gets upon the steps or platform of the car, for the purpose of taking passage, while it is so waiting, he is to be regarded as a passenger.[10] A person may be a passenger though he is riding gratuitously.[11] One who secures free transportation from a conductor, or fraudulently pays him less than the regular fare, is not a passenger.[12] One who improperly rides on a freight train not authorized to carry passengers is not a passenger.[13] One who pays a brakeman less than the regular fare and rides in a common freight car is not a passenger.[14] One who rides on a freight

[3] R. L. 1905 § 1990; Mpls. etc. Ry. v. Manitou Forest Synd., 101–132, 112+13. Christenson v. Am. Ex. Co., 15–270(208). See St. P. etc. Ry. v. Mpls. etc. Ry., 26–243, 2+700.

[4] Christenson v. Am. Ex. Co., 15–270 (208).

[5] Smith v. St. P. C. Ry., 32–1, 18+827.

[6] Goodsell v. Taylor, 41–207, 42+873. See McDonough v. Lanpher, 55–501, 57+152.

[7] Mpls. etc. Ry. v. Manitou Forest Synd., 101–132, 112+13.

[8] McLean v. Burbank, 11–277(189).

[9] Godbout v. St. P. U. D. Co., 79–188, 81+835. This case is criticised in 14 Harv. L. Rev. 59.

[10] Smith v. St. P. C. Ry., 32–1, 18+827; Miller v. St. P. C. Ry., 66–192, 68+862; Gaffney v. St. P. C. Ry., 81–459, 84+304. See as to effect of sign "not in service," on car, Ahern v. Mpls. St. Ry., 102–435, 113+1019.

[11] Jacobus v. St. P. & C. Ry., 20–125 (110) (riding on a pass). See Gradin v. St. P. & D. Ry., 30–217, 14+881.

[12] McVeety v. St. P. etc. Ry., 45–268, 47+809.

[13] Alward v. Oakes, 63–190, 65+270; McVeety v. St. P. etc. Ry., 45–268, 47+809. See Dunlap v. N. P. Ry., 35–203, 28+240.

[14] Janny v. G. N. Ry., 63–380, 65+450; Brevig v. Chi. etc. Ry., 64–168, 66+401; McNamara v. G. N. Ry., 61–296, 63+726.

train when his ticket expressly provides that it is not good on such trains is not a passenger.[15] If a person enters a train and refuses to pay his fare when lawfully demanded he is a trespasser and not a passenger.[16] A railway mail clerk has been held a passenger.[17] Where a through passenger on a railway train, without objection by the company or its agents, alights from the train at an intermediate station for any reasonable and usual purpose, such station being one for the discharge and reception of passengers, he does not cease to be a passenger, and is entitled to the protection accorded to such by law. But a through passenger on a through train, one that does not stop at intermediate stations to receive or discharge passengers, who leaves such train without the knowledge, consent, or invitation of the company at an intermediate station at which the train stops for some purpose incident to its operation and management only, abandons for the time being his relation as a passenger, and assumes all risks incident to his movements.[18] A person on a wharf for the purpose of boarding a steamboat has been held a passenger in the sense of being entitled to the exercise of reasonable care on the part of the carrier in providing suitable and safe accommodations for the landing and discharge of passengers.[19] Cases are cited below holding certain persons not trespassers.[20]

1207. When relation of passenger terminates—A person has been held no longer a passenger where, upon arrival at his destination, he left the box car in which he had been riding, but later returned to it and lay down;[21] and where he took the wrong train and voluntarily left it, elsewhere than at a station, to take another train pointed out by the conductor.[22] A person arriving by a train remains a passenger until he has had a reasonable opportunity, by safe and convenient means, to leave the cars, the railway, and the stationhouse.[23]

1208. Regulations—A carrier may adopt and compel its passengers to comply with reasonable regulations for the conduct of its business.[24]

1209. Right to control passengers by force—A carrier may use such force as may reasonably be necessary to compel its passengers to conform to its reasonable regulations for their conduct.[25] A conductor may use such force as may be reasonably necessary to compel a person standing on the steps of a street car either to get on or off the car.[26]

1210. Passenger elevators—The owner of an elevator in a hotel used for the carriage of his guests and visitors is bound to exercise the same degree of care as other carriers of passengers.[27] A lessee of a building containing an ele-

[15] Dunlap v. N. P. Ry., 35–203, 28+240.

[16] Wyman v. N. P. Ry., 34–210, 25+349. See Hardenbergh v. St. P. etc. Ry., 39–3, 38+625.

[17] Decker v. Chi. etc. Ry., 102–99, 112+901. See McCord v. Mpls. etc. Ry., 96–517, 105+190.

[18] Lemery v. G. N. Ry., 83–47, 85+908. See De Kay v. Chi. etc. Ry., 41–178, 43+182; Hermeling v. Chi. etc. Ry., 105–136, 117+341.

[19] Massolt v. Minnetonka C. Co., 103–517, 114+1132.

[20] Gradin v. St. P. & D. Ry., 30–217, 14+881 (employee of lumber company loading cars riding on train with consent of conductor); Orcutt v. N. P. Ry., 45–368, 47+1068 (person in charge of stock returning to car after its arrival at destination); Jackson v. St. P. C. Ry., 74–48, 76+956 (boy sitting on platform of street car); Rosenbaum v. St. P. & D. Ry., 38–173, 36+447 (employee riding on construction train). See, upon the general subject, 19 Harv. L. Rev. 250.

[21] Orcutt v. N. P. Ry., 45–368, 47+1068.

[22] Finnegan v. Chi. etc. Ry., 48–378, 51+122.

[23] Dean v. St. P. U. D. Co., 41–360, 43+54.

[24] Faber v. Chi. etc. Ry., 62–433, 64+918 (forbidding passengers to pass conductor before paying fare); Dickerman v. St. P. U. D. Co., 44–433, 46+907 (requiring passengers to exhibit tickets at gate before entering cars—forbidding passengers to enter cars in motion); Morrill v. Mpls. St. Ry., 103–362, 115+395 (requiring transfer checks).

[25] Dickerman v. St. P. U. D. Co., 44–433, 46+907; Faber v. Chi. etc. Ry., 62–433, 64+918.

[26] Brace v. St. P. C. Ry., 87–292, 91+1099. See Jackson v. St. P. C. Ry., 74–48, 76+956.

[27] Goodsell v. Taylor, 41–207, 42+873.

vator, or hand hoist, is charged with the statutory duty of maintaining the same with the safety devices required by the statute, though no such duty is imposed by the terms of the lease.[28]

VARIOUS DUTIES

1211. Duty to carry to destination—Where a carrier accepted fare from the plaintiff for passage from West St. Paul to South St. Paul, a distance of a few miles, and the train was stopped before reaching South St. Paul, it was held that the plaintiff was entitled to recover only nominal damages. It was in the daytime and the plaintiff might have walked the remainder of the distance in twenty minutes or taken another train at a cost of five cents.[29]

1212. Duty to announce stations—A railway company is bound to announce the name of stations so as to give passengers a reasonable opportunity to alight.[30]

1213. Duty to furnish information—A carrier is bound to give to its passengers such instructions or directions as to its own system or course of conduct as may be reasonably necessary to enable them to pursue their journey.[31] Where a caboose containing a passenger was taken off its run and sent on a side trip to the relief of a snow-bound train, without notice to the passenger, a recovery by the passenger was sustained.[32]

1214. Duty to furnish safe ingress and egress—A carrier is bound to furnish its passengers with safe ingress and egress to and from its cars[33] or vessels.[34] A passenger crossing a track at a station, to leave or get on his train, has a right to assume that the company will so regulate its trains that it will be safe for him on the track which he is thus invited and required to cross in order to leave or take his train. In such a case the "look and listen" rule does not apply. A carrier is not bound to furnish safe egress or ingress at sidetracks or intermediate stations. Where a passenger enters a railway train and pays his fare to a particular place, his contract does not obligate the company to furnish him with means of egress and ingress at an intermediate station; and if he leaves the train at such a station, he for the time being surrenders his place as a passenger, and takes upon himself the responsibility of his own movements. But if he leaves without objection on the part of the company, he does no illegal act, and has a right to re-enter and resume his journey.[35] While carriers are bound to afford a safe egress from their cars a passenger is bound to exercise reasonable care to ascertain whether the car is at a point where it was intended that he should alight.[36] A carrier must stop its trains at stations a reasonable time in which to allow passengers to alight. What is a reasonable time necessarily varies with the circumstances.[37]

1215. Duty to furnish seats—Under normal conditions of travel it is the duty of a carrier to supply its passengers with seats. A rush of travel which could not reasonably have been foreseen excuses a carrier from supplying seats.[38]

See McDonough v. Lanpher, 55–501, 57+152; McClellan v. Dow, 104–527, 116+1134; 19 Harv. L. Rev. 300.

[28] Welker v. Anheuser, 103–189, 114+745.

[29] Jensen v. Chi. etc. Ry., 64–511, 67+631.

[30] Benedict v. Mpls. etc. Ry., 86–224, 229, 90+360.

[31] Appleby v. St. P. C. Ry., 54–169, 55+1117.

[32] Rosted v. G. N. Ry., 76–123, 78+971.

[33] See §§ 1268, 1275–1278.

[34] Massolt v. Minnetonka C. Co., 103–517, 114+1132.

[35] De Kay v. Chi. etc. Ry., 41–178, 43+182; Schilling v. Winona etc. Ry., 66–252, 68+1083. See Lemery v. G. N. Ry., 83–47, 85+908; Hermeling v. Chi. etc. Ry., 105–136, 117+341.

[36] Farrell v. G. N. Ry., 100–361, 111+388.

[37] Keller v. Sioux City etc. Ry., 27–178, 6+486.

[38] Hardenbergh v. St. P. etc. Ry., 39–3, 38+625. See Rolette v. G. N. Ry., 91–16, 97+431.

1216. Duty to warn passengers of dangers—A carrier is bound to warn its passengers of unusual dangers which call for special care on their part.[39]

1217. Duty to heat passenger coaches—It is the duty of railway companies to heat properly their passenger coaches.[40]

1218. Duty to sick and infirm persons—A railway company is not bound to accept as a passenger on its cars, without an attendant, one who, because of physical or mental disability, is unable to take care of himself; but if it voluntarily accepts such a person as a passenger without an attendant, his inability to care for himself, rendering special care and assistance necessary, being apparent, or made known at the time to its servants, the company is negligent if such care and assistance is not afforded. The degree of care to be exercised in such a case is that which is reasonably necessary for the safety of the passenger, in view of his mental and physical condition.[41]

1219. Duty as to equipment—A carrier of passengers is required to exercise the highest care in respect to the equipment of its road and transportation facilities, in providing suitable machinery for the operation of its cars, in the employment of competent and faithful servants and agents, and generally, as to all acts pertaining in any way to the conduct of its affairs in furtherance of its undertaking as a carrier.[42] Carriers of passengers are bound to use the best precautions in known practical use to secure the safety of their passengers; and this is the measure of their duty whether they carry them on freight or mixed trains, or on exclusively passenger trains. But this does not require that they should adopt, on freight or mixed trains, all the appliances which they use on passenger trains, but merely the highest degree of care consistent with the practical operation of such trains.[43] Whether it is necessary for a street car company to employ a conductor depends on a variety of circumstances, including the expense, the amount of traffic on the streets and cars, and the dangers of the particular route.[44] It has been held a question for a jury whether it is negligent for a street railway company not to provide the rear platform of its cars with guards sufficiently high to prevent passengers from falling off.[45] A railway company is not bound to have its passenger cars vestibuled.[46]

1220. Duty to inspect machinery—A carrier is bound to exercise the highest care in inspecting its machinery. It cannot assume that machinery which is not obviously dangerous and has proved uniformly safe for a long time will continue to be safe.[47]

1221. Duty to remove snow and ice—A street railway company is required to exercise the highest degree of care to keep the platforms and steps of its cars in safe condition for use in the season when operated, so far as it is practicable to do so, in consideration of the climate, temperature, and condition of the air with respect to snow, moisture, and frost.[48]

1222. Duty to employ proper servants—A carrier is bound to exercise the highest care in the employment of competent and faithful servants and agents.[49]

[39] McLean v. Burbank, 11–277(189); Kral v. Burlington etc. Ry., 71–422, 74+166. See Fewings v. Mendenhall, 88–336, 344, 93+118; Rosted v. G. N. Ry., 76–123, 78+971.

[40] See Rosted v. G. N. Ry., 76–123, 78+971; Frigstad v. G. N. Ry., 101–40, 111+838.

[41] Croom v. Chi. etc. Ry., 52–296, 53+1128; Purcell v. St. P. C. Ry., 48–134, 50+1034. See 18 Harv. L. Rev. 540; Note, 107 Am. St. Rep. 298.

[42] Fewings v. Mendenhall, 88–336, 340, 93+118.

[43] Oviatt v. Dakota C. Ry., 43–300, 45+436; Simonds v. Mpls. etc. Ry., 87–408, 92+409. See Bishop v. St. P. C. Ry., 48–26, 50+927 (defective die to grip of cable car).

[44] Palmer v. Winona R. & L. Co., 78–138, 80+869.

[45] Matz v. St. P. C. Ry., 52–159, 53+1071.

[46] Crandall v. Mpls. etc. Ry., 96–434, 105+185.

[47] Goodsell v. Taylor, 41–207, 42+873.

[48] Herbert v. St. P. C. Ry., 85–341, 88+996. See Larson v. Mpls. etc. Ry., 85–387, 88+994.

[49] Fewings v. Mendenhall, 88–336, 340, 93+118.

If it knowingly employs a dangerous and vicious man it is liable even for a wilful assault on a passenger committed by him about its premises.[50]

TICKETS AND FARES

1223. Nature of a ticket—Great uncertainty prevails in the law as to the nature of a ticket.[51] It may be viewed either as the contract, or the evidence of the contract, of a carrier to transport the holder between the points, and on the conditions, therein named. Viewed as the contract itself it is in the nature of a thing in action.[52]

1224. Sale of tickets—Warranty—The seller of a ticket issued by a carrier does not, from the sale alone, undertake for anything beyond the genuineness of the ticket.[53]

1225. Licenses for ticket agents—Our statute [54] requiring a license for ticket agents has been sustained against various constitutional objections.[55]

1226. Authority of ticket agents—The question whether a ticket agent has authority to make a contract for the free carriage of a child has been raised but not decided.[56]

1227. Authority of conductor—A conductor represents the company as to persons on his train and can waive conditions in the contract for transportation.[57]

1228. Conductor's check—A conductor's check is ordinarily simply evidence that a fare has been paid for a continuous journey and does not authorize a stop-over.[58]

1229. Payment of fare to brakeman—A brakeman on a freight train has no authority to receive fares.[59]

1230. Less than fare received by mistake—If a conductor by mistake accepts less than the full fare he may demand the remainder within a reasonable time. If the passenger refuses to pay the remainder he may be ejected, upon returning to him the unearned fare. After he has once refused he may pay the remainder and secure the right to be carried to his destination.[60]

1231. Payment of fare—Instructions—Instructions relating to the payment of fare sustained.[61]

1232. Increased fare on train—It was held, prior to Laws 1907 c. 97, that a railway company might charge more fare when payment was made on the train than when a ticket was purchased, provided a reasonable opportunity was given for the purchase of tickets.[62]

1233. Stop-over privileges—In the absence of any agreement to the contrary, the purchaser of a railway ticket is only entitled to one continuous passage upon it. When he has selected his train and commenced his journey, he has no right to leave at an intermediate point without the carrier's assent, and afterwards demand that the contract be completed on another train.[63]

[50] Dean v. St. P. U. D. Co., 41-360, 43+54.

[51] See 1 Harv. L. Rev. 17; 20 Id. 137; Morrill v. Mpls. St. Ry., 103-362, 115+395.

[52] State v. Corbett, 57-345, 59+317; Elston v. Fieldman, 57-70, 58+830.

[53] Elston v. Fieldman, 57-70, 58+830.

[54] R. L. 1905 § 2043.

[55] State v. Corbett, 57-345, 59+317; State v. Manford, 97-173, 106+907.

[56] Braun v. N. P. Ry., 79-404, 82+675.

[57] Thompson v. Truesdale, 61-129, 63+259. See Olson v. St. P. & D. Ry., 45-536, 48+445; Wyman v. N. P. Ry., 34-210, 25+349.

[58] Wyman v. N. P. Ry., 34-210, 25+349. See Braun v. N. P. Ry., 79-404, 411, 82+675.

[59] McNamara v. G. N. Ry., 61-296, 63+726.

[60] Wardwell v. Chi. etc. Ry., 46-514, 49+206.

[61] Reem v. St. P. C. Ry., 82-98, 84+652.

[62] Du Laurans v. First Div. etc. Ry., 15-49(29); State v. Hungerford, 39-6, 38+628; Reed v. G. N. Ry., 76-163, 78+974.

[63] Wyman v. N. Y. Ry., 34-210, 25+349.

1234. Condition against use on freights—Waiver—A provision in a ticket that it should not be good for passage on freight trains has been held not waived by a subsequent advertisement that passengers with tickets might ride on such trains.[64]

1235. Contract to carry free—A contract of a railway company, made in consideration of a conveyance to it, has been held to entitle a child of the grantor to free transportation.[65]

1236. Detachment of coupons—Waiver—A provision in a coupon ticket against a detachment of coupons, except by the conductor, may be waived.[66] Coupon tickets sometimes contain a provision requiring the production of the cover or book to which they are attached.[67]

1237. Transfer of tickets—A round-trip or excursion ticket is transferable, in the absence of express provision to the contrary.[68] If a ticket is expressly made non-transferable and is presented by one not the original holder the conductor may take it up, at least if the ticket so provides, and the party presenting it is not entitled to its return as a condition of paying his fare.[69] It is permissible for a carrier to provide for the forfeiture of a ticket if it is transferred, but the forfeiture clause will be strictly construed.[70]

1238. Transfer checks—Street railways—A passenger on a street car, who has paid his fare, is by virtue of that fact entitled to ride to the end of a line to which, under the city ordinances, he is entitled to be transferred. The contract of carriage is complete when the fare is paid. Upon demand by the passenger it is the duty of the conductor to give a proper transfer slip, such as should be accepted by the conductor of the car to which the passenger is transferred. The duty to see that a proper transfer slip is given rests upon the conductor, not upon the passenger. The transfer slip is not the sole and exclusive evidence of the passenger's right to ride. No absolute duty rests upon the passenger to examine the transfer slip when it is delivered to him and see that it is for the proper car and is properly punched. He may rely upon the inference that the conductor has properly done his work and performed the duty imposed upon him.[71] Cases are cited below involving the construction of particular ordinances relating to transfer checks.[72]

1239. Duty of parent to pay for child—The law implies a contract on the part of a parent who enters a train with a child, who is subject to a fare, to pay such fare.[73]

BAGGAGE

1240. Definition—Baggage includes such articles as passengers usually carry for their personal comfort, convenience, or necessity.[74]

1241. Checking—Connecting carriers—Depot company—A baggage check is in the nature of a receipt, and is evidence of the delivery, ownership, and identity of the baggage. The possession of a baggage check by a passenger is prima facie evidence that the carrier has received and is in possession of his

[64] Dunlap v. N. P. Ry., 35–203, 28+240.
[65] Grimes v. Mpls. etc. Ry., 37–66, 33+33.
[66] Thompson v. Truesdale, 61–129, 63+259.
[67] See Brown v. Mpls. etc. Ry., 102–298, 113+895.
[68] Carsten v. N. P. Ry., 44–454, 47+49; Hoffman v. N. P. Ry., 45–53, 47+312.
[69] Rahilly v. St. P. & D. Ry., 66–153, 68+853.
[70] Mueller v. Chi. etc. Ry., 75–109, 77+566 (mileage ticket with forfeiture clause—left with scalper who allowed others to use it—authority of scalper and ownership of ticket held a question for jury).
[71] Morrill v. Mpls. St. Ry., 103–362, 115+395.
[72] Pine v. St. P. C. Ry., 50–144, 52+392. See Morrill v. Mpls. St. Ry., 103–362, 115+395.
[73] Braun v. N. P. Ry., 79–404, 82+675.
[74] McKibbin v. G. N. Ry., 78–232, 238, 80+1052. See 12 Harv. L. Rev. 119.

personal baggage; and where he delivers such check to the agent of a connecting railway company, and receives its check in exchange therefor, the presumption is, in the absence of proof to the contrary, that the baggage is received in due course by the latter company, and it is responsible therefor. Where a railway company's trains, by an arrangement with another company, regularly enter and depart from the depot of the latter, to which the former company intrusts the business of handling and checking the baggage of its passengers, and furnishes its own checks therefor, such company must be deemed the agent of the first-named company in respect to such business.[75]

1242. When liability attaches—Delivery—A carrier is liable, as such, for baggage received for transportation and not for storage, though for the convenience of the carrier the passenger consents to some delay in the transportation.[76] Whether there has been a delivery of baggage to a carrier is a question for the jury, unless the evidence is conclusive.[77]

1243. Failure to forward—Damages—When a trunk is delivered to the baggageman at a railway station in proper season, the passenger has the right to require that it shall be carried on the same train which he takes. The proper measure of damages for the failure of a railway company to deliver a drummer's trunk containing samples is the value of the use of the property during the delay, including such incidental expenses and damages as were in the contemplation of the parties when the contract for carriage was entered into.[78]

1244. Passenger not on same train—A railway carrier is not liable for baggage merely as a gratuitous bailee, because the passenger does not go on the same train with his baggage.[79]

1245. Drummer's samples—Judicial notice—While samples of merchandise are not baggage, if a carrier receives the trunks of a drummer as baggage, knowing the character of their contents, it is liable as if they were properly baggage, that is, as an insurer. Proof of such knowledge may be made out by circumstantial evidence. Judicial notice will be taken of the fact that railways are accustomed to carry such trunks as baggage, but not of the conditions on which it is done.[80]

1246. Liability—A carrier engages, as an implied incident of the contract of carriage, to carry the personal baggage of the passenger. His liability is that of an insurer of baggage intrusted to his care.[81] This liability does not extend to articles not designed for the personal use of the passenger. A carrier of passengers for hire is only bound to carry their "personal baggage." Therefore, if a passenger delivers to the carrier as baggage a trunk or valise containing merchandise, not his personal baggage, of which fact the carrier has no notice, the carrier will not, in the absence of negligence, be liable for its loss. The carrier is not bound in such a case to inquire as to the nature of the property, but has a right to assume that it consists only of the personal baggage of the passenger.[82]

[75] Ahlbeck v. St. P. etc. Ry., 39–424, 40+364. See Dean v. St. P. U. D. Co., 41–360, 43+54

[76] Shaw v. N. P. Ry., 40–144, 41+548.

[77] McKibbin v. G. N. Ry., 78–232, 80+1052.

[78] Conheim v. Chi. etc. Ry., 104–312, 116+581.

[79] McKibbin v. Wis. C. Ry., 100–270, 110+964. See 20 Harv. L. Rev. 647.

[80] McKibbin v. Wis. C. Ry., 100–270, 110+964; McKibbin v. G. N. Ry., 78–232, 80+1052. See Haines v. Chi. etc. Ry., 29–160, 12+447; Humphreys v. Perry, 148 U. S. 627.

[81] McKibbin v. G. N. Ry., 78–232, 80+1052; Shaw v. N. P. Ry., 40–144, 41+548; Haines v. Chi. etc Ry., 29–160, 12+447. See Larson v. G. N. Ry., 108–519, 121+121 (suit case left with cashier of baggage room to be kept until owner called for it two days later—complaint for loss sustained); Note, 99 Am. St. Rep. 343.

[82] Haines v. Chi. etc. Ry., 29–160, 12+447; Humphreys v. Perry, 148 U. S. 627.

EJECTION OF PASSENGERS

1247. Duty of passenger to leave when ordered—Use of force—A right of action is complete when the passenger is ordered to leave the car under circumstances which show that force will be used unless the order is obeyed. Actual force need not be used. When a passenger is thus ordered to leave a street car, it is his duty to comply with the order quietly and without insisting upon the application of actual force. If he resists the efforts of the company's agent to eject him, he can recover no additional damages resulting from the use of such force as is reasonably necessary to accomplish the purpose.[83]

1248. Liability of company for acts of servant—A carrier is liable for the acts of those in charge of its trains in wrongfully ejecting passengers.[84] It is liable though its servant acted in accordance with what appeared to him to be his duty.[85]

1249. For non-payment of fare—A passenger may be ejected if he refuses to pay a fare lawfully demanded.[86] If he has paid a part of the fare he cannot be ejected until the unearned portion has been returned to him.[87] If a parent, accompanied by a child, pays his own fare, but wrongfully refuses to pay for the child, both may be ejected. The ejection of the child is an ejection of the parent, though the latter leaves the train voluntarily.[88]

1250. Mistake in ticket—Where by mistake a mileage ticket was punched on the margin to expire on the date of its issue, and a conductor refused to accept it after that date, and ejected the holder, it was held that the latter might recover for the wrongful ejection.[89]

1251. Freight train—Passenger without permit—Where a rule of a company forbids passengers on a freight train, without a permit from a station agent, a passenger without a permit cannot be rightfully ejected if he was not given a reasonable opportunity to obtain a permit at the station.[90]

1252. For violation of regulations—A passenger who persists in violating a reasonable regulation of the carrier may be ejected.[91]

1253. For drunkenness—It is not the duty of a carrier to eject a drunken passenger if he is inoffensive.[92]

1254. Passenger on street car without transfer check—The plaintiff, a passenger on defendant's street-car line, paid his fare, and received a transfer check which entitled him to continue his journey by the "next" connecting car on another line of the same company. He took the next car on the connecting line, and the conductor took up his transfer check. Without notice to the plaintiff, this car was taken off after going a short distance. The conductor having disappeared, the plaintiff was informed by the driver of that car that he should take the next passing car. He did so, but was put off by the conductor of that car because he had no transfer check, and refused to pay fare

[83] Morrill v. Mpls. St. Ry., 103–362, 115+395.

[84] Cain v. Mpls. etc. Ry., 39–297, 39+635. See Brevig v. Chi. etc. Ry., 64–168, 66+401 (authority of brakeman on freight train to eject trespassers—no implied authority where trespasser is on train by virtue of bribing brakeman).

[85] Appleby v. St. P. C. Ry., 54–169, 55+1117; Pine v. St. P. C. Ry., 50–144, 52+392.

[86] Du Laurans v. First Div. etc. Ry., 15–49(29); Wyman v. N. P. Ry., 34–210, 25+349; Wardwell v. Chi. etc. Ry., 46–514, 49+206; Rahilly v. St. P. & D. Ry., 66–153, 68+853.

[87] Wardwell v. Chi. etc. Ry., 46–514, 49+206; Braun v. N. P. Ry., 79–404, 82+675.

[88] Braun v. N. P. Ry., 79–404, 82+675.

[89] Krueger v. Chi. etc. Ry., 68–445, 71+683; Kleven v. G. N. Ry., 70–79, 72+828. See Morrill v. Mpls. St. Ry., 103–362, 115+395; 14 Harv. L. Rev. 70; 20 Id. 137.

[90] Reed v. G. N. Ry., 76–163, 78+974.

[91] Faber v. Chi. etc. Ry., 62–433, 64+918.

[92] Lucy v. Chi. etc. Ry., 64–7, 65+944. See Briggs v. Mpls. St. Ry., 52–36, 53+1019.

again. It was held that plaintiff showed, prima facie, a right to recover for the conduct of the defendant's agents, leading to and including the expulsion.[93]

1255. Threat to eject—If a passenger is wrongfully forced to pay a fare under threat of ejection he may recover his damages, including the mortification and indignity of being threatened with ejection.[94]

1256. Place of ejection—If a person enters a train and refuses to pay his fare when lawfully demanded he is a trespasser and not a passenger, and may be expelled elsewhere than at a station if it will not expose him to serious danger, or result in wanton injury to him.[95] One who rightfully refuses to pay a fare unless he is provided with a seat cannot be expelled except at a station.[96]

1257. Stopping train—It is the duty of a conductor to stop his train before ejecting a passenger. He is liable for an assault if he forcibly ejects a passenger while the train is in motion.[97]

1258. Complaint construed—A complaint for an ejection from a train has been held to state a cause of action ex delicto, the gravamen of the complaint being an intentional and personal assault and battery.[98]

1259. Action ex delicto or ex contractu—A person wrongfully ejected may maintain an action ex delicto for the resulting damages, and is not limited to an action for damages for breach of the contract to carry.[99]

1260. Damages—A passenger wrongfully ejected may recover all damages sustained by him as the direct and natural consequences of the wrongful act, including loss of time, inconvenience, annoyance and indignity felt, and injury to health from exposure to the weather.[1] Remote or speculative damages are not recoverable.[2] Exemplary damages are recoverable on the same grounds as in other actions ex delicto.[3] Where a passenger is ejected because his ticket appears void on its face, he cannot increase the amount of his damages by refusing to leave the train, and compelling the conductor to eject him by force, unless, from the circumstances appearing on the face of the ticket and the surrounding circumstances known to the conductor, it is probable that a mistake has been made by the company in issuing the ticket, and this probability is so strong that the conductor should, under the circumstances, investigate further before ejecting the passenger.[4] Where a passenger is ordered to leave a street car because his transfer slip is defective, it is his duty to comply with the order quietly and without insisting upon the application of actual force. If he resists the efforts of the company's agent to eject him, he can recover no additional

[93] Appleby v. St. P. C. Ry., 54–169, 55+1117. See Morrill v. Mpls. St. Ry., 103–362, 115+395.

[94] See Mueller v. Chi. etc. Ry., 75–109, 77+566; Hoffman v. N. P. Ry., 45–53, 47+312.

[95] Wyman v. N. P. Ry., 34–210, 25+349. See Mykleby v. Chi. etc. Ry., 39–54, 38+763.

[96] Hardenbergh v. St. P. etc. Ry., 39–3, 38+625.

[97] State v. Kinney, 34–311, 25+705.

[98] Mykleby v. Chi. etc. Ry., 39–54, 38+763.

[99] Morrill v. Mpls. St. Ry., 103–362, 115+395. See Beaulieu v. G. N. Ry., 103–47, 59, 114+353.

[1] Serwe v. N. P. Ry., 48–78, 50+1021; Carsten v. N. P. Ry., 44–454, 47+49; Finch v. N. P. Ry., 47–36, 49+329; Du Laurans v. First Div. etc. Ry., 15–49(29); Pine v. St. P. C. Ry., 50–144, 52+392; McLean v. Chi. etc. Ry., 50–485, 52+966; Kleven v. G. N. Ry., 70–79, 72+828; Gisleson v. Mpls. etc. Ry., 85–329, 88+970; Wardwell v. Chi. etc. Ry., 46–514, 49+206; Braun v. N. P. Ry., 79–404, 82+675; Hardenbergh v. St. P. etc. Ry., 41–200, 42+933; Guthier v. Mpls. etc. Ry., 87–355, 91+1096; Brown v. Mpls. etc. Ry., 102–298, 113+895; Morrill v. Mpls. St. Ry., 103–362, 115+395.

[2] Carsten v. N. P. Ry., 44–454, 47+49 (loss of job); Simonson v. Mpls. etc. Ry., 88–89, 92+459 (mal-presentation and death of child fifteen months after ejection). See Hoffman v. N. P. Ry., 45–53, 47+312.

[3] See Hoffman v. N. P. Ry., 45–53, 47+312; Du Laurans v. First Div. etc. Ry., 15–49(29); Mueller v. Chi. etc. Ry., 75–109, 77+566.

[4] Krueger v. Chi. etc. Ry., 68–445, 71+683.

damages resulting from the use of such force as is reasonably necessary to accomplish the purpose.[5]

LIABILITY FOR INJURIES TO PASSENGERS

1261. Care required of carrier—General rules—A carrier of passengers is not an insurer of their safety;[6] but it must take every reasonable precaution therefor.[7] Our supreme court has used various forms of expression in stating this general rule.[8] It is said that carriers of passengers "are bound to exercise the highest degree of care and diligence consistent with the nature of their undertaking."[9] Other expressions are, "the utmost human care and foresight;"[10] "extreme diligence and care;"[11] "greatest care and foresight;"[12] "highest degree of care;"[13] "extraordinary care;" "highest degree of care consistent with the practical operation of trains."[15] All the cases agree in holding a carrier liable for the slightest negligence.[16] This exceptional liability is grounded in public policy, to secure the safe carriage of passengers so far as human skill and foresight can accomplish that result.[17] It is not dependent upon contract.[18] It extends to all the means employed in furtherance of the undertaking to carry passengers, including the construction, equipment, and management of the tracks and rolling stock, the employment of servants, and all the subsidiary arrangements for the safety of passengers.[19] It extends to the protection of passengers from the acts or omissions of those under the control of the carrier, but not to the acts of third parties not under its control.[20] A carrier owes the same degree of care to one carried gratuitously as to those carried for hire.[21] A common carrier of passengers on a freight or mixed train is required to exercise the highest degree of care consistent with the practical operation of such a train. A carrier having limited fitness and capacity to transport passengers, and whose primary business is to transport its logs, is

[5] Morrill v. Mpls. etc. Ry., 103–362, 115+395.

[6] Fewings v. Mendenhall, 88–336, 342, 93+118.

[7] Matz v. St. P. C. Ry., 52–159, 163, 53+1071; Reem v. St. P. C. Ry., 77–503, 80+638.

[8] See Hall v. Chi. etc. Ry., 46–439, 49+239 (comments on confusion resulting from terminology in this connection).

[9] Smith v. St. P. C. Ry., 32–1, 18+827; Fewings v. Mendenhall, 88–336, 93+118. See Campbell v. Duluth etc. Ry., 107–358, 120+375 (the standard of care has due regard to the circumstances—in reference to each particular the highest degree of care which can be exercised in that particular, with reasonable regard to the nature of the undertaking and the requirements of the business in all other respects, must be exercised).

[10] Wilson v. N. P. Ry., 26–278, 3+333; Johnson v. Winona etc. Ry., 11–296(204); Graham v. Burlington etc. Ry., 39–81, 38+812. See Piper v. Mpls. St. Ry., 52–269, 53+1060.

[11] Steege v. St. P. C. Ry., 50–149, 52+393.

[12] McLean v. Burbank, 11–277(189); Jacobus v. St. P. & C. Ry., 20–125(110); Fleming v. St. P. & D. Ry., 27–111, 6+448; Watson v. St. P. C. Ry., 42–46, 43+904.

[13] Farrell v. G. N. Ry., 100–361, 111+388; Oviatt v. Dakota C. Ry., 43–300, 45+436; Herbert v. St. P. C. Ry., 85–341, 88+996.

[14] McLean v. Burbank, 11–277(189, 199); Smith v. St. P. C. Ry., 32–1, 18+827; Dahlberg v. Mpls. St. Ry., 32–404, 21+545; Benedict v. Mpls. etc. Ry., 86–224, 90+360.

[15] Oviatt v. Dakota C. Ry., 43–300, 45+436; Schilling v. Winona etc. Ry., 66–252, 68+1083; Simonds v. Mpls. etc. Ry., 87–408, 92+409; Campbell v. Duluth etc. Ry., 107–358, 120+375. See Fewings v. Mendenhall, 88–336, 93+118 ("consistent with orderly conduct of business").

[16] Smith v. St. P. C. Ry., 32–1, 18+827; Wilson v. N. P. Ry., 26–278, 3+333; Johnson v. Winona etc. Ry., 11–296(204).

[17] Jacobus v. St. P. & C. Ry., 20–125(110); Smith v. St. P. C. Ry., 32–1, 18+827; Chesley v. Miss. etc. Co., 39–83, 87, 38+769; Benedict v. Mpls. etc. Ry., 86–224, 90+360.

[18] Opsahl v. Judd, 30–126, 14+575.

[19] Fewings v. Mendenhall, 88–336, 340, 93+118; McLean v. Burbank, 11–277(189); Smith v. St. P. C. Ry., 32–1, 18+827; Watson v. St. P. C. Ry., 42–46, 43+904.

[20] Fewings v. Mendenhall, 88–336, 93+118.

[21] Jacobus v. St. P. & C. Ry., 20–125(110).

not held to the standard of perfection of an ideal road, but must exercise the highest degree of care practicable under the circumstances.[22]

1262. Limiting liability by contract—A carrier of passengers cannot exempt itself, by contract, from liability to them for its negligence, even though they are carried gratuitously. A condition in a free pass exempting the carrier from liability for negligence is void as against public policy.[23] A railway company cannot, by contract, limit its liability for injuries resulting from its negligence in not stopping at a crossing, as required by statute.[24]

1263. Care of children—Where a boy eight years old sitting on the platform of a street car in rapid motion became dizzy and fell off, it was held a question for the jury whether the conductor was negligent in allowing the boy to ride in that position.[25]

1264. Effect of calling "all aboard"—Where a passenger alights when a train is sidetracked to allow another train to pass, a call of the conductor, "all aboard," does not relieve the passenger of the duty to use reasonable care to avoid the approaching train.[26]

1265. Reliance on assurance of conductor—The conductor of a railway train has control of its movements, and represents the company, so that persons boarding a car with his consent have a right to rely upon his assurance that it is safe to undertake to do so before the train moves.[27]

1266. Collisions—Where a passenger is injured by a collision of trains owned by different companies, and the collision is caused directly by the concurrent negligence of both companies, he may maintain an action against both. The negligence of the carrier upon whose train he was a passenger is not imputable to him.[28] An imminent threatened collision may cause fright and resultant injury for which a recovery may be had.[29] Cases are cited below involving injuries to passengers from collisions.[30]

1267. Derailments—Cases are cited below involving injuries to passengers from the derailment of cars.[31]

[22] Campbell v. Duluth etc. Ry., 107–358, 120+375.

[23] Jacobus v. St. P. & C. Ry., 20–125 (110); Fleming v. St. P. & D. Ry., 27–111, 6+448. See contra, as to one riding on a free pass, N. P. Ry. v. Adams, 192 U. S. 440; 14 Harv. L. Rev. 147; 17 Id. 491.

[24] Starr v. G. N. Ry., 67–18, 69+632.

[25] Jackson v. St. P. C. Ry., 74–48, 76+956.

[26] De Kay v. Chi. Ry., 41–178, 43+182; Hermeling v. Chi. etc. Ry., 105–136, 117+341.

[27] Olson v. St. P. & D. Ry., 45–536, 48+445. See Farrell v. G. N. Ry., 100–361, 111+388.

[28] Flaherty v. Mpls. etc. Ry., 39–328, 40+160.

[29] Purcell v. St. P. C. Ry., 48–134, 50+1034.

[30] Smith v. St. P. C. Ry., 32–1, 18+827 (collision between two street cars as plaintiff was boarding one of them—presumption of negligence); Pratt v. Chi. etc. Ry., 38–455, 38+356 (collision of trains at crossing of two railways); Graham v. Burlington etc. Ry., 39–81, 38+812 (presumption of negligence); Fulmore v. St. P. C. Ry., 72–448, 75+589 (collision between street car and freight train—negligence of motorman conceded—proximate cause of injury); Edlund v. St. P. C. Ry., 78–434, 81+214 (collision between two street cars); McCord v. Mpls. etc. Ry., 96–517, 105+190 (injury to mail agent—negligence of company conceded).

[31] Wilson v. N. P. Ry., 26–278, 3+333 (plaintiff jumping from car to escape danger—contributory negligence); Smith v. St. P. etc. Ry., 30–169, 14+797 (plaintiff jumping from car to escape danger—proximate cause of injury—damages); Eldridge v. Mpls. etc. Ry., 32–253, 20+151 (car derailed while train slacking up for crossing—sufficiency of evidence to overcome presumption of negligence—verdict for company sustained); Edlund v. St. P. C. Ry., 78–434, 81+214 (derailment of street car on temporary track); Bishop v. St. P. C. Ry., 48–26, 50+927 (cable street car ran down hill at great speed and was overturned at foot of hill); Donnelly v. St. P. C. Ry., 70–278, 73+157 (derailment of street car—running car at excessive speed over defective track); Dunn v. Burlington etc. Ry., 35–73, 27+448 (train running at excessive speed—plaintiff burned by fire from stove in car); De

1268. Injuries from unsafe premises—A railway carrier of passengers is bound to use every reasonable means to keep in a safe condition all portions of its platforms and approaches thereto, to which passengers, or those who have purchased tickets with a view to take passage on its cars, would naturally or ordinarily be likely to go. This includes the duty of properly lighting at night their depots, and approaches to and from their trains.[32] Where the plaintiff fell on ice near the steps of a railway platform at a point where passengers or visitors were not invited by the company to go, it was held that the company was not liable.[33] Where the plaintiff was injured by walking off the end of a railway platform in the dark, it was held that she could not recover because of her own negligence, regardless of the duty of the company to keep the platform lighted.[34] A person injured by a defective wharf, upon which he was walking for the purpose of boarding a steamboat, has been held entitled to recover.[35] Where a passenger in a station, without looking where he was going, opened a door not marked for the use of passengers, and fell to the basement below, it was held that he could not recover.[36]

1269. Injuries from defective cars—Where the door to a railway mail car was in such condition that it could not be closed, and in consequence a mail clerk contracted a cold and became ill, a verdict in his favor was sustained.[37]

1270. Overcrowding cars—When a street railway company undertakes to carry large numbers of people, vastly in excess of the seating and standing capacity of its cars, and permits passengers to ride on the platforms, stops its cars when in such crowded condition that other persons may get upon them, and, because of the crowd, a passenger who has boarded a car before it was crowded is pushed off a platform and injured, the company is guilty of negligence.[38] If railway companies allow passengers to ride on the platform of cars they are liable for resulting injuries.[39]

1271. Passengers in improper place—A carrier, in undertaking to carry passengers safely, undertakes to do so only on condition that they place themselves under its directions in the particular places set apart for their accommodation.[40]

1272. Injuries to passengers while riding in baggage-car—The fact that a railway company has a rule prohibiting passengers being in its baggage-cars, does not absolve it from the duty of care toward passengers who are in a baggage-car, if it habitually disregards the rule, and permits passengers to ride in such cars. The fact that a passenger on a railway is, when injured, in a baggage-car, in which, by the rules of the company, passengers are not permitted to be, is not negligence on his part that will defeat his recovery, unless it contributed to or aggravated the injury.[41]

Blois v. G. N. Ry., 99–18, 108+293 (negligence of defendant conceded—controversy as to extent of damages); Floody v. G. N. Ry., 104–474, 116+943 (failure of switch to operate automatically—action against operating company and company owning switch—complaint held insufficient as against the owning company).

[32] Buenemann v. St. P. etc. Ry., 32–390, 20+379. See Christie v. Chi. etc. Ry., 61–161, 63+482; Lemery v. G. N. Ry., 83–47, 85+908; McDonald v. G. N. Ry., 102–515, 113+1135.

[33] De Blois v. G. N. Ry., 71–45, 73+637.

[34] Emery v. Chi. etc. Ry., 77–465, 80+627.

[35] Massolt v. Minnetonka C. Co., 103–517, 114+1132.

[36] Speck v. N. P. Ry., 108–435, 122+497.

[37] Decker v. Chi. etc. Ry., 102–99, 112+901.

[38] Reem v. St. P. C. Ry., 77–503, 80+638, 778. See Brusch v. St. P. C. Ry., 52–512, 55+57.

[39] Benedict v. Mpls. etc. Ry., 86–224, 90+360.

[40] Janny v. G. N. Ry., 63–380, 65+450. But see, Jacobus v. St. P. & C. Ry., 20–125(110); Jones v. Chi. etc. Ry., 43–279, 45+444; Simonds v. Mpls. etc. Ry., 87–408, 92+409.

[41] Jones v. Chi. etc. Ry., 43–279, 45+444; Jacobus v. St. P. & C. Ry., 20–125(110); Simonds v. Mpls. etc. Ry., 87–408, 92+409.

1273. Injuries to passengers riding on platform or steps of train—The mere fact that there are no seats in railway cars does not justify a person in riding on a platform while the train is in motion, for so long as he can find standing room by reasonable effort, on the inside, it is his duty to be there. Where it is unnecessary to stand or ride upon a platform, going there or standing there is such negligence as will prevent a recovery for personal injuries received. If a car is so crowded that a reasonably prudent man would conclude that he could not get inside without unreasonable pushing and crowding his way by main force, the question as to whether or not he is guilty of contributory negligence, when injured because of riding upon the platform, is for the jury. The mere fact that a passenger is injured while necessarily standing upon the platform is not in itself a cause for action against a railway company, for there must be some intervening act attributable to the company, and causing the injury, in order that the passenger can recover. If the accident is caused by the act of the plaintiff himself, or by that of another passenger, the act not being the natural consequence of the company's negligence, it is not liable.[42] It is ordinarily negligent for a passenger to stand on the steps of a car in motion, even though he is preparing to alight at a station.[43] It is ordinarily negligent for a passenger to stand on a platform and lean beyond the line of a car in motion.[44] A carrier of passengers is not bound to have its cars vestibuled; but if it does it cannot by acts and words lead its passengers to believe that the doors of a vestibule will be kept closed between stations and then negligently leave them open without incurring liability for resulting injury to a passenger.[45]

1274. Injuries to passengers riding on platform of street car—It is not negligent, as a matter of law, for a passenger to stand on the rear platform of a moving street car without holding on,[46] even though the car is passing round a curve.[47] Cases are cited below in which a recovery was sustained.[48]

1275. Injuries to passengers boarding trains—Cases are cited below in which a recovery against a company for injuries to passengers while boarding a train was sustained.[49]

1276. Injuries to passengers boarding street car—It is negligent to start a car while a passenger is in the act of boarding it. Passengers must be given a reasonable opportunity to get safely on board, regard being had to the circumstances of each case.[50] More than ordinary care is required where the

[42] Rolette v. G. N. Ry., 91–16, 97+431. See Scheiber v. Chi. etc. Ry., 61–499, 63+1034; Benedict v. Mpls. etc. Ry., 86–224, 90+360.

[43] Scheiber v. Chi. etc. Ry., 61–499, 63+1034.

[44] Benedict v. Mpls. etc. Ry., 86–224, 90+360.

[45] Crandall v. Mpls. etc. Ry., 96–434, 105+185.

[46] Matz v. St. P. C. Ry., 52–159, 53+1071. See Dahlberg v. Mpls. St. Ry., 32–404, 21+545.

[47] Blondel v. St. P. C. Ry., 66–284, 68+1079; Brusch v. St. P. C. Ry., 52–512, 55+57.

[48] Brusch v. St. P. C. Ry., 52–512, 55+57 (car running around curve at high speed—crowd on platform swayed and pushed plaintiff through gate); Reem v. St. P. C. Ry., 77–503, 80+638 (plaintiff pushed off platform by crowd); Jackson v. St. P. C. Ry., 74–48, 76+956 (boy eight years old sitting on platform with feet on step became dizzy and fell off).

[49] Olson v. St. P. & D. Ry., 45–536, 48+445 (plaintiff injured while on couplings in the act of entering stock car through door at rear of car—had been assured by conductor that train was not about to start); Croom v. Chi. etc. Ry., 52–296, 53+1128 (plaintiff eighty years old and very feeble—mounted platform and stepped off from the other side in the darkness); Harrold v. Winona etc. Ry., 47–17, 49+389 (passenger in act of boarding train just starting pulled or kept off by brakeman). See Aske v. Duluth etc. Ry., 83–197, 85+1011 (verdict for defendant sustained).

[50] Steeg v. St. P. C. Ry., 50–149, 52+393; Sahlgaard v. St. P. C. Ry., 48–232, 51+111; Schmeltzer v. St. P. C. Ry., 80–50, 82+1092; Gaffney v. St. P. C. Ry., 81–459, 84+304; Miller v. St. P. C. Ry., 66–192, 68+862. See Wick v. St. P. C. Ry., 104–428, 116+929.

passenger is infirm, or aged, or incumbered with packages.[51] It is unnecessary to wait till a passenger is seated before starting a car.[52] A recovery has been sustained where a passenger was injured by a collision of two cars while he was in the act of boarding one of them;[53] and where a passenger was caught between the closing gates of a car.[54] It is not, as a matter of law, negligent for a passenger to attempt to enter a street car while the same is moving, irrespective of the rate of speed or other qualifying circumstances. It is presumptively negligent to do so if the car is moving at its ordinary rate of speed, or with accelerated speed, and especially if the attempt is made between cars, or at the front instead of the rear of a car. It is ordinarily a question for the jury, depending upon the circumstances of each case.[55] It is a matter of common knowledge that street cars always start with a slight jerk, or sudden movement, and, though much depends upon the operations of the motorman, absolute evenness of movement is not attainable.[56]

1277. Injuries to passengers alighting from trains—Under ordinary circumstances it is negligent to alight from a moving train. But if the train is moving very slowly, and the circumstances are especially favorable, the question of negligence may be one for the jury.[57] It is negligent for a conductor or other trainman to advise a passenger to alight from a train in motion.[58] Railway companies are required to provide means of access to and egress from their trains and stations which may be used without danger. Passengers who have previously been told that the next stop will be at the station at which they desire to leave the train are ordinarily required, when the train stops, to exercise due care in observing the surroundings, in order that they may reasonably determine whether the train has arrived at the place where the company intended them to alight. If the surroundings and indications of the place at which a passenger under such circumstances does in fact alight are such that they preclude a reasonable belief on his part that he is getting out where the company intended him to leave the train, and such that no ordinarily prudent person, possessing average sense of sight and using it, could suppose that the train had arrived at the place of his intended departure, he is prevented by his own negligence from recovering damages resulting from getting off at a wrong place. The mere fact that a train is about to stop at a railway junction, in accordance with statute, does not justify him in disregarding the appearance of the actual environment, nor in concluding that the train has arrived at the place named as the next station. An exception is recognized where a passenger is under reasonable apprehension that, if he does not alight at the place where he is (though an unsafe or an unfit one), he will not have time to alight at all. In such a case he may be justified in taking the risk of alighting as best he can at that place. The exception, however, applies only to cases presenting the alternative of getting off or being carried beyond the passenger's destination.[59] A recovery against a company has been sustained where the plaintiff, in alighting, stepped on the connecting link between two cars and had his foot crushed

[51] Steeg v. St. P. C. Ry., 50–149, 52+393.
[52] Miller v. St. P. C. Ry., 66–192, 68+862.
[53] Smith v. St. P. C. Ry., 32–1, 18+827.
[54] McBride v. St. P. C. Ry., 72–291, 75+231; Hunt v. St. P. C. Ry., 89–448, 95+312.
[55] Sahlgaard v. St. P. C. Ry., 48–232, 51+111; Schacherl v. St. P. C. Ry., 42–42, 43+837.
[56] Wick v. St. P. C. Ry., 104–428, 116+929.
[57] Jones v. Chi. etc. Ry., 42–183, 43+1114; Butler v. St. P. & D. Ry., 59–135, 60+1090; Holden v. G. N. Ry., 103–98, 114+365. See Olson v. Chi. etc. Ry., 94–241, 102+449.
[58] Jones v. Chi. etc. Ry., 42–183, 43+1114; Holden v. G. N. Ry., 103–98, 114+365. See Powers v. Chi. etc. Ry., 108–319, 121+897 (evidence held not to show that porter directed passenger to leave car before train stopped at station).
[59] Farrell v. G. N. Ry., 100–361, 111+388.

in consequence of the train starting suddenly;[60] where the plaintiff, an old woman, was injured in alighting as the train was starting;[61] where the plaintiff was invited by the brakeman to get off beyond the end of the station platform, without telling her that she was not at the platform or advising her as to the distance from the car step to the ground, the night being dark;[62] where the brakeman called out the name of the plaintiff's station and the train stopped at a crossing near the station, the plaintiff in her fright jumping off at the crossing as the cars were starting;[63] where the plaintiff, a woman fifty-nine years old, was thrown to the platform by the train starting as she was in the act of alighting;[64] where the train was negligently started while the plaintiff was in the act of alighting;[65] Where a passenger alighted from a freight train at night when it was on a trestle, having been assured by the conductor that he could get off at that point.[01]

1278. Injuries to passengers alighting from street car—Whether a person is negligent in getting off a street car while it is in motion depends upon the facts of the particular case, and is a question for the jury, where the evidence is not conclusive.[66] It is negligent to start a car while a passenger is in the act of alighting,[67] especially to start it suddenly and with a jerk.[68] It is not always negligent, as a matter of law, for a passenger preparing to alight to stand on the step of a car as it slows down to stop. But a car generally jerks more or less in stopping, and it is the duty of a passenger alighting to act in view of that fact.[69] It is not, as a general rule, the duty of conductors to assist passengers in alighting, but it is their duty to use reasonable efforts to check a dangerous rush of passengers to get off.[70] A recovery has been sustained where a passenger in alighting slipped on ice or snow negligently allowed to remain on the steps and platform of a car;[71] where the gates of a car were closed prematurely, caught the dress of a passenger and dragged her some distance;[72] and where a passenger in alighting stepped into a hole, the car being stopped at a place which the company knew to be dangerous.[73]

1279. Injuries from obstacles near track—A street railway company is bound to exercise the highest degree of care in the management of its cars in approaching and passing structures and obstacles in the street situated unreasonably close to the track. Where the plaintiff was injured by extending his hand slightly out of a street car window while in the act of taking his seat it

[60] Johnson v. Winona etc. Ry., 11–296 (204).

[61] Keller v. Sioux City etc. Ry., 27–178, 6+486.

[62] Kral v. Burlington etc. Ry., 71–422, 74+166.

[63] Larson v. Mpls. etc. Ry., 85–387, 88+994. See Farrell v. G. N. Ry., 100–361, 111+388; Powers v. Chi. etc. Ry., 108–319, 121+897.

[64] Olson v. Chi. etc. Ry., 94–241, 102+449.

[65] Bragg v. Chi. etc. Ry., 81–130, 83+511. See Patzke v. Mpls. etc. Ry., 109–97, 123+57.

[01] Burnside v. Mpls. etc. Ry., 125+895.

[66] Schacherl v. St. P. C. Ry., 42–42, 43+837; Cody v. Duluth St. Ry., 94–74, 102+201, 397; Saiko v. St. P. C. Ry., 67–8, 69+473; De Foe v. St. P. C. Ry., 65–319, 68+35. See Palmer v. Winona R. & L. Co., 78–138, 80+869.

[67] Piper v. Mpls. St. Ry., 52–269, 53+1060; Joyce v. St. P. C. Ry., 70–339, 73+158; Currie v. Mendenhall, 77–179, 79+677; Messenger v. St. P. C. Ry., 77–34, 79+583; Ahern v. Mpls. St. Ry., 102–435, 113+1019.

[68] Cooper v. St. P. C. Ry., 54–379, 56+42; De Foe v. St. P. C. Ry., 65–319, 68+35; Saiko v. St. P. C. Ry., 67–8, 69+473; Joyce v. St. P. C. Ry., 70–339, 73+158; Currie v. Mendenhall, 77–179, 79+677; Palmer v. Winona R. & L. Co., 78–138, 80+869; Weiner v. Mpls. St. Ry., 80–312, 83+181; Skelton v. St. P. C. Ry., 88–192, 92+960; Ahern v. Mpls. St. Ry., 102–435, 113+1019; Koenig v. St. P. C. Ry., 124+832.

[69] Currie v. Mendenhall, 77–179, 79+677; Cooper v. St. P. C. Ry., 54–379, 56+42. See Saiko v. St. P. C. Ry., 67–8, 69+473.

[70] Jarmy v. Duluth St. Ry., 55–271, 56+813; Hoblit v. Mpls. St. Ry., 126+407.

[71] Herbert v. St. P. C. Ry., 85–341, 88+996.

[72] Berger v. St. P. C. Ry., 95–84, 103+724.

[73] Stewart v. St. P. C. Ry., 78–85, 80+854.

was held a question for the jury whether he was negligent.[74] As a general rule a passenger is negligent, as a matter of law, if he extends any part of his body beyond the line of a moving train.[75]

1280. Injuries to passenger putting head out of window—It is ordinarily negligent for a passenger to put his head out of the window of a car in motion, or in any way to extend his body beyond the line of a moving train.[76]

1281. Injuries at a sidetrack—Where a train was sidetracked to allow another train to pass, and a passenger who had alighted was struck by the engine of the passing train, it was held that he was guilty of contributory negligence, and that the company owed him no duty to make the sidetrack a safe place of ingress and egress.[77]

1282. Street car stopping at unsafe place—While a street railway company is not responsible for the condition of the streets on which it operates its cars, yet it is bound to exercise reasonable care to stop its cars for the discharge of passengers at a safe and proper place for that purpose.[78]

1283. Assault on passengers by employees—Cases are cited below involving assaults on passengers by employees of a carrier.[79]

1284. Assault or injury from fellow-passenger—A carrier of passengers is bound to exercise the utmost care to preserve order on its trains and protect its passengers from violence or insult from fellow-passengers. If a passenger receives an injury, which might reasonably have been anticipated from one who is improperly received or permitted to continue as a passenger, the carrier is responsible.[80]

1285. Injuries from strangers—Strike—A carrier is bound to exercise ordinary care to protect its passengers from injuries from persons not under its control or direction. Where a passenger on a street railway was injured by a stone thrown by a boy sympathizing with a strike of the railway company's employees it was held that the evidence did not show any actionable negligence on the part of the company.[81]

1286. Operating cars during strike—A street railway company has been held not negligent toward its passengers in operating its cars during a strike of its employees.[82]

[74] Dahlberg v. Mpls. St. Ry., 32–404, 21+545.

[75] Benedict v. Mpls. etc. Ry., 86–224, 90+360.

[76] Id.

[77] De Kay v. Chi. etc. Ry., 41–178, 43+182. See Hermeling v. Chi. etc. Ry., 105–136, 117+341.

[78] Stewart v. St. P. C. Ry., 78–85, 80+854; Id., 78–110, 80+855.

[79] Conger v. St. P. etc. Ry., 45–207, 47+788 (evidence held to show that a person assaulting a passenger was at the time acting by authority as a brakeman on the train); Harrold v. Winona etc. Ry., 47–17, 49+389 (passenger boarding train—seized and pulled off by brakeman); Sanderson v. N. P. Ry., 88–162, 92+542 (conductor attempting to eject children for non-payment of fare—fright of mother held not to constitute cause of action against company); Dean v. St. P. U. D. Co., 41–360, 43+54 (liability of union depot company for assault on passenger by servant of lessee of parcel-room); Berg v. St. P. C. Ry., 96–513, 105+191 (assault on passenger of street car by conductor and motorman—controversy over payment of fare—evidence held not to justify exemplary damages); Ford v. Mpls. St. Ry., 98–96, 107+817 (passenger boarding street car assaulted by employee who erroneously supposed that passenger had struck him—assault held tortious and plaintiff not restricted to nominal damages); Beardmore v. Barton, 108–28, 121+228 (indecent assault on female passenger of hack by driver—verdict for $2,000 held not excessive).

[80] Mullan v. Wis. C. Ry., 46–474, 49+249 (assault from fellow-passenger—conductor held to have taken due care); Lucy v. Chi. etc. Ry., 64–7, 65+944 (vile and abusive language toward woman by drunken passenger—verdict for plaintiff sustained—damages held not excessive); Mastad v. Swedish Brethren, 83–40, 85+913 (drunken passenger); Fewings v. Mendenhall, 88–336, 93+118 (general rule discussed).

[81] Fewings v. Mendenhall, 88–336, 93+118.

[82] Fewings v. Mendenhall, 83–237, 86+96; Id., 88–336, 93+118.

1287. Injuries from exposure to cold—Where a passenger in a caboose attached to a freight train, which was making a regular scheduled trip, was, before he or the train reached their destination, taken off, in the caboose, on a branch line, on an irregular side trip, without notice or warning, and exposed to cold and injured in health, it was held that the jury were warranted in finding the carrier guilty of negligence which caused such injury.[83]

1288. Injuries from fright—A carrier is not liable for injuries resulting from the fright of a passenger unless the fright is the proximate result of a legal wrong committed by the carrier against the passenger.[84]

1289. Freight and mixed trains—Assumption of risk—A person who takes passage on a freight or mixed train assumes the risks necessarily incident to the operation of such trains.[85]

1290. Liability of connecting carriers—Where a person buys a ticket which entitles him to carriage over connecting lines, and he is injured by one of the connecting carriers, he may maintain an action, either ex delicto or ex contractu, against the carrier causing the injury, without joining the other carriers.[86]

1291. Injuries to passengers in stage coach crossing ferry—Where a passenger in a stage coach was drowned while the coach was being ferried across a river it was held that the stage company was liable for the negligence of the ferryman.[87]

1292. Care required of passengers—The duties of carriers and passengers are reciprocal. A passenger is bound to exercise ordinary or reasonable care to avoid injury.[88] The position which a passenger in a street car may reasonably be allowed to assume, when taking or occupying a seat, is subject to no arbitrary rule. He is to exercise a degree of care commensurate with the danger to which he may be exposed, and such as men of common prudence would exercise in a like situation, having regard to all the circumstances, and considering the probability that the carrier will exercise due care; but the degree of care to be exercised in any particular case is usually a question of fact for the jury.[89]

1293. Sudden emergency—Distracting circumstances—Cases are cited below involving the effect of a sudden emergency and distracting circumstances upon the question of contributory negligence.[90] The subject is treated more fully elsewhere.[91]

1294. Assumptions as to conduct of motorman—A passenger has a right to assume that a motorman will not drive his car round a curve at an unsafe speed.[92]

[83] Rosted v. G. N. Ry., 76–123, 78+971. See Frigstad v. G. N. Ry., 101–40, 111+838.

[84] Sanderson v. N. P. Ry., 88–162, 92+542. See § 9640.

[85] Oviatt v. Dakota C. Ry., 43–300, 45+436; Schilling v. Winona etc. Ry., 66–252, 68+1083; Simonds v. Mpls. etc. Ry., 87–408, 92+409; Campbell v. Duluth etc. Ry., 107–358, 120+375. See Rosted v. G. N. Ry., 76–123, 78+971.

[86] Fryklund v. G. N. Ry., 101–37, 111+727.

[87] McLean v. Burbank, 11–277(189); Id., 12–530(438).

[88] Farrell v. G. N. Ry., 100–361, 111+388; Butler v. St. P. & D. Ry., 59–135, 60+1090; Smith v. St. P. C. Ry., 32–1, 18+827; Reem v. St. P. C. Ry., 77–503, 80+638; De Kay v. Chi. etc. Ry., 41–178, 43+182; Rollette v. G. N. Ry., 91–16, 97+431; Scheiber v. Chi. etc. Ry., 61–499, 63+1034; Benedict v. Mpls. etc. Ry., 86–224, 90+360; Olson v. Chi. etc. Ry., 94–241, 244, 102+449; Emery v. Chi. etc. Ry., 77–465, 80+627; Hermeling v. Chi. etc. Ry., 105–136, 117+341; Speck v. N. P. Ry., 108–435, 122+497.

[89] Dahlberg v. Mpls. St. Ry., 32–404, 21+545.

[90] Wilson v. N. P. Ry., 26–278, 3+333; Smith v. St. P. etc. Ry., 30–169, 14+797; Purcell v. St. P. C. Ry., 48–134, 50+1034; Piper v. Mpls. St. Ry., 52–269, 53+1060; Larson v. Mpls. etc. Ry., 85–387, 88+994; Farrell v. G. N. Ry., 100–361, 111+388.

[91] See § 7020.

[92] Blondel v. St. P. C. Ry., 66–284, 68+1079.

1295. Proximate cause of injury—Cases involving the question of proximate cause in this connection are cited below.[93] The subject is treated more fully elsewhere.[94]

1296. Presumption of negligence and burden of proof—Where an injury occurs to a passenger through a defect in the construction or working or management of a vehicle of the carrier, or anything pertaining to the service which the carrier ought to control, a presumption of negligence arises from the happening of the accident, and upon such proof the burden devolves upon the carrier to exonerate itself by showing the existence of causes beyond its control, unless evidence thereof appears as part of plaintiff's own case.[95] This presumption does not arise where the injury results from the act of a third party over whom the carrier has no control, such as a striker.[96] The burden of proving contributory negligence is on the defendant.[97] The burden of proving that a street railway company is negligent in not employing a conductor is on the plaintiff.[98]

CARRIERS OF GOODS

IN GENERAL

1297. Regulations—A carrier of goods may make and enforce reasonable regulations for the conduct of its business.[99]

1298. Discrimination as to facilities—A carrier is bound to treat all shippers with equality and without discrimination as to shipping facilities.[1]

1299. Right to refuse goods—In the exercise of a reasonable discretion a carrier may refuse to carry articles of a dangerous nature. It may of course refuse to transport articles contrary to law.[2] It cannot refuse goods on the ground that the shipper has neglected to pay back charges for other shipments.[3]

1300. Duty to furnish cars—Cases are cited below involving the duty of a carrier of goods to furnish cars to shippers.[4]

[93] McLean v. Burbank, 11-277(189); Jacobus v. St. P. & C. Ry., 20-125(110); Smith v. St. P. etc. Ry., 30-169, 14+797; Cooper v. St. P. C. Ry., 54-379, 56+42; Kral v. Burlington etc. Ry., 71-422, 74+166; Keegan v. Mpls. etc. Ry., 76-90, 78+965; Bishop v. St. P. C. Ry., 48-26, 50+927; Miller v. St. P. C. Ry., 66-192, 68+862; Rolette v. G. N. Ry., 91-16, 97+431; Benedict v. Mpls. etc. Ry., 86-224, 90+360; Purcell v. St. P. C. Ry., 48-134, 50+1034; Rosted v. G. N. Ry., 76-123, 78+971; Jones v. Chi. etc. Ry., 43-279, 45+444; Crandall v Mpls. etc. Ry., 96-434, 105+185; Mageau v. G. N. Ry., 106-375, 119+200.

[94] See § 6999.

[95] Smith v. St. P. C. Ry., 32-1, 18+827; Wilson v. N. P. Ry, 26-278, 3+333; McLean v. Burbank, 11-277(189); Eldridge v. Mpls. etc. Ry., 32-253, 20+151; Graham v. Burlington etc. Ry., 39-81, 38+812. See Rea v. Mpls. St. Ry., 126+823. Where a box car occupied by an emigrant and his stock took fire, and it did not appear whether the fire originated from within or without the car, it was held that the ordinary presumption did not apply, and that the burden of proof was on the plaintiff. McGuire v. G. N. Ry., 106-192, 118+556. See, as to presumption in case of collision with train of another company, 16 Harv. L. Rev. 227.

[96] Fewings v. Mendenhall, 88-336, 93+118.

[97] Wilson v. N. P. Ry., 26-278, 3+333.

[98] Palmer v. Winona R. & L. Co., 78-138, 80+869.

[99] Christian v. First Div. etc. Ry., 20-21 (12) (regulation requiring consignee to receipt for grain in bin without opportunity to weigh or measure held unreasonable as a matter of law); Rhodes v. N. P. Ry., 34-87, 24+347 (regulations as to place for receipt of freight); Farwell v. Mpls. etc. Ry., 55-8, 56+248 (regulations relating to trackage for elevators); Godbout v. St. P. U. D. Co., 79-188, 81+835 (regulation of hackmen in depot).

[1] See Rhodes v. N. P. Ry., 34-87, 24+347; Myers v. Chi. etc. Ry., 50-371, 52+962; Farwell v. Mpls. etc. Ry., 55-8, 56+248; Godbout v. St. P. U. D. Co., 79-188, 81+835; State v. U. S. Ex. Co., 95-442, 104+556; Grieser v. McIlrath, 13 Fed. 373.

[2] State v. U. S. Ex. Co., 95-442, 104+556. See 23 Harv. L. Rev. 212.

[3] State v. Board, W. & L. Comrs., 105-472, 477, 117-827.

[4] Richey v. N. P. Ry., 125+897; Weida v. Chi. etc. Ry., 72-102, 75+121.

1301. Schedule of rates—Interstate commerce—A schedule of rates filed with the interstate commerce commission by two connecting carriers engaged in interstate commerce has been held sufficient in form and valid as to the rates fixed.[5]

1302. Contents of packages—Disclosure—Fraud—In the absence of more definite information, the carrier has the right to accept the shipper's marks as to the contents of a package offered for transportation, and is not bound to inquire particularly about them in order to take advantage of a false classification. A neglect on the part of the shipper to disclose the true nature of the contents of a receptacle offered for transportation is conduct amounting to a fraud on the carrier, if there is anything in its form, dimensions, or outward appearance which is likely to throw the carrier off its guard, whether so designed or not. Intention to impose upon the carrier is not essential.[6]

1303. Authority of agents—Where a traveling freight agent of a common carrier, clothed with general authority to solicit freight business, and with special authority to contract for the shipment of freight upon special conditions as to the movement of trains, enters into a contract for the shipment of freight without disclosing to the shipper the conditions limiting his authority, the principal is bound by the act of the agent, and is liable to the shipper for resulting damages.[7] A general manager or general freight agent of a railway company has no implied authority to guarantee the payment of the price of goods shipped.[8]

BILLS OF LADING

1304. Definition—A bill of lading is an instrument issued by a carrier consisting of a receipt for goods and a contract for their carriage.[9]

1305. Nature—Symbol of property—Transfer—A bill of lading is a symbol of the property, and its indorsement and delivery operates as a symbolical delivery of the property and a transfer of the title thereto, if such was the intention of the parties.[10] It has a double nature. It is at once a receipt for the property and a contract for its carriage.[11]

1306. As evidence of title—A bill of lading is prima facie evidence that the consignee named therein is the owner of the goods.[12]

1307. Construction—A bill of lading is to be construed strictly against the carrier and liberally in favor of the shipper.[13]

1308. Negotiability—Bona fide pledgee—A bill of lading is not a negotiable instrument in the strict sense of that term.[14] But it is quasi negotiable. It may be indorsed and transferred so as to give the holder superior rights. When it is indorsed and transferred as security for the payment of money the carrier cannot ignore the rights of a bona fide pledgee.[15] A bill of lading, upon which is stamped the words "not negotiable unless delivery is to be made to

[5] Mannheim Ins. Co. v. Erie etc. Co., 72–357, 75+602.

[6] Harrington v. Wabash Ry., 108–257, 122+14.

[7] Baker v. Chi. etc. Ry., 91–118, 97+650.

[8] Weikle v. Mpls. etc. Ry., 64–296, 66+963.

[9] Freeman v. Kraemer, 63–242, 65+455. See Weide v. Davidson, 15–327(258) (informal instrument in nature of a bill of lading); Note, 105 Am. St. Rep. 332.

[10] Security Bank v. Luttgen, 29–363, 13+151; Leuthold v. Fairchild, 35–99, 27+503; Ratzer v. Burlington etc. Ry., 64–245, 66+988; Ryan v. G. N. Ry., 90–12, 95+758; Barnum v. G. N. Ry., 102–147, 112+1030, 1049. See, as to rights and liabilities of assignees, Note, 105 Am. St. Rep. 332.

[11] Freeman v. Kraemer, 63–242, 65+455.

[12] See § 1341.

[13] Mulrooney v. Western T. Co., 102–142, 112+988.

[14] Security Bank v. Luttgen, 29–363, 13+151; Nat. Bank of Com. v. Chi. etc. Ry., 44–224, 46+342, 560.

[15] Ratzer v. Burlington etc. Ry., 64–245, 66+988; Ryan v. G. N. Ry., 90–12, 95+758. See Bank of Litchfield v. Elliott, 83–469, 86+454.

consignee or order," is exempt from the provision of section 7649 G. S. 1894 (R. L. 1905 § 2097), and the rights of parties thereunder are determined by common-law principles. If a railway company, after issuing such a bill of lading, delivers the goods to the consignee named therein, without requiring the bill of lading to be produced, it does so at its peril.[16]

1309. Tranfer by indorsement—Statute—Provision is made by statute for the transfer of bills of lading by indorsement.[17]

1310. Issued for goods not received—If the agent of a carrier without authority issues a bill of lading without receiving the goods which it purports to cover, the carrier is not liable even to an innocent indorsee or consignee for value. It is not estopped by the statements in the bill from showng that no goods were in fact received.[18]

1311. Parol evidence—In so far as a bill of lading constitutes a contract between the parties it is subject to the general rule forbidding the variation of a written contract by parol evidence. And this applies to third parties whose rights depend on the contract.[19] But an indorsement of a bill of lading is not a contract within this rule. It may be shown by parol evidence that an indorsement and delivery were made as an absolute sale, a trust, a mortgage, a pledge, a lien, or a mere agency.[20] The instrument itself is the best evidence of the contract of the parties.[21] It may be modified by a subsequent parol agreement.[22]

LIMITATION OF LIABILITY

1312. Right to limit liability—A carrier of goods may by special contract limit its common-law liability in any way which is just and reasonable in the eye of the law.[23] Most of the freight of the country is now carried under bills of lading limiting the common-law liability of the carrier.[24] As regards interstate commerce the right is limited by the Hepburn Act.[01]

1313. Presumption of common-law liability—The responsibility of a common carrier for damage to shipments intrusted to it is primarily that expressed in the common law. The shipper may insist upon that responsibility, or he may consent to its limitation when he has been afforded option and opportunity of contracting, either in accordance with the common-law rule, or with stipulated change, so long as such stipulation for exemption of the carrier is just and reasonable in the eye of the law.[25]

1314. Consideration—There must be a consideration for a contract limiting the common-law liability of a carrier. The mere receipt of the goods and undertaking to carry is not a sufficient consideration.[26]

[16] Barnum v. G. N. Ry., 102–147, 112+1030, 1049.

[17] R. L. 1905 § 2097. See Nat. Bank of Com. v. Chi. etc. Ry., 44–224, 46+342, 560; Barnum v. G. N. Ry., 102–147, 112+1030, 1049.

[18] Nat. Bank of Com. v. Chi. etc. Ry., 44–224, 46+342, 560; Swedish-Am. N. Bank v. Chi. etc. Ry., 96–436, 105+69. See 22 L. R. A. (N. S.) 828.

[19] Mpls. etc. Ry. v. Home Ins. Co., 55–236, 56+815.

[20] Security Bank v. Luttgen, 29–363, 13+151; Leuthold v. Fairchild, 35–99, 27+503.

[21] Ortt v. Mpls. etc. Ry., 36–396, 31+519.

[22] Steidl v. Mpls. etc. Ry., 94–233, 102+701.

[23] Christenson v. Am. Ex. Co., 15–270 (208); Hutchinson v. Chi. etc. Ry., 37–524, 35+433; Alair v. N. P. Ry., 53–160, 54+1072; O'Malley v. G. N. Ry., 86–380, 90+974; Murphy v. Wells, 99–230, 108+1070; Minn. etc. Co. v. Chi. etc. Ry., 108–470, 122+493. See Gamble v. N. P. Ry., 107–187, 119+1068 (contract that carrier does not undertake to carry goods in time for any particular market, and that it is not liable for damages due to delay); 20 Harv. L. Rev. 297; Note, 88 Am. St. Rep. 74.

[24] Mannheim Ins. Co. v. Erie etc. Co., 72–357, 75+602.

[01] Dodge v. Chi. etc. Ry., 126+627.

[25] Murphy v. Wells, 99–230, 108+1070.

[26] Wehmann v. Mpls. etc. Ry., 58–22, 59+546; Southard v. Mpls. etc. Ry., 60–382, 62+442, 619; Mannheim Ins. Co. v. Erie etc. Co., 72–357, 75+602. See Hutchinson

1315. Liability for negligence—A carrier of goods cannot by special contract exempt itself from liability for any loss resulting from its own negligence or that of its servants. Such a contract is deemed contrary to public policy, because it relieves the carrier of the essential duties of its public employment. It is not just and reasonable in the eye of the law.[27] No distinction can be made in this connection between different degrees of negligence. So-called "gross" negligence is merely negligence with a vituperative epithet.[28]

1316. Sufficiency of contract—The special agreement limiting liability may be in the form of a special acceptance of the goods by the carrier, as by a unilateral bill of lading or receipt. But to bind the shipper by a special acceptance he must expressly assent to it, or it must be brought home to him under circumstances from which his assent is to be implied.[29] The contract must be entered into knowingly and intentionally as a basis for the carrier's charges and responsibility. The fact that the shipper signs a contract containing a limitation is not always sufficient,[30] nor is the mere acceptance of a receipt.[31]

1317. Notice of claim—An agreement between a carrier and shipper exempting the carrier from liability unless the shipper serves a notice of claim for loss as agreed is valid if reasonable.[32] A provision in a stock-shipping contract which requires the owner of the stock, as a condition precedent to his right to recover for any loss or injury to his stock, to give notice in writing of his claim to some officer of the carrier before the stock is removed from the place of its destination or delivery, is unreasonable and void, where the carrier has no officer or agent at such place.[33] A stipulation for notice "to the agent at point of delivery" has been held satisfied by notice to the agent of the final delivering carrier, though the contracting carrier had an agent at the point of delivery.[34] A condition, annexed to a receipt given by an express company upon receiving a draft for transmission and collection, that it should not be liable for any loss or damage unless a claim should be asserted within ninety days, has been held inapplicable to limit the company's liability for neglect or refusal to pay to the plaintiffs the money received.[35] A notice in substantial conformity to the contract is sufficient.[36] The requirement of a notice may be waived.[37]

1318. Agreed valuation—An agreement between a carrier and shipper as to the value of the goods shipped and that such value shall be the limit of recovery in case of loss is valid, even though the loss results from negligence, if it is made fairly and honestly as a basis for the carrier's charges and responsibility.[38] Extrinsic evidence is admissible to show that such an agreement was

v. Chi. etc. Ry., 37-524, 35+433; Hinton v. Eastern Ry., 72-339, 75+373; Cau v. Texas etc. Ry., 194 U. S. 427.

[27] Christenson v. Am. Ex. Co., 15-270 (208); Shriver v. Sioux City etc. Ry., 24-506; Moulton v. St. P. etc. Ry., 31-85, 16+497; Ortt v. Mpls. etc. Ry., 36-396, 31+519; Boehl v. Chi. etc. Ry., 44-191, 46+333; Alair v. N. P. Ry., 53-160, 54+1072; The Kensington, 183 U. S. 263, 268.

[28] Jacobus v. St. P. & C. Ry., 20-125 (110); Powers v. Wells, 93-143, 100+735.

[29] Christenson v. Am. Ex. Co., 15-270 (208).

[30] O'Malley v. G. N. Ry., 86-380, 90+974. See Hutchinson v. Chi. etc. Ry., 37-524, 35+433.

[31] Powers v. Wells, 93-143, 100+735. See Murphy v. Wells, 99-230, 108+1070.

[32] Armstrong v. Chi. etc. Ry., 53-183, 54+1059.

[33] Engesether v. G. N. Ry., 65-168, 68+4; Carpenter v. Eastern Ry., 67-188, 69+720.

[34] Mulrooney v. Western T. Co., 102-142, 112+988.

[35] Bardwell v. Am. Ex. Co., 35-344, 28+925.

[36] Hinton v. Eastern Ry., 72-339, 75+373.

[37] Shumaker v. N. P. Ry., 108-35, 121+122 (finding as to waiver not justified by the evidence).

[38] Alair v. N. P. Ry., 53-160, 54+1072; Douglas v. Minn. T. Ry., 62-288, 64+899; O'Malley v. G. N. Ry., 86-380, 90+974; Powers v. Wells, 93-143, 100+735; Murphy v. Wells, 99-230, 108+1070. See Moulton v. St. P. etc. Ry., 31-85, 16+497; Boehl v.

not fairly and honestly made.[39] An agreement which provides that the amount of loss or damage incurred is to be computed at the value of the property at the time and place of shipment, and which does not exclude from the computation of damages the amount which may have been paid by the consignee as freight charges, is valid.[40]

1319. Authority of agent of shipper—Evidence held to show that an agent of the shipper, who accompanied the stock shipped, was authorized to enter into a contract limiting the common-law liability of a connecting carrier.[41] A local express company has been held to be the agent of a shipper to give information regarding the contents of a package and for the doing of all acts usually connected with the shipment of goods.[42]

CHARGES AND LIEN

1320. Presumption as to payment—When property has been delivered by a carrier to the consignee the presumption is that he has paid the freight.[43]

1321. False declaration of value—Where a shipper made a false declaration as to the value of the goods, it was held that the carrier might recover for any increased risk of carrying valuable goods on the basis of the declared value, but not on the basis of their real value.[44]

1322. Lien—A carrier acquires no lien on government property for carrying it.[45] A carrier acquires no lien unless it fulfils its contract for carriage.[46] The lien of a carrier and warehouseman for keeping property is superior to that of a pledgee who procures the property to be transported and stored.[47] A connecting carrier may have a lien.[48] A lien is waived where credit is given by contract to the shipper for the price of transportation beyond the time when the property is to be delivered and placed out of the control of the carrier. And if the lien is thus waived the insolvency of the shipper, or his default in payment at the expiration of the credit, occurring while the goods remain in the possession of the carrier, will not reinstate it. The mere fact that a carrier delivers a part of a bailment without payment of the charges does not constitute a waiver of the lien on the remainder for the charges on the whole bailment.[49]

LIABILITY FOR LOSS OR INJURY

1323. Carrier an insurer at common law—At common law a carrier is an insurer of the goods shipped and responsible for all losses except those occasioned by the act of God or the public enemy. The reason for this extraordinary liability is found in the public character of the carrier's business, the inequality in the footing of the carrier and shipper, the opportunities for collusion between the carrier and a wrongdoer, and the difficulty for the shipper of proving the cause of a loss.[50] This common-law liability may be either limited[51] or extended[52] by special agreement.

Chi. etc. Ry., 44–191, 46+333; Shea v. Mpls. etc. Ry., 63–228, 65+458; 21 Harv. L. Rev. 32.

[39] O'Malley v. G. N. Ry., 86–380, 90+974.

[40] Davis v. New York etc. Ry., 70–37, 72+823 (overruling Shea v. Mpls. etc. Ry., 63–228, 65+458).

[41] Armstrong v. Chi. etc. Ry., 53–183, 54+1059.

[42] Harrington v. Wabash Ry., 108–257, 122+14.

[43] Shea v. Mpls. etc. Ry., 63–228, 65+458.

[44] U. S. Ex. Co. v. Koerner, 65–540, 68+181.

[45] Dufolt v. Gorman, 1–301(234).

[46] Bass v. Upton, 1–408(292).

[47] Cooley v. Minn. T. Ry., 53–327, 55+141.

[48] See Foy v. Chi. etc. Ry., 63–255, 258, 65+627.

[49] Akeley v. Miss. etc. Co., 64–108, 113, 67+208; Flenniken v. Liscoe, 64–269, 271, 66+979.

[50] Christensen v. Am. Ex. Co., 15–270 (208); Alair v. N. P. Ry., 53–160, 54+1072; Murphy v. Wells, 99–230, 108+1070; Arthur v. St. P. & D. Ry., 38–95, 35+718; Irish v. Mil. etc. Ry., 19–376(323, 327); Hull v. Chi. etc. Ry., 41–510, 43+391.

[51] See § 1312.

[52] McCauley v. Davidson, 10–418(335).

1324. Customary care—The care customarily exercised by carriers is not the measure of a carrier's liability.[53]

1325. Liability not dependent on contract—The liability of a carrier is not dependent on the contract of the parties, but is imposed by law in consequence of the public nature of its business.[54]

1326. Defective cars—It is the duty of a railway company to provide cars reasonably fit for the conveyance of the particular class of goods it intends to carry, and it is not relieved from this duty by transporting the goods over its own line in the car of the connecting carrier in which it received them. If it uses the cars of the connecting carrier, it adopts and makes them its own for the purpose of conveying the goods.[55]

1327. Goods carried gratuitously—A delivery of goods to a carrier is a sufficient consideration for his undertaking to carry them safely.[56]

1328. Seizure under police power—A carrier is excused for the non-delivery of game or fish rightfully taken from it by the game warden.[57]

1329. Goods taken under superior title—The fact that goods are taken from a carrier by one having a title paramount to that of the shipper is a good defence to an action by the consignee or indorsee of the bill of lading for the non-delivery of the goods.[58] The fact that a carrier has delivered the goods on demand to the true owner is a justification for its failure to deliver them according to the directions of the shipper, and it is unnecessary for the carrier to notify the shipper of such delivery.[59]

1330. Seizure of goods under process—A carrier is not liable for goods which are taken from it under a legal process regular and valid on its face. The burden is on the carrier to prove that the process was regular and valid on its face. It is the duty of the carrier to notify the shipper promptly of such a seizure.[60]

1331. Act of God—An act of God will excuse a carrier for the loss of goods, but where the negligence of the carrier concurs in or contributes to the loss it is liable. When it is shown that the loss was due to an act of God the burden is on the adverse party to prove the negligence of the carrier.[61] The tendency of ripe berries to deteriorate is not strictly an act of God.[62]

1332. Inherent nature of goods—A carrier is not liable for loss or damage resulting from the inherent nature of the property shipped, if it exercises ordinary care.[63]

1333. Perishable goods—Fruit—A carrier of perishable goods, such as fruit, is not an insurer as regards their condition, but is liable only for the want of reasonable or ordinary care. The care demanded varies with the circumstances—the nature of the fruit, the time of year, the weather, the usages of the business, the terms of shipment, etc. It may call for refrigeration according to customary practice.[64]

[53] Hinton v. Eastern Ry., 72–339, 75+373.

[54] Shea v. Chi. etc. Ry., 66–102, 107, 68+608.

[55] Id.

[56] McCauley v. Davidson, 10–418(335); Id., 13–162(150).

[57] Thomas v. N. P. Ex. Co., 73–185, 75+1120; Merriman v. G. N. Ex. Co., 63–543, 65+1080 (carrier held liable where warden acted without authority); Graham v. N. P. Ex. Co., 89–193, 94+548 (verdict for plaintiff justified by the evidence).

[58] Nat. Bank of Com. v. Chi. etc. Ry., 44–224, 46+342.

[59] Thomas v. N. P. Ex. Co., 73–185, 75+1120; Merz v. Chi. etc. Ry., 86–33, 90+7.

[60] Merz v. Chi. etc. Ry., 86–33, 90+7.

[61] Jones v. Mpls. etc. Ry., 91–229, 97+893; Bibb v. Atchison etc. Ry., 94–269, 102+709.

[62] Fockens v. U. S. Ex. Co., 99–404, 109+834.

[63] Moulton v. St. P. etc. Ry., 31–85, 87, 16+497.

[64] Brennisen v. Penn. Ry., 100–102, 110+362 (shipment of strawberries from North Carolina to New York in May—duty to ice cars—burden of proof); Brennisen v. Penn. Ry., 101–120, 111+945 (id.); Fock-

1334. Improper packing—Though a shipper cannot recover for injuries to goods due to improper packing, he may recover for injuries resulting independent of such packing.[65]

1335. Dead body—An action ex delicto to recover damages for injured feelings will lie at the suit of a husband against a carrier for soiling and ruining the casket containing the body of his dead wife, and for mutilating and disfiguring the body by negligently and wilfully exposing it to rain.[66] In an action for damages for breach of a contract by a carrier to transport a dead body over its line to a particular point, delivering it there to an intersecting carrier to be conveyed to its place of destination, the breach consisting in the negligence of the carrier's agents and servants in carrying the body beyond the connecting point, thus causing a delay of twenty-four hours in the funeral arrangements, it has been held that, in the absence of wilful or malicious misconduct on the part of the carrier or its agents, damages for mental anguish cannot be recovered.[67]

1336. Contracts as to damaged goods—Where damaged goods were turned over to the consignee for sale on account of the carrier, the fact that the agent of the carrier erred in reporting the condition of the goods was held not material.[68]

LIABILITY FOR DELAY

1337. Duty in general—A carrier is bound to forward goods with reasonable promptness.[69]

1338. Delay concurring with act of God—If a carrier fails to forward the goods with reasonable promptness, and they are overtaken in transit and damaged by an act of God which would not have caused the damages had there been no delay, it is liable, even though the act of God could not reasonably have been anticipated.[70]

1339. Delay to investigate claim—Where property is in the hands of a carrier, and possession thereof is demanded by a stranger to the bill of lading prior to actual shipment and under a claim of ownership, the carrier, having

ens v. U. S. Ex. Co., 99–404, 109+834 (shipment of strawberriers from Winona to St. Paul in June—want of care in handling—burden of proof—verdict for plaintiff sustained); Beede v. Wis. C. Ry., 90–36, 95+454 (shipment in refrigerator car of apples from New Hampshire to St. Paul in December—car sidetracked at Manitowoc seventeen hours—thermometer from eight to seventeen degrees below zero—burden of proof—verdict for plaintiff sustained); Calender v. Chi. etc. Ry., 99–295, 109+402 (shipment of apples in bulk in ordinary box car from New York to Minneapolis in November—mode of shipment held not to constitute contributory negligence—connecting carrier not required to take extraordinary precautions to protect fruit from frost—burden of proof); Shea v. Chi. etc. Ry., 66–102, 68+608 (shipment of lemons from Boston to Minneapolis in June—duty to furnish refrigerator cars—connecting carriers); Hinton v. Eastern Ry., 72–339, 75+373 (shipment of apples from New York to Minnesota in November—apples frozen in transit—connecting carriers—burden of proof); Naas v. Chi. etc. Ry., 96–84, 104+717 (shipment of strawberriers from St. Louis to Minneapolis—negligence in icing car—car report as evidence—notice to consignee); White v. Mpls. etc. Ry., 126+533 (vegetables frozen during delay in transportation—act of God).

[65] Shriver v. Sioux City etc. Ry., 24–506. See Leo v. St. P. etc. Ry., 30–438, 15+872; Davis v. New York etc. Ry., 70–37, 72+823; Shea v. Chi. etc. Ry., 66–102, 107, 68+608.

[66] Lindh v. G. N. Ry., 99–408, 109+823.

[67] Beaulieu v. G. N. Ry., 103–47, 114+353.

[68] Grinnell v. Wis. C. Co., 47–569, 50+891.

[69] Bibb v. Atchison etc. Ry., 94–269, 102+709; Gamble v. N. P. Ry., 107–187, 119+1068. See Grinnell v. Wis. C. Co., 47–569, 50+891; Carpenter v. Eastern Ry., 67–188, 69+720; Moulton v. St. P. etc. Ry., 31–85, 16+497; Baker v. Chi. etc. Ry., 91–118, 97+650.

[70] Bibb v. Atchison etc. Ry., 94–269, 102+709. See 10 Harv. L. Rev. 310; 20 Id. 66; Wabash Ry. v. Sharp (Neb.), 107+758; Green v. Chi. etc. Ry. (Iowa), 106+498.

reasonable doubt, as to which party is entitled to possession and acting in good faith, may have a reasonable time in which to investigate the claims of the respective parties, and for this purpose may delay immediate shipment. The questions of reasonable time and good faith are for the jury, unless the evidence is conclusive.[71]

1339a. Demurrage—The demurrage law of 1907 has been sustained against various objections.[72] An answer has been held to state facts constituting an exception from liability under the law.[73]

DELIVERY OF GOODS

1340. Production of bill of lading—When a bill of lading is outstanding the carrier acts at its peril if it delivers the goods without a production of the bill.[74] Even if the carrier has not the right to require a surrender of the bill upon a delivery of the goods, it has a right to require its production for cancelation.[75] It is common practice for carriers to deliver goods to consignees without demanding the bill of lading.[76]

1341. Consignee presumptively owner—The consignee named in a bill of lading is presumptively the owner of the goods and entitled to their possession.[77] But if there is a bill of lading outstanding the carrier cannot rely on this presumption in making delivery.[78] It has been held that the carrier may rely on this presumption and settle with the consignee where the goods are lost, stolen, or destroyed.[79]

1342. To holder of bill of lading—As between the carrier of goods and the owner to whom they are consigned the bill of lading is a reliable symbol of title and vests in the legitimate holder thereof the right to the possession of the property.[80]

1343. To agent—Delivery may be made to an authorized agent.[81]

1344. Change of destination—While the goods are in the course of transportation the owner may change the place of delivery by directing a delivery at an intermediate point, but the carrier may require him to produce the bill of lading or furnish other evidence of ownership before complying.[82]

1345. Unauthorized delivery—Conversion—If a carrier delivers the goods to the wrong person it is liable as for conversion.[83]

1346. Non-delivery—Sufficiency of evidence—Evidence held sufficient to justify a finding that an expressman failed to deliver a trunk at a railway station as directed.[84]

[71] Merz v. Chi. etc. Ry., 86–33, 90+7.

[72] Hardwick v. Chi. etc. Ry., 124+819.

[73] Martin v. G. N. Ry., 124+825.

[74] Ratzer v. Burlington etc. Ry., 64–245, 66+988; Foy v. Chi. etc. Ry., 63–255, 65+627; Ryan v. G. N. Ry., 90–12, 95+758; Barnum v. G. N. Ry., 102–147, 112+1030, 1049. See Bank of Litchfield v. Elliott, 83–469, 86+454; 23 Harv. L. Rev. 146.

[75] Ratzer v. Burlington etc. Ry., 64–245, 66+988.

[76] Bank of Litchfield v. Elliott, 83–469, 86+454.

[77] McCauley v. Davidson, 13–162(150); Benjamin v. Levy, 39–11, 38+702; Dyer v. G. N. Ry., 51–345, 53+714; Bank of Litchfield v. Elliott, 83–469, 86+454. See Van Dusen v. Piper, 42–43, 43+684; Freeman v. Kraemer, 63–242, 65+455; Ryan v. G. N. Ry., 90–12, 95+758; Zalk v. G. N. Ry., 98–65, 107+814.

[78] See § 1340.

[79] Dyer v. G. N. Ry., 51–345, 53+714.

[80] Ryan v. G. N. Ry., 90–12, 95+758; Ratzer v. Burlington etc. Ry., 64–245, 66+988.

[81] Wilcox v. Chi. etc. Ry., 24–269 (requisite proof of agency).

[82] Ryan v. G. N. Ry., 90–12, 95+758; Steidl v. Mpls. etc. Ry., 94–233, 102+701. See Johnson v. Martin, 87–370, 92+221 (surrender of forged bill of lading).

[83] Jellett v. St. P. etc. Ry., 30–265, 15+237 (measure of damages—mitigation of damages); Foy v. Chi. etc. Ry., 63–255, 65+627 (delivery by last of several connecting carriers according to wrongful directions of prior carrier).

[84] Summers v. Pratt Ex. Co., 98–168, 107+1135.

1347. Delivery at wrong place—Damages—Where a railway company carries cattle beyond the place to which they are billed, and delivers them to the consignee at another place, the latter may recover as damages the difference, if any, between the value of the cattle at the place where they should have been delivered and at the place where they were actually delivered, and in addition thereto any sum which, in order to get possession of the stock, he was required to pay as freight charges for carriage beyond their proper destination.[85]

LIABILITY AS WAREHOUSEMEN

1348. In general—If the consignee fails to take possession of the goods within a reasonable time after notice of their arrival the liability of the carrier, as such, ceases, and it becomes liable only as a warehouseman.[86] An act requiring carriers to turn over to a storage company or public warehouseman goods not delivered or called for within a certain time, has been held unconstitutional, as not a legitimate exercise of the police power.[87] Cases are cited below involving the liability of carriers as warehousemen.[88]

TERMINATION OF LIABILITY

1349. General rules—Necessity of notice—A carrier's liability as such continues after the arrival of the goods at their destination until the consignee has taken possession of them or has had a reasonable time in which to do so.[89] The carrier, is bound, in the absence of special agreement or custom to the contrary, to give notice of the arrival of the goods to the consignee, if he lives at the place of delivery; and if he does not live there, but has, to the knowledge of the carrier, an agent there, then to the agent. The consignee has a reasonable time after such notice to take the goods away.[90] Where the consignee does not reside or have a known agent at or near the place of delivery, and the carrier does not know where he resides, it may place the goods, on their arrival, in its warehouse, and after a reasonable time, if they are not called for and taken away, its liability as a carrier ceases and it is liable only as a warehouseman.[91] A reasonable time, in this connection, does not depend upon the peculiar circumstances of the consignee. It is such time as would give a person residing at the place of delivery, and knowing the carrier's usual course of business, a suitable opportunity within business hours to come to the place of delivery, inspect the goods, and take them away.[92] One consigning goods to himself is not entitled to notice of their arrival.[93]

1350. Necessity of putting goods in warehouse—To terminate the liability of a carrier it is not always necessary that the goods be placed in a warehouse upon their arrival. A railway company may use its cars as a warehouse for certain kinds of goods, such as coal and lumber. But in the case of portable boxes or packages of valuable merchandise the liability of a railway company as com-

[85] Flakne v. G. N. Ry., 106–64, 118+58.

[86] See § 1349.

[87] State v. Chi. etc. Ry., 68–381, 71+400.

[88] Derosia v. Winona etc. Ry., 18–133 (119); Armstrong v. Chi. etc. Ry., 53–183, 54+1059; Cooley v. Minn. T. Ry., 53–327, 55+141; Bagley v. Am. Ex. Co., 63–142, 65+264; Jungclaus v. G. N. Ry., 99–515, 108+1118.

[89] Arthur v. St. P. & D. Ry., 38–95, 35+718; Derosia v. Winona etc. Ry., 18–133 (119); Pinney v. First Div. etc. Ry., 19–251(211); Kirk v. Chi. etc. Ry., 59–161, 60+1084. See Bagley v. Am. Ex. Co., 63–142, 65+264; Jungclaus v. G. N. Ry., 99–515, 108+1118.

[90] Pinney v. First Div. etc. Ry., 19–251 (211); Wehmann v. Mpls. etc. Ry., 58–22, 59+546. See Naas v. Chi. etc. Ry., 96–84, 104+717 (instruction as to sufficiency of notice held sufficient).

[91] Derosia v. Winona etc. R., 18–133 (119).

[92] Pinney v. First Div. etc. Ry., 19–251 (211); Derosia v. Winona etc. Ry., 18–133, (119).

[93] Derosia v. Winona etc. Ry., 18–133 (119).

mon carrier does not terminate until the goods are removed from the cars and placed in its warehouse, ready for delivery to the consignee, and the consignee has had a reasonable time thereafter to remove them.[94]

1351. Delivery of grain to public warehouseman—A delivery of grain to a public warehouseman, in accordance with a local custom at Duluth, has been held to terminate the liability of a carrier.[95]

CONNECTING CARRIERS

1352. Traffic agreements—It is permissible for railway corporations, in the absence of express provision to the contrary, to make reasonable traffic arrangements with other carriers by land or water for through transportation.[96]

1353. Designation of connecting carriers—Where the bill of lading issued by the initial carrier for goods to be transported over several connecting lines of railway, and which may be forwarded over different lines to the place of destination, contains no directions or agreement on the subject, the right to designate the route of transportation rests, by implication of law, with the carrier, and becomes a part of the contract. The right is not absolute or inalienable, however, and the contract in this respect may be changed or modified by subsequent parol agreement between the shipper and the carrier.[97] Where an initial carrier did not forward goods by the connecting carriers designated by the shipper he was held liable as an insurer to the point of destination.[98]

1354. Through cars—Liability—If a carrier uses the cars of another connecting carrier it is responsible for their condition.[99] A railway carrier transferring a car of its own to a connecting carrier for use upon its line owes to the servants of the latter the duty of exercising due care in inspecting and putting the car in a reasonably safe condition for the proposed use. The negligence of the latter in receiving and using the car cannot relieve the former from liability for an injury to such servants, caused by a defective car negligently transferred by it.[1] A carrier owning and transferring a car over its own and connecting lines to a shipper for his use owes to him and his servants who must handle the car the duty of exercising due diligence in inspecting and putting the car in a reasonably safe condition for the proposed service; but, if the car be suitable and safe when it leaves the possession and control of such carrier, it has exercised due care in the premises.[2] A railway company has been held not liable for injury to cars belonging to a connecting company.[3]

1355. Liability for loss or injury—The initial carrier is liable only for losses occurring on its own line unless it has specially contracted to carry the goods beyond its own line. Receiving goods marked for a place beyond its own line does not import an agreement to carry to that place.[4] It is the duty of each intermediate carrier, not only to carry safely and promptly, but also, in the absence of special contract or custom, to deliver to the next carrier; and its liability as an insurer continues until such delivery, or until it has served notice of the arrival of the goods and the next carrier has had a reasonable time after such notice in which to take them. It does not relieve itself of its liability as

[94] Kirk v. Chi. etc. Ry., 59–161, 60+1084. See Naas v. Chi. etc. Ry., 96–84, 104+717.

[95] Arthur v. St. P. & D. Ry., 38–95, 35+718.

[96] Stewart v. Erie etc. Co., 17–372(348). See Wehmann v. Mpls. etc. Ry., 58–22, 59+546; Southard v. Mpls. etc. Ry., 60–382, 62+442, 619.

[97] Steidl v. Mpls. etc. Ry., 94–233, 102+701. See Foy v. Chi. etc. Ry., 63–255, 65+627.

[98] Brown v. Penn. Co., 63–546, 65+961.

[99] Shea v. Chi. etc. Ry., 66–102, 68+608.

[1] Teal v. Am. M. Co., 84–320, 87+837. See 16 Harv. L. Rev. 227.

[2] Olson v. Penn. etc. Co., 77–528, 80+698.

[3] St. Paul etc. Ry. v. Mpls. etc. Ry., 26–243, 2+700.

[4] Ortt v. Mpls. etc. Ry., 36–396, 31+519; Lawrence v. Winona etc. Ry., 15–390(313, 324). See Brown v. Penn. Co., 63–546, 65+961; Baldwin v. G. N. Ry., 81–247, 250, 83+986. The rule is changed, as regards interstate commerce, by the Hepburn Act. Dodge v. Chi. etc. Ry., 126+627.

an insurer by merely putting the goods in its warehouse at the end of its line.[5] Where two or more common carriers, whose lines form a continuous line, establish joint or through tariffs of rates, they do not, by that alone, become joint carriers, nor any one of them become liable for the defaults of any other, but the carrier receiving goods for carriage over the continuous line becomes agent for each to contract for carriage over their respective lines. Under such an arrangement it is the duty of the carrier receiving goods for carriage over the continuous line to carry them to the end of its line, and there deliver them to the next carrier, to which attaches the duty to receive and carry and deliver them to the next carrier, and so on till they reach their destination. The liability of each carrier continues until it has carried the goods to the end of its line, and delivered them to the next carrier, or given it notice of their arrival, and a reasonable time has elapsed for it to receive them.[6] Whether an intermediate carrier continues as an insurer where the next carrier refuses or neglects to take the goods depends upon the particular contract.[7] If an injury to the goods is due to the negligent packing of the initial carrier, it is liable for the injury resulting throughout the transportation.[8]

1356. Presumption as to condition of goods—Burden of proof—It is presumed that the last of several connecting carriers received the goods in the condition in which they were received by the initial carrier. When it is shown that they were received by the initial carrier in good condition and damaged when delivered to the consignee, the last carrier has the burden of proving that the damage did not result from any cause for which it was responsible.[9] This rule is not modified by the fact that the goods pass through in a sealed car,[10] or are of a perishable nature.[11] If a carrier relies on a custom to relieve it of liability in regard to the delivery of goods to a connecting carrier it must prove it.[12]

ACTIONS

1357. Who may sue—The owner may sue on a contract made by his agent without disclosing the agency.[13] The shipper may sue, if he, and not the consignee, is the owner.[14] Where property is consigned to a commission merchant for sale without any previous contract or any advances made to the shipper, the consignee acquires no general or special ownership in the property before its delivery to him, and cannot maintain an action to recover for damages to the property in transit.[15]

1358. Demand before suit—Before an action can be maintained against a carrier for failing to deliver goods to the consignee a demand must be made for them unless it is not in the power of the carrier to deliver them.[16]

[5] Lawrence v. Winona etc. Ry., 15–390 (313); Irish v. Mil. etc. Ry., 19–376 (323); Wehmann v. Mpls. etc. Ry., 58–22, 59+546. See Bick v. Mpls. etc. Ry., 107–78, 119+505.

[6] Wehmann v. Mpls. etc. Ry., 58–22, 59+546.

[7] Southard v. Mpls. etc. Ry., 60–382, 62+442, 619; Shea v. Chi. etc. Ry., 66–102, 68+608; Wehmann v. Mpls. etc. Ry., 58–22, 59+546. See Bick v. Mpls. etc. Ry., 107–78, 119+505.

[8] Davis v. New York etc. Ry., 70–37, 72+823.

[9] Shriver v. Sioux City etc. Ry., 24–506; Leo v. St. P. etc. Ry., 30–438, 15+872; Shea v. Mpls. etc. Ry., 63–228, 65+458; Beede v. Wis. C. Ry., 90–36, 95+454; Paterson v. Chi. etc. Ry., 95–57, 103+621; Calender v. Chi. etc. Ry., 99–295, 109+402; Brennisen v. Penn. Ry., 100–102, 110+362; Id., 101–120, 111+945. See Burnap v. Chi. etc. Ry., 101–542, 112+1141.

[10] Leo v. St. P. etc. Ry., 30–438, 15+872; Beede v. Wis. C. Ry., 90–36, 95+454.

[11] Brennisen v. Penn. Ry., 100–102, 110+362; Id., 101–120, 111+945.

[12] Irish v. Mil. etc. Ry., 19–376(323).

[13] Ames v. First Div. etc. Ry., 12–412 (295).

[14] Jarrett v. G. N. Ry., 74–477, 77+304; Zalk v. G. N. Ry., 98–65, 107+814; Burnap v. Chi. etc. Ry., 101–542, 112+1141.

[15] Grinnell v. Ill. C. Ry., 109–513, 124+377.

[16] Jarrett v. G. N. Ry., 74–477, 77+304. See Zalk v. G. N. Ry., 98–65, 107+814.

1359. Pleading—Negligence may be charged in general terms.[17] An allegation of a loss of "certain goods, the property of the plaintiff" sufficiently shows the interest of the plaintiff.[18] A complaint has been held defective for failure to allege a demand before suit, but not for failure to allege that the freight had been paid or offered.[19] Under a general denial evidence that a damage to goods occurred after they had passed beyond defendant's line has been held admissible.[20] A complaint charging negligence in the care of property in transit and also after arrival while in the custody of the carrier as a warehouseman has been held to state a single cause of action.[21] A denial has been held to make an issue as to the value of the goods.[22] A complaint has been held to show that the consignor was the owner of the goods.[23] It is sufficient to allege generally the delivery of the goods and their injury in transit.[24]

1360. Burden of proof—The plaintiff ordinarily has the burden of making out a prima facie case of negligence on the part of the carrier. This may be done by proof that the goods were delivered to the carrier in good condition and that they were either not delivered by the carrier or delivered in a damaged condition. The carrier then has the burden of proving by a preponderance of the evidence that the loss or damage did not result from a cause for which it was responsible, in other words, from its negligence.[25] If the goods were shipped under a special contract exempting the carrier from its common-law liability the burden is still on the carrier to prove not only that the loss or damage was within the terms of the exemption, but also that there was no negligence on its part.[26] A carrier ordinarily has the burden of proving facts terminating its liability as such.[27] Evidence that the goods were in good condition when shipped may come from the carrier.[28] When it is shown that a loss or damage was due to an act of God the burden is on the adverse party to prove the concurrent negligence of the carrier.[29] If a carrier relies on a custom to relieve it from liability it must prove it.[30] The shipper has the burden of proving that the goods were not transported and delivered with reasonable dispatch.[31]

1361. Evidence—The custom of other carriers under like circumstances is admissible to show that the defendant was not negligent.[32] Evidence that it was impracticable to carry the kind of goods in question has been held inadmissible to show that a contract to carry was not made.[33] An unsigned bill of lading has been held admissible to show the condition of the goods.[34]

[17] McCauley v. Davidson, 10–418(335); Hinton v. Eastern Ry., 72–339, 75+373; Smith v. G. N. Ry., 92–11, 99+47.

[18] Ames v. First Div. etc. Ry., 12–412 (295).

[19] Jarrett v. G. N. Ry., 74–477, 77+304. See Zalk v. G. N. Ry., 98–65, 107+814.

[20] Ortt v. Mpls. etc. Ry., 36–396, 31+519.

[21] Armstrong v. Chi. etc. Ry., 45–85, 47+459.

[22] Ames v. First Div. etc. Ry., 12–412 (295).

[23] Zalk v. G. N. Ry., 98–65, 107+814.

[24] Boehl v. Chi. etc. Ry., 44–191, 194, 46+333.

[25] Fockens v. U. S. Ex. Co., 99–404, 109+834; Brennisen v. Penn. Ry., 100–102, 110+362; Id., 101–120, 111+945; Lindsley v. Chi. etc. Ry., 36–539, 33+7; Hull v. Chi. etc. Ry., 41–510, 43+391; Boehl v. Chi. etc. Ry., 44–191, 46+333; Laverne C. Assn. v. Chi. etc. Ry., 107–94, 119+795.

[26] Shriver v. Sioux City etc. Ry., 24–506; Hull v. Chi. etc. Ry., 41–510, 43+391; Shea v. Mpls. etc. Ry., 63–228, 65+458; Mpls. etc. Ry. v. Home Ins. Co., 64–61, 66+132; Hinton v. Eastern Ry., 72–339, 75+373; Southard v. Mpls. etc. Ry., 60–382, 62+442, 619. These cases are contrary to the prevailing rule. See 13 Harv. L. Rev. 147.

[27] Kirk v. Chi. etc. Ry., 59–161, 60+1084.

[28] Leo v. St. P. etc. Ry., 30–438, 15+872.

[29] Jones v. Mpls. etc. Ry., 91–229, 97+893.

[30] Irish v. Mil. etc. Ry., 19–376(323).

[31] Gamble v. N. P. Ry., 107–187, 119+1068.

[32] Hinton v. Eastern Ry., 72–339, 75+373; Armstrong v. Chi. etc. Ry., 45–85, 47+459.

[33] Ames v. First Div. etc. Ry., 12–412 (295).

[34] Weide v. Davidson, 15–327(258).

CARRIERS OF LIVE STOCK

1362. Liability for loss or injury—The liability of a carrier of live stock is the same as the liability of a carrier of ordinary goods, except that it is not liable for loss or injury resulting from the nature or "proper vice" of the animals carried, in the absence of negligence on its part.[35] It is relieved of special care and oversight of the animals where the owner or his agent accompanies them for that purpose.[36] Due care may require a carrier to throw water on heated animals or to unload them.[37]

1363. Limitation of liability—A carrier of live stock cannot limit its common-law liability for negligence.[38] It may exempt itself by special contract from liability "for loss by jumping from the cars" without negligence on its part.[39] It may limit the extent of its liability to the agreed value of the stock.[40] It may provide for a notice of claim within a reasonable time after a loss.[41]

1364. Contributory negligence of shipper—Evidence held to show negligence on the part of a shipper in leaving open a sliding door or window to a car in which he had tied a horse.[42]

1365. Burden of proof—The rules as to burden of proof applicable to carriers of ordinary goods [43] are applicable to carriers of live stock.[44]

1366. Miscellaneous cases—Various cases relating to the shipment of live stock, which will be found elsewhere under appropriate heads, are cited below for convenience of reference.[45]

CASES AND BILLS OF EXCEPTIONS

1367. Definition and nature—A bill of exceptions is a written statement of exceptions taken at a trial, with so much of the evidence and proceedings as may be necessary to explain them, authenticated by the trial judge or his successor.[46] A case is a written statement of proceedings in a cause, excluding pleadings and other papers properly filed with the clerk, authenticated by the trial judge or his successor. A case may contain all the evidence given or offered at the trial and all the proceedings had, or only so much thereof as the

[35] Moulton v. St. P. etc. Ry., 31–85, 16+497; Lindsley v. Chi. etc. Ry., 36–539, 33+7; Boehl v. Chi. etc. Ry., 44–191, 46+333. See Note, 130 Am. St. Rep. 432.

[36] Boehl v. Chi. etc. Ry., 44–191, 46+333.

[37] Lindsley v. Chi. etc. Ry., 36–539, 33+7.

[38] Moulton v. St. P. etc. Ry., 31–85, 16+497; Ortt v. Mpls. etc. Ry., 36–396, 31+519; Boehl v. Chi. etc. Ry., 44–191, 46+333. See § 1315.

[39] Hutchinson v. Chi. etc. Ry., 37–524, 35+433.

[40] Alair v. N. P. Ry., 53–160, 54+1072.

[41] Armstrong v. Chi. etc. Ry., 53–183, 54+1059; Shumaker v. N. P. Ry., 108–35, 121+122.

[42] Hutchinson v. Chi. etc. Ry., 37–524, 35+433.

[43] See § 1360.

[44] Lindsley v. Chi. etc. Ry., 36–539, 33+7; Boehl v. Chi. etc. Ry., 44–191, 46+333.

[45] Engesether v. G. N. Ry., 65–168, 68+4 (notice of claim for loss); Carpenter v. Eastern Ry., 67–188, 69+720 (id.); Jones v. Mpls. etc. Ry., 91–229, 97+893 (cattle frozen—act of God—burden of proof); Smith v. G. N. Ry., 92–11, 99+47 (complaint for loss of horses held sufficient); Armstrong v. Chi. etc. Ry., 45–85, 47+459 (complaint for loss of mare held to state a single cause of action—evidence of degree of care commonly used—expert evidence as to sufficiency of stable); Orcutt v. N. P. Ry., 45–368, 47+1068 (injury to person in charge of stock); Olson v. St. P. & D. Ry., 45–536, 48+445 (id.); Baker v. Chi. etc. Ry., 91–118, 97+650 (contract with traveling agent of carrier for shipment of stock—authority of agent—intention of parties as to notice before shipping stock—construction of contract for jury); Ross v. Mpls. etc. Ry., 102–249, 113+573 (limitation of issues as to manner in which injury was inflicted—verdict for plaintiff justified by the evidence).

[46] R. L. 1905 § 4201; State v. Egan, 62–280, 64+813; Board of Trustees v. Brown, 66–179, 68+837.

parties may choose to present for review.[47] The office of a bill of exceptions or case is to place in the record matters occurring on the trial which are not made a part of the record by statute.[48]

1368. Necessity—Who may rely upon—No ruling or decision made in the course of a trial, not entered as an order, can be reviewed on appeal, in the absence of a case or bill of exceptions.[49] The necessity of a case or bill of exceptions for the review of orders is considered elsewhere.[50] When a case or bill of exceptions is proposed and procured to be settled by only one defendant on the trial of the issues against him, the other defendants cannot rely upon it on an appeal by them.[51]

1369. No substitute—A fact occurring at the trial, not a matter of record, can only be presented to the supreme court for review by means of a case or bill of exceptions settled and allowed by the trial judge or referee as provided by law.[52] It has been held that the following cannot take the place of a case or bill of exceptions: a statement in the findings or decision of the trial judge;[53] an affidavit;[54] a transcript of the stenographer's notes;[55] a statement in the brief of counsel;[56] a certificate of a referee;[57] a certificate of the clerk;[58] a statement in the memorandum of the trial judge;[59] recitals in an order;[60] and a statement in the certificate of the judge.[61]

1370. Who may allow and authenticate—A case or bill of exceptions will ordinarily be disregarded on appeal if not settled and allowed by the judge or referee as provided by statute.[62] The settlement and allowance is a judicial act which cannot be performed by the clerk [63] or dispensed with by stipulation of the parties.[64] A district judge may settle a case in an action tried by his predecessor.[65]

1371. Securing a stay—A party should always secure a stay within which to have his case or bill of exceptions settled, and to move for a new trial if desired.[66] If a stay is granted the party has until the last day of the stay in which to serve his case or bill upon the adverse party, though the statutory period has expired.[67]

[47] R. L. 1905 § 4201; Farnham v. Thompson, 34–330, 26+9; Board of Trustees v. Brown, 66–179, 68+837; Gardner v. Fidelity etc. Assn., 67–207, 69+895.

[48] Farnham v. Thompson, 34–330, 26+9; Perry v. Miller, 61–412, 63+1040; Peach v. Reed, 87–375, 92+229.

[49] Macauley v. Ryan, 55–507, 57+151.

[50] See § 339.

[51] Frawley v. Hoverter, 36–379, 31+356.

[52] Ham v. Wheaton, 61–212, 63+495; Conron v. Hoerr, 83–183, 85+1012; Youngquist v. Mpls. St. Ry., 102–501, 114+259; Jeremy v. Matsch, 106–543, 118+1008.

[53] Stewart v. Cooley, 23–347; Rhoades v. Siman, 24–192; Stone v. Johnson, 30–16, 13+920; Coolbaugh v. Roemer, 32–445, 21+472; Osborne v. Williams, 39–353, 40+165; Prouty v. Hallowell, 53–488, 55+623; Nat. Invest. Co. v. Schickling, 56–283, 57+663.

[54] St. Martin v. Desnoyer, 1–156(131); Smith v. Wilson, 36–334, 31+176; Smith v. Kingman, 70–453, 73+253; Edlund v. St. P. C. Ry., 78–434, 81+214; Conron v. Hoerr, 83–183, 85+1012; Youngquist v. Mpls. St. Ry., 102–501, 114+259; Jeremy v. Matsch, 106–543, 118+1008.

[55] Thompson v. Lamb, 33–196, 22+443.

[56] Goodell v. Ward, 17–17(1).

[57] Bazille v. Ullman, 2–134(110); Robinson v. Bartlett, 11–410(302); Barber v. Kennedy, 18–216(196); Thompson v. Howe, 21–98.

[58] Blake v. Lee, 38–478, 38+487; Hospes v. N. W. etc. Co., 41–256, 43+180; Elbow Lake v. Holt, 69–349, 72+564.

[59] Nat. Invest. Co. v. Schickling, 56–283, 57+663; Awde v. Cole, 99–357, 109+812.

[60] Hendrickson v. Back, 74–90, 76+1019.

[61] State v. Durnam, 73–150, 75+1127.

[62] Phoenix v. Gardner, 13–294(272); Abrahams v. Sheehan, 27–401, 7+822; Sherman v. St. P. etc. Ry., 30–227, 15+239.

[63] Blake v. Lee, 38–478, 38+487; Hospes v. N. W. etc. Co., 41–256, 43+180.

[64] Abrahams v. Sheehan, 27–401, 7+822; Sherman v. St. P. etc. Ry., 30–227, 15+239; Spriesterbach v. Schmidt, 64–211, 66+721. See Hall v. Smith, 16–58(46); Kelly v. Clow Reaper Mfg. Co., 20–88(74).

[65] Bahnsen v. Gilbert, 55–334, 56+1117. See R. L. 1905 § 4203.

[66] Cook v. Finch, 19–407(350); Kimball v. Palmerlee, 29–302, 13+129; Van Brunt v. Kinney, 51–337, 53+643.

[67] State v. Searle, 81–467, 84+324.

1372. Time allowed for settlement—*a. In general*—The time allowed for the settlement of a case or bill of exceptions is prescribed by statute.[68] One of the primary objects of the statute is to secure the settlement and allowance of the case or bill of exceptions when the details of the trial are still fresh in the minds of counsel and the trial judge.[69] This limitation applies to all cases. Where a party appeals from a judgment he cannot, as a matter of right, propose a case at any time before the expiration of the six months in which an appeal might have been taken.[70] In case of trials by the court or by referees, the time for serving a case or bill of exceptions is computed from the date of service of notice of filing the report, decision, or finding.[71] The neglect of the adverse party to propose amendments within ten days after the service of the proposed bill or case is a waiver of the right to do so; but it does not extend or enlarge the time within which the party proposing the bill or case is bound, in the absence of an order or stipulation extending the time, to present it to the judge or referee for allowance, that is, within fifteen days after service of amendments or failure to do so within the ten days allowed for that purpose.[72]

b. Stipulations—By stipulation the parties may extend or restrict the time for serving and settling a case or bill of exceptions.[73] Of course such a stipulation cannot have the effect of extending the statutory time for an appeal.[74]

c. Waiver—By participating without objection in the settlement of a case or bill of exceptions after the statutory time has expired a party waives any objection on that ground.[75] If a case or bill of exceptions is improperly served after the statutory time it should be refused or promptly returned with the reason stated thereon.[76] It has been held that if a party admits "due service" he will be deemed to have waived the objection that the bill of exceptions or case was not served in time.[77] This rule seems unreasonable and should be applied subject to the qualification that a party may overcome the presumption of waiver involved in the admission of due service by promptly returning the case or bill of exceptions—say, within twenty-four hours.[78]

d. Extension of time—Where a party has failed to have a case or bill of exceptions settled and allowed within the statutory period he may, for good cause shown, secure an order of the court granting an extension of time. The matter of granting or denying such an application 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.[79] The court may allow a case or bill of exceptions to be settled even after an appeal has been perfected,[80] but the time within which an appeal is allowed by statute cannot be extended by any such means.[81] The mere entertaining of a motion to settle and allow a case after the expiration of the statutory period does not in itself constitute an extension of time. With-

[68] R. L. 1905 § 4202.
[69] Van Brunt v. Kinney, 51–337, 53+643.
[70] State v. Powers, 69–429, 72+705.
[71] R. L. 1905 § 4202; Irvine v. Myers, 6–558(394); State v. Kelly, 94–407, 103+15.
[72] State v. Searle, 81–467, 84+324.
[73] State v. Baxter, 38–137, 36+108; State v. Powers, 69–429, 72+705; State v. Kelly, 94–407, 103+15.
[74] Richardson v. Rogers, 37–461, 35+270.
[75] Abbott v. Nash, 35–451, 29+65.
[76] Van Brunt v. Kinney, 51–337, 53+643; Loveland v. Cooley, 59–259, 61+138.
[77] State v. Baxter, 38–137, 36+108. See State v. Powers, 69–429, 72+705.
[78] See Van Brunt v. Kinney, 51–337, 53+643; Loveland v. Cooley, 59–259, 61+138.
[79] Irvine v. Myers, 6–558(394); Cook v. Finch, 19–407(350); Volmer v. Stagerman, 25–234; Bahnsen v. Gilbert, 55–334, 56+1117; Seibert v. Mpls. etc. Ry., 58–72, 59+828; Loveland v. Cooley, 59–259, 61+138; State v. Powers, 69–429, 72+705; Nickerson v. Wells, 71–230, 73+959, 74+891; State v. Searle, 81–467, 84+324; State v. Kelly, 94–407, 103+15; Johnson v. Groth, 102–243, 113+452; State v. Powers, 102–509, 113+1135; State v. Quinn, 107–503, 120+1088.
[80] Pratt v. Pioneer Press Co., 32–217, 18+836; Bahnsen v. Gilbert, 55–334, 56+1117; Loveland v. Cooley, 59–259, 61+138. See Abbott v. Nash, 35–451, 29+65.
[81] Richardson v. Rogers, 37–461, 35+270.

out having previously relieved a party in default in the service of a proposed case or bill of exceptions, a trial court cannot entertain and pass upon a motion to settle and allow such case or bill after the statutory period of time has expired.[82] Though the court has no authority to extend the time within which to propose and settle a case or bill of exceptions upon application ex parte, and without notice to the adverse party, yet, if finally the case is settled upon proper notice, and the various extensions made ex parte were for reasonable cause, and the final settlement of the case did not prejudice the adverse party, such order of settlement will not be considered as an abuse of discretion.[83]

1373. Transcripts—Filing—It is provided by rule of court that "transcripts of the stenographic reporter's minutes shall be made in the exact words and in the form of the original minutes. The party procuring the transcript shall, at or before the time of serving the proposed case or bill of exceptions, file the same with the clerk for the use of parties and the court, and the failure so to file said transcript shall be deemed good and sufficient reason for extending the time within which proposed amendments may be served by the opposite party. After the settled case or bill of exceptions has been filed in the clerk's office, the stenographer's transcript may be withdrawn." [84]

1374. Contents—Mode of stating testimony—Documentary evidence—Testimony should ordinarily be given in a condensed and narrative form. In rare instances the exact words of the stenographic report should be given, as, for example, where the questions and answers in full would give the appellate court a better understanding of the relation and effect of a ruling or where nice shades of meaning in the testimony could not be well brought out by a narrative form or the exact bearing of the testimony presented. And when error is assigned to a ruling sustaining or overruling an objection to evidence it is good practice to state the question in the exact words of the stenographer's notes. In all cases immaterial testimony should be omitted.[85] Documentary evidence may be incorporated in the body of a case or bill of exceptions or attached thereto with apt reference in the body thereof.[86] It is proper practice to abstract documentary evidence, at least where there is no dispute over the contents or the legal effect thereof, but the abstract must contain all of the essential contents of the originals.[87] Immaterial exhibits may be omitted altogether.[88] It is just as necessary to incorporate documentary evidence in a case or bill of exceptions as oral testimony; and where the settled case or bill of exceptions shows that documentary evidence was introduced which might have had a bearing on the verdict or findings and is omitted from the return, the supreme court will not review the sufficiency of the evidence to justify the verdict or finding,[89] or any ruling upon such evidence.[90] Maps, plans, charts, diagrams and the like, with reference to which material evidence was given, should be included in the return, if such evidence would be unintelligible to the supreme court without them.[91] If the party proposing a bill or case refuses to attach exhibits which were introduced in evidence the court may properly refuse to allow it.[92]

[82] Van Brunt v. Kinney, 51–337, 53+643.
[83] Tweto v. Horton, 90–451, 97+128.
[84] Rule 42, District Court.
[85] State v. Otis, 71–511, 74+283.
[86] Wintermute v. Stinson, 16–468(420); Acker Post v. Carver, 23–567; Blake v. Lee, 38–478, 38+487.
[87] Waldorf v. Kipp, 81–379, 84+122; Finnegan v. Brown, 90–396, 97+144.
[88] In re Lyons, 42–19, 43+568.
[89] Blake v. Lee, 38–478, 38+487; Clarke v. Cold Spring Opera House Co., 58–16, 59+632; Sage v. Rudnick, 67–362, 69+1096. But see, Dunham v. Messing, 68–257, 70+1128.
[90] Wintermute v. Stinson, 16–468(420); Acker Post v. Carver, 23–567; Sanborn v. Mueller, 38–27, 35+666.
[91] Larson v. N. P. Ry., 33–20, 21+836; Sage v. Rudnick, 67–362, 69+1096; Baxter v. G. N. Ry., 73–189, 75+1114.
[92] State v. Otis, 71–511, 74+283.

1375. Matters occurring out of court—Matters occurring out of court, or in another action, have no place in a bill of exceptions, but, for the purpose of a motion for a new trial or an appeal, should be presented by affidavit.[93]

1376. Notice of settlement—The statute provides that the case or bill shall be presented for settlement and allowance upon a notice of five days.[94] It is common practice to notice a motion for a new trial to be heard at the time of presenting the bill of exceptions or case for settlement and allowance.[95] In the absence of a stipulation a case or bill cannot be settled and allowed ex parte without notice.[96]

1377. Filing—It is provided by rule of court that "the party procuring a case or bill of exceptions, shall cause the same to be filed within ten days after the case shall be settled, or the same or the amendments thereto shall have been adopted, otherwise it shall be deemed abandoned." [97]

1378. How far conclusive on trial court—A case properly settled and allowed cannot be disregarded by the trial court in determining a motion for a new trial made thereon, though the court may be of the opinion that the case does not correctly set forth the facts.[98] But upon due notice [99] a case or bill of exceptions may be amended by the trial judge.[1] After the decision on a motion for a new trial a case cannot be amended for use on appeal from the order.[2] The district court cannot amend a case settled by a referee. If it is made to appear to the district court that a case as settled by the referee is incorrect on account of an error in engrossing or some oversight the proper practice is to send the case back to the referee for correction.[3]

1379. Discretionary power of trial court—The matter of settling and allowing a case or bill of exceptions rests, aside from statutory regulation, 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.[4]

1380. Amendment by trial court—When an appeal is taken to the supreme court the district court has jurisdiction to correct the record, or settle and allow a case or bill of exceptions, until the return is made.[5] When the return is made the district court loses jurisdiction and can act further only upon an order from the supreme court.[6] Where a case is amended after the denial of a motion thereon for a new trial, the correctness of the order denying the motion must be determined on appeal with reference to the original case.[7]

1381. Amendment by parties—The parties have no right to alter by stipulation the record settled and allowed by the judge, but if they do so they will not be heard to complain of the alteration on appeal.[8]

1382. Effect of hearing motion for new trial on unsettled case—The hearing of a motion for a new trial on a case or bill of exceptions agreed to by the parties is an approval of it and it is the duty of the court thereafter to allow

93 Perry v. Miller, 61–412, 63+1040.
94 R. L. 1905 § 4202.
95 Baxter v. Coughlin, 80–322, 83+190.
96 Daniels v. Winslow, 2–113(93); Dayton v. Craik, 26–133, 1+813. See Tweto v. Horton, 90–451, 97+128.
97 Rule 41, District Court.
98 Steinkraus v. Mpls. etc. Ry., 39–135, 39+70.
99 State v. Laliver, 4–379(286); Dayton v. Craik, 26–133, 1+813. See Jaspers v. Lano, 17–296(273).
1 State v. Macdonald, 30–98, 14+459.
2 Dayton v. Craik, 26–133, 1+813; Anderson v. St. Croix L. Co., 47–24, 49+407; Riley v. Chi. etc. Ry., 71–425, 74+171.
3 Taylor v. Parker, 18–79(63).
4 Irvine v. Myers, 6–558(394); Phoenix v. Gardner, 13–294(272); State v. Powers, 69–429, 72+705; Nickerson v. Wells, 71–230, 73+959; Baxter v. Coughlin, 80–322, 83+190.
5 Pratt v. Pioneer Press Co., 32–217, 18+836, 20+87; Bahnsen v. Gilbert, 55–334, 56+1117; Loveland v. Cooley, 59–259, 61+138; U. S. Invest. Corp. v. Ulrickson, 84–14, 86+613, 1004; State v. Quinn, 107–503, 120+1088; State v. Qvale, 109–530, 124+22.
6 Chesley v. Miss. etc. Co., 39–83, 38+769.
7 Riley v. Chi. etc. Ry., 71–425, 74+171.
8 Selser v. Mpls. etc. Co., 77–186, 79+680.

it as a matter of course.[9] Where a statement of the case, to which amendments had been proposed and allowed, had not been duly approved and certified by the district judge, but a motion for a new trial thereon had been heard and determined by him without objection it was held that it was thereby approved by him and that he might properly certify it at any time nunc pro tunc; and that inasmuch as the defect was merely formal, and the objection might have been obviated if it had been seasonably taken, it should be disregarded in the supreme court.[10]

1383. Appeals—An order refusing an application to settle or certify a case or bill of exceptions is not appealable. The remedy is mandamus.[11] An order granting an application to settle and allow a case or bill of exceptions after the statutory time is not reviewable on an appeal from the final judgment. The remedy is a motion to strike from the return.[12] Irregularities in the settlement and allowance of a case or bill of exceptions cannot be taken advantage of on a motion for a new trial [13] or on appeal from an order granting or denying a new trial. An order denying a motion to strike from the files a settled case or bill of exceptions for irregularities in the settlement thereof is not reviewable on an appeal from an order granting a new trial. Such an order is one "involving the merits of the action or some part thereof" and reviewable by direct appeal or on appeal from the final judgment.[14]

1384. Construction and conclusiveness on appeal—A case or bill of exceptions cannot be impeached on appeal by affidavits. The certificate of the trial judge is conclusive when not inconsistent with the record. The only remedy for mistakes is a direct proceeding by mandamus.[15] In proceedings to compel a trial judge to sign and certify a "case" as one containing all the evidence offered or received upon the trial, or pertinent to specific questions sought to be raised, the burden is on the moving party to satisfy the supreme court that his proposed case in fact contains all the evidence. It is not the duty of the trial judge affirmatively to point out wherein the case is incomplete. His certificate that it does not conform to the truth is final, unless overcome by competent proof.[16] The record is to be construed as a whole [17] and the certificate of the trial judge that the settled case contains all the evidence is not conclusive if the case itself clearly shows the contrary.[18] The supreme court has no authority to amend or to allow the parties to amend a case or bill of exceptions on appeal; [19] but it may remand a cause with leave to apply to the trial judge for an amendment,[20] if a timely application is made.[21] A case being certified as containing all the material evidence, it will not be presumed that there was other evidence which could have affected the result of the trial.[22] When a case is attached to the judgment roll it will be presumed that it was

[9] State v. Cox, 26–214, 2+494.

[10] Sherman v. St. P. etc. Ry., 30–227, 15+239.

[11] Richardson v. Rogers, 37–461, 35+270; State v. Cox, 26–214, 2+494; State v. Macdonald, 30–98, 14+459; Schumann v. Mark, 35–379, 28+927; State v. Ronk, 91–419, 98+334.

[12] Bahnsen v. Gilbert, 55–334, 56+1117; Arine v. Mpls. etc. Ry., 76–201, 78+1108.

[13] Schumann v. Mark, 35–379, 28+927.

[14] Baxter v. Coughlin, 80–322, 83+190.

[15] Hemstad v. Hall, 64–136, 66+366; State v. Ronk, 91–419, 98+334; Haidt v. Swift, 94–146, 102+388; Lesch v. G. N. Ry., 97–503, 106+955.

[16] State v. Quinn, 107–503, 120+1088.

[17] Vassau v. Campbell, 79–167, 81+829.

[18] Acker Post v. Carver, 23–567; In re Post, 33–478, 24+184; Hill v. Gill, 40–441, 42+294; Lundell v. Cheney, 50–470, 52+918; Sage v. Rudnick, 67–362, 69+1096; Dunham v. Messing, 68–257, 70+1128; Vassau v. Campbell, 79–167, 81+829; McDonald v. White, 92–39, 99+1133.

[19] See Anderson v. St. Croix L. Co., 47–24, 49+407; Selser v. Mpls. etc. Co., 77–186, 79+680.

[20] Phoenix v. Gardner, 13–294(272); Chesley v. Miss. etc. Co., 39–83, 38+769; Anderson v. St. Croix L. Co., 47–24, 49+407.

[21] Anderson v. St. Croix L. Co., 47–24, 49+407.

[22] Reiff v. Bakken, 36–333, 31+348.

regularly and properly attached.[23] The supreme court will give a case or bill a reasonably liberal construction, but it will not, by construction, supply omissions or remedy material defects.[24]

1385. Improper case stricken out—A case or bill of exceptions improperly settled or allowed or included in the return will be stricken from the record by the supreme court on motion of the aggrieved party. Affidavits are admissible to show the irregularity. A dismissal of the appeal does not follow as a matter of course.[25]

CASUAL AND INVOLUNTARY—See note 26.
CASUALTY INSURANCE—See Insurance, 4869.
CASUS OMISSUS—See Statutes, 8985.
CATTLE GUARDS—See Railroads, 8135.
CATTLE RUNNING AT LARGE—See Animals, 276.
CAUSE—See note 27.
CAUSE OF ACTION—See note 28.
CAVEAT EMPTOR—See Judicial Sales, 5215; Receivers, 8259; Sales, 8572, 8594.

CEMETERIES

1386. Nature of incorporated associations—Trust—G. S. 1878 c. 34, tit. 3 (G. S. 1894 §§ 2913–2929), as amended by Laws 1872 c. 52, does not authorize the incorporation of burial places for private speculation and profit. In view of the public nature of the use of cemetery grounds, a corporation organized for the avowed purpose "of establishing a public cemetery," without capital stock or contributions from the members, cannot be adapted to the acquisition of profits and emoluments by the directors and incorporators. A cemetery association, having sold lots as burial places, which have been appropriated for that purpose, is a trustee for the benefit of those who lawfully make use of such lots, and is bound to account to its beneficiaries, the lot owners, for moneys received therefrom. The directors of such a cemetery association are not authorized to withhold money received for lots from the treasury of the corporation, or treat it as their private property; such funds are subjected to a public use, in which the lot owners have a private and personal interest, not common to the general public. The denial by the members of such organization of any trust relation to the lot owners who have buried their dead in the cemetery, and a refusal to account for moneys received and appropriated by them, authorizes judicial interference to compel the recognition of the trust relation, and the restoration of such funds to the treasury, for the proper improvement and maintenance of the burial grounds.[29]

1387. Lands dedicated to public use—Cannot be mortgaged—The purposes for which alone cemetery corporations may be organized under our laws are public, rather than private. Lands acquired by such a corporation, and platted pursuant to the statute for cemetery purposes, the plat being recorded,

[23] Teick v. Carver County, 11–292(201).
[24] Board of Trustees v. Brown, 66–179, 68+837; Baxter v. Coughlin, 80–322, 83+190.
[25] Daniels v. Winslow, 2–113(93); Mower v. Hanford, 6–535(372); Dayton v. Craik, 26–133, 1+813; Arine v. Mpls. etc. Ry., 76–201, 78+1108.
[26] State v. Shevlin, 102–470, 113+634.
[27] Davidson v. Farrell, 8–258(225, 228) (the subject of difference between the parties as settled by the pleadings).
[28] State v. Torinus, 28–175, 9+725; King v. Chi. etc. Ry., 80–83, 82+1113. See Damages, 2531; Judgments, 5167.
[29] Brown v. Maplewood C. Assn., 85–498, 89–872.

and the land to some extent having actually been used for burials, are thereby dedicated to the purpose, exclusively, of the burial of the dead. After such dedication the corporation is without power, for reasons in which the public is concerned, to convey any of such lands, except for the exclusive purpose of burials, or to mortgage the same. Its mortgage is wholly void, and the doctrine of estoppel is not applicable to preclude the corporation from asserting its invalidity.[30]

1388. Acquiring land for future needs—An incorporated association is authorized to acquire land for future needs.[31]

1389. Register of burials—The actuary of incorporated associations is required to keep a register of burials.[32]

CENSUS

1390. State census—The fifth decennial census of Minnesota went into legal effect upon its compilation and publication by the superintendent of the census, and not upon the deposit of the enumeration in his hands.[33]

CERTIFICATE OF INDEBTEDNESS—See note 34.

CERTIFICATES OF DEPOSIT—See Bills and Notes, 1001–1010.

CERTIFY—To certify means to testify to a thing in writing.[35]

CERTIFYING QUESTIONS TO SUPREME COURT—See Criminal Law, 2493.

CERTIORARI

IN GENERAL

1391. General nature of writ—Originally, and in English practice, a certiorari was an original writ issuing out of the court of chancery or king's bench, directed to the judges or officers of an inferior court, commanding them to certify or return the records or proceedings in a cause before them, for the purpose of a judicial review of their action. In the United States, the office of this writ has been extended, and its application is not now confined to the decisions of courts, properly so called, but it is also used to review the proceedings of special tribunals, commissions, magistrates, and officers of municipal corporations exercising judicial powers, affecting the rights or property of the citizens, when they act in a summary way, or in a new course different from that of the common law.[36] The writ as used in this state is not the common law writ of certiorari, but rather a writ in the nature of certiorari.[37] In England, the courts, in certain cases, allow the writ at any time, not only as a proceeding in error, but also for the purpose of bringing a cause into the superior court for trial. Under this practice indictments were frequently removed by this writ from the inferior court into the court of king's bench; and when the writ was sustained, the court above would commence the trial de novo, having no regard to the place

[30] Wolford v. Crystal Lake C. Assn., 54–440, 56+56. See Northern T. Co. v. Crystal Lake C. Assn., 67–131, 69+708.

[31] R. L. 1905 § 2939; State v. Lakewood C. Assn., 93–191, 101+161.

[32] R. L. 1905 § 2937; Brown v. Maplewood C. Assn., 85–498, 506, 89+872.

[33] Wolfe v. Moorhead, 98–113, 107+728.

[34] Christie v. Duluth, 82–202, 204, 84+754.

[35] State v. Brill, 58–152, 156, 59+989; Kipp v. Dawson, 59–82, 85, 60+845.

[36] In re Wilson, 32–145, 19+723.

[37] Minn. Central Ry. v. McNamara, 13–508(468); Moede v. Stearns County, 43–312, 45+435.

where the cause left off in the inferior court. But generally, in this country, and certainly in this state, a certiorari is employed strictly as in the nature of a writ of error. The legitimate office of the writ is to review and correct decisions and final determinations of inferior tribunals, not to divest them of the right of terminating the proceedings, nor to withdraw from them the question to be tried—to review and correct decisions and determinations already made. It follows that, before trial and determination, it does not divest the inferior jurisdiction of the right to terminate the proceedings before it. Upon return of the writ the inquiry is whether or not there has been error, and, upon answer to this question, the court above determines whether to affirm or reverse, just as is done in cases of writs of error or of appeals.[38] In other words, the office of the writ, which is in the nature of appeal, is to bring up for review the final determination of an inferior tribunal, which, if unreversed, would stand as a final adjudication of some legal right of the relator.[39] It is not the appropriate remedy to prevent anticipated wrong or injury.[40] Its office is not to restrain or prohibit, but to annul.[41] It is not original process.[42]

1392. As ancillary to appeal—The writ of certiorari is sometimes used as ancillary to an appeal for the purpose of securing a full return to the supreme court.[43]

1393. Allowance discretionary—The writ of certiorari is not a writ of right, its allowance being somewhat a matter of discretion. It should be denied where it would result in grave public detriment and inconvenience.[44] It may be denied where the subject-matter could better be litigated otherwise.[45] But where the proceedings sought to be reviewed are of a strictly legal nature in a court of law, and no other mode of appeal is provided, the writ is practically a writ of right in this state.[46]

1394. Will lie when no right of appeal—Certiorari will always lie for the review of strictly judicial proceedings in a court of law, if no other mode of appeal is provided by statute.[47] When a court acts in a summary manner, or in a new course, different from the common law, certiorari will lie in the absence of any statutory mode of appeal.[48]

1395. Does not lie where there is right of appeal—Except in special and extraordinary cases certiorari will not lie where there is or has been an opportunity for an appeal.[49] Though our supreme court has recognized that cases may arise which would justify the issuance of the writ after the expiration of

[38] Grinager v. Norway, 33-127, 22+174. See Craighead v. Martin, 25-41; State v. Dist. Ct., 44-244, 46+349.

[39] Dousman v. St. Paul, 22-387; Craighead v. Martin, 25-41; Goar v. Jacobson, 26-71, 1+799; Grinager v. Norway, 33-127, 22+174; State v. Linton, 42-32, 43+571; State v. Dunn, 86-301, 90+772.

[40] Bilsborrow v. Pierce, 101-271, 274, 112+274.

[41] Schumacher v. Wright County, 97-74, 105+1125.

[42] Pierce v. Huddleston, 10-131(105).

[43] Boyle v. Musser, 88-456, 93+520. See § 4141.

[44] Libby v. West St. Paul, 14-248(181).

[45] Bilsborrow. v. Pierce, 101-271, 274, 112+274.

[46] Brown County v. Winona etc Co., 38-397, 37+949.

[47] Tierney v. Dodge, 9-166(153); Faribault v. Hulett, 1030(15); Minn. Central Ry. v. McNamara, 13-508(468); Brown County v. Winona etc. Co., 38-397, 37+949; Sherwood v. Duluth, 40-22, 41+234; State v. Leftwich, 41-42, 42+598; State v. Probate Court, 51-241, 53+463; State v. Searle, 59-489, 61+553; State v. Willis, 61-120, 63+169; State v. Dist. Ct., 83-464, 86+455.

[48] Tierney v. Dodge, 9-166(153); Faribault v. Hulett, 10-30(15); Minn. Central Ry. v. McNamara, 13-508(468); St. Paul v. Marvin, 16-102(91); Mass. etc. Co. v. Elliott, 24-134; State v. Dist. Ct., 84-377, 87+942.

[49] St. Paul v. Steamboat Dr. Franklin, 1-97(76) (a special proceeding before the mayor of St. Paul); Wood v. Myrick, 9-149(139) (irregularities of commissioners in probate proceedings); State v. Milner, 16-55(43) (proceedings before a justice for violation of city ordinance against peddling); Dousman v. St. Paul, 22-387 (proceedings by city officials of St. Paul, mak-

the time allowed by statute for appealing, no such case is found in our reports.[50] Mere inability to furnish an appeal bond is not a ground for an exception.[51]

1396. Will not lie to an intermediate order—In this state the writ of certiorari is employed strictly as in the nature of a writ of error. Its office is to review and correct the decisions and final determinations of inferior courts and tribunals and not to divest them of the right of trying and terminating the proceedings before them. A writ of certiorari does not lie directly to an intermediate order.[52] Such orders, however, may be reviewed on certiorari to the final judgment or determination in the proceeding.[53]

1397. To review action of municipalities—Boards—Officers, etc.—The authorities are almost uniform in holding that mere legislative or ministerial acts, as such, of municipal officers cannot be reviewed on certiorari; that only those which are judicial or quasi judicial can be thus reviewed. The mere fact that the proper performance of an act requires the exercise of discretion does not make it a judicial act.[54] "Unless we are prepared to assume a general supervision over all municipal corporations, boards, commissions, and public officers in the state, this writ must be confined to its legitimate office, which is to review proceedings judicial in their nature, which affect the citizen in his rights of person or property." [55] It may be said generally that the exercise of judicial functions is to determine what the law is, and what the legal rights of parties are, with respect to a matter in controversy; and whenever an officer is clothed with that authority, and undertakes to determine those questions, he acts judicially.[56] "While we have to recognize the fact that the office of this writ

ing assessments for local improvements and perfecting a judgment therefor); State v. Weston, 23–366 (intermediate order in a criminal action); State v. Noonan, 24–124 (id.); State v. Bruckhauser, 26–301, 3+695 (prosecution before justice for violation of village ordinance); State v. Board of Public Works, 27–442, 8+161 (action of common council or board of public works in making assessments for local improvements); State v. Probate Court, 28–381, 10+209 (order of probate court granting creditor further time in which to present claim); State v. Severance, 29–269, 13+48 (final order directing receiver to distribute estate of insolvent); State v. Buckham, 29–462, 13+902 (order discharging person brought up on habeas corpus); State v. Hanft, 32–403, 23+308 (judgment against a garnishee); Fall v. Moore, 45–517, 48+404 (order affirming the clerk's refusal to allow and insert costs in a judgment); State v. Olson, 56–210, 57+477 (action of town supervisors in laying out a highway); State v. Willis, 61–120, 63+169 (contempt proceedings when penalty imposed for the benefit of an injured party); State v. Steele, 62–28, 63+1117 (order for maintenance of widow during settlement of estate); State v. Probate Court, 72–434, 75+700 (order allowing amendment of claim after time for filing claims in probate proceedings expired); State v. Dist. Ct., 79–27, 81+536 (order denying application for discharge in bastardy proceedings); State v. Twin Lakes, 84–374, 87+925 (action of a town board of review in refusing an application for the abatement of a personal property assessment for taxation, where the essence of the controversy is in which of two towns in the same county the property should legally be listed for taxation); Dee v. Wilson, 91–115, 97+647 (on order of a probate court discharging an order upon an executrix to show cause why the homestead devised by the will of the testator should not be sold to pay debts of the estate); State v. Dist. Ct., 93–177, 100+889 (personal property tax judgment).

[50] Wood v. Myrick, 9–149(139); State v. Milner, 16–55(43); State v. Probate Court, 72–434, 75+700; State v. Dist. Ct., 79–27, 81+536.

[51] State v. Dist. Ct., 79–27, 81+536.

[52] State v. Weston, 23–366; State v. Noonan, 24–124; Grinager v. Norway, 33–127, 22+174; State v. Linton, 42–32, 43+571; State v. Dist. Ct., 44–244, 46+349; State v. Probate Ct., 51–241, 53+463; State v. Dist. Ct., 58–534, 60+546; State v. Probate Ct., 72–434, 75+700; State v. Probate Ct., 83–58, 85+917.

[53] See § 1402.

[54] In re Wilson, 32–145, 19+723.

[55] Lemont v. Dodge County, 39–385, 40+359. See to same effect, Christlieb v. Hennepin County, 41–142, 42+930; Moede v. Stearns County, 43–312, 45+435; State v. Dunn, 86–301, 90+772.

[56] State v. Dunn, 86–301, 90+772; Minn. S. Co. v. Iverson, 91–30, 97+454.

has been extended beyond what it was at common law, and is not now confined to reviewing the decisions of courts, properly so called, but may also be used in certain cases to review the proceedings of special tribunals, boards, commissions, and officers of municipal corporations, yet reflection and further examination only confirm us in the opinion that, both on principle and considerations of public policy, we are right in confining the office of the writ, in the latter class of cases, to acts that are strictly judicial, or quasi judicial, in their nature. There is no country in which the distinction between the functions of the three departments of government is more definitely marked out on paper than in the United States, and yet there is none in which the courts have assumed so often to review, in advance of actual litigation involving the question, the acts of coordinate branches of the government. It has become the fashion to invoke the courts by direct action, or through some remedial writ, to review almost every conceivable act, legislative, executive, or ministerial, of other departments; and courts have been so often inclined to amplify their jurisdiction in that respect that they have not unfrequently converted themselves into a sort of appellate and supervisory legislative or executive body. Such a practice is calculated to interfere with the proper exercise of the functions of executive and legislative officers or bodies; to obliterate the distinction between the powers and duties of the different departments of government; and, above all, to bring the courts themselves into disrepute, and destroy popular respect for their decisions. It may be very convenient to have in advance a judicial determination upon the validity of a legislative or executive act. It would often be equally so in the case of acts of a legislature. But we think that the courts will best subserve the purposes for which they are organized by confining themselves strictly to their own proper sphere of action, and not assuming to pass upon the purely legislative or executive acts of other officers or bodies until the question properly arises in actual litigation between parties." [57] The fact that a board or officer has, in the performance of their duties, to ascertain certain facts, and, in doing so, to determine what the law is, does not of itself render its acts judicial. That has to be done every day by public bodies and officers, in the discharge of purely legislative or executive acts. Neither does it render an act judicial in its nature because it, in a general sense, affects the relator's interests in common with those of other members of the public. To render the proceedings of special tribunals, commissioners, or municipal officers judicial in their nature, they must affect the rights or property of the citizen in a manner analogous to that in which they are affected by the proceedings of courts acting judicially. Where proceedings are judicial, if no right of appeal is given, certiorari will lie, but the fact that no right of appeal is given has no bearing on the question whether the proceedings are judicial in their nature.[58] Certiorari will not lie to review acts of municipal officers which are mere usurpations of authority. Such acts are not judicial or quasi judicial; they are not even official.[59] The proceedings of municipal bodies are not to be considered according to the strict rules of legal procedure. If such bodies keep within their jurisdiction their action is not to be reversed by the courts for any mere informalities or irregularities such as might constitute reversible error in the proceedings of a court. The action of such bodies should be considered with reference to their nature and the objects for which they are organized.[60]

[57] Moede v. Stearns County, 43-312, 45+435; State v. Duluth, 53-238, 55+118; State v. McIntosh, 95-243, 103+1017.

[58] Christlieb v. Hennepin County, 41-142, 42+930; State v. Clough, 64-378, 67+202; State v. Dunn, 86-301, 90+772; Minn. S. Co. v. Iverson, 91-30, 97+454; State v. McIntosh, 95-243, 103+1017.

[59] State v. St. Paul, 34-250, 25+449; State v. Lamberton, 37-362, 34+336.

[60] State v. Duluth, 53-238, 55+118.

1398. Proceedings held judicial—The following proceedings have been held judicial or quasi judicial and hence reviewable in the courts by certiorari: removal from office of fire commissioners by common council for cause and after notice and hearing;[61] laying out a street or highway across private property and assessing the owner's damages therefor; making special assessments against a man's property to pay for improving or paving a street; assessing damages for the destruction of buildings to prevent the spread of fire; determining contested election cases;[62] the proceedings of town supervisors voting a special tax levy to pay orders drawn by them on the treasurer to pay bounties to volunteers;[63] the action of the state auditor in determining in what county personalty is taxable;[64] the action of the state auditor in relation to a sugar bounty;[65] the action of the state auditor in proceedings for the refundment of taxes.[66]

1399. Proceedings held non-judicial—The following proceedings have been held administrative, legislative, or political rather than judicial, and hence not reviewable in the courts by certiorari: restricting the sale of liquor to certain parts of a city;[67] the action of a county board in forming a new school district;[68] the action of a county board in dividing a town and organizing a new one out of part of its territory;[69] the revocation of an auctioneer's license by the mayor of St. Paul;[70] the action of a county board in designating a newspaper for official publications;[71] the granting of a license by a village council to sell intoxicating liquor;[72] the recanvassing of votes by a city council;[73] the determination of an election contest.[74]

1400. Held to lie—Certiorari has been held to lie to review the following proceedings: for the erection of mill-dams and mills;[75] condemnation proceedings;[76] summary proceedings under a city ordinance;[77] order in probate proceedings denying application for further time in which to present claims;[78] proceedings to enforce the payment of taxes against realty;[79] action of the district court in refusing to appoint person to examine and inspect election ballots under Laws 1893 c. 4 § 188;[80] an order of the probate court directing or refusing to direct payment of a claim against an estate;[81] proceedings for the punishment of criminal contempt;[82] summary criminal proceedings before a city justice;[83] action of common council in removing fire commissioners for cause, after notice and hearing;[84] action of state auditor in determining in what county personalty is taxable;[85] an order of the district court confirming the report of appraisers appointed to determine and award compensation for property damaged by the construction of a dam;[86] proceedings to enforce

[61] State v. Duluth, 53–238, 55+118.
[62] In re Wilson, 32–145, 19+723; Sherwood v. Duluth, 40–22, 41+234; State v. Clough, 64–378, 67+202.
[63] Scribner v. Allen, 12–148(85) (a doubtful case and inconsistent with later cases).
[64] State v. Dunn, 86–301, 90+772.
[65] Minn. S. Co. v. Iverson, 91–30, 97+454.
[66] State v. Dunn, 88–444, 93+306.
[67] In re Wilson, 32–145, 19+723.
[68] Lemont v. Dodge County, 39–385, 40+359; Moede v. Stearns County, 43–312, 45+435.
[69] Christlieb v. Hennepin County, 41–142, 42+930.
[70] State v. St. Paul, 34–250, 25+449.
[71] Sinclair v. Winona County, 23–404.
[72] State v. Lamberton, 37–362, 34+336.
[73] Id.
[74] State v. McIntosh, 95–243, 103+1017.
[75] Faribault v. Hulett, 10–30(15).
[76] Minn. Central Ry. v. McNamara, 13–508(468); State v. Dist. Ct., 87–268, 91+1111.
[77] St. Paul v. Marvin, 16–102(91).
[78] Mass. Mut. L. Ins. Co. v. Elliot, 24–134. Aliter when application is granted, State v. Probate Ct., 28–381, 10+209.
[79] Brown County v. Winona etc. Co., 38–397, 37+949.
[80] State v. Searle, 59–489, 61+553.
[81] State v. Probate Ct., 51–241, 53+463.
[82] State v. Leftwich, 41–42, 42+598; State v. Willis, 61–120, 63+169; State v. Dist. Ct., 78–464, 81+323.
[83] Tierney v. Dodge, 9–166(153).
[84] State v. Duluth, 53–238, 55+118.
[85] State v. Dunn, 86–301, 90+772.
[86] State v. Dist. Ct., 83–464, 86+455.

special assessments for local improvements;[87] drainage proceedings;[88] action of state auditor in proceedings for refundment of taxes;[89] action of state auditor in relation to sugar bounty;[90] action of county auditor in assessing and levying omitted taxes;[91] order of probate court relating to compensation of executor and attorney's fees;[92] action of police board in removing a policeman.[93]

1401. Held not to lie—It has been held that certiorari would not lie to review the following proceedings: proceedings of county board in altering a highway on the relation of one not specially injured;[94] proceedings of town officers in issuing bonds;[95] where the judgment in condemnation proceedings was formally defective and the proper remedy was to apply to the court below for a correction;[96] action of county board in forming a new school district;[97] discharge of accused in bastardy proceedings;[98] action of a town board of review in refusing an application for the abatement of a personal property assessment for taxation, where the essence of the controversy is in which of two towns in the same county the property should be legally listed for taxation;[99] an election contest.[1]

1402. Scope of review—A party has a right to have considered and determined all questions properly presented by the record.[2] In this state the scope of review on certiorari is the same as on appeal from a final judgment except that non-judicial tribunals are not held to strict compliance with the rules of legal procedure. Rulings on evidence, intermediate orders and instructions may be considered.[3] The sufficiency of the evidence to sustain the findings may also be considered, but the supreme court will not reverse for insufficiency of the evidence if there is any evidence reasonably tending to support the decision of the inferior tribunal—if it furnishes any legal and substantial basis for the decision.[4] Of course a reversal will be ordered if the findings are manifestly and palpably against the preponderance of the evidence, though there is some evidence reasonably tending to support them.[5] The review on certiorari is restricted to questions of law appearing on the face of the record.[6] The writ does not permit an investigation of matters outside the record. Nor does it enable the court to give full and complete hearing to all parties interested, and then by a proper mandate to carry its findings into effect.[7] "It has been said that the writ of certiorari brings up nothing but the record, or the proceedings in the nature of a record, and that therefore the court to which the return is made can only review errors apparent upon such record or proceedings, and cannot examine the rulings of the inferior tribunal

[87] Carpenter v. St. Paul, 23–232; Dousman v. St. Paul, 23–394, 398; State v. Dist. Ct., 33–235, 22+625; Sherwood v. Duluth, 40–22, 41+234.

[88] State v. Polk County, 87–325, 92+216; State v. Isanti County, 98–89, 107+730; Heinz v. Buckham, 104–389, 116+736; State v. Posz, 106–197, 118+1014; State v. Buckham, 108–8, 121+217.

[89] State v. Dunn, 88–444, 93+306.

[90] Minn. S. Co. v. Iverson, 90–6, 95+1133; Id., 91–30, 97+454.

[91] State v. Eberhard, 90–120, 95+1115.

[92] State v. Probate Ct., 76–132, 78+1039.

[93] State v. St. Paul, 81–391, 84+127.

[94] Conklin v. Fillmore County, 13–454 (423).

[95] Libby v. West St. Paul, 14–248(181).

[96] St. Paul etc. Ry. v. Murphy, 19–500 (433).

[97] Lemont v. Dodge County, 39–385, 40+359.

[98] State v. Linton, 42–32, 43+571.

[99] State v. Twin Lakes, 84–374, 87+925.

[1] State v. McIntosh, 95–243, 103+1017. See State v. St. Paul, 25–106; State v. Dist. Ct., 74–177, 77+28.

[2] Bunday v. Dunbar, 5–444(362). See Dousman v. St. Paul, 22–387; Gibson v. Brennan, 46–92, 48+460.

[3] Bunday v. Dunbar, 5–444(362); Minn. C. Ry. v. McNamara, 13–508(468).

[4] De Rochebrune v. Southeimer, 12–78 (42); State v. Duluth, 53–238, 55+118.

[5] State v. Buckham, 108–8, 121+217. See Elwell v. Goodnow, 71–383, 73+1092.

[6] State v. Dist. Ct., 83–464, 86+455.

[7] Bilsborrow v. Pierce, 101–271, 112+274

upon the admission or exclusion of evidence, or the giving or refusal of instructions to a jury. * * * If there should be any doubt whether at common law the writ of certiorari would bring up anything except the record, we are of the opinion that the statute gives us, as 'the supreme judicial tribunal' of the state, the power to issue it with an enlarged office, if not as a common-law certiorari, strictly speaking, yet as some other writ * * * necessary to the furtherance of justice and the execution of the laws in the nature of certiorari, and to all intents and purposes a certiorari, with increased scope. * * * It is only necessary to say in this case that the record, the proceedings in the nature of a record, the rulings of the inferior tribunal upon the admission or rejection of testimony, the instructions given and refused to the jury, with the exceptions taken, together with so much of the evidence as may be proper to show the bearing of such rulings and instructions, and the prejudice to the petitioner, may be brought before this court in the return to a certiorari for examination and revision." [8] If it is sought to question the sufficiency of the evidence to justify the findings of the inferior tribunal the return should purport on its face or in the certificate of the officer to contain all the evidence introduced at the trial.[9]

OUT OF SUPREME COURT

1403. Constitutional provision—The constitution of this state provides that the supreme court shall have "appellate jurisdiction in all cases, both in law and equity." [10] . This is held to mean that, in all judicial proceedings, the judgment which finally determines the rights of the parties is subject to review by the supreme court. The legislature may prescribe the mode by which a cause is to be carried to the supreme court, either by appeal or otherwise, and either directly from the court first determining it, or after a rehearing before some other court; but it cannot deprive a party of the right of appeal to the supreme court. If no other mode is given by statute the supreme court may assert and exercise its appellate jurisdiction by means of the writ of certiorari.[11]

1404. Statutory provision—The supreme court is authorized by statute to issue writs of certiorari to all courts of inferior jurisdiction, to corporations, and to individuals, when necessary to the execution of the laws and the furtherance of justice. It is always open for the issuance and return of such writs, and for the hearing and determination of all matters involved therein, subject to such regulations as it may prescribe. Any justice of the court, either in vacation or in term, may order a writ to issue, and prescribe as to its service and return.[12]

OUT OF DISTRICT COURT

1405. Statutory authority—The district courts are authorized by statute to issue writs of certiorari when necessary to the complete exercise of the jurisdiction vested in them by law. Any judge thereof may order the issuance of such writs, and direct as to their service and return.[13]

[8] Gervais v. Powers, 1–45(30); Minn. C. Ry. v. McNamara, 13–508(468); St. Paul v. Marvin, 16–102(91); State v. Duluth, 53–238, 55+118; State v. Dist. Ct., 83–464, 86+455.

[9] Gibson v. Brennan, 46–92, 48+460; State v. St. John, 47–315, 50+200. See Payson v. Everett, 12–216(137); State v. Probate Ct., 83–58, 85+917.

[10] Const. art. 6 § 2.

[11] Dousman v. St. Paul, 23–394, 398; Brown County v. Winona etc. Co., 38–397, 37+949.

[12] R. L. 1905 § 72; State v. Dunn, 86–301, 90+772.

[13] R. L. 1905 § 92; Schultz v. Talty, 71–16, 73+521; State v. Willrich, 72–165, 75+123.

1406. To probate courts—The district courts of the state have jurisdiction to issue writs of certiorari to the probate courts.[14]

1407. To justice courts—Prior to 1881 the district courts had no authority to issue writs of certiorari to justices of the peace.[15] The practice, however, was very common until 1879, as shown by the numerous cases in our early reports.[16] The district court is made a court of appeal from justices of the peace, by statute,[17] pursuant to the constitution; and hence it has power to review the judgments of justices of the peace by certiorari in cases where no appeal is given by statute.[18] The supreme court may issue the writ to a justice of the peace.[19]

PROCEDURE

1408. Time of application and issuance—Application for a writ must be made within sixty days after the petitioner has received notice of the proceeding sought to be reviewed, and the writ must be served upon the adverse party within the sixty days.[20]

1409. Parties—Parties without any joint interest cannot unite in a petition for a writ.[21] Courts will not review the action of public officers by certiorari at the instance of private individuals who have no peculiar interest therein.[22] The test of the right to certiorari, so far as parties are concerned, is whether the person seeking the writ was a party in form or in substance, so as to be concluded by the determination of the matters in controversy.[23]

1410. Petition—A petition for a writ must show on its face that the petitioner has no other mode of appeal.[24] It need not affirmatively allege that the application is made in good faith and not for the purpose of delay. If the facts stated in the petition show a meritorious case and a prima facie right to the writ, good faith will be presumed, in the absence of anything indicating the contrary.[25] Where there is no special occasion for the application of strict technical rules to statements in a petition for certiorari, and in the writ issued, and where no prejudice has resulted from informalities, the writ will be liberally construed, and not held to the standard of definiteness and precision of formal pleadings in action at law and suits in equity.[26]

1411. Form of writ—To whom directed—The writ should run in the name of the state, and be directed to the court or body whose proceedings are sought to be reversed.[27] When a court has but one judge it is immaterial whether the writ is directed to the court or the judge, but the better practice is in all cases to direct it to the court.[28] It need not contain all the allegations of the petition. It is sufficient if it contains in succinct form the substance

[14] State v. Willrich, 72–165, 75+123; State v. Probate Ct., 83–58, 85+917.

[15] Goar v. Jacobson, 26–71, 1+799.

[16] Gervais v. Powers, 1–45(30); Baker v. United States, 1–207(181); Snow v. Hardy, 3–77(35); Bunday v. Dunbar, 5–444(362); Walker v. McDonald, 5–455(368); Tierney v. Dodge, 9–166(153); Cunningham v. La Crosse etc. Co., 10–299(235); De Rochebrune v. Southeimer, 12–78(42); Payson v. Everett, 12–216(137); Craighead v. Martin, 25–41; State v. Fitch, 30–532, 16+411.

[17] R. L. 1905 § 90.

[18] See State v. Willrich, 72–165, 75+123.

[19] State v. Haines, 58–96, 59+976.

[20] Laws 1909 c. 410. See, prior to statute, Wood v. Myrick, 9–149(139); Brown County v. Winona etc. Co., 38–397, 37+949.

[21] Libby v. West St. Paul, 14–248(181).

[22] Conklin v. Fillmore County, 13–454 (423); State v. Lamberton, 37–362, 34+336. See State v. Fitch, 30–532, 16+411.

[23] State v. Isanti County, 98–89, 107+730.

[24] State v. Olson, 56–210, 57+477.

[25] State v. Posz, 106–197, 118+1014.

[26] State v. Isanti County, 98–89, 107+730. See State v. Probate Ct., 76–132, 78+1039.

[27] State v. Blackduck, 107–441, 120+894 (when it is sought to review the action of a village council in canceling a liquor license the writ should be directed to the council and not to the president and recorder of the village). See State v. Probate Ct., 67–51, 69+609, 908.

[28] Brown County v. Winona etc. Co., 38–397, 37+949.

of the petition and clearly points out the errors complained of.[29] In a civil case it must be indorsed by some responsible person as surety for costs.[30]

1412. Return—The return should include a formal certificate of the officer making the return to the effect that the return contains a full transcript of the records as required by the writ. In one case the supreme court said, "we cannot consider the fragmentary and disordered sheets containing what may have possibly been evidence on the trial, for they are not only not certified to be all the evidence, but they are not even certified to as having been evidence at all." [31] The return must contain all the evidence upon which the action of the lower court or tribunal was predicated.[32] The record as returned by the inferior tribunal imports absolute verity and the appellate tribunal is confined to the facts disclosed by the return.[33] No point made upon the evidence can be considered when the whole of the evidence bearing upon the point does not appear to be returned.[34] If the return contains matters not responsive to the writ they will be disregarded.[35]

1413. Burden of proof—A petitioner for a writ has the burden of proving that he has no other mode of appeal or remedy.[36]

1414. Effect as a supersedeas—The writ of certiorari operates by its own force as a supersedeas. No bond is necessary for that effect.[37]

1415. Costs—In a civil proceeding the prevailing party is entitled to costs: and if it appears that the writ was brought for the purpose of delay or vexation, the court may award double costs to the prevailing party.[38]

CHALLENGES—See Jury, 5246.
CHAMBERS—See Court Commissioners, 2331; District Court, 2762, 2764; Judges, 4960; Motions and Orders, 6504.
CHAMBERS OF COMMERCE—See Exchanges.

CHAMPERTY AND MAINTENANCE

1416. What constitutes—A contract of an attorney to prosecute an action on a contingent fee, or for compensation to be taken from the amount recovered, is not champertous.[39] A contract by a stranger to employ an attorney and prosecute a claim against a railway company for failing to fence its right of way, with a stipulation that the claimant should not settle his claim without the consent of the stranger, has been held champertous and barratrous, the same being a part of a speculative scheme to work up many similar cases.[40] It is immaterial at what time a person became a party to such a scheme.[41] A contract between a layman and a lawyer, by which the former undertakes and agrees, in consideration of a division of the fees received by the latter, to hunt

[29] State v. Posz, 106–197, 118+1014.
[30] Laws 1909 c. 410.
[31] State v. St. John, 47–315, 50+200. See State v. Probate Ct., 79–257, 82+580.
[32] Gibson v. Brennan, 46–92, 48+460.
[33] Gervais v. Powers, 1–45(30); Taylor v. Bissell, 1–225(186); State v. St. John, 47–315, 50+200. See also Dousman v. St. Paul, 22–387.
[34] State v. Graffmuller, 26–6, 46+445.
[35] De Rochebrune v. Southeimer, 12–78 (42).
[36] State v. Olson, 56–210, 57+477.
[37] State v. Noonan, 24–124.
[38] Laws 1909 c. 410.
[39] Canty v. Latterner, 31–239, 17+385; Gammons v. Johnson, 76–76, 78+1035. See Anderson v. Itasca L. Co., 86–480, 91+12; Hammons v. G. N. Ry., 53–249, 54+1108; Alworth v. Seymour, 42–526, 44+1030.
[40] Huber v. Johnson, 68–74, 70+806; Gammons v. Johnson, 69–488, 72+563; Gammons v. Johnson, 76–76, 78+1035; Gammons v. Gulbranson, 78–21, 80+779; Gammons v. Honerud, 82–264, 84+911.
[41] Gammons v. Gulbranson, 78–21, 80+779.

up and bring to the attorney persons having causes of action against railway companies for personal injuries, is contrary to public policy and void.[42]

1417. Who may object—A defendant cannot avail himself of a champertous contract by the plaintiff, either as a defence, or by bringing it to the attention of the court and securing a dismissal of the action.[43]

CHANCERY COURTS—See Equity.

CHANGE OF VENUE—See Criminal Law, 2422, 2439; Justices of the Peace, 5292; Venue.

CHARACTER—See Criminal Law, 2458; Evidence, 3242; Libel and Slander, 5501.

CHARGE—See Criminal Law, 2479; Trial, 9781–9800.

CHARITABLE TRUST—See Charities; Trusts.

CHARITIES

Cross-References

See Banks, 806; Perpetuities; Trusts; Wills.

1418. Definition—A charity is a gift or trust for promoting the welfare of the community, or of mankind at large, or some indefinite part of it. Its benefits need not be limited to the poor. It includes gifts or trusts for the benefit of hospitals, schools, churches, and libraries. The term is exceedingly comprehensive. It includes charitable institutions—foundations for the relief of a certain class of persons by alms, education, or care.[44]

1419. Charitable trusts—Cy-pres—Except as expressly authorized charitable trusts and uses are abolished by statute.[45] In this state charitable trusts are no exception to the general rule requiring the terms of a trust and the beneficiaries to be certain, or capable of being made certain.[46] The common-law doctrine of cy-pres, as applied to charitable trusts, does not prevail in this state.[47]

1420. Certainty of devisee—A devise of realty describing the devisees only as "those members of the 'Society of the Most Precious Blood,' who are under my control, and subject to my authority, at the time of my death," is void, because not pointing out with sufficient certainty the persons who are to take.[48]

1421. Diversion of gift—Dissolution of corporation—A corporation organized under the provisions of G. S. 1894 c. 34 tit. 3, has no power to divert a gift from the specific purpose designated by the donor, without his consent. When such corporation declines to carry out the purpose or object of a gift of money as impressed upon such gift when made, declines to use the money for the purpose for which it was donated, and by decree of a court voluntarily dissolves and terminates its corporate existence, the amount of the gift reverts to the donor. It is not to be distributed among the members of the organization.[49]

[42] Holland v. Sheehan, 108–362, 122+1.

[43] Isherwood v. Jenkins, 87–388, 92+230.

[44] State v. Board of Control, 85–165, 88+533. See 20 Harv. L. Rev. 67.

[45] See § 9878.

[46] Little v. Willford, 31–173, 17+282; Atwater v. Russell, 49–57, 51+629; Lane v. Eaton, 69–141, 71+1031; Kahle v. Evangelical L. J. Synod, 81–7, 83+460; Shanahan v. Kelly, 88–202, 92+948; Owatonna v. Rosebrock, 88–318, 92+1122; Watkins v. Bigelow, 93–210, 221, 100+1104.

[47] Lane v. Eaton, 69–141, 71+1031.

[48] Society M. P. B. v. Moll, 51–277, 53+648.

[49] Cone v. Wold, 85–302, 88+977.

1422. Powers of charitable corporations—Laws 1895 c. 158, relating to the organization of corporations to administer and furnish relief and charity for the worthy poor, does not authorize such a corporation to take property by gift, to hold in trust for purposes not otherwise authorized by law. It does, however, authorize the corporation to take as owner, by gift, any property, subject to such conditions and limitations as are not inconsistent with its corporate purposes, as the donor may impose.[50]

1423. Gifts in trust—Absolute gifts—An absolute gift is one where not only the legal title, but the beneficial ownership as well, is vested in the donee. A gift in trust is one where the subject of the gift if transferred to the donee, not for the purpose of vesting both the legal and beneficial ownership of the subject in the donee, but that it may be held and applied to certain uses for a third party—the beneficiary. A gift by deed, devise, or bequest to an existing corporation, or to one to be thereafter organized within the time limited by law, with directions or conditions as to the use or management of the subject-matter of the gift which are reasonably consistent with the corporate purposes of the donee, is not a gift in trust, but an absolute one to the corporation, within the meaning of our statute of uses and trusts.[51]

CHARTER—See Corporations, 1992; Municipal Corporations, 6522; Railroads, 8089.

CHATTEL INTERESTS—See Estates, 3158.

[50] Watkins v. Bigelow, 93–210, 100+1104.

[51] Watkins v. Bigelow, 93–210, 100+1104. See Little v. Willford, 31–173, 17+282; Atwater v. Russell, 49–22, 51+624; Lane v. Eaton, 69–141, 71+1031; Kahle v. Evangelical L. J. Synod, 81–7, 83+460; Cone v. Wold, 85–302, 88+977; Shanahan v. Kelly, 88–202, 92+948; Owatonna v. Rosebrock, 88–318, 92+1122; Appleby v. Appleby, 100–408, 111+305.

CHATTEL MORTGAGES

Cross-References

See Conflict of Laws, 1537; Execution, 3509; Fraudulent Conveyances, 3884; Pledge; Sales, 8648.

IN GENERAL

1424. Definition and nature—A chattel mortgage is a transfer of the title to personal property as security for the payment of a debt or the performance

of some other obligation.[52] A right of redemption in the mortgagor is an essential element of a mortgage.[53] A transfer is not a mortgage if the entire property passes.[54] A mortgage is unlike a conditional sale in that the title passes,[55] and unlike a pledge or common-law lien in that the title and not the possession is transferred and constitutes the security.[56]

1425. Held chattel mortgages—A farm contract;[57] a bill of sale of a piano, absolute on its face;[58] a bill of sale of a stock of goods by a firm executed to one or more, but not to all, of their creditors, to secure their claims, reserving to the firm a right of redemption;[59] a clause in a lease of realty reserving to the lessor a lien for the rent on the goods and chattels of the lessee placed on the demised premises;[60] a contract of sale whereby the vendor was given a right to possession upon a failure to pay the purchase price and to remove and sell the chattel and pay the balance to the vendee;[61] a written instrument for the sale of standing timber, to be severed and carried away from the land and manufactured into lumber by the vendee, in which it was provided that the title to the timber and its manufactured products should remain in the vendor until the entire purchase price was paid and for a release from time to time of the vendor's claim upon blocks of at least one million feet of the lumber, upon partial payments being made;[62] a seed-grain contract;[63] a lease with a "chattel mortgage clause" as security for the performance of the covenants of the lease.[64]

1426. Held not chattel mortgages—A bill of sale transferring the entire property to the vendee without reserving any right of redemption or other interest in the vendor, the vendee promising to sell the property and out of the proceeds to satisfy a debt owing to him by the vendor and to pay over to the latter any balance;[65] a clause in a lease "that said lessor shall at all times have a first lien upon all buildings for any unpaid rental or taxes;"[66] a seed-grain note;[67] a conditional sale with title in vendor until payment of purchase price;[68] a contract in relation to horses in a livery-stable.[69]

1427. What may be mortgaged—Crops to be grown may be mortgaged[70] and it is unnecessary that the mortgagor own or be in possession of the land.[71] But crops cannot ordinarily be mortgaged beyond the next season.[72] A mortgage on crops to be grown in the future gives the mortgagee no interest in or lien on the land. It attaches as a lien only on the interest which the mortgagor

[52] Merrill v. Ressler, 37–82, 33+117; Brunswick v. Brackett, 37–58, 33+214; Scofield v. Nat. El. Co., 64–527, 67+645.

[53] Dyson v. St. Paul Nat. Bank, 74–439, 77+236.

[54] Camp v. Thompson, 25–175; Butler v. White, 25–432.

[55] Keystone Mfg. Co. v. Cassellius, 74–115, 76+1028.

[56] Combs v. Tuchelt, 24–423; Merrill v. Ressler, 37–82, 33+117; Mahoney v. Hale, 66–463, 69+334.

[57] Wright v. Larson, 51–321, 53+712; Strangeway v. Eisenman, 68–395, 71+617; Anderson v. Liston, 69–82, 72+52; McNeal v. Rider, 79–153, 81+830; Ward v. Rippe, 93–36, 100+386; Rector v. Anderson, 96–123, 104+884; Agne v. Skewis, 98–32, 107+415. See Prouty v. Barlow, 74–130, 76+946.

[58] Armstrong v. Freimuth, 78–94, 80+862.

[59] Dyson v. St. Paul Nat. Bank, 74–439, 77+236.

[60] Merrill v. Ressler, 37–82, 33+117.

[61] Berlin M. Works v. Security T. Co., 60–161, 61+1131. See Fletcher v. Lazier, 58–326, 59+1040.

[62] Clark v. Richards, 68–282, 71+389.

[63] Minn. L. O. Co. v. Maginnis, 32–193, 20+85.

[64] Ludlum v. Rothschild, 41–218, 43+137.

[65] Camp v. Thompson, 25–175; Butler v. White, 25–432. See Dyson v. St. Paul Nat. Bank, 74–439, 77+236; Pound v. Pound, 64–428, 67+200.

[66] Caplis v. Am. etc. Co., 60–376, 62+440.

[67] Wallace v. Palmer, 36–126, 30+445.

[68] Keystone Mfg. Co. v. Cassellius, 74–115, 76+1028.

[69] Qualy v. Johnson, 80–408, 83+393.

[70] Minn. L. O. Co. v. Maginnis, 32–193, 20+85; Miller v. McCormick, 35–399, 29+52; Simmons v. Anderson, 44–487, 47+52; Wood v. Mpls. etc. Co., 48–404, 51+378; Wright v. Larson, 51–321, 53+712. See Prentice v. Nutter, 25–484.

[71] Hogan v. Atlantic El. Co., 66–344, 69+1.

[72] R. L. 1905 § 3475; Plano Mfg. Co. v. Hallberg, 61–528, 63+1114; Ward v. Rippe, 93–36, 100+386.

may have in the crops when they come into being.[73] An undivided fraction of a crop to be grown may be mortgaged.[74] A growing crop[75] or an undivided fraction thereof may be mortgaged.[76] Property to be subsequently acquired may be mortgaged.[77] Buildings on leased premises may be mortgaged.[78] A chattel mortgage is void, at least against creditors without actual notice, which purports to assign, to secure a specified debt, all the future earnings of a threshing machine, therein described, also of any other threshing machine operated by the mortgagor, and of the crew, including men and teams, operating them, which may accrue for threshing during the then ensuing two years within three designated townships.[79]

1428. Merger—Where a party held a mortgage to secure a note, and also had a right to take possession as equitable assignee of another note, it was held that there was no merger.[80] A purchaser who takes a bill of sale from both mortgagor and mortgagee acquires a title discharged of the mortgage.[81]

1429. Subrogation—A surety who pays a debt secured by a mortgage is entitled to be subrogated to the rights of the mortgagee, though he holds a mortgage on the same property for another debt.[82]

PARTIES

1430. In general—A mortgage may be taken in the name of a firm.[83] A mortgage taken in the name of an agent may be enforced by the agent or the principal.[84] One may enforce a mortgage in his own name though a third party has an interest in it.[85] An equitable owner may foreclose in the name of the legal owner.[86] A wife must join in a mortgage of exempt property,[87] except in the case of a purchase-money mortgage.[88] An infant may disaffirm his mortgage at any time during infancy or within a reasonable time thereafter.[89] One tenant in common may mortgage his interest.[90] A tenant cultivating a farm under a contract by which he is entitled to one-half the crops raised may, before a division of the crops is had, mortgage his interest therein; subject, however, to all rights of the landlord as fixed by the terms of the tenancy.[91]

FORM AND EXECUTION

1431. Form—Execution—Acknowledgment—No formal words of transfer and no particular form of instrument are necessary. Even though terms are used which would imply something else, yet, if it is apparent that a mortgage was intended, the court will so construe it.[92] Parol evidence is admis-

[73] Simmons v. Anderson, 44–487, 47+52; McMahan v. Lundin, 57–84, 58+827; Christianson v. Nelson, 76–36, 78+875, 79+647.

[74] Fitzpatrick v. Hanson, 55–195, 56+814; McRae v. O'Hara, 62–143, 64+146; Ellingboe v. Brakken, 36–156, 30+659.

[75] Strolberg v. Brandenberg, 39–348, 40+356; Close v. Hodges, 44–204, 46+335.

[76] Potts v. Newell, 22–561; Melin v. Reynolds, 32–52, 19+81.

[77] Montgomery v. Chase, 30–132, 14+586; Ludlum v. Rothschild, 41–218, 43+137; Ambuehl v. Matthews, 41–537, 43+477; Hogan v. Atlantic El. Co., 66–344, 69+1.

[78] Smith v. Park, 31–70, 16+490.

[79] Dyer v. Schneider, 106–271, 118+1011. See Baylor v. Butterfass, 82–21, 84+640.

[80] Torp v. Gulseth, 37–135, 33+550.

[81] Bangs v. Friezen, 36–423, 32+173.

[82] Torp v. Gulseth, 37–135, 33+550.

[83] Kellogg v. Olson, 34–103, 24+364. See Lundberg v. N. W. El. Co., 42–37, 43+685.

[84] Close v. Hodges, 44–204, 46+335.

[85] Lundberg v. N. W. El. Co., 42–37, 43+685.

[86] Carpenter v. Artisans' S. Bank, 44–521, 47+150.

[87] R. L. 1905 § 3465.

[88] Barker v. Kelderhouse, 8–207(178); Strickland v. Minn. T. F. Co., 77–210, 79+674.

[89] Miller v. Smith, 26–248, 2+942; Cogley v. Cushman, 16–397(354). See Lake v. Lund, 92–280, 99+884.

[90] McNeal v. Rider, 79–153, 81+830.

[91] Denison v. Sawyer, 95–417, 104+305.

[92] Merrill v. Ressler, 37–82, 33+117. See Hargreaves v. Reese, 66–434, 69+223 (evidence of execution and delivery held insufficient).

sible to prove that an absolute bill of sale was intended as a mortgage.[93] To constitute an executed mortgage some specific property must be appropriated. Until this is done the contract is merely executory and no property passes to the mortgagee.[94] If the property is exempt a wife must join in the execution,[95] except in the case of a purchase-money mortgage.[96] If a mortgage is executed according to the law of a sister state where the property is situated it is valid here.[97] Mortgages executed on the same day are presumed to have been executed contemporaneously.[98] A return of the mortgage for attestation does not constitute a rescission.[99] No acknowledgment is necessary as between the parties [1] or as to subsequent purchasers or mortgagees with notice.[2] Formal defects and clerical errors in an acknowledgment are not fatal,[3] but the want of a notary's seal is.[4] The fact that the acknowledgment was taken before a person disqualified by interest does not prevent the mortgage from being filed and operating as constructive notice.[5] A mortgage cannot be filed without an acknowledgment.[6] An acknowledgment of a mortgage before a justice of the peace in North Dakota, without the certificate of the clerk of court required by the laws of that state, has been held not to entitle the mortgage to record here.[7]

DESCRIPTION OF THE PROPERTY MORTGAGED

1432. In general—It is a general principle of law, applicable alike to sales, mortgages, and pledges, that the contract becomes executed only by specifying the goods to which it is to attach; or, in legal phrase, by the appropriation of the specific goods to the contract. Until this is done the contract is executory, and the property does not pass.[8] As to strangers a description which will enable them to identify the property, aided by inquiries which the mortgage indicates, is sufficient.[9] As to the parties, their privies, and persons with notice, less definiteness of description is required.[10] Taking possession cures a defective description.[11] The maxim, falsa demonstratio non nocet, is applicable.[12] But a false item of description which not unreasonably misleads a third party is fatal.[13] That distinguishing marks may become obliterated or changed does not make bad a description which was good when given.[14] Bad spelling does

[93] Jones v. Rahilly, 16-320(283); Pound v. Pound, 64-428, 67+200.
[94] Fishback v. Van Dusen, 33-111, 22+244.
[95] R. L. 1905 § 3465.
[96] Barker v. Kelderhouse, 8-207(178); Strickland v. Minn. T. F. Co., 77-210, 79+674.
[97] Keenan v. Stimson, 32-377, 20+364. See Ames v. Benjamin, 74-335, 77+230; Nichols v. Minn. T. M. Co., 70-528, 73+415; Hargreaves v. Reese, 66-434, 69+223.
[98] Sheldon v. Brown, 72-496, 75+709. See § 1448.
[99] Berlin M. Works v. Security T. Co., 60-161, 61+1131.
[1] Bank of Benson v. Hove, 45-40, 47+449.
[2] St. Paul etc. Co. v. Berkey, 52-497, 55+60.
[3] Brunswick v. Brackett, 37-58, 33+214; Evans v. Smith, 43-59, 44+880; Rodes v. St. Anthony etc. Co., 49-370, 52+27.
[4] Thompson v. Scheid, 39-102, 38+801. See Evans v. Smith, 43-59, 44+880.
[5] Bank of Benson v. Hove, 45-40, 47+449.
[6] Hargreaves v. Reese, 66-434, 69+223.
[7] Tweto v. Horton, 90-451, 97+128.
[8] Fishback v. Van Dusen, 33-111, 122, 22+244.
[9] Tolbert v. Horton, 33-104, 22+126; Strolberg v. Brandenberg, 39-348, 40+356; First Nat. Bank v. Hendrickson, 61-293, 63+725; Schneider v. Anderson, 77-124, 79+603; Barrett v. Magner, 105-118, 117+245.
[10] Tolbert v. Horton, 33-104, 22+126; Adamson v. Petersen, 35-529, 29+321; Beaupre v. Dwyer, 43-485, 45+1094; Clarke v. Nat. Citizens' Bank, 74-58, 76+965, 1125.
[11] Clarke v. Nat. Citizens' Bank, 74-58, 76+965, 1125. See First Nat. Bank v. Hendrickson, 61-293, 63+725.
[12] Tolbert v. Horton, 33-104, 22+126; Adamson v. Petersen, 35-529, 29+321; Adamson v. Fagan, 44-489, 47+56.
[13] See First Nat. Bank v. Hendrickson, 61-293, 63+725; Adamson v. Fagan, 44-489, 47+56.
[14] Adamson v. Horton, 42-161, 43+849.

not vitiate.[15] Property to be subsequently acquired must be described with the same certainty as other property.[16] The description must be construed as a whole.[17] What property is included in a description is a question of fact.[18]

1433. Parol evidence to identify property—As to the parties and others charged with notice, parol evidence is admissible of the relations of the parties, the situation of the property, and other surrounding circumstances, to show what was intended to be conveyed. The mortgage is to be interpreted in the light of the facts known to the parties at the time of its execution.[19] Though such evidence is admissible to apply the description in the mortgage to the property claimed to be mortgaged, the description in the mortgage must be sufficient for such purpose.[20] The mortgage cannot be changed, or its legal effect altered, by any parol agreement or understanding between the parties at the time of its execution. Intention to include subsequently acquired property cannot be shown by parol.[21] Evidence to identify the property is admissible as to strangers.[22] The burden rests on the party claiming under the mortgage to introduce evidence to connect the property claimed with the description in the mortgage.[23]

1434. Descriptions held sufficient—Cases are cited below holding various descriptions sufficient.[24]

[15] Strolberg v. Brandenberg, 39–348, 40+356.

[16] Ludlum v. Rothschild, 41–218, 43+137; Wood v. Mpls. etc. Co., 48–404, 51+378.

[17] Beaupre v. Dwyer, 43–485, 45+1094.

[18] Schneider v. Anderson, 77–124, 79+603; Tolbert v. Horton, 33–104, 22+126; Miller v. Adamson, 45–99, 47+452; Butts v. N. W. etc. Co., 43–56, 44+879.

[19] Beaupre v. Dwyer, 43–485, 45+1094; Adamson v. Petersen, 35–529, 29+321.

[20] Wood v. Mpls. etc Co., 48–404, 51+378.

[21] Montgomery v. Chase, 30–132, 14+586.

[22] Eddy v. Caldwell, 7–225(166); Wood v. Mpls. etc. Co., 48–404, 51+378; Schneider v. Anderson, 77–124, 79+603.

[23] Kellogg v. Anderson, 40–207, 41+1045; Butts v. N. W. etc. Co., 43–56, 44+879; Game v. Whaley, 43–234, 45+228; Gorham v. Summers, 25–81.

[24] Eddy v. Caldwell, 7–225(166) ("ten horses in the possession of the mortgagor"); Potts v. Newell, 22–561 ("all the right, title and interest of the said Louis Gauthier in and to that certain crop of wheat raised upon the land of the said Gauthier, situated in the town of Egan, county of Dakato, and state of Minnesota, by one Robert O'Neil, during the year 1875"); Minor v. Sheehan, 30–419, 15+687 ("125 acres of wheat, more or less, growing on the south half" of a specified government subdivision); Melin v. Reynolds, 32–52, 19+81 ("one half of all the crops growing" on certain described lands); Tolbert v. Horton, 33–104, 22+126 (a description of horses as in the possession of the mortgagor in a specified city and county, with a slight error as to age); Adamson v. Petersen, 35–529, 29+321 (a description of property as in the possession of the mortgagor in a specified city, with an error as to the place in such city); Strolberg v. Brandenberg, 39–348, 40+356 ("all that certain personal property described as follows, to wit: the N. W. ¼ of N. W. ¼ and S. W. ¼ of N. W. ¼, in section 11, township number one hundred and thirty-four (134) north, of range thirty-eight (38), eightie, (39) ackers in crop, 33 ackers in whead and (6) ackers ods"); Ludlum v. Rothschild, 41–218, 43+137 ("all the fixtures and furniture of the lessee which are now or may at any time hereafter be in the demised premises"); Adamson v. Horton, 42–161, 43+849 ("one dark wood chamber suit, (three pieces); one red center table," etc., "now in their possession in the city of Minneapolis, in the county of Hennepin and state of Minnesota"); Beaupre v. Dwyer, 43–485, 45+1094 ("the engines and boilers and fixed machinery appurtenant to said building"); Close v. Hodges, 44–204, 46+335 ("all the crops now growing on the northeast ¼ 17–106–44, in Pipestone county, Minn. consisting of 57 acres of wheat, and 15 acres of oats, and 5 acres of corn, and 8 acres of flax; all the said property being now in the possession of said first party in the town of Burke, county of Pipestone, and state aforesaid"); Adamson v. Fagan, 44–489, 47+56 ("one grey horse six years old, weighs 1400 pounds" when in fact the horse was white); Wright v. Larson, 51–321, 53+712 ("one half interest in all crops of every name, nature and description, consisting of 155 acres or more of wheat which have been or shall be hereafter sown, grown, planted, cultivated, or harvested during the year 1890" on certain described land); Schneider v. Anderson, 77–124, 79+603 (a description of live stock as then in the possession of the

1435. Descriptions held insufficient—Cases are cited below holding various descriptions insufficient.[25]

CONSIDERATION

1436. In general—A consideration is essential and the mortgagor may show the want of it against the mortgagee.[26] But a partial failure of consideration is no defence to an action of replevin by the mortgagee after default.[27] The debt secured need not be owed the mortgagee.[28] A pre-existing debt is a sufficient consideration, at least, against the mortgagor and his assigns.[29] A mortgage may be given to secure future advances,[30] or for more than the amount due.[31] Parol evidence is admissible to show the amount and nature of consideration,[32] even against creditors.[33] A usurious consideration renders the mortgage void.[34] The debt secured is presumed to be bona fide.[35] The fact that the debt secured is not correctly described does not alone render the mortgage fraudulent as to creditors.[36]

STIPULATIONS

1437. Condition against removal or disposal—Executing a second mortgage is not a breach of the condition.[37] Taking the property out of the state for any purpose is a breach.[38] Taking possession for a breach of this condition is not declaring a forfeiture arbitrarily or without just cause within the meaning of the statute.[39]

1438. Covenant against incumbrances—An exception in a covenant against incumbrances does not estop the mortgagee from questioning the validity of the excepted incumbrance.[40]

1439. Insecurity clause—Taking possession—Prior to Laws 1879 c. 65 § 2, it was held that the usual insecurity clause in a mortgage authorized the mortgagee to take possession whenever he chose, regardless of whether or not he had reasonable grounds for considering himself insecure.[41] Under the present statute he must have reasonable grounds for his belief, based on facts.[42] The mere fact of the giving of a second mortgage is not a sufficient ground,[43] nor is

mortgagor in a specified town); Barrett v. Magner, 105–118, 117+245 (a description of several horses as of certain ages and weights and in the possession of the mortgagor, but not specifying the place of possession).

[25] Wood v. Mpls. etc. Co., 48–404, 51+378 (a description of forty acres of wheat, to be grown on a quarter section described, without specifying which forty of the quarter, there being seventy-five acres of the quarter sown. See Prentice v. Nutter, 25–484); First Nat. Bank v. Hendrickson, 61–293, 63+725 (a description of crops to be raised on a specified government subdivision with an error as to the range, the mortgagor not living on the land and describing himself in the mortgage as living in a neighboring village).

[26] Bickford v. Johnson, 36–123, 30+439.

[27] Gates v. Smith, 2–30(21).

[28] Foster v. Berkey, 8–351(310).

[29] Close v. Hodges, 44–204, 46+335; Mullen v. Noonan, 44–541, 47+164; Berlin M. Works v. Security T. Co., 60–161, 61+1131; Gaertner v. Western El. Co., 104–467, 116+945.

[30] Berry v. O'Connor, 33–29, 21+840; Anderson v. Liston, 69–82, 72+52.

[31] Heim v. Chapel, 62–338, 64+825; Berry v. O'Connor, 33–29, 21+840; Hanson v. Bean, 51–546, 53+871.

[32] Harrington v. Samples, 36–200, 30+671.

[33] Minor v. Sheehan, 30–419, 15+687.

[34] Ward v. Anderberg, 31–304, 17+630; Wetherell v. Stewart, 35–496, 29+196.

[35] Aretz v. Kloos, 89–432, 95+216, 769.

[36] Berry v. O'Connor, 33–29, 21+840.

[37] Donovan v. Sell, 64–212, 66+722.

[38] King v. Wright, 36–128, 30+448.

[39] Plano Mfg. Co. v. Hallberg, 61–528, 63+1114.

[40] O'Brien v. Findeisen, 48–213, 50+1035.

[41] Deal v. Osborne, 42–102, 43+835. See Braley v. Byrnes, 21–482; Boice v. Boice, 27–371, 7+687.

[42] R. L. 1905 § 3468; Deal v. Osborne, 42–102, 43+835; Nash v. Larson, 80–458, 83+451. See Cushing v. Seymour, 30–301, 15+249.

[43] Donovan v. Sell, 64–212, 66+722.

the mere fact that an officer levying on the interest of the mortgagor removes the mortgaged property to the county seat.[44] Whether reasonable grounds exist is a question for the jury, unless the evidence is conclusive.[45] Laws 1879 c. 65 § 2 was not retroactive.[46]

FILING AND PRIORITIES

1440. What must be filed—All forms of chattel mortgages, including those of an equitable nature, must be filed.[47] A real estate mortgage covering "fixtures" need not be filed as a chattel mortgage.[48]

1441. What constitutes filing—Indexing—Under G. S. 1878 c. 39 it was held that a mortgage was filed when it was delivered to and received and kept by the proper officer for the purpose of filing,[49] and that indexing was not essential.[50] The statute has been amended in this regard.[51]

1442. Renewals—Under the present law a mortgage once filed operates as notice for six years without any renewal or re-filing.[52] Formerly there were statutes requiring periodical renewals.[53]

1443. Place of filing—The statute is applicable to mortgages of crops to be grown.[54] A village is not a part of a township for purposes of filing,[55] but a borough is.[56] Under G. S. 1878 c. 39 a copy of the mortgage had to be filed where the mortgagor resided, if the property was situated elsewhere.[57] Chattels are presumed to be situated at the owner's residence.[58] It is probable that filing is necessary only where the property is given a fixed situs.[59] Mortgages filed in a sister state need not be filed here upon a removal of the property.[60] Evidence that property was located where the mortgage was filed held sufficient.[61] A party claiming under a mortgage must prove that the mortgagor resided where the mortgage was filed. A recital in the mortgage as to the residence of the mortgagor is not evidence against a subsequent mortgagee or purchaser.[62] A first chattel mortgage upon certain property contained the declaration that the mortgagor resided in a certain township and county, and a second mortgage upon the same property contained a similar declaration. It was held, in an action by the first mortgagee, or his assigns, as against the second mortgagee, for the possession of the property, that such declaration as to the place of residence constituted prima facie evidence of the fact of such residence.[63]

1444. Effect of delay in filing—A delay in filing is not fatal. If a mortgage is filed, or the mortgagee takes actual possession, before any other right or

[44] Galde v. Forsyth, 72–248, 75+219.
[45] Nash v. Larson, 80–458, 83+451.
[46] Boice v. Boice, 27–371, 7+687.
[47] Miller v. McCormick, 35–399, 29+52; Merrill v. Ressler, 37–82, 33+117; Wright v. Larson, 51–321, 53+712; Clark v. Richards, 68–282, 71+389.
[48] See Farmers' L. & T. Co. v. Mpls. E. & M. Works, 35–543, 29+349.
[49] Appleton M. Co. v. Warder, 42–117, 43+791.
[50] Gorham v. Summers, 25–81.
[51] R. L. 1905 § 3464.
[52] Id.
[53] See Foster v. Berkey, 8–351(310); McCarthy v. Grace, 23–182; Edson v. Newell, 14–228(167); Game v. Whaley, 43–234, 45+228; Camp v. Murphy, 68–378, 71+1.
[54] Miller v. McCormick, 35–399, 29+52.
[55] Minn. Agr. Co. v. N. W. El. Co., 58–536, 60+671. See Moriarty v. Gullickson, 22–39 (overruled by statute).
[56] Bannon v. Bowler, 34–416, 26+237.
[57] Lundberg v. N. W. El. Co., 42–37, 43+685; Nickerson v. Wells, 71–230, 73+959, 74+891.
[58] Horton v. Williams, 21–187. See Nickerson v. Wells, 71–230, 73+959, 74+891.
[59] Sheldon v. Brown, 72–496, 75+709.
[60] Keenan v. Stimson, 32–377, 20+364; Strickland v. Minn. T. F. Co., 77–210, 79+674.
[61] Reiff v. Bakken, 36–333, 31+348.
[62] Nickerson v. Wells, 71–230, 73+959, 74+891.
[63] Tweto v. Horton, 90–451, 97+128.

lien attaches, it is good against everybody, if it was previously good between the parties.[64]

1445. Effect of filing—Filing has the same effect as a taking of possession by the mortgagee.[65] It operates as notice to all persons of the existence and terms of the mortgage.[66] But when a mortgage is given for future advances, the filing of a second mortgage is not constructive notice to the first mortgagee.[67] When a mortgage is duly filed the retention of possession by the mortgagor only makes the mortgage prima facie fraudulent.[68] It is unnecessary for the mortgagee to take possession after default to make the filing effectual as notice. The force of the filing as notice is not dependent on there being no default.[69] Under G. S. 1894 § 4131 the filing operated as notice for only two years. The force of the filing as notice is not affected by the chattel subsequently being attached to realty.[70] The filing of a chattel mortgage on a growing crop of grain continues to be constructive notice to all the world, though the grain is threshed and removed from the land on which it was raised.[71] A written lease of a building, described therein, contained a chattel mortgage clause, whereby the lessee mortgaged to the lessor all the furniture and fixtures then in the building, or thereafter placed therein, to secure the rent. The lease was duly filed and indexed in the proper clerk's office. The lessee thereafter assigned his interest in the lease with the consent of the lessor. It was held that the lease, after such assignment, continued to be constructive notice of the lien of the lessor on the personal property.[72]

1446. Effect of not filing—As between the parties, filing is immaterial.[73] It it immaterial as to creditors [74] and subsequent purchasers [75] or mortgagees [76] with actual notice. It is also immaterial when the mortgagee takes actual possession.[77] If the mortgagor remains in possession, the statute makes an unfiled mortgage void as to creditors [78] and subsequent purchasers.[79] A chattel mortgage which has not been filed in the proper office until after an assignment for the benefit of creditors, under the insolvency law, is void as to the creditors of the assignor.[80] The term "void," as used in the statute, means voidable.[81]

1447. Who may object to want of filing—One who is not a subsequent purchaser, or mortgagee, or attaching creditor, cannot object to want of filing.[82]

[64] Clarke v. Nat. Citizens' Bank, 74–58, 76+965, 1125; Prouty v. Barlow, 74–130, 76+946.

[65] Keenan v. Stimson, 32–377, 20+364; Miller v. McCormick, 35–399, 29+52; St. Paul etc. Co. v. Berkey, 52–497, 55+60; Clarke v. Nat. Citizens' Bank, 74–58, 76+965, 1125; Deering v. Peterson, 75–118, 77+568. But see Horton v. Williams, 21–187.

[66] Id.; Eddy v. Caldwell, 7–225(166); Ludlum v. Rothschild, 41–218, 43+137; Close v. Hodges, 44–204, 46+335; Hogan v. Atlantic El. Co., 66–344, 69+1; Nickerson v. Wells, 71–230, 73+959, 74+891; Clarke v. Nat. Citizens' Bank, 74–58, 76+965, 1125. See Lienau v. Moran, 5–482 (386).

[67] Anderson v. Liston, 69–82, 72+52.

[68] Braley v. Byrnes, 25–297.

[69] Keenan v. Stimson, 32–377, 20+364.

[70] Nickerson v. Wells, 71–230, 73+959, 74+891.

[71] Hogan v. Atlantic El. Co., 66–344, 69+1; Close v. Hodges, 44–204, 46+335.

[72] Stees v. Lind, 106–485, 119+67.

[73] McNeil v. Finnegan, 33–375, 23+540.

[74] St. Paul etc. Co. v. Berkey, 52–497, 55+60. See Dyer v. Thorstad, 35–534, 29+345.

[75] Ludlum v. Rothschild, 41–218, 43+137.

[76] Tolbert v. Horton, 31–518, 18+647; Id., 33–104, 22+126. See King v. La Crosse, 42–488, 44+517.

[77] Braley v. Byrnes, 25–297; Keenan v. Stimson, 32–377, 20+364.

[78] McCarthy v. Grace, 23–182; Braley v. Byrnes, 25–297; Tolbert v. Horton, 31–518, 18+647; North Star B. & S. Co. v. Ladd, 32–381, 20+334; Bannon v. Bowler, 34–416, 26+237; Baker v. Pottle, 48–479, 51+383. See, under Pub. St. (1849–1858), Lienau v. Moran, 5–482(386).

[79] Hogan v. Atlantic El. Co., 66–344, 69+1.

[80] Farmers' L. & T. Co. v. Mpls. E. & M. Works, 35–543, 29+349; Merrill v. Bessler, 37–82, 33+117; Thomas v. Foote, 46–240, 48+1019; Shay v. Security Bank, 67–287, 69+920.

[81] Tolbert v. Horton, 31–518, 18+647.

[82] Coykendall v. Ladd, 32–529, 21+733;

A receiver of a partnership cannot.[83] A receiver of a corporation appointed under G. S. 1878 c. 76 §§ 9, 10, may.[84] An assignee or receiver for the benefit of creditors may, and without reducing the claims of the creditors to judgment.[85] Creditors must levy on the property and become judgment creditors before they can raise the objection.[86] A purchaser from an assignee for the benefit of creditors may.[87] Parties with actual notice cannot.[88]

1448. Priority among mortgages as affected by filing—Under G. S. 1878 c. 39, it was held that a mortgage was void as against a subsequent bona fide mortgage, if not filed before the latter was executed, though it was first filed.[89] Precedence cannot be secured by priority of filing contrary to an agreement between all the parties.[90] Priority as between contemporaneously filed mortgages may be shown by parol.[91] When two mortgages are executed contemporaneously without agreement as to precedence no precedence can be secured by priority of filing. When two mortgages are executed on the same day they are presumed to have been executed contemporaneously in the absence of evidence to the contrary.[92] As between mortgages on undivided shares of a growing crop no precedence can be secured by priority of filing.[93]

1449. Conflict with other liens—A mortgage lien is superior to a subsequent lien of a livery or boarding-stable keeper under G. S. 1894 § 6249.[94] It is subordinate to the lien of a seed-grain note under G. S. 1878 c. 39 §§ 21, 22, though the mortgage is executed and filed before the note.[95] If a mortgagee takes a mortgage of property held by a third party under a common-law lien he takes subject to such lien.[96]

1450. What is good faith—Evidence—Want of notice and the payment of a valuable consideration are the two essential elements of good faith in this connection.[97] Proof of payment of a valuable consideration in the ordinary course of business under circumstances free from suspicion makes out a prima facie case of good faith and shifts the burden of proving notice on the adverse party.[98] The character and degree of proof required depends much on the circumstances of each case.[99] To make one a bona fide purchaser he must have been without notice at the time of paying the consideration.[1] One who takes from the mortgagor a bill of sale in payment of a precedent debt and without notice of the mortgage is a purchaser in good faith.[2] Notice to an officer making a levy is not notice to the judgment creditor.[3] Notice or want of notice to

Ellingboe v. Brakken, 36–156, 30+659; Howe v. Cochran, 47–403, 50+368. See Hazlett v. Babcock, 64–254, 66+971; Clark v. Richards, 68–282, 71+389.

83 Berlin M. Works v. Security T. Co., 60–161, 61+1131; Walsh v. St. Paul S. F. Co., 60–397, 62+383.

84 Farmers' L. & T. Co. v. Mpls. E. & M. Works, 35–543, 29+349.

85 Merrill v. Ressler, 37–82, 33+117; Baker v. Pottle, 48–479, 51+383; St. Paul etc. Co. v. Berkey, 52–497, 55+60; Clark v. Richards, 68–282, 71+389.

86 Ellingboe v. Brakken, 36–156, 30+659; Howe v. Cochran, 47–403, 50+368; St. Paul etc. Co. v. Berkey, 52–497, 55+60; Tolbert v. Horton, 31 518, 18+647; Clark v. Richards, 68–282, 71+389.

87 Shay v. Security Bank, 67–287, 69+920.

88 See § 1446.

89 Bank of Farmington v. Ellis, 30–270, 15+243. See 22 Harv. L. Rev. 301.

90 Chadbourn v. Rahilly, 28–394 10+420.

91 Minor v. Sheehan, 30–419, 15+687.

92 Sheldon v. Brown, 72–496, 75+709.

93 McRae v. O'Hara, 62–143, 64+146.

94 Petzenka v. Dallimore, 64–472, 67+365. See Smith v. Stevens, 36–303, 31+55 (overruled by statute).

95 McMahan v. Lundin, 57–84, 58+827. See Smith v. Roberts, 43–342, 46+336.

96 Smith v. Stevens, 36–303, 31+55.

97 Tolbert v. Horton, 31–518, 18+647; Wright v. Larson, 51–321, 53+712.

98 Bank of Farmington v. Ellis, 30–270, 15+243; Kellogg v. Olson, 34–103, 24+364; Mullen v. Noonan, 44–541, 47+164; Wright v. Larson, 51–321, 53+712; Hogan v. Atlantic El. Co., 66–344, 69+1; Nichols v. Minn. T. M. Co., 70–528, 73+415. See Plymouth C. Co. v. Seymour, 67–311, 69+1079.

99 Bank of Farmington v. Ellis, 30–270, 15+243.

1 Marsh v. Armstrong, 20–81(66).

2 Horton v. Williams, 21–187.

3 McCarthy v. Grace, 23–182.

an assignee for the benefit of creditors is immaterial. The rights of the creditors are fixed when the assignment is made.[4] A purchaser of grain from the mortgagor, without any knowledge that it was mortgaged, except constructive notice by the record of the mortgage, is not protected as an innocent purchaser by the mere fact that the mortgagee permitted the mortgagor to thresh and sell the grain.[5]

1451. Burden of proving good faith—A person claiming under a mortgage which is filed, but under which the mortgagor remains in possession, has the burden, as against creditors and subsequent purchasers or mortgagees in good faith, of proving good faith and absence of intent to defraud on the part of the mortgagor,[6] but not as to others.[7] A person claiming as a subsequent purchaser from a mortgagor has the burden, as against those claiming under the mortgage, of proving that he was a bona fide purchaser though the mortgage was unfiled.[8] Creditors seeking to take advantage of a want of filing have the burden of proving their own good faith.[9] Subsequent mortgagees have the burden of proving good faith as against prior mortgagees whose mortgages are unfiled.[10] A purchaser of a mortgagee in possession is not required to prove the good faith of the mortgage.[11] A subsequent mortgagee has the burden of proving that a prior mortgagee had notice when making advances subsequent to the filing of the subsequent mortgage.[12] As against a landlord, who, with the consent of the tenant, has canceled a lease held by the latter to carry on a farm "upon shares," and has in good faith purchased and paid for all rights or interests which the tenant may have had in a crop of grain then growing, or to be grown at that season, upon the premises, it is incumbent upon one who claims title to a share of such grain under and by virtue of a chattel mortgage executed and delivered by the tenant before the seed was sown from which such grain was raised, to show that said mortgage was executed in good faith, and not for the purpose of defrauding creditors.[13] Where a chattel mortgage is executed in good faith for a valuable consideration, and not for the purpose of defrauding creditors of the mortgagor, the fact that it was given to secure a larger sum than is actually due does not affect its validity, but such overstatement of the debt secured, unexplained, indicates fraud, and the burden is upon the mortgagee claiming under the mortgage as against creditors to explain the overstatement, and establish the bona fides of his mortgage.[14]

1452. Burden of proving change of possession—The burden of proving a change of possession generally rests on a party claiming under a chattel mortgage.[15]

RIGHTS OF THE PARTIES IN GENERAL

1453. Right of redemption before sale—Prior to sale the mortgagor has a right of redemption which is subject to garnishment [16] and also to levy on execution and attachment.[17] If the mortgagee refuses to deliver possession, upon

[4] St. Paul etc. Co. v. Berkey, 52–497, 55+60.

[5] Endreson v. Larson, 101–417, 112+628.

[6] Braley v. Byrnes, 25–297; Tolbert v. Horton, 31–518, 18+647; North Star B. & S. Co. v. Ladd, 32–381, 20+334; Bannon v. Bowler, 34–416, 26+237; Baker v. Pottle, 48–479, 51+383; Hogan v. Atlantic El. Co., 66–344, 69+1.

[7] Hazlett v. Babcock, 64–254, 66+971.

[8] McNeil v. Finnegan, 33–375, 23+540; Mullen v. Noonan, 44–541, 47+164.

[9] St. Paul etc. Co. v. Berkey, 52–497, 55+60.

[10] Wright v. Larson, 51–321, 53+712; Nickerson v. Wells, 71–230, 73+959, 74+891; Bank of Farmington v. Ellis, 30–270, 15+243.

[11] Marsh v. Armstrong, 20–81(66).

[12] Anderson v. Liston, 69–82, 72+52.

[13] Fitzpatrick v. Hanson, 55–195, 56+814.

[14] Heim v. Chapel, 62–338, 64+825.

[15] McCarthy v. Grace, 23–182.

[16] Becker v. Dunham, 27–32, 6+406.

[17] R. L. 1905 § 4302. See Dyckman v. Sevatson, 39–132, 39+73.

redemption being made, as provided by statute, an action for conversion will lie.[18] The redemptioner must pay all reasonable expenses of the care and custody of the property.[19] A right of redemption is an essential element of a mortgage.[20]

1454. Rights of mortgagor—Under an ordinary mortgage the mortgagor has the right of possession until default or until the mortgagee deems himself insecure on adequate grounds.[21] He may sell the property while it remains in his possession, before default, but the purchaser takes subject to the mortgage if he had notice.[22] By statute it is a criminal offence for him to sell without the written consent of the mortgagee.[23] A sale by the mortgagor, with the consent of the mortgagee and without reference to the mortgage, to a bona fide purchaser discharges the lien of the mortgage.[24] When the mortgagor sells without the knowledge or consent of the mortgagee, the latter may waive the tort and sue the purchaser for the purchase money, if it remains unpaid.[25] If the mortgagee authorizes the mortgagor to sell the property and apply the proceeds to the payment of the debt, the later is the agent of the former in the sale and binds him by any warranty made.[26] Equities of a purchaser from the mortgagor must be asserted before foreclosure.[27] The mortgagor is entitled to possession as against a stranger even after default.[28] He has an equity of redemption.[29]

1455. Rights of mortgagee—The mortgagee is vested with the legal title,[30] but he holds it merely as security for the debt and subject, until a valid foreclosure, to the right of the mortgagor to redeem.[31] He cannot elect to accept the property in payment of the debt.[32] Unless the mortgage otherwise stipulates, he is entitled to the possession,[33] and prior to Laws 1879 c. 65 it was held that he might take it without the consent of the mortgagor, if so authorized by the mortgage.[34] Upon default or breach of condition, he has a right to the possession without foreclosure proceedings,[35] but this right of possession is only for the purpose of foreclosure or sale under the mortgage to satisfy the debt and not for the purpose of using the property.[36] Though he is vested with the legal title he is deprived by statute of many of the rights attaching to such title at common law.[37] At common law his title became absolute upon default.[38]

[18] Latusek v. Davies, 79-279, 82+587.

[19] Id.; Ferguson v. Hogan, 25-135.

[20] Daly v. Proetz, 20-411(363); Dyson v. St. Paul Nat. Bank, 74-439, 77+236.

[21] Horton v. Williams, 21-187; Sherman v. Clark, 24-37; Cushing v. Seymour, 30-301, 15+249; Kellogg v. Anderson, 40-207, 41+1045.

[22] Daly v. Proetz, 20-411(363); Horton v. Williams, 21-187; Ludlum v. Rothschild, 41-218, 43+137.

[23] See § 1486.

[24] Hogan v. Atlantic El. Co., 66-344, 69+1; Partridge v. Minn. etc. Co., 75-496, 78+85; Fairweather v. Nelson, 76-510, 79+506.

[25] McArthur v. Murphy, 74-53, 76+955.

[26] Nat. Citizens' Bank v. Ertz, 83-12, 85+821.

[27] Richards v. Spicer, 23-212.

[28] Vandiver v. O'Gorman, 57-64, 58+831.

[29] Daly v. Proetz, 20-411(363).

[30] Edson v. Newell, 14-228(167); Daly v. Proetz, 20-411(363); Mann v. Flower, 25-500; Stromberg v. Lindberg, 25-513; Fletcher v. Neudeck, 30-125, 14+513; Kellogg v. Olson, 34-103, 24+364; Dyckman v. Sevatson, 39-132, 39+73; Moore v. Norman, 43-428, 45+857; Powell v. Gagnon, 52-232, 53+1148; Scofield v. Nat. El. Co., 64-527, 67+645; Strickland v. Minn. T. F. Co., 77-210, 79+674.

[31] Daly v. Proetz, 20-411(363); Stromberg v. Lindberg, 25-513; Decker v. Dunham, 27-32, 6+406; Fletcher v. Neudeck, 30-125, 14+513; Cushing v. Seymour, 30-301, 15+249; Powell v. Gagnon, 52-232, 53+1148.

[32] Powell v. Gagnon, 52-232, 53+1148.

[33] Fletcher v. Neudeck, 30-125, 14+513; Kellogg v. Olson, 34-103, 24+364.

[34] Braley v. Byrnes, 21-482; Fletcher v. Neudeck, 30-125, 14+513.

[35] Minn. L. O. Co. v. Maginnis, 32-193, 20+85; Torp v. Gulseth, 37-135, 33+550; Thompson v. Scheid, 39-102, 38+801; Moore v. Norman, 43-428, 45+857; Close v. Hodges, 44-204, 46+335; Miller v. Adamson, 45-99, 47+452; First Nat. Bank v. St. Anthony etc. Co., 103-82, 114+265.

[36] Thompson v. Scheid, 39-102, 38-801.

[37] Moore v. Norman, 43-428, 45+857.

A person who takes a mortgage from a tenant on a building erected on leased land cannot remove the building after the tenant's right of removal has expired.[39] A mortgagee of an undivided half of a crop is entitled, upon default, to the possession of the whole as against a stranger showing no right.[40] The mortgagee takes only such interest as the mortgagor had and he takes subject to prior liens.[41]

PERFORMANCE

1456. Payment—Discharge—Release—A mortgage is not discharged by a part payment of the note secured and a new note for the balance, in the absence of an agreement that the new note is taken in full payment.[42] But a new note and mortgage may by agreement discharge a prior note and mortgage.[43] When a new note is given in settlement of the balance due on mutual running accounts, of which a debt secured by a mortgage formed only a part, it is a satisfaction, and not a renewal of the mortgage.[44] A bill of sale from both mortgagor and mortgagee discharges the mortgage.[45] A sale by the mortgagor with the consent of the mortgagee discharges the lien.[46] A mortgage to secure the performance of the conditions of a lease is not discharged by an election of the lessor to terminate the lease.[47] 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 mortgage remains a lien until expressly released, or until the debt it was given to secure is paid, in the absence of conduct creating an estoppel. If a mortgagee takes a new mortgage as a substitute for a former one, and cancels and releases the latter in ignorance of an intervening lien, equity will give the original mortgage priority over the intervening lien, though the latter was of record at the time of the release.[48] A payment made from the proceeds of mortgaged property in the possession of the mortgagee must generally be applied in payment of the mortgage debt. In the absence of any obvious intention of the parties the court will direct the application equitably to all parties concerned.[49] Taking possession by the mortgagee after default and converting the property without foreclosure proceedings may operate as a discharge, but the mortgagee cannot elect to accept the property in payment of the debt.[50] Parol evidence is admissible to show the nature of the obligation secured and its discharge.[51] A mortgage running to several mortgagees jointly to secure a joint debt may be paid to and released by either of them.[52] A mortgage may be discharged by a tender.[53] It is the general rule that a mortgage can only be discharged by a strict compliance with its conditions.[54] Where a first mortgage is discharged a second mortgage executed before default in the first becomes a first mortgage.[55] A "turning over of possession" to the mortgagee by a written instrument, there being no actual change of possession, has been held not to constitute a payment.[56]

[38] Stromberg v. Lindberg, 25–513; Gates v. Smith, 2–30(21).
[39] Smith v. Park, 31–70, 16+490.
[40] Melin v. Reynolds, 32–52, 19+81.
[41] Smith v. Stevens, 36–303, 31+55; Torp v. Gulseth, 37–135, 33+550; Ludlum v. Rothschild, 41–218, 43+137; Simmons v. Anderson, 44–487, 47+52.
[42] Hanson v. Tarbox, 47–433, 50+474. See Seymour v. Bank of Minn., 79–211, 81+1059 and cases cited.
[43] Daly v. Proetz, 20–411(363).
[44] Christofferson v. Howe, 57–67, 58+830.
[45] Bangs v. Friezen, 36–423, 32+173.
[46] Partridge v. Minn. etc. Co., 75–496, 78+85; Fairweather v. Nelson, 76–510, 79+506.
[47] Ludlum v. Rothschild, 41–218, 43+137.
[48] Geib v. Reynolds, 35–331, 28+923; Liget v. Himle, 38–421, 38+201.
[49] Thorne v. Allen, 72–461, 75+706.
[50] Powell v. Gagnon, 52–232, 53+1148.
[51] Harrington v. Samples, 36–200, 30+671; Pound v. Pound, 64–428, 67+200.
[52] Flanigan v. Seelye, 53–23, 55+115.
[53] See § 1457.
[54] Coffin v. Reynolds, 21–456.
[55] Daly v. Proetz, 20–411(363).
[56] Wetherell v. Stewart, 35–496, 29+196.

1457. Tender—A tender must be unconditional,[57] sufficient in amount,[58] and made at the proper place.[59] It may exclude the idea that it is in part payment of the debt.[60] It may be made by an assignee in insolvency or a vendee.[61] It may be made to an attorney for collection,[62] or to one of several joint mortgagees.[63] An acceptance must be unqualified.[64] The mortgagee must be given opportunity to ascertain the amount due.[65] Prior to Laws 1897 c. 292 § 8, a tender after default extinguished the lien though not kept good.[66] The sufficiency of a tender is for the jury.[67] Objection to the right of a party to make a tender must be made at the time or it is waived.[68]

1458. Default—Breach of condition—Forfeiture—Under the statute[69] the mortgagee cannot declare a default arbitrarily and without just cause based on facts.[70] Whether just cause exists and whether there has been a waiver of a breach of condition are questions of fact.[71] Upon default the mortgagee is not required to take possession within a reasonable time to protect his lien.[72] There is no default in the payment of a note secured by mortgage until the expiration of the business hours of the last day of grace.[73] Whether there has been a breach of condition depends on the facts of the particular case.[74]

FORECLOSURE

1459. Power of sale—Cumulative remedy—The power of sale in a mortgage, authorizing the mortgagee, in case of condition broken, to take possession of the mortgaged chattels and sell them at public sale, and out of the proceeds thereof pay the debt secured by the mortgage, is a cumulative, and not an exclusive remedy.[75]

1460. Foreclosure by statutory sale—The statute requiring a posting of notice of sale must be strictly complied with and an affidavit of posting must show such compliance affirmatively. The law does not require a personal service of notice on subsequent mortgagees.[76] It is an open question whether a mistake in the notice of sale as to the default, there being in fact a default, vitiates the sale.[77] The notice need not be signed by the officer who is to conduct the sale. Under Laws 1879 c. 65 § 1 it was necessary that reasonable effort should be made to find the mortgagor for the purpose of making a personal service of notice of sale upon him. Laws 1885 c. 171 did not render personal service unnecessary.[78] Under Laws 1885 c. 171 a policeman of Minneapolis was authorized to conduct the sale so as to permit the mortgagee to purchase.[79] In foreclosure proceedings the mortgagee stands with respect to the mortgagor's rights in the property, as a trustee, and is held to the exercise of good faith and proper care and diligence to avoid any sacrifice of those rights

[57] Moore v. Norman, 52–83, 53+809; Davies v. Dow, 80–223, 83+50; Southwick v. Himmelman, 109–76, 122+1016.
[58] Reisan v. Mott, 42–49, 43+691; Mjones v. Yellow Medicine Co. Bank, 45–335, 47+1072; Ferguson v. Hogan, 25–135; Bank of Benson v. Hove, 45–40, 47+449. See Nelson v. Robson, 17–284(260).
[59] Coffin v. Reynolds, 21–456.
[60] Davies v. Dow, 80–223, 83+50.
[61] Id.
[62] Salter v. Shove, 60–483, 62+1126.
[63] Flanigan v. Seelye, 53–23, 55+115.
[64] Davies v. Dow, 80–223, 83+50.
[65] Moore v. Norman, 43–428, 45+857.
[66] Moore v. Norman, 43–428, 45+857; Bank of Benson v. Hove, 45–40, 47+449; Davies v. Dow, 80–223, 83+50.
[67] Moore v. Norman, 43–428, 45+857. See Nelson v. Robson, 17–284(260).
[68] Davies v. Dow, 80–223, 83+50. See Nelson v. Robson, 17–284(260).
[69] R. L. 1905 § 3468.
[70] See § 1439.
[71] Nash v. Larson, 80–458, 83+451.
[72] Keenan v. Stimson, 32–377, 20+364.
[73] Daly v. Proetz, 20–411(363).
[74] See Houston v. Nord, 39–490, 40+568; Williams v. Wood, 55–323, 56+1066.
[75] First Nat. Bank v. St. Anthony etc. Co., 103–82, 114+265.
[76] Powell v. Hardy, 89–229, 94+682.
[77] Berg v. Olson, 88–392, 93+309.
[78] Powell v. Gagnon, 52–232, 53+1148.
[79] Oswald v. O'Brien, 48–333, 51+220.

not necessary to the reasonable enforcement of his own. Where, without prejudice or great inconvenience to himself, he can satisfy his debt by a sale of part of the property mortgaged he is bound to do so, if the interests of the mortgagor require it.[80] Upon default the mortgagee has a right of possession for the sole purpose of foreclosing.[81] Though the mortgage covers much more property than is necessary to his security he may take possession of the whole for that purpose.[82] The equitable owner of a mortgage may foreclose in the name of the legal owner.[83] The amount for which the property is sold may include the expense of obtaining possession,[84] the expense of the sale,[85] and attorney's fees,[86] but attorney's fees cannot be charged if no attorney is actually employed,[87] or if there is no foreclosure.[88] The mortgagor's wife may purchase at the sale.[89] The mortgagor may resist a foreclosure by the mortgagee of a fraudulent mortgage.[90] Gross inadequacy of price is not alone ground for setting aside the sale.[91] Equities of a purchaser from the mortgagor must be asserted before the sale.[92] The proceeds of the sale must be distributed among all who have a beneficial interest in the mortgage.[93] The sale is presumed to have been conducted fairly.[94]

1461. Foreclosure by action—A mortgage may be foreclosed by action, though it contains a power of sale and the mortgagee may recover possession by action.[95] But he cannot have relief by foreclosure on default unless specifically prayed.[96] In an action to foreclose a purchase-money mortgage the mortgagor may plead a counterclaim for breach of warranty.[97] A person not made a party to the action is not bound by the judgment.[98]

1462. Effect of valid foreclosure—When the mortgagee is the purchaser, the amount of the purchase price, as determined by his bid, if not paid over to the officer making the sale, is in legal effect so much money in his hands to be applied to the payment of the debt secured according to the terms of the mortgage. A party entitled to a commission on payments on the debt is entitled to a commission on such amount.[99] A lien of a bidder at the sale is cut off by the sale if he does not assert it at the time.[1]

1463. Effect of void foreclosure—A void foreclosure at which the mortgagee bids in the property does not affect the mortgage or the rights of the parties therein. The mortgagor still owes the debt and the mortgagee retains possession as security therefor—the lien of the mortgage not being affected.[2] The mortgagor cannot treat the proceedings as having any effect at all without confirming them altogether—cannot treat them as constituting a conversion.[3] If the sale is made to a third party the mortgagor may sue the mortgagee for

[80] Stromberg v. Lindberg, 25–513.
[81] Thompson v. Scheid, 39–102, 38+801. See Reisan v. Mott, 42–49, 43+691.
[82] Stromberg v. Lindberg, 25–513.
[83] Carpenter v. Artisans' S. Bank, 44–521, 47+150.
[84] Reisan v. Mott, 42–49, 43+691; Ferguson v. Hogan, 25–135.
[85] Ferguson v. Hogan, 25–135.
[86] R. L. 1905 § 3471.
[87] Bank of Benson v. Hove, 45–40, 47+449.
[88] Reisan v. Mott, 42–49, 43+691.
[89] Houston v. Nord, 39–490, 40+568.
[90] Bickford v. Johnson, 36–123, 30+439.
[91] Oswald v. O'Brien, 48–333, 51+220.
[92] Richards v. Spicer, 23–212.
[93] Gorman v. Lamb, 89–136, 94+435.
[94] Richards v. Spicer, 23–212.
[95] Forepaugh v. Pryor, 30–35, 14+61; Anderson v. Liston, 69–82, 72+52; First Nat. Bank v. St. Anthony etc. Co., 103–82, 114+265.
[96] Minn. L. O. Co. v. Maginnis, 32–193, 20+85.
[97] Mass. L. & T. Co. v. Welch, 47–183, 49+740; Nichols v. Wiedemann, 72–344, 75+208, 76+41.
[98] Fletcher v. Neudeck, 30–125, 14+513.
[99] Clark v. Gaar, 78–492, 81+530.
[1] Wilson v. Sherffbillich, 30–422, 15+876.
[2] Fletcher v. Neudeck, 30–125, 14+513; Cushing v. Seymour, 30–301, 15+249; Powell v. Gagnon, 52–232, 53+1148; Berg v. Olson, 88–392, 93+309.
[3] Powell v. Gagnon, 52–232, 53+1148.
[4] Cushing v. Seymour, 30–301, 15+249; Powell v. Gagnon, 52–232, 53+1148.

conversion,[4] or replevy the property from the purchaser.[5] But in no event can the mortgagor recover the value of the property without accounting for the amount owed by him on the mortgage.[6] That is, if he sues the mortgagee for conversion the amount due on the mortgage is to be deducted from the damages.[7] If he sues a third party purchaser he may recover the full value of the property, but he is answerable over to the mortgagee for the amount due on the mortgage.[8] If he sues an assignee of the mortgagee the amount due on the mortgage is to be deducted from the damages.[9]

ASSIGNMENT

1464. Assignment of note—The assignment and transfer of a note secured by a chattel mortgage carries the security without any formal assignment of the mortgage.[10]

1465. Assignment of mortgage—An assignment of a mortgage, though it secures a negotiable note, passes to the assignee as an ordinary thing in action, subject to all equities in favor of the mortgagor, prior to notice of the assignment. There is no distinction between chattel and real-estate mortgages in this regard.[11]

REMEDIES

1466. Election of remedies—After the mortgagee has attached the mortgaged property, as the property of the mortgagor, he cannot recover it as his own in an action of replevin.[12]

1467. Intervention—The interest of a mortgagee entitles him to intervene in an action by the mortgagor against a third party for the negligent destruction of the property.[13]

1468. Injunction—When the mortgagee has an adequate remedy by replevin, if possession is refused, an injunction will not lie for the mere preservation of the property or to prevent the mortgagor from disposing of it.[14] A temporary injunction to restrain a threatened sale by the mortgagor may issue in an action to foreclose. An injunction will not lie to restrain a foreclosure of a mortgage which has been paid, the property being in the possession of the mortgagor.[15]

1469. Receiver—A receiver may be appointed to distribute the proceeds of the mortgaged property among several claimants.[16]

1470. Garnishment—So long as the mortgagor has a right of redemption his interest is subject to garnishment.[17]

1471. Attachment and execution—At common law, if the mortgagor is in possession for a definite period, his interest is subject to levy; otherwise not.[18] At common law the interest of the mortgagor is not leviable after the mortgagee takes possession.[19] The interest of the mortgagee before foreclosure is not leviable.[20] An officer levying on the interest of a mortgagor, as authorized by Laws 1883 c. 60 § 1, after default, but before possession has been taken by

[5] Berg v. Olson, 88–392, 93+309.
[6] Id.
[7] Cushing v. Seymour, 30–301, 15+249.
[8] See Vandiver v. O'Gorman, 57–64, 58+831.
[9] Berg v. Olson, 88–392, 93+309.
[10] Tweto v. Horton, 90–451, 97+128.
[11] Oster v. Mickley, 35–245, 28+710; Mass. L. & T. Co. v. Welch, 47–183, 49+740. See § 6284.
[12] Dyckman v. Sevatson, 39–132, 39+73.
[13] Wohlwend v. Case, 42–500, 44+517.
[14] Minn. L. O. Co. v. Maginnis, 32–193, 20+85.
[15] Normandin v. Mackey, 38–417, 37+954.
[16] Sheldon v. Brown, 72–496, 75+709.
[17] Becker v. Dunham, 27–32, 6+406. See North Star B. & S. Co. v. Ladd, 32–381, 20+334; Coykendall v. Ladd, 32–529, 21+733.
[18] Chophard v. Bayard, 4–533(418).
[19] Id.; Becker v. Dunham, 27–32, 6+406. See Barber v. Amundson, 52–358, 54+733; Prouty v. Barlow, 74–130, 76+946.

the mortgagee, may take the property into his custody and retain it for the purposes of sale.[21] In the absence of a showing that the mortgagee has been prejudiced, a levy will not be set aside for the failure of the officer to seize all the mortgaged property.[22] The levy must be confined to the right and interest of the mortgagor.[23] In case of a contract for work and payment therefor between employer and employee, secured by the former by chattel mortgage, the right of the employee to go on under the contract and hold and enforce the mortgage is not affected by a levy by a creditor of the mortgagor.[24] If a mortgagee takes possession before any other lien attaches, his title is valid as against subsequent attachment or execution creditors, there being no fraud in fact, though the mortgage was not filed or the property delivered.[25] A railroad, with its rolling stock, and personal property belonging to the road and appertaining thereto, is, in favor of mortgagees, one property, and the different items cannot, as to such mortgagees, be levied on separately.[26] No notice of claim by the mortgagee was required to be served under Laws 1862 c. 41 § 2, on the officer making a levy.[27] A notice of claim under G. S. 1894 § 5296 has been held sufficient.[28] A cause of action in a mortgagor on account of an excessive foreclosure sale is not subject to levy.[29] The fact that the sheriff making the levy is the mortgagee in a chattel mortgage on the property levied upon is not notice to the levying creditor of the existence of the mortgage. In making the levy the sheriff is the officer of the law and not the agent of the levying creditor.[30]

1472. Reformation—If there is a mistake in the mortgage, it may be reformed in an action of replevin by the mortgagee against the mortgagor, the facts being set out in the answer.[31]

1473. Marshaling assets and securities—Where a mortgage covers both exempt and non-exempt property, the mortgagor has a right, both as against the mortgagee and as against a creditor having a lien, by judgment or the levy of an execution, upon the non-exempt property alone, to demand that the mortgagee first exhaust the non-exempt property before resorting to the exempt. But this is a right which the mortgagor must seasonably assert for himself. The mortgagee is not required to assert it for him or to institute proceedings to protect it. The rule will not be enforced where, from the acts or omissions of the mortgagor, it would be inequitable to do so.[32] A senior mortgagee, having actual notice of a junior mortgage of the same property, cannot release that portion of the property not covered by his mortgage, so as to throw the whole burden of his mortgage upon the property covered by the junior mortgage; and, if he does, the value of the part of the property so released will be deducted from the amount due on the senior mortgage, before this can be charged upon the property covered by the junior mortgage.[33]

1474. Action for conversion by mortgagor against mortgagee—Upon a conversion of the property by the mortgagee, the mortgagor is entitled to recover the value of his interest, which is the difference between the whole value of the property and the amount of the debt secured.[34] If the mortgagee wrong-

[20] See Butman v. James, 34–547, 27+66.
[21] Barber v. Amundson, 52–358, 54+733; Galde v. Forsyth, 72–248, 75+219.
[22] Galde v. Forsyth, 72–248, 75+219.
[23] Appleton M. Co. v. Warder, 42–117, 43+791. See McCarthy v. Grace, 23–182.
[24] Minor v. Sheehan, 30–419, 15+687.
[25] Prouty v. Barlow, 74–130, 76+946.
[26] Central T. Co. v. Moran, 56–188, 57+471.
[27] Edson v. Newell, 14–228(167).
[28] Schneider v. Anderson, 77–124, 79+603.
[29] Stromberg v. Lindberg, 25–513.
[30] McCarthy v. Grace, 23–182.
[31] Plano Mfg. Co. v. Hallberg, 61–528, 63+1114.
[32] Miller v. McCarty, 47–321, 50+235. See Richards v. Spicer, 23–212.
[33] Loveland v. Cooley, 59–259, 61+138.
[34] Cushing v. Seymour, 30–301, 15+249;

fully sells and delivers the property to another, whether under void proceedings to foreclose or otherwise, an action for conversion will lie.[35] But when the mortgagee himself bids in the property at a void foreclosure and retains the possession an action for conversion will not lie.[36] When a mortgagee who has taken possession for the purposes of foreclosure refuses to deliver possession to a mortgagor who has redeemed, as provided by G. S. 1894, § 4137, an action for conversion will lie.[37] Evidence of the amount due on the debt secured is admissible under a general denial. Special damages must be pleaded.[38] Anticipated profits from a threshing-machine cannot be recovered as damages.[39] Evidence that a sale by the mortgagee was made with the consent of the mortgagor is admissible under a denial.[40] An infant may disaffirm his mortgage and if the mortgagee refuses to deliver possession an action for conversion will lie.[41] If the mortgagee takes possession of property under a usurious mortgage without the consent of the mortgagor and sells it an action for conversion will lie.[42] The value of the property should be assessed, subject to the liens thereon, and the plaintiff can only recover the value of his interest or equity.[43]

1475. Action for conversion by mortgagee against mortgagor—If the mortgage does not provide for possession in the mortgagor, the mortgagee is entitled to it and the refusal of the mortgagor to deliver it to the mortgagee constitutes a conversion for which an action will lie.[44] The amount which the mortgagee may recover against the mortgagor is the amount due on the mortgage, not exceeding the value of the property.[45] It is unnecessary to allege the non-payment of the mortgage.[46]

1476. Action for conversion by mortgagee against purchaser from mortgagor—If a purchaser with notice from the mortgagor refuses to deliver possession to the mortgagee on demand, an action for conversion will lie.[47] The measure of damages is the amount due on the mortgage, not exceeding the value of the property.[48] Where the law gives to a mortgagee a mere lien, he can maintain an action for conversion, if he has the right of immediate possession.[49] The defendant cannot be held liable for conversion if nothing more appears than that he purchased the property from the mortgagor for an adequate consideration, which implies good faith.[50]

1477. Action for conversion by mortgagor against stranger—A mortgagor may maintain an action for conversion against a stranger to the mortgage and it is no defence that there is a default in the mortgage. He may recover the full value of the property.[51] A purchaser from the mortgagee is not a stranger.[52]

Torp v. Gulseth, 37–135, 33+550; Powell v. Gagnon, 52–232, 53+1148. See Deal v. Osborne, 42–102, 43+835.

[35] Wetherell v. Stewart, 35–496, 29+196; Powell v. Gagnon, 52–232, 53+1148; Penney v. Mutual I. Co., 54–541, 56+165; Donovan v. Sell, 64–212, 66+722; Southwick v. Himmelman, 109–76, 122+1016.

[36] Powell v. Gagnon, 52–232, 53+1148.

[37] Latusek v. Davies, 79–279, 82+587.

[38] Cushing v. Seymour, 30–301, 15+249.

[39] Id. See Williams v. Wood, 55–323, 56+1066.

[40] Penney v. Mutual I. Co., 54–541, 56+165.

[41] Miller v. Smith, 26–248, 2+942.

[42] Wetherell v. Stewart, 35–496, 29+196.

[43] Torp v. Gulseth, 37–135, 33+550.

[44] Fletcher v. Neudeck, 30–125, 14+513.

[45] Strickland v. Minn. T. F. Co., 77–210, 79+674. See Becker v. Dunham, 27–32, 6+406.

[46] Strickland v. Minn. T. F. Co., 77–210, 79+674.

[47] Jorgensen v. Tait, 26–327, 4+44; Fletcher v. Neudeck, 30–125, 14+513; McNeil v. Finnegan, 33–375, 23+540; Close v. Hodges, 44–204, 46+335; Nichols v. Minn. T. M. Co., 70–528, 73+415. See McArthur v. Murphy, 74–53, 76+955; Osborne v. Cargill, 62–400, 64+1135.

[48] Strickland v. Minn. T. F. Co., 77–210, 79+674; Agne v. Skewis, 98–32, 107+415.

[49] Nichols v. Minn. T. M. Co., 70–528, 73+415.

[50] Id.

[51] Vandiver v. O'Gorman, 57–64, 58+831.

[52] Berg v. Olson, 88–392, 93+309.

1478. Action for conversion by mortgagee against stranger—A mortgagee, with a subsisting right of possession, may maintain an action for conversion against a stranger to the mortgage, and he may recover the full value of the property.[53] He need not allege non-payment of the mortgage.[54] Under Laws 1862 c. 41 § 2 no notice of claim was necessary before suit against a sheriff.[55] A notice of claim under G. S. 1894 § 5296 (R. L. 1905 § 4213) held sufficient.[56] A complaint held sufficient.[57]

1479. Action of replevin by mortgagee against mortgagor—Upon default or breach of condition the mortgagee is entitled to possession and may maintain replevin.[58] He cannot recover as damages the value of the use of the property during its unlawful detention [59] or anticipated profits from its use.[60] But the mortgagor may recover the value of the use of the property.[61] The mortgagor may plead an equity, counterclaim, or setoff, in his answer.[62] The mortgagee may waive the right to an alternative judgment.[63] A mortgagee who has caused the property to be attached for the mortgage debt cannot maintain replevin for the same property, the two remedies being inconsistent.[64] The mortgagor may prove that the mortgage was usurious under a general denial.[65]

1480. Action of replevin by mortgagee against purchaser from mortgagor—A mortgagee, with a subsisting right of possession, may maintain replevin against a purchaser from the mortgagor.[66]

1481. Action of replevin by mortgagor against mortgagee—The alternative value which the mortgagor is entitled to recover in case a return of the property cannot be had is only the value of his interest in it; that is, the value of the property less the amount of the mortgage.[67] The mortgagor may recover as damages the value of the use of the property during its unlawful detention, if it is specially pleaded.[68] Upon a void foreclosure the mortgagor may replevy the property,[69] or if the mortgagee takes possession without authority.[70] Where an answer alleges that plaintiff "violated the terms and broke the conditions" of a mortgage and on the trial the defendant proves certain acts of plaintiff in support of such allegation, the latter may, under a general denial in the reply, show, by any evidence, that such acts were not a violation of such terms and conditions.[71]

1482. Action of replevin by mortgagee or his grantee against stranger—When the defendant sets up title to the property in his answer and demands a return thereof it is unnecessary to prove a demand before suit.[72] The mort-

[53] Edson v. Newell, 14–228(167); Melin v. Reynolds, 32–52, 19+81; Adamson v. Petersen, 35–529, 29+321; Appleton M. Co. v. Warder, 42–117, 43+791; Schneider v. Anderson, 77–124, 79+603; Strickland v. Minn. T. F. Co., 77–210, 79+674. See Becker v. Dunham, 27–32, 6+406.

[54] Strickland v. Minn. T. F. Co., 77–210, 79+674.

[55] Edson v. Newell, 14–228(167).

[56] Schneider v. Anderson, 77–124, 79+603.

[57] Schneider v. Anderson, 77–124, 79+603; Melin v. Reynolds, 32–52, 19+81; Brunswick v. Brackett, 37–58, 33+214.

[58] Gates v. Smith, 2–30(21); Ferguson v. Hogan, 25–135; Minn. L. O. Co. v. Maginnis, 32–193, 20+85; Williams v. Wood, 55–323, 56+1066; Plano Mfg. Co. v. Hallberg, 61–528, 63+1114; Nash v. Larson, 80–458, 83–451; First Nat. Bank v. St. Anthony etc. Co., 103–82, 114+265.

[59] Thompson v. Scheid, 39–102, 38+801.

[60] Williams v. Wood, 55–323, 56+1066.

[61] Nash v. Larson, 80–458, 83+451.

[62] Gates v. Smith, 2–30(21); Plano Mfg. Co. v. Hallberg, 61–528, 63+1114; Mass. L. & T. Co. v. Welch, 47–183, 49+740.

[63] Thompson v. Scheid, 39–102, 38+801.

[64] Dyckman v. Sevatson, 39–132, 39+73.

[65] Adamson v. Wiggins, 45–448, 48+185.

[66] Gorham v. Summers, 25–81.

[67] Deal v. Osborne, 42–102, 43+835; Berg v. Olson, 88–392, 93+309.

[68] Ferguson v. Hogan, 25–135.

[69] Berg v. Olson, 88–392, 93+309.

[70] Sherman v. Clark, 24–37; Bickford v. Johnson, 36–123, 30+439.

[71] Ellingsen v. Cooke, 37–400, 34+747.

[72] Kellogg v. Olson, 34–103, 24+364; Ellingboe v. Brakken, 36–156, 30+659; Miller v. Adamson, 45–99, 47+452.

gagee cannot recover without proving default or breach of condition in the mortgage and the identity of the property.[73] If the defendant is not a subsequent purchaser, mortgagee, or creditor, he cannot question the validity of the mortgage.[74] The grantee of the mortgagee, in possession after an invalid chattel mortgage foreclosure sale, may recover the full value of the property, even in excess of his debt, in an action against a stranger who shows no right to the property.[75]

1483. Action of replevin by one mortgagee against another—One mortgagee cannot maintain replevin as against another to whom he bears the relation of tenant in common.[76] The amount which the plaintiff may recover, if possession cannot be had, is the amount due on his mortgage.[77]

1484. Action for trespass by mortgagor against mortgagee—An action for trespass will lie for a wrongful seizure of chattels under a mortgage void for usury or fraud, and exemplary damages may be recovered.[78]

1485. Action for purchase price on sale by mortgagor—Where the mortgagor sells the property without the knowledge or consent of the mortgagee, and the purchase price remains unpaid, the mortgagee may waive the tort and sue the purchaser for the purchase money.[79]

CRIMES

1486. Selling, removing, or concealing mortgaged property—The sale, removal, or concealment of mortgaged property by the mortgagor, under certain conditions, is a criminal offence.[80]

CHEAT—See note 81.

CHEATING—See False Pretences, 3740.

CHECK—See Accord and Satisfaction, 42; Bills and Notes, 981; Gifts, 4030; Payment, 7445.

CHILDREN—See Infants; Master and Servant, 5859; Witnesses, 10311.

CHOSES IN ACTION—See Assignments.

CIRCUMSTANTIAL EVIDENCE—See Evidence, 3234.

CITIES—See Municipal Corporations.

CITIZENSHIP

1487. Who are citizens—Persons born within the United States of foreign parents residing therein, and subject to the jurisdiction thereof, are citizens.[82] Indians who have received an allotment in severalty and complied with the act of Congress of Feb. 8, 1887, are citizens.[83] Children living in this country with a father who has become naturalized are citizens.[84]

[73] Kellogg v. Anderson, 40–207, 41+1045.
[74] Ellingboe v. Brakken, 36–156, 30+659.
[75] Jones v. Minn. & M. Ry., 97–232, 106+1048.
[76] Sheldon v. Brown, 72–496, 75+709.
[77] Miller v. Adamson, 45–99, 47+452.
[78] Kemmitt v. Adamson, 44–121, 46+327.
[79] McArthur v. Murphy, 74–53, 76+955.
[80] R. L. 1905 § 5109; State v. Ruhnke, 27–309, 7+264 (indictment held insufficient for failure to allege intent to defraud mortgagee); State v. Williams, 32–537, 21+746 (indictment sustained); Collins v. Brackett, 34–339, 25+708 (warrant of commitment sustained).
[81] In re Shotwell, 43–389, 393, 45+842.
[82] Stadtler v. School Dist., 71–311, 73+956.
[83] See § 4347.
[84] State v. Mims, 26–183, 2+494, 683.

CIVIL RIGHTS

1488. Equal rights in public places—It is provided by statute that no one shall be excluded from hotels, public resorts, or conveyances, on account of race or color.[85] Formerly the statute did not include saloons.[86]

CLAIM AND DELIVERY—See Replevin.

CLAIMS—See Counties; Executors and Administrators; Municipal Corporations, and other specific heads.

CLASS LEGISLATION—See Building and Loan Associations, 1169; Constitutional Law, 1668; Municipal Corporations, 6773.

CLEARING HOUSES—See Banks and Banking.

CLERK OF THE DISTRICT COURT

1489. Nature of office—The clerk is not a judicial officer and the legislature may authorize him to issue a distress warrant for taxes.[87]

1490. Eligibility—A court commissioner may be a clerk of court, and vice versa.[88]

1491. Term—The constitution fixes the term of the clerk at four years. He does not hold over until his successor is elected and qualified.[89]

1492. Bond—A clerk's bond has been held to cover a loss from the failure of a bank in which he had deposited money paid into court in condemnation proceedings.[90]

1493. Seal—The clerk of the district court has no official seal, as such, and is not required to affix a seal in administering oaths.[91]

1494. Compensation—Fees—Under R. L. 1905 § 2694 (25) the clerk is entitled to a separate fee for each name with respect to which he is asked to search.[92] He is not entitled to fees from the county for swearing jurors and witnesses for the purpose of verifying their per diem and mileage accounts.[93] For certifying to the existence or non-existence of judgments he is entitled to fifty cents for making search and certifying to each judgment, and to fifty cents for each name with respect to which he is asked to search.[94] Laws 1903 c. 333, fixing and regulating the collection and disposition of the fees of clerks of district courts in counties having, or which hereafter may have, a population of two hundred thousand inhabitants or over, as amended by Laws 1905 c. 171, is constitutional.[95] Cases are cited below involving the construction of various special and obsolete laws.[96]

[85] R. L. 1905, § 2812.

[86] Rhone v. Loomis, 74–200, 77+31.

[87] Nelson v. McKinnon, 61–219, 63+630.

[88] Kenney v. Goergen, 36–190, 31+210.

[89] State v. O'Leary, 64–207, 66+264. See, as to the effect of the constitutional amendments of 1883 and of Laws 1885 c. 30 § 3, on term beginning in 1884, O'Leary v. Steward, 46–126, 48+603.

[90] N. P. Ry. v. Owens, 86–188, 90+371.

[91] State v. Barrett, 40–65, 41+459; Crombie v. Little, 47–581, 50+823; Nelson v. McKinnon, 61–219, 63+630; State v. Day, 108–121, 121+611.

[92] Church v. St. P. etc. Ry., 33–410, 23+860.

[93] Wilcox v. Sibley County, 34–214, 25+351.

[94] State v. Scow, 93–11, 100+382.

[95] State v. Rogers, 97–322, 106+345; State v. Krahmer, 98–530, 106+1133; Id., 98–531, 106+1133.

[96] Armstrong v. Ramsey County, 25–344 (Sp. Laws 1872 c. 197 and Sp. Laws 1876 c. 207 relating to the clerk's fees in Ramsey county construed); Davenport v. Hennepin County, 40–335, 42+20 (under Sp. Laws 1881 c. 408 § 2 clerk of Hennepin

1495. Duties—It is the duty of the clerk to give attorneys and others access to his records in proper cases,[97] and upon the tender of proper fees to search his records at the request of any person engaged in the business of making abstracts of title, and to certify and deliver transcripts of judgments entered upon his docket.[98] He is required to keep such record books as the court directs.[99]

1496. Liability for negligence—A clerk is liable for negligence in failing to file and deposit in a proper place papers which are presented to him for filing. A person has been held not negligent in presenting papers for filing. A creditor of an insolvent has been held entitled to recover for the negligent loss of a statutory release, without showing that his debtor has not again become solvent.[1] A clerk is liable for negligence in furnishing information from his records.[2]

1497. Vacancy—Vacancies created by Laws 1891 c. 39 were to be filled by judicial appointment as in other cases.[3]

1498. Deputy—Under Sp. Laws 1891 c. 424, a deputy clerk is an employee of the county and not of the clerk, and as such may maintain an action against the county in proper cases for services.[4] A deputy clerk may sign officially, as such, without the name of the clerk.[5] He may administer oaths.[6]

CLOUD ON TITLE—See Quieting Title.

CLUBS

Cross-References

See Intoxicating Liquors, 4909.

1499. Assessment of members—An incorporated social club has not the power, as incident to it, to assess for its own use a sum of money on its members, and to compel them, by an action at law, to pay it. Such power must be derived from statute or agreement.[7]

1500. Liability of members for acts of each other—The members of a club are liable for the acts of their associates on the ground of agency and not of partnership.[8]

COALHOLE—See Negligence, 6991.
CODE—See note 9.

county held not entitled to a per diem for copying delinquent tax lists and entering delinquent tax judgments); Rasmusson v. Clay County, 41–283, 43+3 (county held not liable to a clerk for indexing judgment records under Laws 1888 c. 181); O'Connor v. Ramsey County, 61–370, 63+1025 (clerk of Ramsey county held entitled to twenty-five cents for each warrant for delinquent personal property taxes under G. S. 1894 § 1567); Hennepin County v. Dickey, 86–331, 90+775 (certain fees obtained by the clerk of Hennepin county from abstract companies and commercial agencies held official and required to be turned into the county treasury under Sp. Laws 1891 c. 373).

[97] R. L. 1905 § 109; State v. McCubrey, 84–439, 87+1126; Nixon v. Dispatch P. Co., 101–309, 312, 112+258.

[98] State v. Scow, 93–11, 100+382.

[99] R. L. 1905 § 110; Smith v. Valentine, 19–452(393); Rasmusson v. Clay County, 41–283, 43+3.

[1] Rosenthal v. Davenport 38–543, 38+618.

[2] See Selover v. Sheardown, 73–393, 76+50.

[3] State v. O'Leary, 64–207, 66+264.

[4] Sortedahl v. Polk County, 84–509, 88+21.

[5] State v. Barrett, 40–65, 70, 41+459.

[6] Crombie v. Little, 47–581, 586, 50+823.

[7] Duluth Club v. Macdonald, 74–254, 76+1128.

[8] Ehrmanntraut v. Robinson, 52–333, 54+188.

[9] Johnson v. Harrison, 47–575, 578, 50+923.

COERCION—See note 10.
COHABIT—See Fornication, 3805.
COLLATERAL ATTACK—See Judgments, 5137–5146, 5208.
COLLATERAL FACTS—See Evidence, 3252.
COLLATERALS—See Pledge.
COLLEGES AND UNIVERSITIES—See Schools and School Districts.
COLOR OF TITLE—See Adverse Possession, 119; Improvements, 4315.
COMBINATIONS—See Restraint of Trade.
COMITY—See Conflict of Laws, 1530.
COMMERCE—See note 11.
COMMERCIAL AGENCIES—See Libel and Slander, 5527.
COMMISSION MERCHANTS—See Factors.
COMMITMENT—See Criminal Law, 2436, 2437.
COMMITTING MAGISTRATES—See Criminal Law, 2428.
COMMON CARRIERS—See Carriers.

COMMON LAW

Cross-References

See Criminal Law, 2408.

1501. Definition—The term "common law" is generally used to denote the common law of England—that body of law which was administered in the Court of King's Bench, the Court of Exchequer and the Court of Common Pleas before the Judicature Act.[12] The term was borrowed from the canonists in the thirteenth century, meaning, both in its lay and in its ecclesiastical use, general, as opposed to local, law or custom. The use of "common law" in contrast to "statute law" was later, arising from the circumstance that statutes were rare.[13] The common law of this state includes English statutes enacted prior to the Revolution.[14]

1502. Nature—The common law is not a code of inflexible and logically consistent rules, but a body of broad and comprehensive principles, based upon reason, justice, and practical considerations.[15] It is elastic, adaptive, and progressive, keeping pace with advancing civilization and new conditions.[16] Its elasticity is largely due to the fact that it is unwritten. In the language of Lord Chief Justice Cockburn, "whatever disadvantages attach to a system of unwritten law, and of these we are fully sensible, it has at least this advantage. that its elasticity enables those who administer it to adapt it to the varying conditions of society, and to the requirements and habits of the age in which we live, so as to avoid the inconsistencies and injustice which arise when the law is no longer in harmony with the wants and usages and interests of the genera-

[10] State v. Ladeen 104–252, 116+486.
[11] Foster v. Blue Earth County, 7–140(84, 88); State v. Chi. etc. Ry., 40–267, 41+1047. See Interstate Commerce.
[12] Century Dict.; Bouvier L. Dict. See Mille Lacs County v. Morrison, 22–178.
[13] Maitland, Canon Law in the Church of England, 4; Maitland, Equity, 2; Salmond, Jurisprudence, 33.
[14] Dutcher v. Culver, 24–584. See Ohio I. Co. v. Auburn I. Co., 64–404, 67+221.
[15] Arthur v. St. P. & D. Ry., 38–95, 101, 35+718; Lamprey v. State, 52–181, 192, 53+1139; Francis v. W. U. Tel. Co., 58–252, 265, 59+1078; Hulett v. Carey, 66–327, 341, 69+31; State v. St. P. etc. Ry., 98–380, 400, 108+261. See, as to the nature of common law, Bryce, 41 Am. L. Rev. 641.
[16] Arthur v. St. P. & D. Ry., 38–95, 101, 35+718; Cigar Makers' P. Union v. Conhaim, 40–243, 248, 41+943; Lommen v. Mlps. G. Co., 65–196, 226, 68+53; State v. St. P. etc. Ry., 98–380, 400, 108+261; Tuttle v. Buck, 107–145, 119+946.

tion to which it is immediately applied."[17] The life of the common law has not been logic; it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellowmen, have played a greater part than logic in forming the common law.[18] Its development has been determined by the social needs of the community. It is the resultant of conflicting social forces, and it has been profoundly affected by prevalent economic theories.[19] The spirit of the common law is the instinct of practical sense.[20] The judges who have made it have had the wisdom not to sacrifice good sense to a syllogism.[21] They have always had an eye to practical considerations.[22] Since the common law is a body of principles, and not of mere arbitrary rules, the effort should be, in administering it, to apply the spirit and reason of the principles to the state of facts presented.[23] The intense individualism of the common law is opposed to the present trend toward collectivism, and to this fact is due much of the popular discontent with the law.[24]

1503. How far in force here—The common law is in force in this state, except as it has been abrogated by statute,[25] or is not adapted to our conditions.[26] Where the reason for a common-law rule has ceased to exist in this state, the rule does not exist here.[27]

1504. Courts cannot abrogate—While the common law is flexible and adaptive, and may be applied to new conditions, the courts cannot abrogate its established rules any more than they can abrogate a statute.[28]

1505. Force of English precedents—Our supreme court has refused to follow a firmly established rule of the English courts on the ground that it is a perversion of the common law and contrary to one of its fundamental principles.[29]

COMMON SCHOOLS—See Schools and School Districts.
COMPARATIVE NEGLIGENCE—See Negligence, 7014.
COMPARISON OF HANDWRITING—See Evidence, 3330.
COMPENSATION—See note 30.
COMPETENT—See note 31.
COMPETENT EVIDENCE—See Evidence, 3227.
COMPETITION—See Restraint of Trade; Unfair Competition.
COMPLAINT—See note 32.

[17] Wason v. Walter, L. R. 4 Q. B. 73, 79.
[18] Holmes, Common Law, 1, 35–37; State v. St. P. etc. Ry., 98–380, 401, 108+261.
[19] Tuttle v. Buck, 107–145, 119+946.
[20] Bader v. New Amsterdam C. Co., 102–186, 189, 112+1065.
[21] Holmes, Common Law, 36.
[22] Francis v. W. U. Tel. Co., 58–252, 265, 59+1078.
[23] Lamprey v. State, 52–181, 192, 53+1139.
[24] See Roscoe Pound, 18 Green Bag, 17.
[25] Schurmeier v. St. P. etc. Ry., 10–82(59, 76); State v. Pulle, 12–164(99); Blackman v. Wheaton, 13–326 (299); State v. Crummey, 17–72(50); Dutcher v. Culver, 24–584; Kelly v. Stevenson, 85–247, 88+739.
[26] Castner v. St. Dr. Franklin, 1–73(51); Jones v. Rigby, 41–530, 43+390; Goodwin v. Kumm, 43–403, 45+853; Kelly v. Stevenson, 85–247, 88+739. See Hulett v. Carey, 66–327, 341, 69+31.
[27] Kelly v. Stevenson, 85–247, 88+739.
[28] Francis v. W. U. Tel. Co., 58–252, 265, 59+1078; Hulett v. Carey, 66–327, 341, 69+31. See Wilkinson v. Tousley, 16–299 (263).
[29] Wilkinson v. Tousley, 16–299(263).
[30] Winona etc. Ry. v. Denman, 10–267 (208, 219).
[31] Montour v. Purdy, 11–384(278, 285); State v. Johnson, 12–476 (378, 387).
[32] State v. Richardson, 34–115, 24+354. See Criminal Law, 2432; Justices of the Peace, 5343; Municipal Corporations, 6804; Pleading, 7527.

COMPOSITIONS WITH CREDITORS

1506. Definition—A composition is an agreement between a debtor and his creditors whereby the creditors agree with the debtor, and among themselves, to receive, and the debtor agrees to pay, a part of their claims in satisfaction of the whole.[33]

1507. Mutuality—Consideration—The creditors must agree among themselves and not simply with the debtor. Otherwise the agreement will lack consideration.[34]

1508. Necessity of all creditors joining—Unless otherwise agreed, it is unnecessary that all the creditors join in the agreement.[35]

1509. Effect as a discharge—A composition, when duly performed, operates as a discharge of the original claims of the creditors, and no action can be maintained thereon.[36] A composition has been held not to release certain secured claims.[37]

1510. Construction—Secured claims—The expression "general creditors" in a composition has been held to mean "unsecured creditors," so that secured claims were not released.[38] The words "other creditors" have been held to mean all other creditors.[39]

1511. Payment—A finding of payment to the other creditors has been held unnecessary in an action involving a single creditor.[40]

1512. Fraud—A secret separate agreement by which one of the creditors secures an advantage over the others is a fraud upon them and unenforceable.[41] Such a fraud justifies a single creditor in repudiating the composition and suing on his original claim.[42]

1513. Actions—Any creditor who is a party to a composition may maintain a several action for its breach.[43] In an action involving a composition, the burden of proving a breach thereof has been held to be on the plaintiff.[44]

COMPOUNDING CRIMES

1514. Criminal offence—The compounding of certain crimes is made a criminal offence by statute.[45]

[33] Brown v. Farnham, 48–317, 51+377; Newell v. Higgins, 55–82, 56+577. See, for agreements held not compositions, Trunkey v. Crosby, 33–464, 23+846; Napa Valley W. Co. v. Daubner, 63–112, 65+143.

[34] Sage v. Valentine, 23–102; Murchie v. McIntire, 40–331, 42+348.

[35] Murchie v. McIntire, 40–331, 334, 42+348; Bruggemann v. Wagener, 72–329, 75+230; Abel v. Allemannia Bank, 79–419, 82+680; Seed v. Wunderlich, 69–288, 72+122.

[36] Brown v. Farnham, 48–317, 51+377; Id., 55–27, 56+352. See Murchie v. McIntire, 40–331, 42+348.

[37] Noyes v. Chapman, 60–88, 61+901.

[38] Id.

[39] Seed v. Wunderlich, 69–288, 72+122.

[40] Murchie v. McIntire, 40–331, 42+348. See Seed v. Wunderlich, 69–288, 72+122.

[41] Newell v. Higgins, 55–82, 56+577; First Nat. Bank v. Steele, 58–126, 59+959.

[42] Powers v. Harlin, 68–193, 71+16.

[43] Brown v. Farnham, 55–27, 56+352.

[44] Brown v. Farnham, 58–499, 60+344.

[45] R. L. 1905 §§ 4849, 5312. See Taylor v. Blake, 11–255(170) (property obtained by compounding a crime, both parties being equally guilty, cannot be recovered back); State v. Quinlan, 40–55, 41+299 (accomplice—necessity of corroboration—indictment—variance).

COMPROMISE AND SETTLEMENT

Cross-References

See Accord and Satisfaction, 40; Attorney and Client, 690, 691; Compositions with Creditors; Release.

1515. Definition—A compromise and settlement is an agreement made between two or more persons as a settlement of matters in dispute between them.

1516. A contract—A valid compromise and settlement is a contract for the breach of which an action for damages will lie.[46]

1517. Offer of compromise—An unaccepted offer by way of compromise is inadmissible in a subsequent action against the party making it.[47]

1518. Necessity of dispute or doubt—To constitute a good consideration for the compromise of a disputed claim, it is unnecessary that the matter in dispute be really doubtful in fact, if the parties in good faith believe it to be so. But there must be a real dispute or doubt as to the rights of the parties. A party cannot create a dispute sufficient as a consideration for a compromise by merely refusing to pay an undisputed claim. That would be extortion, not compromise.[48]

1519. Favored—The law favors the settlement of claims.[49]

1520. Consideration—The compromise of a disputed or doubtful claim is in itself a good consideration. The real consideration is not the sacrifice of the right but the settlement of the dispute.[50] If the liability is not disputed the fact that the amount is unliquidated affords a sufficient consideration.[51]

1521. Mistake of law—Where there is neither fraud, nor misrepresentations, nor mistake of fact, and both parties had equal means of ascertaining what their rights were, a compromise will not be set aside because a subsequent judicial decision shows that their rights were different from what they supposed them to be, or that one of them really had no rights at all and so nothing to forego.[52] As a general rule a mistake of law is not a ground for setting aside a compromise.[53]

1522. Enforceability of claim—It is unnecessary that the claim compromised could have been successfully maintained. It is enough if it was asserted in good faith and upon reasonable grounds of belief in its enforceability.[54]

1523. Breach—Rescission—It has been held that a certain agreement purporting to settle and adjust matters of difference between the parties constituted one entire contract; and that the engagements thereby entered into by the parties were mutual and reciprocal, and a refusal of performance by plaintiff gave defendant the right to rescind, and declare the agreement wholly at an end.[55]

[46] Schweider v. Lang, 29–254, 13+33; Hanley v. Noyes, 35–174, 28+189; Neibles v. Mpls. etc. Ry., 37–151, 33+332; Shove v. Martine, 85–29, 33, 88+254, 412.

[47] Melby v. Osborne, 35–387, 29+58; Gauthier v. West, 45–192, 47+656; State v. Mpls. etc. Ry., 90–88, 95+581. See Person v. Bowe, 79–238, 82+480; Stoakes v. Larson, 108–234, 121+1112.

[48] Demars v. Musser, 37–418, 35+1; Hansen v. Gaar, 63–94, 65+254; Ness v. Minn. etc. Co., 87–413, 92+333; Kelley v. Hopkins, 105–155, 117+396.

[49] Fidelity & C. Co. v. Gillette, 92–274, 99+1123; Boogren v. St. P. C. Ry., 97–51, 56, 106+104.

[50] Demars v. Musser, 37–418, 35+1; Perkins v. Trinka, 30–241, 244, 15+115; Copley v. Hyland, 46–205, 48+777.

[51] Neibles v. Mpls. etc. Ry., 37–151, 33+332.

[52] Perkins v. Trinka, 30–241, 15+115; Hall v. Wheeler, 37–522, 35+377.

[53] Fidelity & C. Co. v. Gillette, 92–274, 99+1123.

[54] Neibles v. Mpls. etc. Ry., 37–151, 33+332.

[55] Benson v. Larson, 95–438, 104+307.

1524. Fraud—Avoidance—Where a release of damages embracing the subject-matter in a legal controversy is sought to be avoided upon the ground of fraud, it is necessary to show intentional misrepresentations (scienter), and the failure to do so is fatal to the claims of the party relying upon the alleged fraud.[56] The issues being whether a party was bound by a contract of settlement of the cause of action pleaded, it was held error to refuse to instruct the jury that he ratified the contract, if he accepted the benefits of its terms after becoming informed of its contents, though he may have executed the same when mentally incapacitated, or upon false representations.[57]

1525. Burden of proof—The burden of proving facts invalidating a compromise is generally on the party attacking it.[58]

1526. Evidence—Admissibility—Cases are cited below involving the admissibility of evidence.[59]

1527. Evidence—Sufficiency—Cases are cited below involving the sufficiency of evidence.[60]

COMPULSORY PHYSICAL EXAMINATION—See Evidence, 3262.

CONCEALED DANGERS—See Negligence, 6990.

CONCLUSIONS OF LAW—See Pleading, 7517; Reference, 8318, 8319; Trial, 9846–9874.

CONCURRENT—See note 61.

CONDEMNATION—See Eminent Domain.

CONDITIONAL DELIVERY—See Evidence, 3377.

CONDITIONAL SALES—See Mortgages, 6156; Sales, 8648.

CONDITION PRECEDENT—A condition precedent is a provision which must be fulfilled or an event which must occur before the instrument or clause affected by it can take effect.[62]

CONDITION SUBSEQUENT—A condition subsequent contemplates that, after the instrument has taken effect, a right established or recognized by it may be extinguished by some future or uncertain event.[63]

CONFESSION AND AVOIDANCE—See Pleading, 7578.

CONFESSION OF JUDGMENT—See Judgments, 4973; Justices of the Peace, 5311.

CONFESSIONS—See Criminal Law, 2462; Witnesses, 10351d.

CONFIDENTIAL RELATIONS—See Fraud, 3833.

CONFIRMATION—See note 64.

[56] Kelly v. Pioneer P. Co., 94–448, 103+330. See Copley v. Hyland, 46–205, 48+777.

[57] Ham v. Potter, 101–439, 112+1015.

[58] Hinkle v. Mlps. etc. Ry., 31–434, 18+275.

[59] Cumbey v. Lovett, 76–227, 79+99 (account books and admissions of an agent made in the course of a settlement held admissible); Southwick v. Herring, 82–302, 84+1013 (oral evidence of a compromise and settlement held admissible).

[60] Olson v. Cremer, 43–232, 45+616; Kanne v. Mpls. etc. Ry., 104–318, 116+470; Lindstrom v. Fitzpatrick, 105–331, 117+441.

[61] Kelly v. Liverpool etc. Co., 102–178, 184, 111+395, 112+870, 1019.

[62] Century Dict.; Chambers v. N. W. etc. Co., 64–495, 67+367 (a condition precedent is one which is to be performed before the agreement of the parties becomes operative). See Contracts, 1728; Pleading, 7533.

[63] Century Dict.; Chambers v. N. W. etc. Co., 64–495, 67+367 (a condition subsequent calls for the performance of some act or the happening of some event after the contract is entered into, and upon the performance or happening of which its obligation is made to depend). See Contracts, 1728; Deeds, 2675; Evidence, 3381; Pleading, 7534.

[64] Duluth v. Lindberg, 70–132, 136, 72+967.

CONFLICT OF LAWS

Cross-References

See Corporations, 2082; Foreign Laws.

IN GENERAL

1528. Definitions—The title "Conflict of Laws" embraces the rules governing the recognition and enforcement of foreign created rights [65]—the extraterritorial recognition of rights.[66] It is synonymous with "Private International Law." [67] The phrase "lex loci contractus" means the law of the country or state where a contract is made.[68] It is sometimes defined as the law of the place with a view to which a contract is entered into, or by which it must, by reason of its subject-matter or nature, be governed or performed—the law which the parties either expressly or presumptively incorporated into their contract.[69]

1529. States of Union are foreign to one another—The several states of the United States are foreign to one another as regards conflict of laws.[70]

COMITY AND PUBLIC POLICY

1530. Comity—The laws of a state have no extraterritorial operation, but by "comity" rights and obligations growing out of the laws of one state may be enforced in another state,[71] subject to certain exceptions stated elsewhere.[72] Strictly, one state never enforces the laws of another state, but merely enforces certain kinds of rights and obligations growing out of such laws.[73] The principles governing the conflict of laws are a part of the common law and enforceable as such, but a state may change these principles by statute at will, without violating its duty toward any other state. In this sense the matter rests in comity. But except as these principles are modified by statute, they are to be enforced as inflexibly as any other rules of the common law.[74]

1531. Public policy, etc.—A state will not enforce a foreign law which is repugnant to the policy of its own laws, or to its conceptions of justice or good morals, or the enforcement of which would be prejudicial to the general interests of its own citizens.[75] A state will not refuse to enforce a right growing out of a foreign law simply because it has no similar law of its own.[76] A contract made with a view to a breach of the laws of another state is not enforceable.[77]

CONTRACTS

1532. In general—It is the general rule that personal contracts are governed, as to their execution, nature, obligation, construction, and validity, by

[65] 3 Beale, Cases, C. of L. 501.

[66] Dicey, C. of L. (2 ed.) 3, 5; Holland, Jurisprudence (10 ed.) 411.

[67] Dicey, C. of L. (2 ed.) 5.

[68] Dicey, C. of L. (2 ed.) xxxiv, 77; Thomson v. Palmer, 52–174, 53+1137.

[69] Swedish etc. Bank v. First Nat. Bank, 89–98, 111, 94+218. See 16 Harv. L. Rev. 58; 17 Id. 570; Minor, C. of L. § 153; Dicey, C. of L. (2 ed.) 77, 529.

[70] Renlund v. Commodore M. Co., 89–41, 93+1057.

[71] See Wendell v. Lebon, 30–234, 237, 15+109; In re Paige, 31–136, 138, 16+700; Herrick v. Mpls. etc. Ry., 31–11, 13, 16+413; Keenan v. Stimson, 32–377, 379, 20+364; First Nat. Bank v. Gustin, 42–327, 44+198; Midland Co. v. Broat, 50–562, 52+972; Seamans v. Christian, 66–205, 68+1065.

[72] See § 1531.

[73] Dicey, C. of L. (2 ed.) 11.

[74] 3 Beale, Cases, C. of L. 504; Dicey, C. of L. (2 ed.) 10; Hilton v. Guyot, 159 U. S. 113.

[75] Herrick v. Mpls. etc. Ry., 31–11, 16+413; In re Dalpay, 41–532, 43+564; Midland Co. v. Broat, 50–562, 52+972; Seamans v. Christian, 66–205, 68+1065; Corbin v. Houlehan, 100 Me. 246.

[76] Herrick v. Mpls. etc. Ry., 31–11, 16+413.

[77] Bollinger v. Wilson, 76–262, 79+109. See Corbin v. Houlehan, 100 Me. 246.

the law of the place where they are made.[78] They are "made" in this sense where the final act to make them go into effect is done.[79] They have the same force and effect in a foreign forum as in the place where they are made, if they are not repugnant to the public policy or laws of the state of such forum.[80] It is immaterial whether the right of action is of a statutory or common-law nature.[81] As to matters pertaining to the performance of contracts the laws of the place of performance govern.[82] It has sometimes been said to be a rule of general application that the validity of contracts is to be determined by the laws of the place of performance,[83] but this doctrine is now discredited.[84] It would seem that the discharge of a contract should be governed by the place of performance,[85] but it has been held that the question whether the giving and receiving of a note by the debtor for the amount of an antecedent debt operates as payment is governed by the law of the place where the contract is made.[86] Where a contract is made in one state for the purchase of realty located in another state, and the money is to be paid in the state in which the contract is made, the lex loci contractus governs as to the rights of the parties growing out of a breach of the contract.[87] A contract which is void where it is made and to be performed is void everywhere.[88]

1533. Intention of parties—To what extent the intention of the parties shall be considered in determining the law governing their contracts is a subject on which the cases are in hopeless confusion.[89] The better view is that such intention controls only to the extent it is made a matter of stipulation and that such stipulations have only the force of ordinary stipulations in a contract.[90]

1534. Relating to realty—Contracts relating to realty are generally governed by the lex rei sitae.[91]

1535. Relating to personalty—To an extent not well defined contracts relating to personalty are governed by the lex rei sitae.[92] The general rule is that the validity and effect of contracts relating to personalty are to be determined

[78] Herrick v. Mpls. etc. Ry., 31–11, 16+413; In re Paige, 31–136, 16+700; Reiff v. Bakken, 36–333, 31+348; Stahl v. Mitchell, 41–325, 43+385; Thomson v. Palmer, 52–174, 53+1137; In re Kahn, 55–509, 57+154; McKibbin v. Ellingson, 58–205, 59+1003; Schultz v. Howard, 63–196, 65+363; Powers v. Wells 93–143, 100+735; Finnes v. Selover, 102–334, 113+883; Clement v. Willett, 105–267, 117+491; Liverpool v. Phenix Ins. Co., 129 U. S. 397; Mut. L. Ins. Co. v. Hill, 193 U. S. 551; Baxter Nat. Bank v. Talbot, 154 Mass. 213; 3 Beale, Cases, C. of L. 541; 17 Harv. L. Rev. 570; 23 Id. 1, 79, 194, 260.

[79] McKibbin v. Ellingson, 58–205, 59+1003.

[80] Thomson v. Palmer, 52–174, 53+1137; Midland Co. v. Broat, 50–562, 52+972; First Nat. Bank v. Gustin, 42–327, 44+198.

[81] Herrick v. Mpls. etc. Ry., 31–11, 13, 16+413.

[82] Finnes v. Selover, 102–334, 113+883; Scudder v. Union Nat. Bank, 91 U. S. 406; Pritchard v. Norton, 106 U. S. 124; Liverpool etc. Co. v. Phenix Ins. Co., 129 U. S. 397; Beale, Cases, C. of L. 541, 544. See Lewis v. Bush, 30–244, 15+113.

[83] Swedish etc. Bank v. First Nat. Bank, 89–98, 94+218. See also, Seamans v. Christian, 66–205, 68+1065; Ames v. Benjamin, 74–335, 77+230.

[84] See cases under 78 supra.

[85] 3 Beale, Cases, C. of L. 544.

[86] Thomson v. Palmer, 52–174, 53+1137. See Tarbox v. Childs, 165 Mass. 408.

[87] Finnes v. Selover, 102–334, 113+883; Walsh v. Selover, 109–136, 123+291.

[88] Buckley v. Humason, 50–195, 52+385.

[89] 3 Beale, Cases, C. of L. 541. See Thomson v. Palmer, 52–174, 53+1137; Swedish etc. Bank v. First Nat. Bank, 89–98, 94+218.

[90] Mut. L. Ins. Co. v. Hill, 193 U. S. 551; 17 Harv. L. Rev. 570.

[91] Swedish etc. Bank v. First Nat. Bank, 89–98, 113, 94+218; Harris v. McKinley, 57–198, 58+991. See Finnes v. Selover, 102–334, 113+883 (sale of realty—statutory notice of rescission); Clement v. Willett, 105–267, 117+491 (assumption of mortgage governed by lex loci contractus); Walsh v. Selover, 109–136, 123+291 (sale of realty—statutory notice of rescission).

[92] Swedish etc. Bank v. First Nat. Bank, 89–98, 94+218. See 20 Harv. L. Rev. 394.

by the law of the state where they are made, and as a matter of comity, they will, if valid there, be enforced in another state though not executed or recorded according to its laws.[93]

1536. Sales of personalty—It is the general rule that a sale or other voluntary transfer of personalty is governed by the law of the place where the sale or transfer is made. If valid there is is valid everywhere. A sale is generally "made" within this rule where the delivery is made.[94] If a sale is invalid where made it is invalid everywhere.[95] A sale made with a view to the breach of the laws of another state is probably not enforceable anywhere.[96] A state may regulate the sale or transfer of personalty within its limits.[97]

1537 Chattel mortgages—The validity and effect of chattel mortgages is generally governed by the law of the place where they are made.[98] Where the contract is made in one state and the property is in another, the law of the latter state may control.[99] Where a chattel mortgage is filed in another state and subsequently the mortgagor removes to this state, with the mortgaged property, the mortgage need not be filed in this state.[1] An acknowledgment of a chattel mortgage before a justice of the peace in North Dakota, without the certificate of the clerk of court required by the laws of that state, has been held not to entitle the mortgage to record here.[2]

1538. Pledge—The validity of a contract of pledge is determined by the lex rei sitae.[3]

1539. Debts—The situs of debts has been considered elsewhere in relation to attachment [4] and garnishment.[5] The payment of debts is governed by the law of the place where payment is required to be made.[6]

1540. Interest—Express agreement—Where parties make a contract of loan in one state to be performed in another they may, acting in good faith, and without intent to evade the law, agree that the law of either state shall control as to rate of interest.[7] If a contract is valid, as regards interest, under the law of the place where it is made it is valid everywhere.[8]

TORTS

1541. In general—The general rule is that actions for personal torts are transitory and may be brought wherever the wrongdoer can be found and jurisdiction of his person obtained. It is immaterial whether the right of action is based on a statute or on the common law, or whether the wrong, if committed in the state of the forum, would be actionable or not. The liability is determined by the lex loci delicti, the remedy by the lex fori.[9] The right given by

[93] Keenan v. Stimson, 32–377, 20+364.

[94] In re Kahn, 55–509, 57+154; In re Paige, 31–136, 16+700; Covey v. Cutler, 55–18, 56+255; Bollinger v. Wilson, 76–262; 79+109; Hamm v. Young, 76–246, 79+111.

[95] Hamm v. Young, 76–246, 79+111.

[96] Bollinger v. Wilson, 76–262, 79+109.

[97] Swedish etc. Bank v. First Nat. Bank, 89–98, 115, 94+218.

[98] Keenan v. Stimson, 32–377, 20+364. See Nichols v. Minn. T. M. Co., 70–528, 73+415.

[99] Swedish etc. Bank v. First Nat. Bank, 89–98, 115, 94+218.

[1] Keenan v. Stimson, 32–377, 20+364; Strickland v. Minn. T. F. Co., 77–210, 79+674.

[2] Tweto v. Horton, 90–451, 97+128.

[3] Swedish etc. Bank v. First Nat. Bank, 89–98, 94+218.

[4] See § 625.

[5] See §§ 3961–3963.

[6] Lewis v. Bush, 30–244, 248, 15+113.

[7] Smith v. Parsons, 55–520, 57+311; Ames v. Benjamin, 74–335, 77+230. See 3 Beale, Cases, C. of L. 542; 17 Harv. L. Rev. 568.

[8] Reiff v. Bakken, 36–333, 31+348.

[9] Herrick v. Mpls. etc. Ry., 31–11, 16+413; Myers v. Chi. etc. Ry., 69–476, 72+694; Dennick v. Railroad Co., 103 U. S. 11; N. P. Ry. v. Babcock, 154 U. S. 190; Stewart v. B. & O. Ry., 168 U. S. 445; Huntington v. Attrill, 146 U. S. 657.

the lex loci delicti may, however, be so peculiar as to be unenforceable through its procedure in the state of the forum.[10]

1542. Injury to land—An action will lie in this state for an injury to land lying in another state.[11]

1543. Death by wrongful act—An action will lie in this state under the statute of another state allowing recovery for death by wrongful act whether such statute is similar to our own or not.[12] An action will lie in this state for the death of a non-resident from an injury received here.[13]

1544. Negligence of fellow-servants—An action will lie in this state under the fellow-servant act of a sister state whether such act is similar to our own or not.[14] The construction placed on the statute where it is enacted will govern here.[15]

REMEDIES

1545. General rule—The lex fori governs in all matters pertaining to the remedy.[16]

1546. Limitation of actions—Statutes of limitation generally pertain merely to the remedy and are governed by the lex fori.[17] Where by statute a right of action is given which did not exist at common law, and the statute giving the right also fixes the time within which the right may be enforced, the time so fixed controls in whatever forum the action is brought.[18] The effect of foreign statutes of limitation is partially regulated by statute.[19]

1547. Parties—The subject of parties to actions is governed by the lex fori.[20]

1548. Evidence—The rules of evidence pertain to the remedy and are governed by the lex fori. Whether a witness is competent or not, whether certain matters require to be proved by writing or not, whether certain evidence proves a fact or not, whether evidence is admissible or not, are questions to be determined by the lex fori.[21] But where a substantive rule of law is stated in the form of a rule of evidence or presumption the lex loci governs.[22] The burden of proof is governed by the lex fori.[23]

1549. Pleading—The rules of pleading pertain to the remedy and are governed by the lex fori.[24]

[10] Slater v. Mexican Nat. Ry., 194 U. S. 120. See 16 Harv. L. Rev. 63.

[11] Little v. Chi. etc. Ry., 65–48, 67+846. See 3 Beale, Cases, C. of L. 520.

[12] Herrick v. Mpls. etc. Ry., 31–11, 16+413; Myers v. Chi. etc. Ry., 69–476, 72+694; Nicholas v. Burlington etc. Ry., 78–43, 80+776; Negaubauer v. G. N. Ry., 92–184, 99+620; Powell v. G. N. Ry., 102–448, 113+1017; Stewart v. G. N. Ry., 103–156, 114+953. See N. P. Ry. v. Babcock, 154 U. S. 190; Slater v. Mexican etc. Ry., 194 U. S. 120.

[13] Hutchins v. St. P. etc. Ry., 44–5, 46+79.

[14] Herrick v. Mpls. etc. Ry., 31–11, 16+413; Njus v. Chi. etc. Ry., 47–92, 49+527.

[15] Njus v. Chi. etc. Ry., 47–92, 49+527.

[16] Fryklund v. G. N. Ry., 101–37, 111+727; Fletcher v. Spaulding, 9–64(54); Herrick v. Mpls. etc. Ry., 31–11, 16+413; Wendell v. Lebon, 30–234, 15+109; First Nat. Bank v. Gustin, 42–327, 44+198; Commercial Bank v. Slater, 21–174. See Stahl v. Mitchell, 41–325, 43+385; Pritchard v. Norton, 106 U. S. 124; Baxter Nat. Bank v. Talbot, 154 Mass. 213; 3 Beale, Cases, C. of L. 520.

[17] Fletcher v. Spaulding, 9–64(54); Bigelow v. Ames, 18–527(471).

[18] Negaubauer v. G. N. Ry., 92–184, 99+620.

[19] See § 5612.

[20] Fryklund v. G. N. Ry., 101–37, 111+727.

[21] Jones v. Chi. etc. Ry., 80–488, 83+446; Kaufman v. Barbour, 98–158, 107+1128.

[22] Bronson v. St. Croix L. Co., 44–348, 46+570; Thomson v. Palmer, 52–174, 53+1137. See Baxter Nat. Bank v. Talbot, 154 Mass. 213.

[23] Bisbee v. Torinus, 22–555; Musser v. McRae, 38–409, 38+103; Bronson v. St. Croix L. Co., 44–348, 46+570.

[24] Thomson v. Palmer, 52–174, 53+1137; Kaufman v. Barbour, 98–158, 107+1128.

1550. Damages—The measure of damages is a matter of substantive rather than remedial law and is governed by the lex loci.[25]

1551. Attachment and garnishment—Whether property is subject to attachment or garnishment is determined by the lex fori.[26] So is the effect of an assignment of an insolvent in dissolving an attachment.[27]

PENAL AND CRIMINAL LAWS

1552. In general—The courts of one state will not enforce the criminal or penal laws of another state. A ne exeat bond is not a penal obligation within this rule.[28] There is much conflict of opinion as to what constitutes a penal obligation in this connection.[29]

MISCELLANEOUS

1553. Situs of personalty—It is an old rule of law that the situs of personalty is at the domicil of the owner—mobilia sequuntur personam.[30] But for most purposes tangible personalty is governed by the law of the place where it is actually situated.[31]

1554. Realty—Realty and interests therein are governed exclusively by the law of the state wherein it is situated.[32] The transmission of title to realty must be according to the law of its situs. The courts of one state cannot pass, or affect in any way, the title to realty lying in another state.[33]

1555. Descent and testamentary disposition—The lex rei sitae governs the descent and testamentary disposition of realty.[34] The law of the domicil of the decedent governs the descent and testamentary disposition of personalty.[35]

1556. Statutory liens on personalty—Whether the holder of a statutory lien existing under the statutes of another state can, after the property covered thereby has been sold by the owner to a third person, and by him removed into this state, lawfully seize the property, and effect a foreclosure of his lien within this state, is an open question.[36]

1557. Marriage—The validity of a marriage is to be determined by the law of the place where it is entered into. If it is valid there it is valid everywhere.[37] The rights of one spouse in the property of the other are governed by the law of the domicil.[38]

1558. Insolvency—An involuntary transfer of property under the insolvency laws of one state will not transfer the property of the insolvent in another state.[39] An assignment under the insolvent law of 1881 is not an involuntary transfer within this rule.[40] Whether a transaction constitutes an unlawful pref-

[25] Northern Pac. Ry. v. Babcock, 154 U. S. 190; Slater v. Mex. Nat. Ry., 194 U. S. 120. See Note, 91 Am. St. Rep. 714.

[26] Lewis v. Bush, 30–244, 15+113; Jenks v. Ludden, 34–482, 27+188.

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

[28] Midland Co. v. Broat, 50–562, 52+972.

[29] See Huntington v. Attrill, 146 U. S. 657; 3 Beale, Cases, C. of L. 518.

[30] Lewis v. Bush, 30–244, 247, 15+113; Harvey v. G. N. Ry., 50–405, 52+905; In re Jefferson, 35–215, 28+256; Swedish etc. Bank v. First Nat. Bank, 89–98, 113, 94+218.

[31] See §§ 1535, 1538.

[32] Prentiss v. Prentiss, 14–18(5); Washburn v. Van Steenwyk, 32–336, 20+324; Bronson v. St. Croix L. Co., 44–348, 46+570; Swedish etc. Bank v. First Nat. Bank, 89–98, 113, 94+218; Stahl v. Mitchell, 41–325, 43+385; Hawkins v. Ireland, 64–339, 346, 67+73; Davis v. Hudson, 29–27, 32, 11+136.

[33] Stahl v. Mitchell, 41–325, 43+385.

[34] Washburn v. Van Steenwyk, 32–336, 20+324; Prentiss v. Prentiss, 14–18(5).

[35] Fox v. Hicks, 81–197, 83+538; Putnam v. Pitney, 45–242, 47+790; Harvey v. G. N. Ry., 50–405, 407, 52+905; Babcock v. Collins, 60–73, 77, 61+1020.

[36] Schuler v. McCord, 79–39, 81+547.

[37] Earl v. Godley, 42–361, 44+254; McHenry v. Bracken, 93–510, 101+960.

[38] Muus v. Muus, 29–115, 12+343. See 13 Harv. L. Rev. 601.

[39] In re Paige, 31–136, 16+700; Hawkins v. Ireland, 64–339, 67+73.

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

erence or act of insolvency is to be determined by the lex fori.[41] Our insolvency law is effectual as to non-residents, so far as to control the disposition of property within our jurisdiction. A preferential conveyance of property in this state may be avoided under that law though the creditor preferred is a non-resident.[42] The courts of this state will not restrain one of our citizens from enforcing an attachment in another state though such an attachment in this state would be dissolved by an assignment.[43] Debts due an insolvent who has a domicil in this state will be deemed to have a situs here.[44]

1559. Assignment for benefit of creditors—As a general rule, a voluntary assignment for the benefit of creditors, valid by the law where it is made, will pass the title to personalty, wherever situated.[45] But such an assignment will not be given effect in this state if it is opposed to the policy of our laws, as, for example, if it gives a preference to certain creditors.[46] Such an assignment will pass the title to realty, at least as against every one but the creditors, of the assignor, if it is executed in conformity to the laws of the state where the realty is situated.[47] Whether it will pass the title as against the creditors of the assignor is an open question.[48] An order of a court, in the state where an assignment was made, appointing an assignee in place of the original assignee has been held to vest the title of the realty covered by the assignment wherever situated.[49] Whether property is subject to attachment notwithstanding an assignment in another state is determined by the lex fori.[50]

1560. Acknowledgments—An acknowledgment must be taken in accordance with the law of the place.[51]

CONFUSION OF GOODS

1561. In general—Where, without fraudulent intent, goods of the same nature and value, belonging to different owners, are mixed, if a division can be made of equal value, each owner is entitled to his aliquot part of the whole mass.[52] Where, under contract to deliver to the defendant a certain number of railway ties, the plaintiff delivered some of an inferior quality which were not accepted by the defendant, but which were commingled with those which were accepted, it was held that the defendant, having inadvertently used some of them, was not liable as for conversion, in the absence of a demand, or in an action ex contractu for their value.[53] Where game or fish illegally caught or killed is commingled with that which was legally caught or killed the burden is on the possessor to prove, as against the state, what part was lawfully caught or killed.[54] Replevin has been held not to lie for a share of commingled goods incapable of identification.[55] Evidence has been held not to show a commin-

[41] In re Howes, 38–403, 38+104; In re Dalpay, 41–532, 43+564; In re Kahn, 55–509, 57+154.
[42] Macdonald v. First Nat. Bank, 47–67, 49+395; In re Kahn, 55–509, 57+154.
[43] Jenks v. Ludden, 34–482, 27+188.
[44] In re Dalpay, 41–532, 32+564.
[45] In re Paige, 31–136, 16+700; Covey v. Cutler, 55–18, 56+255; McKibbin v. Ellingson, 58–205, 59+1003; Hawkins v. Ireland, 64–339, 67+73.
[46] In re Dalpay, 41–532, 43+564. See Wendell v. Lebon, 30–234, 15+109.
[47] Stahl v. Mitchell, 41–325, 43+385; Thompson v. Ellenz, 58–301, 59+1023.
[48] Hawkins v. Ireland, 64–339, 67+73.
[49] Stahl v. Mitchell, 41–325, 43+385.
[50] Jenks v. Ludden, 34–482, 27+188.
[51] Tweto v. Horton, 90–451, 97+128.
[52] Stone v. Quaal, 36–46, 29+326; Osborne v. Cargill, 62–400, 64+1135; Chandler v. De Graff, 25–88; Id., 27–208, 6+611.
[53] Chandler v. De Graff, 25–88.
[54] Thomas v. N. P. Ex. Co., 73–185, 75+1120.
[55] Ames v. Miss. B. Co., 8–467(417). See Weiland v. Sunwall, 63–320, 322, 65+628.
[56] Ames v. Miss. B. Co., 8–467(417).

gling of logs.[56] Where grain was commingled in a common mass it was held that if there was a bailment the bailors were owners as tenants in common, and that if a part of the grain had been converted or lost the loss must be borne by all pro rata.[57]

CONGRESS—See United States.
CONNECTING CARRIERS—See Carriers, 1290, 1352–1356.
CONSERVATORS OF THE PEACE—See Criminal Law, 2428.
CONSIDERATION—See Contracts, 1750–1773; Evidence, 3373.
CONSOLIDATION OF ACTIONS—See Action, 91.

CONSPIRACY

Cross-References

See Criminal Law, 2416, 2460; Fraudulent Conveyances, 3916; Homicide, 4230.

1562. Concert of action—To constitute a conspiracy the minds of the parties must meet on a definite line of action and a particular result.[58]

1563. At common law—Prior to the Penal Code conspiracy was punishable as a common-law offence, and no overt act in pursuance of it was essential.[59]

1564. What constitutes under statute—A conspiracy between A, an employee of B, and C whereby A is to purchase goods for B from C and obtain a secret compensation from C, is unlawful.[60] A conspiracy between A, B and C against D, whereby B, the owner of certain land was to place it with D, a land company, for sale, at a price considerably above its real value, and A, who was insolvent, in the interest of B and C was to obtain a contract from D for the purchase of the land, pay the earnest money and afterwards secure a loan from D, whereupon B was to refuse to sell the land and A to refuse to return the loan and divide with B and C, is unlawful.[61]

1565. Preventing employment—R. L. 1905 § 5097, declaring it unlawful for two or more employers of labor to combine or confer together for the purpose of preventing any person from procuring employment is valid. If one employer by conference with another employer prevents, without excuse or justification, a third person from procuring employment with such other employer, he is liable for damages under the statute to the person interfered with. A malicious motive or purpose is essential to give rise to a cause of action under the statute; not actual malice, but such as the law implies from the fact that the act complained of was unlawful and without justification.[62]

1566. Boycott—A boycott is a combination of several persons to cause loss or injury to a third person by causing others, against their will, to withdraw from him their beneficial business intercourse, through threats that, unless a compliance with their demands be made, the persons forming the combination will cause loss or injury to him: or an organization formed to exclude a person from business relations with others by persuasion, intimidation, or other acts

[57] Weiland v. Sunwall, 63–320, 322, 65+628. One cannot be held a conspirator simply because his agent had knowledge of a conspiracy or participated therein. Benton v. Mpls. T. M. Co., 73–498, 76+265.
[58] State v. Crawford, 95–467, 470, 104+295; Kolbe v. Boyle, 99–110, 108+847. See Pfefferkorn v. Seefield, 66–223, 68+1072; Sweaas v. Evenson, 125+272.
[59] State v Pulle, 12–164(99).
[60] Nord v. Gray, 80–143, 82+1082. See Earle v. Johnson, 81–472, 84+332.
[61] Bauer v. Sawyer, 90–536, 97+428.
[62] Joyce v. G. N. Ry., 100–225, 110+975.

which tend to violence, and thereby cause him through fear of resulting injury, to submit to dictation in the management of his affairs. Intimidation, coercion, or threats of injury are essential elements of a boycott, but what would constitute acts of that character must depend upon the facts of each particular case. A boycott is an unlawful conspiracy and may be restrained by injunction.[63] A complaint which alleges that the plaintiff, a dealer in farm produce, had a profitable business, that the defendants had conspired to refuse to deal with him and to induce others to do likewise, it not appearing that their interference with his business was to serve any legitimate interests of their own, but that it was done maliciously, to injure him, and that the conspiracy had been carried into execution, whereby his business was ruined, states a cause of action.[64]

1566a. Evidence—Acts and declarations of fellow conspirators—Where two or more persons conspire together to commit a crime everything said, done, or written by any one of them in the execution or furtherance of the common purpose, is admissible against each of them; but statements as to measures taken in the execution or furtherance of the common purpose—mere narratives of past events—are inadmissible against any conspirators except those by whom or in whose presence such statements were made. Evidence of the acts or declarations of fellow conspirators should not ordinarily be admitted until the existence of the conspiracy is proved prima facie, apart from them, but the order of proof is a matter of discretion with the trial court, and if the conspiracy is subsequently proved there is no error.[01] Conspiracy may be proved by circumstantial evidence.[02] One charged with conspiracy may testify that he never had any conversation with other defendants in relation to the alleged conspiracy.[03]

1567. Pleading—Cases are cited below involving questions of pleading.[65]

CONSTABLES—See Sheriffs and Constables.

CONSTITUTIONAL CONVENTIONS—See Constitutional Law, 1570, 1585.

[63] Gray v. Building T. Council, 91–171, 97+663. See Note, 103 Am. St. Rep. 488.

[64] Ertz v. Produce Exch., 79–140, 81+737.

[01] See §§ 2460, 3916.

[02] Redding v. Wright, 49–322, 51+1056.

[03] Redding v. Godwin, 44–355, 46+563.

[65] O'Connor v. Jefferson, 45–162, 47+538 (complaint charging a conspiracy to defraud the plaintiff of his property sustained); Whiting v. Clugston, 73–6, 75+759 (conspiracy in execution of mortgage—fraudulent appropriation of sum loaned—complaint in foreclosure and for a receiver—joinder of causes of action); Ertz v. Produce Exch., 79–140, 81+737 (complaint charging conspiracy to injure business sustained). See Jones v. Morrison, 31–140, 16+854 (action by stockholder—conspiracy of directors—what matters may be joined in complaint); Stewart v. Cooley, 23–347 (complaint against judge for conspiring with others to maliciously prosecute plaintiff sustained).

CONSTITUTIONAL LAW

IN GENERAL

AMENDMENT OF CONSTITUTION

CONSTRUCTION OF CONSTITUTION

THREE DEPARTMENTS OF GOVERNMENT

RIGHT TO LOCAL GOVERNMENT

EXTENT OF LEGISLATIVE POWER

POLICE POWER

VESTED RIGHTS

CURATIVE ACTS

IMPAIRMENT OF CONTRACTS

DUE PROCESS OF LAW

EX POST FACTO LAWS

Cross-References

See Statutes, 8929.

IN GENERAL

1568. Nature of constitution—The constitution is the fundamental and organic law of the state. It underlies and sustains the social structure—furnishes the frame of government.[66] It is designed to provide a complete and harmonious scheme of state government.[67] It is said not to be a creative, but a restrictive instrument.[68] A constitution is but a higher form of statutory law.[69] It is a creature of the people—an instrument of their convenience. It is the work of the people acting in their original sovereign capacity. By it they organize the government and determine the powers and duties of the different departments, officers, and agencies. In framing and adopting it they exercise inherent political power, which includes the whole of government.[70]

[66] State v. Sutton, 63-147, 149, 150, 65+262; Weir v. St. P. etc. Ry., 18-155(139, 146).

[67] State v. Stearns, 72-200, 211, 75+210.

[68] Ramsey County v. Heenan, 2-330(281); Roos v. State, 6-428(291).

[69] Willis v. Mabon, 48-140, 150, 50+1110.

[70] McConaughy v. Secretary of State, 106-392, 414, 119+408.

1569. People source of power—The people, that is, the electors, are the paramount source of political power.[71]

1570. Constitutional conventions—A constitutional convention is the highest legislative assembly recognized by law, with full control of all its proceedings. It may provide for the perpetuation of its records, either by printing or manuscript.[72] The convention which framed our constitution divided on the first day of the session, forming two antagonistic organizations. A joint committee of each reported a draft which was adopted by both organizations.[73] The debates of a convention may be resorted to in aid of construction.[74]

AMENDMENT OF CONSTITUTION

1571. In general—In making provision for amendment it was designed to provide for growth and progress, as well as stability. A government cannot be expected to be permanent unless it guarantees progress as well as order, and it cannot really secure order unless it promotes progress. Provisions for amendment are in the nature of safety valves. They should not be so adjusted as to discharge their function too easily, lest they become the ordinary escape pipes of party passion. On the other hand they should not discharge with such difficulty that the force needed to induce action is sufficient to explode the machine. In making provision for amendment the people deliberately placed restrictions upon their own freedom of political action.[75]

1572. Extent permissible—The constitution may be amended by the methods prescribed therein in any manner not subversive of a republican form of government.[76]

1573. Submission to people—It is indispensable that an amendment be submitted to the people. Neither the form or manner of submission is prescribed by the constitution. The constitution does not require the ballot to state the nature of the amendment.[77] An act proposing an amendment need not have a title. It may be in the form of a joint resolution. If it has a title the title may be referred to in aid of construction.[78] Since the amendment of 1898 the submission must be at a general election,[79] and a majority of all the electors voting at such election, and not merely of those voting on the amendment, is essential to the adoption of an amendment.[80] The courts have authority to determine whether an amendment has been legally submitted to and adopted. Whether the constitution shall be amended is a political question. Whether it has been legally amended is a judicial question. The statement and certificate of the state canvassing board and the proclamation of the governor that a proposed amendment has been adopted is not conclusive upon the courts. The statutory procedure for contesting the declared result of a popular vote on an amendment is adequate. A contest of this character is not in a strict legal sense an adversary proceeding. It is more in the nature of an investigation for the purpose of discovering the truth, in which no one individual has any direct personal interest antagonistic to the general public. It must be conducted in the

[71] State v. Dist. Ct., 87–146, 150, 91+300; McConaughy v. Secretary of State, 106–392, 414, 119+408.

[72] Goodrich v. Moore, 2–61(49).

[73] Taylor v. Taylor, 10–107(81, 99).

[74] See § 1585.

[75] McConaughy v. Secretary of State, 106–392, 416, 119+408.

[76] Hopkins v. Duluth, 81–189, 83+536; State v. Dist. Ct., 87–146, 91+300.

[77] State v. Stearns, 72–200, 218, 75+210.

[78] Julius v. Callahan, 63–154, 65+267; State v. O'Connor, 81–79, 83+498.

[79] See R. L. 1905 § 24; State v. Kiewel, 86–136, 138, 90+160.

[80] State v. Stearns, 72–200, 218, 75+210; State v. Hugo, 84–81, 84, 86+784. See Dayton v. St. Paul, 22–400 (overruled by amendment).

manner required by the statute, and an orderly proceeding requires that the general rules regulating the production of evidence shall be observed. But it is not necessary or desirable that every technical rule of evidence shall be observed with extreme nicety, nor should the result, in a matter of such public importance, be determined by a nice balancing of presumptions and probabilities. The certificate of the canvassing board is conclusive in collateral proceedings, and in a direct proceeding it can only be overcome by clear and strong evidence. The burden of proof is on the contestant. A partial recount has been held an insufficient basis for declaring an amendment not adopted.[81]

1574. When takes effect—It is not the action of the legislature in proposing an amendment, but the action of the people in adopting it, that gives it effect as part of the organic law of the state.[82] An amendment does not take effect at least until the official canvass of the vote. Whether it takes effect before the proclamation of the result by the governor is undetermined.[83]

1575. Mistakes—When there is a difference between the enrolled bill proposing the amendment, and the copy thereof published for election purposes, it is an unsettled question which controls.[84]

CONSTRUCTION OF CONSTITUTION

1576. In general—The fundamental aim in construing the constitution is to ascertain and give effect to the intent of the people in adopting it, as expressed in the language used.[85] If the language used is unambiguous it must be taken as it reads.[86] Words must be given their ordinary meaning.[87] Words which have a technical and definite meaning must be taken in the sense in which they were understood at the time when they were introduced into the constitution.[88] In the main the rules for the construction of statutes and of constitutions are the same.[89] But a constitution may be more liberally construed than a statute.[90] The constitution is to be construed as a whole and so as to harmonize its various parts.[91] The maxim, noscitur a sociis, is applicable to constitutional construction,[92] and so is the argument ab inconvenienti.[93] A construction which is in accord with the reason and spirit of a constitutional provision may be adopted, though it is contrary to the literal meaning of the language used.[94] The spirit of the times when the constitution was adopted may be considered.[95] If a provision is merely affirmative of pre-existing law it is to be construed in an historical sense.[96] A constitution is designed to meet future

[81] McConaughy v. Secretary of State, 106–392, 119+408.

[82] Julius v. Callahan, 63–154, 65+267.

[83] Duluth v. Duluth St. Ry., 60–178, 62+267.

[84] State v. Twin City T. Co., 104–270, 116+835.

[85] Davis v. Hugo, 81–220, 222, 83+984; State v. Twin City T. Co., 104–270, 116+835.

[86] State v. Sutton, 63–147, 65+262; Davis v. Hugo, 81–220, 83+984; Lindberg v. Johnson, 93–267, 101+74; Minn. etc. Ry. v. Sibley, 2–13(1); Cooke v. Iverson, 108–388, 122+251.

[87] Minn. etc. Ry. v. Sibley, 2–13(1); Sanborn v. Rice County, 9–273(258); Brisbin v. Cleary, 26–107, 1+825; Rippe v. Becker, 56–100, 113, 57+331. See Taylor v. Taylor, 10–107(81).

[88] Lauritsen v. Seward, 99–313, 323, 109+404.

[89] Taylor v. Taylor, 10–107(81, 93); State v. Twin City T. Co., 104–270, 285, 116+835. See Ramsey County v. Heenan, 2–330 (281).

[90] State v. Megaarden, 85–41, 46, 88+412.

[91] State v. Stearns, 72–200, 211, 75+210; State v. Twin City T. Co., 104–270, 116+835.

[92] Dike v. State, 38–366, 38+95.

[93] Taylor v. Taylor, 10–107(81); State v. Benedict, 15–198(153); Davis v. Hugo, 81–220, 223, 83+984. See Ames v. Lake Superior, etc. Ry., 21–241, 265.

[94] Taylor v. Taylor, 10–107(81); Stinson v. Smith, 8–366(326).

[95] State v. Bishop Seabury Mission, 90–92, 97, 95+882.

[96] State v. Nelson, 74–409, 77+223.

as well as existing conditions, and it must be given a broad and liberal construction so as to admit of its adaptation to changing conditions.[97]

1577. Relation of parts—A provision with reference to a particular subject-matter is, within its own sphere, so far as that subject-matter is concerned, paramount and supreme. One part of the constitution is of equal authority, per se, with any other part.[98]

1578. Prospective—Constitutional provisions are to be construed prospectively, if the language used is reasonably susceptible of such construction.[99]

1579. Practical construction—A practical construction of the constitution, which has been adopted and followed by the legislature and people for many years, is entitled to receive great consideration from the courts.[1]

1580. Mandatory and directory provisions—All provisions of the constitution are to be construed as mandatory unless clearly directory.[2]

1581. Restrictive provisions—Provisions of the constitution restrictive of rights formerly enjoyed are to be strictly construed.[3]

1582. Implied grants of power—Where a constitution gives a general power or enjoins a duty, it also gives by implication every particular power necessary for the exercise of the one or the performance of the other.[4]

1583. Amendments—In construing an amendment it is proper to consider the evils it was designed to remedy and the history of relevant legislation.[5] The title of the act proposing the amendment may be considered,[6] and so may its legislative history.[7]

1584. Self-executing—If the nature and extent of the right conferred and of the liability imposed is fixed by the provision itself, so that they can be determined by the examination and construction of its own terms, and there is no language used indicating that the subject is referred to the legislature for action, the provision should be construed as self-executing.[8] The following provisions of the constitution have been held self-executing: section 3 of article 10, relating to the liability of stockholders;[9] the provisio in section 12 of article 1, relating to exemptions;[10] and the exemption from taxation of seminaries of learning in section 3 of article 9.[11] The home rule amendment is not self-executing.[12]

1585. Debates of constitutional convention—The debates of the constitutional convention may be resorted to in aid of construction.[13]

[97] Elwell v. Comstock, 99-261, 109+113, 698.

[98] State v. Winona, etc. Ry., 21-315, 318.

[99] Brown v. Hughes, 89-150, 94+438; State v. Clark, 23-422.

[1] Carson v. Smith, 5-78(58); State v. Benedict, 15-198(153); Bayard v. Klinge, 16-249(221, 231); Faribault v. Misener, 20-396(347); Ames v. Lake Superior, etc. Ry., 21-241, 289; State v. Cronkhite, 28-197, 9+681; Burke v. St. P. etc. Ry., 35-172, 174, 28+190; Willis v. Mabon, 48-140, 50+1110; State v. Luther, 56-156, 57+464; State v. Moffett, 64-292, 67+68; State v. Stearns, 72-200, 218, 75+210; Traverse County v. St. P. etc. Ry., 73-417, 76+217; State v. N. P. Ry., 95-43, 103+731; State v. Evans, 99-220, 108+958; State v. Twin City T. Co., 104-270, 116+835. See § 8952.

[2] Sjoberg v. Security, etc. Assn., 73-203, 212, 75+1116; State v. Sutton, 63-147, 149, 65+262; Lincoln v. Haugan, 45-451, 48+196; Ramsey County v. Heenan, 2-330 (281). See Hanna v. Russell, 12-80(43); Thomson v. Bickford, 19-17(1).

[3] Roos v. State, 6-428(291, 303).

[4] State v. Peterson, 50-239, 52+655.

[5] State v. O'Connor, 81-79, 83+498; State v. Brown, 97-402, 106+477; State v. Twin City T. Co., 104-270, 116+835.

[6] State v. O'Connor, 81-79, 83+498.

[7] Minn. etc. Ry. v. Sibley, 2-13(1).

[8] Willis v. Mabon, 48-140, 50+1110.

[9] Id.; McKusick v. Seymour, 48-158, 50+1114.

[10] Nickerson v. Crawford, 74-366, 77+292; Brown v. Hughes, 89-150, 94+438.

[11] State v. Bishop Seabury Mission, 90-92, 95+882.

[12] State v. Kiewel, 86-136, 90+160.

[13] Minn. etc. Ry. v. Sibley, 2-13(1); Crowell v. Lambert, 9-283(267); State v. Scott, 105-513, 516, 117+845, 1044. Contra, Taylor v. Taylor, 10-107(81).

1586. Subordination to federal constitution—The state constitution must be construed subject to the supremacy of the federal constitution.[14]

THREE DEPARTMENTS OF GOVERNMENT

1587. In general—The constitution divides the powers of the government into three departments, the legislative, executive, and judicial.[15] This division is conventional rather than natural. The constitution does not attempt to make an abstract or exhaustive distribution of governmental functions. It merely assigns such as are of recognized character to the departments which are created by it for their exercise. Administrative or ministerial functions are not assigned to any particular department. If a power or duty is not essentially executive, legislative, or judicial, the legislature may place it where it wishes.[16] The importance of this separation of powers has frequently been insisted upon,[17] but the modern tendency is not to enforce it in a doctrinaire spirit.[18] Each department is entirely independent of the other. It is the duty of each to abstain from encroaching upon the other and to oppose encroachments by the others.[19] It is the function of the legislative department to make the laws, of the executive to execute them, and of the judiciary to construe and apply them.[20] The power and duty to make, declare, and execute the will of the people is delegated to different agencies, all of which, however, exercise what in the broad and general sense is called "political power." Neither department can legally exercise the powers which in the constitutional distribution are granted to any of the others. A grant to one is a denial to the others.[21] The judicial power of the state is coextensive with the power of legislation and resides in the courts exclusively.[22] This constitutional provision cannot be waived.[23]

1588. What are political powers—The word "political" is sometimes used to describe a class of powers which are not judicial, but may be either legislative or executive. Many questions arise which are clearly political, and not of judicial cognizance. Thus the recognition of a foreign sovereign or government, the adjustment of boundaries, the existence of a state of war or belligerency, and whether a proposed new constitution has been adopted by a state, are clearly political questions. The questions which arise within the sphere of state action are less easily differentiated. When the governor vetoes a bill, he exercises a political power; but, when he removes a subordinate officer, he is said to exercise an administrative power. What is generally meant, when it is said that a question is political, and not judicial, is that it is a matter which is to be exercised by the people in their primary political capacity, or that it has been specifically delegated to some other department or particular officer of the government, with discretionary power to act.[24]

1589. What constitutes a judicial question—The exercise of judicial functions is to determine what the law is, and what the legal rights and obligations

[14] Smith v. Webb, 11–500(378, 383).

[15] Const. art. 3 § 1. See, for an extended discussion of the general subject, State v. Brill, 100–499, 111+294, 639.

[16] State v. Bates, 96–110, 104+709. See State v. Stearns, 72–200, 214, 75+210.

[17] State v. Board of Control, 85–165, 168, 88+533; Rhodes v. Walsh, 55–542, 547, 57+212; McGee v. Hennepin County, 84–472, 476, 88+6; State v. Brill, 100–499, 111+294, 639.

[18] State v. Crosby, 92–176, 180, 99+636; State v. Bates, 96–110, 104+709.

[19] In re Application of Senate, 10–78 (56); Rice v. Austin, 19–103(74).

[20] State v. Chi. etc. Ry., 38–281, 299, 37+782; State v. Young, 29–474, 551, 9+737; McGee v. Hennepin County, 84–472, 477, 88+6.

[21] McConaughy v. Secretary of State, 106–392, 414, 119+408.

[22] Agin v. Heyward, 6–110(53).

[23] St. Paul etc. Ry. v. Brown, 24–517, 574; State v. Dike, 20–363(314).

[24] McConaughy v. Secretary of State, 106–392, 415, 119+408.

of parties are, with respect to a matter in controversy. The exercise of judicial functions may involve the performance of legislative or administrative duties, and the performance of administrative duties may, in a measure, involve the exercise of judicial functions.[25] That a duty cast on a judicial or administrative officer involves the ascertainment of facts does not alone make the duty a judicial one.[26] The precise line of cleavage between judicial and ministerial functions cannot be definitely located. There are many duties which may be either the one or the other, depending upon the officer or body performing them and the effect to be given to the action or determination of such officer or body.[27] The propriety of the exercise of the right of eminent domain is a political or legislative and not a judicial question.[28]

1590. Held not a delegation of judicial power—A law authorizing trial by referees;[29] a law requiring county attorneys to examine into the financial condition of insurance companies and certify as to their compliance with the law;[30] a law authorizing clerks of court to enter judgment on default;[31] a law authorizing the state medical board to revoke certificates of physicians;[32] a law authorizing county commissioners to determine the amount of compensation for the publication of a financial statement;[33] a law imposing certain duties on county auditors as to refundments on void tax sales;[34] a law investing county commissioners with certain powers in the removal of county seats;[35] a law establishing the Torrens system and investing registrars of title with certain powers;[36] a law authorizing county commissioners to examine and accept a bridge;[37] a law regulating the licensing of dentists.[38]

1591. Held a delegation of judicial power—A law authorizing county commissioners to audit, adjust, and fix the amount of certain claims against a school district.[39]

1592. Imposing non-judicial duties on judiciary—Neither the legislative or executive branches of the government can constitutionally assign to the judiciary any duties but such as are properly judicial and to be performed in a judicial manner.[40] But a duty may involve the exercise of judicial and legislative or administrative functions so connected that they cannot well be separated. In such cases the duty may be imposed on the judiciary. It is a question of legislative discretion. The courts will presume that the legislature intended that the duty should be discharged in a judicial manner.[41] The following laws have been sustained: a law authorizing the district courts to establish drainage ditches;[42] to establish roads;[43] to determine whether assessing officers have correctly determined the facts on which assessments for local

[25] State v. Dunn, 86–301, 304, 90+772; Minn.-S. Co. v. Iverson, 91–30, 34, 97+454; Rockwell v. Fillmore County, 47–219, 49+690; Home Ins. Co. v. Flint, 13–244(228); State v. Iverson, 92–355, 362, 100+91. See, as to the nature of a judicial inquiry, Prentis v. Atlantic Coast Line, 211 U. S. 210.

[26] Home Ins. Co. v. Flint, 13–244(228); State v. Ueland, 30–29, 14+58; State v. Dressel, 38–90, 35+580.

[27] Foreman v. Hennepin County, 64–371, 67+207.

[28] State v. Rapp, 39–65, 67, 38+926. See § 3014.

[29] Carson v. Smith, 5–78(58).

[30] Home Ins. Co. v. Flint, 13–244(228).

[31] Skillman v. Greenwood, 15–102(77).

[32] State v. State Board, 34–387, 26+123.

[33] Fuller v. Morrison County, 36–309, 30+824.

[34] State v. Dressel, 38–90, 35+580.

[35] Todd v. Rustad, 43–500, 46+73.

[36] State v. Westfall, 85–437, 89+175.

[37] Guilder v. Dayton, 22–366.

[38] State v. Crombie, 107–166, 119+658.

[39] Sanborn v. Rice County, 9–273(258).

[40] In re Application of Senate, 10–78(56); State v. Young, 29–474, 9+737; State v. Simons, 32–540, 21+750; Foreman v. Hennepin County, 64–371, 67+207; State v. Bates, 96–110, 104+709; State v. Brill, 100–499, 111+294, 639; Brenke v. Belle Plain, 105–84, 117+157.

[41] Foreman v. Hennepin County, 64–371, 67+207; McGee v. Hennepin County, 84–472, 88+6; State v. Crosby, 92–176, 180, 99+636; State v. Bates, 96–110 104+709.

[42] State v. Crosby, 92–176, 99+636.

[43] State v. Macdonald, 26–445, 4+1107.

improvements are made;[44] to determine whether the public interests will be advanced by a proposed local improvement requiring an exercise of eminent domain;[45] to appoint examiners of title under the Torrens law;[46] to fix the salaries of county attorneys;[47] and to approve the bonds of applicants for liquor licenses.[48] The legislature cannot require the supreme court to give its opinion on any subject;[49] or authorize the district courts to organize and incorporate villages;[50] or require judges of the district court to appoint public officers not connected with the judicial department of the government.[51]

1593. Control of executive officers by judiciary—The courts cannot control the official action of the governor or other state executive officers in matters involving the exercise of discretion, by mandamus, injunction, or otherwise; but they may do so in matters involving the exercise of merely ministerial duties.[52] Every officer under a constitutional government must act according to law and subject to its restrictions, and every departure therefrom or disregard thereof must subject him to the restraining and controlling power of the people, acting through the agency of the judiciary; for it must be remembered that the people act through the courts, as well as through the executive or the legislature. One department is just as representative as the other, and the judiciary is the department which is charged with the special duty of determining the limitations which the law places upon all official action. The recognition of this principle, unknown except in Great Britain and America, is necessary, to the end that the government may be one of laws and not of men.[53]

1594. Control of legislature by judiciary—The courts have no control over a contest in a legislative election.[54]

1595. Assumption of legislative power by courts—A court cannot extend the period of redemption from proceedings to foreclose a mechanic's lien. It cannot relieve against statutory forfeitures,[55] or extend the time to appeal.[56]

1596. Assumption of judicial power by legislature—The legislature is not authorized to instruct courts as to how they shall construe statutes in case of doubt;[57] or to grant a new trial.[58] It has been held not an assumption of judicial power for the legislature to determine the propriety of local public improvements and who shall pay for them;[59] to ratify the acts of a state agent so as to affect a judgment;[60] to repeal a franchise;[61] or to make certain orders issued and received in payment for the construction of highways a legal indebtedness against counties.[62] The legislature cannot determine a private controversy.[63]

[44] State v. Ensign, 55–278, 56+1006.
[45] McGee v. Hennepin County, 84–472, 88+6.
[46] State v. Westfall, 85–437, 89+175.
[47] Rockwell v. Fillmore County, 47–219, 49+690.
[48] State v. Bates, 96–110, 104+709.
[49] In re Application of Senate, 10–78 (56); Rice v. Austin, 19–103(74); State v. Dike, 20–363(314).
[50] State v. Simons, 32–540, 21+750.
[51] State v. Brill, 100–499, 111+294, 639.
[52] Cooke v. Iverson, 108–388, 122+251. See State v. Berry, 3–190; Chamberlain v. Sibley, 4–309(228); Rice v. Austin, 19–103(74); State v. Dike, 20–363(314); St. Paul etc. Ry. v. Brown, 24–517; Western Ry. v. De Graff, 27–1, 6+341; State v. Whitcomb, 28–50, 8+902; Secombe v. Kittelson, 29–555, 12+519; State v. Harrison, 34–526, 26+729; State v. Fidelity etc. Co., 39–538, 41+108; State v. Braden, 40–174, 41+817; Hayne v. Met. T. Co., 67–245, 69+916; Armstrong v. State Public School, 88–382, 93+3; Berman v. Minn. S. A. Soc., 93–125, 100+732.
[53] McConaughy v. Secretary of State, 106–392, 416, 119+408; Cooke v. Iverson, 108–388, 122+251.
[54] State v. Peers, 33–81, 21+860.
[55] State v. Kerr, 51–417, 53+719.
[56] See § 318.
[57] Meyer v. Berlandi, 39–438, 446, 40+513.
[58] State v. Flint, 61–539, 63+1113.
[59] Guilder v. Dayton, 22–366.
[60] State of Wis. v. Torinus, 28–175, 9+725.
[61] Myrick v. Brawley, 33–377, 23+549.
[62] State v. Gunn, 92–436, 442, 100+97.
[63] Sanborn v. Rice County, 9–273(258).

1597. Delegation of legislative power—The constitution vests all legislative power in the legislature and there it must remain. The legislature cannot abdicate. It cannot surrender or delegate its legislative power. No one but the legislature can determine what the law shall be.[64] It is often difficult to discriminate, in particular cases, between what is properly legislative, and what is or may be executive or administrative, duty. The authority that makes the laws has large discretion in determining the means through which they shall be executed; and the performance of many duties, which they may provide for by law, they may refer to some ministerial officer, specially named for the duty. It is not every grant of powers, involving the exercise of discretion and judgment, to executive or administrative officers, that amounts to a delegation of legislative power. The difference between the departments undoubtedly is that the legislative makes, the executive executes, and the judiciary construes, the law; but the maker of the law may commit something to the discretion of the other departments, and the precise boundary of this power is a subject of delicate and difficult inquiry, into which a court will not unnecessarily enter. The principle is repeatedly recognized by all courts that the legislature may authorize others to do things which it might properly, but cannot conveniently or advantageously, do itself. The difference between the power to say what the law shall be, and the power to adopt rules and regulations, or to investigate and determine the facts, in order to carry into effect a law already passed, is apparent. The true distinction is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and the conferring an authority or discretion to be exercised under and in pursuance of the law.[65] The legislature is the sole lawmaking power.[66] It is an exception to the general rule that the legislature may delegate legislative power to municipal corporations.[67]

1598. Held an unauthorized delegation of legislative power—A law to take effect if the voters of the whole state so decide;[68] a law authorizing the insurance commissioner to prepare a standard form of insurance policy;[69] a law authorizing the district court to determine whether villages should be incorporated;[70] a law authorizing certain judges to determine which of two sections of a law should take effect and be the law;[71] a law authorizing the railroad and warehouse commission to allow or disallow, in its discretion, railway companies to increase their capital stock;[72] a law providing for the separation of agricultural lands from municipalities.[73]

1599. Held not a delegation of legislative power—A law authorizing the railroad and warehouse commission to approve the bonds of commission merchants dealing in farm products;[74] a law authorizing citizens to take the initiative in the organization of villages;[75] a law creating the state capitol commission;[76] a law to take effect upon an affirmative vote by a city council;[77] a law

[64] State v. Young, 29–474, 551, 9+737; State v. Simons, 32–540, 543, 21+750; State v. Chi. etc. Ry., 38–281, 298, 37+782; State v. Sullivan, 67–379, 384, 69+1094; State v. Board Park Comrs., 100–150, 110+1121; State v. G. N. Ry., 100–445, 111+289; Brenke v. Belle Plain, 105–84, 117+157; State v. Robinson, 101–277, 285, 112+269. See 21 Harv. L. Rev. 205.

[65] State v. Chi. etc. Ry., 38–281, 299, 37+782.

[66] Blake v. Winona etc. Ry., 19–418(362, 372).

[67] See § 6692.

[68] State v. Copeland, 66–315, 317, 69+27.

[69] Anderson v. Manchester etc. Co., 59–182, 60+1095, 63+241.

[70] State v. Simons, 32–540, 21+750.

[71] State v. Young, 29–474, 9+737.

[72] State v. G. N. Ry., 100–445, 111+289. See 21 Harv. L. Rev. 205.

[73] Brenke v. Belle Plain, 105–84, 117+157. See Hunter v. Tracy, 104–378, 116+922.

[74] State v. Wagener, 77–483, 80+633, 778.

[75] State v. Minnetonka, 57–526, 59+972; St. Paul G. Co. v. Sandstone, 73–225, 75+1050.

[76] Fleckten v. Lamberton, 69–187, 72+65.

[77] State v. Sullivan, 67–379, 69+1094.

providing that the courts may determine the manner in which notice may be given to common carriers proceeded against by the railroad and warehouse commission;[78] a law providing that the court or judge allowing a writ of mandamus shall direct the manner of serving the same;[79] a law providing for the dissolution of independent school districts upon a popular vote;[80] a law providing that steam boilers may be exempted from state inspection upon a certificate of an inspector of an insurance company;[81] a law authorizing the railroad and warehouse commission to determine what are reasonable railroad rates;[82] a law requiring carriers to furnish their agents with certificates of authority to sell tickets;[83] a law authorizing a voting machine commission to determine whether a voting machine would permit an elector to exercise his right of franchise in accordance with the constitutional guaranty;[84] a law providing for the separation of agricultural lands from the corporate limits of cities;[85] a law authorizing the Secretary of War to allow or approve bridges across navigable rivers;[86] a law regulating the licensing of dentists.[87]

1600. Administrative boards—While the legislature cannot delegate legislative power it may delegate legislative functions which are merely administrative or executive. It may clothe officials, commissioners, or boards with administrative powers. The legislature has a large discretion in determining the means through which its laws shall be administered. Administrative officers may be clothed with power to exercise a discretion under a law, but not a discretion as to what the law shall be.[88]

RIGHT TO LOCAL GOVERNMENT

1601. Right to local self-government—The interests of a particular locality can be best administered by its own inhabitants, or the legally selected persons of their own choice, and the right of local self-government is one of the distinctive features of our republican system.[89]

EXTENT OF LEGISLATIVE POWER

1602. In general—Except as limited by the state and federal constitutions, the legislative power is practically absolute. Within their limits the legislature is intrusted with the general authority to make laws at discretion,[90] and has as

[78] State v. Adams Ex. Co., 66–271, 68+1085.
[79] Id.
[80] State v. Cooley, 65–406, 68+66.
[81] State v. McMahon, 65–453, 68+77.
[82] State v. Chi. etc. Ry., 38–281, 37+782.
[83] State v. Corbett, 57–345, 59+317.
[84] Elwell v. Comstock, 99–261, 109+113, 698.
[85] Hunter v. Tracy, 104–378, 116+922; Brenke v. Belle Plain, 105–84, 117+157.
[86] Minn. C. & P. Co. v. Pratt, 101–197, 226, 112+395.
[87] State v. Crombie, 107–166, 119+658.
[88] State v. Chi. etc. Ry., 38–281, 299, 37+782; State v. Wagener, 77–483, 501, 80+633, 778; Fleckten v. Lamberton, 69–187, 72+65; State v. G. N. Ry., 100–445, 111+289. See 21 Harv. L. Rev. 205.
[89] St. Paul etc. Ry. v. Robinson, 40–360, 367, 42+79; Harrington v Plainview, 27–224, 232, 6+777; Cooke v. Iverson, 108–388, 122+251. See 13 Harv. L. Rev. 441, 570, 638; 14 Id. 20, 116; 15 Id. 468.
[90] Stone v. Bassett, 4–298(215, 225); Roos v. State, 6–428(291, 296); Burwell v. Tullis, 12–572(486, 496); Langford v. Ramsey County, 16–375(333, 338); Jewell v. Weed, 18–272(247, 252); Davidson v. Ramsey County, 18–482(432, 434); Blake v. Winona etc. Ry., 19–418(362, 372); State v. Winona etc. Ry., 19–434(377); Barton v. Drake, 21–299, 303; First Nat. Bank v. Shepard, 22–196; State v. Lautenschlager, 22–514, 524; Curryer v. Merrill, 25–1; State v. Register of Deeds, 26–521, 6+337; Osborne v. Knife Falls B. Corp., 32–412, 420, 21+704; St. Paul v. Umstetter, 37–15, 33+115; State v. Corbett, 57–345, 350, 59+317; Lommen v. Mpls. G. Co., 65–196, 208, 68+53; State v. Rogers, 97–322, 106+345; State v. Evans, 99–220, 228, 108+958.

extensive powers as the parliament of Great Britain.[91] Under our system of government, as well as that of Great Britain, the residuum of power rests with the legislature as the representative of the people or nation.[92]

POLICE POWER

1603. Nature—The police power is the power of the state to impose those restraints upon private rights which are necessary for the general welfare.[93] It is an attribute of sovereignty and exists without reservation in the constitution.[94] The limits of the police power are incapable of exact definition, but speaking generally, the power extends to all matters where the general public welfare, morals, and health of the community, are involved. The property, rights, and liberty of the citizen are to be enjoyed in subordination to the general public welfare. Rights of property, like all other social and conventional rights, are subject to such reasonable limitations in their enjoyment as shall prevent them from being injurious, and to such reasonable restraints and regulations, established by law, as the legislature, under the governing and controlling power vested in it by the constitution, may think necessary and expedient.[95] It is not limited to matters affecting the public health, morals, peace, and comfort, but extends to all matters involving the general welfare.[96] It does not authorize the state to engage in business. It authorizes the enforcement of the maxim, sic utere tuo alienum non laedas.[97] All personal and property rights are subject to it,[98] and all contracts are made subject to its future exercise.[99] The modern tendency is to extend rather than to restrict the power.[1]

1604. Limitations—The limits of the police power are undefined, and it is not thought desirable to attempt to define them absolutely.[2] While the power is extensive it is not without limits.[3] To be sustained under the police power a law must be a police regulation in fact;[4] it must not arbitrarily or unreasonably interfere with personal or property rights;[5] it must have for its object the public welfare and not merely private interests;[6] and it must have some real and substantial relation to its ostensible object and have some tendency to accomplish it.[7] It has been held that restrictions placed on a lawful business or occupation under the police power must be necessary to promote the public welfare, or, in other words, to prevent the infliction of a public injury.[8] The legislature may regulate, within reasonable limits, a legitimate business or pro-

[91] Roos v. State, 6-428(291, 296).
[92] State v. St. Paul, 25-106, 109.
[93] Winona etc. Ry. v. Waldron, 11-515 (392, 409); Rippe v. Becker, 56-100, 112, 57+331; State v. Wagener, 77-483, 494, 80+633, 778; State v. Boehm, 92-374, 378, 45. See, for a definition of police regulations, State v. Lee, 29-445, 451, 13+913.
[94] N. W. etc. Co. v. Minneapolis 81-140, 83+527, 86+69.
[95] State v. St. P. etc. Ry., 98-380, 108+261.
[96] State v. Wagener, 77-483, 495, 80+633, 778; State v. Boehm, 92-374, 378, 100+95. See Joyce v. G. N. Ry., 100-225, 110+975.
[97] Rippe v. Becker, 56-100, 57+331.
[98] Butler v. Chambers, 36-69, 71, 30+308; State v. St. P. etc. Ry., 98-380, 389, 108+261.
[99] State v. Smith, 58-35, 38, 59+545.
[1] State v. St. P. etc. Ry., 98-380, 392, 108+261.
[2] Butler v. Chambers, 36-69, 71, 30+308; State v. Wagener, 77-483, 495, 80+633, 778.
[3] State v. Chi. etc. Ry., 68-381, 385, 71+400; Butler v. Chambers, 36-69, 71, 30+308.
[4] State v. Chi. etc. Ry., 68-381, 71+400; State v. Donaldson, 41-74, 42+781.
[5] N. W. etc. Co. v. Minneapolis, 81-140, 83+527, 86+69; State v. Donaldson, 41-74, 83, 42+781; State v. Chi. etc. Ry., 68-381, 385, 71+400; Evison v. Chi. etc. Ry., 45-370, 48+6.
[6] Lien v. Norman County, 80-58, 63, 82+1094.
[7] State v. Corbett, 57-345, 59+317; State v. Mrozinski, 59-465, 467, 61+560; State v. Chi. etc. Ry., 68-381, 385, 71+400; State v. Donaldson, 41-74, 42+781; Rippe v. Becker, 56-100, 111, 57+331.
[8] State v. Chi. etc. Ry., 68-381, 71+400; State v. Wagener, 77-483, 494, 80+633, 778.

fession, but it cannot prohibit it altogether.[9] The police power is not limited by the fourteenth amendment of the federal constitution.[10]

1605. Discretion of legislature—Power of courts—It is largely a matter of discretion with the legislature to determine the subjects of police regulation, and the mode and extent of such regulation. It is not for the courts to determine the wisdom or expediency of police legislation.[11] But the courts may declare a law invalid if it is not within the police power, or is an unreasonable or arbitrary exercise of that power.[12] It is an open question whether courts may receive extrinsic evidence to aid them in determining whether a law is within the police power.[13]

1606. Cannot be surrendered—The police power cannot be surrendered by the state or by a municipality to which it is delegated. A contract by a city by which the police power is surrendered is ultra vires and void.[14]

1607. Delegation—The police power, like all other legislative powers, may be delegated to municipalities.[15] It seems that such delegation may be implied.[16]

1608. Fees and licenses—The legislature may make any business requiring police regulation, pay the expense of regulating and controlling it, and this may be done by exacting license or inspection fees. The amount of the fees is, within reasonable limits, for the legislature.[17]

1609. Seizure and destruction of property—The police power authorizes the seizure and destruction of property which is either the subject of crime or the means of perpetrating it.[18] Game unlawfully possessed may be confiscated.[19]

1610. Held within police power—A law regulating the observance of Sunday;[20] a law declaring certain weeds nuisances and providing for their destruction;[21] a law regulating the practice of plumbing;[22] a law authorizing the search, seizure, and destruction of property which is the subject of crime, or the means of perpetrating it, as for example, intoxicating liquors;[23] a law regulating the sale of cottolene and other lard substitutes;[24] a law forbidding the sale of cream containing less than twenty per cent. of fat;[25] a law for the drainage of wet lands;[26] a law regulating freight rates;[27] a law regulating the

[9] Minn. S. P. Assn. v. State Board, 103-21. 114+245; St. Paul v. Traeger, 25-248; State v. Wagener, 69-206, 72+67.

[10] See § 1701.

[11] Butler v. Chambers, 36-69, 30+308; St. Paul v. Colter, 12-41(16); State v. Aslesen, 50-5, 52+220; Willis v. Standard Oil Co., 50-290, 52+652; State v. Corbett, 57-345, 349, 59+317; State v. Smith, 58-35, 37, 59+545; State v. Rodman, 58-393, 402, 59+1098; State v. Mrozinski, 59-465, 467, 61+560; State v. Chapel, 64-130, 132, 66+205; State v. Sherod, 80-446, 450, 83+417; State v. Chi. etc. Ry., 68-381, 385, 71+400; State v. Wagener, 77-483, 495, 80+633, 778; State v. Zimmerman, 86-353, 90+783; St. Paul v. Schleh, 101-425, 112+532.

[12] State v. Donaldson, 41-74, 83, 42+781; N. W. etc. Co. v. Minneapolis, 81-140, 83+527, 86+69; State v. Chi. etc. Ry., 68-381, 71+400. See §§ 1610, 1611.

[13] State v. Donaldson, 41-74, 82, 42+781. See 17 Harv. L. Rev. 269.

[14] N. W. etc. Co. v. Minneapolis, 81-140, 83+527, 86+69; Gillam v. Sioux City etc. Ry., 26-268, 3+353; State v. St. P. etc. Ry., 98-380, 108+261; State v. Board Park Comrs., 100-150, 110+1121; State v. G. N. Ry., 100-445, 475, 111+289; State v. Robinson, 101-277, 285, 112+269.

[15] St. Paul v. Troyer, 3-291(200); State v. Ludwig, 21-202; St. Paul v. Colter, 12-41(16).

[16] See N. W. etc. Co. v Minneapolis, 81-140, 160, 83+527, 86+69; Red Wing v. Chi. etc. Ry., 72-240, 75+223.

[17] Willis v. Standard Oil Co., 50-290, 52+652.

[18] State v. Stoffels, 89-205, 209, 94+675.

[19] Selkirk v. Stephens, 72-335, 75+386.

[20] State v. Weiss, 97-125, 105+1127; State v. Justus, 91-447, 98+325.

[21] State v. Boehm, 92-374, 100+95.

[22] State v. Justus, 90-474, 97+124.

[23] State v. Stoffels, 89-205, 94+675.

[24] State v. Hanson, 84-42, 86+768. See State v. Aslesen, 50-5, 52+220.

[25] State v. Crescent C. Co., 83-284, 86+107; State v. Tetu, 98-351, 107+953.

[26] Lien v. Norman County, 80-58, 82+1094.

[27] State v. Mpls. etc. Ry., 80-191, 83+60.

sale of baking powder;[28] a law regulating barbers;[29] a law regulating banking;[30] a law regulating commission merchants selling farm products;[31] a law regulating the weighing of grain in elevators;[32] a law forbidding the shipment of game out of the state and authorizing its seizure and confiscation;[33] a law regulating gift, fire, and bankrupt sales;[34] a law requiring railway companies to make track connections with other companies;[35] a law forbidding the sale of liquor to Indians;[36] a law for the location of boundaries between adjoining owners;[37] a law for the inspection of steam boilers;[38] a law forbidding the consignment for sale of elk, moose, deer, etc.;[39] a law forbidding the taking of fish otherwise than by angling with hook and line;[40] a law to protect motormen on street railways from cold;[41] a law forbidding the possession of certain game more than five days after the commencement of the closed season;[42] a law regulating the sale and redemption of transportation tickets;[43] a law requiring railway companies to stop passenger trains at county seats;[44] a law regulating the sale of imitation butter;[45] a law regulating the manufacture and sale of lard and lard substitutes;[46] a law for the inspection of illuminating oils;[47] a law regulating the sale of baking powder containing alum;[48] a law regulating employment agencies;[49] a law regulating the practice of dentistry;[50] a law regulating the practice of medicine;[51] a law regulating the practice of pharmacy and the sale of patent medicines;[52] a law regulating railroad rates;[53] a law forbidding the manufacture and sale of unhealthy or adulterated dairy products;[54] a law requiring railway companies to fence their right of way;[55] a law regulating the keeping of dogs;[56] a law relating to bastardy;[57] a law to establish a fund for an inebriate asylum out of license fees for the sale of intoxicating liquors;[58] a law regulating the sale of intoxicating liquors;[59] a law regulating freight and passenger rates;[60] a law imposing a penalty on railway companies for charging more than a maximum toll;[61] a law regulating butchers;[62] an ordinance requiring telephone poles to be placed underground;[63] a law forbidding any one to sell ruffed grouse;[64] a law regulating

[28] State v. Sherod, 80–446, 83+417.
[29] State v. Zeno, 79–80, 81+748.
[30] Seymour v. Bank of Minn., 79–211, 223, 81+1059.
[31] State v. Wagener, 77–483, 80+633, 778; State v. Edwards, 94–225, 102+697.
[32] Vega S. Co. v. Consolidated El. Co., 75–308, 77+973.
[33] Selkirk v. Stephens, 72–335, 75+286.
[34] State v. Schoenig, 72–528, 75+711.
[35] Jacobson v. Wis. etc. Ry., 71–519, 74+893; Id., 179 U. S. 287.
[36] State v. Wise, 70–99, 72+843.
[37] Davis v. St. Louis County, 65–310, 67+997.
[38] State v. McMahon, 65–453, 68+77.
[39] State v. Chapel, 64–130, 66+205.
[40] State v. Mrozinski, 59–465, 61+560.
[41] State v. Smith, 58–35, 59+545.
[42] State v. Rodman, 58–393, 59+1098.
[43] State v. Corbett, 57–345, 59+317; State v. Manford, 97–173, 106+907.
[44] State v. Gladson, 57–385, 59+487.
[45] State v. Horgan, 55–183, 56+688; State v. Hammond, 105–359, 117+606.
[46] State v. Aslesen, 50–5, 52+220. See State v. Hanson, 84–42, 86+768.
[47] Willis v. Standard Oil Co., 50–290, 52+652.
[48] Stolz v. Thomson, 44–271, 46+410. See State v. Sherod, 80–446, 83+417.
[49] Moore v. Minneapolis, 43–418, 45+719.
[50] State v. Vandersluis, 42–125, 43+789; State v. Crombie, 107–166, 119+658; Id. 107–171, 119+660.
[51] State v. Fleischer, 41–69, 42+696. See State v. State Board, 34–387, 26+123; State v. State Med. Ex. Board, 32–324, 20+238.
[52] State v. Donaldson, 41–74, 42+781.
[53] State v. Chi. etc. Ry., 38–281, 296, 37+782.
[54] Butler v. Chambers, 36–69, 30+308.
[55] State v. Dist. Ct., 42–247, 44+7; Emmons v. Mpls. etc. Ry., 35–503, 29+202; Gillam v. Sioux City etc. Ry., 26–268, 3+353; Winona etc. Ry. v. Waldron, 11–515(392).
[56] Faribault v. Wilson, 34–254, 25+449.
[57] State v. Becht, 23–1.
[58] State v. Cassidy, 22–312.
[59] State v. Ludwig, 21–202, 205.
[60] Blake v. Winona etc. Ry., 19–418(362).
[61] State v. Winona etc. Ry., 19–434(377).
[62] St. Paul v. Colter, 12–41(16).
[63] N. W. etc. Co. v. Minneapolis, 81–140, 83+527, 86+69.
[64] State v. Shattuck, 96–45, 104+719.

the business of pharmacy;[65] a law declaring it unlawful for two or more employers of labor to combine or confer together for the purpose of preventing any person from obtaining employment;[66] an ordinance regulating insurance within the fire limits of a city;[67] a law regulating insurance;[68] a regulation requiring school children to be vaccinated;[69] an ordinance regulating billiard and pool rooms;[70] an ordinance regulating draymen;[71] an ordinance regulating the emission of smoke from buildings;[72] a law requiring railway companies to construct and maintain safety devices at crossings;[73] a law regulating the increase of capital stock of railway companies;[74] a law forbidding the adulteration of linseed oil;[75] a law for the inspection of animals imported into the state;[76] a law establishing a hospital farm for inebriates;[77] a law providing for reciprocal demurrage;[78] a law providing for the abatement of premises and occupations menacing the public health.[79]

1611. Held not within police power—A law requiring railway and transportation companies to turn over to a storage company or public warehouseman all property which the consignee fails to call for or receive within twenty days after notice of its arrival;[80] a law establishing a state grain elevator at Duluth;[81] an ordinance requiring a railway company to keep a flagman at a crossing;[82] a law regulating the issue and redemption of trading stamps.[01]

VESTED RIGHTS

1612. Definition—The word "vested" is used to define an estate, either present or future, the title to which has become established in some person or persons and is no longer subject to any contingency, and when the phrase a "vested right" or a "vested interest" is used in other relations it may, with reasonable precision, be held to mean some right or interest in property that has become fixed or established and is no longer open to doubt or controversy.[83]

1613. Impairment unconstitutional—A law which impairs vested rights is unconstitutional as not due process of law.[84] When substantive rights are acquired under existing law there is no power in any branch of the government to take them away except by due process of law for a public purpose.[85] They cannot be impaired by the repeal of a law,[86] or by the enactment of a retroactive law.[87] A person cannot be divested of his vested rights of property by mere legislative enactment.[88] The right of private ownership in lands is secured by

[65] State v. Hovorka, 100–249, 110+870; Minn. etc. Assn. v. State Board, 103–21, 114+245.
[66] Joyce v. G. N. Ry., 100–225, 110+975.
[67] Larkin v. Glens Falls Ins. Co., 80–527, 83+409.
[68] State v. Beardsley, 88–20, 92+472.
[69] State v. Zimmerman, 86–353, 90+783.
[70] State v. Pamperin, 42–320, 44+251.
[71] State v. Robinson, 42–107, 43+833.
[72] St. Paul v. Haugbro, 93–59, 100+470.
[73] State v. St. P. etc. Ry., 98–380, 108+261.
[74] State v. G. N. Ry., 100–445, 111+289.
[75] State v. Williams, 93–155, 100+641.
[76] Evans v. Chi. etc. Ry., 109–64, 122+876.
[77] Leavitt v. Morris, 105–170, 117+393.
[78] Hardwick v. Chi. etc. Ry., 124+819.
[79] McMillan v. State Board, 124+828.
[80] State v. Chi. etc. Ry., 68–381, 71+400.
[81] Rippe v. Becker, 56–100, 57+331.
[82] Red Wing v. Chi. etc. Ry., 72–240, 75+223.
[01] State v. Sperry, 126+120.
[83] Griswold v. McGee, 102–114, 127, 112+1020.
[84] N. W. etc. Co. v. Minneapolis, 81–140, 146, 83+527, 86+69; Beaupre v. Hoerr, 13–366(339); Wieland v. Shillock, 24–345; U. S. v. Minn. etc. Ry., 1–127(103).
[85] U. S. v. Minn. etc. Ry., 1–127(103); Baker v. Kelley, 11–480(358, 375); Sanborn v. School Dist., 12–17(1, 14); Beaupre v. Hoerr, 13–366(339); Wilson v. Red Wing School Dist., 22–488, 491; Kelly v. Dill, 23–435; Shell v. Matteson, 81–38, 41, 83+491.
[86] Lovell v. St. Paul, 10–290(229); Kipp v. Johnson, 31–360, 17+957; Whitney v. Wegler, 54–235, 55+927.
[87] Beaupre v. Hoerr, 13–366(339). See § 1651.
[88] Kipp v. Johnson, 31–360, 17+957.

our laws and is not subject to legislative interference except by due process of law for a public purpose.[89]

1614. Right to cause of action or defence—A vested cause of action is beyond legislative impairment and a vested right to an existing defence is equally protected, saving only those which are based on informalities not affecting substantial rights and which are not based on equity and justice. There can be no vested right to violate a moral duty or to resist the performance of a moral obligation.[90]

1615. Executory statutory rights—Where a statute gives a right in its nature not vested, but remaining executory, if it does not become executed before a repeal of the law, it falls with it and cannot thereafter be enforced.[91]

1616. Evidence—There can be no vested right in a rule of evidence.[92]

1617. To remedies—There is no such thing as a vested right to a particular remedy,[93] or in an exemption from it.[94]

1618. Rights held vested—The rights of a judgment creditor in the homestead of his debtor;[95] the rights of a judgment creditor in a judgment which has become absolute;[96] the rights of a riparian owner;[97] the rights of a purchaser at an administrator's sale after the time within which a sale may be vacated has expired;[98] the rights of a landlord in property distrained for rent;[99] the rights of an assignee of the state under a tax sale;[1] the right of a judgment creditor or owner to redeem from a foreclosure sale;[2] the right of redemption from a tax sale;[3] rights in property which have become absolute by the running of a statute of limitations;[4] the rights of a grantee of a husband under a deed in which his wife did not join;[5] the right of an entryman to a patent of United States land;[6] the rights of an occupant of land when the owner has failed to pay the occupant for his improvements within the statutory time;[7] the rights of certificate-holders under tax sales;[8] rights of the territory of Minnesota in a land grant;[9] rights under a lease renewed by implication;[10] the rights of a homesteader;[11] the interest of a husband in his wife's homestead after her death.[12]

[89] Shell v. Matteson, 81–38, 83+491.

[90] Merchants Nat. Bank v. East Grand Forks, 94–246, 102+703; Farnsworth v. Com. etc. Co., 84–62, 67, 86+877; Christian v. Bowman, 49–99, 51+663; Peet v. East Grand Forks, 101–523, 529, 112+1005.

[91] Bailey v. Mason, 4–546(430).

[92] Irwin v. Pierro, 44–490, 47+154; Burke v. Lacock, 41–250, 256, 42+1016; Straw v. Kilbourne, 80–125, 138, 83+36; Fish v. Chi. etc. Ry., 82–9, 84+458.

[93] Grimes v. Byrne, 2–89(72); Converse v. Burrows, 2–229(191, 200); Levering v. Washington, 3–323(227); Barry v. McGrade, 14–163(126); Streeter v. Wilkinson, 24–288, 291; Kipp v. Johnson, 31–360, 363, 17+957; State v. Baldwin, 62–518, 65+80; Dunn v. Dewey, 75–153, 77+793; Straw v. Kilbourne, 80–125, 137, 83+36; Fish v. Chi. etc. Ry., 82–9, 84+458. See Hillebert v. Porter, 28–496, 11+84 (overruling Stone v. Bassett, 4–298(215); Heyward v. Judd, 4–483, 375); Phelan v. Terry, 101–454, 112+872.

[94] Kipp v. Johnson, 31–360, 363, 17+957; Watson v. Chi. etc. Ry., 46–321, 329, 48+1129.

[95] Tillotson v. Millard, 7–513(419).

[96] Beaupre v. Hoerr, 13–366(339); Wieland v. Shillock, 24–345. See Spooner v. Spooner, 26–137, 1+838.

[97] Brisbine v. St. P. etc. Ry., 23–114, 130; Shell v. Matteson, 81–38, 83+491.

[98] Streeter v. Wilkinson, 24–288.

[99] Dutcher v. Culver, 24–584, 595.

[1] State v. McDonald, 26–145, 1+832.

[2] Willis v. Jelineck, 27–18, 6+373; O'Brien v. Krenz, 36–136, 30+458; Lowry v. Mayo, 41–388, 43+78.

[3] Merrill v. Dearing, 32–479, 21+721.

[4] Kipp v. Johnson, 31–360, 17+957; Gates v. Shugrue, 35–392, 29+57.

[5] Morrison v. Rice, 35–436, 29+168.

[6] Polk County v. Hunter, 42–312, 314, 44+201.

[7] Flynn v. Lemieux, 46–458, 49+238; Craig v. Dunn, 47–59, 49+396.

[8] Lovell v. St. Paul, 10–290(229).

[9] U. S. v. Minn. etc. Ry., 1–127(103).

[10] Caley v. Thornquist, 89–348, 94+1084.

[11] Red River etc. Ry. v. Sture, 32–95, 20+229.

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

1619. Rights held not vested—The inchoate statutory interest of a wife in her husband's realty before his death;[13] the right to continue in a licensed occupation;[14] a right to a particular form or amount of taxation.[15]

CURATIVE ACTS

1620. In general—What the legislature may authorize prospectively it may validate retrospectively, provided it does not impair vested rights.[16] It cannot validate what it could not previously have authorized.[17] Jurisdictional defects in judicial proceedings cannot be remedied by a curative act.[18] The legislature may validate a contract which a party attempted to enter into, but which was invalid by reason of some personal inability on his part, or through neglect of some legal formality, or because of something in the contract forbidden by law. An invalid contract is not impaired by an act validating it.[19] A curative act cannot impair vested rights.[20] A curative act may be valid though it would be invalid as original legislation as in conflict with the constitutional provision against special legislation.[21]

1621. Curative acts held valid—An act curing, as between the parties, the defective execution of a deed;[22] an act validating bonds issued by a town without authority;[23] an act validating a tax levied without authority;[24] an act validating an administrator's sale defective for want of an administrator's bond;[25] an act legalizing certain highways;[26] an act legalizing a publication of the financial statement of a county;[27] an act validating the incorporation of certain villages;[28] an act validating the sole deed of a married woman;[29] an act validating a foreclosure defective for want of an affidavit of costs and disbursements;[30] an act validating a defective incorporation;[31] an act validating certain city warrants;[32] an act validating foreclosure proceedings;[33] an act validating the refundment of money paid for liquor licenses subsequently revoked.[34]

[13] Morrison v. Rice, 35–436, 29+168; Griswold v. McGee, 102–114, 112+1020; Stitt v. Smith, 102–253, 113+632; State Board v. Hart, 104–88, 116+212; Howe v. Parker, 105–310, 117+518.

[14] State v. Hovorka, 100–249, 110+870.

[15] State v. Chi. etc. Ry., 106–290, 119+211; State v. G. N. Ry., 106–303, 119+202.

[16] Streeter v. Wilkinson, 24–288; Farnsworth v. Com. etc. Co., 84–62, 86+877; State v. Dist. Ct., 102–482, 113+697; Calderwood v. Schlitz, 107–465, 121+221. See McCord v. Sullivan, 85–344, 347, 88+989.

[17] Peet v. East Grand Forks, 101–523, 112+1005.

[18] Wistar v. Foster, 46–484, 486, 49+247. See Olson v. Cash, 98–4, 107+557.

[19] Farnsworth v. Com. etc. Co., 84–62, 72, 86+877; Wistar v. Foster, 46–484, 486, 49+247; Calderwood v. Schlitz, 107–465, 121+221.

[20] Thompson v. Morgan, 6–292(199); Meighen v. Strong, 6–177(111); Lowry v. Mayo, 41–388, 43+78; Christian v. Bowman, 49–99, 104, 51+663; Farnsworth v. Com. etc. Co., 84–62, 86+877; McCord v. Sullivan, 85–344, 88+989; Olson v. Cash, 98–4, 107+557; Peet v. East Grand Forks, 101–523, 112+1005.

[21] State v. Brown, 97–402, 106+477.

[22] Meighen v. Strong, 6–177(111); Ross v. Worthington, 11–438(323); Moreland v. Lawrence, 23–84.

[23] Kunkle v. Franklin, 13–127(119); Comer v. Folson, 13–219(205).

[24] Wilson v. Buckman, 13–441(404).

[25] Streeter v. Wilkinson, 24–288, 290.

[26] State v. Bruggerman, 31–493, 18+454.

[27] Fuller v. Morrison County, 36–309, 30+824.

[28] State v. Spaude, 37–322, 34+164.

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

[30] Farnsworth v. Com. etc. Co., 84–62, 86+877.

[31] Christian v. Bowman, 49–99, 51+663.

[32] Merchants Nat. Bank v. East Grand Forks, 94–246, 102+703.

[33] Bitzer v. Campbell, 47–221, 49+691; Johnson v. Peterson, 90–503, 97+384; Risch v. Jensen, 92–107, 99+628.

[34] Calderwood v. Schlitz, 107–465, 121+221.

IMPAIRMENT OF CONTRACTS

1622. What constitutes—In general—A law does not impair the obligation of a contract within the meaning of the constitution, if neither party is relieved thereby from performing anything of that which he obligated himself to do. But, if either party is absolved from performing any of these things, such obligation is impaired, whether the absolution is effected directly and expressly or indirectly, and only as the result of some modification of the legal proceedings for enforcement.[35]

1623. To be enforced firmly—No constitutional guaranty is more subject to legislative encroachment, and it is to be enforced with firmness by the courts.[36]

1624. To what applicable—The constitutional guaranty is applicable to executed as well as executory contracts;[37] to contracts of the state;[38] to legislative grants of a franchise;[39] and to antenuptial contracts.[40] It is inapplicable to contracts without consideration,[41] and to judgments.[42]

1625. What is the obligation—The obligation of a contract is distinct from the remedy afforded by the law for the enforcement of the contract.[43]

1626. Extent of impairment immaterial—The extent to which a law impairs the obligation of contracts is not material. If it impairs it at all it is unconstitutional.[44]

1627. Due process of law—A law which impairs the obligation of contracts is not due process of law.[45]

1628. Change of or abolishing remedies—The remedy subsisting in a state when and where a contract is made, and is to be performed, is a part of its obligation, and any subsequent law of the state, which so affects that remedy as substantially to impair and lessen the value of the contract, impairs its obligation, and is forbidden by the federal constitution.[46] On the contrary changes of remedy which do not materially lessen the value of the contract are not forbidden.[47]

1629. Change in rules of evidence—As a general rule changes in rules of evidence, and in the order or burden of proof, do not impair the obligation of contracts.[48]

1630. Right to contract—The right to contract, and the obligations assumed by contract, are equally protected. The right to contract is not derived from constitutional or legislative grant.[49]

1631. Police power—All contracts are subject to a valid exercise of the police power.[50] The state cannot contract away this sovereign power.[51]

[35] State v. Krahmer, 105–422, 117+780. See Levering v. Washington, 3–323(227, 232).

[36] Heyward v. Judd, 4–483(375, 389).

[37] St. Paul etc. Ry. v. Brown, 24–517, 578; Cass County v. Morrison, 28–257, 261, 9+761; State v. Young, 29–474, 525, 9+737.

[38] State v. Young, 29–474, 9+737.

[39] McRoberts v. Washburne, 10–23(8); Mower v. Staples, 32–284, 20+225. See Myrick v. Brawley, 33–377, 23+549; U. S. v. Minn. etc. Ry., 1–127(103).

[40] Desnoyer v. Jordan, 27–295, 7+140.

[41] State v. Young, 29–474, 528, 9+737.

[42] State v. Dist. Ct., 102–482, 490, 113+697, 114+654.

[43] State v. Young, 29–474, 9+737. See § 1622.

[44] Hillebert v. Porter, 28–496, 500, 11+84.

[45] Cass County v. Morrison, 28–257, 9+761.

[46] Dunn v. Stevens, 62–380, 64+924, 65+348; Keystone Mfg. Co. v. Howe, 89–256, 94+723.

[47] Lanier v. Irvine, 24–116, 122; Straw v. Kilbourne, 80–125, 137, 83+36 and cases under §§ 1635, 1636.

[48] See § 1616.

[49] Goenen v. Schroeder, 8–387(344, 350). See § 1652.

[50] State v. Smith, 58–35, 38, 59+545. See N. W. etc. Co. v. Minneapolis, 81–140, 83+527, 86+69.

[51] See § 1606.

1632. Validating acts—A contract invalid, or for the enforcement of which the law affords no remedy, is not impaired by validating it, or affording a remedy for its enforcement.[52]

1633. Insolvent laws—Waiver—State insolvent laws which assume to discharge prior contracts are unconstitutional, but a creditor may waive the objection.[53]

1634. Acts of Congress—The fifth amendment to the federal constitution declaring that no person shall be deprived of property without due process of law renders an act of Congress impairing the obligation of contracts invalid.[54]

1635. Held to impair obligation—A law changing the time of redemption from a foreclosure sale;[55] a law forfeiting a security as a penalty for bringing suit before enforcing the security;[56] a law suspending the right of persons aiding the rebellion to sue and defend;[57] a law repealing a franchise to run a ferry;[58] a law as to the payment of certain debts contracted in connection with the construction of the St. Paul & Pacific Ry. Company;[59] a law affecting the right of a chattel mortgagee to take possession and sell the mortgaged property in case he deems himself insecure;[60] an act of Congress subsequent to a railroad land grant imposing conditions on the grant;[61] a law changing the rate of interest to be paid on redemption from a mortgage foreclosure sale;[62] the amendment of 1860 to section 2 of article 9 of the state constitution relating to state railroad bonds;[63] a law affecting the right of a purchaser at a void tax sale to a refundment;[64] a law affecting the right to foreclose under a power;[65] a law changing the law of descent as to homesteads;[66] an ordinance requiring a telephone company to put its wires underground;[67] an act of Congress revoking a land grant;[68] a law imposing conditions on foreign corporations doing business in this state;[69] a law relating to the refundment of money paid for certificates of sale issued on special assessments.[70]

1636. Held not to impair obligation—A retroactive exemption law;[71] a retroactive law allowing an appeal from an order granting a new trial;[72] a retroactive statute of limitations;[73] a law regulating the mode of serving notice of protest;[74] a retroactive law as to notice of foreclosure sales;[75] the legal tender acts of Congress;[76] a law imposing a penalty on railway companies for charging more than a maximum toll;[77] a law creating a new town out of the territory of an old town, without making the new town liable for the debts of

[52] Wistar v. Foster, 46–484, 486, 49+247.
[53] Wendell v. Lebon, 30–234, 15+109; Lambert v. Scandinavian etc. Bank, 66–185, 68+834; Union Bank v. Rugg, 78–256, 80+1121.
[54] Cass County v. Morrison, 28–257, 261; 9+761; U. S. v. Minn. etc. Ry., 1–127(103).
[55] Heyward v. Judd, 4–483(375); Goenen v. Schroeder, 8–387(344).
[56] Swift v. Fletcher, 6–550(386).
[57] Davis v. Pierse, 7–13(1); Wilcox v. Davis, 7–23(12); Keough v. McNitt, 7–30(16); McFarland v. Butler, 8–116(91); Jackson v. Butler, 8–117(92).
[58] McRoberts v. Washburne, 10–23(8).
[59] De Graff v. St. P. etc. Ry., 23–144.
[60] Boice v. Boice, 27–371, 7+687.
[61] Cass County v. Morrison, 28–257, 9+761.
[62] Hillebert v. Porter, 28–496, 11+84.
[63] State v. Young, 29–474, 9+737.
[64] State v. Foley, 30–350, 15+375; Fleming v. Roverud, 30–273, 15+119.
[65] O'Brien v. Krenz, 36–136, 30+458.
[66] Dunn v. Stevens, 62–380, 64+924, 65+348.
[67] N. W. etc. Co. v. Minneapolis, 81–140, 83+527, 86+69.
[68] U. S. v. Minn. etc. Ry., 1–127(103).
[69] Keystone Mfg. Co. v. Howe, 89–256, 94+723.
[70] Gray v. St. Paul, 105–19, 116+1111.
[71] Grimes v. Bryne, 2–89(72).
[72] Converse v. Burrows, 2–229(191).
[73] Holcombe v. Tracy, 2–241(201); Burwell v. Tullis, 12–572(486); Archambau v. Green, 21–520.
[74] Levering v. Washington, 3–323(227).
[75] Atkinson v. Duffy, 16–45(30).
[76] Breen v. Dewey, 16–136(123).
[77] State v. Winona etc. Ry., 19–434(377).
[78] State v. Lake City, 25–404.

the old town [78] a law requiring a railway company to fence its right of way; [79] a law changing the number of directors of a corporation; [80] a law revoking the franchise of a corporation; [81] a law giving a liveryman a lien superior to that of a mortgagee; [82] a law regulating foreclosure sales; [83] a law validating the sole deeds of married women; [84] an amendment to the insolvent law of 1881; [85] an act for the partition and distribution among the stockholders of realty not required for corporate purposes; [86] a law requiring street railway companies to protect motormen from cold; [87] a law revising the banking laws; [88] a law for the assessment of omitted or undervalued property; [89] a law affecting the gross earnings tax on railroads; [90] a law requiring an affidavit of costs on foreclosure; [91] a law for the enforcement of the liability of stockholders; [92] a law giving a lien for seed priority over a mortgage on the crop; [93] a law relating to the increase of capital stock of railway companies; [94] a law creating a thresher's lien; [95] a law relating to the service of notice of the expiration of the period of redemption from tax sales; [96] a law increasing the gross earnings tax of railway companies.[97]

DUE PROCESS OF LAW

1637. Nature—The phrase "due process of law" is not susceptible of exact definition.[98] The constitution does not define it.[99] It is deemed best to leave its meaning to be evolved by a gradual process of judicial inclusion and exclusion as cases arise.[1] The determination of each case must necessarily depend largely on its own facts.[2] The phrases "due process of law" and "law of the land" are synonymous.[3] The phrase "law of the land" does not mean merely an act of the legislature.[4] The question of what constitutes due process of law is often largely a question of history.[5] Due process of law means such an exercise of the powers of government as the settled maxims of law permit and sanction, under such safeguards as these maxims prescribe for the class of cases to which the one in question belongs. This constitutional guaranty is intended to secure the citizen from the arbitrary exercise of the powers of government, unrestrained by the established principles of right and distributive justice.[6] As to what constitutes due process of law there is a marked distinction between judicial and administrative proceedings.[7] As regards judicial proceedings due process of law involves notice before judgment and an opportunity to be heard in an orderly proceeding adapted to the nature of the case.[8] Law of the land

[79] Gillam v. Sioux City etc. Ry., 26-268, 3+353.
[80] Mower v. Staples, 32-284, 20+225.
[81] Myrick v. Brawley, 33-377, 23+549.
[82] Smith v. Stevens, 36-303, 31+55.
[83] Webb v. Lewis, 45-285, 47+803.
[84] Wistar v. Foster, 46-484, 49+247.
[85] Willis v. Mabon, 48-140, 50+1110.
[86] Merchant v. Western L. Assn., 56-327, 57+931.
[87] State v. Smith, 58-35, 59+545.
[88] Anderson v. Seymour, 70-358, 73+171.
[89] State v. Weyerhauser, 72-519, 75+718.
[90] State v. Stearns, 72-200, 75+210; State v. Duluth etc. Ry., 77-433, 80+626. See 179 U. S. 223.
[91] Perkins v. Stewart, 75-21, 77+434.
[92] Straw v. Kilbourne, 80-125, 83+36.
[93] McMahan v. Lundin, 57-84, 58+827.
[94] State v. G. N. Ry., 100-445, 111+289.
[95] Phelan v. Terry, 101-454, 112+872.
[96] State v. Krahmer, 105-422, 117+780.
[97] State v. Chi. etc. Ry., 106-290, 119+211; State v. G. N. Ry., 106-303, 119+202.
[98] Bardwell v. Collins, 44-97, 101, 46+315; Davis v. St. Louis County, 65-310, 313, 67+997.
[99] Davidson v. Farrell, 8-258(225, 229).
[1] State v. Billings, 55-467, 474, 57+206, 794.
[2] Davidson v. Farrell, 8-258(225, 229); Bardwell v. Collins, 44-97, 104, 46+315.
[3] State v. State Board, 34-387, 389, 26+123.
[4] Baker v. Kelley, 11-480(358, 375); Beaupre v. Hoerr, 13-366(339); Wieland v. Shillock, 24-345, 349; Bardwell v. Collins, 44-97, 102, 46+315; State v. Billings, 55-467, 474, 57+206, 794.
[5] Nelson v. McKinnon, 61-219, 222, 63+630.
[6] State v. State Board, 34-387, 26+123.
[7] Lovell v. Seeback, 45-465, 468, 48+23.
[8] See § 1641.

was defined by Webster as "the general law; a law which hears before it condemns; which proceeds upon inquiry and renders judgment only after trial." [9] Due process of law is often defined as "law in its regular course of administration through the courts of justice." [10] These definitions are unsatisfactory. They are obviously too restrictive as they apply only to judicial proceedings. It is well settled that the constitutional guaranty is not restricted to judicial process or proceedings, but applies also to the legislative and executive departments.[11]

1638. Meaning of process—The word "process" in this connection is not used in the technical sense of an original writ or summons. It does not forbid the entry of judgment without the service of process.[12]

1639. To what applicable—Police power—Taxation—The constitutional guaranty is not limited to judicial proceedings. It is a protection against the executive and legislative departments.[13] It does not restrict the police power of the state.[14] Its application to the taxing power is considered elsewhere.[15] The question whether a foreign corporation is doing business in the state, so that service of summons may be made upon its agent within the state, is one of due process of law under the constitution of the United States.[16]

1640. Federal supreme court final arbiter—The effect of the fourteenth amendment is to make the federal supreme court the final arbiter as to what constitutes due process of law.[17]

1641. Notice and opportunity to be heard—In judicial proceedings due process of law requires notice before judgment and an opportunity to be heard in an orderly proceeding adapted to the nature of the case.[18] As sometimes expressed a party is entitled to a day in court.[19] This notice need not in all cases be personal. In proceedings in rem, or quasi in rem, it may be constructive. It is sufficient if a kind of notice is provided by which it is reasonably probable that the party proceeded against will be apprised of what is going on against him and an opportunity is afforded him to defend.[20] In personal actions it must ordinarily be personal.[21] There is no constitutional right to notice at every stage of a proceeding.[22] Notice to a non-resident infant is not a constitutional prerequisite to the appointment of a guardian of his estate.[23] In condemnation proceedings an owner has a right to notice and an opportunity to be heard.[24]

1642. Administrative proceedings—The requisites of due process of law are not the same in administrative proceedings as in judicial proceedings. No-

[9] State v. Becht, 23–411, 413; Bardwell v. Collins, 44–97, 46+315; State v. Billings, 55–467, 474, 57+206, 794.

[10] Baker v. Kelley, 11–480(358, 374); Beaupre v. Hoerr, 13–366(339); State v. Becht, 23–411, 413; Wieland v. Shillock, 24–345, 349.

[11] State v. State Board, 34–387, 26+123.

[12] Davidson v. Farrell, 8–258(225).

[13] State v. State Board, 34–387, 26+123; Lovell v. Seeback, 45–465, 468, 48+23.

[14] Butler v. Chambers, 36–69, 72, 30+308.

[15] See § 9145.

[16] Wold v. Colt, 102–386, 114+243. See Mikolas v. Walker, 73–305, 76+36.

[17] State v. Weyerhauser, 72–519, 75+718.

[18] Bardwell v. Collins, 44–97, 102, 46+315; Irwin v. Pierro, 44–490, 47+154; State v. Billings, 55–467, 474, 57+206; Davis v. St. Louis County, 65–310, 313, 67+997; State v. Dist. Ct., 87–146, 154, 91+300; State v. Dist. Ct., 90–457, 97+132.

[19] Stapp v. St. Clyde, 44–510, 512, 47+160; Lovell v. Seeback, 45–465, 468, 48+23; Vega S. Co. v. Consolidated El. Co., 75–308, 77+973.

[20] Stapp v. St. Clyde, 43–192, 45+430; Shepherd v. Ware, 46–174, 48+773; State v. Westfall, 85–437, 444, 89+175. See § 6879.

[21] Bardwell v. Collins, 44–97, 46+315; Smith v. Hurd, 50–503, 52+922.

[22] McNamara v. Casserly, 61–335, 344, 63+880.

[23] Kurtz v. St. P. etc. Ry., 48–339, 51+221; Kurtz v. West Duluth L. Co., 52–140, 53+1132.

[24] Lyle v. Chi. etc. Ry., 55–223, 56+820. See § 3085.

tice and an opportunity to be heard are not a prerequisite. Administrative process of the customary sort is as much due process of law as judicial process. A day in court is a matter of right in judicial proceedings, but administrative proceedings rest upon different principles. The party affected by them may always test their validity by a suit instituted for that purpose and this is supposed to give him ample protection. An administrative proceeding that was well established at the time the constitution was adopted cannot be regarded as not due process of law.[25]

1643. New modes of procedure—This provision of the constitution does not prevent the legislature from adopting new modes of procedure which are not arbitrary or contrary to fundamental principles of justice.[26]

1644. Impairment of contracts—A law impairing the obligation of contracts is not due process of law. A contract right is property.[27]

1645. Taking private property for a private use—A law which authorizes the taking of private property for a private use is not due process of law.[28]

1646. Held due process of law—A law authorizing a judgment against a surety in a recognizance upon affirmance of a judgment of a justice of the peace;[29] a law for the recognizance of witnesses for the state in criminal cases;[30] an occupying claimant's act;[31] a law authorizing a commitment in supplementary proceedings;[32] a mechanic's lien law;[33] a law authorizing condemnation proceedings;[34] the provision for proving claims under the insolvency law of 1881;[35] the provisions for involuntary bankruptcy and release of claims under the insolvency law of 1881;[36] a law authorizing the state medical examining board to refuse a certificate to a physician for unprofessional conduct or to revoke a certificate on that ground;[37] a law limiting the time within which a decedent's realty may be sold to pay his debts;[38] a law authorizing special assessments without notice to the owner of the initial proceedings;[39] a law for the assessment and collection of omitted taxes;[40] a law regulating the practice of medicine;[41] a law providing that a road used and kept in repair for six years as a public highway shall be deemed dedicated to the public;[42] a law regulating condemnation proceedings;[43] a law creating a maritime lien;[44] a law authorizing a decree of heirship by the probate court;[45] a law authorizing the entry of judgment against the obligors on a bond in proceedings against a steamboat, when judgment has been rendered in favor of the plaintiff;[46] a law authorizing the summary removal of paupers;[47] a law authorizing service of

[25] Lovell v. Seeback, 45–465, 468, 48+23; Nelson v. McKinnon, 61–219, 222, 63+630; State v. State Board, 34–387, 26+123; Davis v. St. Louis County, 65–310, 313, 67+997. See §§ 1646, 1647.

[26] Davidson v. Farrell, 8–258(225); Bardwell v. Collins, 44–97, 102, 46+315.

[27] Cass County v. Morrison, 28–257, 9+761. See § 1622.

[28] State v. Rockford, 102–442, 114+244; Lyon County v. Lien, 105–55, 116+1017. See §§ 3024–3029.

[29] Davidson v. Farrell, 8–258(225); Libby v. Husby, 28–40, 8+903. See Stapp v. St. Clyde, 44–510, 47+160.

[30] State v. Grace, 18–398(359).

[31] Wilson v. Red Wing School Dist., 22–488; Madland v. Benland, 24–372.

[32] State v. Becht, 23–411.

[33] Bohn v. McCarthy, 29–23, 11+127; Laird v. Moonan, 32–358, 20+354; Bardwell v. Mann, 46–285, 48+1120.

[34] Minneapolis v. Wilkin, 30–140, 14+581.

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

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

[37] State v. State M. E. Board, 32–324, 20+238; State v. State Board, 34–387, 26+123.

[38] In re Ackerman, 33–54, 21+852.

[39] Hennepin County v. Bartleson, 37–343, 34+222; Kelly v. Minneapolis, 57–294, 59+304.

[40] Redwood County v. Winona etc. Co., 40–512, 41+465, 42+473.

[41] State v. Fleischer, 41–69, 42+696.

[42] Miller v. Corinna, 42–391, 44+127.

[43] St. Paul v. Nickl, 42–262, 44+59.

[44] Stapp v. St. Clyde, 43–192, 45+430.

[45] Irwin v. Pierro, 44–490, 47+154.

[46] Stapp v. St. Clyde, 44–510, 47+160.

[47] Lovell v. Seeback, 45–465, 48+23.

summons by publication on unknown claimants;[48] a law providing for the appointment of guardians of the estate of non-resident infants;[49] a law regulating the sale and redemption of transportation tickets;[50] a law creating a lien on logs;[51] a law authorizing distress for delinquent taxes;[52] a law authorizing a parent to sue for an injury to his minor child;[53] certain provisions of the charter of Duluth relating to special assessments;[54] a law allowing plaintiff reasonable attorney's fees in an action to recover land taken by a railway company without compensation;[55] a law forbidding the consignment of certain game for sale;[56] a law authorizing the court to determine the mode of serving process on carriers under the railroad and warehouse law;[57] a law authorizing a wife whose husband has deserted her to sue in his name;[58] a law for the commitment of insane persons;[59] a law for the assessment and taxation of undervalued or omitted property;[60] a law forbidding the sale of liquor to Indians;[61] a law for the service of summons on corporations without officers in this state by service on the secretary of state;[62] a law authorizing the state bank examiner to take possession of insolvent banks;[63] a law for the enforcement of the liability of stockholders;[64] a front foot assessment for local improvements;[65] an act to prevent blacklisting of employees by employers;[66] a law establishing the Torrens system;[67] a provision of the charter of St. Paul adopted May 1, 1900, relating to special assessments;[68] a law for the presentation of claims against cities and appeal from the determination thereon;[69] a law making owners of property liable for water and light furnished to a tenant by a municipality;[70] a law forbidding the sale of cream containing less than twenty per cent. of fat;[71] a law forbidding any one to sell ruffed grouse;[72] a law providing for the laying out, altering, or discontinuing of town highways;[73] a law requiring railway companies to construct and maintain crossings;[74] an ordinance for the licensing of peddlers;[75] a law for removal of public officers by the governor;[76] a law establishing a hospital farm for inebriates and providing for commitments thereto;[77] a law regulating the practice of dentistry;[78] a law relating to the vacation of licenses of physicians;[79] a law for the taxation of telegraph companies;[80] a law providing for reciprocal demurrage.[81]

[48] Shepherd v. Ware, 46–174, 48+773.
[49] Kurtz v. St. P. etc. Ry., 48–339, 51+221; Kurtz v. West Duluth L. Co., 52–140, 53+1132.
[50] State v. Corbett, 57–345, 59+317; State v. Manford, 97–173, 106+907.
[51] Brown v. Markham, 60–233, 62+123; Foley v. Markham, 60–216, 62+125.
[52] Nelson v. McKinnon, 61–219, 63+630.
[53] Lathrop v. Schutte, 61–196, 63+493; Hess v. Adamant Mfg. Co., 66–79, 68+774.
[54] Duluth v. Dibblee, 62–18, 63+1117.
[55] Cameron v. Chi. etc. Ry., 63–384, 65+652.
[56] State v. Chapel, 64–130, 66+205.
[57] State v. Adams Ex. Co., 66–271, 68+1085.
[58] Allen v. Minn. L. & T. Co., 68–8, 70+800.
[59] State v. Kilbourne, 68–320, 71+396.
[60] State v. Weyerhauser, 68–353, 71+265; Id., 72–519, 75+718.
[61] State v. Wise, 70–99, 72+843.
[62] Hinckley v. Kettle River Ry., 70–105, 72+835.
[63] Anderson v. Seymour, 70–358, 73+171.
[64] Straw v. Kilbourne, 80–125, 83+36; London etc. Co. v. St. Paul etc. Co., 84–144, 86+872.
[65] State v. Lewis, 82–390, 85+207, 86+611; State v. Trustees, 87–165, 91+484.
[66] State v. Justus, 85–279, 88+759.
[67] State v. Westfall, 85–437, 89+175.
[68] State v. Dist. Ct., 87–146, 91+300.
[69] State v. Dist. Ct., 90–457, 97+132.
[70] East Grand Forks v. Luck, 97–373, 107+393.
[71] State v. Crescent C. Co., 83–284, 86+107; State v. Tetu, 98–351, 107+953.
[72] State v. Shattuck, 96–45, 104+719.
[73] Hurst v. Martinsburg, 80–40, 82+1099.
[74] State v. St. P. etc. Ry., 98–380, 108+261.
[75] In re White, 43–250, 45+232.
[76] State v. Peterson, 50–239, 52+655.
[77] Leavitt v. Morris, 105–170, 117+393.
[78] State v. Crombie, 107–171, 119+660.
[79] Wolf v. State Board, 109–360, 123+1074.
[80] State v. W. U. Tel. Co., 124+380.
[81] Hardwick v. Chi. etc. Ry, 124+819.

1647. Held not due process of law—A statute of limitations cutting off the rights of a person in possession unless he brought an action to determine his rights within a certain time;[82] a law giving a right of appeal retrospectively;[83] a law authorizing the taking of private property for public use without proper notice and hearing;[84] an ordinance authorizing the arrest and detention of persons refusing, at a fire, to obey the orders of certain persons;[85] a retrospective law authorizing the setting aside of fraudulent judgments;[86] an occupying claimant's act requiring repayment of purchase money to occupant;[87] a retrospective mechanic's lien law;[88] a law cutting off a right of redemption from a foreclosure sale;[89] a law subsequent to a grant imposing conditions thereon;[90] a law taxing property for a private purpose;[91] a mechanic's lien law;[92] a law authorizing service of summons by publication on a resident who is personally within the state and can be served therein;[93] a law authorizing a decree of heirship in ex parte proceedings;[94] a retroactive occupying claimant's act;[95] a law for the commitment of insane persons;[96] a proceeding to set aside a probate decree of distribution without personal notice to resident parties;[97] a law for the collection of outlawed taxes;[98] a law for the location of section and quarter section corners without appropriate judicial proceedings;[99] a law authorizing the service of summons in personal actions on non-residents by service on their agents in this state;[1] a law providing for assessments for a public ditch;[2] a law providing for the enlargement of drainage ditches without notice to property owners affected.[3]

EX POST FACTO LAWS

1648. Definition—An ex post facto law is one which imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed; or changes the rules of evidence by which less or different evidence is sufficient to convict than was then required.[4] A law is ex post facto which is enacted after an offence is committed and which, in relation to it or its consequences, alters the situation of the accused to his disadvantage.[5]

1649. Held ex post facto laws—A law suspending the privilege of all persons aiding the rebellion of prosecuting and defending actions;[6] a law changing the rule of evidence as to the mode of proving marriage;[7] a law making an

[82] Baker v. Kelley, 11–480(358). See Whitney v. Wegler, 54–235, 55+927.
[83] Beaupre v. Hoerr, 13–366(339).
[84] Langford v. Ramsey County, 16–375 (333).
[85] Judson v. Reardon, 16–431(387).
[86] Wieland v. Shillock, 24–345, 349.
[87] Madland v. Benland, 24–372.
[88] O'Neil v. St. Olaf's School, 26–329, 4+47.
[89] Willis v. Jelineck, 27–18, 6+373; O'Brien v. Krenz, 36–136, 30+458.
[90] Cass County v. Morrison, 28–257, 9+761.
[91] State v. Foley, 30–350, 15+375.
[92] Meyer v. Berlandi, 39–438, 40+513.
[93] Bardwell v. Collins, 44–97, 46+315; Smith v. Hurd, 50–503, 52+922; McNamara v. Casserly, 61–335, 63+880. See Shepherd v. Ware, 46–174, 48+773.
[94] Irwin v. Pierro, 44–490, 47+154.
[95] Flynn v. Lemieux, 46–458, 49+238; Craig v. Dunn, 47–59, 49+396.
[96] State v. Billings, 55–467, 57+206, 794. See State v. Kilbourne, 68–320, 71+396.
[97] McNamara v. Casserly, 61–335, 63+880.
[98] Kipp v. Elwell, 65–525, 68+105; Folsom v. Whitney, 95–322, 104+140.
[99] Davis v. St. Louis County, 65–310, 67+997.
[1] Cabanne v. Graf, 87–510, 92+461.
[2] Lyon County v. Lien, 105–55, 116+1017.
[3] State v. McGuire, 109–88, 122+1120.
[4] State v. Johnson, 12–476(378). See State v. Ryan, 13–370(343); State v. Gut, 13–341(315, 335).
[5] Kring v. Missouri, 107 U. S. 221.
[6] Davis v. Pierse, 7–13(1); Wilcox v. Davis, 7–23(12); Keough v. McNitt, 7–30(16); McFarland v. Butler, 8–116(91); Jackson v. Butler, 8–117(92).
[7] State v. Johnson, 12–476(378).

act punishable by imprisonment or fine which was formerly punishable only by imprisonment.[8]

1650. Held not ex post facto laws—A law changing the number of peremptory challenges allowed the state in criminal prosecutions;[9] a law changing the place of trial;[10] a law relating to the execution of convicts.[11]

RETROACTIVE LAWS

1651. Constitutionality—A retroactive law of a civil nature is not unconstitutional unless it impairs contracts or vested rights.[12] If it affects remedial rights only it is not ordinarily invalid.[13] But retroactive laws are not favored and a law relating to substantive rights or duties, is to be construed as prospective, if it will reasonably bear that construction.[14] Retroactive laws of a criminal nature—ex post facto laws—are always unconstitutional.[15] A statute which creates a new obligation, or imposes a new duty, in respect to transactions already past, is retroactive.[16] It is questionable whether the legislature can make an act a tort by means of retroactive legislation.[17]

LIBERTY

1652. Liberty of contract—There is a limit, not well defined, beyond which the state cannot interfere with the liberty of private contract.[18]

1653. Religious liberty—The religious liberty of the citizen is protected by the constitution.[19]

1654. Liberty of press—It is provided by the constitution that, "the liberty of the press shall forever remain inviolate, and all persons may freely speak, write and publish their sentiments on all subjects, being responsible for the abuse of such right."[20] This is not an unrestrained liberty to publish everything, but is subject to reasonable limitations in the interest of public decency.[21] The press does not enjoy immunities not possessed by individuals.[22]

1655. Liberty to adopt and pursue calling—Property—The right to choose one's calling is an essential part of that liberty which it is the object of government to protect. A person's occupation or calling is property within the meaning of the law, and entitled to protection as such.[23] The legislature can regulate, within reasonable limits, a legitimate calling, but it cannot abolish it.[24]

[8] State v. McDonald, 20–136(119). See State v. Smith, 62–540, 64+1022; State v. Herzog, 25–490.

[9] State v. Ryan, 13–370(343).

[10] State v. Gut, 13–341(315); Id., 9 Wall. (U. S.) 35.

[11] State v. Pioneer P. Co., 100–173, 177, 110+867.

[12] Ross v. Worthington, 11–438(323, 327); Beaupre v. Hoerr, 13–366(339, 342); State v. Cronkhite, 28–197, 9+681; Coles v. Washington County, 35–124, 27+497; Easton v. Hayes, 35–418, 29+59; Schoonover v. Galarnault, 45–174, 47+654; Webb v. Lewis, 45–285, 47+803; In re Piedmont Ave., 59–522, 61+678; Wade v. Drexel, 60–164, 62+261. See §§ 1612–1619.

[13] Tompkins v. Forrestal, 54–119, 55+813. See §§ 1617, 5589.

[14] See § 8916.

[15] See § 1648.

[16] Gatson v. Merriam, 33–271, 279, 22+614.

[17] Kettle River Q. Co. v. East Grand Forks, 96–290, 293, 104+1077.

[18] See Goenen v. Schroeder, 8–387(344, 350); Lucy v. Freeman, 93–274, 276, 101+167; Dickson v. St. Paul, 97–258, 260, 106+1053; White v. Jefferson, 124+373; 18 Yale Law Rev. 454.

[19] Const. art. 1 § 16. See State v. Ludwig, 21–202, 205; State v. Petit, 74–376, 77+225; State v. Weiss, 97–125, 105+1127.

[20] Const. art. 1 § 3.

[21] State v. Pioneer P. Co., 100–173, 110+867 (statute forbidding publication of details of execution of criminals sustained).

[22] Aldrich v. Press P. Co., 9–133(123).

[23] Gray v. Building T. Council, 91–171, 182, 97+663; Aldrich v. Wetmore, 52–164, 172, 53+1072.

[24] See § 1604.

REMEDIES FOR WRONGS

1656. Nature of right—The constitution provides that "every person is entitled to a certain remedy in the laws for all injuries or wrongs which he may receive in his person, property, or character." [25] This is but declaratory of a general fundamental principle upon which the courts have always acted, and which would have been the law even if not incorporated in the constitution. It creates no new legal rights or new legal wrongs, and establishes no new rule of damages. It merely declares that for any wrong, recognized as such by law, a person shall have a remedy to obtain the redress to which he is entitled according to the principles of law.[26] It is not a mere glittering generality.[27] There can be no legal right which cannot be judicially enforced or a wrong without a remedy therefor in the law. The constitutional provision includes the enforcement of rights as well as the redress of wrongs.[28] Every person is entitled to a certain remedy, but not to any particular remedy.[29] What constitutes a "certain" or "adequate" remedy cannot be determined by inflexible rules. New conditions require new remedies. Hence a wide latitude must be allowed the legislature in determining both the form and the measure of remedies.[30] A person is not denied a certain remedy solely because the granting of the remedy lies in the discretion of a court.[31] The legislature may prescribe the order in which remedies shall be pursued.[32]

1657. Who protected—Every person, except aliens, is entitled to the protection of this guaranty. It has been held to protect those who aided the rebellion,[33] Indians,[34] and women.[35]

1658. What is property—A man's business, calling, or occupation, is "property" within this provision.[36]

1659. Held to deny remedy—A law requiring the abandonment of a security as a condition of maintaining an action;[37] a law suspending the privilege of all persons aiding the rebellion of prosecuting and defending actions;[38] a statute of limitations.[39]

1660. Held not to deny remedy—The common-law right of distress for rent;[40] a law authorizing an action to set aside a judgment obtained by fraud;[41] a law regulating libel by newspapers;[42] a provision of the charter of Stillwater requiring abstracts of title to be furnished by those claiming awards in condemnation proceedings;[43] the provisions of the Military Code for trial by court-martial;[44] a law regulating commission merchants dealing in farm products;[45] a statute of limitations.[46]

[25] Const. art. 1 § 8; Winona etc. Ry. v. Waldron, 11-515(392, 419); Gray v. Building T. Council, 91-171, 182, 97+663; Joyce v. G. N. Ry., 100-225, 232, 110+ 975; Nixon v. Dispatch P. Co., 101-309, 112+258.

[26] Francis v. W. U. Tel. Co., 58-252, 261, 59+1078; Beaulieu v. G. N. Ry., 103-47, 56, 114+353.

[27] Rhodes v. Walsh, 55-542, 549, 57+212.

[28] Agin v. Heyward, 6-110(53, 59).

[29] State v. Dist. Ct., 90-457, 462, 97+132.

[30] Allen v. Pioneer P. Co., 40-117, 123, 41+936.

[31] Wieland v. Shillock, 24-345, 347.

[32] Swift v. Fletcher, 6-550(386).

[33] Davis v. Pierse, 7-13(1); Wilcox v. Davis, 7-23(12); Keough v. McNitt, 7-30 (16); McFarland v. Butler, 8-116(91); Jackson v. Butler, 8-117(92).

[34] Bem-Way-Bin-Ness v. Eshelby, 87-108, 91+291.

[35] Lockwood v. Lockwood, 67-476, 70+784.

[36] Gray v. Building T. Council, 91-171, 182, 97+663.

[37] Swift v. Fletcher, 6-550(386).

[38] Davis v. Pierse, 7-13(1).

[39] Baker v. Kelley, 11-480(358, 371).

[40] Dutcher v. Culver, 24-584, 590.

[41] Spooner v. Spooner, 26-137, 1+838.

[42] Allen v. Pioneer P. Co., 40-117, 41+ 936.

[43] Coles v. Stillwater, 64-105, 66+138.

[44] State v. Wagener, 74-518, 522, 77+424.

[45] State v. Wagener, 77-483, 80+633, 778.

[46] Thornton v. Turner, 11-336(237).

CRUEL AND UNUSUAL PUNISHMENT

1661. What constitutes—The amount of punishment to be inflicted for a crime is a matter lying almost wholly in the discretion of the legislature. In this state no punishment, provided or inflicted, has ever been held cruel or unusual, within the constitutional guaranty.[47]

RIGHT TO OBTAIN JUSTICE FREELY

1662. Nature of right—The constitution [48] does not guarantee to the citizen the right to litigate without expense, but simply protects him from the imposition of such terms as unreasonably and injuriously interfere with his right to a remedy in the law.[49] It was originally aimed in Magna Charta to the corrupt practice of taking bribes and exacting illegal fees.[50] It is not a justification for lobbying.[51]

1663. Held to deny right—A law requiring a person to pay a tax before bringing an action to contest it; [52] a law requiring the payment of taxes in the form of fees as a condition precedent to probate proceedings.[53]

1664. Held not to deny right—A law requiring the prepayment of a jury fee; [54] a law requiring the plaintiff to pay costs; [55] a law allowing the plaintiff reasonable attorney's fees in an action for the possession of land wrongfully taken by a railway company without compensation; [56] a law for a struck jury; [57] a law requiring notice before suit against a city for negligence.[58]

IMPRISONMENT FOR DEBT

1665. Definition of debt—A debt, within the constitutional provision against imprisonment for debt, imports a sum of money or something due and owing from one to another, arising out of a contract, express or implied.[59]

1666. Held unconstitutional—A law authorizing the imprisonment of a contractor for neglect to pay laborers and materialmen; [60] an imprisonment for contempt for failure to pay alimony, without regard to the ability of the party to pay.[61]

1667. Held not unconstitutional—A law authorizing commitment in bastardy proceedings; [62] a law authorizing commitment for contempt in supplementary proceedings; [63] a law imposing a penalty for fraud on hotel keepers; [64] an imprisonment of an insolvent for contempt in refusing to turn over assets to the assignee; [65] an imprisonment for contempt in refusing to pay alimony; [66] an imprisonment for failure to pay a fine imposed by a court-martial.[67]

[47] State v. Lautenschlager, 22–514, 524; Allen v. Pioneer P. Co., 40–117, 122, 41+936; State v. Rodman, 58–393, 402, 59+1098; State v. Borgstrom, 69–508, 520, 72+799, 975; State v. Phillips, 73–77, 79, 75+1029; State v. Durnam, 73–150, 166, 75+1127; State v. Larson, 83–124, 128, 86+3; State v. Poole, 93–148, 100+647; State v. Dist. Ct., 98–136, 107+963; Glaser v. Kaiser, 103–241, 114+762.

[48] Const. art. 1, § 8.

[49] Adams v. Corriston, 7–456(365); State v. Gorman, 40–232, 41+948.

[50] Lommen v. Mpls. G. Co., 65–196, 208, 68+53.

[51] Houlton v. Dunn, 60–26, 33, 61+898.

[52] Weller v. St. Paul, 5–95(70).

[53] State v. Gorman, 40–232, 41+948.

[54] Adams v. Corriston, 7–456(365).

[55] Willard v. Redwood County, 22–61. See State v. Dist. Ct., 87–268, 91+1111.

[56] Cameron v. Chi. etc. Ry., 63–384, 65+652.

[57] Lommen v. Mpls. G. Co., 65–196, 68+53.

[58] Nichols v. Minneapolis, 30–545, 16+410.

[59] State v. Becht, 23–1.

[60] Meyer v. Berlandi, 39–438, 40+513.

[61] Hurd v. Hurd, 63–443, 65+728.

[62] State v. Becht, 23–1.

[63] State v. Becht, 23–411.

[64] State v. Benson, 28–424, 10+471.

[65] In re Burt, 56–397, 57+940.

[66] Hurd v. Hurd, 63–443, 65+728.

[67] State v. Wagener, 74–518, 77+424.

CLASS LEGISLATION

1668. Definition—Class legislation is such as selects particular individuals from a class, and imposes upon them special burdens, from which others from the same class are exempt, and thus denies them the equal protection of the laws.[68] Unequal and partial legislation is used synonymously with class legislation.[69] All class legislation is special legislation, but all special legislation is not class legislation.[70]

1669. General principles—Class legislation, discriminating against some and favoring others, is prohibited, but legislation is not prohibited either by the state or federal constitution, which, in carrying out a public purpose, is limited in its application, if, within the sphere of its operation, it affects alike all persons similarly situated and the classificaton is not arbitrary.[71] Whether a law shall apply generally throughout the state or only to a class or locality, is a question of legislative policy for the determination of the legislature.[72]

1670. Principles of classification—The principles of classification applicable to "special" legislation and "class" legislation are identical,[73] and need not be repeated.[74]

1671. Uniformity of operation—A law must be uniform in its operation. Not only must it treat alike, under the same conditions, all who are brought within its influence, but in its classification it must bring within its influence all who are under the same conditions.[75]

1672. Bounties—The state cannot bestow bounties on any class or occupation. The discrimination by the state between different classes of occupations and the favoring of one at the expense of the rest is an invasion of that equality of right and privilege which is a maxim of state government. It is not the business of the state to make discriminations in favor of one class against another, or in favor of one employment against another. Its business is to protect the industry of all and to give all the benefit of equal laws.[76]

1673. Constitutional prohibition—Class legislation is forbidden by section 2 of article 1 of the state constitution which provides that "no member of this state shall be * * * deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land."[77] It is also forbidden by the fourteenth amendment of the federal constitution, which provides that no state shall deny to any person within its jurisdiction the equal protection of the laws.[78] As class legislation is always special legislation it is also forbidden by section 33 of article 4 of the state constitution.[79]

[68] State v. Cooley, 56–540, 550, 58+150; State v. Wagener, 77–483, 497, 80+633, 778.

[69] See Allen v. Pioneer P. Co., 40–117, 41+936.

[70] State v. Cooley, 56–540, 550, 58+150.

[71] Cameron v. Chi. etc. Ry., 63–384, 65+652; Johnson v. St. P. etc. Ry., 43–222, 45+156. See State v. Standard Oil Co., 126+527.

[72] Johnson v. Chi. etc. Ry. Co., 29–425, 432, 13+673; Merritt v. Knife Falls B. Corp., 34–245, 25+403; Bruce v. Dodge County, 20–388(339).

[73] State v. Cooley, 56–540, 58+150. See § 1679.

[74] See Cameron v. Chi. etc. Ry., 63–384, 388, 65+652; State v. Smith, 58–35, 38, 59+545; Allen v. Pioneer P. Co., 40–117, 41+936; Cobb v. Bord, 40–479, 42+396; Johnson v. St. P. etc. Ry., 43–222, 45+156; Lavallee v. St. P. etc. Ry., 40–249, 41+974.

[75] Johnson v. St. P. etc. Ry., 43–222, 45+156. See § 1683.

[76] Minn. S. Co. v. Iverson, 91–30, 97+454.

[77] State v. Wagener, 69–206, 210, 72+67; Hennepin County v. Jones, 18–199(182, 185).

[78] Herrick v. Mpls. etc. Ry., 31–11, 16+413; Lavallee v. St. P. etc. Ry., 40–249, 41+974; Johnson v Chi. etc. Ry., 29–425, 13+673.

[79] State v. Wagener, 69–206, 72+67; State v. Sheriff, Ramsey County, 48–236, 51+112; State v. Justus, 85–279, 88+759; State v. Stoffels, 89–205, 94+675; State v. Justus, 91–447, 98+325; Webb v. Downes, 93–457, 101+966; Phelan v. Terry, 101–454, 112+872.

1674. Held class legislation—An exemption law discriminating between different classes of creditors and kinds of debts or liabilities;[80] an ordinance forbidding the peddling of goods not manufactured or grown in the county;[81] a law regulating hawkers and peddlers.[82]

1675. Held not class, unequal, or partial legislation—A law fixing the salary of a public officer;[83] a law giving extra costs in actions against railway companies for the killing of stock;[84] a law imposing on railway companies a liability for the negligence of fellow-servants;[85] a law fixing the fees of the surveyor general of logs;[86] a law relating to exemptions in actions for the purchase money of property sold;[87] a law relating to libels by newspapers;[88] a law limiting the time to foreclose mortgages under powers;[89] a law regulating the sale and redemption of railway tickets;[90] a law to protect motormen on street railways from cold;[91] a law allowing plaintiff attorney's fees in actions against railway companies to recover land wrongfully taken without compensation;[92] a law forbidding the consignment of certain game;[93] a law authorizing the erection of warehouses and grain elevators on the right of way of railroads;[94] a law providing for a struck jury;[95] a law forbidding the sale of liquor to Indians;[96] a law regulating commission merchants selling farm products;[97] a law exempting building and loan associations from the usury laws;[98] a law allowing manufacturers of liquor in prohibition districts to sell outside;[99] a law providing for notice before suit against a city for negligence;[1] a law forbidding barber shops to keep open on Sunday;[2] a law relating to the reorganization of the state agricultural society.[3]

SPECIAL LEGISLATION

1676. History and object of constitutional provisions—The original amendment to the constitution prohibiting special legislation was adopted in 1881. It was not general, but prohibited special legislation only as to a limited number of subjects. In 1892 the sweeping amendment which is now section 33 of article 4 of the constitution was adopted.[4] This amendment proved too drastic as regards legislation for cities and villages.[5] In 1896 the home rule amendment, which is now section 36 of article 4 of the constitution, was adopted to meet the requirements of local conditions in municipal govern-

[80] Tuttle v. Strout, 7-465(374); Coleman v. Ballandi, 22-144.
[81] Gifford v. Wiggins, 50-401, 52+904.
[82] State v. Parr, 109-147, 123+408; State v. Ramage, 109-302, 123+823.
[83] Hennepin County v. Jones, 18-199 (182); Bruce v. Dodge County, 20-388 (339).
[84] Johnson v. Chi. etc. Ry., 29-425, 13+673; Schimmele v. Chi. etc. Ry., 34-216, 25+347.
[85] Herrick v. Mpls. etc. Ry., 31-11, 16+413; Lavallee v. St. P. etc. Ry., 40-249, 41+974.
[86] Merritt v. Knife Falls B. Corp., 34-245, 25+403.
[87] Rogers v. Brackett, 34-279, 25+601.
[88] Allen v. Pioneer P. Co., 40-117, 41+936.
[89] Cobb v. Bord, 40-479, 42+396.
[90] State v. Corbett, 57-345, 59+317.
[91] State v. Smith, 58-35, 59+545.
[92] Cameron v. Chi. etc. Ry., 63-384, 65+652; Pfaender v. Chi. etc. Ry., 86-218, 90+393.
[93] State v. Chapel, 64-130, 66+205.
[94] Stewart v. G. N. Ry., 65-515, 68+208.
[95] Lommen v. Mpls. G. Co., 65-196, 68+53.
[96] State v. Wise, 70-99, 72+843.
[97] State v. Wagener, 77-483, 80+633, 778.
[98] Zenith etc. Assn. v. Heimbach, 77-97, 79+609.
[99] State v. Johnson, 86-121, 90+161.
[1] Nichols v. Minneapolis, 30-545, 16+410.
[2] State v. Pettit, 74-376, 77+225 (affirmed, 177 U. S. 164).
[3] Berman v. Minn. S. A. Soc., 93-125, 100+732.
[4] State v. Minor, 79-201, 207, 81+912. In Dahlsten v. Anderson, 99-340, 109+697, it is said that the prohibitions of section 33 are specific, not general, and are limited to the subjects particularly enumerated.
[5] See State v. Johnson, 77-453, 459, 80+620; State v. Dist. Ct., 87-146, 152, 91+300.

ment.[6] The constitutional provision against special legislation was designed to prevent log-rolling,[7] and a multiplicity of laws.[8]

1677. Definition of general law—A law is none the less general and uniform because it divides the subjects of its operation into classes and applies different rules to the different classes. A law general in form, but special in its operation, violates the constitution as much as if special in form. A law is general and uniform in its operation which operates equally upon all the subjects within the class of subjects for which the rule is adopted.[9] A law is general, in the constitutional sense, which applies to and operates uniformly upon all members of any class of persons, places, or things requiring legislation peculiar to itself in matters covered by the law. A special law is one which relates and applies to particular members of a class, either particularized by the express terms of the act, or separated by any method of selection from the whole class to which the law might, but for such limitation, be applicable.[10] If the basis of classification is proper, an act is general, though it operates only on one class of municipalities, and makes no provision as to those not falling within the class, or for those which, by reason of an increase or decrease of population, pass out of the class.[11]

1678. Discretion of legislature—Construction—Classification is so much a question of policy that the legislature should be allowed a large measure of discretion in the matter. The courts should not hold a classification arbitrary unless it is manifestly so.[12] The constitutional provision should receive a reasonable and practical construction so as not to hamper the legislature unduly.[13] It should be construed in the light of the evils it was designed to remedy.[14]

1679. General principles of classification—A classification of subjects for purposes of legislation must not be arbitrary. It must rest on a distinction which is real, and substantial, and not slight, or illusory. There must be something more than a mere designation of such characteristics as will serve to classify; the characteristics must be of such a nature as to mark the subjects so designated as peculiarly requiring exclusive jurisdiction. There must be a substantial distinction, having a reference to the subject-matter of the proposed legislation, between the objects or places embraced in such legislation and the objects or places excluded. A classification must be based upon some apparent natural reason, some reason suggested by necessity; by such a difference in the situation and circumstances of the subjects placed in different classes as suggests the necessity, or propriety of different legislation with respect to them.[15]

[6] State v. Dist. Ct., 87–146, 152, 91+300; State v. O'Connor, 81–79, 84, 83+498.

[7] State v. Cloquet, 52–9, 11, 53+1016; State v. Brown, 97–402, 106+477; Dahlsten v. Anderson, 99–340, 109+697.

[8] State v. Minor, 79–201, 205, 81+912.

[9] Nichols v. Walter, 37–264, 33+800.

[10] State v. Cooley, 56–540, 549, 58+150; State v. Rogers, 93–55, 58, 100+659; Kaiser v. Campbell, 90–375, 96+916.

[11] State v. Sullivan, 72–126, 75+8.

[12] State v. Westfall, 85–437, 439, 89+175; State v. Sullivan, 72–126, 132, 75+8; State v. Brown, 97–402, 106+477; Hunter v. Tracy, 104–378, 116+922; Wall v. St. Louis County, 105–403, 117+611; Calderwood v. Schlitz, 107–465, 121+221.

[13] State v. Sullivan, 67–379, 69+1094; State v. Brown, 97–402, 106+477; Wall v. St. Louis County, 105–403, 117+611.

[14] State v. Brown, 97–402, 106+477.

[15] Nichols v. Walter, 37–264, 33+800; State v. Spaude, 37–322, 34+164; Lavallee v. St. P. etc. Ry., 40–249, 41+974; Cobb v. Bord, 40–479, 42+396; Allen v. Pioneer P. Co., 40–117, 41+936; Johnson v. St. P. etc. Ry., 43–222, 45+156; State v. Sheriff, Ramsey County, 48–236, 51+112; State v. Cooley, 56–540, 58+150; Cameron v. Chi. etc. Ry., 63–384, 65+652; State v. Ritt, 76–531, 79+535; Murray v. Ramsey County, 81–359, 84+103; Duluth Banking Co. v. Koon, 81–486, 84+6; State v. Walker, 83–295, 297, 86+104; State v. Jensen, 86–19, 25, 89+1126; Hetland v. Norman County, 89–492, 95+305; Stees v. Bergmeier, 91–513, 516, 98+648; State v. Rogers, 93–55, 100+659; State v. Brown, 97–402, 106+477; Hunter v. Tracy, 104–378, 116+922; Hjelm v. Patterson, 105–256, 117+610; State v.

A classification must be based on some reason of public policy, growing out of the condition or business of the class to which the legislation is limited.[16] Except in the case of curative or remedial legislation, a classification cannot be based on existing conditions, it must provide for the future so that it will be permanent though the membership of the class may change.[17] It is immaterial how many members there are of a class. One may constitute a class, but the fewer the number the closer the courts will scrutinize the act to see that it is not an evasion of the constitution.[18] Where an evil exists in a variety of cases it is a sufficient reason for including some and excluding others, that in the former the evil can be remedied while in the latter it cannot.[19] The general rule that the basis of classification must be germane to the subject-matter of legislation does not apply to a classification of cities on an exclusive basis of population.[20] The principles of classification as regards "special" and "class" legislation are identical.[21]

1680. Population as a basis of classification—Population, if not limited to the present, is a proper basis for the classification of cities and counties for legislation upon some subjects but not upon all.[22] It is not a proper basis, as regards counties, if it is not germane to the subject or object of the law, and it is not a proper basis, as regards either cities or counties, if the classification is incomplete or arbitrary, because it does not include all cities or counties similarly situated.[23] Under section 36 article 4 of the constitution cities may be classified on a basis of population without regard to the relation of such basis to the subject-matter of the legislation.[24] It is no objection to a classification based on population that there is only one city or county in the class.[25] It is discretionary with the legislature to prescribe any reasonable rule of evidence for determining population for purposes of classification. It may be by reference either to the state or federal census.[26] The question of classification on a basis of population is largely a matter of discretion with the legislature.[27]

1681. Financial condition as a basis of classification—The financial condition of counties as shown by the relation between bonded indebtedness and the assessed valuation of property, is a proper basis for classification for the purpose of legislation with reference to the increase of indebtedness by the issue of bonds without a popular vote.[28]

1682. Classification of cities under section 36—The object of the amendment of 1899, which is now section 36 of article 4 of the constitution, was to permit a classification of cities on a basis of population without regard to the relation of such basis to the subject-matter of legislation.[29] If a classification

Parr, 109–147, 123+408; Lowry v. Scott, 124+635.

[16] Cameron v. Chi. etc. Ry., 63–384, 65+652.

[17] State v. Cooley, 56–540, 552, 58+150; Alexander v. Duluth, 77–445, 80+623.

[18] State v. Cooley, 56–540, 552, 58+150.

[19] State v. Smith, 58–35, 38, 59+545.

[20] See § 1680.

[21] State v. Cooley, 56–540, 550, 58+150; State v. Sheriff, Ramsey County, 48–236, 51+112.

[22] State v. Dist. Ct., 61–542, 64+190; Bowe v. St. Paul, 70–341, 73+184; State v. Sullivan, 72–126, 131, 75+8; Alexander v. Duluth, 77–445, 448, 80+623; State v. Westfall, 85–437, 89+175; State v. Rogers, 97–322, 106+345; Farwell v. Minneapolis, 105–178, 117+422; Calderwood v. Schlitz, 107–465, 121+221.

[23] State v. Ritt, 76–531, 79+535; Murray v. Ramsey County, 81–359, 84+103; Hetland v. Norman County, 89–492, 95+305; State v. Brown, 97–402, 106+477; Hjelm v. Patterson, 105–256, 117+610; Lowry v. Scott, 124+635.

[24] See § 1682.

[25] State v. Dist. Ct., 61–542, 64+190; Bowe v. St. Paul, 70–341, 73+184; State v. Cooley, 56–540, 552, 58+150.

[26] State v. Dist. Ct., 84–377, 87+942; State v. Rogers, 97–322, 106+345.

[27] State v. Westfall, 85–437, 439, 89+175; State v. Sullivan, 72–126, 132, 75+8. See State v. Ritt, 76–531, 536, 79+535.

[28] Wall v. St. Louis County, 105–403, 117+611.

[29] Alexander v. Duluth, 77–445, 80+623; State v. Ames, 87–23, 91+18; Le Tourneau v. Hugo, 90–420, 97+115; State v. Brown,

of cities is not based exclusively on population it may be unconstitutional under sections 33 and 34 of the constitution.[30] In all cases a law must be uniform in its operation.[31]

1683. Uniformity of operation—A law must have a uniform operation, that is, it must operate uniformly on all of the class—all whose conditions and wants render the legislation equally appropriate to them as a class. To whatever class a law applies it must apply to every member of that class. Not only must a law treat alike, under the same conditions, all who are brought within its influence, but in its classification it must bring within its influence all who are under the same conditions. If the basis of classification is such that new members of the class may come into existence, the law must be so framed as to include them when they arise.[32] These rules are to be construed in a broad and general way so as not to interfere unduly with practical legislation.[33] The presumption is that the legislature included all cases of like character.[34] The uniform operation of a law cannot be left to a future contingency.[35]

1684. Remedial and curative laws—Remedial and curative laws are an exception to the general rule that a classification cannot be based on existing conditions. For such laws a classification is valid if it includes all the subjects which are affected by the conditions which it is sought to remedy or the evils it is sought to cure.[36]

1685. Existing special legislation—The legislature cannot, by a law general in form, adopt and extend prohibited special legislation. Existing special legislation cannot be made the basis of classification. The legislature cannot touch it except to repeal it.[37] But a law recognizing school districts organized under special laws has been sustained.[38] A general law of uniform operation throughout the state is not unconstitutional merely because it incidentally modifies a special law.[39] Existing special legislation is not repealed by implication by subsequent general laws, where it would not be so repealed prior to the constitutional provision against special legislation.[40]

1686. Acts creating new courts—Section 33 of article 4 of the constitution, prohibiting special legislation upon certain enumerated subjects, has no application to the power of the legislature to create new courts under section 1 of article 6, or to an amendment of an act creating and establishing a court thereunder.[41]

97–402, 408, 106+477; Gould v. Grout, 125+273.

[30] State v. Justus, 90–474, 97+124; Thomas v. St. Cloud, 90–477, 97+125; State v. Rogers, 93–55, 100+659; State v. Schraps, 97–62, 106+106.

[31] State v. Schraps, 97–62, 106+106; State v. Rogers, 93–55, 100+659. See § 1683.

[32] State v. Cooley, 56–540, 552, 58+150; State v. Ritt, 76–531, 534, 79+535; Thomas v. St. Cloud, 90–477, 97+125; Johnson v. St. P. etc. Ry., 43–222, 45+156; Hetland v. Norman County, 89–492, 95+305; Alexander v. Duluth, 57–47, 58+866; State v. Rogers, 93–55, 100+659; State v. Sullivan, 72–126, 75+8; Murray v. Ramsey County, 81–359, 84+103; State v. Schraps, 97–62, 106+106; State v. Sheriff, Ramsey County, 48–236, 51+112; State v. Stoffels, 89–205, 208, 94+675; State v. Wagener, 69–206, 72+67.

[33] State v. Sheriff, Ramsey County, 48–236, 51+112.

[34] State v. Gunn, 92–436, 439, 100+97.

[35] State v. Copeland, 66–315, 69+27.

[36] State v. Spaude, 37–322, 34+164; Cobb v. Bord, 40–479, 42+396; Flynn v. Little Falls etc. Co., 74–180, 192, 77+38, 78+106; State v. Thief River Falls, 76–15, 18, 78+876; Alexander v. Duluth, 77–445, 80+623; State v. Ames, 87–23, 91+18; Kaiser v. Campbell, 90–375, 96+916; State v. Gunn, 92–436, 440, 100+97; State v. Henderson, 97–369, 106+348; State v. Brown, 97–402, 106+477.

[37] Alexander v. Duluth, 57–47, 58+866; State v. Sullivan, 62–283, 287, 64+813; State v. Johnson, 77–453, 80+620; Bowe v. St. Paul, 70–341, 73+184; State v. Sullivan, 72–126, 75+8.

[38] State v. Minor, 79–201, 81+912.

[39] State v. Sullivan, 62–283, 64+813; Farwell v. Minneapolis, 105–178, 117+422.

[40] State v. Egan, 64–331, 67+77.

[41] Dahlsten v. Anderson, 99–340, 109+697; State v. Sullivan, 67–379, 69+1094.

1687. Granting special privileges or franchises—The legislature is forbidden to pass a special law granting to any corporation, association, or individual, any special or exclusive privilege, immunity or franchise.[42]

1688. Repeals—The legislature is authorized to repeal any existing special or local law.[43]

1689. Laws sustained under section 36 of the constitution—A law authorizing cities of a certain population to issue bonds to take up their floating indebtedness;[44] a law authorizing cities of a certain population to issue bonds for a "revolving fund;"[45] a law limiting the amount of indebtedness in cities of a certain population;[46] a law authorizing cities of a certain population to issue its bonds.[47]

1690. Laws held invalid under section 36—A law regulating the sale of liquor in cities of a certain population with patrol limits.[48]

1691. Laws sustained since amendment of 1892—A law for the completion of the Minneapolis courthouse;[49] a law regulating the compensation of jurors;[50] a law authorizing reassessments for local improvements;[51] a law relating to the change of county seats;[52] a law to establish municipal courts in certain cities;[53] a law prohibiting the sale of liquor to Indians;[54] a law to revise the laws relating to banks of discount;[55] a law relating to the salaries of county officers in counties of a certain population;[56] a law requiring notice to municipalities of a claim for damages from negligence;[57] a law legalizing village ordinances and contracts in certain cases;[58] a law legalizing the incorporation of cities of a certain class;[59] a law providing for an extra levy in school districts having a certain population;[60] a law relating to baking powders;[61] a law relating to city markets in cities of a certain population;[62] a law relating to the inspection of public records;[63] a law prohibiting blacklisting of employees by employers;[64] a law establishing the Torrens system in counties of a certain population;[65] a law prohibiting blind pigs in prohibition districts;[66] a law authorizing villages with a certain indebtedness to issue funding bonds;[67] a law regulating the manner of drawing jurors in counties of a certain population;[68] a law forbidding the sale of certain articles on Sunday and allowing the sale of others;[69] a law relating to the holding over by a tenant of urban property;[70] a law legalizing certain county orders;[71] a law authorizing certain cities to issue bonds for armories;[72] a law providing for a board of school inspectors in cities of a certain population in which the council performs the du-

[42] Dike v. State, 38–366, 38+95; Minn. etc. Co. v. Beebe, 40–7, 10, 41+232; State v. Beck, 50–47, 52+380.
[43] Const. art. 4 § 33; Pushor v. Morris, 53–325, 55+143.
[44] Alexander v. Duluth, 77–445, 80+623.
[45] State v. Ames, 87–23, 91+18.
[46] Beck v. St. Paul, 87–381, 92+328.
[47] Le Tourneau v. Hugo, 90–420, 97+115.
[48] State v. Schraps, 97–62, 106+106.
[49] State v. Cooley, 56–540, 58+150. See 18 Harv. L. Rev. 596.
[50] State v. Sullivan, 62–283, 64+813.
[51] State v. Egan, 64–331, 67+77.
[52] State v. Pioneer P. Co., 66–536, 68+769.
[53] State v. Sullivan, 67–379, 69+1094.
[54] State v. Wise, 70–99, 72+843.
[55] Anderson v. Seymour, 70–358, 375, 73+171.
[56] State v. Sullivan, 72–126, 75+8.
[57] Bausher v. St. Paul, 72–539, 75+745.
[58] Flynn v. Little Falls etc. Co., 74–180, 77+38, 78+106.
[59] State v. Thief River Falls, 76–15, 78+867.
[60] State v. Minor, 79–201, 81+912 (overruling State v. Johnson, 77–453, 80+620).
[61] State v. Sherod, 80–446, 83+417.
[62] State v. Dist. Ct., 84–377, 87+942.
[63] State v. McCubrey, 84–439, 87+1126.
[64] State v. Justus, 85–279, 88+759.
[65] State v. Westfall, 85–437, 89+175; Nat. Bond & Security Co. v. Hopkins, 96–119, 104+678.
[66] State v. Stoffels, 89–205, 94+675.
[67] Kaiser v. Campbell, 90–375, 96+916.
[68] State v. Ames, 91–365, 98+190.
[69] State v. Justus, 91–447, 98+325.
[70] Stees v. Bergmeier, 91–513, 98+648.
[71] State v. Gunn, 92–436, 100+97.
[72] State v. Rogers, 93–55, 100+659.

ties of a board of education;[73] a law legalizing certain school bonds;[74] a law creating a thresher's lien;[75] a law for the licensing of engineers;[76] a law for the separation of unplatted agricultural lands from municipal limits;[77] a law providing for the issuance of bonds by cities having a population of fifty thousand or more;[78] a law authorizing counties having a certain assessed valuation of property and bonded indebtedness to issue bonds;[79] a law validating refundment of liquor license money made by cities of a certain population;[80] a law making special assessments a paramount lien in counties of a certain population.[81]

1692. Laws held invalid since amendment of 1892—A law to authorize the construction of tunnels by cities in certain cases;[82] a law granting charter powers to certain cities to take effect upon their adoption by any city;[83] a law regulating hawkers and peddlers;[84] a law relating to the salary of the assistant county attorney of St. Paul;[85] a law providing for the election of a county assessor in counties of a certain population;[86] a law to provide for the treatment of inebriates in counties of a certain population;[87] a law for the enforcement of delinquent taxes in certain counties;[88] a law relieving certain counties from the operation of the general tax laws;[89] a law authorizing certain counties to issue bonds for courthouses;[90] a law regulating journeymen plumbers in cities of a certain population;[91] a law authorizing the issue of bonds for the repurchase of waterworks in cities of a certain population;[92] a law regulating the sale of property stored with warehousemen;[93] a law providing for the appointment of superintendents of highways in counties having less than two hundred thousand inhabitants;[94] a law authorizing counties of a certain population to issue bonds for the improvement of roads.[95]

1693. Laws prior to amendment of 1892 sustained—A law declaring valid the incorporation of villages attempted to be incorporated under Laws 1883 c. 73;[96] a law providing for the judicial determination and adjustment of two alleged claims of a certain person;[97] a law authorizing the organization of trust companies and granting them power to act as guardians;[98] a law for the incorporation of villages and providing for municipal courts therein;[99] a law providing for the payment to a particular school district of the money received for liquor licenses in a village embraced within such district;[1] a law requiring the village council of Cloquet to publish its proceedings;[2] a law authorizing Winnebago City to issue bonds for waterworks;[3] a law amendatory of the charter of Wadena, whereby additional territory was taken into the village;[4] a law

[73] State v. Henderson, 97-369, 106+348.
[74] State v. Brown, 97-402, 106+477.
[75] Phelan v. Terry, 101-454, 112+872.
[76] Hyvonen v. Hector I. Co., 103-331, 115+167.
[77] Hunter v. Tracy, 104-378, 116+922; Brenke v. Belle Plaine, 105-84, 117+157.
[78] Farwell v. Minneapolis, 105-178, 117+422.
[79] Wall v. St. Louis County, 105-403, 117+611.
[80] Calderwood v. Schlitz, 107-465, 121+221.
[81] Gould v. Grout, 125+273.
[82] Alexander v. Duluth, 57-47, 58+866.
[83] State v. Copeland, 66-315, 69+27.
[84] State v. Wagener, 69-206, 72+67.
[85] Bowe v. St. Paul, 70-341, 73+184.
[86] State v. Ritt, 76-531, 79+535.
[87] Murray v. Ramsey County, 81-359, 84+103.
[88] Duluth B. Co. v. Koon, 81-486, 84+6.
[89] State v. Walker, 83-295, 86+104.
[90] Hetland v. Norman County, 89-492, 95+305.
[91] State v. Justus, 90-474, 97+124.
[92] Thomas v. St. Cloud, 90-477, 97+125.
[93] Webb v. Downes, 93-457, 101+966.
[94] Hjelm v. Patterson, 105-256, 117+610.
[95] Lowry v. Scott, 124+635.
[96] State v. Spaude, 37-322, 34+164.
[97] Dike v. State, 38-366, 38+95.
[98] Minn. etc. Co. v. Beebe, 40-7, 41+232.
[99] McCormick v. West Duluth, 47-272, 50+128.
[1] State v. Beck, 50-47, 52+380.
[2] State v. Cloquet, 52-9, 53+1016.
[3] Brady v. Moulton, 61-185, 63+489.
[4] State v. Wiswell, 61-465, 63+1103.

relating to assessments for local improvements;[5] a law providing for the dissolution of independent school districts;[6] a law increasing the salaries of district court judges in Ramsey county;[7] a law establishing the independent school district of Duluth.[8]

1694. Laws prior to amendment of 1892 held invalid—A law providing a mode for removing county seats;[9] a law declaring the emission of dense smoke within the city of St. Paul a nuisance;[10] a law authorizing the vacation of a part of Maple Hill Cemetery.[11]

MISCELLANEOUS

1695. Privileges and immunities of citizens—The federal constitution provides that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." This covers the right to sue and defend in the courts,[12] to do business,[13] and reside in the state.[14]

1696. Keeping troops—The Military Code of this state is not in violation of section 10 of article 1 of the federal constitution forbidding a state to keep "troops" in time of peace.[15]

1697. Republican government—The home rule amendment of the state constitution is not in violation of section 4 of article 4 of the federal constitution guaranteeing a republican form of government.[16]

1698. Full faith and credit clause—This clause of the federal constitution is applicable only when the court rendering the judgment, or in which the proceedings are had, has jurisdiction of the parties and of the subject-matter. This jurisdiction is always open to inquiry.[17] The enforcement by the courts of this state of a policy of insurance issued by a company of this state on property in another state where the company was not authorized to do business has been held not to violate this provision.[18]

1699. Rights and privileges of citizens—Section 2 of article 1 of our constitution provides that "no member of this state shall be disfranchised, or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land, or the judgment of his peers." The phrase "law of the land" is synonymous with "due process of law."[19] This provision forbids class legislation.[20] The right to a public office or its emoluments is not a right or privilege within this provision.[21] The following have been held not obnoxious to this provision: a law allowing the plaintiff reasonable attorney's fees in an action to recover land wrongfully taken by a railway company without compensation;[22] the Military Code;[23] a law regulating commission merchants dealing in farm products;[24] a law relating to baking powders;[25] a law forbidding the

[5] State v. Dist. Ct., 61–542, 64+190.
[6] State v. Cooley, 65–406, 68+66.
[7] Steiner v. Sullivan, 74–498, 77+286.
[8] State v. West Duluth L. Co., 75–456, 78+115.
[9] Nichols v. Walter, 37–264, 33+800.
[10] State v. Sheriff, Ramsey County, 48–236, 51+112.
[11] Sacks v. Minneapolis, 75–30, 77+563.
[12] Davis v. Pierse, 7–13(1); McShane v. Knox, 103–268, 114+955.
[13] Cabanne v. Graf, 87–510, 514, 92+461; State v. Nolan, 108–170, 122+255.
[14] Foster v. Blue Earth County, 7–140 (84, 93).
[15] State v. Wagener, 74–518, 523, 77+424.
[16] Hopkins v. Duluth, 81–189, 83+536.
[17] Boyle v. Musser, 88–456, 93+520.
[18] Strampe v. Minn. etc. Co., 109–364, 123+1083.
[19] Beaupre v. Hoerr, 13–366(339).
[20] State v. Wagener, 69–206, 210, 72+67; Hennepin County v. Jones, 18–199(182, 185).
[21] Hennepin County v. Jones, 18–199(182).
[22] Cameron v. Chi. etc. Ry., 63–384, 65+652.
[23] State v. Wagener, 74–518, 522, 77+424.
[24] State v. Wagener, 77–483, 80+633, 778; State v. Edwards, 94–225, 231, 102+697.
[25] State v. Sherod, 80–446, 83+417.

blacklisting of employees by employers;[26] a law relating to elections for the organization of counties.[27]

1700. Equal protection of the laws—The legislature cannot provide that a tax shall be collected of one person by one process and of another by an entirely different process.[28] It cannot by a special law exempt a person from the operation of a general law.[29] To require intersecting railway companies to put in switch connections is not to deprive them of the equal protections of the laws.[30] An ordinance of a city, enacted for the regulation of hawkers and peddlers, discriminating between resident and non-resident citizens and expressly excluding from its operation bona fide residents of the city, has been held unconstitutional, as denying non-residents the equal protection of the laws.[31] The right to equal protection of the laws is protected by the fourteenth amendment to the federal constitution.[32]

1701. Fourteenth amendment—The fourteenth amendment provides that, "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside.[33] No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States,[34] nor shall any state deprive any person of life, liberty, or property, without due process of law;[35] nor deny to any person within its jurisdiction the equal protection of the laws."[36] This amendment does not abridge the police power of the several states.[37] Its effect is to make the federal supreme court the final arbiter as to what constitutes due process of law.[38]

CONSTRUCTION CONTRACTS—See Contracts, 1842.
CONSTRUCTION OF CONTRACTS—See Contracts, 1816; Evidence, 3397; Landlord and Tenant, 5388; Trial, 9709.
CONSTRUCTIVE NOTICE—See Notice.
CONSTRUCTIVE POSSESSION—See Property, 7856.
CONSTRUCTIVE TRUSTS—See Trusts, 9915.
CONTAGIOUS DISEASES—See Health.

[26] State v. Justus, 85–279, 88+759.
[27] State v. Falk, 89–269, 94+879.
[28] McComb v. Bell, 2–295(256).
[29] Sanborn v. Rice County, 9–273(258).
[30] Jacobson v. Wis. etc. Ry., 71–519, 74+893.
[31] State v. Nolan, 108–170, 122+255.
[32] See § 1701.
[33] Stadtler v. School Dist., 71–311, 73+956.
[34] State v. Wise, 70–99, 72+843; State v. Weber, 96–422, 105+490; State v. Nolan, 108–170, 122+255.
[35] State v. Grace, 18–398(359, 364); Lathrop v. Schutte, 61–196, 63+493; State v. Wise, 70–99, 101, 72+843; State v. Weyerhauser, 72–519, 75+718; State v. Wagener, 77–483, 80+633, 778; Hurst v. Martinsburg, 80–40, 82+1099; State v. Pillsbury, 82–359, 374, 85+175; State v. Trustees, Macalester College, 87–165, 91+484; Cabanne v. Graf, 87–510, 92+461; State v. Edwards, 94–225, 231, 102+697; State v. Shattuck, 96–45, 104+719; State v. Marciniak, 97–355, 105+965.
[36] Herrick v. Mpls. etc. Ry., 31–11, 16+413; Lavallee v. St. P. etc. Ry., 40–249, 251, 41+974; State v. Weyerhauser, 72–519, 75+718; State v. Wagener, 77–483, 80+633, 778; State v. St. P. etc. Ry., 98–380, 387, 108+261; State v. Nolan, 108–170, 122+255; State v. W. U. Tel. Co., 124+380; Hardwick v. Chi. etc. Ry., 124+819.
[37] Butler v. Chambers, 36–69, 72, 30+308; State v. Wise, 70–99, 72+843; State v. Shattuck, 96–45, 104+719.
[38] State v. Weyerhauser, 72–519, 75+718.

CONTEMPT

1702. In general—To the end that order in the courtroom, and respect for the court and the dignity of judicial proceedings may be maintained, every court of superior jurisdiction has inherent power to punish in a summary manner for contempt committed in its presence.[39] The matter, however, is regulated by statute in this state.[40] Within ill-defined limits a court of superior jurisdiction has power to punish, but not in a summary manner, for contempt of its writs, orders, and judgments.[41] The fact that an act is a criminal offence and punishable as such does not deprive the court of jurisdiction to punish for it summarily as for contempt.[42] The writs, orders, and judgments of a superior court must be obeyed, though they are irregular or erroneous, if they are not absolutely void.[43] To bring a party into contempt for the violation of an order it must be personally served.[44]

1703. What constitutes—A party may be punished for contempt for refusing to pay alimony;[45] for disobeying an injunction;[46] for refusing to turn over assets in insolvency proceedings;[47] for persisting in a course of examining witnesses contrary to the orders of the court;[48] for refusing to obey an order in supplementary proceedings;[49] for entering judgment notwithstanding a stay;[50] or for refusing to pay over money to a receiver.[51] An officer of a court may be punished for contempt in giving information, derived by him while in attendance on the court, to third parties accused of crime, against whom a warrant has been issued out of the court.[52] After an action has terminated, it is not a contempt for a person to criticise a ruling or decision of the court therein.[53] A party cannot be punished for contempt for failure to perform an act not in his power;[54] for failing to plead;[55] for merely reading an affidavit for change of venue for prejudice of the judge.[56]

1704. Direct contempt—Procedure—When the contempt is committed in the immediate presence of the court it may be punished summarily, without trial or the submission of evidence. The court simply makes an order reciting the facts as occurring in its immediate view and presence and adjudging that the person proceeded against is thereby guilty of a contempt and that he be punished as therein specified. This is an arbitrary power, born of necessity,

[39] State v. Leftwich, 41–42, 42+598; State v. Ives, 60–478, 62+831. See Hovey v. Elliott, 167 U. S. 409; 21 Harv. L. Rev. 161.

[40] R. L. 1905 §§ 4638–4653.

[41] State v. Becht, 23–411; State v. Wilcox, 24–143; State v. Dist. Ct., 52–283, 53+1157; State v. Probate Ct., 66–246, 68+1063; State v. Dist. Ct., 78–464, 81+323.

[42] State v. Dist. Ct., 52–283, 53+1157.

[43] State v. Jamison, 69–427, 72+451; Elwell v. Goodnow, 71–383, 73+1092; State v. Giddings, 98–102, 107+1048 (facts arising subsequent to a judgment rendering its modification proper cannot be interposed as a defence to contempt proceedings thereunder).

[44] State v. Dist. Ct., 42–40, 43+686.

[45] Semrow v. Semrow, 26–9, 46+446; Papke v. Papke, 30–260, 15+117; Wagner v. Wagner, 39–394, 40+360; In re Fanning, 40–4, 41+1076; State v. Dist. Ct., 42–40, 43+686; State v. Willis, 61–120, 63+169; Hurd v. Hurd, 63–443, 65+728; State v. Jamison, 69–427, 72+451.

[46] Bass v. Shakopee, 27–250, 4+619, 6+776; State v. Dist. Ct., 52–283, 53+1157; Elwell v. Goodnow, 71–383, 73+1092; State v. Dist. Ct., 78–464, 81+323; State v. Dist. Ct., 98–136, 107+963.

[47] In re Burt, 56–397, 57+940.

[48] State v. Leftwich, 41–42, 42+598. See State v. Dist. Ct., 125+1020.

[49] State v. Becht, 23–411; Menage v. Lustfield, 30–487, 16+398; Dohs v. Holbert, 103–283, 114+961.

[50] St. Paul etc. Ry. v. Hinckley, 53–102, 54+940.

[51] Elwell v. Goodnow, 71–383, 73+1092.

[52] State v. O'Brien, 87–161, 91+297.

[53] State Board v. Hart, 104–88, 116+212.

[54] Register v. State, 8–214(185); Hurd v. Hurd, 63–443, 65+728.

[55] Perrin v. Oliver, 1–202(176).

[56] Ex parte Curtis, 3–274(188).

which must be exercised with great prudence and always limited to cases of direct contempt. But the supreme court will rarely reverse the action of the trial court. [57]

1705. Constructive contempt—Procedure—When the contempt does not occur in the immediate presence of the court, there is no power to punish summarily. Upon being informed by affidavit of the facts constituting the contempt the court may either issue a warrant for the arrest of the accused, or summon him into court by a notice or order to show cause. When the accused is brought before the court, or appears in response to the order, the court must proceed without a jury to investigate the charges by examining him and the witnesses for and against him; and on the evidence so adduced, and on such evidence alone, the court must determine whether the accused is guilty of the contempt charged. The court cannot act upon facts within its own knowledge not in evidence, or upon information obtained outside the orderly course of trial, or upon the affidavit on which the order to show cause or warrant issued. An adjournment of the proceedings may be had from time to time.[58] In cases of strictly criminal contempt the rules of evidence and presumptions of law applied in criminal cases must be observed.[59] The warrant must specify whether the accused shall be let to bail or detained in custody, and if he may be bailed the amount in which he may be let to bail.[60] The judgment must be responsive to the order to show cause.[61]

1706. Jurisdiction—By appearing and raising objections going to the merits of the charge a party waives objection to the jurisdiction of the court over him.[62] If the judge in a district where an injunction of the court has been disobeyed is disqualified from acting, contempt proceedings may be had in an adjoining district.[63]

1707. Presumption in favor of proceedings—In the absence of a proper showing to the contrary, a general adjudication in contempt proceedings is to be taken as involving an adjudication upon whatever minor facts are necessary to authorize it.[64]

1708. Punishment—The power of a court to punish for constructive contempt is limited to a fine not exceeding fifty dollars, unless it expressly appears that the right of a party to an action or special proceeding was defeated or prejudiced by the contempt,[65] and when it so appears the court may impose a fine of not more than two hundred and fifty dollars.[66] A person may be imprisoned for contempt in refusing to pay over money as ordered by the court and such imprisonment does not violate the constitutional provision against imprisonment for debt.[67] The fine and imprisonment prescribed by the statute for contempt does not contravene the constitutional provisions against excessive fines and cruel and unusual punishments.[68]

CONTIGUOUS—See note 69.
CONTINGENT CLAIMS—See Executors and Administrators, 3593.
CONTINGENT REMAINDERS—See Estates, 3173.

[57] R. L. 1905 § 4641; State v. Leftwich, 41–42, 42+598; State v. Ives, 60–478, 62+831.
[58] R. L. 1905 §§ 4642, 4647, 4648; State v. Ives, 60–478, 62+831; State v. Willis, 61–120, 63+169; State v. Dist. Ct., 65–146, 67+796; Elwell v. Goodnow, 71–383, 73+1092.
[59] State v. Dist. Ct., 65–146, 67+796.
[60] R. L. 1905 § 4644; Papke v. Papke, 30–260, 15+117.
[61] State v. Willis, 61–120, 63+169.
[62] Papke v. Papke, 30–260, 15+117.
[63] State v. Dist. Ct., 52–283, 53+1157.
[64] State v. Becht, 23–411, 414.
[65] R. L. 1905 § 4640; State v. Miesen, 98–19, 106+1134, 108+513.
[66] R. L. 1905 § 4648; State v. Dist. Ct., 98–136, 107+963.
[67] State v. Becht, 23–411; In re Burt, 56–397, 57+940; Hurd v. Hurd, 63–443, 65+728.
[68] State v. Dist. Ct., 98–136, 107+963.
[69] Olson v. St. Paul etc. Co., 35–432, 433, 29+125.

CONTINUANCE

Cross-References

See Criminal Law, 2470; Justices of the Peace.

1709. Definition—A continuance is an adjournment or postponement of the trial of a cause from one day to another of the same term, or from one term to another.

1710. A matter of discretion—The granting of a continuance or postponement of a cause is a matter lying in the discretion of the trial court and its action will not be reversed on appeal except for a clear abuse of discretion.[70]

1711. Necessity of substantial grounds—As parties are entitled to a speedy trial, continuances should not be lightly granted against objection.[71] They should not be granted on the mere oral statements of counsel that they are necessary, or upon the mere suspicion that absent witnesses may be needed at the trial. Substantial reasons for a continuance must be properly shown.[72]

1712. Time of motion—Motions for a continuance must be made on the first day of the term, unless the cause for the continuance arises or comes to the knowledge of the party subsequent to that day.[73] They are not made on the first call of the calendar.[74]

1713. Moving affidavits—It is provided by statute that "a motion to postpone a trial for the absence of evidence can only be made upon affidavit, stating the evidence expected to be obtained, the reasons for its absence and for expecting that it can be procured, and showing its materiality, and that due diligence has been used to procure it." [75] In an affidavit for a continuance on account of the absence of a material witness, the deponent must set forth particularly what he expects and believes the witness would testify to were he present and orally examined in court.[76] The name of the witness should be given.[77]

1714. Counter affidavits—In our practice counter affidavits are often submitted.[78]

1715. To secure evidence—An application for a continuance to secure evidence will not be granted unless it is made to appear that the evidence sought could not have been secured in time for the trial by the exercise of due diligence;[79] that it is so material that it might reasonably change the result;[80]

[70] Allis v. Day, 14–516(388); State v. McCartey, 17–76(54); Wright v. Levy, 22–466; State v. Conway, 23–291; Carson v. Getchell, 23–571; Boice v. Boice, 27–371; 7+687; Johnson v. Chi. etc. Ry., 31–57, 16+488; Lowenstein v. Greve, 50–383, 52+964; West v. Hennessey, 63–378, 65+639; Adamek v. Plano Mfg. Co., 64–304, 66+981; Allen v. Brown, 72–459, 75+385; State v. Fay, 88–269, 92+978; Davies v. Johnson, 99–520, 109+1132; McAllister v. St. P. C. Ry., 105–1, 116+917; Wehring v. Modern Woodmen, 107–25, 119+245; Anderson v. Foley, 124+987.

[71] Adamek v. Plano Mfg. Co., 64–304, 66+981.

[72] State v. Fay, 88–269, 92+978.

[73] Rule 33, District Court.

[74] Rule 32, District Court.

[75] R. L. 1905 § 4168. See Washington County v. McCoy, 1–100(78).

[76] Rule 33, District Court. See Mackubin v. Clarkson, 5–247(193).

[77] School Dist. v. Thompson, 5–280(221).

[78] Adamek v. Plano Mfg. Co., 64–304, 66+981; Wehring v. Modern Woodmen, 107–25, 119+245. See Dunnell, Minn. Pr. § 385.

[79] Washington County v. McCoy, 1–100(78); Cooper v. Stinson, 5–201(160); Mackubin v. Clarkson, 5–247(193); School Dist. v. Thompson, 5–280(221); State v. Conway, 23–291; Cargill v. Thompson, 50–211, 52+644; Holmes v. Corbin, 50–209, 52+531; Allen v. Brown, 72–459, 75+385; Wehring v. Modern Woodmen, 107–25, 119+245.

[80] Cooper v. Stinson, 5–201(160); McLean v. Burbank, 12–530(438). See Brosius v. Evans, 90–521, 97+373; McAllister v. St. P. C. Ry., 105–1, 116+917.

that it is admissible under the pleadings and the rules of evidence;[81] and that there is reasonable ground for believing that it can be secured.[82]

1716. Stipulation—Where a postponement is granted on stipulation of the parties for the sole purpose of securing the testimony of certain specified witnesses, other witnesses cannot be substituted.[83]

1717. Defeating application by admission—By virtue of statute an application for a continuance for the absence of evidence may be defeated by the adverse party admitting that such evidence would be given, and that it be considered as actually given on the trial, or offered and rejected as improper.[84]

1718. Imposing conditions—Where in the course of a trial the court grants plaintiff's motion to amend the complaint by omitting certain facts which have 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.[85]

1719. Waiver—By consenting to a reference a party waives objections to a denial of his prior application for a continuance.[86]

1720. Granted—A continuance has been granted where a witness was pregnant so that she could not attend the trial with safety.[87] It has been held that it would have been proper to have granted a continuance where a party was surprised by the exclusion of a deposition upon which he relied for the cross-examination of a witness.[88]

1721. Denied—A continuance has been denied where a party was compelled by prior engagements to go out of the state;[89] where assistant counsel was unable to be present, there being no claim that he alone was advised as to the law and facts of the case and able to present them intelligently to the court;[90] where the attorney of one of the parties was professionally engaged elsewhere in the trial of a cause;[91] where one of the parties was necessarily absent from a second trial of the cause and the adverse party consented to let the testimony of the absent party at the former trial be read and considered as actually given on the second trial;[92] where the attorney of one of the parties was absent on account of a violent storm;[93] where an attorney wanted time in which to prepare on a motion to set aside a default judgment;[94] where a witness was absent whom the party had neglected to subpœna, relying on the promise of the witness to be present;[95] where a witness who was a member of the legislature was absent and his deposition might easily have been taken in St. Paul;[96] where the evidence sought was inadmissible under the pleadings;[97] where there was a failure to exercise due diligence in securing the evidence sought;[98] where, in a criminal action, the testimony of the absent witness given before the com-

[81] Coit v. Waples, 1–134(110); Dingman v. State, 48 Wis. 485.
[82] State v. Conway, 23–291; Johnson v. Chi. etc. Ry., 31–57, 16+488; Lowenstein v. Greve, 50–383, 52+964.
[83] Cook v. Kittson, 68–474, 71+670.
[84] R. L. 1905 § 4168. See Dunnell, Minn. Pr. § 391.
[85] Despatch L. Co. v. Employers' L. A. Corp., 105–384, 117+506, 118+152.
[86] Allis v. Day, 14–516(388).
[87] Wright v. Levy, 22–466.
[88] Stitt v. Rat Portage L. Co., 94–529, 103+1133.
[89] West v. Hennessey, 63–378, 65+639.
[90] Id.
[91] Adamek v. Plano Mfg. Co., 64–304, 66+981. See Glaeser v. St. Paul, 67–368, 69+1101.
[92] Conrad v. Dobmeier, 64–284, 67+5.
[93] Boice v. Boice, 27–371, 7+687.
[94] Glaeser v. St. Paul, 67–368, 69+1101.
[95] Beaulieu v. Parsons, 2–37(26); Mackubin v. Clarkson, 5–247(193).
[96] Washington County v. McCoy, 1–100(78).
[97] Coit v. Waples, 1–134(110).
[98] See cases under § 1715.

mitting magistrate was read to the jury, under a stipulation of the parties;[00] where a witness was sick, but no adequate proof of the sickness was offered;[1] where there was no evidence that an absent witness could ever be found;[2] where the application was based on nothing but the unsworn oral statement of counsel;[3] where a deposition sought to be obtained might easily have been secured in time for trial;[4] where a witness was absent who had been subpœnaed and there was no evidence that he was not within reach of process of the court;[5] where it was discovered on the trial that a juror was disqualified;[6] where a witness, who had been subpœnaed and was present during the first days of a trial, left the state.[7]

[00] State v. Conway, 23–291.
[1] State v. McCartey, 17–76(54).
[2] Johnson v. Chi. etc. Ry., 31–57, 16+488. See cases under § 1715.
[3] Cheney v. Dry Wood L. Co., 34–440, 26+236.
[4] Holmes v. Corbin, 50–209, 52+531; Allen v. Brown, 72–459, 75+385.
[5] West v. Hennessey, 63–378, 65+639.
[6] Wells v. Bowman, 59–364, 61+135.
[7] McAllister v. St. P. C. Ry., 105–1, 116+917.

CONTRACTS

IN GENERAL

PARTIES

EXECUTION AND DURATION

OFFER AND ACCEPTANCE

CONSIDERATION

MODIFICATION AND SUBSTITUTION

PERFORMANCE

BREACH

RESCISSION BY ACT OF PARTY

Cross-References

See Conflict of Laws, 1532; Damages, 2559-2569; Implied or Quasi Contracts; Sales; Vendor and Purchaser; and other specific heads.

IN GENERAL

1722. Definition—A contract is an agreement or promise enforceable by law.[8] It is often defined as "an agreement between two or more parties for the doing or the not doing of some particular thing."[9] The word "contract" is applied to so many different things that it is impossible to frame a satisfactory definition.[10]

1723. What constitutes—A mere acknowledgment of indebtedness is not a contract.[11] A promise by one party, where there is no correlative undertaking or promise by the other party, does not constitute a contract, but is a mere offer which may be withdrawn at any time before it is accepted or acted upon.[12] A mere "understanding" by one party is not a contract.[13]

1724. Express contracts—Definition—Contracts are express when their terms are stated by the parties, either orally or in writing.[14]

1725. Bilateral and unilateral contracts distinguished—A bilateral contract is one which is to be performed on each side at some future time, while a unilateral contract is one in which one of the parties performs at the moment when the other covenants or promises to perform. In other words, a bilateral contract is executory on both sides, while a unilateral contract is executed on one side. A bilateral contract becomes unilateral whenever one side of it is fully performed, the other side remaining to be performed. It is of the essence of a bilateral contract that its promises constitute the consideration for each other. In a bilateral contract both parties must be bound at the same time, or neither is bound. In a unilateral contract the offeree is not bound to perform at all, nor until performance by him is the offerer bound, but upon performance by the offeree the proposal of the offerer is converted into a binding promise.[15]

1726. Definiteness and certainty—The terms of a contract must be definite and certain, or capable of being made so.[16]

1727. Entire and severable contracts—Whether a contract is entire or severable depends upon the intention of the parties and is not to be determined by the application of hard and fast rules. The modern tendency is to construe a contract as severable rather than entire, where the intention of the parties is fairly doubtful.[17] If the part of a contract to be performed by one party con-

[8] Pollock, Contracts (Williston's ed. 1906), p. 1. See, for a criticism of this definition, Markby, Elements of Law, 613.

[9] Sharpe v. Rogers, 10-207(168).

[10] Harriman, Contracts (2 ed.), §§ 3, 610.

[11] Alexander v. Thompson, 42-498, 44+534.

[12] Ellsworth v. Southern etc. Co., 31-543, 18+822.

[13] Bardwell v. Witt, 42-468, 44+983. See Winslow v. Dakota L. Co., 32-237, 20+145.

[14] Stees v. Bergmeier, 91-513, 98+648.

[15] Langdell, Contracts, § 183; Pollock, Contracts (Williston's ed. 1906), p. 35; Ellsworth v. Southern etc. Co., 31-543, 18+822; McMillan v. Ames, 33-257, 22+612; Magoon v. Minn. T. P. Co., 34-434, 26+235; Horn v. Hanson, 56-43, 57+315; Storch v. Duhnke, 76-521, 79+533; Lapham v. Flint, 86-376, 90+780. See Andreas v. Holcombe, 22-339; Griffin v. Bristle, 39-456, 40+523; Stensgaard v. Smith, 43-11, 44+669.

[16] Sergeant v. Dwyer, 44-309, 46+444; National P. Assn. v. Prentice, 49-220, 51+916; Ames v. Aetna Ins. Co., 83-346, 86+344; Robertson v. Grand Rapids, 96-69, 104+715; Hobe v. McGrath, 104-345, 116+652.

[17] Cook v. Finch, 19-407(350); Weber v. Clark, 24-354; Spear v. Snider, 29-463, 13+910; Frankoviz v. Smith, 34-403, 406, 26+225; Handy v. St. Paul etc. Co., 41-188, 42+872; Ennis v. Buckeye P. Co., 44-105, 46+314; Bowe v. Minn. M. Co., 44-460, 47+151; Peterson v. Mayer, 46-468, 49+245; McGrath v. Cannon, 55-457, 57+150; Uldrickson v. Samdahl, 92-297, 100+5; Frye v. Met. Music Co., 96-535, 104+1149; Todd v. Bettingen, 98-170, 107+1049;

sists of several distinct items, and the price to be paid by the other is apportioned to each item to be performed, or is left to be implied by law, the contract will generally be construed to be severable.[18] A contract which can be fulfilled only as a whole, so that failure in any part is failure in the whole, is said to be entire. A contract of which the performance can be separated, so that failure in one part affects the parties' rights as to that part only, is said to be divisible or separable.[19]

1728. Conditions precedent and subsequent—When a right sought to be asserted under a contract is dependent upon the prior performance of conditions precedent, such performance must be shown to entitle a party to enforce the right.[20] Cases are cited below holding conditions precedent,[21] or subsequent.[22]

1729. Termination by death—A contract for services of a personal nature is terminated by the death of the party agreeing to perform the services.[23]

1730. Validity determined by law at time—The validity of a contract is governed by the law in force at the time of its execution.[24]

PARTIES

1731. Contractual capacity—The capacity of infants;[25] insane persons;[26] married women;[27] and corporations,[28] to contract is considered elsewhere. Mere mental weakness does not incapacitate a person from contracting. It is sufficient if he has enough mental capacity to understand, to a reasonable extent, the nature and effect of what he is doing.[29] 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.[30]

1732. Assumed name—A party may contract under an assumed name.[31]

1733. Strangers—A stranger to a contract is not ordinarily bound by it,[32] and cannot sue thereon.[33]

EXECUTION AND DURATION

1734. Signing—It is not indispensable that all the parties to a contract should sign it.[34] As a general rule a party who signs and delivers an instrument is bound by the obligation he therein assumes, though it is not executed by all the parties for whose signatures it was prepared.[35] The general subject

Langguth v. Burmeister, 101–14, 111+653; Chapman v. Fabian, 104–176, 116+207; Johnson v. Fehsefeldt, 106–202, 118+797; Duluth L. Co. v. Hill, 124+967.

[18] McGrath v. Cannon, 55–457, 57+150; Stauff v. Bingenheimer, 94–309, 102+694.

[19] Pollock, Contracts (Williston's ed. 1906), p. 321.

[20] Gjerness v. Mathews, 27–320, 7+355.

[21] Gjerness v. Mathews, 27–320, 7+355; State v. Minneapolis, 32–501, 21+722; Wright v. Wilcox, 52–438, 54+483.

[22] Root v. Childs, 68–142, 70+1078; Merchants' R. Co. v. St. Paul, 77–343, 79+1040.

[23] East Norway Lake etc. Church v. Froislie, 37–447, 35+260.

[24] Olson v. Nelson, 3–53(22).

[25] See § 4435.

[26] See § 4519.

[27] See § 4258.

[28] See § 1998.

[29] Woodcock v. Johnson, 36–217, 30+894; Albrecht v. Albrecht, 44–70, 46+145; Trimbo v. Trimbo, 47–389, 50+350; Knox v. Haug, 48–58, 50+934; Youn v. Lamont, 56–216, 57+478; Young v. Otto, 57–307, 59+199; Graham v. Graham, 84–325, 87+923.

[30] Whitcomb v. Hardy, 73–285, 76+29; Ham v. Potter, 101–439, 112+1015.

[31] Scanlan v. Grimmer, 71–351, 74+146.

[32] Graves v. Moses, 13–335(307); Napa Valley W. Co. v. Boston B. Co., 44–130, 46+239.

[33] See § 1892.

[34] Magoon v. Minn. T. P. Co., 34–434, 26+235; Griffin v. Bristle, 39–456, 40+523.

[35] Naylor v. Stene, 96–57, 104+685.

of signing instruments is considered elsewhere.[36] A signing by three out of five commissioners has been held sufficient.[37]

1735. Signing without reading—Where one has executed a contract, the bare fact that he did not read it or know its contents, will not relieve him.[38]

1736. Delivery—Conditional—As a general rule delivery is essential to the execution of a contract in writing.[39] A contract may be delivered to become operative only on the happening of a contingency.[40] One who executes a contract may protect himself from liability thereon by affirmatively showing an express agreement that there should be no delivery until others executed it.[41]

1737. Evidence—Sufficiency as to execution—Cases are cited below involving the sufficiency of evidence to prove contracts.[42]

1738. By telephone—A contract may be entered into through a telephone.[43]

1739. Duration—The duration of a contract may be left indefinite, so that it may be terminated by either party at will.[44] A contract between a hospital and a master for the care of an injured servant has been held not terminable at the will of the master, while the servant was unfit to be discharged or removed from the hospital.[45]

OFFER AND ACCEPTANCE

1740. In general—A mere offer is not a contract.[46] As no contract is complete without the mutual assent of the parties, an offer imposes no obligation until it is accepted, according to its terms. So long as the offer has been neither accepted nor rejected, the negotiation remains open, and imposes no obligation upon either party; the one may decline to accept, or the other may withdraw his offer; and either rejection or withdrawal leaves the matter as if no offer had ever been made. A proposal to accept, or an acceptance, upon terms varying from those offered, is a rejection of the offer, and puts an end to the negotiation, unless the party who made the original offer renews it, or assents to the modification suggested. The other party, having once rejected the offer, cannot afterwards revive it by tendering an acceptance of it.[47] If the time for

[36] See § 8769.

[37] Hooper v. Webb, 27–485, 8+589.

[38] Quimby v. Shearer, 56–534, 58+155.

[39] Hill v. Webb, 43–545, 45+1133; Jenson v. Chi. etc. Ry., 37–383, 34+743.

[40] See § 3377.

[41] Naylor v. Stene, 96–57, 104+685.

[42] Jenson v. Chi. etc. Ry., 37–383, 34+743; In re Hummel, 55–315, 56+1064; Berryhill v. Carney, 76–319, 79+170; Hobe v. McGrath, 102–66, 112+1053.

[43] See State v. Priester, 43–373, 45+712; Barrett v. Magner, 105–118, 117+245; Peterson v. Rogers, 105–523, 117+1126.

[44] Ryberg v. Goodnow, 59–413, 61+455; Newhall v. Journal P. Co., 105–44, 117+228. See § 5802.

[45] St. Barnabas Hospital v. Mpls. I. E. Co., 68–254, 70+1126.

[46] Ellsworth v. Southern etc. Co., 31–543, 18+822; Cannon River M. Assn. v. Rogers, 42–123, 43+792; Stensgaard v. Smith, 43–11, 44+669; Graff v. Buchanan, 46–254, 48+915; Bergmeier v. Eisenmenger, 59–175, 60+1097.

[47] Mpls. etc. Ry. v. Columbus etc. Co., 119 U. S. 149; Beaupre v. Pac. & Atl. Tel. Co., 21–155 (offer to buy unaccepted); Horn v. Western L. Assn., 22–233 (resolution of executive committee or board of association—acceptance by letter); Langellier v. Schaefer, 36–361, 31+690 (acceptance held not according to offer as to place of delivery and payment); Johnson v. Jacobs, 42–168, 44+6 (evidence held not to show an acceptance of an offer to sell); Stensgaard v. Smith, 43–11, 44+669 (offer of agency to sell land unaccepted); Union Bank v. Shea, 57–180, 58+985 (offer to accept drafts drawn on offerer accepted by cashing drafts); Ames v. Smith, 65–304, 67+999; Wemple v. Northern D. E. Co., 67–87, 69+478 (neither of two offers accepted); Hayden v. Byron, 78–27, 80+835 (a letter held an unconditional acceptance of an offer to sell personalty); Reid v. N. W. etc. Co., 79–369, 82+672 (offer to purchase goods held not accepted); Hanson v. Nelson, 82–220, 84+742 (mere silence held not an acceptance); King v. Dahl, 82–240, 84+737 (telegram and letter held an unconditional acceptance); Kileen v. Kennedy, 90–414, 97+126 (offer to sell—acceptance varying from offer); Anderson v. Wis. C. Ry., 107–296, 120+39 (auction—bid); Smith v. Independent School Dist.,

acceptance is limited, the limit is absolute. In other words time is of the essence.[48] If there is no express limitation of time the acceptance must be within a reasonable time.[49] An acceptance need not repeat the terms of the offer.[50] An offer may be of such a nature as to require a notice of acceptance,[51] but no notice of acceptance is necessary when the acceptance consists of acts.[52] Whether an offer is accepted is a question for the jury, unless the evidence is conclusive.[53]

1741. Withdrawal—Revocation of offer—As long as a proposed contract rests in mere negotiation, either party may withdraw.[54] An offer may be revoked at any time before it is accepted.[55] Prior to Laws 1899 c. 86, it was held that an offer under seal was not revocable within the time limited.[56]

1742. Mutual assent—There can be no contract without the mutual assent of the parties. There must be a clear accession on both sides to one and the same set of terms.[57] The minds of the parties must meet and agree upon the expressed terms of the contract.[58] Assent up to a certain point is not enough, there must be assent to an agreement.[59] A mere "understanding" by one party is not a contract.[60] The intention of one party, not communicated to the other, is immaterial.[61]

1743. Mistake—If the minds of the parties meet upon the terms of their agreement, there is a binding contract, though one of them may have been mistaken as to their legal effect.[62]

1744. Definiteness of offer—An offer must be sufficiently definite to form the basis of a contract.[63]

1745. Advertisement for bids—Where a party advertises for bids for work, etc., he is not bound to award a contract to the lowest bidder.[64] It is the acceptance of the bid that creates a contract.[65]

1746. Prospectus—In order that a prospectus of a proposed publication may become a part of the contract of a subscriber for the work to be published, it must appear that the contents of the prospectus were communicated to him, so that he may be supposed to have been influenced thereby.[66]

1747. Quotation of market price—A mere quotation of the market price of an article is not an offer to sell.[67]

1748. Acceptance by mail or telegraph—When acceptance of an offer is made by mail or telegraph the contract is complete when the letter is deposited

108–322, 122+173 (contract for construction of schoolhouse—proposals and acceptance—specifications).

[48] Steele v. Bond, 32–14, 18+830; Cannon River M. Assn. v. Rogers, 42–123, 43+792.

[49] Stone v. Harmon, 31–512, 19+88; Graff v. Buchanan, 46–254, 48+915; Wemple v. Northern D. E. Co., 67–87, 69+478; Mpls. etc. Ry. v. Columbus etc. Co., 119 U. S. 149.

[50] Hayden v. Byron, 78–27, 80+835.

[51] Stensgaard v. Smith, 43–11, 44+669; Graff v. Buchanan, 46–254, 48+915; Baker v. Chi. etc. Ry., 91–118, 97+650. See Storch v. Duhnke, 76–521, 79+533.

[52] Union Bank v. Shea, 57–180, 58+985.

[53] Cameron v. Booth, 99–513, 108+514.

[54] Scanlon v. Oliver, 42–538, 44+1031; Hill v. Webb, 43–545, 45+1133; Schumacher v. Pabst, 78–50, 80+838; Anderson v. Wis. C. Ry., 107–296, 120+39.

[55] Stensgaard v. Smith, 43–11, 44+669; Union Bank v. Shea, 57–180, 58+985; Storch v. Duhnke, 76–521, 79+533; Schumacher v. Pabst, 78–50, 80+838.

[56] McMillan v. Ames, 33–257, 22+612. See Storch v. Duhnke, 76–521, 79+533.

[57] Starkey v. Minneapolis, 19–203(166, 170); Ames v. Smith, 65–304, 67+999; Wemple v. Northern D. E. Co., 67–87, 69+478; Schumacher v. Pabst, 78–50, 80+838; Reid v. N. W. etc. Co., 79–369, 82+672; Kileen v. Kennedy, 90–414, 97+126.

[58] Stong v. Lane, 66–94, 68+765.

[59] Scanlon v. Oliver, 42–538, 44+1031; Mitchell v. Tschida, 71–133, 73+625.

[60] Bardwell v. Witt, 42–468, 44+983. See Winslow v. Dakota L. Co., 32–237, 20+145.

[61] Phoenix v. Gardner, 13–430(396).

[62] Paine v. Smith, 33–495, 24+305.

[63] Cameron v. Booth, 99–513, 108+514.

[64] Starkey v. Minneapolis, 19–203(166).

[65] See Cameron v. Booth, 99–513, 108+514.

[66] Tichnor v. Hart, 52–407, 54+369.

[67] Beaupre v. Pac. & Atl. Tel. Co., 21–155.

in the postoffice, or the message delivered to the telegraph company. Thereafter, and before the actual receipt of the letter or telegram, the offer cannot be revoked.[68]

1749. Contract for a future contract—A contract between two persons, upon a valid consideration, that they will, at a specified future time, at the election of one of them, enter into a particular contract, is binding; and upon the breach of such a contract the party having the election may recover as damages what such a contract would have been worth to him. But a contract to make such a contract in the future as the parties may then agree upon is not binding. The preliminary contract must express all the material terms of the future contract.[69]

CONSIDERATION

1750. Definition—Consideration is often defined as "something which is of some value in the eye of the law moving from the plaintiff; it may be some benefit to the defendant or some detriment to the plaintiff." [70] A valuable consideration, in the sense of the law, may consist either in some right, interest, profit or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility, given, suffered or undertaken by the other.[71] Consideration means, not so much that one party is benefited, as that the other suffers detriment.[72] Indeed, a benefit to the promisor without a detriment to the promisee is probably not a sufficient consideration in any case. The modern theory of consideration is based exclusively upon the idea of detriment to the promisee.[73] Consideration is otherwise defined as "the thing given or done by the promisee in exchange for the promise;" [74] or as "any act or forbearance given in exchange for a promise;" [75] or as, "any act or forbearance called for and induced by the promise;" [76] or as, "something done, forborne, or suffered or promised to be done, forborne, or suffered by the promisee in respect of the promise." [77] A legal consideration does not necessarily mean a pecuniary gain, and it is not essential to the validity of a contract that a benefit or gain of such a nature move to the person assuming an obligation. It is sufficient if any advantage of benefit result to him, or any detriment or injury to the other party, by his failure to keep his agreement.[78]

1751. Reason for requiring—The only rational excuse for the requirement of a consideration is that it affords a practical test for determining whether the parties intended their agreement to be legally enforceable.[79]

[68] Patrick v. Bowman, 149 U. S. 411; Brauer v. Shaw, 168 Mass. 198; Pollock, Contracts (Williston's ed. 1906), p. 39. See Beaupre v. Pac. & Atl. Tel. Co., 21–155.

[69] Shepard v. Carpenter, 54–153, 55+906. See Scanlon v. Oliver, 42–538, 44+1031; Dow v. State Bank, 88–355, 93+121.

[70] New York etc. Co. v. Martin, 13–417 (386); Ten Eyck v. Sleeper, 65–413, 67+1026. See, as applying the general test of benefit to the promisor or detriment to the promisee, Brewster v. Leith, 1–56(40); Sharpe v. Rogers, 12–174(103); Bailey v. Austrian, 19–535(465); Thompson v. Hanson, 28–484, 11+86; Michaud v. MacGregor, 61–198, 63+479; Grant v. Duluth etc. Ry., 61–395, 63+1026; Turle v. Sargent, 63–211, 65+349; Ten Eyck v. Sleeper, 65–413, 417, 67+1026; Anderson v. Nystrom, 103–168, 114+742.

[71] Currie v. Misa, L. R. 10 Exch. 162; Heitsch v. Cole, 47–320, 50+235.

[72] Heitsch v. Cole, 47–320, 50+235.

[73] Langdell, Contracts, § 64; Pollock, Contracts (Williston's ed. 1906), p. 185; Harriman, Contracts (2 ed.), § 91; 2 Harv. L. Rev. 1; 8 Id. 33; 10 Id. 257; 19 Id. 312.

[74] Langdell, Contracts, § 45.

[75] Ames, 12 Harv. L. Rev. 531.

[76] Harriman, Contracts (2 ed.), § 91.

[77] Anson, Contracts (Huffcut's ed. 1906), p. 100; Hamer v. Sidway, 124 N. Y. 538.

[78] Albert Lea College v. Brown, 88–524, 93+672.

[79] Anson, Contracts (Huffcut's ed. 1906), p. 101; Markby, Elements of Law, §§ 626–647. See, for the history of consideration, Langdell, Contracts, § 46; Harriman, Contracts (2 ed.), § 85; Holmes, Common Law, 247; Hare, Contracts, 117; 2 Harv. L. Rev. 1, 60.

1752. Executed contracts—The rule requiring a consideration has no application to executed contracts.[80]

1753. Options—Unilateral contracts—In unilateral contracts acceptance and performance thereunder constitute consideration.[81] If a party has paid a valuable consideration for an optional contract he may enforce it.[82]

1754. Writing—Under Laws 1899 c. 86 § 2 all contracts in writing, expressing a consideration, signed by the party to be bound, imported a consideration.[83]

1755. From whom must move—A consideration may move from a person other than the promisee.[84]

1756. Adequacy—It is unnecessary that a consideration should be adequate. It is sufficient if it is something which the law regards as of value,[85] or of a nature that may inure to the benefit of the party.[86]

1757. Moral consideration—A moral duty is not a sufficient consideration for a promise.[87] A promise to pay a pre-existing obligation not enforceable because within the statute of frauds, or the statute of limitations, or because discharged in bankruptcy, is sometimes stated to be an exception to this rule,[88] but improperly.[89]

1758. Mutual promises—Mutuality of obligation—In bilateral contracts the mutual and concurrent promises of the parties are a sufficient consideration for each other.[90] A promise is not a sufficient consideration for a promise unless both parties are presently bound—unless there is mutuality of obligation.[91]

[80] Stewart v. Hidden, 13–43(29); Copley v. Hyland, 46–205, 48+777; Potter v. Holmes, 72–153, 75+591.

[81] Lapham v. Flint, 86–376, 90+780; Andreas v. Holcombe, 22–339; Bolles v. Sachs, 37–315, 33+862; Stensgaard v. Smith, 43–11, 44+669; Stout v. Watson, 45–454, 48+195; McMillan v. Ames, 33–257, 22+612.

[82] Smith v. St. P. & D. Ry., 60–330, 62+392; Staples v. O'Neal, 64–27, 65+1083. See Ellsworth v. Southern etc. Co., 31–543, 18+822.

[83] Northern I. Co. v. Barquist, 93–106, 100+636.

[84] Van Eman v. Stanchfield, 10–255(197).

[85] Thompson v. Hanson, 28–484, 11+86; Bedford v. Small, 31–1, 16+452; Mpls. L. Co. v. McMillan, 79–287, 82+591.

[86] Bedford v. Small, 31–1, 16+452.

[87] Mason v. Campbell, 27–54, 6+405; Harriman, Contracts (2 ed.), § 141; Pollock, Contracts (Williston's ed. 1906), p. 199; 53 L. R. A. 353, n.

[88] Mason v. Campbell, 27–54, 6+405; Rogers v. Stevenson, 16–68(56); Higgins v. Dale, 28–126, 9+583; 53 L. R. A. 353, n.

[89] Langdell, Contracts, §§ 71–73; Harriman, Contracts (2 ed.), §§ 136, 141.

[90] Starkey v. Minneapolis, 19–203(166); St. Paul etc. Ry. v. Robbins, 23–439; Schweider v. Lang, 29–254, 13+33; Mpls. M. Co. v. Goodnow, 40–497, 42+356; Wilson v. Fairchild, 45–203, 47+642; Forbes v. Bushnell, 47–402, 50+368; Elston v. Fieldman, 57–70, 58+830; Hughson v. Hardy, 62–209, 64+389; McMullan v. Dickinson Co., 63–405, 65+661, 663; Ames v. Aetna Ins. Co., 83–346, 86+344; Bowers v. Whitney, 88–168, 92+540; Lamprey v. St. P. etc. Ry., 89–187, 94+555; Barnett v. Block, 94–138, 102+390; Stauff v. Bingenheimer, 94–309, 102+694; Emerson v. Pac. etc. Co., 96–1, 104+573; Hall v. Parsons, 105–96, 117+240.

[91] Bailey v. Austrian, 19–535(465) (cited with disapproval in Pollock, Contracts, Williston's ed. 1906, p. 197; 9 Cyc. 330; 14 Harv. L. Rev. 150); Starkey v. Minneapolis, 19–203(166); Tarbox v. Gotzian, 20–139(122); Bolles v. Carli, 12–113 (62); Stensgaard v. Smith, 43–11, 44+669. See Ellsworth v. Southern etc. Co., 31–543, 18+822; Bolles v. Sachs, 37–315, 33+862; Mpls. M. Co. v. Goodnow, 40–497, 42+356; Aultman v. Olson, 43–409, 45+852; Beyerstedt v. Winona M. Co., 49–1, 51+619; Staples v. O'Neal, 64–27, 65+1083; Potter v. Holmes, 72–153, 75+591; Swanson v. Andrus, 83–505, 86+465; Ames v. Aetna Ins. Co., 83–346, 86+344; Lapham v. Flint, 86–376, 90+780; Stauff v. Bingenheimer, 94–309, 102+694; Emerson v. Pacific etc. Co., 96–1, 104+573; Newhall v. Journal P. Co., 105–44, 117+228; Anderson v. Wis. C. Ry., 107–296, 120+39. The rule is general that in an action at law to recover damages for the breach of an alleged contract, in all cases the contract must bind both parties. Neither party should be in a position where he can hold the other party to the contract and compel its performance if advantageous to him, and at the same time be at liberty to avoid the contract on his part if disadvantageous. In other words, both parties should be bound, or neither should be. Schwab v. Baremore, 95–295, 104+10.

A promise is a good consideration for a promise, and it is so previous to performance and without performance. A mere promise to do an act at a future time is a sufficient consideration for an engagement to the party making such promise. But where the bare promise of the plaintiff is the only consideration for the promise, it must appear that the promises were made mutually and concurrently. There must be a reciprocity of obligation, so that if the fact of the promise of one party not being binding on him would leave the other party without a consideration for his promise, the engagement of that other party is not obligatory. A promise is not a good consideration for a promise unless there is an absolute mutuality of engagement, so that each party has the right at once to hold the other to a positive agreement.[92] Want of mutuality simply means want of consideration.[93] Mutuality does not mean that the promises must correspond,[94] or that there must be corresponding remedies. Thus, it is immaterial that one of the promises is unenforceable, because within the statute of frauds.[95] An implied promise may be the consideration for another promise.[96] It is a controverted question whether a promise, to be a sufficient consideration, must be such that its performance would or might be a legal detriment to the promisor.[97] It is no objection that a promise is dependent upon a condition.[98]

1759. One contract consideration for another—A written agreement not showing upon its face mutuality of obligation, or other consideration, may be supported as a contract by another written contract made at the same time, and shown to have been a consideration for the former agreement.[99]

1760. Forbearance—If a person has a right at law his forbearance to institute proceedings to protect or enforce it is a valuable consideration.[1] It is not essential that the right be valid. It is sufficient if it is reasonably and in good faith believed to be valid.[2] The extension of the time of the payment of a debt is a sufficient consideration for a promise to pay it, either by the debtor or a third party.[3] Refraining from taking security is a valuable consideration.[4] A promise to forbear from doing an illegal act is not a sufficient consideration.[5] To constitute a mere promise to refrain from doing an act a consideration sufficient to support a contract, an advantage must accrue therefrom to the promisee or a loss or disadvantage be sustained by the promisor.[6] A promise to refrain from doing that which it is legally impossible to do is not a sufficient consideration.[7]

1761. Payment of debt before due—An agreement to pay money on a debt before it is due is a sufficient consideration.[8]

[92] Starkey v. Minneapolis, 19–203(166).

[93] Ellsworth v. Southern etc. Co., 31–543, 18+822; Smith v. St. P. & D. Ry., 60–330, 62+392.

[94] Harriman, Contracts (2 ed.), § 103.

[95] Bowers v. Whitney, 88–168, 92+540.

[96] Ames v. Aetna Ins. Co., 83–346, 86+344; Mpls. M. Co. v. Goodnow, 40–497, 42+356; St. Paul etc. Ry. v. Robbins, 23–439.

[97] Pollock, Contracts (Williston's ed. 1906), p. 201.

[98] McMullan v. Dickinson Co., 63–405, 65+661, 663.

[99] Bolles v. Sachs, 37–315, 33+862.

[1] Brewster v. Leith, 1–56(40); Streeter v. Smith, 31–52, 16+460; In re Hummel, 55–315, 56+1064; Mpls. Land Co. v. McMillan, 79–287, 82+591; O'Gara v. Hansing, 88–401, 93+307; First S. Bank v. Sibley Co. Bank, 96–456, 105+485; Hall v. Parsons, 105–96, 117+240. See Nelson v. Larson, 57–133, 58+687; Anderson v. Nystrom, 103–168, 114+742.

[2] See § 1522.

[3] Lundberg v. N. W. El. Co., 42–37, 43+685; Hubbard v. Fletcher, 61–148, 63+612; Nichols v. Dedrick, 61–513, 63+1110; Peterson v. Russell, 62–220, 64+555; Germania Bank v. Michaud, 62–459, 65+70; Hooper v. Pike, 70–84, 72+829; First S. Bank v. Sibley Co. Bank, 96–456, 105+485.

[4] Heitsch v. Cole, 47–320, 50+235.

[5] Davis v. Mendenhall, 19–149(113).

[6] Anderson v. Nystrom, 103–168, 114+742.

[7] Turle v. Sargent, 63–211, 65+349.

[8] Reed v. McGregor, 62–94, 64+88; Schweider v. Lang, 29–254, 13+33.

1762. Deed and agreement to reconvey—Where, as one transaction, A executes a deed conveying realty to B and the latter executes an agreement to reconvey, the execution of each is a sufficient consideration to support the other.[9]

1763. Satisfaction of debt of another—The satisfaction of the debt of a third party to the promisee is a sufficient consideration.[10]

1764. What one is legally bound to do—Doing or promising to do what one is already legally bound to do, either by the general law or by contract with the other party, is not a sufficient consideration.[11]

1765. Pre-existing obligations—A promise to pay a debt which is not enforceable because within the statute of frauds,[12] or because it is barred by the statute of limitations,[13] or because it has been discharged in bankruptcy [14] is based on a sufficient consideration. Such a promise, however, is not contractual. It is rather a waiver of a defence. The action must be based on the original promise.[15] A past indebtedness is sufficient consideration to sustain a mortgage given to secure it.[16]

1766. Promises of extra compensation—It is the general rule that where one party to a contract refuses to perform it unless promised some further pay or benefit than the contract provides, and the promise is made, and such refusal and promise are one transaction the promise is without consideration.[17] The general rule does not apply where the refusal is caused by substantial and unforeseen difficulties in the performance; [18] or where it is due to delays caused by the other party; [19] or where there is a settlement of a bona fide controversy.[20]

1767. Past consideration—A past consideration, as, for example, a prior contract, is not a sufficient consideration.[21]

1768. Discharged debts—A debt which has been voluntarily discharged by act of the parties is not a consideration for a subsequent promise to pay it.[22] Debts discharged by operation of law stand on a different footing.[23]

1769. Recitals of "for value received," etc.—The recital "for value received" imports a sufficient consideration.[24] A recital of consideration in an instrument is prima facie evidence of a consideration.[25]

1770. Effect of seal—Prior to Laws 1899 c. 86, it was held that a seal imported a consideration; [26] but for many purposes the actual consideration might

[9] Wilson v. Fairchild, 45–203, 47+642.

[10] Holm v. Sandberg, 32–427, 21+416; Osborne v. Doherty, 38–430, 38+111.

[11] Colter v. Greenhagen, 3–126(74); Davidson v. Old People's M. B. Soc., 39–303, 39+803; King v. Duluth etc. Ry., 61–482, 63+1105; First S. Bank v. Schatz, 104–425, 116+917. See Forbes v. Bushnell, 47–402, 50+368; Esch v. White, 76–220, 78+1114; Pollock, Contracts (Williston's ed. 1906), p. 204.

[12] Rogers v. Stevenson, 16–68(56).

[13] Mason v. Campbell, 27–54, 6+405.

[14] Higgins v. Dale, 28–126, 9+583.

[15] Langdell, Contracts, §§ 71–73; Harriman, Contracts (2 ed.), §§ 136, 141.

[16] Gaertner v. Western El. Co., 104–467, 116+945.

[17] King v. Duluth etc. Ry., 61–482, 63+1105 (disapproving Bryant v. Lord, 19–396 (342). See Grant v. Duluth etc. Ry., 61–395, 63+1026.

[18] Michaud v. MacGregor, 61–198, 63+479; King v. Duluth etc. Ry., 61–482, 63+1105; Osborne v. O'Reilly, 42 N. J. Eq. 467. This exception is not well established in the law. See Harriman, Contracts (2 ed.), § 119; 12 Harv. L. Rev. 529; 9 Cyc. 352.

[19] King v. Duluth etc. Ry., 61–482, 63+1105.

[20] Michaud v. MacGregor, 61–198, 63+479.

[21] Colter v. Greenhagen, 3–126(74); Aultman v. Kennedy, 33–339, 23+528.

[22] Mason v. Campbell, 27–54, 6+405; Higgins v. Dale, 28–126, 9+583.

[23] See § 1765.

[24] Frank v. Irgens, 27–43, 6+380; Osborne v. Baker, 34–307, 25+606; Elmquist v. Markoe, 39–494, 40+825; Osborne v. Gullikson, 64–218, 66+965. See Mendenhall v. Duluth D. G. Co., 72–312, 75+232.

[25] Fitzgerald v. English, 73–266, 76+27.

[26] Rose v. Roberts, 9–119(109, 113); Crone v. Braun, 23–239; McMillan v. Ames, 33–257, 22+612; Erickson v. Brandt, 53–10, 55+62; Jefferson v. Asch, 53–446, 55+604; Hale v. Dressen, 73–277, 76+31. See Sharpe v. Rogers, 12–174(103, 112).

be inquired into without reference to the seal.[27] Where a sealed contract expresses a consideration the seal does not import a different consideration.[28]

1771. In equity—Equity requires an actual consideration for executory agreements. It will not extend its remedies to gratuitous promises, even though they are under seal.[29]

1772. Held to have a sufficient consideration—A renewal of a note at a lower rate of interest, the obligor agreeing to forego the right to pay the note at any time;[30] a note given to a charitable educational institution, the institution having incurred liabilities in reliance thereon;[31] a contract to convey realty, it being a substitute for prior contracts, the vendee agreeing to waive his claims to damages growing out of the original contracts and to pay for an appraisal of the lands;[32] a promise of a grantee to pay for a deed, the deed being without covenants of warranty and the grantor having no title;[33] a contract relating to the refundment of money by a ticket seller, the ticket being rejected by the carrier;[34] an agreement by a warehouseman to keep property stored with him insured;[35] a promise to pay a building contractor for extra expense in removing stone from certain lots, the parties not knowing of the existence of the stone at the time of the original contract;[36] a promise of A to pay B extra compensation if he would perform his contract with C to do certain work which C was under contract with A to do;[37] a contract of a surety of a defaulting contractor for the completion of a job;[38] a note given in extension of another note;[39] a promise of a partner to pay a note out of partnership funds turned over to him by his partner;[40] a promise of a husband and wife not to engage in business in a village, the consideration being the sale of certain property by the wife to the promisee;[41] the indorsement of a note, the consideration being a verbal promise to pay the debt of another;[42] a promise to a debtor to pay his debt to another, the consideration being the transfer of a business;[43] a note given to satisfy the debt of a third party to the payee;[44] a deed and an agreement to reconvey;[45] an agreement to accept less rent than stipulated for in a lease;[46] a promise by an owner to an adjoining owner to pay for the use of a shed and driveway which was partly on the land of each owner;[47] an agreement for the extension of a mortgage, the mortgagor undertaking to perfect his title and give a new mortgage;[48] a note given to a bank for its stock;[49] a note given for corporate stock;[50] an agreement for a commission for the sale of realty;[51] a guaranty of a past due note, the consideration being the extension of the time of payment of the note;[52] an agreement after separation between a husband and wife for

[27] Lamprey v. Lamprey, 29–151, 12+514; Fitzgerald v. English, 73–266, 76+27; Anderson v. Lee, 73–397, 76+24; Hale v. Dressen, 73–277, 76+31.

[28] Storch v. Duhnke, 76–521, 79+533.

[29] Lamprey v. Lamprey, 29–151, 12+514; Hale v. Dressen, 73–277, 76+31; Storch v. Duhnke, 76–521, 79+533.

[30] Simpson v. Evans, 44–419, 46+908.

[31] Albert Lea College v. Brown, 88–524, 93+672.

[32] Lamprey v. St. P. & C. Ry., 89–187, 94+555.

[33] Washington L. Ins. Co. v. Marshall, 56–250, 57+658; Mitchell v. Chisholm, 57–148, 58+873.

[34] Elston v. Fieldman, 57–70, 58+830.

[35] Keller v. Smith, 59–203, 60+1102.

[36] Michaud v. MacGregor, 61–198, 63+479.

[37] Grant v. Duluth etc. Ry., 61–395, 63+1026.

[38] McHenry v. Brown, 66–123, 68+847.

[39] Hubbard v. Fletcher, 61–148, 63+612.

[40] Black v. Oliva, 80–396, 83+386.

[41] Kronschnabel v. Kronschnabel, 87–230, 91+892.

[42] Rogers v. Stevenson, 16–68(56).

[43] Goetz v. Foos, 14–265(196).

[44] Holm v. Sandberg, 32–427, 21+416; Osborne v. Doherty, 38–430, 38+111.

[45] Wilson v. Fairchild, 45–203, 47+642.

[46] Ten Eyck v. Sleeper, 65–413, 67+1026.

[47] Fish v. Dunn, 59–99, 60+843.

[48] McKinnon v. Palen, 62–188, 64+387.

[49] Atwater v. Stromberg, 75–277, 77+963; Atwater v. Smith, 73–507, 76+253.

[50] Wyatt v. Jackson, 55–87, 56+578.

[51] Forbes v. Bushnell, 47–402, 50+368.

[52] Nichols v. Dedrick, 61–513, 63+1110; Peterson v. Russell, 62–220, 64+555.

her separate support;[53] a promise by a holder of a note to release a surety on the note if the latter would refrain from taking security from his principal;[54] a promise to save sureties harmless if they would remain on an appeal bond;[55] a promise to pay the note of a decedent if the holder would refrain from filing a claim against the estate;[56] a release of a claim for damages for personal injury in return for a promise of future employment;[57] an extension of a privilege in a note to secure its cancelation, acted upon by the maker within the time extended;[58] the obligation of a surety to a note;[59] a promise to pay a debt after composition with creditors;[60] a promise to pay the debt of another;[61] a note given for a book account, the extension of the credit being a sufficient consideration;[62] a deed of land, the consideration being a contract for farming the land;[63] a unilateral contract under seal, offering to convey land under certain conditions;[64] a deed of land, the consideration being improvements made on the land;[65] a waiver of protest and notice on a note after maturity;[66] a note of a married woman for a debt of her husband given to induce a creditor to refrain from bringing an action against the husband;[67] a contract to insure cargoes for a season;[68] the note of a wife for her husband's debt, the creditor surrendering the husband's past due paper and further time for payment being obtained;[69] a contract for the removal of rock in connection with the construction of a bridge;[70] a promise by a mortgagee to pay off a second mortgage if the mortgagor would surrender the property to him;[71] an assignment to secure a pre-existing debt;[72] a note, the consideration being certain letters patent;[73] a note given to secure the surrender of an entry on public lands;[74] a note given as a substitute for another note;[75] a note, the money given for the note coming into the hands of the maker;[76] a note given to free land from an incumbrance;[77] a note given by an alleged trespasser to the claimant of land for trees cut from the land;[78] a note given for money not belonging to the payee;[79] a bond against mechanic's liens given in consideration of a promise to pay money before due;[80] a guaranty in a lease;[81] a guaranty of a note;[82] a transfer of certificates of deposit;[83] a promise to pay for the transfer and relinquishment of a homestead claim;[84] a note given for the price on a contract to convey realty;[85] an agreement to purchase improvements and possessory rights in public lands;[86] a promise to pay money for the discharge by the promisee of a person in his employ;[87] the relinquishment of a timber-culture claim;[88] an agreement to pay a note and mortgage held by a third person;[89] a chattel mortgage given for a pre-existing debt;[90] a promise to convey land in consideration of the dis-

[53] Roll v. Roll, 51–353, 53+716.
[54] Heitsch v. Co'e, 47–320, 50+235.
[55] Esch v. White, 76–220, 78+1114.
[56] In re Hummel, 55–315, 56+1064. See Nelson v. Larson, 57–133, 58+687.
[57] Smith v. St. P. & D. Ry., 60–330, 62+392.
[58] Stout v. Watson, 45–454, 48+195.
[59] Bowen v. Thwing, 56–177, 57+468.
[60] Higgins v. Dale, 28–126, 9+583.
[61] Yale v. Edgerton, 14–194(144).
[62] Lundberg v. N. W. El. Co., 42–37, 43+685.
[63] Somerdorf v. Schliep, 43–150, 44+1084.
[64] McMillan v. Ames, 33–257, 22+612.
[65] Schaps v. Lehner, 54–208, 55+911.
[66] Lockwood v. Bock, 50–142, 52+391.
[67] O'Gara v. Hansing, 88–401, 93+307.
[68] Ames v. Aetna Ins. Co., 83–346, 86+344.
[69] Osborne v. Doherty, 38–430, 38+111.
[70] St. Anthony Falls etc. Co. v. King, 23–186.
[71] Pulliam v. Adamson, 43–511, 45+1132.
[72] Bradley v. Thorne, 67–281, 69+909.
[73] Owsley v. Greenwood, 18–429(386).
[74] Thompson v. Hanson, 28–484, 11+86.
[75] Egan v. Fuller, 35–515, 29+313.
[76] Gotzian v. Steinkamp, 53–462, 55+602.
[77] Morrison v. Morse, 75–126, 77+561.
[78] N. P. Ry. v. Holmes, 88–389, 93+606.
[79] Cooper v. Hayward, 67–92, 69+638.
[80] Reed v. McGregor, 62–94, 64+88.
[81] Highland v. Dresser, 35–345, 29+55.
[82] Osborne v. Gullikson, 64–218, 66+965.
[83] Sather v. Sexton, 93–480, 101+654.
[84] Lindersmith v. Schwiso, 17–26(10).
[85] Lough v. Bragg, 18–121(106).
[86] Bedford v. Small, 31–1, 16+452.
[87] In re Cater, 33–529, 24+197.
[88] Palmer v. March, 34–127, 24+374.
[89] Lahmers v. Schmidt, 35–434, 29+169.
[90] Close v. Hodges, 44–204, 46+335; Berlin M. Works v. Security T. Co., 60–161, 61–1131.

missal of pending actions;[91] a sale of a patent right;[92] a subscription for corporate stock;[93] an agreement between an assignee of an executory contract and the other party to the contract whereby each promised to perform for the benefit of the other;[94] a premium paid for admission into a partnership;[95] a logging contract;[96] a promise by a mortgagee to pay a second mortgage;[97] a contract changing a tenancy at will to one for a fixed term;[98] an assignment for the benefit of creditors;[99] an accommodation note;[1] a contract of a carrier;[2] a security for a debt;[3] an indorsement on a note;[4] a modification of a contract;[5] an antenuptial contract;[6] a chattel mortgage to secure a past indebtedness;[7] a promise not to bring suit on a note for a certain time;[8] a contract for the surrender and purchase of a claim to public lands;[9] a license to sell a patented article;[10] a sale of the good will of a business;[11] a promise to pay a commission on the sale of land.[12]

1773. Held not to have a sufficient consideration—A renewal of notes, the new notes including unauthorized interest;[13] the note of an administrator given for a debt of his testator;[14] an agreement to convey realty, the consideration being a promise to withdraw certain objections to the location of scrip;[15] an agreement for the temporary possession of personalty by a claimant, until his claim could be determined;[16] an agreement for a re-purchase of land by a defaulting vendee;[17] a promise not to enforce certain notes;[18] a promise to pay the debt of a decedent;[19] a parol promise by one in possession of land to pay rent to one out of possession, who had neither title or right of possession;[20] a promise made as a consideration of reinstatement in a mutual benefit society;[21] a promise to pay a debt extinguished by the voluntary act of the parties;[22] a covenant to convey realty;[23] an instrument in the nature of a will;[24] a note given for a policy of insurance which the company had no authority to issue;[25] a promise by a telegraph operator to forward a message;[26] an agreement by a vendee of personalty to pay the seller for the use of the property and to deliver it to him on demand, the sale being absolute;[27] a subscription in aid of the construction of a hotel;[28] a note given as security for a non-existent debt;[29] a note, the consideration being a void sale of logs;[30] a note given as

91 Slingerland v. Slingerland, 46–100, 48+605.
92 Van Norman v. Barbeau, 54–388, 55+1112.
93 Wood v. Robbins, 56–48, 57+317; St. Paul etc. Ry. v. Robbins, 23–439.
94 Hughson v. Hardy, 62–209, 64+389.
95 Corcoran v. Sumption, 79–108, 81+761.
96 Porteous v. Com. L. Co., 80–234, 83+143.
97 Pulliam v. Adamson, 43–511, 45+1132.
98 Engels v. Mitchell, 30–122, 14+510.
99 Truitt v. Caldwell, 3–364(257).
1 First Nat. Bank v. Lang, 94–261, 102+700.
2 Hutchinson v. Chi. etc. Ry., 37–524, 35+433.
3 Am. L. & T. Co. v. Billings, 58–187, 59+998.
4 Mpls. T. Co. v. Clark, 47–108, 49+386.
5 Thompson v. Thompson, 78–379, 81+204, 543.
6 Appleby v. Appleby, 100–408, 111+305.
7 Gaertner v. Western El. Co., 104–467, 116+945.
8 Hall v. Parsons, 105–96, 117+240.
9 Lindersmith v. Schwiso, 17–26(10).
10 Wilson v. Hentges, 26–288, 3+338.
11 Southworth v. Davidson, 106–119, 118+363.
12 Larson v. Hortman, 108–287, 121+900.
13 Simpson v. Evans, 44–419, 46+908.
14 Germania Bank v. Michaud, 62–459, 65+70.
15 Sharpe v. Rogers, 12–174(103).
16 Smith v. Force, 31–119, 16+704.
17 Fife v. Blake, 38–426, 38+202.
18 Bardwell v. Witt, 42–468, 44+983.
19 Nelson v. Larson, 57–133, 58+687.
20 Clary v. O'Shea, 72–105, 75+115.
21 Davidson v. Old People's M. B. Soc., 39–303, 39+803.
22 Mason v. Campbell, 27–54, 6+405.
23 Lamprey v. Lamprey, 29–151, 12+514.
24 Fitzgerald v. English, 73–266, 76+27.
25 Rochester Ins. Co. v. Martin, 13–59(54).
26 Abbott v. W. U. Tel. Co., 86–44, 90+1.
27 Domestic S. M. Co. v. Anderson, 23–57.
28 Culver v. Banning, 19–303(260).
29 Dunning v. Pond, 5–302(238).
30 State of Wis. v. Torinus, 24–332.

security for a past due note of the son of the maker;[31] a promise to pay a note of the promisor;[32] a note given by a third party, without any consideration personal to himself, to a creditor as collateral security for the mere naked debt of another, without any circumstance of advantage to the debtor or disadvantage to the creditor;[33] a note given for premiums in a mutual insurance company;[34] a note given in settlement of a balance of an account mistakenly supposed to exist in favor of the payee;[35] an agreement that a note should not be paid for a certain time after its maturity;[36] an agreement to pay a note at a particular place;[37] a contract to render services where there is no corresponding obligation to receive them;[38] a promise to drain land so that it would sustain a building which the promisee was bound to build irrespective of the condition of the soil;[39] a composition with creditors;[40] a promise by a lessor to accept less rent than stipulated in the lease;[41] a promise of a broker not to charge a commission;[42] a release of a guarantor on a note;[43] an accord and satisfaction;[44] a promise to pay a sum of money for a tort;[45] a contract of a carrier exempting from common-law liability;[46] a promise to secure the discharge of a lis pendens and to convey land;[47] a promise to pay a debt of another;[48] a promise to extend the time for the payment of a note;[49] a note given for a license to sell an article under a void patent;[50] a formal waiver of a lien.[51]

MODIFICATION AND SUBSTITUTION

1774. Written contract—Modification by parol—A written contract, not within the statute of frauds, may be modified by a subsequent oral agreement.[52]

1775. Sealed contract—Prior to Laws 1899 c. 86, it was held that an oral modification of a sealed contract was valid, if executed, or if it had been acted upon so that the party could not be placed in statu quo.[53] Since Laws 1899 c. 86 a sealed contract may of course be modified as if unsealed.

1776. Consideration—A modification of a contract requires a consideration.[54]

1777. Burden of proof—The party who asserts a modification of a written contract by the course of business between the parties thereto must bear the burden of showing that the minds of the parties met upon a modification definite in terms. That burden is not borne by proof of ambiguous transactions from which one party might infer that the original contract was still in force and the other that it had been changed. In such a case no mutual agreement would result.[55]

[31] Security Bank v. Bell, 32–409, 21+470.
[32] Aultman v. Olson, 43–409, 45+852.
[33] Turle v. Sargent, 63–211, 65+349.
[34] Bankers' Acc. Ins. Co. v. Rogers, 73–12, 75+747.
[35] Wildermann v. Donnelly, 86–184, 90+366.
[36] Michaud v. Lagarde, 4–43(21).
[37] Colter v. Greenhagen, 3–126(74).
[38] Starkey v. Minneapolis, 19–203(166).
[39] Stees v. Leonard, 20–494(448).
[40] Sage v. Valentine, 23–102.
[41] Wharton v. Anderson, 28–301, 9+860.
[42] Little v. Rees, 34–277, 26+7.
[43] Hale v. Dressen, 76–183, 78+1045.
[44] Ness v. Minn. & Colo. Co., 87–413, 92+333.
[45] Steinhart v. Pitcher, 20–102(86).
[46] Wehmann v. Mpls. etc. Ry., 58–22, 59+546; Southard v. Mpls. etc. Ry., 60–382, 62+442.
[47] Joslyn v. Schwend, 89–71, 93+705.
[48] Johnson v. Rumsey, 28–531, 11+69.
[49] First S. Bank v. Schatz, 104–425, 116+917.
[50] Wilson v. Hentges, 26–288, 3+338.
[51] Abbott v. Nash, 35–451, 29+65.
[52] Hewitt v. Brown, 21–163; Van Santvoord v. Smith, 79–316, 82+642; Youngberg v. Lamberton, 91–100, 97+571.
[53] Siebert v. Leonard, 17–433(410); McClay v. Gluck, 41–193, 42+875.
[54] Bryant v. Lord, 19–396(342); Little v. Rees, 34–277, 26+7. See Michaud v. MacGregor, 61–198, 63+479; King v. Duluth etc. Ry., 61–482, 63+1105.
[55] N. W. etc. Co. v. Conn. etc. Co., 105–483, 117+825.

1778. Substitution of written for oral contract—A written contract may be substituted for a prior oral contract which has been partly performed, and when this is done the oral contract is merged in the written contract.[56]

PERFORMANCE

1779. Definition—Performance of a contract is such a thorough fulfilment of its duties as puts an end to its obligations by leaving nothing more to be done.[57]

1780. By whom—A contract to do ordinary work, as floating, driving and sorting logs, does not call for personal performance.[58] The contract of a clergyman with his society is personal.[59]

1781. What constitutes—Substantial—It is the general rule that a substantial compliance with the terms of a contract is sufficient.[60] In commercial contracts a strict performance is required.[61] And so of contracts under which municipal bonds are issued in aid of a railway.[62] The doctrine of "substantial performance" is most frequently applied to building contracts.[63] In all cases a party is entitled to receive essentially what he contracted for.[64]

1782. Sufficiency—Cases are cited below involving the sufficiency of performance in particular instances.[65]

1783. To satisfaction of other party—It is permissible for the parties to stipulate that performance shall be to the satisfaction of one of the parties.[66] When a party has substantially complied with the terms of a contract, which he is to perform to the satisfaction or approval of the other party, whereby the property of the latter has been materially benefited, the improvements and benefits being of such a character that they must necessarily be appropriated and retained by the party for whom they are made, the contractor is entitled to recover upon his contract.[67]

1784. Gratuitous assistance—Gratuitous assistance incidentally rendered by the party for whom work is to be done under a contract, which renders it unnecessary for the other party to incur certain expense and to perform certain labor, does not constitute a breach of the contract, or compel the party performing to resort to an action for damages, or deprive him of his right to recover for the entire contract price.[68]

1785. Time—General rules—In the absence of a stipulation as to the time of performance a contract must be performed within a reasonable time.[69]

[56] Pearce v. McGowan, 35–507, 29+176; Blondel v. Le Vesconte, 41–35, 42+544; Cable v. Foley, 45–421, 47+1135.

[57] McGuire v. Neils, 97–293, 107+130.

[58] Id.

[59] East Norway Lake etc. Church v. Froislie, 37–447, 35+260.

[60] Leeds v. Little, 42–414, 419, 44+309; Madden v. Oestrich, 46–538, 49+301; Main v. Oien, 47–89, 49+523; Potter v. Barton, 86–288, 90+529; Holt v. Sims, 94–157, 102+386.

[61] Norrington v. Wright, 115 U. S. 188.

[62] Birch Cooley v. First Nat. Bank, 86–385, 90+789.

[63] See § 1850.

[64] Winona v. Minn. Ry. Const. Co., 27–415, 6+795, 8+148. See § 1850.

[65] Beede v. Proehl, 34–497, 27+191 (note payable in merchandise—readiness to perform—unnecessary to seggregate goods from stock); Walker v. Crosby, 38–34, 35+475 (contract to pay a judgment); Orme v. Mackubin, 53–412, 55+560 (contract "to at once proceed to procure, and use all reasonable efforts to procure" a release of an interest in realty); McGuire v. Neils, 97–293, 107+130 (contract to float, drive, and sort logs); Phillips v. Menomonie H. B. Co., 109–55, 122+874.

[66] Butler v. Winona M. Co., 28–205, 9+697; O'Dea v. Winona, 41–424, 43+97; Frary v. Am. R. Co., 52–264, 53+1156; Magee v. Scott, 78–11, 80+781. See Olson v. Nonenmacher, 63–425, 65+642; 20 Harv. L. Rev. 558.

[67] O'Dea v. Winona, 41–424, 43+97.

[68] McGuire v. Neils, 97–293, 107+130.

[69] Whalon v. Aldrich, 8–346(305); Palmer v. Breen, 34–39, 24+322; Liljengren v. Mead, 42–420, 44+306; Lynch v. Kampff, 69–448, 72+455; Am. B. Co. v. Am. D. S. Co., 107–140, 119+783.

What is a reasonable time is a question for the jury, unless the evidence is conclusive.[70] A promise to pay money, no time being expressed, is deemed in law a promise to pay on demand.[71] A contract, stipulating for payment within a reasonable time, has been construed.[72]

1786. Time of the essence—In mercantile contracts time is of the essence.[73] In equity time is not generally of the essence,[74] but it may be made so by express agreement.[75] It is of the essence where an option to purchase is given for a limited time,[76] or where a subscription is made upon a limitation of time.[77] Where time is made of the essence as to both parties, and one performs within the time, he may require performance of the other after the time.[78] Parol evidence is inadmissible to prove a contemporaneous oral agreement that time should be of the essence of a written agreement, but it is admissible to prove the circumstances for the purpose of showing that time was impliedly essential or what was a reasonable time.[79]

1787. Delay excused—A delay in performance caused by the other party is excused.[80] Delay in performance is excused if the other party allows performance to go on without objection after the time limited.[81]

1788. Place of performance—Where a contract is silent as to the place of performance, it will be presumed that it is to be performed where made.[82]

1789. Impossibility—If a party contracts absolutely to do a thing which is not impossible or unlawful, he is bound to do it, unless prevented by an act of God, the law, or the other party to the contract.[83] There is a tendency to break away from this harsh rule of the common law in cases where the conditions have so materially changed, in an unforeseeable way, between the time of contracting and the time of performance, that justice requires that performance should be excused.[84] It is an established rule of law that, where a person creates a charge or obligation upon himself by express contract, he will not be permitted to excuse himself therefrom by pleading an act of God rendering performance impracticable; but it is equally as well settled that where a contract is entered into, of a continuing character, or to be performed at a future time, dependent upon the continued existence of a particular person or thing, or the continuing ability of the obligor to perform, subsequent death, destruction, or disability will excuse the obligor from compliance with the terms of the contract. A con-

[70] Palmer v. Breen, 34–39, 24+322.

[71] Chamberlain v. Tiner, 31–371, 18+97. See Ganser v. Fireman's etc. Co., 34–372, 25+943.

[72] Bell v. Mendenhall, 78–57, 80+843.

[73] Norrington v. Wright, 115 U. S. 188; Cleveland etc. Co. v. Rhodes, 121 U. S. 255; Bowes v. Shand, 2 App. Cas. 455; Lefferts v. Weld, 167 Mass. 531; Cowley v. Davidson, 13–92(86) (contract to transport and deliver wheat).

[74] Gill v. Bradley, 21–15; Austin v. Wacks, 30–335, 15+409.

[75] Steele v. Bond, 32–14, 18+830; Grant v. Munch, 54–111, 55+902; Cheney v. Libby, 134 U. S. 68; Waterman v. Banks, 144 U. S. 394.

[76] Steele v. Bond, 32–14, 18+830; Cannon River M. Assn. v. Rogers, 42–123, 43+792.

[77] Bohn v. Lewis, 45–164, 47+652.

[78] Robbins v. Morgan, 56–304, 57+799.

[79] Austin v. Wacks, 30–335, 15+409; Stone v. Harmon, 31–512, 19+88; Liljengren v. Mead, 42–420, 44+306; Am. B. Co. v. Am. D. S. Co., 107–140, 119+783.

[80] Am. G. Co. v. Mpls. etc. Ry., 44–93, 46+143; Davis v. Crookston etc. Co., 57–402, 59+482; Chicago B. & I. Co. v. Olson, 80–533, 83+461.

[81] Fowlds v. Evans, 52–551, 54+743. See Merchant v. Howell, 53–295, 55+131.

[82] Clement v. Willett, 105–267, 117+491.

[83] Cowley v. Davidson, 13–92(86) (contract to transport wheat—low water in river no excuse); Stees v. Leonard, 20–494(448) (contract to build house—latent defect in soil no excuse); Paine v. Sherwood, 21–225 (contract to furnish timber—impossibility of securing timber no excuse); Nash v. St. Paul, 23–132 (contract for grading—unexpected rock no excuse); Anderson v. May, 50–280, 52+530 (contract to raise and deliver beans—unexpected early frosts no excuse).

[84] 12 Harv. L. Rev. 501; 15 Id. 63, 418; 18 Id. 384; 19 Id. 462; 1 Columbia L. Rev. 529.

dition is implied that if the performance becomes impossible, from the death of the person, or by the perishing of the thing, performance of the contract is excused, and this implication arises in spite of the unqualified character of the promissory words.[85]

1790. Prevented by other party—Performance is excused when it is prevented or rendered impossible by the other party.[86]

1791. Excused by breach—As a general rule a breach of a contract by one party excuses performance by the other.[87]

1792. Part performance—Acceptance—Waiver—A full performance may be waived where a part performance is accepted as a full performance without objection.[88] A recovery may sometimes be had for a part performance on a quantum meruit.[89] Where a contract is entire, and one party, not in default, is willing to complete its performance, the other party, who abandons the contract or refuses or neglects to perform it without excuse, cannot recover on the contract, or on a quantum meruit the value of the labor which he has expended in its part performance.[90]

1793. Partial performance—Recovery—To entitle a party to recover for part performance or for performance in a different way from that contracted for, his contract remaining open and unperformed, the circumstances must be such that a new contract may be implied from the conduct of the parties to pay a compensation for the partial or substituted performance. The acceptance of the benefit of a partial performance, or of performance in a way different from that contracted for, where the party has the option of returning or rejecting the consideration performed, will usually be sufficient to imply a promise to pay a compensation commensurate with the benefit accepted. But the mere fact that a part performance has been beneficial is not enough to render the party benefited liable to pay for the advantage. It must appear that he has taken the benefit under circumstances sufficient to raise an implied promise to pay for the work done, notwithstanding the non-performance of the special contract.[91] Though conditions precedent must be performed, and a partial performance is not sufficient, yet when a contract has been performed in a substantial part, and the other party has voluntarily accepted and received the benefit of the part performance, knowing that the contract was not being fully performed, the latter may thereby be precluded from relying upon the performance of the residue as a condition precedent to his liability to pay for what he has received, and may be compelled to rely upon his claim for damages in respect of the defective performance.[92] Of course, if full performance is prevented by the other party, a recovery may be had for partial performance.[93] In the case of severable contracts a party may recover for a partial performance.[94]

1794. Stopping—A party to an executory contract may stop performance on the other side by an explicit direction to that effect, but if he does so, he subjects himself to an immediate right of action for damages.[95]

[85] Dow v. State Bank, 88–355, 93+121.

[86] Dodge v. Rogers, 9–223(209); Siebert v. Leonard, 17–433(410); Glaspie v. Glassow, 28–158, 9+699; Douglas v. Leighton, 53–176, 54+1053; Newton v. Highland I. Co., 62–436, 64+1146.

[87] Wasser v. Western L. S. Co., 97–460, 107+160. See Rea v. Algren, 104–316, 116+580.

[88] See Sykes v. St. Cloud, 60–442, 62+613; Swank v. Barnum, 63–447, 65+722; Lynch v. Kampff, 69–448, 72+455.

[89] See §§ 1793, 1858, 4304, 10369.

[90] Mapes v. Olmsted County, 11–367 (264); Johnson v. Fehsefeldt, 106–202, 118+797.

[91] Elliott v. Caldwell, 43–357, 45+845.

[92] Sykes v. St. Cloud, 60–442, 62+613.

[93] See Tantholt v. Ness, 35–370, 29+49.

[94] McGrath v. Cannon, 55–457, 57+150; Spear v. Snider, 29–463, 13+910.

[95] See § 1799.

1795. Option to discharge in money or land—Where a party to a contract has an option to discharge it in land or money, and he does not exercise his option to discharge it in land, it becomes a money demand.[96]

1796. Law and fact—Whether a contract has been performed is a question for the jury, unless the evidence is conclusive.[97]

1797. Penalties for non-performance—Contracts frequently prescribe penalties for non-performance.[98] Equity will sometimes grant relief from such penalties.[99]

BREACH

1798. Modes—A breach of contract occurs when a party thereto renounces his liability under it, or by his own act makes it impossible that he should perform his obligations under it, or totally or partially fails to perform such obligations.[1]

1799. Repudiation—Anticipatory breach—Disabling one's self—The parties to an executory contract have a right to have the contractual relation maintained up to the time of performance, as well as to a performance when due. A violation of this right is called an "anticipatory breach" of contract.[2] It occurs when a party voluntarily disables himself from performing or absolutely repudiates the contract. One who voluntarily disables himself from performing becomes at once liable for damages.[3] So, when a party repudiates an executory contract, other than for the payment of money, the other party is absolved from performance on his part, and may either at once sue for damages, or wait until the time of performance.[4] The rule is otherwise in the case of a contract to pay a stated sum of money on a future day.[5] But if the promisor also agrees to give a note as evidence of his agreement, and refuses to do so, the promisee may sue at once, and recover as damages the full amount.[6] Where a contract is executory, one party has the power to stop performance on the other side by an explicit direction to that effect, subjecting himself to such damages as will compensate the other party for being stopped in the performance of his part at that stage in the execution of the compact. The party thus forbidden to proceed cannot afterwards go on, complete the contract, and recover the contract price, as such; his only remedy being for damages for breach of contract.[7] It has been said that the renunciation of a contract requires both intention to abandon it and external action so to do.[8] A party desiring to treat a renunciation of an executory contract as a breach must elect to do so within a reasonable time.[9]

[96] Fitzhugh v. Harrison, 75–481, 487, 78+95.

[97] Dodge v. Rogers, 9–223(209); Potter v. Barton, 86–288, 90+529.

[98] See § 1845.

[99] Bidwell v. Whitney, 4–76(45, 57); Toledo N. Works v. Bernheimer, 8–118(92); Steele v. Bond, 32–14, 21, 18+830.

[1] McGuire v. Neils, 97–293, 107+130.

[2] Roehm v. Horst, 178 U. S. 1; Alger v. Tracy, 98–432, 107+1124; Harriman, Contracts (2 ed.) § 553.

[3] Bolles v. Sachs, 37–315, 33+862; Rowe v. Minn. M. Co., 44–460, 47+151; Laybourn v. Seymour, 53–105, 54+941; Kalkhoff v. Nelson, 60–284, 62+332; Crowell v. N. W. etc. Co., 99–214, 108+962. See 14 Harv. L. Rev. 431.

[4] Roehm v. Horst, 178 U. S. 1; In re Neff, 157 Fed. 57 (claim provable in bankruptcy); Alger v. Tracy, 98–432, 107+1124; Matteson v. U. S. etc. Co., 103–407, 115+195; Grand Forks L. Co. v. McClure L. Co., 103–471, 115+406; Blunt v. Egeland, 104–351, 116+653; Wessel v. Wessel, 106–66, 118+157. See 14 Harv. L. Rev. 433.

[5] Alger v. Tracy, 98–432, 107+1124.

[6] Am. Mfg. Co. v. Klarquist, 47–344, 50+243; Barron v. Mullin, 21–374; Deering v. Johnson, 86–172, 90+363; Wasser v. Western L. S. Co., 97–460, 107+160; Alger v. Tracy, 98–432, 107+1124.

[7] Gibbons v. Bente, 51–499, 53+756. See 14 Harv. L. Rev. 422.

[8] McGuire v. Neils, 97–293, 107+130.

[9] Alger v. Tracy, 98–432, 107+1124.

1800. Default in instalments—In mercantile contracts a default in an instalment justifies the other party in treating the contract as at an end.[10] Where a contract for cutting, booming, and delivering logs provides for payment in instalments, a failure to pay an instalment when due is not such a breach of the entire contract as to authorize the contractor to refuse to proceed further, and to recover the profits which he would have earned had the contract been fully performed on his part. In such case the contractor may abandon the work, and recover for what has already been done under it; but mere non-payment of money due on such instalment is not, of itself, such a denial of the right of the contractor to continue the performance of the contract as to justify him in stopping and suing for anticipated profits.[11]

1801. Dependent, concurrent, and independent promises—Promises are independent when, though they are mutual, breach of any one of them gives the other party a right of action, without showing performance on his part. They are dependent when the obligation to perform one depends on the prior performance of another. They are concurrent when they are to be performed at the same time.[12] Whether promises are dependent or independent depends upon the intention of the parties, and is not to be determined by the application of hard and fast rules.[13] They will be held not dependent when the contract will reasonably bear that construction.[14] Where, by the terms of a contract, the time to perform a promise on one side is to happen, or may happen, before the time for the performance of a promise on the other side, the former promise is not dependent on the latter.[15]

1802. Alternative contracts—In the case of alternative contracts one of the parties has a right of election.[16]

1803. Effect—Excusing performance by other party—A breach of a contract by one party generally excuses performance by the other.[17]

1804. Waiver—To constitute a waiver of a breach of a contract the acts relied on must have been done with knowledge of, or when the party ought to have known of, the breach.[18] Allowing a party to go on with performance, without objection, after the time limited, is a waiver of the breach.[19]

1805. Law and fact—Whether there has been a breach is question for the jury, unless the evidence is conclusive.[20]

RESCISSION BY ACT OF PARTY

1806. What constitutes—Preventing the other party from performing amounts to a rescission.[21]

[10] Robson v. Bohn, 22–410; Id., 27–333, 7+357; Palmer v. Breen, 34–39, 24+322; Norrington v. Wright, 115 U. S. 188. See Mason v. Thompson, 94–472, 103+507.

[11] Beatty v. Howe, 77–272, 79+1013. See Newton v. Highland I. Co., 62–436, 64+1146.

[12] Langdell, Contracts, § 105; Pollock, Contracts (Williston's ed. 1906) p. 321; Snow v. Johnson, 1–48(32); Chouteau v. Rice, 1–106(83).

[13] See Sennett v. Shehan, 27–328, 7+266; Robson v. Bohn, 27–333, 7+357; Snow v. Johnson, 1–48(32); Chouteau v. Rice, 1–106(83); St. Paul etc. Ry. v. Robbins, 23–439; Reynolds v. Lynch, 98–58, 107+145; Loud v. Pomona etc. Co., 153 U. S. 564, 576.

[14] Fulton v. Am. B. & L. Assn., 46–190, 48+781.

[15] State v. Winona etc. Ry., 21–472.

[16] Chapin v. Murphy, 5–474(383).

[17] Wasser v. Western L. S. Co., 97–460, 107+160. See Rea v. Algren, 104–316, 116+580.

[18] Dodge v. Minn. etc. Co., 14–49(39).

[19] Fowlds v. Evans, 52–551, 54+743.

[20] Nelson v. Johnson, 38–255, 36+868; Weicher v. Cargill, 82–265, 84+1007 (order for judgment on the pleadings held erroneous).

[21] Marcotte v. Beaupre, 15–152(117). See Siebert v. Leonard, 17–433(410).

1807. By mutual consent—The parties may rescind a contract by mutual consent.[22]

1808. For breach—A material breach of contract justifies the other party in rescinding.[23] The failure or refusal of one party to an executory contract to perform it constitutes a legal justification for the other party to rescind the entire contract and demand to be restored to his former position, if he is himself without fault. If he has done some act which justifies the other party in refusing or delaying performance, or has failed to perform his own part of the contract, he has no right to rescind.[24]

1809. For failure of consideration—A total or substantial failure of consideration justifies a party in rescinding a contract.[25]

1810. For fraud—Restoring property—A party who has been induced to enter into a contract by fraud of the other party may rescind the contract by his own act. In doing so he must give the other party notice of his rescission, and restore or offer to restore whatever of value he has received under the contract. It is sufficient for him to make a fair offer to return what he received, and demand what he parted with. If his offer and demand are refused, a strict and technical tender is not essential, but it is sufficient if proof of such offer and demand is made on the trial, with restoration in such practicable way as the court may direct.[26] A party who is induced to enter into a contract by the fraud of the other party may rescind the contract whether the fraud worked any real injury or not.[27] He must rescind promptly upon learning of the fraud.[28] No act in recognition of the existence of the contract done before such discovery, will amount to an affirmance or ratification, so as to prevent rescission.[29] Any act of ratification, after knowledge of facts authorizing a rescission, amounts to an affirmance, and terminates the right to rescind.[30]

1811. Partial—A party cannot rescind in part and affirm in part.[31]

1812. Not allowable at pleasure—A party to a contract is not at liberty to rescind it at pleasure,[32] unless it contains a provision authorizing him to do so.[33]

1813. Waiver of provisions—Where the parties proceed in disregard of provisions of a contract they are deemed to have waived them.[34]

FRAUD

1814. Effect—As a general rule fraud does not render a contract void, but renders it voidable at the option of the defrauded party.[35] A contract affected by fraud is binding on the party guilty of the fraud. It is the general rule that fraud vitiates every contract into which it enters as to all affected by it, save

[22] See State v. Reed, 27–458, 8+768.

[23] Robson v. Bohn, 22–410. See Hooper v. Webb, 27–485, 8+589; Pollock, Contracts (Williston's ed. 1906), p. 342.

[24] Mason v. Thompson, 94–472, 103+507. See Sennett v. Shehan, 27–328, 7+266; Reynolds v. Franklin, 41–279, 281, 43+53.

[25] Kessler v. Parelius, 107–224, 119+1069.

[26] Corse v. Minn. G. Co., 94–331, 102+728; Neibuhr v. Gage, 99–149, 108+884, 109+1. See § 1815.

[27] MacLaren v. Cochran, 44–255, 46+408.

[28] Parsons v. McKinley, 56–464, 57+1134; Marshall v. Gilman, 47–131, 49+688; McCarty v. N. Y. etc. Co., 74–530, 77+426; McQueen v. Burhans, 77–382, 80+201; Wildermann v. Donnelly, 86–184, 90+366; Weller v. Minn. L. & C. Co., 87–227, 91+891; Shevlin v. Shevlin, 96–398, 418, 105+257; Neibuhr v. Gage, 99–149, 108+884.

[29] Kraus v. Thompson, 30–64, 14+266.

[30] Crooks v. Nippolt, 44–239, 46+349.

[31] See Mulcahy v. Dieudonne, 103–352; 115+636.

[32] Milner v. Norris, 13–455(424); Horn v. Western L. Assn., 22–233; Jones v. Schneider, 22–279. See St. Barnabas Hospital v. Mpls. I. E. Co., 68–254, 70+1126.

[33] Magee v. Scott, 78–11, 80+781. See Ryberg v. Goodnow, 59–413, 61+455.

[34] Meyer v. Berlandi, 53–59, 54+937.

[35] Mlnazek v. Libera, 83–288, 86+100.

parties and privies to the fraud.[36] It renders them voidable ab initio.[37] A fraud in procuring a signature to an instrument by misrepresenting its nature or contents renders the instrument void and not merely voidable. There is no contract in such a case. The defrauded party may deny that he executed it.[38] A fraudulent party to a contract may convey a good title to a bona fide purchaser.[39]

1815. Election of remedies—A party who has been induced to enter into a contract by fraud has an election of several remedies. If the contract has been performed, wholly or in part, he may affirm the contract by keeping what he received under it, and bringing an action for the damages he has sustained by reason of the fraud; or he may sue in equity for a rescission of the contract by the court, and recover what he parted with, upon such conditions as the court may deem to be equitable; or he may rescind by his own act, and sue at law for what he parted with by reason of the fraud. When he sues in equity to rescind, it is unnecessary that he should have previously attempted a rescission, or made any offer to return what he received, for what he ought to do and must do, as a condition of the rescission, is a question which the court will determine. When, however, he seeks to rescind by his own act, he must give to the other party notice of his rescission, and restore or offer to restore to him whatever of value he received from him by reason of the contract. In such case it is sufficient for the defrauded party to make a fair offer to return what he received, and demand what he parted with; and, if his offer and demand are refused, a strict and technical tender is not essential, but it is sufficient if proof of such offer and demand is made on the trial, with restoration in such practicable way as the court may direct.[40] If a party discovers the fraud while the contract is still wholly executory he has no such election of remedies. He cannot go on and execute it and then sue for the fraud. That would permit him to sue for self-inflicted injury.[41] But if the contract is partly performed before he discovers the fraud, he may go on with it and recover his damages for the fraud.[42] If the defrauded party elects to stand by the contract and treat is as valid, he need not, as a condition precedent to his right of action to recover for the fraud, return or offer to return the consideration received by him.[43] The same rules apply whether the fraud takes the form of deceit or duress.[44] If a party is led to sign a contract by misrepresentations as to its nature or contents, he may treat the contract as void and plead that he did not execute it.[45] Instead of taking affirmative action a defrauded party to a contract may plead the fraud as a defence to an action on the contract by the other party,[46] or by way of counterclaim.[47]

CONSTRUCTION

1816. Object—Intention of parties—The object of construction is to ascertain and give effect to the intention of the parties, as expressed in the language

[36] Greenleaf v. Edes, 2-264(226, 236). See § 3899.
[37] Newell v. Randall, 32-171, 19+972.
[38] Aultman v. Olson, 34-450, 26+451.
[39] Cochran v. Stewart, 21-435. See §§ 957, 10079.
[40] Corse v. Minn. G. Co., 94-331, 102+728; Neibuhr v. Gage, 99-149, 108+884; Ritko v. Grove, 102-312, 113+629. See, to same general effect, Brown v. Manning, 3-35(13); Kiefer v. Rogers, 19-32(14); Haven v. Neal, 43-315, 45+612; Knappen v. Freeman, 47-491, 50+533; Nelson v. Carlson, 54-90, 55+821; Mlnazek v. Libera, 83-288, 86+100.
[41] Thompson v. Libby, 36-287, 31+52; Bartleson v. Vanderhoff, 96-184, 104+820.
[42] Haven v. Neal, 43-315, 45+612.
[43] Mlnazek v. Libera, 83-288, 86+100 Neibuhr v. Gage, 99-149, 155, 108+884.
[44] Neibuhr v. Gage, 99-149, 108+884.
[45] Aultman v. Olson, 34-450, 26+451.
[46] Wilder v. De Cou, 18-470(421).
[47] See § 7610.

used.[48] The secret, unexpressed intention of the parties is not sought.[49] The meaning must be collected from what is expressed, not from a mere conjecture of some intention which the parties may have had in their minds, and would have expressed if they had been better advised.[50] The construction must always be such as the language used will reasonably bear.[51]

1817. When language plain—It is often said that where the language used is plain and unambiguous there is no room for construction.[52]

1818. With reference to applicable law—All contracts are to be construed in the light of the rules and principles of law applicable to the subject-matter of the transaction, and those rules and principles control the rights of the parties, except where the contract discloses an intention to depart therefrom.[53] Parties are presumed to contract with reference to the existing law affecting their contracts.[54]

1819. Agreement as to construction—Where the parties to a contract express an intention therein as to what construction shall be placed on the language used, such construction is conclusive on the courts, no question of good morals, or public policy, or violation of law, being involved.[55]

1820. Practical construction—If the meaning of a contract is doubtful, the practical construction which the parties have placed upon it will be followed by the courts;[56] otherwise if its meaning is not doubtful.[57]

1821. Technical rules disfavored—The modern tendency is not to apply technical rules of construction with strictness.[58] Such rule, or at least some of them, are mere suggestions to the judicial mind.[59]

1822. To be sustained if reasonably possible—The rule of construction that the parties attempting to make a contract are presumed to intend that it shall be effectual and valid, and that the language used must, if it will admit of it, be interpreted to sustain, rather than defeat, such presumed intention, does not apply where they have clearly expressed themselves, so that, taking all the terms used, in connection with the subject-matter and the circumstances in which the parties stand, but one meaning can be attributed to them. In

[48] Leppla v. Mackey, 31–75, 16+470; Witt v. St. P. etc. Ry., 38–122, 35+862; Grueber v. Lindenmeier, 42–99, 43+964; Cannon v. Emmans, 44–294, 46+356; Lockwood v. Bock, 50–142, 52+391; Flaten v. Moorhead, 51–518, 53+807; Tuman v. Pillsbury, 60–520, 63+104; Strangeway v. Eisenman, 68–395, 71+617; Snell v. Weyerhauser, 71–57, 73+633; Lawton v. Joesting, 96–163, 104+830; Musolf v. Duluth E. E. Co., 108–369, 122+499. See 28 Am. L. Rev. 323; 20 Law Quarterly Rev. 247.

[49] See Phoenix v. Gardner, 13–430(396); Merriam v. Pine City L. Co., 23–314.

[50] Smith v. Lucas, 18 Ch. D. 531, 542.

[51] Baldwin v. Winslow, 2–213(174, 177); Case v. Young, 3–209(140, 143); Winona v. Thompson, 24–199, 208; Merchant v. Howell, 53–295, 300, 55+131; Board of Trustees v. Brown, 66–179, 184, 68+837; U. S. v. Union Pac. Ry., 91 U. S. 72, 86.

[52] Davis v. Hugo, 81–220, 83+984; Lawton v. Joesting, 96–163, 104+830. See § 3407.

[53] Haugen v. Sundseth, 106–129, 118+666.

[54] O'Neil v. St. Olaf's School, 26–329, 332, 4+47; Bohn v. McCarthy, 29–23, 11+127.

[55] White v. Miller, 66–119, 68+851; Quimby v. Shearer, 56–534, 58+155.

[56] Hall v. Smith, 16–58(46); Austrian v. Davidson, 21–117; Hodgman v. St. P. etc. Ry., 23–153; Ganser v. Fireman's etc. Co., 38–74, 35+584; First Nat. Bank v. Jagger, 41–308, 43+70; O'Dea v. Winona, 41–424, 43+97; Staples v. Edwards, 56–16, 57+220; Hill v. Duluth, 57–231, 58+992; McDonough v. Hennepin etc. Assn., 62–122, 64+106; Walters v. Mpls. etc. Ry., 76–506, 79+516; Lakeside Ry. v. Duluth St. Ry., 78–129, 80+831; Cornish v. West, 82–107, 84+750; Norwegian etc. Cong. v. U. S. F. & G. Co., 83–269, 86+330; Murray v. Nickerson, 90–197, 95+898; Hamel v. Mpls. etc. Ry., 97–334, 107+139; District of Columbia v. Gallaher, 124 U. S. 505.

[57] St. Paul & D. Ry. v. Blackmar, 44–514, 47+172; Schwab v. Baremore, 95–295, 104+10. See Blew v. Collins, 61–418, 63+1091.

[58] Witt v. St. Paul etc. Ry., 38–122, 35+862; Lawton v. Joesting, 96–163, 104+830. See Pollock, Contracts (Williston's ed. 1906), p. 317; Leader v. Duffey, 13 App. Cas. 301; 2 Harv. L. Rev. 183; Gray, Nature and Sources of Law, § 700.

[59] See § 8937.

such case the court will not, even to sustain the contract, give a meaning contrary to what they have expressed. That would be making a contract for them when they have failed to do so.[60]

1823. As a whole—A contract is to be construed as a whole. The intention of the parties is to be gathered, not from isolated clauses, but from the instrument as a whole.[61] The court will take an instrument by its four corners in order to ascertain its meaning.[62] So far as reasonably possible a contract is to be so construed as to give effect to every word and phrase,[63] and harmonize all its parts.[64]

1824. Absurd and unjust results to be avoided—Reasonable construction—So far as reasonably possible a construction is to be avoided which would lead to absurd [65] or unjust [66] results. A contract is to receive a reasonable construction.[67]

1825. Ordinary sense of words—Words are to be given their ordinary, popular meaning, unless it is obvious that the parties used them with a different meaning.[68] They are to be construed in the sense in which a prudent and reasonable man on the other side would understand them.[69]

1826. Terminology not decisive—The nature of a contract is to be determined from its contents, and not from its terminology.[70] It is not important what a contract is named or called by the parties. The real intention as expressed in the writing must control.[71]

1827. Object of contract—A contract is to be construed with reference to its object.[72]

1828. General and specific—Definite and indefinite—The definite and precise prevails over the indefinite, the particular over the general, and the expressed over what might otherwise be implied.[73]

1829. Writing controls printing—If a contract is partly written and partly printed, the written part controls, if the two parts are inconsistent.[74] The two parts must be harmonized if it is reasonably possible.[75]

[60] Hayes v. Crane, 48–39, 50+925.

[61] Rose v. Roberts, 9–119(109); Miss. R. Co. v. Ankeny, 18–17(1); Bass v. Veltum, 28–512, 11+65; Lindley v. Groff, 37–338, 34+26; Witt v. St. P. etc. Ry., 38–122, 35+862; Thorsen v. Perkins, 39–420, 40+557; Grueber v. Lindenmeier, 42–99, 43+964; Flaten v. Moorhead, 51–518, 53+807; Scofield v. Quinn, 54–9, 55+745; Scase v. Gillette, 55–349, 57+58; Lawton v. Joesting, 96–163, 104+830; Heryford v. Davis, 102 U. S. 235.

[62] Boright v. Springfield etc. Co., 34–352, 25+796; Sanborn v. Minneapolis, 35–314, 29+126.

[63] Flaten v. Moorhead, 51–518, 53+807; Bass v. Veltum, 28–512, 11+65; Union S. P. Co. v. Olson, 82–187, 84+756.

[64] Lawton v. Joesting, 96–163, 104+830.

[65] Lovejoy v. Gaskill, 30–137, 14+583; St. Anthony Falls etc. Co. v. Minneapolis, 41–270, 43+56.

[66] St. Anthony Falls etc. Co. v. Minneapolis, 41–270, 43+56; Pineville L. Co. v. Thompson, 46–502, 49+204; Chicago etc. Ry. v. St. Paul U. D. Co., 54–411, 56+129; Magee v. Scott, 78–11, 80+781.

[67] Siebert v. Leonard, 17–433(410).

[68] Cogan v. Cook, 22–137, 141; Brisbin v. Cleary, 26–107, 1+825; Kerrick v. Van Dusen, 32–317, 20+228; Bader v. New Amsterdam C. Co., 102–186, 112+1065.

[69] Symonds v. N. W. etc. Co., 23–491, 502.

[70] Physicians' D. Co. v. O'Brien, 100–490, 111+396.

[71] McNeal v. Rider, 79–153, 81+830; Morrison v. St. P. etc. Ry., 63–75, 65+141.

[72] Rose v. Roberts, 9–119(109); Miss. R. Co. v. Ankeny, 18–17(1); Longfellow v. McGregor, 56–312, 57+926; Magee v. Scott, 78–11, 80+781; Lindquist v. Swanson, 78–444, 81+1; Lawton v. Joesting, 96–163 104+830.

[73] Quimby v. Shearer, 56–534, 58+155; McAlpine v. Foley, 34–251, 25+452; Guerin v. Hunt, 6–375(260).

[74] Phoenix Ins. Co. v. Taylor, 5–492 (393); Ortt v. Mpls. etc. Ry., 36–396, 31+519; Murray v. Pillsbury, 59–85, 60+844; Sprague v. Hennepin County, 83–262, 86+332; Egan v. Winnipeg B. Club, 96–345, 104+947.

[75] Frost's etc. Works v. Millers' etc. Co., 37–300, 34+35; Phinney v. Coolidge, 97–204, 105+553.

1830. Clerical mistakes or omissions—Obvious clerical mistakes or omissions will be disregarded, or corrected by intendment.[76] Where one word has been erroneously used for another, or a word omitted, and the context affords the means of correction, the proper word will be deemed substituted.[77]

1831. Related instruments—Where several instruments are made as part of one transaction they are to be construed with reference to each other,[78] unless the parties stipulate otherwise.[79] Where one instrument refers to another for any purpose, the latter, for the purpose and to the extent of the reference, will be deemed a part of the former.[80]

1832. Against party using words—The words of an instrument are to be taken most strongly against the party using them.[81]

1833. Grammatical—A grammatical construction will not be followed contrary to the obvious intention of the parties.[82]

1834. Punctuation—Little importance is attached to punctuation.[83]

1835. Words and figures—Where words and figures are used to express the same number, and they do not agree, the words prevail. Where in a written instrument a number is attempted to be expressed in words, and it is evident a word has been omitted,—a numeral, for instance,—and there are on the instrument figures evidently intended to also express the number, they may be resorted to, to ascertain the omitted word.[84]

1836. Noscitur a sociis—The rule of "noscitur a sociis" applies to the construction of private writings,[85] as well as to statutes.[86]

1837. Ejusdem generis—The rule of ejusdem generis is applied in the construction of private instruments,[87] as well as to statutes.[88]

1838. Expressio unius est exclusio alterius—The rule that "the expression of one thing is the exclusion of another" is applied in the construction of private instruments,[89] as well as statutes.[90] It is not of universal application, but yields to the obvious intention of the parties.[91]

[76] Fowler v. Woodward, 26–347, 4+231; Butler v. Bohn, 31–325, 17+862; Gran v. Spangenberg, 53–42, 54+933; Bradley v. Whitesides, 55–455, 57+148; Larson v. Kelly, 64–51, 66+130.

[77] Larson v. Kelly, 64–51, 66+130.

[78] Brackett v. Edgerton, 14–174(134); Nelson v. Robson, 17–284(260); Beer v. Aultman, 32–90, 19+388; Bolles v. Sachs, 37–315, 33+862; Grueber v. Lindenmeier, 42–99, 43+964; Somerdorf v. Schliep, 43–150, 44+1084; Shaw v. First B. Church, 44–22, 46+146; Chute v. Washburn, 44–312, 46+555; St. Paul etc. Ry. v. St. Paul U. D. Co., 44–325, 46+566; White v. Miller, 52–367, 54+736; Scofield v. Quinn, 54–9, 55+745; Quimby v. Shearer, 56–534, 58+155; North Star H. F. Co. v. Rinkey, 92–80, 99+429; Myrick v. Purcell, 95–133, 103+902; Dowagiac Mfg. Co. v. Benson, 101–54, 111+924; Hobe v. McGrath, 104–345, 116+652.

[79] White v. Miller, 66–119, 68+851.

[80] Carli v. Taylor, 15–171(131); Short v. Van Dyke, 50–286, 52+643; Ryberg v. Goodnow, 59–413, 61+455; Noyes v. Butler Bros., 98–448, 108+839; Kingsley v. Anderson, 103–510, 115+642; Moore v. Ramsey County, 104–30, 115+750.

[81] St. Anthony Falls etc. Co. v. Eastman, 20–277(249); Austrian v. Davidson, 21–117; Symonds v. N. W. etc. Co., 23–491, 502; Swank v. St. P. etc. Ry., 72–380, 75+594; Thompson v. Germania etc. Co., 97–89, 106+102. See §§ 2686, 4659.

[82] Witt v. St. Paul etc. Ry., 38–122, 35+862; Lawton v. Joesting, 96–163, 104+830; Budds v. Frey, 104–481, 117+158.

[83] Boright v. Springfield etc. Co., 34–352, 25+796. See Van Eman v. Stanchfield, 8–518(460); Id., 10–255(197).

[84] Gran v. Spangenberg, 53–42, 54+933.

[85] Bader v. New Amsterdam C. Co., 102–186, 112+1065.

[86] See § 8978.

[87] See Langworthy v. Washburn, 77–256, 79+974.

[88] See § 8977.

[89] Gasser v. Sun Fire Office, 42–315, 44+252; Niven v. Craig, 63–20, 65+86; Thompson v. Germania etc. Co., 97–89, 106+102. See Maine T. & B. Co. v. Butler, 45–506, 48+333; Williston v. Mathews, 55–422, 56+1112.

[90] See § 8980.

[91] Williston v. Mathews, 55–422, 56+1112.

1839. Particular phrases construed—"With all suitable precautions for its safety;"[92] "to at once proceed to procure, and use all reasonable efforts to procure:"[93] "in such an event;"[94] "as hereinafter set forth;"[95] "out of the proceeds:"[96] "all of the outstanding indebtedness:"[97] "directly or indirectly."[98]

1840. Particular contracts construed—Cases are cited below involving the construction of particular contracts.[99]

1841. Law and fact—At an early day, either by adoption from the Roman law, or because at that time jurors could not read, the rule became established that the construction of writings is for the court.[1] This is the universal rule when the intention is to be gained wholly from the writing.[2] But when resort to extrinsic evidence is necessary the construction of private writings is for the jury,[3] unless the evidence is conclusive.[4] If a contract is partly in writing and partly oral the whole question is for the jury.[5] What extrinsic facts may be considered by a jury in aid of construction,[6] and whether separate writings taken together constitute a contract,[7] are questions for the court. If the construction of writings is improperly submitted to the jury, and they find as the court ought to have found, it is error without prejudice.[8]

[92] St. Anthony etc. Co. v. Eastman, 20–277(249).

[93] Orme v. Mackubin, 53–412, 55+560.

[94] In re Iron Bay Co., 57–338, 59+346.

[95] Hollister v. Sweeney, 88–100, 92+525.

[96] Nat. C. & L. Builder v. Cyclone etc. Co. 49–125, 51+657.

[97] Bell v. Mendenhall, 78–57, 80+843.

[98] Nelson v. Johnson, 38–255, 36+868.

[99] Conehan v. Crosby, 15–13(1) (contract to carry mails—subcontract—stipulation for payment construed); Ferguson v. Hogan, 25–135 (note payable in labor); Beede v. Proehl, 34–497, 27+191 (note payable in merchandise); Everard v. Warner, 36–383, 31+353 (order for payment of money—acceptance on certain conditions); Bomash v. Supreme Sitting, 42–241, 44+12 (contract for payment of money to one's heirs); Mjones v. Yellow Medicine Co. Bank, 45–335, 47+1072 (contract relating to renewal of a mortgage); Nat. G. & F. Co. v. Bixby, 48–323, 51+217 (contract relating to the payment of freight on certain goods); National etc. Builder v. Cyclone etc. Co., 49–125, 51+657 (contract to pay "out of proceeds" of certain sales); Stranahan v. Richardson, 71–186, 73+858 (contract to invest funds and secure a certain income; Gaines v. Trengrove, 77–349, 79+1045 (contract for carrying mails—subcontract—stipulation as to concelation by Postmaster General construed); Bell v. Mendenhall, 78–57, 80+843 (contract to pay all the outstanding indebtedness of another not exceeding a certain sum); Landquist v. Swanson, 78–444, 81+1 (mining contract—stipulation as to payment of "assessment work" construed); Sprague v. Hennepin County, 83–262, 86+332 (contract for replacing wornout elevators in Hennepin county court house); Hollister v. Sweeney, 88–100, 92+525 (contract for work in exploring and testing land for iron ore); Yanish v. Neils, 101–78, 111+921 (contract for cutting timber—deposit with federal government); Law R. Co. v. Poehler, 106–213, 118+664 (contract for furnishing a transcript of testimony taken in a grain investigation); Nowak v. Knight, 44–241, 46+348; Id., 47–298, 50+79 (contract acknowledging receipt of note in consideration of services to be rendered in procuring a homestead entry with a stipulation for a surrender of the note "if no entry is made").

[1] Thayer, Ev. 203.

[2] Van Eman v. Stanchfield, 8–518(460); Dodge v. Rogers, 9–223(209); Donnelly v. Simonton, 13–301(278); Hanson v. Eastman, 21–509; Downer v. St. P. etc. Ry., 23–271; Hooper v. Webb, 27–485, 8+589; Gross v. Diller, 33–424, 23+837; State v. Fellows, 98–179, 107+542, 108+825.

[3] Donnelly v. Simonton, 13–301(278); Engel v. Scott, 60–39, 61+825; Board of Trustees v. Brown, 66–179, 68+837; Alworth v. Gordon, 81–445, 84+454; State v. Fellows, 98–179, 107+542, 108+825; Trustees v. Vail, 151 N. Y. 463; Goddard v. Foster, 17 Wall. (U. S.) 142.

[4] State v. Fellows, 98–179, 107+542, 108+825; Board of Trustees v. Brown, 66–179, 68+837.

[5] Downer v. St. P. etc. Ry., 23–271. See Vaughan v. McCarthy, 63–221, 65+249.

[6] St. Anthony Falls etc. Co. v. Eastman 20–277(249).

[7] Scanlan v. Hodges, 10 U. S. App. 352; Goddard v. Foster, 17 Wall. (U. S.) 142. See Bryant v. Lord, 19–396(342).

[8] Hooper v. Webb, 27–485, 8+589; Gross v. Diller, 33–424, 23+837.

BUILDING AND CONSTRUCTION CONTRACTS

1842. Plans and specifications—A contract has been held to prevail over specifications which were inconsistent with the contract in relation to extras.[9] Certain specifications referred to in a contract as a part thereof have been held sufficiently identified.[10] Certain estimates submitted to bidders have been held controlled by the accompanying plans and specifications.[11] Objection that plans and specifications were not furnished as agreed upon has been held waived by going on with the work.[12] As between a contractor and his subcontractor, a reference to the plans and specifications has been held to be for a specific purpose only, and not for the purpose of adopting them as a whole.[13] Plans and specifications are commonly made a part of the contract by reference.[14] A contractor cannot abandon work on the ground that the plan is improper.[15]

1843. Bids—A bid, taken in connection with the plans and specifications has been held sufficiently definite and complete. A verdict that a bid was accepted has been sustained.[16] When an owner invites bids he is not bound to award a contract to the lowest bidder, in the absence of express agreement.[17]

1844. Alteration in plans—Certain re-surfacing of stone work has been held not an alteration in the contract or plans.[18]

1845. Forfeiture clause for delay—Building contracts often contain forfeiture clauses for delay.[19]

1846. Workmanlike manner—Evidence has been held to show that a contractor failed to construct a wall "in a good and workmanlike manner." [20]

1847. Measurements, quantities, etc.—A contract for grading has been construed as to the method of measuring the quantity of earth removed.[21]

1848. Particular stipulations construed—A stipulation as to additional floors and partitions in a building;[22] as to the construction and leasing of a building;[23] as to the presentation of a written claim to the architect by the contractor of any act of the owner or architect causing delay;[24] as to conferences between the board of managers of the builder and the contractor;[25] as to precautions to be taken in the construction of a tunnel;[26] as to the payment for materials upon orders of the contractor;[27] as to allowance for overhauls in a contract for grading;[28] as to commission of superintendent.[29]

1849. Performance assisted by builder—A builder may be responsible for the full contract price, though by his own acts he lessens the costs of performance by the contractor.[30]

1850. Substantial performance—Where a contractor has in good faith made substantial performance of the terms of a building contract, but there are some slight omissions or defects which can be readily remedied, so that an allowance therefor out of the contract price will give the other party full indem-

[9] Meyer v. Berlandi, 53–59, 54+937.
[10] Hooper v. Webb, 27–485, 8+589.
[11] St. Paul etc. Ry. v. Bradbury, 42–222, 44+1.
[12] Robertson v. Burton, 88–151, 92+538.
[13] Noyes v. Butler Bros., 98–448, 108+839.
[14] Shaw v. First B. Church, 44–22, 46+146.
[15] Hooper v. Webb, 27–485, 8+589.
[16] Cameron v. Booth, 99–513, 108+514.
[17] Starkey v. Minneapolis, 19–203(166).
[18] Norwegian etc. Cong. v. U. S. etc. Co., 83–269, 86+330.
[19] Davis v. Crookston etc. Co., 57–402, 59+482 (delay caused by failure of other party to perform); Chicago etc. Co. v. Olson, 80–533, 83+461 (application of forfeiture clause to subcontractor).
[20] Lynes v. Holl, 60–532, 63+108.
[21] O'Dea v. Winona, 41–424, 43+97.
[22] Swanson v. Andrus, 83–505, 86+465.
[23] Bradley v. Met. Music Co., 89–516, 95+458.
[24] Reardon v. Cushing, 90–360, 96+1126.
[25] Cornish v. Antrim etc. Assn., 82–215, 84+724.
[26] St. Anthony etc. Co. v. Eastman, 20–277(249).
[27] Larson v. Schmaus, 31–410, 18+273.
[28] Moore v. Ramsey County, 104–30, 115+750.
[29] Irwin v. Gould, 107–233, 119+1065.
[30] McGuire v. Neils, 97–293, 107+130.

nity, and, in substance, what he bargained for, the contractor, in an action on the contract, may recover the contract price, less the damages on account of the omissions or defects.[31] If the other party wishes to claim a deduction on account of such omissions or defects the burden is on him to allege and prove his damages.[32] A contractor cannot recover on the contract where the deviations from the contract are so material that the other party does not get essentially what he bargained for.[33] The doctrine of substantial performance does not apply where the omissions or defects were intentional, but only where they resulted from mistake or inadvertence. Whether they were intentional and whether they were substantial are questions of fact.[34]

1851. Work to satisfaction of builder—The doctrine of substantial performance is applicable to a building contract under which the work is to be done "to the satisfaction" of the builder.[35]

1852. Acceptance as in full performance—Work may be accepted as in full performance of the contract, notwithstanding defects or omissions.[36]

1853. Architect or engineer as umpire—Where a contract provides that an architect, engineer, or other third party shall be umpire as to work or materials and that his decision shall be conclusive upon the parties his decision is conclusive, in the absence of fraud or such gross mistake as would imply bad faith or a failure to exercise an honest judgment.[37] His decision is not conclusive unless it is so stipulated.[38] He is bound by the contract.[39] His failure or refusal to act will not defeat a recovery by the contractor.[40] Whether his authority as umpire extends to extra work depends upon the stipulations of the particular contract.[41] Certain estimates by an engineer, not delivered to a subcontractor, have been held not binding upon him.[42] Where two architects were made umpires and one acted solely on what the other had told him it was held that their decision was not binding.[43]

1854. Decision of building inspector—The decision of the building inspector of St. Paul has been held not binding upon a contractor as to whether the latter had complied with the conditions of his contract.[44]

[31] O'Dea v. Winona, 41–424, 43+97; Leeds v. Little, 42–414, 44+309; Madden v. Oestrich, 46–538, 49+301; Birch Cooley v. First Nat. Bank, 86–385, 90+789; Gray v. New Paynesville 89–258, 94+721; Holt v. Sims, 94–157, 102+386; Robertson v. Grand Rapids, 96–69, 104+715; Hankee v. Arundel R. Co., 98–219, 108+842; Snyder v. Crescent M. Co., 126+822.

[32] Leeds v. Little, 42–414, 44+309; Madden v. Oestrich, 46–538, 49+301. See Gray v. New Paynesville, 89–258, 94+721.

[33] Bixby v. Wilkinson, 25–481; Belt v. Stetson, 26–411, 4+779; Winona v. Minn. etc. Co., 27–415, 6+795, 8+148; Elliott v. Caldwell, 43–357, 45+845; Taylor v. Marcum, 60–292, 62+330; Lynes v. Holl, 60–532, 63+108; Anderson v. Pringle, 79–433, 82+682; Cornish v. Antrim etc. Assn., 82–215, 84+724; Uldrickson v. Samdahl, 92–297, 100+5; Haglund v. Sortedahl, 101–359, 112+408.

[34] Elliott v. Caldwell, 43–357, 45+845; Johnson v. Fehsefeldt, 106–202, 118+797.

[35] O'Dea v. Winona, 41–424, 43+97.

[36] See Winona v. Minn. etc. Co., 27–415, 6+795, 8+148; Lynes v. Holl, 60–532, 63+108; Swank v. Barnum, 63–447, 65+722; Lynch v. Kampff, 69–448, 72+455.

[37] Schwerin v. De Graff, 19–414(359) (as to measurement of excavation); Johnson v. Howard, 20–370(322) (as to measurement of stone); Trainor v. Worman, 33–484, 24+297 (as to completion of work); St. Paul etc. Ry. v. Bradbury, 42–222, 44+1 (as to work and materials); Langdon v. Northfield, 42–464, 44+984 (as to amount due); King v. Duluth, 78–155, 80+874 (as to extra work); Merchants Nat. Bank v. East Grand Forks, 94–246, 102+703 (as to requirements and performance); Robertson v. Grand Rapids, 96–69, 104+715 (as to completion of work and materials).

[38] Schwerin v. De Graff, 21–354; Nelson v. Betcher, 88–517, 93+661.

[39] Starkey v. De Graff, 22–431.

[40] Schwerin v. De Graff, 19–414(359); Starkey v. DeGraff, 22–431.

[41] King v. Duluth, 78–155, 80+874; Reardon v. Cushing, 90–360, 96+1126; Schwerin v. De Graff, 19–414(359); Starkey v. De Graff, 22–431. See Schwerin v. De Graff, 21–354; Langdon v. Northfield, 42–464 44+984.

[42] Schwerin v. De Graff, 21–354.

[43] Benson v. Miller, 56–410, 57+943.

[44] White v. Harrigan, 41–414, 43+89.

1855. Abandonment of contract—Where a contract for the performance of certain work stipulates that the contractor shall be paid in instalments as the work progresses, upon estimates of an engineer agreed upon by the parties, the failure to pay instalments at the time agreed upon justifies the contractor in abandoning the contract, and entitles him to recover the value of the work actually performed thereunder.[45] An issue as to the abandonment of a contract without just cause has been held improperly withdrawn from the jury.[46] Evidence held not to show a repudiation.[47]

1856. Excuses for non-performance—A delay has been held excused by the failure of the other party to perform.[48] A failure to make substantial performance has been held not excused by the failure of the board of managers of a creamery to "confer" with the contractor as stipulated.[49] Non-performance has been held not justified by a defect in the plan, or by the failure of all five commissioners to sign the contract, or by a delay or omission of an engineer to make estimates as the work progressed.[50] Non-performance has been held not excused by a latent defect in the soil.[51] Where work was to be done under the orders of the builder, and he gave such orders as to render performance impossible, the contractor was held entitled to treat the contract as at an end.[52]

1857. Taking work from contractor—Contracts frequently authorize the architect, engineer, or builder to take the work from the contractor, if he fails to comply with the conditions of the contract, and to complete it. This power cannot be exercised arbitrarily.[53]

1858. Part performance—Recovery—A contract has been construed as severable so that the contractor might recover for a part performance.[54]

1859. Extra work—Recovery—A contractor cannot recover extra compensation simply because the building required more material than he estimated.[55] Contracts providing that no recovery can be had for extra labor or material except upon a certificate of the architect or engineer are valid.[56] Such conditions may be waived.[57] A provision in a contract, for presenting to the architect a written claim of any act of the owner or architect causing delay has been held inapplicable to extra work.[58] A verdict for extras has been sustained.[59]

1860. Modification—A building contract, like any other contract, may be subsequently modified by the parties.[60]

1861. Completion of work by sureties—The bonds of contractors frequently provide for the completion of the work by the sureties upon a default by the contractor.[61]

[45] Peet v. East Grand Forks, 101–518, 112+1003.

[46] Robertson v. Burton, 88–151, 92+538.

[47] Bradley v. Met. Music Co., 89–516, 95+458.

[48] Davis v. Crookston etc. Co., 57–402, 59+482.

[49] Cornish v. Antrim etc. Assn., 82–215, 84+724.

[50] Hooper v. Webb, 27–485, 8+589.

[51] Stees v. Leonard, 20–494(448).

[52] Siebert v. Leonard, 17–433(410).

[53] White v. Harrigan, 41–414, 43+89; Langdon v. Northfield, 42–464, 44+984; Benson v. Miller, 56–410, 57+943.

[54] Spear v. Snider, 29–463, 13+910. See § 1793.

[55] St. Paul etc. Ry. v. Bradbury, 42–222, 44+1.

[56] Shaw v. First B. Church, 44–22, 46+146; Duluth v. McDonnell, 61–288, 63+727; King v. Duluth, 78–155, 80+874.

[57] Meyer v. Berlandi, 53–59, 54+937; Michaud v. MacGregor, 61–198, 63+479.

[58] Reardon v. Cushing, 90–360, 96+1126.

[59] Meyer v. Berlandi, 53–59, 54+937; Michaud v. MacGregor, 61–198, 63+479; Swank v. Barnum, 63–447, 65+722; Reardon v. Cushing, 90–360, 96+1126; Steele v. Ely, 96–25, 104+566. See Bradley v. Met. Music Co., 89–516, 95+458; Shaw v. First B. Church, 44–22, 46+146.

[60] Siebert v. Leonard, 17–433(410); O'Dea v. Winona, 41–424, 43+97; Michaud v. MacGregor, 61–198, 63+479; Robertson v. Burton, 88–151, 92+538.

[61] Robinson v. Hagenkamp, 52–101, 53+813; McHenry v. Brown, 66–123, 68+847.

1862. Defective material—Liability of contractor—A contractor has been held not liable for a latent defect in brick.[62]

1863. Payment as work progresses—Contracts often provide for payment on estimates as the work progresses.[63]

1864. Pleading—Cases are cited below involving questions of pleading.[64]

1865. Railway construction contracts—Cases are cited below involving the interpretation of contracts for the construction of railways.[65]

1866. Subcontractors—Certain estimates made by an engineer of a railway have been held not binding between a contractor and his subcontractor.[66] A subcontractor has been held chargeable with notice of the principal contract.[67] A stipulation for a forfeiture for delay has been construed in its application to a subcontractor.[68] A reference to plans and specifications has been held to have been made solely for the purpose of determining the amount and sizes of glass to be furnished by a subcontractor.[69]

ILLEGAL CONTRACTS

1867. Definition—An illegal contract is one which is contrary to statute, common law, good morals, or public policy.[70]

1868. Mala prohibita and mala in se—A distinction was formerly made in this connection between acts mala prohibita and acts mala in se. At the present time it is immaterial whether the act is merely prohibited or intrinsically iniquitous.[71]

1869. Illegality—In general—A mere excess of authority by a public officer in executing a lease is not an illegality rendering it void. The illegality which avoids a contract tainted with it is something which is against good morals or involves some breach of good morals.[72] While a contract is void when it is illegal, or immoral, it is not void simply because there is something immoral or illegal in its surroundings, or connections.[73] Transactions in violation of law cannot be made the foundation of a valid contract.[74]

1870. Public policy—In general—It would be unwise to attempt an exact definition by which to determine whether a contract is or is not void as against public policy. But it may be stated generally that a contract is not void as against public policy unless it is injurious to the interests of the public, or contravenes some established interest of society.[75] Contracts are contrary to public policy if they clearly tend to injure the public health, the public morals, or confidence in the purity of the administration of the law, or to undermine that sense of security for individual rights, whether of personal liberty or private property, which every citizen has the right to feel.[76] It is of paramount public

[62] Wisconsin etc. Co. v. Hood, 67–329, 69+1091.

[63] Newton v. Highland I. Co., 62–436, 64+1146. See Peet v. East Grand Forks, 101–518, 112+1003.

[64] Larson v. Schmaus, 31–410, 18+273 (contractor who has fully performed an express contract may recover a balance due on an indebitatus assumpsit); Meyer v. Berlandi, 53–59, 54+937 (matter tending to defeat or diminish a claim for extras held pleadable by defendant); Pye v. Bakke, 54–107, 55+904 (answer in action for extras held to state a counterclaim).

[65] Starkey v. De Graff, 22–431; Hodgman v. St. P. etc. Ry., 23–153; Hatch v. Minn. Ry. Const. Co., 26–451, 5+97; Langdon v. Northfield, 42–464, 44+984.

[66] Schwerin v. De Graff, 21–354.

[67] Shaw v. First B. Church, 44–22, 46+146.

[68] Chicago B. & I. Co. v. Olson, 80–533, 83+461.

[69] Noyes v. Butler Bros., 98–448, 108+839.

[70] See Mohr v. Miesen, 47–228, 234, 49+862; Anheuser v. Mason, 44–318, 46+558; Holland v. Sheehan, 108–362, 122+1; Pollock, Contracts (Williston's ed. 1906), p. 373.

[71] Holland v. Sheehan, 108–362, 122+1.

[72] Reed v. Seymour, 24–273.

[73] Anheuser v. Mason, 44–318, 46+558.

[74] Solomon v. Dreschler, 4–278(197); Buckley v. Humason, 50–195, 52+385.

[75] Peterson v. Christensen, 26–377, 4+623. See Boyle v. Adams, 50–255, 52+860.

[76] Holland v. Sheehan, 108–362, 122+1.

policy not lightly to interfere with freedom of contract.[77] Public policy requires that the right to contract shall be preserved inviolate in ordinary cases. It is denied only when the particular contract violates some principle which is of even more importance to the general public. It must not be forgotten that the right of private contract is no small part of the liberty of the citizen, and that the usual and most important function of courts of justice is rather to maintain and enforce contracts than to enable parties thereto to escape from their obligation on the pretext of public policy, unless it clearly appears that they contravene public right or the public welfare.[78] The right of a party to waive the protection of the law is subject to the control of public policy.[79] The House of Lords has said that public policy is not a safe guide in determining the validity of contracts.[80] General business usage is strong evidence of what is in accord with public policy.[81]

1871. Contracts held contrary to public policy—A lobbying contract;[82] a contract making a voucher conclusive evidence of a party's liability;[83] a contract giving a railway company an exclusive right of way;[84] a contract not to prosecute;[85] a contract of parents turning their children over to another;[86] a contract for the withdrawal of a bid or offer for public property;[87] a contract between a county auditor and a county treasurer for the performance of official duties of one by the other;[88] a contract ousting the jurisdiction of the courts;[89] a contract tending to induce a separation of husband and wife;[90] a contract to facilitate divorce;[91] a contract providing against a settlement or a dismissal of an action without the consent of an attorney;[92] a contract having for its object the practice of deception or fraud upon a third party, or to take advantage of confidential relations with him for the purpose of drawing him into a bargain by which the party undertaking to use his influence will secretly receive a benefit from the seller;[93] a subscription to a corporation to foster gambling and the selling of pools on horse racing;[94] a contract between a layman and an attorney, by which the former undertook, in consideration of a division of the fees received by the latter, to hunt up and bring to him persons having claims against railway companies for personal injuries.[95]

1872. Contracts held not contrary to public policy—A contract of an agent in effect turning over his agency to another;[96] a contract with an attorney for service in procuring a pardon;[97] a contract among certain local dealers not to trade with certain wholesalers;[98] a contract guaranteeing the honesty of employees;[99] a contract for the discharge of an employee;[1] a contract making

[77] National B. Co. v. Union H. Co., 45–272, 47+806.
[78] Quirk v. Mpls. etc. Ry., 98–22, 107+742.
[79] Fidelity & C. Co. v. Eickhoff, 63–170, 65+351; Leighton v. Grant, 20–345(298).
[80] Janson v. Drefonten (1902) A. C. 484.
[81] Alair v. N. P. Ry., 53–160, 54+1072.
[82] Houlton v. Dunn, 60–26, 61+898.
[83] Fidelity & C. Co. v. Eickhoff, 63–170, 65+351; Fidelity & C. Co. v. Crays, 76–450, 79+531.
[84] Kettle River Ry. v. Eastern Ry., 41–461, 43+469.
[85] See Turle v. Sargent, 63–211, 65+349.
[86] State v. Anderson, 89–198, 94+681.
[87] Boyle v. Adams, 50–255, 52+860.
[88] Keough v. Wendelschafer, 73–352, 76+46.
[89] Whitney v. Nat. M. A. Assn., 52–378, 54+184. See Gasser v. Sun Fire Office, 42–315, 44+252; Guilford v. Mpls. etc. Ry., 48–560, 51+658; Seibert v. Mpls. etc. Ry., 52–148, 53+1134; Fidelity & C. Co. v. Eickhoff, 63–170, 65+351; White v. Miller, 66–119, 68+851.
[90] Appleby v. Appleby, 100–408, 111+305.
[91] Belden v. Munger, 5–211(169); McAllen v. Hodge, 94–237, 102+707.
[92] Anderson v. Itasca L. Co., 86–480, 91+12.
[93] Torpey v. Murray, 93–482, 101+609.
[94] Augir v. Ryan, 63–373, 65+640.
[95] Holland v. Sheehan, 108–362, 122+1.
[96] Peterson v. Christensen, 26–377, 4+623.
[97] Moyer v. Cantieny, 41–242, 42+1060.
[98] Bohn Mfg. Co. v. Hollis, 54–223, 55+1119.
[99] Fidelity & C. Co. v. Eickhoff, 63–170, 65+351.
[1] In re Cater, 33–529, 24+197.

the scaling of logs by the surveyor general final;[2] a contract of a railway company granting a right to build an elevator on its right of way on condition that it should not be responsible for damages caused by fires resulting from the operation of its engines;[3] a stipulation in a contract for the payment of money for attorney's fees or costs of collection.[4]

1873. Contracts in voilation of statutes—As a general rule contracts in violation of a statute which imposes a penalty for the doing of an act are unlawful,[5] but they are not always so. It is a question of legislative intention.[6] Where the object of a statute is to prevent fraud or imposition a contract in violation of it is unlawful though the statute merely imposes a penalty.[7] Where a statute or an ordinance makes a particular business unlawful for unlicensed persons, a contract made in such business by an unlicensed person is unlawful.[8] A contract entered into in contravention of express law is wholly void.[9]

1874. Contracts contrary to administrative orders—A mere administrative order is not a law rendering a contract in violation of it void.[10]

1875. Illegal consideration—A contract based on an illegal consideration is void.[11] Every part of the consideration for a contract goes equally to the whole promise, and if any part of it is contrary to public policy the whole promise falls.[12]

1876. Leases for illegal purposes—A lease of property to be used as a brothel is illegal.[13]

1877. Sales for unlawful use—A sale is not rendered illegal by the mere fact that the seller knows that the buyer is to put the goods sold to an illegal use—at least if the illegal use does not involve great moral turpitude.[14]

1878. Contract collateral to illegal contract—An offer of an award, on the back of a lottery ticket, designed to promote the sale of the ticket, has been held void.[15]

1879. Illegality collateral to contract—A contract is not rendered illegal by illegality in some matter collateral to the contract, or in its surroundings or connections.[16]

[2] Leighton v. Grant, 20–345(298).

[3] Quirk v. Mpls. etc. Ry., 98–22, 107+742.

[4] Campbell v. Worman, 58–561, 60+668.

[5] Solomon v. Dreschler, 4–278(197) (statute regulating sale of liquors); Brimhall v. Van Campen, 8–13(1) (statute regulating observance of Sunday); Ingersoll v. Randall, 14–400(304) (statute for boxing knuckles and tumbling rods of threshing machine); Bisbee v. McAllen, 39–143, 39+299 (statute regulating weights and measures); National I. Co. v. National etc. Assn., 49–517, 52+138 (statute forbidding building associations from leasing money to certain persons); Heileman v. Peimeisl, 85–121, 88+441 (statute imposing restrictions on foreign corporations); Swedish etc. Bank v. First Nat. Bank, 89–98, 117, 94+218 (statute regulating pledges); Berni v. Boyer, 90–469, 97+121 (lease of property to be used as a brothel); Thomas v. Knapp, 101–432, 112+989 (statute prescribing conditions of foreign corporations doing business in this state).

[6] De Mers v. Daniels, 39–158, 39+98 (statute relating to town plats); Tolerton v. Barck, 84–497, 88+19 (statute requiring foreign corporations to appoint a local agent).

[7] Bisbee v. McAllen, 39–143, 39+299.

[8] Solomon v. Dreschler, 4–278(197) (sale of liquor without a license); Buckley v. Humason, 50–195, 52+385 (ordinance licensing real estate brokers). See Gunnaldson v. Nyhus, 27–440, 8+147.

[9] Swedish etc. Bank v. First Nat. Bank, 89–98, 117, 94+218.

[10] Citizens' State Bank v. Bonnes, 83–1, 85+718.

[11] Ingersoll v. Randall, 14–400(304); Davis v. Mendenhall, 19–149(113); Adams v. Adams, 25–72; Anheuser v. Mason, 44–318, 46+558; Merchants Nat. Bank v. Sullivan, 63–468, 65+924.

[12] Hazelton v. Sheckells, 202 U. S. 71.

[13] Berni v. Boyer, 90–469, 97+121.

[14] Anheuser v. Mason, 44–318, 46+558 (sale of beer for use in brothel). See Bollinger v. Wilson, 76–262, 79+109.

[15] Dieckhoff v. Fox, 56–438, 57+930.

[16] See Ingersoll v. Randall, 14–400(304); Gunnaldson v. Nyhus, 27–440, 8+147; Bisbee v. McAllen, 39–143, 39+299; Anheuser v. Mason, 44–318, 46+558; Disbrow v. Creamery P. M. Co., 125+115.

1880. Entire contracts—If an entire contract is affected with illegality it is void as a whole.[17]

1881. Severable contracts—Partial illegality—Where a contract is illegal only in part, and the illegal part is severable, the remainder will be enforced.[18]

1882. Conflict of laws—If a contract is illegal where it is made and to be performed it is illegal everywhere.[19] A contract in one state for the breach of the laws of another state is probably illegal everywhere.[20] In the absence of proof of the statutes of a sister state the common-law rule will be applied in determining the legality of contracts made in that state.[21]

1883. Law at time of contract governs—The legality of a contract is governed by the law in force at the time it is made.[22]

1884. Nature of defence—The plea of illegality is a shield, not a sword; a defence, not a ground for affirmative relief.[23]

1885. No right of action upon—No right of action arises upon an illegal contract. Ex turpi contractu actio non oritur. A court will not lend its aid in any way for the enforcement of such a contract. It will leave the parties where it finds them, at least if they are in pari delicto.[24] This general rule has been held inapplicable to a municipality.[25] While a plaintiff cannot recover if it is necessary for him to prove, as a part of his cause of action, his own illegal contract, or other illegal transaction, he may recover if he can show a complete cause of action without being obliged to prove the illegal act, though such act may incidentally appear, and may even be important as explanatory of other facts in the case.[26] Guilty intent is unnecessary to make the parties in pari delicto.[27]

1886. Third parties—While an illegal contract is not enforceable as between the parties, it is often enforceable in favor of third parties.[28]

1887. Estoppel—A party to an illegal contract is not generally estopped from asserting its invalidity,[29] but he is sometimes prevented from taking advantage of it.[30]

1888. Waiver—The right of a party to waive the protection of the law is subject to the control of public policy, which cannot be set aside or contravened by any arrangement or agreement of the parties, however expressed.[31]

[17] Handy v. St. Paul G. P. Co., 41–188, 42+872; Todd v. Bettingen, 98–170, 107+1049. See Cohen v. Conrad, 124+992.

[18] Murphy v. Wells, 99–230, 108+1070; Cohen v. Conrad, 124+992. See 17 Yale L. J. 338; 21 Harv. L. Rev. 549.

[19] Buckley v. Humason, 50–195, 52+385.

[20] Bollinger v. Wilson, 76–262, 79+109; Hamm v. Young, 76–246, 79+111.

[21] Mohr v. Miesen, 47–228, 49+862.

[22] Olson v. Nelson, 3–53(22); Handy v. St. Paul G. P. Co., 41–188, 42+872.

[23] Erb v. Yoerg, 64–463, 67+355; McAllen v. Hodge, 94–237, 102+707.

[24] St. Peter Co. v. Bunker, 5–192(153); McCue v. Smith, 9–252(237); Taylor v. Blake, 11–255(170); Ingersoll v. Randall, 14–400(304); Butler v. Bohn, 31–325, 17+862; Franklin v. Stoddart, 34–247, 25+400; Anheuser v. Mason, 44–318, 46+558; Mohr v. Miesen, 47–228, 234, 49+862; Buckley v. Humason, 50–195, 52+385; Leveroos v. Reis, 52–259, 53+1155; Erb v. Yoerg, 64–463, 67+355; Anderson v. Minn. L. & T. Co., 68–491, 499, 71+665, 819; Berni v. Boyer, 90–469, 97+121; Holland v. Sheehan, 108–362, 122+1. See Harriman v. Northern Securities Co., 197 U. S. 244, and cases cited in briefs of counsel.

[25] Fergus Falls v. Fergus Falls H. Co., 80–165, 83+54.

[26] Gammons v. Johnson, 69–488, 72+563; Lindgren v. Lindgren, 73–90, 75+1034; Eagle R. M. Co. v. Dillman, 67–232, 69+910.

[27] Holland v. Sheehan, 108–362, 122+1.

[28] Augir v. Ryan, 63–373, 65+640. See Merchants Nat. Bank v. Sullivan, 63–468, 65+924.

[29] Adams v. Adams, 25–72; Bisbee v. McAllen, 39–143, 39+299.

[30] See Ganser v. Fireman's etc. Co., 34–372, 25+943; Augir v. Ryan, 63–373, 65+640; Erb v. Yoerg, 64–463, 67+355; McAllen v. Hodge, 94–237, 102+707.

[31] Fidelity & C. Co. v. Eickhoff, 63–170, 65+351.

1889. Ratification—A contract illegal at the time it is made cannot be ratified at a time when, owing to a change in the law, it would be legal if then made. An entire contract cannot be ratified in part.[32]

1890. Presumptions and burden of proof—A court should not declare a contract illegal on doubtful or uncertain grounds.[33] The presumption is in favor of the legality of contracts.[34] The burden of proving the illegality of a contract is on him who asserts it.[35]

1891. Pleading—In pleading illegality the facts showing the illegality must be specifically alleged. It is insufficient to allege generally that an act or contract is unlawful.[36] Illegality is generally new matter which must be specially pleaded, and is not admissible under a denial.[37] But it is never necessary to plead the law. Advantage may be taken of illegality whenever it appears upon the evidence.[38] To justify judgment on the pleadings for illegality the illegality must appear unequivocally.[39]

PARTIES TO ACTIONS

1892. In general—No person can be sued for the breach of a contract who is not a party to the contract.[40]

1893. All parties must join—It is the general rule that all the parties with whom a contract is made must join in an action for the breach of it.[41] There is an exception to this rule where there has been a severance by agreement of the parties;[42] where the interest of each is several and the damages accruing to each in case of a breach are severable;[43] and where one of them refuses to join.[44]

1894. Parties plaintiff—General rule—It is the general rule that no one can sue for the breach of a contract who is not a party to the contract. In other words, there must be privity of contract between the parties.[45] A promise to one person, upon a consideration moving from another, the latter assenting to the promise, is valid, and an action may be maintained by the promisee for a breach of it.[46]

1895. Party in whose name contract made for another—A party with whom, or in whose name, a contract is made for the benefit of another, may sue

[32] Handy v. St. Paul G. P. Co., 41–188, 42+872.

[33] Anheuser v. Mason, 44–318, 46+558; White v. Western A. Co., 52–352, 54+195; Quirk v. Mpls. etc. Ry., 98–22, 107+742.

[34] Moyer v. Cantieny, 41–242, 42+1060.

[35] Anheuser v. Mason, 44–318, 46+558; Mohr v. Miesen, 47–228, 49+862; McCarthy v. Weare, 87–11, 91+33; Quirk v. Mpls. etc. Ry., 98–22, 107+742. See Hamm v. Young, 76–246, 250, 79+111.

[36] Taylor v. Blake, 11–255(170); Woodbridge v. Sellwood, 65–135, 67+799; Simon v. Haut, 95–521, 104+129.

[37] Woodbridge v. Sellwood, 65–135, 67+799; Dodge v. McMahan, 61–175, 63+487.

[38] Handy v. St. Paul G. P. Co., 41–188, 42+872; First Nat. Bank v. Kidd, 20–234 (212).

[39] Simon v. Haut, 95–521, 104+129.

[40] Graves v. Moses, 13–335(307); Wheeler v. Johnson, 21–507; Mahoney v. McLean, 26–415, 4+784. See Campbell v. Rotering, 42–115, 43+795.

[41] Porter v. Fletcher, 25–493; Hedderly v. Downs, 31–183, 17+274; Moore v. Bevier, 60–240, 62+281; Mason v. St. Paul etc. Co., 82–336, 85+13. See Peck v. McLean, 36–228, 30+759.

[42] Pratt v. Pratt, 22–148.

[43] Brown v. Farnham, 55–27, 56+352. See Sprague v. Wells, 47–504, 50+535; Moede v. Haines, 66–419, 69+216.

[44] Peck v. McLean, 36–228, 30+759. See Rowland v. McLaughlin, 125+1019.

[45] Armstrong v. Vroman, 11–220(142); Follansbee v. Johnson, 28–311, 9+882; Greenwood v. Sheldon, 31–254, 17+478; McCarthy v. Couch, 37–124, 33+777; State Bank v. Heney, 40–145, 41+411; Brown v. Stillman, 43–126, 45+2; Nelson v. Rogers, 47–103, 49+526; Union R. S. Co. v. McDermott, 53–407, 55+606; Jefferson v. Asch, 53–446, 55+604; Walsh v. Featherstone, 67–103, 69+811; Klemer v. Sheffield, 78–224, 80+1055; Kramer v. Gardner, 104–370, 116+925.

[46] Van Eman v. Stanchfield, 10 255(197).

in his own name without joining the person for whose benefit the action is brought.[47]

1896. Contracts for benefit of third parties—The mere fact that a stranger to a contract is to be benefited thereby does not give him a right of action thereon. A stranger to a contract between others, in which one of the parties promises to do something for the benefit of such stranger, there being nothing but the promise, no consideration from such stranger, and no duty or obligation to him on the part of the promisee, cannot recover upon it.[48] The following exceptions to the general rule are established: if A transfers property to B, who, in consideration therefor, promises A to pay C a debt due him from A, C may sue B on his promise to A.[49] In such an action B may set up any equities he has against A.[50] If A promises B to pay a debt which B owes C the latter may sue A on his promise to B.[51] The beneficiary in an insurance policy may sue in his own name [52] and so in certain cases one may sue for whose benefit a bond is given.[53] As regards the right of a beneficiary to sue, there is no distinction between sealed and unsealed contracts. Our supreme court has not attempted to formulate a general rule as to when a stranger to a contract may sue thereon.[54] One who seeks to enforce a promise made to another for his benefit is bound, the same as the promise would be, by the rule excluding parol proof to vary a written contract.[55]

1897. Promise to pay debt of plaintiff—A may sue B on a promise of B to pay a debt of A to C and he may do so without first paying the debt himself.[56]

1898. Death of joint parties—Survivorship—The right of action on a contract made with several persons jointly passes on the death of each to the survivors.[57]

1899. Parties to joint obligation—By virtue of statute the parties to a joint obligation may be sued either separately or jointly, subject to the right of the court to order persons not made parties to be brought in.[58] Prior to Laws 1897 c. 303 the common-law rule, that where several persons are jointly liable on an obligation they must all be joined in an action for the breach thereof, pre-

[47] R. L. 1905 § 4055; Armstrong v. Vroman, 11–220(142); Huntsman v. Fish, 36–148, 30+455; Lake v. Albert, 37–453, 35+177; State Bank v. Heney, 40–145, 41+411; Cremer v. Wimmer, 40–511, 42+467; Lundberg v. N. W. El. Co., 42–37, 43+685; Close v. Hodges, 44–204, 46+335; Murphin v. Scovell, 44–530, 47+256; Struckmeyer v. Lamb, 64–57, 65+930; McLean v. Dean, 66–369, 69+140; Cooper v. Hayward, 71–374, 74+152. See Miller v. State Bank, 57–319, 59+309.

[48] Jefferson v. Asch, 53–446, 55+604; Union R. S. Co. v. McDermott, 53–407, 55+606; Kramer v. Gardner, 104–370, 116+925. See Van Eman v. Stanchfield, 13–75(70); Sherwood v. O'Brien, 58–76, 59+957; Basting v. Northern T. Co., 61–307, 314, 63+721; Michaud v. Erickson, 108–356, 122+324. See, upon the subject generally, Pollock, Contracts (Williston's ed. 1906), pp. 237–278; 9 Harv. L. Rev. 233; 15 Id. 767; 21 Id. 426.

[49] Sanders v. Classon, 13–379(352); Jordan v. White, 20–91(77); Follansbee v. Johnson, 28–311, 9+882; Stariha v. Greenwood, 28–521, 11+76; Maxfield v. Schwartz, 43–221, 45+429; Sayre v. Burdick, 47–367, 50+245; Rogers v. Castle, 51–428, 53+651; Lovejoy v. Howe, 55–353, 57+57; Bell v. Mendenhall, 71–331, 73+1086; Scanlan v. Grimmer, 71–351, 74+146.

[50] Rogers v. Castle, 51–428, 53+651; Maxfield v. Schwartz, 45–150, 47+448; Gold v. Ogden, 61–88, 63+266.

[51] Hawley v. Wilkinson, 18–525(468); Pulliam v. Adamson, 43–511, 45+1132; Barnes v. Hekla F. Ins. Co., 56–38, 57+314.

[52] See § 4734.

[53] Michaud v. Erickson, 108–356, 122+324. See § 6720.

[54] Jefferson v. Asch, 53–446, 55+604.

[55] Sayre v. Burdick, 47–367, 50+245.

[56] Merriam v. Pine City L. Co., 23–314.

[57] Freeman v. Curran, 1–169(144); Hedderly v. Downs, 31–183, 17+274; Northness v. Hillestad, 87–304, 91+1112; Semper v. Coates, 93–76, 100+662.

[58] R. L. 1905 § 4282; Hollister v. United States etc. Co., 84–251, 87+776; Sundberg v. Goar, 92–143, 99+638; 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.

vailed in this state.[59] Where an action is brought against one of several 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.[60]

1900. Persons severally liable on same instrument—It is provided by statute that persons severally liable on the same obligation or instrument may all or any of them be included in the same action.[61] The statute applies to parties liable on a joint and several obligation.[62] The maker and guarantor of an instrument may be joined.[63] The statute abrogates the common-law rule that persons holding different relations to the same instrument cannot be joined.[64] It does not change the relative rights of the parties.[65]

1901. Party contracting in representative capacity—As a general rule a party contracting in a representative capacity cannot be sued on the contract itself as his contract.[66]

PLEADING

1902. How alleged—A contract may be alleged either according to its legal effect,[67] or according to its terms—in haec verba.[68] If it is alleged in haec verba, its terms will control any inconsistent allegation.[69] In alleging an instrument in haec verba it is unnecessary to include the names of witnesses or an acknowledgment.[70]

1903. Indebitatus assumpsit—Where the plaintiff has fully performed an express contract on his part, he may state his cause of action for the recovery of the amount due him substantially in the form of the indebitatus assumpsit count.[71]

1904. As express or implied—A party who declares on an express contract cannot recover on a contract implied by law,[72] nor can he recover an express contract when he declares on an implied contract,[73] if seasonable objection is made. If seasonable objection is not made a recovery may be had either upon an express or implied contract.[74]

1905. Implied contracts—In pleading a contract implied by law it is unnecessary to allege the promise which the law implies. It is sufficient to allege the facts from which the law implies the promise.[75]

1906. How much alleged—A plaintiff is required to plead only such portions of a contract as he claims have been broken.[76]

[59] 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; Sundberg v. Goar, 92–143, 99+638.

[60] Morgan v. Brach, 104–247, 116+490.

[61] R. L. 1905 § 4062.

[62] Lanier v. Irvine, 24–116; Steffes v. Lemke, 40–27, 41+302. See Laramee v. Tanner, 69–156, 71+1028.

[63] Hammel v. Beardsley, 31–314, 17+858; Lucy v. Wilkins, 33–21, 21+849; Bank of Com. v. Smith, 57–374, 59+311; First Nat. Bank v. Burkhardt, 71–185, 73+858.

[64] Hammel v. Beardsley, 31–314, 17+858.

[65] Folsom v. Carli, 5–333(264).

[66] Hayes v. Crane, 48–39, 45, 50+925.

[67] Estes v. Farnham, 11–423(312, 319); Weide v. Porter, 22–429; Elliot v. Roche, 64–482, 67+539.

[68] Elliot v. Roche, 64–482, 67+539; Mpls. etc. Ry. v. Grethen, 86–323, 90+573. See § 7525.

[69] Doud v. Duluth M. Co., 55–53, 56+463; Beatty v. Howe, 77–272, 79+1013.

[70] Roberts v. Nelson, 65–240, 68+14.

[71] Larson v. Schmaus, 31–410, 18+273.

[72] Ecker v. Isaacs, 98–146, 107+1053; Elliott v. Caldwell, 43–357, 45+845.

[73] Gaar v. Fritz, 60–346, 62+391. See Evans v. Miller, 37–371, 34+596.

[74] Dean v. Leonard, 9–190(176); Hewitt v. Brown, 21–163; Wilcox v. Ritteman, 88–18, 92+472.

[75] Heinrich v. Englund, 34–395, 26+122; Oevermann v. Loebertmann, 68–162, 70+1084; Boston C. Co. v. Garland, 90–520, 97+433.

[76] Estes v. Farnham, 11–423(312); Rollins v. St. Paul L. Co., 21–5; Wright v. Tileston, 60–34, 61+823.

1907. Consideration—Except where a consideration is implied by law [77] a consideration must be alleged.[78] Where the consideration is an executory contract such contract must be alleged and performance averred.[79] A recital of "for value received" in a written instrument, alleged in haec verba, is sufficient.[80] A general allegation of "a valuable consideration" has been held sufficient.[81] Failure to allege a consideration may be cured by proof admitted without objection.[82]

1908. Want of consideration—In pleading want of consideration it is unnecessary to state the facts showing want of consideration. It is sufficient to allege generally that the contract was executed without any consideration.[83]

1909. Failure of consideration—In pleading a failure of consideration the facts constituting the failure must be alleged.[84]

1910. Performance—Performance by the plaintiff of all the terms of the contract on his part must be alleged, or an offer or readiness so to do,[85] or facts excusing him for non-performance.[86] By statute a general form of allegation is sufficient.[87]

1911. Breach—A complaint on a contract must show a breach thereof.[88] A complaint to recover damages for breach of a contract, where the obligation of the defendant depends on a contingency other than an act to be done by plaintiff, must allege the happening of such contingency. A general allegation that defendant refused to perform "according to the terms of said agreement" is not sufficient.[89]

1912. Demand—Where a demand of performance is a condition precedent it must be alleged.[90] An allegation "although often requested" is sufficient as against a demurrer.[91]

1913. Execution—An allegation that a written contract was "made and entered into" includes its delivery.[92]

1914. Modified contract—A modified contract may be declared upon as modified, without reference to the original contract.[93]

1915. Several promises—A plaintiff may allege and prove as many promises as he may have to pay the debt sued for, if they are separate, distinct, and valid undertakings.[94]

1916. Allegation of writing—In declaring on a contract within the statute of frauds it is unnecessary to allege that it is in writing.[95]

1917. Promise to pay money on demand—A promise to pay money, no time being expressed, is deemed in law a promise to pay on demand. It is

[77] See § 869.
[78] Abbott v. W. U. Tel. Co., 86–44, 90+1.
[79] Becker v. Sweetzer, 15–427(346).
[80] Frank v. Irgens, 27–43, 6+380; Elmquist v. Markoe, 39–494, 40+825; Campbell v. Worman, 58–561, 60+668.
[81] Russell v. Minnesota Outfit, 1–162 (136).
[82] Frank v. Irgens, 27–43, 6+380.
[83] Grimes v. Ericson, 94–461, 103+334. See Webb v. Michener, 32–48, 19+82; Wells v. Moses, 87–432, 92+334.
[84] Grimes v. Ericson, 94–461, 103+334.
[85] See Johnson v. Howard, 20–370(322); Andreas v. Holcombe, 22–339.
[86] Johnson v. Howard, 20–370(322); Boon v. State Ins. Co., 37–426, 34+902.
[87] R. L. 1905 § 4150.
[88] See Burns v. Jordan, 43–25, 44+523; Blunt v. Egeland, 104–351, 116+653; Branton v. McLaughlin, 109–244, 123+808.
[89] Wilson v. Clarke, 20–367(318).
[90] Parr v. Johnson, 37–457, 35+176; Malone v. Minn. S. Co., 36–325, 31+170; Newton v. Highland I. Co., 62–436, 64+1146; Snow v. Johnson, 1–48(32); Jarrett v. G. N. Ry., 74–477, 77+304. See, as to the necessity of a demand, Bailey v. Merritt, 7–159(102); Smith v. Jordan, 13–264 (246); White v. Phelps, 14–27(21); Board of Ed. v. Moore, 17–412(391); McClung v. Capehart, 24–17.
[91] Hall v. Williams, 13–260(242).
[92] Romans v. Langevin, 34–312, 25+638.
[93] Estes v. Farnham, 11–423(312); Swank v. Barnum, 63–447, 65+722.
[94] Walsh v. Kattenburgh, 8–127(99).
[95] See § 8857.

sufficient to plead such a promise as made, without pleading the construction which the law places upon it by alleging a promise to pay on demand.[96]

1918. Denial of execution—Under a general denial the defendant may prove that the contract alleged was never made,[97] or that the contract actually made was different from the one alleged.[98] The denial of the execution of a written instrument, in order to shift the burden of proof, must be positive, specific, and personally verified by the defendant.[99]

CONTRIBUTION

Cross-References

See Guaranty, 4080; Suretyship, 9090.

1919. Definition—Contribution is a payment made by each, or by any one of several having a common interest or liability, of his share in a loss suffered, or in an amount necessarily paid, by one of the parties in behalf of all.[1]

1920. Liability—In general—The general rule is that, where two or more persons are jointly, or jointly and severally, bound to pay a sum of money, and one or more of them pays the whole, or more than his or their share, and thereby relieves the others from their liability, those paying may recover from those not paying the aliquot proportion which they ought to pay. The persons not paying, but being relieved from a positive liability by a payment made by others, who were bound with them, are held to be under an implied promise to contribute each his share to make the whole sum paid. This rule applies equally to those who are bound as original co-contractors and to those who are bound to pay the debt of another or answer for his default as co-sureties.[2]

1921. Basis of doctrine—The doctrine of contribution is based on the maxim that equality is equity.[3] It is not based on contract.[4]

1922. When right accrues—One is not entitled to contribution until he has actually paid more than his share, or so assumed the common obligation as to release those from whom he claims contribution.[5]

1923. Between judgment debtors—Statute—Under the statute,[6] where one of several joint judgment debtors pays more than his share, and files notice of his payment and claim to contribution, he is ipso facto subrogated to the rights of the judgment creditor, and may issue execution to enforce contribution. It is unnecessary that his property should have been levied on before he paid the judgment.[7]

1924. Between wrongdoers—The rule that contribution will not be allowed between wrongdoers is applicable only where the person seeking the contribution was guilty of an intentional wrong, or, at least, where he must be presumed to have known that he was doing an illegal act. It is inapplicable to a case of mere negligence in doing a lawful act.[8]

[96] Chamberlain v. Tiner, 31-371, 18+97.
[97] Scone v. Amos, 38-79, 35+575; McCormick v. Doucette, 61-40, 63+95.
[98] Scone v. Amos, 38-79, 35+575; Ortt v. Mpls. etc. Ry., 36-396, 31+519.
[99] See § 3365.
[1] Canosia v. Grand Lake, 80-357, 83+346; Kettle River v. Bruno, 106-58, 118+63. See Note, 98 Am. St. Rep. 31.
[2] Gugisberg v. Eckert, 101-116, 111+945.
[3] Van Brunt v. Gordon, 53-227, 54+1118.
[4] Schmidt v. Coulter, 6-492(340).
[5] Canosia v. Grand Lake, 80-357, 83+346.
[6] R. L. 1905 § 4281.
[7] Ankeny v. Moffett, 37-109, 33+320; Whelan v. Reynolds, 101-290, 112+223; Akin v. Lake Superior C. I. Mines, 103-204, 114+654, 837.
[8] Ankeny v. Moffett, 37-109, 33+320; Engstrand v. Kleffman, 86-403, 90+1054; Mayberry v. N. P. Ry., 100-79, 110+356; Warren v. Westrup, 44-237, 239, 46+347.

1925. Co-debtors—Where one of several who are jointly, or jointly and severably, liable on contract for the same debt, pays more than his share, he is entitled to contribution from the others to reimburse him for the excess thus paid.[9]

CONTRIBUTORY NEGLIGENCE—See Carriers; Master and Servant; Municipal Corporations; Negligence; Railroads; Street Railways; and other specific heads involving negligence.

CONTROVERSY—See note 10.

CONVENIENT—See note 11.

CONVERSATIONS—See Evidence, 3237; Witnesses, 10316, 10319.

CONVERSATIONS WITH DECEASED PERSONS—See Witnesses, 10316.

CONVERSION

Cross-References

See Carriers, 1345; Chattel Mortgages, 1474–1478; Corporations, 2040; Equitable Conversion; Sheriffs and Constables, 8747; Warehousemen, 10140.

WHAT CONSTITUTES

1926. Definition—A conversion is an unauthorized assumption and exercise of a right of complete ownership over personal property of another, to the total exclusion of his rights, or any unauthorized physical dealing with it which destroys it, or changes its essential nature or quality, or in any way deprives the owner of it permanently.[12] It has been otherwise defined as, "any unauthorized dealing with the goods of another by one in possession, whereby the nature or quality of the goods is essentially altered, or by which one having the right of possession is deprived of all substantial use of the goods, permanently or temporarily;" [13] "any distinct act of dominion wrongfully exerted over the personal property of another in denial of his right or inconsistent with it;" [14] "an unauthorized exercise of dominion over the personal property of another;" [15]

See Lesher v. Getman, 30–321, 330, 15+309; Mpls. M. Co. v. Wheeler, 31–121, 16+698; 12 Harv. L. Rev. 176.

[9] Van Brunt v. Gordon, 53–227, 54+1118.

[10] Barber v. Kennedy, 18–216(196, 206).

[11] McClung v. Bergfield, 4–148 (99, 103).

[12] This definition is based on Merz v. Croxen, 102–69, 112+890; Century Dictionary; 21 Harv. L. Rev. 408. The test of conversion is definitely settled in this state by the Merz case which holds that "to constitute a conversion of personal property, there must be some repudiation of the owner's right, or some exercise of dominion over it inconsistent with such right, or some act done which has the effect of destroying or changing its character." This test wisely excludes many acts for which trover would lie at common law, such as a misuse of property by a bailee. See McCurdy v. Wallblom, 94–326, 102+873; 21 Harv. L. Rev. 408. The Merz case is admirable in substance and effect, but its language is infelicitous. The expressions, "some repudiation of the owner's right" and "some exercise of dominion," are vague and unfit to submit to a jury. Even with lawyers the word "dominion" has no fixed and definite meaning. The expression "repudiation of the owner's right" is objectionable in that it suggests the necessity of knowledge of the owner's right. See, upon the general subject, 15 Am. L. Rev. 363; 21 Law Quarterly Rev. 43; Note, 24 Am. St. Rep. 795; Note to Donald v. Suckling, Bigelow, Leading Cases in Torts; Dean Ames, Disseizin of Chattels, 3 Harv. L. Rev. 23, 313, 337.

[13] Prof. J. B. Ames. See 15 Am. L. Rev. 363.

[14] Hossfeldt v. Dill, 28–469, 475, 10+781; Allen v. Am. B. & L. Assn., 49–544, 550, 52+144; Carpenter v. Am. B. & L. Assn., 54–403, 409, 56+95; Cumbey v. Ueland, 72–453, 458, 75+727; Johnson v. Dun, 75–533, 537, 78+98; McDonald v. Bayha, 93–139, 100+679; Humphreys v. Minn. C. Co., 94–469, 103+338; Kloos v. Gatz, 97–167, 105+639. See, for a very just criticism of this definition, 21 Harv. L. Rev. 412.

[15] Coleman v. Pearce, 26–123, 132, 1+846.

"an unauthorized act which deprives another of his property permanently, or for an indefinite time;" [16] "an unauthorized assumption and exercise of the right of ownership over personal property belonging to another in hostility to his rights;" [17] "a distinct and unauthorized assumption of the powers of the true owner;" [18] "the act of wilfully interfering with any chattel, without lawful justification, whereby any person entitled thereto is deprived of the possession of it;" [19] "any dealing with a chattel which impliedly or by its terms excludes the dominion of the owner;" [20] "an act of dominion over the movables of another; that is, a usurpation of ownership;" [21] "every act of control or dominion over personal property without the owner's authority, and in disregard and violation of his rights;" [22] "an unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the alteration of their condition or the exclusion of the owner's rights;" [23] and "the turning or applying the property of another to one's own use." [24] Some of these definitions are obviously framed to cover every act for which trover would lie at common law, and do not accurately express the law of this state, but they indicate the general trend of authority. To constitute a conversion it is not essential that the wrongdoer take actual possession of the property, or that he convert it to his own use.[25] As an action for conversion is a means of forcing the title on the converter and making him pay for the full value of the property it would seem proper that nothing should be regarded as a conversion which does not deprive the owner of the property completely and permanently.

1927. Ministerial dealing with goods—Mere ministerial dealing with goods, at the request of an apparent owner having actual control of them, appears not to be a conversion.[26]

1928. Intent—Knowledge—Motive—As a general rule, the intent, knowledge, or motive of the converter is immaterial, except as affecting damages.[27] It seems, however, that there are ill-defined exceptions to this general rule.[28]

1929. Conversion of realty—An action will not lie to recover the value of realty, as for converting it, against one who caused it to be sold under execution issued on a judgment which has been paid.[29] An action will lie for the conversion of chattels attached to realty.[30]

1930. Time of conversion—A conversion of logs has been held to relate back to the time of cutting down the trees.[31]

1931. Knowledge and consent of owner—If the conversion was with the knowledge and consent of the owner he cannot recover.[32] A disposition of property pursuant to an agreement with the owner cannot be a conversion.[33]

An owner of personal property cannot be deprived of his right to it through the unauthorized act of another. Hall v. Pillsbury, 43–33, 37, 44+673.

[16] Merz v. Croxon, 102–69, 112+890; Sutton v. G. N. Ry., 99–376, 109+815.

[17] Century Dictionary.

[18] McCurdy v. Wallblom, 94–326, 102+873.

[19] Salmond, Torts, 294.

[20] Bishop, Non-Contract Law, § 403.

[21] Bigelow, Torts, 8 ed. 395.

[22] 28 Am. & Eng. Ency. of Law 679.

[23] Bouvier, Dict. (Rawle's ed.).

[24] Hodge v. Eastern Ry., 70–193, 196, 72+1074.

[25] Hossfeldt v. Dill, 28–469, 475, 10+781; McDonald v. Bayha, 93–139, 100+679; Chase v. Baskerville, 93–402, 101+950; Kloos v. Gatz, 97–167, 105+639. See Molm v. Barton, 27–530, 8+765.

[26] Merz v. Croxen, 102–69, 112+890. See Hollins v. Fowler, L. R. 7 H. L. 757.

[27] Kronschnable v. Knoblauch, 21–56, 58; Appleton M. Co. v. Warder, 42–117, 120, 43+791; Jesurun v. Kent, 45–222, 47+784; Dolliff v. Robbins, 83–498, 86+772; Vine v. Casmey, 86–74, 77, 90+158; Johnson v. Martin, 87–370, 92+221; Hoyt v. Duluth etc. Ry., 103–396, 115+263.

[28] See Merz v. Croxen, 102–69, 112+890.

[29] Norgren v. Edson, 51–567, 53+876.

[30] See § 1932.

[31] Goss v. Meehan, 83–178, 85+1010.

[32] Freeman v. Etter, 21–2; Tousley v. Board of Ed., 39–419, 40+509; Griffin v.

1932. Acts held to constitute conversion—Retaking property under an attachment, the property having been replevied from the attaching officer;[34] investing money in his own name by an agent intrusted with the money to be invested in the name of his principal;[35] purchasing from a person in possession, but without title, or authority, or indicia of authority from the true owner;[36] re-selling by a purchaser at an unauthorized private sale on execution;[37] wrongfully refusing to deliver possession of the property of another on demand;[38] a sale as his own by a cotenant of joint property;[39] purchasing from a mortgagor and wrongfully refusing to deliver possession to the mortgagee on demand;[40] wrongfully refusing to sell or to account by a factor;[41] wrongfully levying on the property of another by an officer;[42] repudiating a trust;[43] refusing to permit an owner to remove a chattel attached to a building;[44] a refusal by a mortgagor to let his mortgagee have possession;[45] quarrying and disposing of stone below street grade by a city;[46] a sale on execution of more than the judgment debtor's interest;[47] purchasing the grain of another stored with a warehouseman;[48] an unauthorized sale and purchase of its stock by a corporation for non-payment of dues;[49] a renewal by a bank of a note which it ought to have collected;[50] an unauthorized release of an attachment bond by an attorney;[51] tearing up and carrying away railway rails and accessories;[52] ordering a third party not to deliver goods to the plaintiff which the defendants had purchased from such third party on behalf of the plaintiff;[53] failure to account for funds received;[54] an unauthorized sale by an agent;[55] canceling stock;[56] taking property and neglecting to return it;[57] use of property pledged;[58] cutting and removing crops;[59] an unauthorized sale of the property of another;[60] obtaining money under false pretences;[61] refusal by corporation to record transfer of stock;[62] removal of goods stored with a bailee from one

Bristle, 39–456, 40+523; Penney v. Mutual I. Co., 54–541, 56+165; Partridge v. Minn. etc. Co., 75–496, 78+85; Wrigley v. Watson, 81–251, 83+989. See Kronschnable v. Knoblauch, 21–56; Person v. Wilson, 25–189; Wetherell v. Stewart, 35–496, 29+196; Kendall v. Duluth, 64–295, 66+1150; Herrick v. Barnes, 78–475, 81+526; Boxell v. Robinson, 82–26, 84+635.

[33] Chase v. Blaisdell, 4–90(60).

[34] Vanderburgh v. Bassett, 4–242(171).

[35] Farrand v. Hurlburt, 7–477(383); Cock v. Van Etten, 12–522(431, 434).

[36] Nesbitt v. St. Paul L. Co., 21–491; Johnson v. Martin, 87–370, 92+221. See 15 Am. L. Rev. 363.

[37] Kronschnable v. Knoblauch, 21–56.

[38] Morish v. Mountain, 22–564; Chase v. Blaisdell, 4–90(60); Jorgenson v. Tait, 26–327, 4+44; Boxell v. Robinson, 82–26, 84+635; Northness v. Hillestad, 87–304, 306, 91+1112; St. Paul etc. Ry. v. Gardner, 19–132(99, 112).

[39] Person v. Wilson, 25–189.

[40] Jorgensen v. Tait, 26–327, 4+44.

[41] Coleman v. Pearce, 26–123, 1+846.

[42] Molm v. Barton, 27–530, 8+765; Hossfeldt v. Dill, 28–469, 10+781; Kloos v. Gatz, 97–167, 105+639.

[43] Judd v. Dike, 30–380, 385, 15+672.

[44] Shapira v. Barney, 30–59, 14+270; Stout v. Stoppel, 30–56, 14+268; Medicke v. Sauer, 61–15, 63+170. See Woods v. Wulf, 84–299, 87+840.

[45] Fletcher v. Neudeck, 30–125, 14+513; Close v. Hodges, 44–204, 46+335.

[46] Viliski v. Minneapolis, 40–304, 41+1050.

[47] App'eton M. Co. v. Warder, 42–117, 43+791.

[48] Hall v. Pillsbury, 43–33, 44+673.

[49] Allen v. Am. B. & L. Assn., 49–544, 52+144; Carpenter v. Am. B. & L. Assn., 54–403, 56+95.

[50] Cumbey v. Ueland, 72–453, 75+727.

[51] Johnson v. Dun, 75–533, 78+98.

[52] Hodge v. Eastern Ry., 70–193, 72+1074.

[53] McDonald v. Bayha, 93–139, 100+679.

[54] Danvers F. E. Co. v. Johnson, 93–323, 101+492; Id., 96–272, 104+899.

[55] Chase v. Baskerville, 93–402, 101+950.

[56] Humphreys v. Minn. C. Co., 94–469, 103+338.

[57] Stickney v. Smith, 5–486(390, 392).

[58] Scott v. Reed, 83–203, 85+1012.

[59] Mueller v. Olson, 90–416, 97+115.

[60] Johnson v. Martin, 87–370, 374, 92+221.

[61] Holland v. Bishop, 60–23, 61+681.

[62] Nicollet Nat. Bank v. City Bank, 38–85, 35+577; Humphreys v. Minn. C. Co., 94–469, 103+338.

warehouse to another;[63] an improper payment of part of the purchase money for grain to a third party claiming a lien under a chattel mortgage.[64]

1933. Acts held not to constitute conversion—An indorsement and delivery of bills of lading by a bank holding them as collateral security;[65] replevying property by a preferred creditor;[66] selling realty on an execution which had been paid;[67] a void attempt to foreclose a chattel mortgage, the mortgagee bidding in;[68] an assignment of a thing in action subject to a lien, the assignee having notice of the lien;[69] the acceptance by a creditor from his debtor of a preferential security voidable under the insolvent law;[70] sending an engine out of the state to effect a sale thereof, the defendant being under contract with the plaintiff to sell the same;[71] taking possession by a vendor under a conditional sale;[72] refusal by one cotenant of a demand for the entire property by other cotenants;[73] taking a farm implement, with the consent of the person in possession, who was not the owner, and returning it as directed by him;[74] placing money held by an agent in a drawer with his private money.[75]

1934. Conversion of various forms of property—Wheat;[76] logs and lumber;[77] money;[78] promissory note;[79] bonds;[80] stock;[81] chattels attached to realty;[82] stock of merchandise;[83] hay;[84] household goods;[85] threshing ma-

[63] McCurdy v. Wallblom, 94–326, 102+873.

[64] Gaertner v. Western El. Co., 104–467, 116+945.

[65] Leuthold v. Fairchild, 35–99, 27+503, 28+218.

[66] Moore v. Hayes, 35–205, 28+238.

[67] Norgren v. Edson, 51–567, 53+876.

[68] Powell v. Gagnon, 52–232, 53+1148.

[69] Comfort v. Creelman, 52–280, 53+1157.

[70] Hay v. Tuttle, 67–56, 69+696.

[71] Port Huron etc. Co. v. Otto, 89–393, 94+1088.

[72] McClelland v. Nichols, 24–176.

[73] Person v. Wilson, 25–189.

[74] Merz v. Croxen, 102–69, 112+890.

[75] Furber v. Barnes, 32–105, 19+728.

[76] Coleman v. Pearce, 26–123, 1+846; Sanders v. Chandler, 26–273, 3+351; Kenrick v. Rogers, 26–344, 4+46; Howard v. Barton, 28–116, 9+584; Hossfeldt v. Dill, 28–469, 10+781; Melin v. Reynolds, 32–52, 19+81; Howard v. Rugland, 35–388, 29+63; Homberger v. Brandenberg, 35–401, 29+123; Wetherell v. Stewart, 35–496, 29+196; Stone v. Quaal, 36–46, 29+326; Griffin v. Bristle, 39–456, 40+523; Close v. Hodges, 44–204, 46+335; Donovan v. Sell, 64–212, 66+722; Herrick v. Barnes, 78–475, 81+526; Jackson v. Sevatson, 79–275, 82+634; Matteson v. Munro, 80–340, 83+153; Linde v. Goffke, 81–304, 84+41; Mann v. Lamb, 83–14, 85+827; Bank of Litchfield v. Elliott, 83–469, 86+454; Cummings v. Newell, 86–130, 90+311; Johnson v. Martin, 87–370, 92+221; Robine v. Little, 88–122, 92+1130; Flour City Nat. Bank v. Bayer, 89–180, 94+557; Lake v. Lund, 92–280, 99+884; Holden v. Maxfield, 94–27, 101+955; Kloos v. Gatz, 97–167, 105+639; First Nat. Bank v. St. Anthony etc. Co., 103–82, 114+265; Gaertner v. Western El. Co., 104–467, 116+945; Woodworth v. Theis, 109–4, 122+310.

[77] Hurlburt v. Schulenburg, 17–22(5); Washburn v. Mendenhall, 21–332; Nesbitt v. St. Paul L. Co., 21–491; Person v. Wilson, 25–189; Haven v. Place, 28–551, 11+117; Shepard v. Pettit, 30–481, 16+271; Clark v. Nelson, 34–289, 25+628; Whitney v. Huntington, 34–458, 26+631; Adamson v. Petersen, 35–529, 29+321; Whitney v. Huntington, 37–197, 33+561; Libby v. Johnson, 37–220, 33+783; King v. Merriman, 38–47; 35+570; Hoxsie v. Empire L. Co., 41–548, 43+476; Miss. etc. Co. v. Page, 68–269, 71+4; Breault v. Merrill, 72–143, 75+122; Goss v. Meehan, 83–178, 85+1010; Carver v. Crookston L. Co., 84–79, 86+871; Hastay v. Bonness, 84–120, 86+896.

[78] Clayton v. Bennington, 24–14; First Nat. Bank v. Lincoln, 36–132, 30+449; Reynolds v. St. Paul T. Co., 51–236, 53+457; Hodgson v. St. Paul P. Co., 78–172, 80+956; Lahr v. Kraemer, 91–26, 97+418; Danvers F. E. Co. v. Johnson, 93–323, 101+492.

[79] Nininger v. Banning, 7–274(210); Haas v. Sackett, 40–53, 41+237; Cumbey v. Ueland, 72–453, 75+727; Enneking v. Woebkenberg, 88–259, 92+932.

[80] Winona v. Minn. Ry. Const. Co., 29–68, 11+228; Johnson v. Dun, 75–533, 78+98.

[81] Nicollet Nat. Bank v. City Bank, 38–85, 35+577; McKusick v. Seymour, 48–172, 50+1116; Allen v. Am. B. & L. Assn., 49–544, 52+144; Carpenter v. Am. B. & L. Assn., 54–403, 56+95; Upham v. Barbour, 65 364, 68+42; Windham Co. S. Bank v. O'Gorman, 66–361, 69+317; Humphreys v. Minn. C. Co., 94–469, 103+338.

[82] Tyler v. Hanscom, 28–1, 8+825; Stout v. Stoppel, 30–56, 14+268; Shapira v. Barney, 30–59, 14+270; Whitney v. Huntington, 34–458, 463, 26+631; Erickson v. Jones, 37–459, 35+267; Ingalls v. St. P. etc. Ry., 39–479, 40+524; Wylie v. Grundysen, 51–360, 53+805; Medicke v. Sauer,

chine;[86] harvester;[87] buggy;[88] buildings;[89] public funds;[90] wearing apparel;[91] books of account;[92] printing press;[93] electrotype plates;[94] steer;[95] railway cross ties;[96] railway rails;[97] cord wood;[98] wagon;[99] piano;[1] stone;[2] harness;[3] carload of potatoes;[4] flax seed;[5] timber;[6] safe;[7] automobile;[8] sawmill and machinery;[9] crops;[10] carload of live stock;[11] carload of oranges;[12] jewelry;[13] horses;[14] carload of corn;[15] cane-mill;[16] flour;[17] sheep and lambs;[18] watches.[19]

1935. Conversion by various classes of persons—Sheriff;[20] grain elevator company;[21] warehousemen;[22] purchaser from warehousemen;[23]

61–15, 63+170; Capehart v. Foster, 61–132, 63+257; Woods v. Wulf, 84–299, 87+840.

[83] Derby v. Gallup, 5–119(85); Stickney v. Bronson, 5–215(172); Beebe v. Wilkinson, 30–548, 16+450; Howard v. Manderfield, 31–337, 17+946; Bennett v. Denny, 33–530, 24+193; Dallemand v. Janney, 51–514, 53+803; Rollofson v. Nash, 75–237, 77+954; Scheffer v. Lowe, 77–279, 79+970; Carson v. Hawley, 82–204, 84+746; Moss v. Anheuser, 95–515, 103+1133; Barbieri v. Messner, 106–102, 118+258.

[84] Burger v. N. P. Ry., 22–343; Walker v. Johnson, 28–147, 9+632; Hinman v. Heyderstadt, 32–250, 20+155; Freeman v. Kraemer, 63–242, 65+455; Vine v. Casmey, 86–74, 90+158; Stitt v. Namakan L. Co., 95–91, 103+707.

[85] Young v. Ege, 63–219, 65+249, 67+4; Boxell v. Robinson, 82–26, 84+635; McDonald v. Bayha, 93–139, 100+679; Webb v. Downes, 93–457, 101+966; McCurdy v. Wallblom, 94–326, 102+873; Kincaid v. Junkunz, 109–400, 123+1082.

[86] McClelland v. Nichols, 24–176; Cushing v. Seymour, 30–301, 15+249; Nichols v. Minn. T. M. Co., 70–528, 73+415; Mpls. T. M. Co. v. Burton, 94–467, 103+335.

[87] Tillman v. International H. Co., 93–197, 101+71.

[88] Allen v. Coates, 29–46, 11+132.

[89] Woods v. Wulf, 84–299, 87+840.

[90] Mower County v. Smith, 22–97.

[91] Johnson v. Morstad, 63–397, 65+727; Scott v. Reed, 83–203, 85+1012.

[92] Sawyer v. Knowles, 61–531, 63+1038.

[93] Pound v. Pound, 64–428, 67+200; Strickland v. Minn. T. F. Co., 77–210, 79+674.

[94] Davis v. Tribune etc. Co., 70–95, 72+808.

[95] Cooley v. Copperud, 81–431, 84+1115.

[96] Chandler v. De Graff, 27–208, 6+611.

[97] Hodge v. Eastern Ry., 70–193, 72+1074.

[98] Molm v. Barton, 27–530, 8+765; Tousley v. Board of Ed., 39–419, 40+509.

[99] Walker v. Johnson, 28–147, 9+632.

[1] Adams v. Castle, 64–505, 67+637; Lane v. Dreger, 95–4, 103+710.

[2] Viliski v. Minneapolis, 40–304, 41+1050.

[3] Jorgensen v. Tait, 26–327, 4+44.

[4] Lepeska v. Masek, 88–55, 92+131.

[5] Winter v. Atlantic E. Co., 88–196, 92+955.

[6] Shepard v. Pettit, 30–119, 14+511; State v. Shevlin, 66–217, 68+973; Foot v. Miss. etc. Co., 70–57, 72+732; Chadbourne v. Reed, 83–447, 86+415; White v. Neils, 100–16, 110+371; Hoyt v. Duluth etc. Ry., 103–396, 115+263; State v. Rat Portage L. Co., 106–1, 115+162, 117+922; Williams v. Monks, 108–256, 122+5; State v. Clarke, 109–123, 123+54. See § 1959.

[7] Moulton v. Thompson, 26–120, 1+836.

[8] Chase v. Baskerville, 93–402, 101+950.

[9] Nickerson v. Wells, 71–230, 73+959, 74+891.

[10] Ohlson v. Manderfeld, 28–390, 10+418; Bloemendal v. Albrecht, 79–304, 82+585; Cummings v. Newell, 86–130, 90+311; Northness v. Hillestad, 87–304, 91+1112; Mueller v. Olson, 90–416, 97+115; Rector v. Anderson, 96–123, 104+884; Agne v. Skewis, 98–32, 107+415; Bibb v. Roth, 101–111, 111+919.

[11] Brown v. Bayer, 91–140, 97+736; Id., 95–472, 104+225; Sutton v. G. N. Ry., 99–376, 109+815.

[12] Foy v. Chi. etc. Ry., 63–255, 65+627.

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

[14] Torp v. Gulseth, 37–135, 33+550.

[15] Jellett v. St. P. etc. Ry., 30–265, 15+237.

[16] Lampsen v. Brander, 28–526, 11+94.

[17] Kronschnable v. Knoblauch, 21–56.

[18] Barry v. McGrade, 14–163(126).

[19] Illingworth v. Greenleaf, 11–235(154).

[20] Stickney v. Bronson, 5–215(172); Lynd v. Picket, 7–184(128); Zimmerman v. Lamb, 7–421(336); Barry v. McGrade, 14–163(126); Orr v. Box, 22–485; Murphy v. Sherman, 25–196; Moulton v. Thompson, 26–120, 1+836; Sanders v. Chandler, 26–273, 3+351; Becker v. Dunham, 27–32, 6+406; Molm v. Barton, 27–530, 8+765; Tyler v. Hanscom, 28–1, 8+825; Howard v. Barton, 28–116, 9+584; Ohlson v. Manderfeld, 28–390, 10+418; Hossfeldt v. Dill, 28–469, 10+781; Lampsen v. Brander, 28–526, 11+94; Allen v. Coates, 29–46, 11+132; Howard v. Manderfield, 31–337, 17+946; Perkins v. Zarracher, 32–71, 19+385; Howard v. Rugland, 35–388, 29+63; Homberger v. Brandenberg, 35–401, 29+123; Hopkins v. Swensen, 41–292, 42+1062; Appleton M. Co. v. Warder, 42–117, 43+791; Wylie v. Grundysen, 51–360, 53+805; Dallemand v. Janney, 51–514, 53+803; Casper v. Klippen, 61–353, 63+737; Young v. Ege, 63–219, 65+249, 67+4; Johnson v. Randall, 74–

pledgee;[24] agent;[25] servant;[26] factor;[27] attorney;[28] bailee;[29] common carrier;[30] cotenant;[31] partners;[32] trustee;[33] executor;[34] mortgagor;[35] purchaser from mortgagor;[36] mortgagee;[37] purchaser at execution sale;[38] judgment creditor;[39] landlord under farm contract;[40] United States marshal;[41] city;[42] innkeeper;[43] commission merchant.[44]

ACTIONS

1936. Election of remedies—Waiver—When personalty is wrongfully taken from the owner and converted, he has an election to sue in replevin for the recovery of the property in specie, or to sue for the trespass and recover dam-

44, 76+791; Rollofson v. Nash, 75–237, 77+954; Schneider v. Anderson, 77–124, 79+603; Scheffer v. Lowe, 77–279, 79+970; Matteson v. Munro, 80–340, 83+153; Coombs v. Bodkin, 81–245, 83+986; Linde v. Gaffke, 81–304, 84+41; Carson v. Hawley, 82–204, 84+746; Flour City Nat. Bank v. Bayer, 89–180, 94+557; Brown v. Bayer, 91–140, 97+736; Lane v. Dreger, 95–4, 103+710; Brown v. Bayer, 95–472, 104+225; Kloos v. Gatz, 97–167, 105+639; Adams v. Overboe, 105–295, 117+496.

[21] Lewis v. St. P. etc. Ry., 20–260(234); Leuthold v. Fairchild, 35–99, 27+503, 28+218; Wallace v. Mpls. etc. Co., 37–464, 35+268; Lundberg v. N. W. El. Co., 42–37, 43+685; Close v. Hodges, 44–204, 46+335; Tarbell v. Farmers' M. E. Co., 44–471, 47+152; Plano Mfg. Co. v. Northern Pac. El. Co., 51–167, 53+202; McLennan v. Mpls. etc. El. Co., 57–317, 59+628; Osborne v. Cargill, 62–400, 64+1135; Scofield v. Nat. El. Co., 64–527, 67+645; Chezick v. Mpls. etc. Co., 66–300, 68+1093; Hogan v. Atlantic El. Co., 66–344, 69+1; Avery v. Stewart, 75–106, 77+560, 78+244; Partridge v. Minn. etc. Co., 75–496, 78+85; Rice v. Madelia F. W. Co., 78–124, 80+853; Winter v. Atlantic El. Co., 88–196, 92+955; Cramer v. N. W. El. Co., 91–346, 98+96; Gaertner v. Western El. Co., 104–467, 116+945.

[22] Jesurun v. Kent, 45–222, 47+784; McCurdy v. Wallblom, 94–326, 102+873.

[23] Hall v. Pillsbury, 43–33, 44+673; Jesurun v. Kent, 45–222, 47+784; Herrick v. Barnes, 78–475, 81+526; Jackson v. Sevatson, 79–275, 82+634; Mann v. Lamb, 83–14, 85+827; Dolliff v. Robbins, 83–498, 86+772.

[24] Upham v. Barbour, 65–364, 68+42; Windham Co. S. Bank v. O'Gorman, 66–361, 69+317; Scott v. Reed, 83–203, 85+1012.

[25] Farrand v. Hurlburt, 7–477(383); Greenleaf v. Egan, 30–316, 15+254; Leuthold v. Fairchild, 35–99, 27+503, 28+218; Am. Ex. Co. v. Piatt, 51–568, 53+877; McLennan v. Mpls. etc. Co., 57–317, 59+628; Milton v. Johnson, 79–170, 81+842; Boxell v. Robinson, 82–26, 29, 84+635; Snell v. Goodlander, 90–533, 97+421; Lahr v. Kraemer, 91–26, 97+418; Chase v. Baskerville, 93–402, 101+950.

[26] Leuthold v. Fairchild, 35–99, 27+503, 28+218; Hodgson v. St. Paul P. Co., 78–172, 80+956 (criticised in 13 Harv. L. Rev. 530).

[27] Coleman v. Pearce, 26–123, 1+846; Johnson v. Martin, 87–370, 92+221.

[28] Johnson v. Dun, 75–533, 78+98.

[29] Brown v. Shaw, 51–266, 53+633; Davis v. Tribune etc. Co., 70–95, 72+808; McCurdy v. Wallblom, 94–326, 102+873.

[30] Jellett v. St. P. etc. Ry., 30–265, 15+237; Foy v. Chi. etc. Ry., 63–255, 65+627; Merz v. Chi. etc. Ry., 86–33, 90+7.

[31] Strong v. Colter, 13–82(77); Person v. Wilson, 25–189; Shepard v. Pettit, 30–119, 14+511; Rector v. Anderson, 96–123, 104+884.

[32] Vanderburgh v. Bassett, 4–242(171).

[33] Judd v. Dike, 30–380, 385, 15+672.

[34] Reynolds v. St. Paul T. Co., 51–236, 53+457; Wrigley v. Watson, 81–251, 83+989.

[35] Fletcher v. Neudeck, 30–125, 14+513.

[36] Jorgensen v. Tait, 26–327, 4+44; Fletcher v. Neudeck, 30–125, 14+513; Adamson v. Petersen, 35–529, 29+321; Close v. Hodges, 44–204, 46+335; McArthur v. Murphy, 74–53, 76+955; Partridge v. Minn. etc. Co., 75–496, 78+85; Strickland v. Minn. etc. Co., 77–210, 79+674; Lake v. Lund, 92–280, 99+884.

[37] Cushing v. Seymour, 30–301, 15+249; Wetherell v. Stewart, 35–496, 29+196; Torp v. Gulseth, 37–135, 33+550; Deal v. Osborne, 42–102, 106, 43+835; Powell v. Gagnon, 52–232, 53+1148; Penney v. Mutual I. Co., 54–541, 56+165; Donovan v. Sell, 64–212, 66+722; Latusek v. Davies, 79–279, 82+587; Southwick v. Himmelman, 109–76, 122+1016.

[38] Kronschnable v. Knoblauch, 21–56; Appleton M. Co. v. Warder, 42–117, 43+791; Heberling v. Jaggar, 47–70, 49+396.

[39] Cohen v. Goldberg, 65–473, 67+1149.

[40] Northness v. Hillestad, 87–304, 91+1112; Rector v. Anderson, 96–123, 104+884; Agne v. Skewis, 98–32, 107+415.

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

[42] Viliski v. Minneapolis, 40–304, 41+1050.

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

[44] Holden v. Maxfield, 94–27, 101+955.

ages, or to sue for the conversion and recover the value of the property.[45] An owner whose property is converted may waive the tort and sue on an implied contract to pay the value of the property or the amount received on its sale.[46] If the owner sues in conversion he waives the trespass.[47] When an officer wrongfully seizes property under process and sells it, the owner may elect to sue either the officer or the purchaser at the sale.[48] The statutory action where a grain warehouseman refuses delivery of grain stored [49] is not exclusive of an action for conversion.[50] The owner of property converted is under no obligation to receive it back.[51] An assignee in insolvency has been held not to have an election to sue for the conversion of a preferential security.[52]

1937. Essentials of cause of action—The two essentials of a cause of action for conversion are property in the plaintiff, either general or special, and a conversion by the defendant.[53] To maintain the common-law action of trover it was essential that the plaintiff have the possession, or the right to the immediate possession, at the time of the conversion.[54] This common-law rule has been inadvertently laid down in some of our cases.[55] It has been said in one of our cases that to maintain an action for conversion some right of the plaintiff as respects the possession of the property must have been violated.[56] It is well settled, however, that under the code an action will lie for a conversion where the plaintiff had neither the possession nor the right to the possession at the time of the conversion. The gist of the action under the code is the injury to the property right of the plaintiff.[57] To constitute a conversion it is unnecessary that the property should have been taken from the possession of the plaintiff.[58] The fact that it was not in the power of the defendant to deprive the plaintiff of his rights in the property is not the test of a right of action.[59] The rights of the parties are determined by the conditions at the time of the conversion. If the plaintiff had the right to the possession at the time of the conversion, it is immaterial that he did not have the right at the commencement of the action.[60]

1938. Distinguished from trover—The action under the code for conversion is not governed by the same rules as the common-law action of trover, and is of wider scope.[61]

1939. Object of action—The object of the action is not to obtain possession of the thing converted, but compensation for the conversion.[62]

[45] Vanderburgh v. Bassett, 4–242(171, 176); Johnson v. Dun, 75–533, 539, 78+98; Mueller v. Olson, 90–416, 97+115. See State v. Shevlin, 62–99, 108, 64+81.

[46] Brady v. Brennan, 25–210; Plainview v. Winona etc. Ry., 36–505, 32+745; Libby v. Johnson, 37–220, 222, 33+783; Downs v. Finnegan, 58–112, 59–981; McArthur v. Murphy, 74–53, 76+955; Northness v. Hillestad, 87–304, 91+1112.

[47] Vanderburgh v. Bassett, 4–242(171, 176).

[48] See § 8747.

[49] R. L. 1905 § 2051.

[50] Daniels v. Palmer, 41–116, 42+855.

[51] Carpenter v. Am. B. & L. Assn., 54–403, 56+95.

[52] Hay v. Tuttle, 67–56, 58, 69+696.

[53] Vanderburgh v. Bassett, 4–242(171, 176).

[54] Adams v. Castle, 64–505, 508, 67+637; Breault v. Merrill, 72–143, 75+122.

[55] Hodge v. Eastern Ry., 70–193, 72+1074; Latusek v. Davies, 79–279, 82+587. See Hatch v. Coddington, 32–92, 94, 19+393; McDonald v. Bayha, 93–139, 141, 100+679.

[56] Haven v. Place, 28–551, 553, 11+117.

[57] Adams v. Castle, 64–505, 67+637; Scofield v. Nat. El. Co., 64–527, 530, 67+645; Breault v. Merrill, 72–143, 145, 75+122. See Whitney v. Huntington, 34–458, 26+631.

[58] Lampsen v. Brander, 28–526, 528, 11+94.

[59] Nichols v. Minn. T. M. Co., 70–528, 532, 73+415.

[60] Southwick v. Himmelman, 109–76, 122+1016.

[61] Stout v. Stoppel, 30–56, 58, 14+268; Adams v. Castle, 64–505, 508, 67+637; Breault v. Merrill, 72–143, 75+122. See, for the history of trover, 11 Harv. L. Rev. 277, 374; Salmond, Torts, § 97.

[62] Carpenter v. Am. B. & L. Assn., 54–403, 410, 56+95.

1940. Who may maintain action—Bare possession, though wrongfully obtained, entitles a party to maintain an action against a mere stranger to the property who takes it from him.[63] A mere depositary or gratuitous bailee may maintain an action, not only against one who has tortiously converted the property, but also against one through whose negligence or failure of duty it has been lost, as, for example, a common carrier or innkeeper.[64] An action may be maintained by the master of a vessel;[65] by one cotenant against another;[66] by a cotenant against a stranger to the title;[67] by a lienholder;[68] by a holder of a seed-grain note;[69] by a mortgagee;[70] by a mortgagor;[71] by a board of county commissioners against the county treasurer;[72] by a purchaser at an execution sale;[73] by an equitable owner;[74] by a landlord;[75] by an agent.[76]

1941. Limitation of actions—Where there has been a fraudulent conversion, the statute of limitations runs from the discovery of the fraud.[77] An action by the state for conversion to recover the value of timber which had not been removed within the time prescribed by a permit, has been held 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.[78]

1942. Demand before suit—A demand and refusal of possession are merely evidence of conversion and need not be proved where there is other evidence of conversion[79]—where there has been an actual conversion.[80] They need not be proved where the original taking was unlawful;[81] or where the defendant has sold the property;[82] or where he has purchased it from a converter;[83] or where he asserts title in his answer;[84] or where his conduct shows that a demand would have been futile.[85] If the original taking by the defendant was rightful and there is no evidence of an actual conversion—the conversion consisting merely in a wrongful detention, there can be no recovery without proof of a demand and refusal before suit.[86] It has been held that where the defendant purchased the property in good faith from the apparent owner and there is no evidence of any act of conversion on his part, proof of a demand and

[63] Stitt v. Namakan L. Co., 95–91, 103+707. See Anderson v. Gouldberg, 51–294, 53+636.

[64] Chamberlain v. West, 37–54, 33+114; Brown v. Shaw, 51–266, 53+633; Laing v. Nelson, 41–521, 43+476; Grinell v. Ill. C. Ry., 109–513, 124+377.

[65] Houghton v. Lynch, 13–85(80).

[66] Strong v. Colter, 13–82(77); Person v. Wilson, 25–189; Shepard v. Pettit, 30–119, 14+511; Rector v. Anderson, 96–123, 104+884.

[67] Melin v. Reynolds, 32–52, 19+81.

[68] Nichols v. Minn. T. M. Co., 70–528, 73+415; Breault v. Merrill, 72–143, 75+122.

[69] Nash v. Brewster, 39–530, 41+105; Scofield v. Nat. El. Co., 64–527, 67+645.

[70] See §§ 1475, 1476, 1478.

[71] See §§ 1474, 1477.

[72] Mower County v. Smith, 22–97.

[73] Whitney v. Huntington, 34–458, 26+631.

[74] Adams v. Castle, 64–505, 67+637.

[75] Whitney v. Huntington, 34–458, 463, 26+631.

[76] Parks v. Fogleman, 97–157, 105+560.

[77] Mower County v. Smith, 22–97; Cock v. Van Etten, 12–522(431).

[78] State v. Rat Portage L. Co., 106–1, 115+162, 117+922.

[79] Adams v. Castle, 64–505, 67+637; Hogan v. Atlantic El. Co., 66–344, 349, 69+1; Homberger v. Brandenberg, 35–401, 403, 29+123.

[80] Kenrick v. Rogers, 26–344, 4+46; Kronschnable v. Knoblauch, 21–56; Farrand v. Hurlburt, 7–477(383); Cock v. Van Etten, 12–522(431, 434).

[81] Murphy v. Sherman, 25–196; Lynd v. Picket, 7–184(128, 137); State v. New, 22–76, 80; Ormund v. Hobart, 36–306, 31+213.

[82] Kronschnable v. Knoblauch, 21–56; Adams v. Castle, 64–505, 67+637.

[83] Hogan v. Atlantic El. Co., 66–344, 69+1; 15 Harv. L. Rev. 590. See Plano Mfg. Co. v. Northern Pac. El. Co., 51–167, 53+202.

[84] Jackson v. Sevatson, 79–275, 277, 82+634; Ormund v. Hobart, 36–306, 31+213. See Ambuehl v. Matthews, 41–537, 43+477; Kellogg v. Olson, 34–103, 24+364.

[85] Shapira v. Barney, 30–59, 14+270. See Jackson v. Sevatson, 79–275, 82+634; Plano Mfg. Co. v. Northern Pac. El. Co., 51–167, 168, 53+202.

[86] State v. New, 22–76, 80; Boxell v. Robinson, 82–26, 29, 84+635. See Chandler v. De Graff, 25–88; Id., 27–208, 6+611.

refusal of possession is necessary.[87] A demand has been held unnecessary where the party was brought into the action by order of court.[88] While a demand must be unconditional, the refusal to abide by the conditions of special property does not operate as a conversion, where a reasonable qualification is annexed to the refusal. It is ordinarily for the jury to pass upon the existence of the qualification and its reasonableness.[89] A demand on a cotenant has been held insufficient.[90] A demand on an agent, whose authority has terminated, has been held insufficient.[91] A demand on an agent in charge of a grain elevator has been held proper.[92] A demand on a grain warehouseman has been held sufficient, though it was for more than the party was entitled to as his share of a depleted stock.[93] A formal tender of charges and grain receipts on a demand for grain stored by a warehouseman has been held waived.[94] A demand has been held unnecessary before an action on an indemnity bond for a conversion of funds by a secretary of a corporation.[95] A conversion may be found prior to the time of a demand and refusal.[96] Where there has been an actual conversion it is immaterial whether a demand was sufficient.[97]

1943. Complaint—The essential allegations are (1) a description of the property converted, (2) the plaintiff's right to the property, (3) the conversion by the defendant, and (4) the damages sustained by the plaintiff.[98] A general allegation of ownership is sufficient.[99] Under such an allegation either a general or special property may be proved,[1] but a lien under a seed-grain note has been held inadmissible.[2] Where the facts giving rise to plaintiff's title are alleged, and they are insufficient, they are not helped by a general allegation of ownership.[3] Ownership must be alleged as of the date of the conversion.[4] The specific acts constituting the conversion need not be alleged; it is sufficient to allege that the defendant "converted" the property.[5] It is unnecessary to allege that the property was "wrongfully" or "unlawfully" converted.[6] It is proper practice to allege the value of the property converted,[7] but this is unnecessary if there is an allegation of damages.[8] An allegation of demand and refusal is unnecessary.[9] If special [10] or exemplary [11] damages are sought the

[87] Plano Mfg. Co. v. Northern Pac. El. Co., 51–167, 53+202. To same effect, Nichols v. Minn. T. M. Co., 70–528, 531, 73+415; Stone v. Quaal, 36–46, 48, 29+326. The soundness of this decision is questionable. See 15 Am. Law Rev. 363, 376–378; 15 Harv. L. Rev. 590; 28 Am. & Eng. Ency. of Law (2 ed.) 704. It is apparently inconsistent with Hogan v. Atlantic El. Co., 66–344, 69+1.

[88] McArthur v. Murphy, 74–53, 55, 76+955.

[89] Sutton v. G. N. Ry., 99–376, 109+815.

[90] Person v. Wilson, 25–189.

[91] Hay v. Tuttle, 67–56, 69+696.

[92] Lundberg v. N. W. El. Co., 42–37, 43+685.

[93] Leuthold v. Fairchild, 35–99, 27+503, 28+218.

[94] Wallace v. Mpls. etc. Co., 37–464, 35+268.

[95] Danvers F. E. Co. v. Johnson, 93–323, 101+492.

[96] McLennan v. Mpls. etc. Co., 57–317, 59+628.

[97] Kenrick v. Rogers, 26–344, 4+46.

[98] Brunswick v. Brackett, 37–58, 60, 33+214.

[99] Jones v. Rahilly, 16–320(283); First Nat. Bank v. St. Croix B. Corp., 41–141, 42+861; Scofield v. Nat. El. Co., 64–527, 530, 67+645; McArthur v. Clark, 86–165, 90+369; First Nat. Bank v. St. Anthony etc. Co., 103–82, 114+265.

[1] Cushing v. Seymour, 30–301, 307, 15+249; McArthur v. Clark, 86–165, 90+369 and cases supra.

[2] Scofield v. Nat. El. Co., 64–527, 67+645.

[3] First Nat. Bank v. St. Croix B. Corp., 41–141, 42+861. See Bloemendal v. Albrecht, 79–304, 82+585.

[4] Smith v. Force, 31–119, 16+704. See Morish v. Mountain, 22–564; Northness v. Hillestad, 87–304, 307, 91+1112.

[5] First Nat. Bank v. St. Croix B. Corp., 41–141, 42+861; Nichols v. Minn. etc. Co., 70–528, 531, 73+415. See State v. Munch, 22–67, 73; Kendall v. Duluth, 64–295, 66+1150.

[6] Cordill v. Minn. El. Co., 89–442, 95+306.

[7] Brunswick v. Brackett, 37–58, 33+214.

[8] Brunswick v. Brackett, 37–58, 33+214; Humphreys v. Minn. C. Co., 94–469, 103+338.

[9] Brunswick v. Brackett, 37–58, 33+214; Adams v. Castle, 64–505, 67+637; Lynd v.

facts justifying them must be pleaded. Cases are cited below holding particular complaints sufficient,[12] or insufficient.[13]

1944. Answer—Cases are cited below involving the construction of particular answers.[14]

1945. General denial—Evidence admissible—Where the complaint alleges ownership in the plaintiff and conversion by the defendant in general terms, the defendant is entitled, under a general denial, to prove any fact inconsistent with such ownership and conversion.[15]

1946. Defences—Title in a third person is no defence unless the defendant can in some manner connect himself with such person and claim under him.[16] In an action by a mortgagor against a mere wrongdoer who is a stranger to the mortgage, it is no defence that there is a default in the mortgage which is held by a third party, and that it is due and payable.[17] It is no defence that the defendant honestly believed that the property was his own.[18] A judgment in replevin for the same cause of action is a bar.[19] It is no defence that the defendant offered to return the property.[20] A conversion cannot be purged.[21] It is no defence that the defendant did not have possession at the commencement of the action.[22] The defence of an accounting or settlement is new matter to be pleaded by the defendant.[23] In an action for conversion by execution sale, the fact that the defendant had deposited the surplus with the justice who issued the execution, has been held not a defence.[24] An answer setting up an equitable interest in a third party has been held not to state a defence.[25] In an action against a carrier the fact that the property was taken from the carrier by one having a title paramount to that of the plaintiff is a defence.[26] An offer to reinstate a shareholder on payment of accrued dues and fees has been held not a defence.[27] A denial of taking and converting has been held inconsistent with a

Picket, 7–184(128); Homberger v. Brandenberg, 35–401, 29+123. But see Kendall v. Duluth, 64–295, 66+1150; Jarrett v. G. N. Ry., 74–477, 77+304.

[10] Chase v. Blaisdell, 4–90(60); Humphreys v. Minn. C. Co., 94–469, 103+338.

[11] Vine v. Casmey, 86–74, 90+158.

[12] Hurlburt v. Schulenburg, 17–22(5); St. Paul etc. Ry. v. Gardner, 19–132(99, 112); Washburn v. Mendenhall, 21–332; Morish v. Mountain, 22–564; Jorgensen v. Tait, 26–327, 4+44; Tyler v. Hanscom, 28–1, 8+825; Melin v. Reynolds, 32–52, 19+81; McKusick v. Seymour, 48–172, 50+1116; Schneider v. Anderson, 77–124, 79+603; Strickland v. Minn. T. F. Co., 77–210, 79+674; Northness v. Hillestad, 87–304, 91+1112; Kramer v. N. W. El. Co., 91–346, 98+96; Rector v. Anderson, 96–123, 104+884; First Nat. Bank v. St. Anthony etc. Co., 103–82, 114+265.

[13] Haven v. Place, 28–551, 11+117; Clayton v. Bennington, 24–14.

[14] Derby v. Gallup, 5–119(85) (held to admit a taking); Chandler v. De Graff, 27–208, 6+611 (held to deny plaintiff's ownership and the conversion charged); Lampsen v. Brander, 28–526, 11+94 (held to admit a taking). See cases under §§ 1945, 1946.

[15] Jones v. Rahilly, 16–320(283); McClelland v. Nichols, 24–176 (right of possession in defendant); Chandler v. De Graff, 27–208, 6+611 (title in defendant); Cushing v. Seymour, 30–301, 15+249; Johnson v. Oswald, 38–550, 38+630 (fraud); Penney v. Mutual L. Co., 54–541, 56+165 (consent of plaintiff); Johnson v. Morstad, 63–397, 65+727 (title in defendant); Pound v. Pound, 64–428, 432, 67+200; Nichols v. Minn. T. M. Co., 70–528, 73+415; Kramer v. N. W. El. Co., 91–346, 349, 98+96 (fraud).

[16] Brown v. Shaw, 51–266, 53+633. See Anderson v. Gouldberg, 51–294, 53+636; Vandiver v. O'Gorman, 57–64, 58+831; Hoxsie v. Empire L. Co., 41–548, 43+476.

[17] Vandiver v. O'Gorman, 57–64, 58+831.

[18] See § 1928.

[19] Hardin v. Palmerlee, 28–450, 10+773; Veline v. Dahlquist, 64–119, 121, 66+141. See Woodcock v. Carlson, 49–536, 52+142; Hatch v. Coddington, 32–92, 19+393.

[20] Carpenter v. Am. B. & L. Assn., 54–403, 56+95. See Sutton v. G. N. Ry., 99–376, 109+815.

[21] Sutton v. G. N. Ry., 99–376, 109+815.

[22] Morish v. Mountain, 22–564.

[23] Mower County v. Smith, 22–97, 114.

[24] Allen v. Coates, 29–46, 11+132.

[25] Hoxsie v. Empire L. Co., 41–548, 43+476.

[26] Nat. Bank of Com. v. Chi. etc. Ry., 44–224, 46+342, 560; Merz v. Chi. etc. Ry., 86–33, 90+7.

[27] Carpenter v. Am. B. & L. Assn., 54–403, 56+95; Allen v. Am. B. & L. Assn., 49–544, 52+144.

plea that the goods were the property of a third person and that the defendant took them under a writ duly issued against such person.[28] A general denial has been held not inconsistent with an allegation of payment.[29]

1947. Waiver—Cases are cited below involving questions as to a waiver.[30]

1948. Variance—Under a general allegation of ownership proof of a lien under a seed-grain note has been held a fatal variance.[31] Recovery as for conversion has been held permissible under a prayer for possession as in replevin.[32] A variance has been held waived by a failure to object.[33] A conversion may be found to have occurred prior to a demand and refusal.[34] Proof as to title in a third party has been held a variance.[35]

1949. Burden of proof—Under a general denial the plaintiff has the burden of proving his ownership, either general or special, at the time of the conversion, and the fact of the conversion by the defendant. These are the two essential facts constituting the cause of action.[36] Some cases hold that he must prove a right of immediate possession.[37] It is unnecessary to prove a paper title. The plaintiff may make out a prima facie case, and shift the burden of going on with the evidence, by showing that the defendant took the property from his possession, or that of his grantor. Possession is itself prima facie evidence of ownership, and a taking of property from the possession of the owner is prima facie wrongful and a conversion.[38] In an action against a bailee the plaintiff makes out a prima facie case by proof of failure or refusal on the part of the bailee to return the property on demand. The burden is on the bailee, in case of loss of the goods, to prove not only the loss but also that he exercised due care in keeping them.[39] The burden of proof has been held on the principal in an action against an agent;[40] on a carrier, to prove that seizure under process was valid;[41] on the defendant, as to the consent of the plaintiff to the conversion;[42] on the defendant, as to the amount of wheat raised under a farm contract;[43] on the defendant, as to facts rendering a thing in action of less than its face value;[44] on the plaintiff, claiming under a chattel mortgage, that it was executed in good faith;[45] on the defendant, that he was a bona fide mortgagee;[46] on the plaintiff, that the property was transferred to the defendant as security and that the debt secured was paid;[47] on the defendant, that property was lawfully sold for storage charges;[48] on the defendant, an officer, attacking the title of plaintiff as fraudulent;[49] on the defendant, a commission merchant, to prove fraud.[50]

[28] Derby v. Gallup, 5–119(85). See Zimmerman v. Lamb, 7–421(336).

[29] First Nat. Bank v. Lincoln, 36–132, 30+449.

[30] Chase v. Baskerville, 93–402, 101+950 (whether the acceptance of a part of the purchase price constituted a waiver held a question for the jury); Webb v. Downes, 93–457, 101+966 (waiver of irregularities in sale by warehouseman for storage charges).

[31] Scofield v. Nat. El. Co., 64–527, 67+645.

[32] See § 1952.

[33] Adams v. Castle, 64–505, 67+637.

[34] McLennan v. Mpls. etc. Co., 57–317, 59+628.

[35] Derby v. Gallup, 5–119(85).

[36] Vanderburgh v. Bassett, 4–242(171, 176); Holden v. Maxfield, 94–27, 101+955; Bibb v. Roth, 101–111, 111+919.

[37] See § 1937.

[38] Derby v. Gallup, 5–119(85, 101); Jellett v. St. P. etc. Ry., 30–265, 267, 15+237; Pound v. Pound, 60–214, 62+264; Freeman v. Kraemer, 63–242, 247, 65+455; Rollofson v. Nash, 75–237, 77+954; Cordill v. Minn. El. Co., 89–442, 95+306.

[39] Davis v. Tribune etc. Co., 70–95, 72+808.

[40] Lahr v. Kraemer, 91–26, 97+418.

[41] Merz v. Chi. etc. Ry., 86–33, 90+7.

[42] Herrick v. Barnes, 78–475, 479, 81+526.

[43] Avery v. Stewart, 75–106, 108, 77+560, 78+244. See Christianson v. Nelson, 76–36, 78+875, 79+647.

[44] Johnson v. Dun, 75–533, 539, 78+98.

[45] Hogan v. Atlantic El. Co., 66–344, 69+1.

[46] Nickerson v. Wells, 71–230, 238, 73+959, 74+891.

[47] Pound v. Pound, 64–428, 432, 67+200.

[48] Jesurun v. Kent, 45–222, 47+784.

[49] Derby v. Gallup, 5–119(85); Howard

1950. Evidence—Admissibility—Cases are cited below holding evidence admissible [51] or inadmissible.[52]

1951. Evidence—Sufficiency—Cases are cited below holding evidence sufficient to justify a verdict for the plaintiff; [53] holding evidence to justify a verdict for the defendant; [54] holding evidence insufficient to justify a verdict for the plaintiff; [55] holding it proper,[56] or improper,[57] to dismiss an action for failure of proof; and holding it proper to set aside a directed verdict for the defendant.[58]

v. Manderfield, 31–337, 17+946; Homberger v. Brandenberg, 35–401, 29+123. See Sanders v. Chandler, 26–273, 3+351.

[50] Holden v. Maxfield, 94–27, 101+955.

[51] Derby v. Gallup, 5–119(85) (opinion of owner as to value); Illingworth v. Greenleaf, 11–235(154) (average value of a number of watches); Burger v. N. P. Ry., 22–343 (opinion evidence of a qualified witness as to the value of hay, cost of production, supply and demand, etc., there being no market value); Clark v. Nelson, 34–289, 25+628 (scale-bills of logs); Hoxsie v. Empire L. Co., 41–548, 43+476 (letter from defendant to plaintiff); McLennan v. Mpls. etc. Co., 57–317, 59+628 (value of article a short time before its conversion); Johnson v. Morstad, 63–397, 65+727 (books of account); Rollofson v. Nash, 75–237, 77+954 (possession of party through whom plaintiff claims title and his declarations characterizing such possession); Scheffer v. Lowe, 77–279, 79+970 (manner of conducting a business); Carson v. Hawley, 82–204, 84+746 (statements of conspirators); Spoon v. Frambach, 83–301, 86+106 (assignment of a note); Carver v. Crookston L. Co., 84–79, 86+871 (estimate of attaching officer as to number of logs in a boom—scale-bills of logs); Yoki v. First S. Bank, 87–295, 91+1101 (affidavit of plaintiff made in another action tending to contradict his claim of ownership); Kramer v. N. W. El. Co., 91–346, 98+96 (warehouse receipts); McDonald v. Bayha, 93–139, 100+679 (declarations of a party holding possession of the property for defendant); Humphreys v. Minn. C. Co., 94–469, 103+338 (what stock sold for in a bona fide transaction).

[52] Derby v. Gallup, 5–119(85) (declarations of a prior owner of a sale by him—fact that A was a silent partner of B who sold the property to plaintiff); Stickney v. Bronson, 5–215(172) (a memorandum and evidence as to value based thereon); Zimmerman v. Lamb, 7–421(336) (declarations of a vendor after a sale); Beebe v. Wilkinson, 30–548, 16+450 (fact that third party had some interest in the property); Hanson v. Tarbox, 47–433, 50+474 (payment after suit begun of a mortgage under which defendant justified); Reynolds v. St. Paul T. Co., 51–236, 53+457 (a final decree in another action and the files of the probate court in the estate of a third party); Cohen v. Goldberg, 65–473, 67+1149 (the wealth of the defendant, there being no foundation for exemplary damages); McDonald v. Bayha, 93–139, 100+679 (as to letters written by the plaintiff, the letters not being produced).

[53] Clark v. Nelson, 34–289, 25+628; Brown v. Shaw, 51–266, 53+633; Am. Ex. Co. v. Piatt, 51–568, 53+877; McLennan v. Mpls. etc. Co., 57–317, 59+628; Sawyer v. Knowles, 61–531, 63+1038; Young v. Ege, 63–219, 65+249, 67+4; Avery v. Stewart, 75–106, 77+560, 78+244; Latusek v. Davies, 79–279, 82+587; Linde v. Gaffke, 81–304, 84+41; Scott v. Reed, 83–203, 85+1012; Carver v. Crookston L. Co., 84–79, 86+871; Woods v. Wulf, 84–299, 87+840; Cummings v. Newell, 86–130, 90+311; Northness v. Hillestad, 87–304, 91+1112; Robine v. Little, 88–122, 92+1130; Enneking v. Woebkenberg, 88–259, 92+932; Flour City Nat. Bank v. Bayer, 89–180, 94+557; Maloney v. Warner, 91–364, 98+1102; Lake v. Lund, 92–280, 99+884; Tillman v. International H. Co., 93–197, 101+71; Holden v. Maxfield, 94–27, 101+955; Humphreys v. Minn. C. Co., 94–469, 103+338; Brown v. Bayer, 95–472, 104+225; Moss v. Anheuser, 95–515, 103+1133.

[54] Dallemand v. Janney, 51–514, 53+803; Chezick v. Mpls. etc. Co., 66–300, 68+1093; Rollofson v. Nash, 75–237, 77+954; Scheffer v. Lowe, 77–279, 79+970; Cooley v. Copperud, 81–431, 84+1115; Mann v. Lamb, 83–14, 85+827; Spoon v. Frambach, 83–301, 86+106; Bank of Litchfield v. Elliott, 83–469, 86+454; Winter v. Atlantic El. Co., 88–196, 92+955; Port Huron etc. Co. v. Otto, 89–393, 94+1088; Mpls. T. M. Co. v. Burton, 94–467, 103+335; Danvers F. E. Co. v. Johnson, 96–272, 104+899.

[55] Pound v. Pound, 64–428, 67+200; Windham Co. S. Bank v. O'Gorman, 66–361, 69+317; Lepeska v. Masek, 88–55, 92+131; Brown v. Bayer, 91–140, 97+736; Rector v. Anderson, 96–123, 104+884; Bibb v. Roth, 101–111, 111+919.

[56] Goss v. Meehan, 83–178, 85+1010; Rector v. Anderson, 96–123, 104+884.

[57] Pound v. Pound, 60–214, 62+264; Stitt v. Namakan L. Co., 95–91, 103+707; Kloos v. Gatz, 97–167, 105+639; Woodworth v. Theis, 109–4, 122+310.

[58] Mueller v. Olson, 90–416, 97+115.

1952. Relief allowable—Recovery may be had as in an action for conversion if the complaint is sufficient, though the relief asked is for the possession of the property or its value as in replevin.[59] If the complaint is sufficient a recovery may be had either as for a conversion, or as for money had and received.[60]

1953. Effect of judgment—A judgment for the plaintiff vests the title to the property in the defendant, at least, if it is satisfied.[61] It is a bar to a subsequent action of replevin.[62]

1954. Accounting—An action for conversion has been tried as an action for an accounting.[63]

DAMAGES

1955. General rule—The general rule for the measure of damages, is the value of the property at the time of the conversion, with interest from that time.[64] The market value is the standard of value.[65] The value of crops levied on may be assessed as of the date of the execution sale.[66]

1956. Where plaintiff has special interest only—One having only a special property in the thing converted may recover its full value as against a stranger to the title,[67] but as against the general owner, or one in privity with him, he can recover only the value of his special property.[68]

1957. When property returned—Nominal damages—In cases of merely technical conversion, where the property is returned in the same condition as before the unauthorized act, not only when the owner voluntarily receives back the goods, but also when he takes them back against his will, the plaintiff is entitled to only nominal damages and costs.[69]

1958. Things in action—Where the property converted is a thing in action, such as a bill, note, bond, or other security, the measure of damages is prima facie its face value, the defendant being at liberty to show in reduction of dam-

[59] Washburn v. Mendenhall, 21–332; Morish v. Mountain, 22–564; Howard v. Barton, 28–116, 9+584.

[60] Northness v. Hillestad, 87–304, 306, 91+1112.

[61] Johnson v. Dun, 75–533, 538, 78+98; Third Nat. Bank v. Rice, 161 Fed. 822. See, as to the necessity of satisfaction, 16 Harv. L. Rev. 131.

[62] Hatch v. Coddington, 32–92, 19+393.

[63] Ambuehl v. Matthews, 41–537, 43+477.

[64] Derby v. Gallup, 5–119(85) (stock of merchandise); Zimmerman v. Lamb, 7–421(336) (cattle); Farrand v. Hurlburt, 7–477(383) (money placed with an agent for investment); Jones v. Rahilly, 16–320(283, 290) (horses and buggy); Murphy v. Sherman, 25–196 (horse); Coleman v. Pearce, 26–123, 132, 1+846 (wheat—deduction for storage charges); Jellett v. St. P. etc. Ry., 30–265, 15+237 (carload of corn); Judd v. Dike, 30–380, 385, 15+672 (money); Hinman v. Heyderstadt, 32–250, 20+155 (grass); First Nat. Bank v. Lincoln, 36–132, 30+449 (insurance money); Triggs v. Jones, 46–277, 281, 48+1113 (wrongful delivery of deed); Dallemand v. Janney, 51–514, 53+803 (stock of wine and liquors); St. Paul T. Co. v. Kittson, 62–408, 65+74 (trust funds); Berryhill v. Peabody, 77–59, 79+651 (trust funds); Woods v. Wulf, 84–299, 303, 87+840 (buildings removed from land); McCurdy v. Wallblom, 94–326, 102+873 (household goods); Sutton v. G. N. Ry., 99–376, 109+815 (livestock).

[65] Beebe v. Wilkinson, 30–548, 552, 16+450; Humphreys v. Minn. C. Co., 94–469, 103+338. See Burger v. N. P. Ry., 22–343, 346.

[66] Howard v. Rugland, 35–388, 29+63.

[67] Jellett v. St. P. etc. Ry., 30–265, 267, 15+237; Adamson v. Petersen, 35–529, 29+321 (mortgagee); Chamberlain v. West, 37–54, 33+114 (bailee); Brown v. Shaw, 51–266, 53+633 (depositary); Dyer v. G. N. Ry., 51–345, 53+714 (consignee); Vandiver v. O'Gorman, 57–64, 58+831 (mortgagor); Strickland v. Minn. etc. Co., 77–210, 217, 79+674.

[68] Becker v. Dunham, 27–32, 6+406 (mortgagee); Jellett v. St. P. etc. Ry., 30–265, 267, 15+237; Cushing v. Seymour, 30–301, 15+249 (mortgagor); Chamberlain v. West, 37–54, 33+114 (bailee); Torp v. Gulseth, 37–135, 33+550 (mortgagor); Deal v. Osborne, 42–102, 106, 43+835 (mortgagor); Strickland v. Minn. etc. Co., 77–210, 217, 79+674 (mortgagee); Berg v. Olson, 88–392, 397, 93+309; Agne v. Skewis, 98–32, 107+415 (mortgagee).

[69] Sutton v. G. N. Ry., 99–376, 109+815.

ages payment, insolvency of the maker, or any fact tending to invalidate the security.[70]

1959. Where property is enhanced in value by converter—Where the property converted is subsequently enhanced in value by the labor or money of the converter, the following rules apply: Where the original taking was without wrongful purpose or intent and with the honest and reasonable belief that the taker had a right to the property, the measure of damages is the value of the property at the time of such taking, with interest. Within this rule actual notice of the claim of the owner is not inconsistent with good faith on the part of the converter. Where the original taking was wilful and without color or claim of right, the measure of damages is the value of the property at the time and place demand is made for its return, and in such cases it is immaterial that the converter has changed the character of the property or by improvements greatly enhanced its value. If the defendant is an innocent purchaser from a wilful converter the measure of damages is the value of the property at the time of the purchase.[71] As every trespass is presumptively wilful the burden of proving his good faith is on the defendant.[72] The question of good faith is for the jury, unless the evidence is conclusive.[73] Where a person cuts timber as a wilful trespasser, contracts for the sale to an innocent purchaser, to be delivered at a specified place, at which it is subsequently delivered, in an action for conversion against the purchaser, the measure of damages is the value of the timber at the time and place of its delivery to him, and not at the place where it was situated when the contract was made.[74]

1960. Where part of a thing is converted—If converting part of an article renders the whole article valueless for any purpose, the measure of damages is the value of the article at the time of converting the part, with interest. If converting a part does not leave the remainder wholly valueless, it is proper to arrive at the damages by proving the value of the article entire, and the value of the part remaining after the severance; the difference, with interest, being the damages.[75]

1961. Special damages—Special damages are recoverable upon proper averments and evidence.[76] The expenses of suit are not recoverable.[77]

1962. Treble damages—Treble damages are recoverable by statute for the conversion of certain products of the soil.[78]

[70] Nininger v. Banning, 7-274(210) (note); Winona v. Minn. Ry. Const. Co., 29-68, 11+228 (coupon bonds—exception to general rule); First Nat. Bank v. Lincoln, 36-132, 30+449 (note); Hersey v. Walsh, 38-521, 38+613 (note); Haas v. Sackett, 40-53, 41+237 (note); Johnson v. Dun, 75-533, 539, 78+98 (bond for release of attachment).

[71] Nesbitt v. St. Paul L. Co., 21-491; Lindsay v. Winona etc. Ry., 29-411, 413, 13+191; Shepard v. Pettit, 30-481, 16+271; Hinman v. Heyderstadt, 32-250, 20+155; Whitney v. Huntington, 37-197, 33+561; King v. Merriman, 38-47, 54, 35+570; Viliski v. Minneapolis, 40-304, 308, 41+1050; Hoxsie v. Empire L. Co., 41-548, 43+476; State v. Shevlin, 62-99, 108, 64+81; Miss. R. L. Co. v. Page, 68-269, 71+4; Dolliff v. Robbins, 83-498, 86+772; Hastay v. Bonness, 84-120, 86+896; Mueller v. Olson, 90-416, 97+115; Hoyt v. Duluth etc. Ry., 103-396, 115+263; Williams v. Monks, 108-256, 122+5; State v. Clarke, 109-123, 123+54. See § 7957 and 20 Harv. L. Rev. 227.

[72] Hoxsie v. Empire L. Co., 41-548, 43+476; Miss. R. L. Co. v. Page, 68-269, 71+4; Hastay v. Bonness, 84-120, 86+896; Hoyt v. Duluth etc. Ry., 103-396, 115+263.

[73] Hoyt v. Duluth etc. Ry., 103-396, 115+263.

[74] Hoxsie v. Empire L. Co., 41-548, 43+476.

[75] Walker v. Johnson, 28-147, 9+632.

[76] Jones v. Rahilly, 16-320(283, 290); Cushing v. Seymour, 30-301, 15+249; Humphreys v. Minn. C. Co., 94-469, 103+338; Flakne v. G. N. Ry., 106-64, 66, 118+58. See Chase v. Blaisdell, 4-90(60); Gray v. Bullard, 22-278.

[77] Seeman v. Feeney, 19-79(54).

[78] R. L. 1905 §§ 4268, 4449; Tait v. Thomas, 22-537; Berg v. Baldwin, 31-541, 18+821; State v. McCrum, 38-154, 156, 36+102; Potulni v. Saunders, 37-517, 35+379; Hobe v. Swift, 58-84, 90, 59+831.

1963. Exemplary damages—Exemplary damages are recoverable, as in other actions ex delicto, if proper foundations are laid in the pleadings.[79]

1964. Mitigation—The defendant may show, in mitigation of damages, any lawful application of the property or its avails to the use of the owner. He may show that the property has been returned and received by the plaintiff, or that its proceeds have, by due process of law, gone to pay the plaintiff's debts. In general, the right of the plaintiff to recover the full value of the property is subject to any lawful lien, claim, or interest, which the defendant may have in it, to be adjudicated in the same action.[80] The defendant may show that the property has been lawfully taken from him under process in favor of a third party and sold to dischange an obligation of the plaintiff.[81] Possibly the court may order the plaintiff to receive the property in mitigation of damages under certain circumstances, but as a general rule he is not bound to receive it.[82] Matter in mitigation need not be pleaded.[83]

CONVEY—See note 84.

CONVEYANCE—The act of transferring property from one person to another; the instrument or document by which property is transferred from one person to another.[85]

CONVICTS

Cross-References

See Witnesses, 10309.

1965. Convict labor—Under a former statute the warden and inspectors of the state prison were authorized to lease the prison shops and vacant grounds and let for hire certain convicts.[86]

CO-OPERATIVE SOCIETY—A union of individuals, commonly laborers or small capitalists, formed for the prosecution in common of a productive enterprise, the profits being shared in accordance with the amount of capital or labor contributed by each member.[87]

[79] Lynd v. Picket, 7–184(128); Jones v. Rahilly, 16–320(283, 290); Seeman v. Feeney, 19–79(54); Dallemand v. Janney, 51–514, 516, 53+803; Cohen v. Goldberg, 65–473, 67+1149; Matteson v. Munro, 80–340, 83+153; Vine v. Casmey, 86–74, 90+158.

[80] Jellett v. St. P. etc. Ry., 30–265, 268, 15+237. See Allen v. Coates, 29–46, 48, 11+132; Chase v. Baskerville, 93–402, 404, 101+950; Cushing v. Seymour, 30–301, 15+249.

[81] Howard v. Manderfield, 31–337, 339, 17+946; Beyersdorf v. Sump, 39–495, 499, 41+101.

[82] Carpenter v. Am. B. & L. Assn., 54–403, 410, 56+95.

[83] Hoxsie v. Empire L. Co., 41–548, 43+476; Hoyt v. Duluth etc. Ry., 103–396, 115+263.

[84] State v. Winona etc. Ry., 21–472, 478; Sanford v. Johnson, 24–172.

[85] Century Dict. See R. L. 1905 §§ 3334, 3504; Palmer v. Bates, 22–532; Sanford v. Johnson, 24–172; State v. Williams, 32–537, 21+746; Gregg v. Owens, 37–61, 33+216; Haaven v. Hoaas, 60–313, 62+110 and §§ 8272, 9246.

[86] State v. Reed, 27–458, 8+768; Reed v. Seymour, 24–273.

[87] Finnegan v. Noerenberg, 52–239, 244, 53+1150.

COPYRIGHT

1966. Right statutory—There is no copyright in a published work at common law. Copyright is the creature of acts of Congress.[88]

1967. What may be copyrighted—Books containing indexes and abstracts of title to lands in a county, showing incumbrances and liens on such lands, prepared and compiled from the public records of the county, may be copyrighted.[89]

CORD—See note 90.
CORN—See note 91.

CORONERS

1968. Fees for inquest—It was held, under a former statute, that where the coroner on the same day makes two separate examinations of two different dead bodies, or holds an inquest on one body, and makes an examination of the other, he was not entitled to a fee of five dollars for each examination and each inquest, or to anything more than five dollars per day for the time actually spent.[92]

[88] Banker v. Caldwell, 3-94(46).
[89] Id.
[90] McManus v. Louden, 53-339, 55+139.
[91] Kerrick v. Van Dusen, 32-317, 20+228.
[92] Kistler v. Hennepin County, 65-262, 68+26.

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IN GENERAL

1969. Definition and nature—A corporation is an artificial person, created by law, or under authority of law, from a group or succession of natural persons, as a distinct legal entity, with rights and liabilities independent of such persons.[93] It is a legal entity distinct from the natural persons composing it.[94]

[93] Century Dict.; Beale, Foreign Corp. § 1. See School Dist. v. Thompson, 5–280 (221) (mere creatures of law, established for special purposes and deriving all their powers from the acts creating them); Aldrich v. Press P. Co., 9–133(123) (may be composed of one person or several—a purely intellectual and ideal existence); Huff v. Winona etc. Ry., 11–180(114) (the artificial person called a corporation is composed of natural persons and the law deems it to be first brought into existence and then clothes it with the granted franchises and property); Auerbach v. LeSueur M. Co., 28–291, 296, 9+799 (a being created by the law); Merchant v. Western L. Assn., 56–327, 57+931 (only an ideal thing or entity representing the stockholders); Nicollet Nat. Bank v. Frisk, 71–413, 74+160 (a mere creature of the law); State v. Hulder, 78–524, 81+532 (a person in law); Senour v. Church, 81–294, 84+109 (corporations are mere creatures of the state, deriving their exist-

It is not identical with the individuals who compose it, nor is it the equivalent of the sum of its members.[95] This corporate entity is sometimes characterized as a "fiction," but with questionable propriety.[96] The legislative authority to act collectively is the essential attribute of a corporation.[97] The primary object of a corporation is to bestow the character and properties of individuality on a collective and changing body of men.[98] A corporation is a "person" within the meaning of most statutes.[99] A leading purpose of incorporation is to interpose a non-conductor through which, in matters of contract, it is impossible to see the men behind.[1] One of the objects of organizing a corporation is to prevent the death of any of its members from interfering with the affairs of the concern.[2]

1970. Domestic and foreign corporations defined—A domestic corporation is one organized under the laws of this state. All other corporations are foreign.[3]

1971. Name—In the absence of statutory provisions regulating the subject, parties organizing a corporation must choose a name at their peril, and the use of a name similar to one adopted by another corporation may be enjoined at the instance of the latter, if misleading and calculated to injure its business.[4] An action against a corporation which changed its name after the cause of action accrued should be brought against it by its new name.[5] A change in the name of a corporation does not ordinarily make any break in its continuity or identity as a corporation so as to affect its title to property previously acquired.[6] A variance between the name of a corporation in the original charter and in an amendatory act has been held immaterial.[7]

1972. Seal—All corporations are authorized to have and use a common seal and alter the same at pleasure.[8] It is unnecessary that the corporate seal should be attached to the ordinary contracts of a corporation.[9] When a corporate seal it attached to an instrument the presumption is that it was attached by proper authority.[10] The officer or agent who, in behalf of the corporation,

ence solely from legislative grant). Corporations are distinguishable from joint-stock associations, State v. Adams Ex. Co., 66–271, 68+1085; from partnership, State v. U. S. Ex. Co., 81–87, 83+465; Holbrook v. St. Paul etc. Co., 25–229; 14 Harv. L. Rev. 222; and from societies or associations, State v. Steele, 37–428, 34+903.

[94] Gallagher v. Germania B. Co., 53–214, 54+1115; Mercantile Nat. Bank v. Parsons, 54–56, 65, 55+825; State v. U. S. Ex. Co., 81–87, 90, 83+465; Merchants Nat. Bank v. Wehrmann, 202 U. S. 295; Connell v. Herring, 208 U. S. 267. The theory of a distinct entity is sometimes disregarded and the corporation treated as a mere association of natural persons. Gallagher v. Germania B. Co., 53–214, 219, 54+1115; State v. Creamery P. M. Co., 126+126; Erickson v. Revere El. Co., 126+130; 20 Harv. L. Rev. 223; 23 Id. 216; Machen, Corp. § 1312. A corporation is, after all, but an association of individuals under an assumed name and with a distinct legal entity. Hale v. Henkel, 201 U. S. 43, 76.

[95] 19 Harv. L. Rev. 223.

[96] Gallagher v. Germania B. Co., 53–214, 219, 54+1115. See 19 Harv. L. Rev. 222; 20 Id. 78, 223.

[97] 11 Harv. L. Rev. 197.

[98] Hale v. Henkel, 201 U. S. 43, 85.

[99] R. L. 1905 §§ 1738, 2208, 4748(11), 5514(11); First Nat. Bank v. Loyhed, 28–396, 398, 10+421; State v. Hulder, 78–524, 81+532.

[1] Donnell v. Herring, 208 U. S. 267.

[2] Dent v. Matteson, 70–519, 73+416.

[3] R. L. 1905 § 2840. See In re St. Paul etc. Ry., 36–85, 30+432 (a corporation formed by a consolidation of a domestic and a foreign corporation, under Laws 1881 c. 94, held a domestic corporation).

[4] Nesne v. Sundet, 93–299, 101+490.

[5] Gould v. Sub-District, 7–203(145).

[6] Meyer v. German etc. Church, 37–241, 33+786; State v. Oftedal, 72–498, 511, 75+692.

[7] Cotton v. Miss. etc. Co., 22–372.

[8] R. L. 1905 § 2852.

[9] Sullivan v. Murphy, 23–6; Nat. Protective Assn. v. Prentice, 49–220, 51+916.

[10] Morris v. Keil, 20–531(474); Bowers v. Hechtman, 45–238, 47+792; Yanish v. Pioneer F. Co., 64–175, 66+198; Bennett v. Knowles, 66–4, 68+111; Emerson v. Pacific etc. Co., 92–523, 100+365.

affixes the common seal to an instrument, is, in the absence of any statutory provision, deemed the party executing it. He also stands in the relation of a subscribing witness to the execution of the deed by the corporation, and is the proper party to be examined or to make affidavit to prove that the seal affixed by him was the corporate seal, and that it was affixed by authority of the board of directors.[11]

1973. Office in state—All corporations organized in this state must maintain an office here.[12]

1974. By-laws—All corporations are authorized to enact by-laws for the management of their property and the regulation and government of their affairs.[13] Corporate by-laws must be reasonable, and consistent with law and public policy,[14] and with the charter or articles of incorporation.[15] They are only rules and regulations as to the manner in which the corporate powers shall be exercised.[16] The mere failure of a stockholder to object to an unauthorized by-law until an attempt is made to enforce it against him does not estop him from objecting to it.[17] The adoption and amendment of by-laws is regulated by statute.[18] Where a by-law is ambiguous the practical construction placed upon it by the corporation and its members is controlling.[19]

1975. Records—Stock books—Admissibility—Resolutions adopted or declarations made at a corporate meeting and entered in the corporate records are inadmissible against persons not members of the corporation.[20] Corporate records are not notice to third parties.[21] But the stock books of a corporation are admissible, even as to third parties, to prove who are stockholders in the corporation.[22] An entry in the minutes of a meeting of a corporation, or its board of directors, that a certain proposition was adopted is prima facie evidence that it received the number of votes necessary to adopt it legally.[23] An entry that a quorum was present is prima facie evidence that the meeting was duly called.[24] An entry in the books of a corporation, which is part of a transaction, and in accordance with the course which the corporation usually pursued in such cases, when properly verified, is competent evidence in its favor.[25] The minutes of corporation meetings are prima facie evidence only of the proceedings, and parol testimony is admissible for the purpose of proving what actually occurred.[26]

1976. Proof of acts by oral evidence—The acts of a corporation may be proved by oral evidence, in the absence of express provision to the contrary.[27]

[11] Bowers v. Hechtman, 45–238, 47+792.

[12] R. L. 1905 § 2870; State v. Park, 58–330, 59+1048 (construing statute since repealed).

[13] R. L. 1905 § 2852.

[14] Evans v. Chamber of Com., 86–448, 91+8 (by-law of chamber of commerce for arbitration of disputes between members sustained); Kolff v. St. Paul F. Exch., 48–215, 50+1036 (by-law in restraint of trade).

[15] Bergman v. St. Paul M. B. Assn., 29–275, 13+120; Kolff v. St. Paul F. Exch., 48–215, 50+1036.

[16] Bergman v. St. Paul M. B. Assn., 29–275, 13+120.

[17] Kolff v. St. Paul F. Exch., 48–215, 50+1036.

[18] R. L. 1905 § 2854. See Heintzelman v. Druids' R. Assn., 38–138, 36+100 (amendment of by-laws by board of directors authorized by articles of incorporation and by-laws).

[19] McDonough v. Hennepin etc. Assn., 62–122, 64+106.

[20] Redding v. Godwin, 44–355, 46+563.

[21] Hastings v. Iron Range B. Co., 65–28, 67+652.

[22] Holland v. Duluth etc. Co., 65–324, 68+50.

[23] Heintzelman v. Druids' R. Assn., 38–138, 36+100; Fletcher v. Chi. etc. Ry., 67–339, 69+1085.

[24] Fletcher v. Chi. etc. Ry., 67–339, 69+1085.

[25] Schell v. Second Nat. Bank, 14–43(34).

[26] State v. Guertin, 106–248, 119+43.

[27] Flakne v. Minn. etc. Co., 105–479, 117+735; State v. Guertin, 106–248, 119+43.

PROMOTERS

1977. Contracts of promoters—Adoption—While a corporation is not bound by engagements made on its behalf by its promoters before it is organized, it may, after it is organized, make such engagements its contracts by adopting them; and this it may do precisely as it might make similar original contracts, formal action of its board of directors being necessary only where it would be necessary to a similar original contract. It is unnecessary that such adoption or acceptance be express, but it may be shown from acts or acquiescence of the corporation or its authorized agents as any similar contracts may be shown.[28] The act of the corporation in adopting such engagements is not a ratification, which relates back to the date of the making of the contract by the promoter, but is, in legal effect, the making of a contract as of the date of the adoption. The contract must be one which the corporation itself could make, and one which the usual agents of the company have express or implied authority to make.[29] The relation between promoters and the officers and stockholders of the corporation may be such as to require a court to scrutinize the adoption with great strictness. The utmost good faith and fairness is required.[30] A corporation may assume the obligations of a contract made before its organization, or make a new contract concerning the same subject-matter with the parties to the original agreement.[31] When stock certificates are issued in contemplation of incorporation, the issue of stock may, after incorporation, be adopted by the corporation, and the holders thereby become stockholders without the formal issue of new certificates.[32]

1978. Intention of promoters as to character of corporation—Whether a corporation is a manufacturing corporation or not is not determined by the intentions of the promoters.[33]

1979. Presumption of good faith—The presumption is that a promoter of a corporation is connected therewith for the legitimate purpose of organization, not for the illegitimate purpose of conspiring to defraud.[34]

1980. Liability of promoters—Where several persons associate themselves for the purpose of promoting and organizing a corporation for the pecuniary profit of its members, and, after contracts have been made for and in the name of the proposed corporation, they voluntarily abandon their purpose, their relation one to the other, as to third parties, if not that of partners, is that of agent and principal, and each will be liable upon all the contracts of the association he has directly or indirectly authorized or ratified.[35] A promoter has been held a trustee ex maleficio of property taken in his own name, but rightfully belonging to the corporation.[36]

CORPORATE EXISTENCE

1981. General statement—A de facto corporation exists where there is a law authorizing the creation of corporations, an attempt to organize a corpora-

[28] Battelle v. N. W. etc. Co., 37–89, 33+327; McArthur v. Times P. Co., 48–319, 51+216; Church v. Church C. Co., 75–85, 77+548; Selover v. Isle Harbor L. Co., 91–451, 98+344; Id., 100–253, 111+155; Wasser v. Western etc. Co., 97–460, 107+160; Hillside C. Assn. v. Holmes, 97–261, 105+905; Bond v. Pike, 101–127, 111+916. See 19 Harv. L. Rev. 97.

[29] McArthur v. Times P. Co., 48–319, 51+216.

[30] Battelle v. N. W. etc. Co., 37–89, 33+327; Church v. Church C. Co., 75–85, 77+548. See Nester v. Gross, 66–371, 69+39; 22 Harv. L. Rev. 48.

[31] Wasser v. Western etc. Co., 97–460, 107+160.

[32] Thorpe v. Pennock, 99–22, 108+940.

[33] Senour v. Church, 81–294, 84+109.

[34] Benton v. Mpls. etc. Co., 73–498, 76+265.

[35] Roberts v. Schlick, 62–332, 64+826; Roberts v. Wright, 62–337, 64+827.

[36] Nester v. Gross, 66–371, 69+39.

tion pursuant to it, and user as a corporation under such attempted organization. A substantial compliance with the law is unnecessary to constitute the body a de facto corporation. The mere fact that a body of men assume to act as a corporation does not create a de facto corporation. No one but the state can question the existence of a de facto corporation. This rule is not founded on any principle of estoppel, but on the broader principles of common justice and public policy.[37] The existence of a corporation de facto may be proved by oral evidence.[38] It seems that a de facto corporation may exist under an unconstitutional act.[39]

1982. Evidence of corporate existence—User—A continued user of the franchises of an incorporated and organized company, by persons assuming to act as the directors and officers of such company—persons in the actual possession and exercise of such franchises, and in possession and control of the company's records, and who have carried on its business without any objection—is competent evidence of the continued corporate existence of such company, and that the persons who thus claim to be its directors, and acted as such, were its legal directors.[40]

1983. Estoppel to deny corporate existence—A person who has contracted with a corporation as such cannot ordinarily question the legality of its organization when sued upon the contract.[41] Conversely, when persons undertake to form a corporation and as such enter into a contract, they, or the corporation, cannot ordinarily question the legality of the organization, when sued upon the contract.[42] Where a number of persons are associated together, and are acting as a corporation under color of lawful authority as such, though their corporate organization is legally defective, a subscriber to the corporate stock, who was a promoter of the corporate organization, and who has been a party to and has acquiesced in the subsequent proceedings in incurring liabilities and issuing the stock, is estopped to deny that the association is a corporation de facto, or that the stock so issued is valid.[43] A creditor who has dealt with a corporation de facto in its corporate name and capacity, and given credit to it, and not to its members or stockholders, cannot, in the absence of fraud, charge them, as partners, with the debts of the corporation.[44] When a person subscribes for stock in a corporation to be formed he is not ordinarily estopped to deny its legal existence when sued on the subscription, if he did not acquiesce in its organization.[45] The sureties on a bond in which the principal is described as

[37] Finnegan v. Noerenberg, 52–239, 53+1150; East Norway Lake etc. Church v. Froislie, 37–447, 35+260; Foster v. Moulton, 35–458, 29+155; Jewell v. Grand Lodge, 41–405, 43+88; Hause v. Mannheimer, 67–194, 69+810; Johnson v. Okerstrom, 70–303, 73+147; State v. Rue, 72–296, 75+235; Richards v. Minn. Sav. Bank, 75–196, 77+822; Tulare v. Shepard, 185 U. S. 1. See 20 Harv. L. Rev. 456; Note, 118 Am. St. Rep. 253.

[38] Johnson v. Okerstrom, 70–303, 73+147.

[39] Richards v. Minn. Sav. Bank, 75–196, 77+822; Gardner v. Mpls. etc. Ry., 73–517, 76+282. See Huber v. Martin, 127 Wis. 412; Clark, Corp. (2 ed.) p. 84; Elliott, Pri. Corp. (3 ed.) § 76; Machen, Corp. § 286; 17 Harv. L. Rev. 357.

[40] St. Paul etc. Co. v. Allis, 24–75.

[41] Columbia E. Co. v. Dixon, 46–463, 49+244; Minn. etc. Co. v. Denslow, 46–171, 48+771; Holbrook v. St. Paul etc. Co., 25–229; French v. Donohue, 29–111, 12+354; Johnston v. Clark, 30–308, 15+252; Continental Ins. Co. v. Richardson, 69–433, 72+458. See Christian v. Bowman, 49–99, 51+663; St. Paul L. Co. v. Dayton, 39–315, 40+66; Dimond v. Minn. S. Bank, 70–298, 303, 73+182; 20 Harv. L. Rev. 477.

[42] Scheufler v. Grand Lodge, 45–256, 47+799; Jewell v. Grand Lodge, 41–405, 43+88; Perine v. Grand Lodge, 48–82, 50+1022. See Johnson v. Corser, 34–355, 25+799.

[43] Minn. etc. Co. v. Denslow, 46–171, 48+771; Foster v. Moulton, 35–458, 29+155; Columbia E. Co. v. Dixon, 46–463, 49+244; Hause v. Mannheimer, 67–194, 69+810; Gardner v. Mpls. etc. Ry., 73–517, 76+282. See Bacon v. Brotherhood, R. B., 46–303, 48+1127.

[44] Richards v. Minn. Sav. Bank, 75–196, 77+822.

[45] Columbia E. Co. v. Dixon, 46–463, 465, 49+244; Byronville C. Assn. v. Ivers, 93–8,

a corporation cannot ordinarily escape liability by denying the legal existence of the corporation.[46] Stockholders who have accepted the benefits of an act incorporating the company by organizing, issuing stock, and doing business as a corporation under it, are estopped to assert the unconstitutionality of the act.[47] 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.[48] According to the better view the doctrine of estoppel applies though the pretended corporation is not even a de facto corporation.[49]

INCORPORATION AND ORGANIZATION

1984. By special act—Constitutional prohibition—Our state constitution provides that "no corporations shall be formed under special acts,[50] except for municipal purposes."[51] An amendment of a charter has been held not to violate this provision,[52] and so has the extension of the life of an existing corporation.[53] Stockholders may be estopped, from asserting that the creation of their corporation was in violation of this provision.[54] A special act declaring a foreign railway company a domestic corporation for certain purposes and authorizing it to do business in this state, has been held not to be within this provision.[55] A legislative transfer of corporate franchises has been held not within the provision.[56]

1985. For what purposes corporations may be formed—Under the clause "or other lawful business" in the statute,[57] a corporation may be formed for carrying on any kind of lawful business for pecuniary profit, not elsewhere specifically provided for by statute.[58] A savings association, formed for the pecuniary profit of its members, is not a benevolent or charitable society within the meaning of the statute authorizing the incorporation of benevolent and charitable societies.[59] Under the statute[60] authorizing the incorporation of co-operative associations, a corporation may be formed for the purpose of buying, owning, improving, selling, and leasing of lands, tenements, and hereditaments, real, personal, and mixed estates and property, including the constructing and leasing of a building, etc.[61] A corporation cannot be organized under R. L. 1905 § 3068 except for an exclusively manufacturing or mechanical business.[62]

100+387 (action against person signing agreement for organization of a creamery association for failing to deliver milk as agreed). See Hause v. Mannheimer, 67–194, 69+810.

[46] Jefferson v. McCarthy, 44–26, 46+140.

[47] Gardner v. Mpls. etc. Ry., 73–517, 76+282.

[48] State v. School Dist., 85–230, 88+751.

[49] See Clark, Corp. (2 ed.) p. 98.

[50] Art. 10 § 2; McRoberts v. Washburne, 10–23(8); First Div. etc. Ry. v. Parcher, 14–297(224); Ames v. Lake Superior etc. Ry., 21–241.

[51] Tierney v. Dodge, 9–166(153, 158); St. Paul v. Colter, 12–41(16); Board of Ed. v. Moore, 17–412(391).

[52] Ames v. Lake Superior etc. Ry., 21–241; St. Paul etc. Co. v. Allis, 24–75; Green v. Knife Falls B. Corp., 35–155, 27+924.

[53] Cotton v. Miss. etc. Co., 22–372.

[54] Gardner v. Mpls. etc. Ry., 73–517, 76+282.

[55] Moore v. Chi. etc. Ry., 21 Fed. 817.

[56] First Div. etc. Ry. v. Parcher, 14–297(224).

[57] R. L. 1905 § 2846.

[58] Brown v. Corbin, 40–508, 42+481.

[59] Sheren v. Mendenhall, 23–92. See R. L. 1905 § 3102.

[60] R. L. 1905 § 3073.

[61] Finnegan v. Noerenberg, 52–239, 53+1150.

[62] State v. Minn. T. Mfg. Co., 40–213, 41+1020.

1986. Articles must be signed by requisite number—Articles signed by only two persons are not good as original articles of incorporation under Laws 1885 c. 184.[63]

1987. Filing proof of publication of articles—The organization of a corporation is not complete until proof of the publication of the certificate of incorporation is filed with the secretary of state as required by statute.[64]

1988. Reincorporation—Where a majority of the directors of a corporation attempted to reorganize the corporation under Laws 1885 c. 184 § 11, it was held that it would be presumed, upon proceedings of quo warranto on the part of the state to test the question of a corporate existence, that such action of the directors was authorized by the other members of the corporation.[65]

1989. Co-operative associations—Under the statutes for the organization of co-operative associations,[66] articles of incorporation have been held defective in not being signed by the requisite number of associates, in not being properly recorded,[67] and in not providing for the issuance and payment of stock.[68]

1990. Recording certificate—Foreign statute—Where a foreign statute provided for a certain certificate to be made and recorded, and that thereupon "the persons associated shall be a body corporate and politic," it was held that the recording of the certificate was essential to the existence of the corporation.[69]

1991. Consolidation—The effect of the consolidation of railway companies under special acts has been determined in several cases.[70] As a general rule a consolidation results in a new corporation which succeeds to the rights and liabilities of the consolidating corporations.[71]

ARTICLES OF INCORPORATION

1992. Nature—Contract—The articles of incorporation of an association formed under the general laws of the state are its charter, and, subject to the constitution and general laws of the state, its fundamental and organic law. They fix the rights of the stockholders, and are in the nature of a fundamental contract, in form between the corporators, and in practical effect between the association and its stockholders, which neither party is at liberty to violate.[72] The charter of a private corporation is a contract between the state and the corporators, and between the corporators themselves, which is constitutionally protected against impairment.[73] The charter of a corporation constitutes the law of the corporation and the obligation and liabilities it imposes enter into and form a part of its corporate existence, as an inseparable part of its being.[74]

[63] State v. Critchett, 37–13, 32+787.

[64] R. L. 1905 § 2851; Christian v. Bowman, 49–99, 51+663; Hause v. Mannheimer, 67–194, 69+810. See, under former statute, In re Shakopee Mfg. Co., 37–91, 33+219.

[65] State v. Steele, 37–428, 34+903.

[66] G. S. 1894 §§ 2903–2912; R. L. 1905 §§ 3073–3078.

[67] Johnson v. Okerstrom, 70–303, 73+147; Byronville C. Assn. v. Ivers, 93–8, 100+387.

[68] Byronville C. Assn. v. Ivers, 93–8, 100+387.

[69] Becht v. Harris, 4–504(394).

[70] In re St. P. etc. Ry., 36–85, 30+432; In re Mpls. etc. Ry., 36–481, 32+556; Plainview v. Winona etc. Ry., 36–505, 32+745; Elgin v. Winona etc. Ry., 36–517, 32+749; Gardner v. Mpls. etc. Ry., 73–517, 76+282. See Robbins v. School Dist., 10–340(268); Fitz v. Minn. C. Ry., 11–414(304).

[71] Robbins v. School Dist., 10–340(268); Swing v. Empire L. Co., 105–356, 117+467. See Note, 89 Am. St. Rep. 604.

[72] Bergman v. St. Paul M. B. Assn., 29–275, 13+120; Trustees v. Halvorson, 42–503, 508, 44+663.

[73] Mower v. Staples, 32–284, 20+225; First Div. etc. Ry. v. Parcher, 14–297 (224); Stevens County v. St. P. etc. Ry., 36–467, 471, 31+942.

[74] Welsh v. First Div. etc. Ry., 25–314, 320.

The charter of a private corporation is a contract, and like other contracts it can be made only by the mutual consent of the parties. The consent of the state is expressed in the grant, and that of the corporators in the acceptance of the privilege. Incorporation is a privilege granted by the state for a definite period which cannot be abandoned or cast aside at will without the consent of the state.[75]

1993. Acceptance—The acceptance of a charter need not be express, but may be evidenced by the exercise of corporate powers.[76]

1994. Parol evidence inadmissible to vary—Parol evidence is inadmissible to vary the terms of articles of incorporation.[77]

1995. Amendment by act of corporators—The amendment of articles of incorporation is regulated by statute. They may be amended in the mode prescribed in respect to the amount of stock or any other matter which the original articles of a corporation of the same kind might lawfully have contained.[78] Void articles of incorporation cannot be validated by amendment.[79] It has been held that an amendment may be made at a regular meeting of the stockholders on the usual notice.[80] The directors have no implied authority to amend the articles.[81]

1996. Determine character of corporation—The articles of incorporation are the sole criterion in determining the nature and character of a corporation and the objects and purposes for which it was formed,[82] but not in determining under what statutes it was formed.[83] In determining the character of a corporation reference must be had to that portion of its articles of association expressing the nature and scope of its business. It cannot be made one kind of a corporation merely by being labeled as such, if its declared objects show it to be something else.[84]

1997. Amendment by legislative act—Acceptance—Subject to some extent to an exception in favor of the right of the state to amend the charter of a private corporation, under an express reservation of authority to do so, or in the exercise of its police power, the rule is that amendment of such charters, to become binding and effectual, must be accepted on the part of corporators. Alterations in such charters, which are not fundamental, and are authorized by the legislature, may be effectually accepted by a majority of the stockholders: that is to say, by a majority per capita, when the right to vote is per capita, and by a majority of stock, where each share of the stock is entitled to one vote. Alterations which change the nature and purposes of the corporation, or of the enterprise for which it was created, are fundamental, while those which work no such material change are not fundamental. An alteration of a charter increasing the number of directors from five to nine is not fundamental. It is not a change of the nature, purpose, or character of the company, or of its enterprise, but of the machinery by which that purpose is to be effected and that en-

[75] Beyer v. Woolpert, 99–475, 109+1116.

[76] St. Paul etc. Sons of T. v. Brown, 11–356(254).

[77] Oswald v. Mpls. T. Co., 65–249, 68+15; Craig v. Benedictine etc. Assn., 88–535, 93+669.

[78] R. L. 1905 § 2871; Mercantile S. Co. v. Kneal, 51–263, 53+632. See Mower v. Staples, 32–284, 20+225; Palmer v. Bank of Zumbrota, 72–266, 75+380; State v. Oftedal, 72–498, 75+692.

[79] State v. Critchett, 37–13, 32+787.

[80] Jones v. Morrison, 31–140, 16+854.

[81] State v. Oftedal, 72–498, 75+692.

[82] Senour v. Church, 81–294, 84+109; Gould v. Fuller, 79–414, 82+673; Citizens State Bank v. Story, 84–408, 87+1016; Craig v. Benedictine S. H. Assn., 88–535, 93+669. See § 2080c.

[83] Citizens State Bank v. Story, 84–408, 87+1016; Mpls. etc. Ry. v. Manitou Forest Syndicate, 101–132, 112+13.

[84] International B. Co. v. Rainy Lake etc. Corp., 97–513, 107+735; Mpls. etc. Ry. v. Manitou Forest Syndicate, 101–132, 112+13.

terprise carried on. Such alteration may be effectually accepted by a majority of the stockholders.[85]

POWERS AND FRANCHISES

1998. In general—Certain general powers are conferred upon all corporations by statute.[86] A corporation has only such powers as are expressly granted, or are incidental to its very existence, or are reasonably necessary to carry out the powers expressly granted. It does not have all the powers of a natural person which are not expressly withheld.[87] When an express power is granted, and the specific manner of its exercise is prescribed, it can only be exercised in that manner.[88] An incidental power is one that is directly and immediately appropriate to the execution of the specific power granted, and not one that has a slight or remote relation to it.[89] To accomplish its legitimate objects a corporation may deal precisely as an individual who seeks to accomplish the same end.[90] One of the "incidental" powers of a corporation is the right to admit new members.[91] Every corporation has the incidental power to insure its property.[92]

1999. Power to sue—Every corporation has the power to sue in all courts.[93] It cannot sue in behalf of its stockholders.[94] Pursuant to the principle that for every wrong there is a remedy, it is the intention of the law to secure to a corporation all the rights and remedies of a natural person, so far as its artificial nature will permit. A corporation, however, cannot bring an action ex delicto for a purely personal tort, nor can it be awarded purely personal damages.[95]

2000. Power to admit new members—The right to admit new members is one of the incidental powers of every corporation, in the absence of express prohibition.[96]

2001. Power to assess members—A corporation has not the power, as incident to it, to assess for its own use a sum of money on the corporators, and compel them, by an action at law, to pay it. Such power must be derived from the statute or some other express promise to pay it.[97]

2002. Power to own and hold realty—Alien stockholders—All corporations are authorized to acquire and hold such realty as may be necessary for their corporate purposes;[98] but there are certain general statutory limitations, including a limitation in case of alien stockholders.[99] In respect to convey-

[85] Mower v. Staples, 32–284, 20+225. See, as to acceptance, State v. Sibley, 25–387; Miss. etc. Co. v. Prince, 34–79, 24+361.

[86] R. L. 1905 § 2852. The powers here granted are such as are said to be incidental to the very existence of a corporation.

[87] School Dist. v. Thompson, 5–280(221); Williams v. Lash, 8–496(441); Rochester Ins. Co. v. Martin, 13–59(54); Farmers etc. Bank v. Baldwin, 23–198; Auerbach v. LeSueur M. Co., 28–291, 296, 9+799; Smith v. Library Board, 58–108, 59+979; Nicollet Nat. Bank v. Frisk, 71–413, 74+160; N. W. etc. Co. v. O'Brien, 75–335, 77+989; Gould v. Fuller, 79–414, 82+673; State v. St. P. G. Co., 92–467, 100+216.

[88] Farmers' etc. Bank v. Baldwin, 23–198; School Dist. v. Thompson, 5–280 (221).

[89] Nicollet Nat. Bank v. Frisk, 71–413, 74+160.

[90] Chaska Co. v. Carver County, 6–204 (130, 138).

[91] State v. Sibley, 25–387.

[92] St. Paul T. Co. v. Wampach, 50–93, 52+274.

[93] Const. art. 10 § 1; R. L. 1905 § 2852.

[94] Waseca Co. Bank v. McKenna, 32–468, 21+556. See Cummings v. Nat. Bank, 101 U. S. 153.

[95] Hansen v. Wyman, 105–491, 117+926.

[96] State v. Sibley, 25–387.

[97] Duluth Club v. Macdonald, 74–254, 76+1128.

[98] R. L. 1905 § 2852. See Williams v. Lash, 8–496 (441); Dana v. Bank of St. Paul, 4–385(291).

[99] R. L. 1905 §§ 3235–3239; Laws 1907 c. 439. See N. W. Tel. Exch. Co. v. Chi.

ances to or by a corporation, no one whose interests are not affected, except the state, can call in question the capacity of the corporation either to convey or receive and hold property. As to persons whose interests are not so affected, if the state acquiesces in the exercise by the corporation of power to purchase and convey, beyond what the state has conferred on it, they have no right to complain.[1]

2003. Power to transfer property—A corporation may convey its realty by an attorney appointed by a resolution of its directors or governing board, or by one of its officers.[2] A corporation has been held authorized to assign and mortgage a leasehold estate as security for the payment of its note.[3] A corporation cannot sell, mortgage, or lease, its property for the benefit of an officer or stockholder.[4]

2004. Power to mortgage—Corporations generally have the power to mortgage their property.[5] They cannot do so for the benefit of an officer or stockholder.[6]

2005. Power to take and enforce securities—A corporation ordinarily has the same power to take and enforce securities, in connection with its legitimate business, as a natural person.[7]

2006. Power to loan money—As a general rule corporations have no implied power to loan money.[8]

2007. Power to guarantee debt of another—As a general rule a corporation has no authority to enter into a contract of guaranty.[9]

2008. Power to purchase and hold its own stock—An agreement of a corporation to take back its stock, upon a conditional sale thereof, is not ultra vires as a contract to purchase its own stock.[10] A national bank is not permitted to hold its own stock.[11] There is great uncertainty in the law as to the right of a corporation to purchase and hold its own stock.[12]

2009. Power to act as bailee—Under Sp. Laws 1885 c. 3, the library board of Minneapolis has power to become an ordinary bailee of property appropriate for exhibition in its public museum, as, for example, a collection of coins.[13]

2010. Negotiable paper—Accommodation paper—As a general rule corporations have power to incur debts and give their notes therefor,[14] but the power is sometimes withheld.[15] While a corporation has no power to make accommodation paper, yet a bona fide purchaser for value of such paper of a corpora-

etc. Ry., 76–334, 79+315 (domestic corporation—alien stockholders—presumption).

[1] Crolley v. Mpls. etc. Ry., 30–541, 16+422.

[2] R. L. 1905 § 3339; Morris v. Keil, 20–531(474).

[3] Penney v. Lynn, 58–371, 59+1043.

[4] Mpls. T. M. Co. v. Jones, 95–127, 103+1017.

[5] Chaska Co. v. Carver County, 6–204 (130, 138); Penney v. Lynn, 58–371, 59+1043.

[6] Mpls. T. M. Co. v. Jones, 95–127, 103+1017.

[7] Lebanon S. Bank v. Hollenbeck, 29–322, 13+145; St. Paul G. Co. v. Sandstone, 73–225, 75+1050.

[8] St. Paul G. Co. v. Sandstone, 73–225, 75+1050.

[9] Weikle v. Mpls. etc. Ry., 64–296, 66+963. See Bausman v. Credit G. Co., 47–377, 50+496.

[10] Vent v. Duluth etc. Co., 64–307, 67+70.

[11] See Atwater v. Smith, 73–507, 76+253.

[12] See Jones v. Morrison, 31–140, 16+854; 7 Am. & Eng. Ency. Law (2 ed.) 818; 18 Harv. L. Rev. 531; Machen, Corp. § 626.

[13] Smith v. Library Board, 58–108, 59+979.

[14] Chaska Co. v. Carver County, 6–204 (130, 138); Gebhard v. Eastman, 7–56 (40); Sullivan v. Murphy, 23–6; Auerbach v. LeSueur M. Co., 28–291, 9+799; Rosemond v. N. W. etc. Co., 62–374, 64+925; Africa v. Duluth etc. Co., 82–283, 84+1019. The following cases involve notes by corporations: Brunswick v. Boutell, 45–21, 47+261; Souhegan Nat. Bank v. Boardman, 46–293, 48+1116; Mpls. T. Co. v. Clark, 47–108, 49+386; Penney v. Lynn, 58–371, 59+1043; Kraniger v. People's B. Soc., 60–94, 61+904; Helm v. Smith, 76–328, 79+313; Porter v. Winona etc. Co., 78–210, 80+965; La Plant v. Pratt, 102–93, 112+889.

[15] Regents v. Hart, 7–61(45) (regents of state university).

tion having general power to deal in mercantile paper in the course of its business, made by an officer having apparent power to issue it, may recover thereon from the corporation.[16]

2011. Deeds—It is unnecessary that a deed purporting to be executed by a corporation should recite facts to show that it was in fact a corporation, and the authority of the officers purporting to execute it.[17]

2012. Power to enter partnerships—It is the prevailing rule that a corporation cannot enter into a partnership without express authority,[18] but where an association or corporation and another have assumed to enter into a partnership, and jointly transacted business together, they may recover, by reason of their joint interest, upon obligations made to them in their partnership name, irrespective of their partnership rights and duties as between themselves, or the power of such association to execute the powers incident to a partnership.[19]

2013. Power to hold stock in other corporations—It is the general rule that one corporation is not authorized to hold stock in another.[20] Corporations organized for manufacturing or mining purposes are authorized by statute to acquire and hold stock in other corporations if the majority of their stockholders shall elect.[21] The rule forbidding one corporation to hold stock in another does not forbid a manufacturing corporation from becoming a member of a mutual insurance company.[22]

2014. Power to transfer business to another company—A transfer of the business of a corporation to another corporation may be enjoined at the instance of a non-assenting stockholder. In the absence of express provision to the contrary the affairs of a corporation are to be managed in the interest of its stockholders and by directors and agents appointed by it.[23]

2015. Admission of authority—The admission of the execution of a contract by a corporation includes an admission of the power of the corporation to make the contract, and of the authority of the officer or agent who executed it it in its behalf.[24]

2016. Contracts—Authority of officers and agents must appear—As a corporation can only act through authorized agents or officers it should appear that a contract claimed to be that of a corporation was authorized and made by the proper parties.[25]

2017. Notice of corporate powers—Persons dealing with a corporation are charged with notice of its powers as disclosed by its charter or articles of incorporation.[26]

2018. Presumptions—The presumption is that a corporation acts within the scope of its powers.[27] Every reasonable intendment is to be made in favor of

[16] Am. T. & S. Co. v. Gluck, 68–129, 70+1085. See Patterson v. Stewart, 41–84, 42+926.

[17] Womack v. Coleman, 89–17, 22, 93+663.

[18] Whittenton Mills v. Upton, 10 Gray 582. See Stewart v. Erie etc. Co., 17–372(348); Machen, Corp. § 86.

[19] French v. Donohue, 29–111, 12+354.

[20] Hunt v. Hauser, 90–282, 96+85; Id., 95–206, 103+1032.

[21] R. L. 1905 § 2853. See Cowling v. Zenith Iron Co., 65–263, 68+48.

[22] St. Paul T. Co. v. Wampach, 50–93, 52+274.

[23] Small v. Mpls. etc. Co., 45–264, 47+797. See Pinkus v. Mpls. L. Mills, 65–40, 67+643; St. Paul T. Co. v. St. Paul etc. Co., 60–105, 61+813; State v. Savings Bank, 102–199, 113+268.

[24] Bausman v. Credit G. Co., 47–377, 50+496.

[25] Mpls. T. Co. v. Clark, 47–108, 49+386. See Nat. Protective Assn. v. Prentice, 49–220, 51+916; Dana v. Bank of St. Paul, 4–385(291).

[26] Ross v. Kelly, 36–38, 31+219; Kraniger v. People's B. Soc., 60–94, 61+904; Weikle v. Mpls. etc. Ry., 64–296, 66+963; Nicollet Nat. Bank v. Frisk, 71–413, 420, 74+160; Senour v. Church, 81–294, 84+109; Legault v. Mpls. etc. Assn., 93–72, 100+666. See Bell v. Kirkland, 102–213, 113+271.

[27] Gebhard v. Eastman, 7–56(40); Penney v. Lynn, 58–371, 59+1043. See Dana v. Bank of St. Paul, 4–385(291, 296).

the proceedings of private corporations in their corporate acts.[28] Corporations like natural persons are presumed to act rightly and legally. Corporate acts which presuppose the existence of other acts to make them legally operative are presumptive evidence of such acts.[29]

2019. Franchises and privileges—Nature—The grant of a franchise is the essential thing in a charter, and whether given to new corporators, or those already organized, or in an original or amended charter, the grant of a corporate franchise is, as between the sovereign and the corporators, so far the grant of a charter, or the grant of a "franchise by act of incorporation." The right to be a corporation is itself a franchise, but all franchises granted to a corporation become corporate franchises, and essential portions of its charter or act of incorporation, and the chief value of the charter, in order to accomplish the purposes of the corporate organization.[30] While the franchise to be a corporation is, in one sense, the essential franchise of a corporation, that by which it is, and without which it cannot be, yet this franchise of mere existence, essential though it be, is one which is of little if any value in itself.[31] Corporations usually possess many powers which are not franchises or privileges.[32] It is not the franchises that constitute, or the conferring of franchises that creates, the corporation.[33] As applied to corporations the word "privilege" is ordinarily used as synonymous with "franchise," and means a special privilege conferred by the state, which does not belong to citizens generally by common right, and which cannot be enjoyed or exercised without legislative authority.[34] Statutes granting franchises to corporations, involving rights of the public, are to be construed liberally in favor of the public and strictly against the corporation.[35] A franchise of a public nature is not transferable except by express legislative authority.[36]

LIABILITIES

2020. Limit of corporate indebtedness—The highest amount of indebtedness or liability to which the corporation shall at any time be subject is generally specified in the articles of incorporation.[37]

2021. Unauthorized acts of officers and corporators—A corporation is not bound by the unauthorized acts of its officers, or of individual corporators, in the absence of ratification or estoppel.[38]

2022. Liability for torts—As a general rule corporations are liable to the same extent as natural persons for the torts of their officers or agents. Thus they may be liable for libel,[39] fraud,[40] or negligence.[41] Whether a corporation

[28] Heintzelman v. Druids' R. Assn., 38–138, 36+100.

[29] Langworthy v. Garding, 74–325, 77+207.

[30] Green v. Knife Falls B. Corp., 35–155, 27+924; State v. Minn. T. M. Co., 40–213, 41+1020. See McRoberts v. Washburne, 10–23(8); First Div. etc. Ry. v. Parcher, 14–297(224, 252); Stevens County v. St. P. etc. Ry., 36–467, 471, 31+942; International T. Co. v. Am. etc. Co., 62–501, 65+78, 632; State v. G. N. Ry., 106–303, 325, 119+202.

[31] Ames v. Lake Superior etc. Ry., 21–241, 258; Green v. Knife Falls B. Corp., 35–155, 27+924.

[32] International T. Co. v. Am. etc. Co., 62–501, 65+78, 632; State v. Minn. T. M. Co., 40–213, 41+1020.

[33] Huff v. Winona etc. Co., 11–180(114).

[34] International T. Co. v. Am. etc. Co., 62–501, 65+78, 632.

[35] St. Louis etc. Co. v. Nelson, 51–10, 52+976; N. W. etc. Co. v. O'Brien, 75–335, 77+989; State v. St. P. etc. Ry., 98–380, 108+261.

[36] State v. Dist. Ct., 31–354, 358, 17+954; State v. Savings Bank, 102–199, 113+268.

[37] R. L. 1905 § 2849; Auerbach v. Le Sueur M. Co., 28–291, 9+799 (negotiable paper in excess of limit); Kraniger v. People's B. Soc., 60–94, 61+904 (validity of loan beyond limit of indebtedness—loan valid up to limit and invalid only as to excess); Oswald v. Mpls. T. Co., 65–249, 68+15 (findings held insufficient to show limit exceeded).

[38] Miss. etc. Co. v. Prince, 34–79, 24+361.

[39] Aldrich v. Press P. Co., 9–133(123).

[40] Mpls. T. Co. v. Menage, 73–441, 76+

organized for purely charitable purposes, and dependent upon voluntary contributions for its support, is liable for the negligence of its officers and agents is an open question in this state.[42] The fact that a corporation was acting ultra vires at the time of an accident will not relieve it from liability for negligence.[43]

2023. Imposed by charter—Liabilities of third parties—A corporation may be bound under its charter to discharge obligations incurred by others.[44]

ULTRA VIRES TRANSACTIONS

2024. Definition—The term "ultra vires" is used in different senses. Its primary sense is that of an act beyond the powers of a corporation—an act which it is not authorized to do under any circumstances. It is also used to denote an act which is irregular or unauthorized under the circumstances, though not beyond the power of the corporation under all circumstances.[45] It is to be noted that the word "power" in this connection means right or authority. A corporation has power, in the sense of ability, to do unauthorized acts and such acts are not absolutely void but may give rise to rights and obligations.[46]

2025. What constitutes—Construction—A contract should not be held to be ultra vires unless it is clearly so.[47]

2026. When enforceable—An executory ultra vires contract is not enforceable.[48] Where an ultra vires contract has been fully performed by both parties the law leaves them where it finds them—the contract is unassailable by either party.[49] An ultra vires contract which has been fully performed on one side is enforceable either in favor of or against the corporation,[50] unless it is expressly forbidden by statute,[51] or would not be enforced in the case of natural persons because contrary to public policy.[52] Our court has frequently placed its decision on the ground of estoppel,[53] but this is unsatisfactory and seems a perversion of the doctrine of estoppel.[54] It has been said that the doctrine of

195. See Dunn v. State Bank, 59–221, 61+27; McCord v. W. U. Tel. Co., 39–181, 39+315.

41 Lane v. Minn. etc. Soc., 62–175, 64+382; Smith v. Library Board, 58–108, 59+979; Gould v. Sub-Dist., 7–203(145).

42 Craig v. B. S. H. Assn., 88–535, 93+669. See 9 Harv. L. Rev. 541; 12 Id. 128; 16 Id. 530.

43 Gould v. Sub-Dist., 7–203(145).

44 Welsh v. First Div. etc. Ry., 25–314.

45 Bergman v. St. Paul etc. Assn., 29–275, 13+120; Minn. etc. Co. v. Langdon, 44–37, 46+310; Bell v. Kirkland, 102–213, 113+271.

46 Auerbach v. LeSueur M. Co., 28–291, 9+799; Vought v. Eastern etc. Assn., 172 N. Y. 508; 18 Harv. L. Rev. 462; 19 Id. 608; 23 Id. 496.

47 Dana v. Bank of St. Paul, 4–385(291).

48 Rochester Ins. Co. v. Martin, 13–59 (54); Delaware etc. Co. v. Wagner, 56–240, 57+656; Erb v. Yoerg, 64–463, 465, 67+355. See Olson v. Burk, 94–456, 103+335; Note, 70 Am. St. Rep. 165.

49 Bell v. Kirkland, 102–213, 221, 113+271; Machen, Corp. § 1048.

50 Auerbach v. LeSueur M. Co., 28–291, 9+799; Seymour v. Chicago etc. Soc., 54–147, 55+907; Oswald v. St. Paul G. P. Co., 60–82, 61+902; Central etc. Assn. v. Lampson, 60–422, 62+544; Erb v. Yoerg, 64–463, 67+355; St. Paul G. Co. v. Sandstone, 73–225, 75+1050; Bell v. Mendenhall, 78–57, 65, 80+843; Hunt v. Hauser, 90–282, 96+85; Bell v. Kirkland, 102–213, 113+271; Moore v. Ramsey County, 104–30, 115+750. See Bath G. L. Co. v. Claffy, 151 N. Y. 24; Vought v. Eastern etc. Assn, 172 N. Y. 508; Nims v. Mt. Vernon School, 160 Mass. 177; New York etc. Co. v. Kidder, 192 Mass. 391; Note, 70 Am. St. Rep. 170; Machen, Corp. § 1055; 23 Harv. L. Rev. 495. It seems that the rule is otherwise if the other party has not had the benefit of the performance. Kraniger v. People's B. Soc., 60–94, 61+904.

51 Nat. Invest. Co. v. Nat. etc. Assn., 49–517, 52+138.

52 29 Am. & Eng. Ency. Law (2 ed.) 60.

53 Auerbach v. LeSueur M. Co., 28–291, 9+799; Erb v. Yoerg, 64–463, 67+355; Hunt v. Hauser, 90–282, 96+85; Bell v. Kirkland, 102–213, 113+271. The doctrine of estoppel is applied less freely against public corporations. Wolford v. Crystal L. C. Assn., 54–440, 56+56. See § 6717.

54 9 Harv. L. Rev. 269; 14 Id. 337; Clark, Corp. (2 ed.) p. 183. The doctrine of estoppel does not prevail in the federal

ultra vires, when invoked for or against a corporation, should not be allowed to prevail where it would defeat the ends of justice or work a legal wrong.[55] The present tendency of our court is to restrict the defence of ultra vires in actions between individuals, as far as possible, if not to deny it altogether, except in the case of executory contracts.[56] Perhaps the best position to take is that an ultra vires contract is not illegal in the sense of being void,[57] but generally unenforceable because contrary to public policy; that public policy renders it unenforceable in all cases when it is merely executory; and that it is generally enforceable when it has been executed on one side because the public policy of justice overbalances the public policy of keeping the corporation within the limits of its charter.[58] There has been some tendency to hold that if a corporation enters into an ultra vires contract the state alone can object.[59] It may be well to remark by way of caution that the decisions of the federal courts on this subject are at variance with the law of this state.[60]

STOCK

2027. Nature of shares—Shares of stock are personal property.[61] They are "property" subject to levy.[62]

2028. What constitutes—The interest acquired by the stockholders of a railway company, under a certain agreement in relation to the land of the company, has been held not to constitute "stock." [63]

2029. Nature of certificates of stock—It has been said that "a stock certificate issued by a corporation having power so to issue, in which it is stated that a designated person is the owner of a certain number of shares of stock transferable only on the books of the association, on the indorsement and surrender of the certificate itself, is a continuing affirmation as to the ownership of the stock, and that the corporation will not transfer the stock upon its books unless the certificate is first surrendered. Such a certificate is an assurance to the commercial world that the shares of stock are the property of the person designated, and that he has the power and right to transfer and sell the stock, until this power and right has been lawfully terminated." [64] As pointed out in a later case this statement is not quite accurate.[65] Certificates of stock are not strictly negotiable instruments.[66] They are not essential to legal ownership of stock or

courts. California Bank v. Kennedy, 167 U. S. 362; First Nat. Bank v. Converse, 200 U. S. 425; Merchants' Nat. Bank v. Wehrmann, 202 U. S. 295.

[55] Auerbach v. LeSueur M. Co., 28–291, 9+799; Central etc. Assn. v. Lampson, 60–422, 62+544; Hunt v. Hauser, 90–282, 96+85; Bell v. Kirkland, 102–213, 113+271. See, for comments on this glittering generality, Machen, Corp. § 1055.

[56] Bell v. Kirkland, 102–213, 113+271.

[57] In Stewart v. Erie etc. Co., 17–372 (348, 376) it is said that ultra vires contracts are illegal, but in Oswald v. St. Paul etc. Co., 60–82, 86, 61+902, it is said that they are not void. See Machen, Corp. § 1020; 23 Harv. L. Rev. 495.

[58] See 18 Harv. L. Rev. 461; 19 Id. 608; 23 Id. 495; Clark, Corp. (2 ed.) p. 185; Machen, Corp. § 1055.

[59] Crolley v. Mpls. etc. Ry., 30–541, 16+422; Merchants Nat. Bank v. Hanson, 33–40, 21+849; Newell v. Mpls. etc. Ry., 35–112, 27+839; Baker v. N. W. etc. Co., 36–185, 30+464; Senour v. Church, 81–294, 300, 84+109. See Farwell v. Wolf, 96 Wis. 10; Note, 70 Am. St. Rep. 178; 10 Cyc. 1164.

[60] Hunt v. Hauser, 90–282, 96+85; 19 Harv. L. Rev. 608; 23 Id. 495.

[61] Baldwin v. Canfield, 26–43, 56, 1+261.

[62] Fowler v. Jenks, 90–74, 87, 95+887, 96+914, 97+127.

[63] St. Paul etc. Ry. v. McDonald, 34–182, 25+57.

[64] Joslyn v. St. P. D. Co., 44–183, 46+337. See Guilford v. W. U. Tel. Co., 43–434, 437, 46+70.

[65] Guilford v. W. U. Tel. Co., 59–332, 61+324.

[66] In re People's L. S. Ins. Co., 56–180, 57+468; Carpenter v. Am. B. & L. Assn., 54–403, 56+95; Wallace v. Carpenter, 70–321, 73+189; Guilford v. W. U. Tel. Co., 59–332, 61+324. But see Brown v. Equitable L. A. Soc., 75–412, 421, 78+103, 671, 79+968.

to membership in a corporation. They are not the shares themselves, but are merely representatives or evidence thereof.[67] A certificate for paid-up shares is simply a written statement in the name of the corporation that the holder thereof is a stockholder, and that the full par value of his shares has been paid to the corporation.[68] They are personal property.[69] They represent the corporate property.[70] In a stock certificate the corporation certifies that at the date of its issue the person therein named is the owner of the specified number of shares of its stock. That fact it would undoubtedly be estopped to deny as against a bona fide purchaser for value. But the certificate contains no representation or warranty that the party to whom it is issued will continue to be the owner of the stock for any particular length of time, or until some future act is done or event occurs.[71]

2030. Issue of stock before incorporation—When stock certificates are issued in contemplation of incorporation, the issue of stock may, after incorporation, be adopted by the corporation, and the holders thereby become stockholders without the formal issue of new certificates.[72]

2031. Issued in exchange for property—Unless forbidden by some constitutional or statutory provision, or the nature of its business, a corporation may, in good faith, issue paid-up shares of its stock for the purchase of property at a fair valuation.[73]

2032. Watered or bonus stock—Stock issued at less than par—Statute—The issue of watered or bonus stock is forbidden by statute. A corporation cannot issue its stock as fully paid up and sell the same for less than par, and on such terms as its directors deem advisable.[74] An agreement by subscribers for stock in a corporation, that for each share paid for, a certificate for two or more shares shall be issued to the stockholders, is illegal.[75] The statute does not render watered stock so far void as to exempt the holder from liability to creditors.[76] Where a corporation received a note and mortgage in payment for stock as a device to evade the statute, it was held that the corporation was bound thereby.[77] Shares of stock in a corporation issued and sold as full paid stock, but for a sum less than its par value, are not void, but the agreement between the holder and the corporation that it shall be considered and treated as paid in full is voidable as to the creditors of the corporation. The holder of such stock, though he paid therefor less than the par value, may maintain an action to protect such rights as accrue to him as a stockholder. A request to the managing officers of a corporation to institute an action to set aside and cancel a fraudulent issue of corporate stock, and their refusal, is all that is necessary to enable an individual stockholder to maintain the suit. It is unnecessary that he go further, and request other stockholders to commence the action.[78]

2033. Capital—How far a trust fund for creditors—The capital of a corporation is its own property, which it may use and dispose of (if not prohibited

[67] Columbia E. Co. v. Dixon, 46–463, 49+244; Marson v. Deither, 49–423, 52+38; Guilford v. W. U. Tel. Co., 59–332, 61+324; Basting v. Northern T. Co., 61–307, 63+721; Holland v. Duluth etc. Co., 65–324, 68+50; Fowler v. Jenks, 90–74, 87, 95+887, 96+914, 97+127.

[68] Wallace v. Carpenter, 70–321, 73+189.

[69] Puget Sound Nat. Bank v. Mather, 60–362, 62+396.

[70] Baldwin v. Canfield, 26–43, 56, 1+261.

[71] Guilford v. W. U. Tel. Co., 59–332, 61+324.

[72] Thorpe v. Pennock, 99–22, 108+940.

[73] Hastings v. Iron Range B. Co., 65–28, 67+652; State v. Minn. T. Mfg. Co., 40–213, 227, 41+1020. See Milnor v. Home S. & L. Assn., 64–500, 67+346; 19 Harv. L. Rev. 366 and § 2086.

[74] R. L. 1905 § 2878; Wallace v. Carpenter, 70–321, 73+189.

[75] Rogers v. Gross, 67–224, 69+894.

[76] Olson v. State Bank, 67–267, 276, 69+904. See § 2083.

[77] St. Paul Nat. Bank v. Life etc. Co., 71–123, 73+713. See Dorr v. Life etc. Co., 71–38, 73+635.

[78] Shaw v. Staight, 107–152, 119+951.

by its charter) the same as a natural person. It is not held in trust for creditors, except in the sense that there can be no distribution of it among stockholders without provision being first made for the payment of corporate debts, and that, as in the case of a natural person, any disposition of it in fraud of creditors is void; and in this respect there is no distinction between unpaid capital and paid capital, between "stock subscriptions" and any other assets of the corporation.[79]

2034. Increase of capital stock—Where a corporation has power to increase its capital stock, the power is held in trust for the subsisting stockholders in proportion to the original stock held by them, so that each of such stockholders has a right to an opportunity to subscribe for and take the new or increased stock, in proportion to the old stock held by him. A vote at a stockholders' meeting directing the new stock to be sold, without giving a stockholder such opportunity unless he consents to it, is void as to him.[80] An unauthorized increase of stock may not be absolutely void.[81]

2035. Right to certificate—Action—A shareholder is entitled to a certificate showing the number of shares held by him. This right may be enforced by him either by an action for specific relief, or for damages, the measure of damages being the value of the stock.[82] A supplemental complaint in an action by a promoter to compel the issuance of certain common stock to him for services rendered in promoting the corporation, has been held to state a cause of action.[83]

2036. New certificates in case of loss—Provision is made by statute for the issue of a new certificate in case of loss, and independent of statute an action will lie to compel the issue of a new certificate.[84]

2037. Surrender—Purchase by corporation—A by-law providing for a surrender to a corporation of its capital stock, and the purchase of the same by the corporation, at a regular meeting of stockholders, thirty days' previous notice being given, has been construed as requiring thirty days' notice of the intention of a stockholder to make such a surrender; the time for the holding of such meetings being definitely fixed by the by-laws.[85]

2038. Lien of corporation—Corporations often have a statutory lien on the shares of their stockholders,[86] and provision is often found in corporate by-laws for a lien.[87] Corporations are not given a lien at common law. They have none unless given by a statute, or by the charter, articles of incorporation, rules, or by-laws.[88]

2039. Held in trust for stockholders—Unissued stock of a corporation was, by agreement of all the stockholders (there being no creditors), paid for with

[79] Hospes v. N. W. etc. Co., 48–174, 50+1117.

[80] Jones v. Morrison, 31–140, 16+854. See 18 Harv. L. Rev. 541.

[81] Olson v. State Bank, 67–267, 69+904.

[82] Milnor v. Home S. & L. Assn., 64–500, 67+346.

[83] Selover v. Isle Harbor L. Co., 100–253, 111+155.

[84] R. L. 1905 § 2880; Guilford v. W. U. Tel. Co., 59–332, 61+324. See Guilford v. W. U. Tel. Co., 43–434, 46+70.

[85] Farnsworth v. Robbins, 36–369, 31+349.

[86] Schmidt v. Hennepin Co. B. Co., 35–511, 29+200 (lien given by G. S. 1878 c. 34 §§ 114, 135 held to attach whether debt accrued before or after stock acquired); Prince v. St. P. etc. Co., 68–121, 70+1079 (lien given by G. S. 1894 § 2799 must be acquired in good faith); Dorr v. Life etc. Co., 71–38, 73+635 (lien given by G. S. 1894 § 2799 valid against world unless waived, surrendered, or lost in some sufficient manner—assignment or sale of stock to a person ignorant of the lien will not discharge it); St. Paul Nat. Bank v. Life etc. Co., 71–123, 73+713 (lien given by G. S. 1894 § 2799—waiver).

[87] Nicollet Nat. Bank v. City Bank, 38–85, 35+577 (lien given bank by by-law defeated by statute forbidding bank to make loans or discounts on the security of its own stock).

[88] State v. Chamber of Com., 77–308, 79+1026.

funds of the corporation, and the stock issued to one of the stockholders to be held in trust for all the stockholders in proportion to the stock held by them. It was held that the issue was valid, and that the directors had no authority afterwards to direct the stock to be sold.[89]

2040. Conversion by corporation—Irregular sale—Where a corporation has practically deprived a stockholder of his stock, and the advantages accruing from its ownership, by bidding it in for itself at a sale which it pretends to make under its by-laws, and on account of the failure of the stockholder to meet and pay certain prescribed monthly dues, an action for conversion of the stock, or one in the nature of an action on the case, will lie against the corporation, though such sale was irregular and illegal, having been conducted in total disregard of the requirements of the by-laws authorizing the same.[90] A wrongful refusal of a corporation to transfer stock on its books, and its assertion of a right to cancel the stock, constitute a conversion.[91]

2041. Conditional sale of stock by corporation—A corporation may sell its stock on the condition that the purchaser may, upon certain conditions, return the stock and receive back the purchase price.[92]

2042. Non-payment—Forfeiture—A corporation has no authority at common law to forfeit stock for non-payment. It can only do so when authorized by statute, or by the charter, or by the consent of the stockholders.[93] If a corporation sells without authority the stock of a sockholder for non-payment, it is liable for conversion.[94] Statutes of this state forbid corporations from forfeiting absolutely the shares of its stock of its members to its own use for non-payment of dues, but it must sell such forfeited shares, and out of the proceeds of the sale indemnify itself, and return the surplus, if any, to the delinquent holder.[95]

2043. Transfer—Effect—Novation—The effect of a transfer, when made in good faith, to a solvent person, and entered on the books of the corporation, is like that of a novation. The transferrer is thereby discharged from his debt to the corporation, and the transferee thereby assumes and becomes liable for such debt precisely as the transferrer was.[96]

2044. Transfer on stock books—Statute—Provision is made by statute for the transfer of stock on the stock books of corporations.[97] The statute is designed for the benefit of corporations,[98] and possibly of its creditors. A corporation may waive the requirement.[99] Transfers of stock are good between the parties without being entered in the stock books,[1] and as against a subsequent attachment by a creditor of the transferrer.[2] In some of our cases it is intimated

[89] Jones v. Morrison, 31–140, 16+854.

[90] Allen v. Am. B. & L. Assn., 49–544, 52+144; Carpenter v. Am. B. & L. Assn., 54–403, 56+95; Allen v. Am. B. & L. Assn., 55–86, 56+577.

[91] Nicollet Nat. Bank v. City Bank, 38–85, 35+577; Humphreys v. Minn. C. Co., 94–469, 103+338.

[92] Vent v. Duluth etc. Co., 64–307, 67+70; Browne v. St. Paul P. Works, 62–90, 64+66.

[93] Minnehaha etc. Assn. v. Legg, 50–333, 52+898; Henkel v. Pioneer S. & L. Co., 61–35, 63+243.

[94] Allen v. Am. etc. Assn., 49–544, 52+144; Carpenter v. Am. etc. Assn., 54–403, 56+95; Allen v. Am. etc. Assn., 55–86, 56+577.

[95] Henkel v. Pioneer S. & L. Co., 61–35, 63+243.

[96] In re People's L. S. Ins. Co., 56–180, 57+468.

[97] R. L. 1905 § 2863.

[98] Baldwin v. Canfield, 26–43, 1+261; Joslyn v. St. Paul D. Co., 44–183, 46+337; Basting v. Northern T. Co., 61–307, 312, 63+721; Prince v. St. Paul etc. Co., 68–121, 70+1079.

[99] Basting v. Northern T. Co., 61–307, 312, 63+721.

[1] Baldwin v. Canfield, 26–43, 1+261; Nicollet Nat. Bank v. City Bank, 38–85, 35+577; Joslyn v. St. Paul D. Co., 44–183, 46+337; Lund v. Wheaton etc. Co., 50–36, 52+268; Prince v. St. Paul etc. Co., 68–121, 70+1079; St. Paul Nat. Bank v. Life etc. Co., 71–123, 73+713.

[2] Lund v. Wheaton etc. Co., 50–36, 52+268. See Nicollet Nat. Bank v. City Bank 38–85, 35+577.

that when a transfer is not registered, the legal title remains in the transferrer, and that the transferee acquires only an equitable title,[3] but it is clearly the law in this state that the legal title passes.[4] Until a transfer on the books a corporation may treat the transferrer as entitled to vote and receive dividends on the stock.[5] A corporation having knowledge of a transfer may record it on its books without any request from the transferee, or even against his objections. The purchase of stock in itself authorizes the vendor to record the transfer or to compel the purchaser to do so.[6] A transfer as collateral security is within the statute.[7] A corporation is liable to a transferee for a wrongful refusal to transfer stock on its books.[8] Mandamus will not lie to compel a transfer.[9] An informal transfer has been held sufficient to charge the transferee with liability to the corporation for the payment of calls on the stock.[10]

SUBSCRIPTIONS TO STOCK

2045. Nature of subscription to stock in company to be formed—A subscription by a number of persons to the stock of a corporation, to be thereafter formed by them, constitutes, first, a contract between the subscribers themselves to become stockholders when the corporation is formed, upon the conditions expressed in the agreement, and as such it is binding and irrevocable from the date of the subscription; second, it is in the nature of a continuing offer to the proposed corporation, which, upon acceptance by it, becomes as to each subscriber a contract between him and the corporation.[11]

2046. Distinguished from a sale—A sale of stock is to be distinguished from a subscription to stock. The former stands on the same footing as the sale of any other form of property. A subscription to stock differs from an ordinary contract for the purchase of property.[12]

2047. Effect—Interest of subscriber in company—A subscriber to stock acquires an interest in the corporation even before the issuance of stock to him. A subscription to stock does not stand on the footing of a purchase of property. When the subscriber complies with the terms of his subscription and pays for the stock he is an owner of the stock and a stockholder. The certificate of stock is merely evidence of his interest. He may be a full stockholder though no certificate is ever issued to him.[13] A subscriber to stock in a prospective corporation acquires a right to take part in its organization.[14]

2048. Consideration—Mutuality—Failure of consideration—A subscription to stock is a contract,[15] and must have a sufficient consideration [16] and mu-

[3] Nicollet Nat. Bank v. City Bank, 38–85, 35+577; Joslyn v. St. Paul D. Co., 44–183, 46+337; Basting v. Northern T. Co., 61–307, 63+721; Prince v. St. Paul etc. Co., 68–121, 70+1079.

[4] Baldwin v. Canfield, 26–43, 1+261; Lund v. Wheaton etc. Co., 50–36, 52+268.

[5] Prince v. St. Paul etc. Co., 68–121, 70+1079.

[6] Basting v. Northern T. Co., 61–307, 63+721.

[7] Nicollet Nat. Bank v. City Bank, 38–85, 89, 35+577.

[8] Humphreys v. Minn. C. Co., 94–469, 103+338; Nicollet Nat. Bank v. City Bank, 38–85, 35+577; Haslam v. First Nat. Bank, 79–1, 81+535.

[9] Baker v. Marshall, 15–177(136).

[10] Basting v. Northern T. Co., 61–307, 63+721.

[11] Mpls. T. M. Co. v. Davis, 40–110, 41+1026; Red Wing H. Co. v. Friedrich, 26–112, 1+827. See Crow River etc. Co. v. Strande, 104–46, 115+1038. See Note, 93 Am. St. Rep. 349.

[12] Marson v. Deither, 49–423, 52+38; Wood v. Jefferson, 71–367, 74+149.

[13] Marson v. Deither, 49–423, 52+38; Columbia E. Co. v. Dixon, 46–463, 49+244; Wood v. Robbins, 56–48, 57+317; Mpls. etc. Ry. v. Bassett, 20–535(478, 482); Pacific Nat. Bank v. Eaton, 141 U. S. 227.

[14] St. Paul etc. Ry. v. Robbins, 23–439. See Carter v. Hazzard, 65–432, 68+74.

[15] Wood v. Robbins, 56–48, 57+317. See § 2045.

[16] New York etc. Co. v. Martin, 13–417 (386); Mpls. etc. Ry. v. Bassett, 20–535 (478); St. Paul etc. Ry. v. Robbins, 23–439; Wood v. Robbins, 56–48, 57+317.

tuality of obligation.[17] Plaintiff paid cash for the right to have issued to him certain shares in a mining company thereafter to be organized to receive a certain option, on which the first payment only had been made, and to take over, operate, and develop the properties therein described. On an unfavorable report of mining experts, the effort to carry the venture through was abandoned when the option expired. Plaintiff sought to recover the cash paid by him. Fraud on the part of the defendant was disclaimed. It was held that the facts did not show a failure of consideration.[18]

2049. Parol evidence to vary—A stock subscription cannot be varied by a prior or contemporaneous oral agreement.[19]

2050. Who may subscribe—Railway companies entering the city of St. Paul subsequent to the incorporation of the St. Paul Union Depot Company have been held entitled, for the purpose of becoming members of the company. and sharing in and contributing to its benefits, to subscribe for and purchase a proper proportion of its stock at its par value.[20]

2051. Full amount of capital must be subscribed—Where the charter or articles of a corporation, or the terms of subscription to its capital stock, do not provide otherwise, payment of a subscription cannot be required till the whole capital stock is subscribed. But the subscriber may waive that defence. Acts done by him, as stockholder or director, which constitute a part of the business for which the corporation is formed, and which from their nature assume it to be ready for business, and evince a willingness to enter upon that business, with the stock already subscribed, will amount to a waiver.[21]

2052. Secret oral condition—Where a person subscribes to the stock of a proposed corporation, and delivers the subscription to a promoter, and other persons, without notice of any oral condition attached to such delivery, also subscribe to the stock, and pay the same in, and in reliance on the subscriptions the corporation is organized, engages in its business, expends large sums of money, and contracts liabilities therein, such person, when sued for instalments due on his stock subscriptions, will not be allowed to defeat a recovery by showing that he attached a secret oral condition to the delivery of his subscription to the promoter.[22]

2053. Acceptance—An offer or subscription "to take" shares in a corporation yet to be formed must not only be made, but it must also be accepted. As between the corporation and the subscriber, the equities or rights of corporate creditors not having intervened, such an offer cannot be held in abeyance at the will of other subscribers, who have arrogated to themselves the right to organize the corporation, without regard to the conditions fastened upon the subscription contract, to the exclusion of others equally interested.[23]

2054. Fraud—Cases are cited below involving questions of fraud in connection with stock subscriptions.[24]

2055. Conditions subsequent—Cases are cited below involving the consideration of conditions subsequent in subscriptions.[25]

[17] Mpls. etc. Ry. v. Bassett, 20–535(478).
[18] Clark v. McManus, 105–111, 117+476.
[19] Mpls. T. M. Co. v. Davis, 40–110, 41+1026; Masonic T. Assn. v. Channell, 43–353, 45+716.
[20] St. Paul etc. Co. v. Minn. etc. Ry., 47–154, 49+646.
[21] Masonic T. Assn. v. Channell, 43–353, 45+716; Arthur v. Clarke, 46–491, 49+252; Duluth Invest. Co. v. Witt, 63–538, 65+956. See Farnsworth v. Robbins, 36–369, 31+349; Wood v. Jefferson, 71–367, 74+149.
[22] Mpls. T. M. Co. v. Davis, 40–110, 41+1026.
[23] Carter v. Hazzard, 65–432, 68+74.
[24] Columbia E. Co. v. Dixon, 46–463, 49+244; Dunn v. State Bank, 59–221, 61+27; Traphagen v. Sagar, 63–317, 65+633; Wood v. Jefferson, 71–367, 74+149.
[25] Red Wing H. Co. v. Friedrich, 26–112, 1+827 (condition as to the place where a

2056. Delivery of subscription to promoter—A promoter of a proposed corporation, who solicits and procures stock subscriptions, is the agent of the body of the subscribers to hold the subscriptions until the corporation is formed, and then turn them over to it without any further act of delivery on the part of the subscribers. Hence a delivery of a subscription to such promoter is a complete delivery, so that it becomes eo instanti a binding contract as between the subscribers.[26]

2057. Liability of subscribers—The subscribers to an agreement for the formation of a creamery company mutually bound themselves for the payment of a loan its directors were authorized to negotiate in such manner that between themselves they should be equally liable for the payment of said loan and interest. The corporation was formed and the loan negotiated. The corporation sought to enforce the collection of the pro rata share of defendant, the only subscriber who had not paid the proportion. It was held that the agreement created an obligation on defendant's part on which the corporation could sue.[27]

2058. Calls—Where a corporation has made an assignment for the benefit of creditors under the insolvent law, the court in which the insolvency proceedings are pending may make an order requiring payment of unpaid stock subscriptions, the same as the directors might have done before the insolvency proceedings.[28] The subject of calls is sometimes regulated by charter.[29]

2059. Actions on subscriptions—Pleading—Cases are cited below involving questions of pleading in actions on stock subscriptions.[30]

2060. Tender of certificate before suit—A tender of a certificate before suit on a subscription is unnecessary,[31] in the absence of express agreement to the contrary.[32]

hotel was to be built); Master Plumbers' S. Co. v. Colliton, 73–193, 75+1042 (condition as to return of stock).

[26] Mpls. T. M. Co. v. Davis, 40–110, 41+1026.

[27] Crow River etc. Co. v. Strande, 104–46, 115+1038.

[28] Marson v. Deither, 49–423, 52+38; In re Minnehaha etc. Assn., 53–423, 55+598.

[29] Mpls. etc. Ry. v. Morrison, 23–308 (charter of Minneapolis & St. Louis Ry. Co.).

[30] Robertson v. Sibley, 10–323(253) (action by sheriff levying on unpaid subscription—essentials of complaint); St. Paul etc. Ry. v. Robbins, 23–439 (complaint not alleging issuance of stock or offer to issue, held insufficient); Mpls. H. Works v. Libby, 24–327 (complaint not showing authority of corporation, or transfer of subscription, or tender of stock, held insufficient); Farnsworth v. Robbins, 36–369, 31+349 (answer held insufficient to admit proof of defence that all the capital stock was not taken); Wood v. Robbins, 56–48, 57+317 (allegation that a call was duly made and that a notice was duly given held sufficient—allegations as to organization of company and of full subscription of shares held sufficient—unnecessary to allege tender of stock before suit); Mpls. T. M. Co. v. Crevier, 39–417, 40+507 (complaint in action on subscription to stock in unformed company held sufficient); Columbia E. Co. v. Dixon, 46–463, 49+244 (unnecessary to allege delivery or tender of stock); Marson v. Deither, 49–423, 52+38 (id.); Wood v. Jefferson, 57–456, 59+532 (action to recover full amount on last instalment of subscription—necessity of alleging readiness and willingness to deliver stock); Smith v. Prior, 58–247, 59+1016 (complaint held insufficient to admit proof that corporation accepted, in payment of stock, property greatly overvalued—application on trial for amendment of complaint properly denied); Duluth Invest. Co. v. Witt, 63–538, 65+956 (complaint sufficient though it failed to allege that all the shares had been subscribed); Wood v. Jefferson, 71–367, 74+149 (unnecessary to allege tender of stock—sufficient to allege that corporation is ready and willing to deliver stock); McConey v. Belton O. & G. Co., 97–190, 106+900 (action by creditor—complaint held sufficient).

[31] Marson v. Deither, 49–423, 52+38 (overruling, St. Paul etc. Ry. v. Robbins, 23–439; Mpls. H. Works v. Libby, 24–327); Columbia E. Co. v. Dixon, 46–463, 49+244; Wood v. Robbins, 56–48, 57+317; Wood v. Jefferson, 57–456, 59+532; Id., 71–367, 74+149.

[32] Marson v. Deither, 49–423, 52+38. See Wood v. Jefferson, 57–456, 59+532.

2061. Various defences to actions on subscriptions—It is no defence that the subscriber has not paid an instalment due at the time of the subscription;[33] or that the corporation is not legally organized, the action being for the benefit of creditors or the subscription having been made with an organized company;[34] or that the corporation was organized for an illegal purpose, the action being for the benefit of creditors;[35] or that the subscriber was not eligible, the action being for the benefit of creditors.[36] In an action by a corporation on a subscription to its stock before it was formed, it is a good defence that the corporation was not legally organized,[37] or was not organized within a reasonable time and in compliance with the conditions of the subscription.[38] The objection that other subscribers were not authorized to subscribe has been held waived under the circumstances.[39] The evidence in an action has been held insufficient to sustain a defence of a forfeiture or surrender of the stock.[40]

2062. Release—The capital stock of a corporation, contributed or agreed to be contributed, is, in equity, treated as a trust fund charged with the payment of its debts; and no by-law or resolution of the stockholders, as opposed to the rights of creditors, can authorize the release of the obligation of a solvent stockholder to pay for the stock taken by him, even though such release is in consideration of his surrendering his stock.[41] A subscriber may be released by an unreasonable delay in the organization of a corporation.[42] A subscriber cannot release himself from his obligation on a subscription by voluntarily surrendering or abandoning his stock without the consent of the corporation.[43]

STOCKHOLDERS

2063. Who are stockholders—In order to constitute one a stockholder in a corporation it is unnecessary that the stock certificate to which he is entitled be issued.[44] One to whom corporate stock has been transferred as collateral security, but who appears upon the books of the corporation as the general owner thereof, is liable as a stockholder for the debts of the corporation. Where, however, shares of stock are transferred to a party as collateral security, and they are so registered in the stock record of the corporation, whereby his true relation to the stock appears, he is not liable as a stockholder for the debts of the corporation.[45] A pledgee of stock shares does not become a stockholder in a corporation, as between himself, the pledgor, and the corporation, by simply receiving the shares as collateral security; nor does the pledgor part with his ownership of the shares, nor is he divested of his rights as a stockholder, by merely pledging them as security for the payment of his debt.[46] When stock certificates are issued in contemplation of incorporation the issue of stock may, after incorporation, be adopted by the corporation, and the holders thereby become stockholders without the formal issue of new certificates.[47] Presumptively

[33] Mpls. etc. Ry. v. Bassett, 20–535(478).
[34] Columbia E. Co. v. Dixon, 46–463, 49+244; Hause v. Mannheimer, 67–194, 69+810.
[35] Augir v. Ryan, 63–373, 65+640.
[36] Blien v. Rand, 77–110, 79+606.
[37] Columbia E. Co. v. Dixon, 46–463, 49+244.
[38] Carter v. Hazzard, 65–432, 68+74.
[39] Wood v. Jefferson, 71–367, 74+149.
[40] Minnehaha etc. Assn. v. Legg, 50–333, 52+898.
[41] Farnsworth v. Robbins, 36–369, 31+349.
[42] Carter v. Hazzard, 65–432, 68+74.
[43] Minnehaha etc. Assn. v. Legg, 50–333, 52+898.
[44] Holland v. Duluth etc. Co., 65–324, 68+50; Columbia E. Co. v. Dixon, 46–463, 49+244; Marson v. Deither, 49–423, 52+38.
[45] Harper v. Carroll, 66–487, 69+610, 1069; State v. Bank of New England, 70–398, 73+153; Field v. Evans, 106–85, 118+55.
[46] McMullan v. Dickinson Co., 63–405, 65+661, 663.
[47] Thorpe v. Pennock, 99–22, 108+940.

those are stockholders who appear as such on the stock books of a corporation.[48] The term "associates" in acts of incorporation is ambiguous. It may mean those who are already associated with the persons named, or those who may come in afterwards.[49] As against creditors a person may be estopped from denying that he is a stockholder. Parties dealing with corporations have a right to assume that one representing himself to the world as a stockholder in such corporation, by permitting his name to stand on its books as such, must take the responsibilities of the situation.[50] A person cannot be made a stockholder without his consent.[51] A mutual recognition by the corporation and a transferee of stock of the relation of stockholder may be sufficient to establish the relation without a formal transfer on the corporate books.[52] Cases are cited below involving questions as to membership in corporations.[53]

2064. Qualifications—Limitation of nationality—In the absence of a statute to the contrary the right to membership in a corporation may be restricted by express provision of its charter, as, for example, to persons of a certain nationality.[54] When the charter does not regulate the admission of new members or place any restriction thereon, the whole matter is within the control of the corporation.[55]

2065. Relation to corporation—A mere stockholder is not an agent of the corporation.[56] A corporation is not ordinarily bound or estopped by the acts of a stockholder.[57]

2066. Relation to each other—While stockholders owe the duty of good faith to each other in the management of the affairs of the corporation, they do not stand toward each other in a fiduciary relation. They are not trustees or agents for each other in the matter of voting at stockholders' meetings.[58]

2067. Trust relation between corporation and stockholders—It is sometimes said that there is a trust relation between a corporation and its stockholders—that a corporation is a trustee of the corporate property, for the benefit of the stockholders, in proportion to the stock held by them.[59]

2068. Powers—Except as otherwise provided, the powers of a corporation are to be exercised by the stockholders acting together as a body, in their organized capacity.[60] The right to elect the trustees or directors of a corporation is in its stockholders, in the absence of express provision to the contrary.[61]

2069. Right to sue and defend—It is the general rule that a stockholder cannot maintain an action on a cause of action accruing to the corporation.[62]

[48] Holland v. Duluth etc. Co., 65–324, 68+50. See Basting v. Northern T. Co., 61–307, 63+721.

[49] State v. Sibley, 25–387.

[50] Olson v. State Bank, 67–267, 69+904; Palmer v. Bank of Zumbrota, 72–266, 75+380; Blien v. Rand, 77–110, 79+606; State v. Germania Bank, 90–150, 95+1116; Hunt v. Hauser, 90–282, 96+85; Id., 95–206, 103+1032; Dunn v. State Bank, 59–221, 61+27; Atwater v. Smith, 73–507, 76+253; Atwater v. Stromberg, 75–277, 77+963; Thorpe v. Pennock, 99–22, 33, 108+940.

[51] Basting v. Northern T. Co., 61–307, 313, 63+721.

[52] Basting v. Northern T. Co., 61–307, 63+721; Oswald v. Mpls. T. Co., 65–249, 68+15.

[53] State v. Sibley, 25–387 (failure to sign by-laws and constitution—membership acquiesced in for long time by corporation); State v. Oftedal, 72–498, 75+692 (religious society—conference—effect of custom); Scandinavian Am. Bank v. Mechanics B. Soc., 78–483, 81+528 (surrender of stock—evidence held to show party a stockholder); Hunt v. Reardon, 93–375, 101+606 (finding as to ownership of stock justified by the evidence).

[54] Blien v. Rand, 77–110, 79+606.

[55] State v. Sibley, 25–387.

[56] Dunn v. State Bank, 59–221, 229, 61+27.

[57] Miss. etc. Co. v. Prince, 34–79, 24+361.

[58] Bjorngaard v. Goodhue Co. Bank, 49–483, 487, 52+48.

[59] Jones v. Morrison, 31–140, 152, 16+854.

[60] State v. Sibley, 25–387.

[61] State v. Oftedal, 72–498, 512, 75+692.

[62] Rothwell v. Robinson, 39–1, 38+772; Horn v. Ryan, 42–196, 44+56; Mealey v.

But there are certain exceptions to the general rule. A stockholder in a corporation may sue both at law and in equity in his own name in behalf of its interest and to vindicate a wrong done to it, when it cannot or will not do so in its corporate capacity; and under like circumstances a stockholder may defend in his own name an action brought against a corporation.[63] He may maintain an action to protect his interests against the illegal, ultra vires, or fraudulent acts, of the managers of the corporation, or the majority stockholders.[64] If a plaintiff is a legal stockholder, his rights do not depend on the manner in which he obtained his stock.[65] A stockholder may maintain an action to protect his rights as a stockholder though he paid less than par for his stock. A request to the managing officers of a corporation to institute an action to set aside and cancel a fraudulent issue of corporate stock, and their refusal, is all that is necessary to enable an individual stockholder to maintain the suit. It is unnecessary that he go further, and request other stockholders to commence the action.[66]

2070. Right to inspect corporate books—A stockholder has a right, for proper purposes, to inspect the books and to investigate the affairs of the corporation, subject to reasonable limitations as to time and manner.[67]

2071. Rights in corporate property—Corporate property belongs to the corporation and not to its stockholders. The members of a corporation are of course interested in the corporate property, for they may derive individual benefit from its use or from its proceeds, but they are not the owners of it. They have no power to transfer or dispose of it, or to appropriate it to their own use.[68]

2072. Right to profits—Dividends—Statute enforcing—Stockholders are entitled to the profits of the business and to have such profits seasonably divided among them in proportion to the amounts of stock held by them respectively. A corporation has no right, against the protest of any stockholder, to go on year after year, adding profits to capital, and accumulating property indefinitely as to time or amount. A statute enforcing dividends out of profits invades no right vested in the corporation, and enforces the rights of the stockholders.[69] It happens not infrequently that corporations, instead of distributing their profits in the way of dividends to stockholders, accumulate them till a large surplus is on hand. Each stockholder has an interest in such surplus which the courts will protect.[70]

2073. Contracting with corporation—A stockholder who is not an officer is as free to contract with the corporation as a stranger.[71] A sale of the assets of an insolvent corporation to a stockholder who had the controlling vote has been sustained, the sale being approved by a majority of the stockholders.[72]

2074. Rights of minority stockholders—Courts will protect minority stockholders against the acts of the directors or majority stockholders when

Nickerson, 44–430, 46+911; Hodgson v. Duluth etc. Ry., 46–454, 49+197; Pencille v. State etc. Co., 74–67, 76+1026.

[63] Morrill v. Little Falls Mfg. Co., 46–260, 48+1124; Id., 53–371, 55+547; Id., 60–405, 62+548; Baldwin v. Canfield, 26–43, 1+261 (action by stockholder to remove cloud on title of property of corporation).

[64] See § 2074.

[65] Stewart v. Erie etc. Co., 17–372(348).

[66] Shaw v. Staight, 107–152, 119+951.

[67] R. L. 1905 § 2869; Dunn v. State Bank, 59–221, 229, 61+27; State v. Monida etc. Co., 124+971. See Note, 107 Am. St. Rep. 674.

[68] St. Paul etc. Ry. v. McDonald, 34–182, 188, 25+57; Baldwin v. Canfield, 26–43, 56, 1+261. See Merchant v. Western L. Assn., 56–327, 57+931.

[69] Merchant v. Western L. Assn., 56–327, 57+931.

[70] Jones v. Morrison, 31–140, 152, 16+854.

[71] See St. Paul etc. Ry. v. McDonald, 34–182, 25+57; Rosemond v. N. W. etc. Co., 62–374, 64+925; Church v. Church C. Co., 75–85, 77+548; Petrie v. Mut. etc. Co., 92–489, 100+236.

[72] Roberts v. Herzog, 124+997.

they are ultra vires,[73] illegal,[74] or fraudulent.[75] As a general rule, however, the management of corporations must be left to the will of the directors and majority stockholders, free from interference by the courts. For example, a minority stockholder has no right to insist, against the will of the majority, that the business shall be continued at a loss.[76] A minority stockholder may resist, in the courts, a misapplication of the corporate assets,[77] or a transfer of the corporate business to another corporation,[78] or an impairment of his contract rights as fixed by the charter or articles of incorporation.[79] The right to control a joint stock corporation is vested in the holders of the majority of the stock.[80] When the purposes for which the corporation was organized have failed, a minority of the stockholders may have the affairs of the corporation wound up by a court of equity.[81] The appointment of a receiver of a solvent corporation on the application of a minority of the stock is a very drastic remedy and justifiable only in an extreme case. Still, the management of the corporate affairs by the directors, elected by a majority of the stock, may, even in the absence of positive fraud or illegal acts, be so grossly incompetent or negligent as to justify the appointment of a receiver to preserve the property from destruction.[82]

2075. Estoppel of minority stockholders—It is inequitable for a stockholder, knowing that an act done by the directors and a majority of the stockholders, in good faith, for the benefit of the corporation, is in fact unauthorized, to apparently acquiesce by his silence, but secretly reserve an option to repudiate the act in case of loss, or to enjoy its benefits if it proves profitable. Fairness requires, in such cases, that dissenting shareholders should act promptly, and make known their objections without unreasonable delay. If they fail to do so, their assent to the unauthorized act will be presumed, and they will be estopped from denying that they have assented to or ratified the act.[83]

2076. Notice to corporation not notice to members—A mere stockholder is not chargeable with notice of the contracts of the corporation and their breach.[84]

2077. Notice to members as notice to corporation—If notice to members is ever notice to the corporation it is only when all the members have notice.[85]

2078. When bound by judgment against corporation—In proceedings against a corporation, the corporation, when duly summoned and brought into court, represents the stockholders; and all stockholders, in so far as the interests and affairs of the corporation are concerned, are bound by the judgment of the court. But the stockholders are not bound by any such judgment as re-

[73] Stewart v. Erie etc. Co., 17–372(348); Bergman v. St. Paul etc. Assn., 29–275, 13+120; Small v. Mpls. etc. Co., 45–264, 47+797; Kolff v. St. Paul F. Exch., 48–215, 50+1036.

[74] Stewart v. Erie etc. Co., 17–372(348).

[75] Jones v. Morrison, 31–140, 16+854; Bjorngaard v. Goodhue Co. Bank, 49–483, 52+48; Pencille v. State Farmers' etc. Co., 74–67, 76+1026; Roberts v. Herzog, 124+997.

[76] Rothwell v. Robinson, 44–538, 47+255. See Figge v. Bergenthal, 109(Wis.)+581, 589.

[77] Jones v. Morrison, 31–140, 16+854; Rothwell v. Robinson, 39–1, 38+772. See, as to the right of a stockholder to complain of acts committed before he became a stockholder, 21 Harv. L. Rev. 195.

[78] Small v. Mpls. etc. Co., 45–264, 47+797. See Pinkus v. Mpls. L. Mills, 65–40, 67+643; St. Paul T. Co. v. St. Paul etc. Co., 60–105, 61+813.

[79] Bergman v. St. Paul etc. Assn., 29–275, 13+120; Id., 29–282, 13+122.

[80] Beyer v. Woolpert, 99–475, 109+1116.

[81] Sjoberg v. Security S. & L. Assn., 73–203, 75+1116.

[82] Rothwell v. Robinson, 44–538, 47+255.

[83] Pinkus v. Mpls. L. Mills, 65–40, 67+643; Stewart v. Erie etc. Co., 17–372(348); Barton v. Pioneer S. & L. Co., 69–85, 71+906; Roberts v. Herzog, 124+997.

[84] Tarbox v. Gorman, 31–62, 16+466.

[85] Mercantile Nat. Bank v. Parsons, 54–56, 55+825. See Whittle v. Vanderbilt etc. Co., 83 Fed. 48.

spects their individual interests or liability. A judgment adopting and effectuating the reorganization of a bank provided that the reorganization should not operate to release any of the stockholders in any way or to any extent from their liability theretofore existing. It was held ineffectual as against stockholders who were not parties to such proceedings and did not become members of the new bank.[86] The effect of judgments in proceedings to enforce the liability of stockholders is considered elsewhere.[87]

2079. Meetings—*a. Notice*—The presumption is that notice was duly given.[88] If the charter or by-laws fix the time and place of regular meetings no further notice is necessary.[89] If the required notice is given it is immaterial that a stockholder resides or is temporarily at such a distance that it cannot reach him in time to enable him to attend.[90] The subject of notice is partially regulated by statute.[91] If the proper notice is not given the action of the meeting may be subsequently ratified.[92] Mandamus will lie to compel a resident of this state, the secretary of a domestic corporation, to call a stockholders' meeting pursuant to a by-law of the corporation.[93]

b. Who entitled to vote—Where stock is transferable only on the books of the corporation, the person in whose name the stock stands on such books is entitled to vote it, and the books of the company are conclusive upon the question as to who is entitled to vote stock legally issued.[94] Before one can complain that his vote was not taken, he must show that he offered to vote, or that he properly presented his claim of right to vote, and that it was excluded. If the charter and by-laws prescribe no different rule, and the meeting appoints no tellers or inspectors for the purpose, it is for the meeting to determine, in the first instance, the right to vote. The president of the corporation or chairman of the meeting has no authority to pass upon it. One who, upon an adverse opinion expressed by that officer, refrains from offering his vote, and does not present his claim of right to the meeting for it to pass upon, cannot be heard afterwards to complain.[95] Stockholders are not disqualified to vote, upon a matter coming before a stockholders' meeting, by the fact that they may have a personal interest in the matter, as upon a proposition to ratify a purchase of property from themselves which they as directors had assumed to make.[96] The holders of all outstanding stock are entitled to vote, though their stock was improperly issued, if its invalidity has not been judicially determined.[97]

c. Quorum—Unless otherwise provided in the charter or the by-laws of a corporation, such of the stockholders as actually assemble at a properly convened meeting, whether one or more, and though a minority of the whole number, and representing only a minority of the stock, constitute a quorum for the transaction of business.[98] At a valid stockholders' meeting, the charter and by-laws being silent on the subject, a majority of the votes cast, though but a minority of the stock represented, prevails. Those having an opportunity to vote, and not voting, are held to acquiesce in the result of the votes actually cast.[99]

[86] Willius v. Mann, 91–494, 98+341, 867; Swing v. Red River L. Co., 105–336, 117+442; Lagerman v. Casserly, 107–491, 120+1086.

[87] See § 2148.

[88] East Norway Lake etc. Church v. Froislie, 37–447, 35+260.

[89] Morrill v. Little Falls Mfg. Co., 53–371, 55+547.

[90] Jones v. Morrison, 31–140, 16+854.

[91] R. L. 1905 §§ 2875, 2980. See Jones v. Morrison, 31–140, 16+854.

[92] East Norway Lake etc. Church v. Froislie, 37–447, 35+260; State v. Sibley, 25–387.

[93] State v. De Groat, 109–168, 123+417.

[94] Morrill v. Little Falls Mfg. Co., 53–371, 55+547.

[95] State v. Chute, 34–135, 24+353.

[96] Bjorngaard v. Goodhue Co. Bank, 49–483, 52+48. See 16 Harv. L. Rev. 585.

[97] Beyer v. Woolpert, 99–475, 109+1116.

[98] Morrill v. Little Falls, 53–371, 55+547.

[99] State v. Chute, 34–135, 24+353.

d. Held out of state—A general stockholders' meeting for the election of officers held out of the state, all of the stockholders not consenting, and the by-laws providing that it shall be held at a specified place in the state, is illegal, and, as against the officers thus elected, those previously in office have the right to retain control of the affairs of the corporation.[1]

e. Presumption of regularity—A presumption is indulged in favor of the regularity of meetings.[2]

LIABILITY OF STOCKHOLDERS

2080. Constitutional liability—*a. Nature and extent*—It is provided by the constitution that each stockholder in any corporation, excepting those organized for the purpose of carrying on a manufacturing, mechanical, or banking business, shall be liable to the amount of stock held or owned by him.[3] This provision is self-executing and creates an individual liability on the part of the stockholder for corporate debts to an amount equal to the amount of stock held or owned by him.[4] It is not restrictive. The legislature may increase the liability.[5] It is said to be of a contractual nature.[6] It is certainly not penal. It is several, and a judgment against one stockholder does not release another.[7] It is absolute and not ratable. A stockholder is not liable only ratably when some of the other stockholders are insolvent or beyond the jurisdiction of the court.[8] A new stockholder is liable for old debts. All those who are stockholders at the time the action is commenced are liable, though some of them were not stockholders at the time the corporate liability was incurred.[9] The liability extends to creditors who are stockholders.[10] The stockholders of annuity, safe-deposit, and trust companies are liable under this provision,[11] and so are stockholders of railway companies.[12] The legislature cannot exempt stockholders from the liability.[13] It sustains the relation of surety for the debts of the corporation.[14] It is not a corporate asset enforceable by the corporation, but goes directly to the creditors. It can be enforced only for the benefit of the creditors, and then only to the extent of paying the corporate debts unpaid after the corporate assets have been exhausted.[15]

b. How enforced—At the present time the exclusive mode of enforcing the liability is that prescribed by R. L. 1905 §§ 3184–3190.[16] Prior to Laws 1897 c. 341, receivers in sequestration proceedings were not authorized to enforce the liability;[17] nor were assignees for the benefit of creditors or in insolvency pro-

[1] Hodgson v. Duluth etc. Ry., 46–454, 49+197.

[2] Heintzelman v. Druids' R. Assn., 38–138, 36+100; East Norway Lake etc. Church v. Froislie, 37–447, 35+260.

[3] Const. art. 10 §§ 1, 3.

[4] Willis v. Mabon, 48–140, 50+1110; McKusick v. Seymour, 48–158, 50+1114; Bernheimer v. Converse, 206 U. S. 516.

[5] See Allen v. Walsh, 25–543, 551; Harper v. Carroll, 66–487, 69+610, 1069. But not retroactively. See Bernheimer v. Converse, 206 U. S. 516; Converse v. Aetna Nat. Bank, 64 Atl. (Conn.) 341; Robertson v. Sibley, 10–323(253).

[6] Hanson v. Davison, 73–454, 76+254. See, as to whether it is purely contractual, Christopher v. Norvell, 201 U. S. 216; Bernheimer v. Converse, 206 U. S. 516.

[7] Hanson v. Davison, 73–454, 76+254.

[8] First Nat. Bank v. Winona P. Co., 58–167, 59+997.

[9] First Nat. Bank v. Winona P. Co., 58–167, 59+997. See Gebhard v. Eastman, 7–56(40); Olson v. Cook, 57–552, 59+635.

[10] Oswald v. Mpls. T. Co., 65–249, 68+15; Janney v. Mpls. I. Expo., 79–488, 82+984.

[11] International T. Co. v. Am. etc. Co., 62–501, 65+78, 632.

[12] Gardner v. Mpls. etc. Ry., 73–517, 76+282.

[13] Anderson v. Anderson, 65–281, 68+49.

[14] Mpls. B. Co. v. City Bank, 66–441, 444, 69+331.

[15] In re People's L. S. Ins. Co., 56–180, 185, 57+468; Mpls. B. Co. v. City Bank, 66–441, 445, 69+331; Richardson v. Merritt, 74–354, 362, 77+234, 407, 968; Hunt v. Roosen, 87–68, 79, 91+259.

[16] See §§ 2163–2173.

[17] Mpls. B. Co. v. City Bank, 66–441, 69+331.

ceedings.[18] The liability of the estate of a deceased stockholder for corporate debts is not a claim which can be presented to a probate court for allowance.[19]

c. Manufacturing or mechanical business—Stockholders in a corporation organized for the purpose of carrying on a manufacturing or mechanical business are exempted from the constitutional liability imposed on stockholders in other corporations.[20] The articles of an alleged manufacturing corporation are the sole criterion for determining the intention of the incorporators and the purposes for which the corporation was organized, and, unless it fairly appears therefrom that it was organized for the exclusive purpose of engaging in manufacturing and such incidental business as may be reasonably necessary for effectuating the purposes of its organization, its stockholders are liable for its debts to the amount of stock held by them.[21] A "mechanical business" within the meaning of the constitution is one closely allied to, or incidental to, some kind of manufacturing business.[22] The purpose of the exemption was to encourage manufacturing enterprises.[23] The mere fact that a corporation does business not authorized by its charter does not render its stockholders liable.[24]

2081. Enforcement in other states—Under the provisions of R. L. 1905 §§ 3184–3190, a receiver or assignee of an insolvent corporation may enforce the liability in the courts of another state, including the federal courts.[25] Prior to express statutory authority he could not do so.[26]

2082. Conflict of laws—Where a person becomes a stockholder in a corporation organized under the laws of a foreign state, he contracts with reference to all the laws of that state which enter into the constitution of the corporation; hence the extent of his individual liability, as a shareholder, for corporate debts, must be determined by the laws of that state. This liability may be enforced by creditors wherever they can obtain jurisdiction of the necessary parties. The remedy, however, is governed by the law of the forum.[27]

2083. Liability in equity on bonus or watered stock—The original holders of bonus or watered stock issued as paid-up, and their transferees with notice, will, in case of the insolvency of the corporation, be charged, in favor of a creditor who became such after the stock was issued, with the difference between the par value of the stock and the amount paid the corporation therefor, to the extent necessary to satisfy the creditor's claim.[28] They are not chargeable in

[18] Olson v. Cook, 57–552, 59+635; International T. Co. v. Am. L. & T. Co., 62–501, 65+78, 632.

[19] In re Martin, 56–420, 57+1065.

[20] Const. art. 10 § 3.

[21] Merchants' Nat. Bank v. Minn. T. Mfg. Co., 90–144, 95+767; Senour v. Church, 81–294, 84+109; State v. Minn. T. Mfg. Co., 40–213, 41+1020; Mohr v. Minn. El. Co., 40–343, 41–1074; Arthur v. Willius, 44–409, 46+851; Densmore v. Shepard, 46–54, 48+528; First Nat. Bank v. Winona P. Co., 58–167, 59+997; Oswald v. St. Paul etc. Co., 60–82, 61+902; Anchor I. Co. v. Columbia E. Co., 61–510, 63+1109; St. Paul B. Co. v. Mpls. D. Co., 62–448, 64+1143; Hastings v. Iron Range B. Co., 65–28, 67+652; Cowling v. Zenith I. Co., 65–263, 68+48; Anderson v. Anderson, 65–281, 68+49; Holland v. Duluth etc. Co., 65–324, 68+50; Commercial Bank v. Azotine Mfg. Co., 66–413, 69+217; Nicollet Nat. Bank v. Frisk, 71–413, 74+160; Minn. etc. Co. v. Regan, 72–431, 75+722; Cuyler v. City Power Co., 74–22, 76+948; Gould v. Fuller, 79–414, 82+673; Citizens State Bank v. Story, 84–408, 87+1016; Meen v. Pioneer P. Co., 90–501, 97+140; First Nat. Bank v. Converse, 200 U. S. 425; Bernheimer v. Converse, 206 U. S. 516.

[22] Cowling v. Zenith I. Co., 65–263, 68+48; Gould v. Fuller, 79–414, 82+673.

[23] State v. Minn. T. Mfg. Co., 40–213, 41+1020; Nicollet Nat. Bank v. Frisk, 71–413, 74+160.

[24] Nicollet Nat. Bank v. Frisk, 71–413, 74+160.

[25] Berheimer v. Converse, 206 U. S. 516.

[26] Hale v. Allinson, 188 U. S. 56; Finney v. Guy, 189 U. S. 335.

[27] First Nat. Bank v. Gustin, 42–327, 44+198.

[28] Wallace v. Carpenter, 70–321, 73+189; Hospes v. N. W. etc. Co., 48–174, 50+1117; McConey v. Belton etc. Co., 97–190, 106+900. A different rule prevailed in the case of mining companies under

favor of a creditor who became such before the stock was issued [29] or with notice that it was issued without full payment.[30] In an action by a creditor to collect his judgment against an insolvent corporation from the holder of bonus or watered stock issued as paid-up, the burden is on such holder to show that he acquired his stock bona fide without actual notice of the facts making its issue fraudulent as to the creditor, or that he purchased his stock from a bona fide transferrer.[31] It is the settled law of this state that, in an action by creditors of an insolvent corporation, or by a receiver acting for them, against it and its stockholders to recover from them the respective amounts, so far as may be necessary to satisfy the claims of creditors, unpaid upon stock held by them, whether it was issued as bonus stock or otherwise, it will be presumed that the creditors relied upon the professed capital stock of the corporation, and induced thereby gave it credit without direct proof of the fact.[32]

2084. Same—Basis of liability—In the federal courts the liability stated in the preceding paragraph is based on the trust fund doctrine.[33] Our supreme court has repudiated this doctrine and bases the liability on the ground of fraud.[34] It is questionable whether the fraud theory is an improvement on the trust theory which it supplanted in this state. It would collapse utterly if it were not bolstered up by arbitrary presumptions.[35] In the absence of statute, it would probably have been better if the courts had denied the liability altogether, or based it on grounds of public policy.[36] In this state the liability might well be based on our statute.[37]

2085. Statutory liability on watered and bonus stock—The liability of holders of bonus or watered stock to creditors has been treated in this state as of an equitable nature. In the Hospes case it was said that we had no statute against the issuance of watered stock.[38] In this the court erred. We had then and have now a statute which forbids the issuance of watered stock.[39] There seems no reason why the liability of holders of watered stock should not be based on the statute, or at least on public policy as evidenced by the statute. If it were, it would be immaterial whether a subsequent creditor had notice or not.[40]

2086. Stock paid for in overvalued property—A corporation, unless prohibited by some constitutional or statutory provision, may, in good faith, issue paid shares of its stock for the purchase of property at a fair valuation; and in such case both the corporation and its creditors will be bound thereby. But if there is a material overvaluation of the property, to the knowledge of the contracting parties, the transaction is fraudulent as to subsequent creditors of the corporation without notice; and, if it becomes insolvent, the shareholders so

G. S. 1878 c. 34 § 149. Ross v. Kelly, 36–38, 29+591, 31+219.

[29] Hospes v. N. W. etc. Co., 48–174, 50+1117.

[30] First Nat. Bank v. Gustin, 42–327, 44+198.

[31] Wallace v. Carpenter, 70–321, 73+189.

[32] Dwinnell v. Mpls. etc. Ins. Co., 97–340, 106+312; Hastings v. Iron Range B. Co., 65–28, 67+652; Hospes v. N. W. etc. Co., 48–174, 50+1117; First Nat. Bank v. Gustin, 42–327, 44+198.

[33] See Sanger v. Upton, 91 U. S. 56; Hollins v. Brierfield etc. Co., 150 U. S. 371; McDonald v. Williams, 174 U. S. 397; 20 Harv. L. Rev. 401.

[34] Hospes v. N. W. etc. Co., 48–174, 50+1117; 20 Harv. L. Rev. 401. Prior to the Hospes case our court had recognized the trust fund doctrine. Farnsworth v. Robbins, 36–369, 31+349; Ross v. Kelly, 36–38, 29+591; Patterson v. Stewart, 41–84, 90, 42+926; Minn. T. Mfg. Co. v. Langdon, 44–37, 46+310.

[35] See 12 Yale L. Journal 76; 15 Harv. L. Rev. 844.

[36] See 34 Am. L. Reg. (N. S.) 448; 15 Harv. L. Rev. 844.

[37] See § 2085.

[38] Hospes v. N. W. etc. Co., 48–174, 196, 50+1117.

[39] R. L. 1905 § 2878; Wallace v. Carpenter, 70–321, 73+189.

[40] See 20 Harv. L. Rev. 402; Eastern Nat. Bank v. Am. etc. Co., 64 Atl. (N. J.) 917.

paying for their stock will be charged in favor of such creditors with the difference between the real value of the property and the par value of their stock.[41]

2087. Statutory liability for unpaid instalment on stock—It is provided by statute that every stockholder shall be personally liable for corporate debts "for all unpaid instalments on stock owned by him or transferred for the purpose of defrauding creditors."[42] It has been held that a similar statute of another state was merely declaratory of the common law.[43] The statute is inapplicable to foreign corporations.[44] In the absence of fraud the liability of a stockholder does not continue after the transfer of his stock. In other words a transferee is liable for instalments unpaid at the time the stock was transferred to him.[45] A claim under the statute may be proved in the probate court.[46] The liability is not enforceable at the instance of an individual creditor after a receiver has been appointed for an insolvent company.[47] If a stockholder, who is indebted to the company on his subscription, transfers the stock without consideration, and after the corporation has become insolvent and in debt, a prima facie case of fraudulent transfer is made out.[48] In purchasing stock the transferee impliedly agrees with the transferrer to pay all future calls.[49]

2088. Actions to enforce—In general—Under R. L. 1905 § 2865 a creditor of a corporation may sue the corporation for the debt, and join as defendants one or more of the stockholders to enforce their individual liability; and in such an action it is unnecessary to join all the creditors of the corporation, or all the stockholders subject to individual liability.[50] The corporation is not a necessary party when judgment has been obtained against it and an execution thereon returned unsatisfied.[51] An action under the statute is somewhat in the nature of a garnishment—an action which may be brought against any solvent, active corporation, and which may be prosecuted to satisfaction without interfering with its continuing its business.[52] The constitutional liability of a stockholder is not enforceable in the action.[53]

2089. For misconduct—The statute renders a stockholder personally liable for corporate debts when he is guilty of certain forms of misconduct.[54] The statute is drastic and is to be applied cautiously.[55] It is not penal.[56] An action at law will lie under the statute by a single creditor if he has suffered peculiar damage. The measure of his recovery is the amount of his debt and not merely the amount of his loss.[57] An action under the statute cannot be

[41] Hastings v. Iron Range B. Co., 65–28, 67+652. See Smith v. Prior, 58–247, 59+1016; Browning v. Hinkle, 48–544, 51+605.

[42] R. L. 1905 § 2865.

[43] First Nat. Bank v. Gustin, 42–327, 44+198.

[44] Rule v. Omega etc. Co., 64–326, 67+60.

[45] In re People's etc. Co., 56–180, 57+468; Gunnison v. U. S. Invest. Co., 70–292, 73+149; McConey v. Belton etc. Co., 97–190, 106+900; Basting v. Northern T. Co., 61–307, 63+721.

[46] Nolan v. Hazen, 44–478, 47+155; State v. Probate Ct., 66–246, 68+1063.

[47] Merchants' Nat. Bank v. N. W. etc. Co., 48–361, 51+119.

[48] McConey v. Belton etc. Co., 97–190, 106+900.

[49] Basting v. Northern T. Co., 61–307, 63+721.

[50] Merchants Nat. Bank v. Bailey, 34–323, 25+639; First Nat. Bank v. Gustin, 42–327, 44+198; In re People's etc. Co., 56–180, 57+468. See Dodge v. Minn. etc. Co., 16–368(327).

[51] Nolan v. Hazen, 44–478, 47+155. See Dodge v. Minn. etc. Co., 16–368(327); McConey v. Belton etc. Co., 97–190, 106+900.

[52] Merchants Nat. Bank v. Bailey, 34–323, 25+639.

[53] Winnebago P. Mills v. N. W. etc. Co., 61–373, 63+1024.

[54] R. L. 1905 § 2865(3).

[55] Rice v. Madelia etc. Co., 87–398, 92+225.

[56] Nat. New Haven Bank v. N. W. etc. Co., 61–375, 63+1079; Flowers v. Bartlett, 66–213, 68+976. See Hanson v. Davison, 73–454, 460, 76+254.

[57] Nat. New Haven Bank v. N. W. etc. Co., 61–375, 63+1079.

joined with one to enforce the constitutional liability of stockholders.[58] Prior to the revision of 1905 the statute imposed liability for "unfaithfulness" on the part of an officer.[59] Under the statute a person who is induced to become a creditor of an insolvent corporation by reason of the negligence or other unfaithfulness of an officer thereof, and is injured thereby, may maintain an action against such officer for the amount of his debt. And when the creditor of such insolvent corporation is induced to become such by reason of the fraud of an inferior officer, and the negligence of a superior officer, and is injured thereby, he may maintain an action for the amount of his debt against such superior officer.[60]

2090. For non-compliance with statute in organization—It is provided by statute that every stockholder shall be personally liable for corporate debts "for failure of the corporation to comply substantially with the provisions as to organization and publicity." [61] This refers to a non-compliance with the provisions of R. L. 1905 §§ 2850, 2851, relating to the filing and publication of the articles of incorporation.[62]

2091. Charter provisions—The liability of stockholders for corporate debts is sometimes fixed by charter.[63]

2092. Liability as partners—The members of a de facto corporation are not ordinarily liable as partners.[64] The members of a pretended corporation which is not even a de facto corporation are not liable as partners, if the object of the association is not pecuniary profit, but they are liable individually upon ordinary grounds of contract and agency.[65] If the pretended corporation is designed for pecuniary profit, it seems that the members are liable as partners, at least if the association involves the essential elements of a partnership and there is no estoppel.[66] The law on this subject is not well settled in this state.

2093. Avoiding liability by contract—Stockholders cannot avoid their liability to creditors by agreement among themselves or with the corporation.[67] It has been held that where a person accepts the written obligation of a corporation, and at the same time orally agrees that the stockholders should incur no personal liability for the claim, the agreement is binding, and may be proved by parol evidence as a distinct and separate oral agreement.[68]

2094. Effect of transfer of stock—A stockholder cannot affect his constitutional liability for the prior debts of the corporation by a bona fide sale of his stock to a solvent party, and a transfer thereof on the books of the corporation.[69] A defendant, who was a former stockholder, transferred his stock before any time at which it appears that any indebtedness had been incurred by the corporation, or it had become insolvent: but it was alleged in the complaint, among other things, that the transfer was made for the purpose of avoiding the stock-

[58] Sturtevant v. Mast, 66–437, 69+324. See N. W. Railroader v. Prior, 68–95, 70+869.

[59] Rice v. Madelia etc. Co., 78–124, 80+853; Id., 87–398, 92+225.

[60] Nat. New Haven Bank v. N. W. etc. Co., 61–375, 63+1079.

[61] R. L. 1905 § 2865. See Nolan v. Hazen, 44–478, 47+155.

[62] Nat. New Haven Bank v. N. W. etc. Co., 61–375, 63+1079.

[63] Gebhard v. Eastman, 7–56(40). See Robertson v. Sibley, 10–323(253).

[64] Richards v. Minn. Sav. Bank, 75–196, 77+822; Johnson v. Okerstrom, 70–303, 73+147; Finnegan v. Noerenberg, 52–239, 53+1150; Foster v. Moulton, 35–458, 29+155. See Christian v. Bowman, 49–99, 51+663.

[65] Johnson v. Corser, 34–355, 25+799.

[66] Sheren v. Mendenhall, 23–92; Holbrook v. St. Paul etc. Co., 25–229. See Foster v. Moulton, 35–458, 29+155; Christian v. Bowman, 49–99, 51+663; Roberts v. Schlick, 62–332, 64+826; 19 Harv. L. Rev. 389.

[67] Atwater v. Stromberg, 75–277, 77+963; Atwater v. Smith, 73–507, 76+253.

[68] Oswald v. Mpls. T. Co., 65–249, 253, 68+15.

[69] Gunnison v. U. S. Invest. Co., 70–292, 73+149.

holders' liability, and was not bona fide, no consideration was paid therefor, and that he was still the beneficial owner and holder of the stock. It was held on demurrer that the complaint alleged a cause of action against him.[70] Where a complaint states facts sufficient to establish a stockholder's liability under the constitution, by reason of his ownership of stock at a time when the corporation was in debt and insolvent, such issue is not waived by the additional allegation that the stock had subsequently been transferred in bad faith and without consideration. Such stockholder is liable upon his stock, notwithstanding the fact that he had subsequently transferred the same in good faith for a valuable consideration, and it is error to dismiss the action at the close of plaintiff's case upon the ground that the evidence is insufficient, and upon the ground that plaintiff abandoned the cause of action in not proving a legal transfer of the stock as alleged. The original stockholder is liable in an independent action, and it is unnecessary to make the transferee a party. If defendant desires to have him made a party upon the ground that execution might be enforced against him in the first instance, because of his primary liability, application should be made for such purpose.[71]

2095. Tenant in common—When a tenant in common has an undivided half interest in stock he is liable for only one-half of the constitutional liability on the stock.[72]

DIRECTORS

2096. Relation to corporation—Trustees—It is often said that the directors of a corporation are its agents.[73] While they are not trustees in the sense of holding the legal title to any of its property for its benefit or that of its stockholders or creditors,[74] their relation to the corporation and stockholders is fiduciary,[75] and as respects their possession and control of the corporate property they are quasi trustees.[76]

2097. Relation to creditors of corporation—Directors of a corporation are not in any contractual relation with its creditors, but they are liable to them if they do them a legal injury.[77]

2098. Powers—In general—The board of directors is invested with general power to manage the corporation.[78] This power, though very great, is subject to the limitation that it must be exercised solely in pursuance of the company's chartered purposes and for the benefit of the stockholders.[79] It belongs to the directors collectively and not individually.[80] Unless otherwise provided the board of directors has authority to fix the compensation of officers of the corporation. When, however, as directors, they fix the compensation for their own

[70] Pioneer F. Co. v. St. Peter etc. Co., 64–386, 67+217.

[71] Tiffany v. Giesen, 96–488, 105+901.

[72] Markell v. Ray, 75–138, 77+788.

[73] Jones v. Morrison, 31–140, 148, 16+854; Patterson v. Stewart, 41–84, 90, 42+926; Horn v. Ryan, 42–196, 44+56; Browning v. Hinkle, 48–544, 51+605; State v. Kortgaard, 62–7, 10, 64+51; State v. Oftedal, 72–498, 75+692; Janney v. Mpls. I. Expo., 79–488, 82+984. They are not agents of a majority of the stockholders, but of the corporate entity. If they were agents of the stockholders the latter could revoke their authority and themselves manage the corporation, but it is well settled that they cannot do so. See 19 Harv. L. Rev. 620; 20 Id. 225.

[74] Janney v. Mpls. I. Expo., 79–488, 496, 82+984.

[75] Horn v. Ryan, 42–196, 44+56; Mower v. Staples, 32–284, 288, 20+225; Currie v. School Dist., 35–163, 27+922; Janney v. Mpls. I. Expo., 79–488, 496, 82+984; Taylor v. Mitchell, 80–492, 496, 83+418; Klein v. Funk, 82–3, 7, 84+460.

[76] Horn v. Ryan, 42–196, 44+56; Taylor v. Mitchell, 80–492, 83+418.

[77] Patterson v. Stewart, 41–84, 90, 42+926.

[78] R. L. 1905 §§ 2858, 2869.

[79] Jones v. Morrison, 31–140, 147, 16+854.

[80] Baldwin v. Canfield, 26–43, 1+261.

services, either as directors or other officers, their action is not necessarily conclusive on the corporation. They are agents of the corporation and their acts, when their own interest conflicts with that of the corporation, are prima facie voidable at the election of the corporation or of a stockholder. The directors of a corporation have no authority to appropriate its funds in paying claims which the corporation is under no legal or moral obligation to pay, as to pay for past services which have been rendered and paid for at a fixed salary previously agreed on, or under a previous agreement that there should be no compensation for them.[81] Directors are not authorized to amend the articles of incorporation.[82] Cases are cited below involving the authority of directors in various particulars.[83]

2099. Must act collectively—To bind the corporation directors must act collectively as a board and not individually.[84]

2100. Duty to enforce obligations—Directors are bound to see that the obligations of the corporation are faithfully performed.[85]

2101. Contracting with corporation—The rules stated elsewhere [86] as to contracts between a corporation and its officers apply to directors.[87] A contract between a director and the corporation is not voidable merely because made with a director, where all interested in the corporation, officers, directors, and stockholders, not only know of but consent to it, and the property acquired by it is kept and used by the corporation.[88] The relation of directors to their corporation is essentially a fiduciary one, and upon grounds of public policy, they are, as a general rule, inhibited from purchasing for their own benefit the property of the corporation, very much as a trustee is disqualified from purchasing for his own advantage the property of his cestui que trust.[89] But where the title, possession, and control of all the property of the corporation are in an assignee or receiver, who by order of the court, and subject to its approval, offers the property at public sale, a director who has interests to protect may, in good faith, purchase at such sale the property for his sole benefit. The transaction, however, will be jealously scrutinized by the court.[90] A court will refuse to give effect to arrangements of directors of a corporation to secure at its expense advantages to themselves. This applies whether a director deals with himself, or with the directors of whom he is one, or with a board of which he is a member.[91] Where directors contract with themselves their action may be ratified by the stockholders.[92] Cases are cited below involving dealings between directors and the corporation.[93]

[81] Jones v. Morrison, 31–140, 16+854; Williams v. Little Falls etc. Co., 99–4, 108+289.

[82] State v. Oftedal, 72–498, 75+692.

[83] Western L. Assn. v. Ready, 24–350, 354 (authority to ratify unauthorized act of agent presumed); State v. Steele, 37–428, 34+903 (authority to reincorporate presumed); Heintzelman v. Druids' R. Assn., 38–138, 36+100 (to amend by-laws); Tripp v. N. W. Nat. Bank, 41–400, 43+60; Id., 45–383, 48+4 (to authorize assignment of corporation under insolvent law of 1881); Bjorngaard v. Goodhue Co. Bank, 49–483, 52+48 (authority of directors of a bank to buy building); Pinkus v. Mpls. L. Mills, 65–40, 67+643 (authority to exchange plant of failing business for stock in another corporation); Oswald v. St. P. etc. Co., 60–82, 61+902 (authority to lease building larger than necessary for corporate business).

[84] Baldwin v. Canfield, 26–43, 1+261; Cannon River etc. Assn. v. Rogers, 51–388, 53+759.

[85] Gill v. Russell, 23–362, 366.

[86] See § 2118.

[87] Savage v. Madelia etc. Co., 98–343, 108+296. See Currie v. School Dist., 35–163, 27+922; Bjorngaard v. Goodhue Co. Bank, 49–483, 52+48.

[88] Battelle v. N. W. etc. Co., 37–89, 33+327.

[89] Janney v. Mpls. I. Expo., 79–488, 82+984; Taylor v. Mitchell, 80–492, 83+418; Klein v. Funk, 82–3, 84+460.

[90] Janney v. Mpls. I. Expo., 79–488, 82+984.

[91] Young v. Mankato, 97–4, 105+969; Weed v. Little Falls etc. Ry., 31–154, 16+851.

[92] Bjorngaard v. Goodhue Co. Bank, 49–483, 52+48.

[93] Atwater v. Smith, 73–507, 76+253 (a

2102. Cannot prefer themselves as creditors—When a corporation is insolvent, its directors who are its creditors cannot, by taking advantage of their fiduciary relation, secure to themselves a preference over other creditors.[94]

2103. Liability to corporation for neglect of duty—The directors of a corporation are its agents, and occupy a fiduciary relation to it. They are therefore held to the exercise of good faith in all their dealings with the corporation, and in the management of its property; and in relation to their possession or control of the corporate property they are treated as quasi trustees. Their relation to the corporation necessarily forbids the use of its property for their own benefit and for any misfeasance or breach of duty resulting in damage to the corporation they are subject to be called to account by the corporation in the appropriate action. Where directors waste or misappropriate the funds or convert assets of the corporation in violation of their trust, or lose them in speculations, a recovery at law may be had against the defaulting directors, while a suit in equity might also be maintained for an accounting, at the election of the corporation. The directors of a moneyed corporation who wilfully abuse their trust or misapply the funds of the company, by which a loss is sustained, are personally liable to make good that loss; and they are equally liable if they suffer the corporate funds or property to be lost or wasted by gross negligence and inattention to the duties of their trust. And so, also, if there is a negligent abandonment of his official duty by a director, or if he leaves the entire control of the company's business to other agents, and fails to exercise the proper supervision, he is liable for losses which due attention and diligence on his part might have prevented. Directors are bound to use as much diligence and care as the proper performance of the duties of their office requires. What constitutes a proper performance of the duties of a director is a question of fact, which must be determined in each case in view of all the circumstances. The character of the company, the condition of its business, the usual method of managing such companies, and all other relevant facts must be taken into consideration. It is evident that no abstract reasoning can be of service in reaching a proper solution. In an action against directors of a corporation for misfeasance or culpable negligence in the discharge of their official duty, the corporation, and not the stockholders, is the proper party plaintiff. The form of the action may be legal or equitable, according to the circumstances of particular cases.[95]

2104. Ratification of unauthorized acts—The unauthorized acts of directors may be ratified by the stockholders.[96] A dissenting stockholder must act with reasonable promptness or he will be deemed to have acquiesced.[97]

2105. Compensation for non-official services—A director who performs services for the corporation outside the scope of his duties as a director may recover the amount agreed upon as compensation for such services, or the reasonable value thereof, in the absence of an agreement fixing the amount. But he cannot aid by his vote in fixing the amount of such compensation.[98]

corporation transferred to a director shares of its stock which it had received in payment of a debt and which it could not hold, and received in return the note of the director, the agreement being that a purchaser of the stock should be found as soon as possible—the corporation failed—in an action by the receiver the director was held liable on the note); Klein v. Funk, 82–3, 84+460 (maker of note to corporation when sued by directors not entitled to object that the directors could not acquire note from corporation).

[94] Taylor v. Mitchell, 80–492, 83+418; Taylor v. Fanning, 87–52, 91+269.

[95] Horn v. Ryan, 42–196, 44+56; Patterson v. Stewart, 41–84, 90, 42+926. See Briggs v. Spaulding, 141 U. S. 132.

[96] Bjorngaard v. Goodhue Co. Bank, 49–483, 52+48; Pinkus v. Mpls. L. Mills, 65–40, 67+643.

[97] Pinkus v. Mpls. L. Mills, 65–40, 67+643.

[98] Rogers v. Hastings & D. Ry., 22–25; Deane v. Hodge, 35–146, 27+917; Morse v. Home S. & L. Assn., 60–316, 62+112

2106. Compensation for use of property of director—Where a corporation used a patented article of a director it was held that he might recover compensation, upon an implied contract, notwithstanding his relation to the corporation.[99]

2107. Liability to creditors under R. L. 1905 § 2865—By statute directors of corporations are liable to creditors for corporate debts when guilty of certain forms of misconduct.[1]

2108. Liability to creditors under R. L. 1905 § 3069—By statute directors of manufacturing corporations are liable to creditors for corporate debts when guilty of certain wrongful acts or omissions.[2]

2109. Meetings—Notice—The fact that notice of a meeting is not given is immaterial if all the directors appear and participate in the proceedings.[3] There is a presumption in favor of the regularity of meetings and the proceedings therein. If the record of a meeting shows that a proposition was adopted the presumption is that it was legally adopted.[4] If the records of a meeting show that a quorum was present the presumption is that all were duly notified.[5] When notice of a meeting is given in accordance with the statute or by-laws it is sufficient, though a director may reside or be temporarily at such a distance that the notice will not reach him in time to enable him to attend.[6] Evidence of a want of notice has been held immaterial, where the party offering it was not in a position to take advantage of the objection, and there had been a subsequent ratification of the action of the board.[7]

OFFICERS AND AGENTS

2110. Election—The articles of a corporation provided that a board of directors should serve for one year, and until their successors were elected and qualified, and that the officers of the corporation should be chosen by the directors at their first meeting after their appointment or election, and hold office for one year, or until their successors were elected and qualified. The stockholders having failed to elect a board of directors at the annual meeting, the hold-over directors were authorized, at a meeting called for that purpose, subsequent to the annual meeting, to elect new officers as the successors of those holding over.[8]

2111. De facto—To make one a de facto officer, it is not enough that he claims to be an officer, or that some people think him an officer, or that he assumes to act as such. He must be acting as an officer under color of having been rightfully elected or appointed.[9]

See Forster v. Columbia Nat. Bank, 77–119, 79+605.

[99] Deane v. Hodge, 35–146, 27+917.

[1] R. L. 1905 § 2865(3); Nat. N. H. Bank v. N. W. etc. Co., 61–375, 63+1079; Flowers v. Bartlett, 66–213, 68+976; Sturtevant v. Mast, 66–437, 69+324; Rice v. Made ia etc. Co., 78–124, 80+853; Id., 87–398, 92+225. See § 2108.

[2] R. L. 1905 § 3069; Patterson v. Stewart, 41–84, 42+926 (nature of action to enforce liability—parties—joinder of corporation—judgment against corporation not a prerequisite—for what acts directors are liable—issuing accommodation paper—what constitutes "assent" within statute—statute penal); Minn. T. Mfg. Co. v. Langdon, 44–37, 46+310 (effect of appointment of receiver on right of creditor to maintain action); Citizens State Bank v. Story, 84–408, 87+1016 (assent of directors to unauthorized business—effect of assenting director's withdrawal from corporation—effect of withdrawal of assent).

[3] Mpls. T. Co. v. Nimocks, 53–381, 55+546.

[4] Heintzelman v. Druids' R. Assn., 38–138, 36+100.

[5] Fletcher v. Chi. etc. Ry., 67–339, 69+1085.

[6] Jones v. Morrison, 31–140, 16+854.

[7] Opera House Co. v. Baxter, 90–334, 96+1133.

[8] State v. Guertin, 106–248, 119+43.

[9] Trustees v. Halvorson, 42–503, 44+663; St. Paul etc. Co. v. Allis, 24–75; Welker

2112. Officers are agents—While all agents are not officers, all officers are agents.[10]

2113. Fiduciary relation—The officers and agents of a corporation occupy a fiduciary relation toward the corporation. They owe to it the utmost good faith and cannot make any personal profits out of their position. If such profits are made they belong to the corporation.[11]

2114. Powers—Persons dealing with officers or agents of a corporation are charged with notice of their powers.[12] The powers of a general manager are necessarily very large.[13] He has implied authority to borrow money to pay the debts of the corporation accruing in the ordinary course of business, even in the absence of any express authorization in the by-laws, or by formal resolution of the directors.[14] A corporation may clothe an officer with apparent authority beyond his authority as defined by the articles of incorporation or by-laws, and be bound accordingly.[15] The powers of the president of a corporation are not well defined. They seem to depend largely upon the facts of the particular case.[16] Inasmuch as a corporation cannot act except through officers or agents, it cannot by contract limit the power of all its officers and agents so as to prevent its future action.[17] The presumption is that officers act within their authority.[18] Cases are cited below involving the authority of officers or agents in particular instances.[19]

2115. Liability on contracts—Signatures—If an officer of a corporation executes a contract in its behalf by merely signing his name thereto with the suffix "Pres.," "Sec.," "Mgr.," or like word, the contract is presumptively his individual contract, but extrinsic evidence is admissible to show that the parties understood it to be the contract of the corporation.[20]

v. Anheuser, 103–189, 114+745. See Pratt v. Pioneer P. Co., 35–251, 28+708.

[10] State v. Kortgaard, 62–7, 10, 64+51. See § 2096.

[11] Gill v. Russell, 23–362; Rhodes v. Webb, 24–292; Goodhue F. W. Co. v. Davis, 81–210, 83+531; Gray v. Clay, 89–166, 94+552, 95+588.

[12] Regents v. Hart, 7–61(45). See Legault v. Mpls. etc. Assn., 93–72, 100+666.

[13] Robertson v. Anderson, 96–527, 530, 105+972; Peterson v. Mille Lacs L. Co., 51–90, 52+1082; Rosemond v. N. W. etc. Co., 62–374, 64+925; Africa v. Duluth N. T. Co., 82–283, 84+1019.

[14] Kraniger v. People's B. Soc., 60–94, 61+904; Rosemond v. N. W. etc. Co., 62–374, 64+925; Africa v. Duluth N. T. Co., 82–283, 84+1019. See Willis v. St. Paul S. Co., 53–370, 55+550.

[15] See Grant v. Duluth etc. Ry., 66–349, 69+23; Kraniger v. People's B. Soc., 60–94, 61+904.

[16] See Grant v. Duluth etc. Ry., 66–349, 69+23; Porter v. Winona etc. Co., 78–210, 80+965; Africa v. Duluth N. T. Co., 82–283, 84+1019.

[17] Lamberton v. Conn. F. Ins. Co., 39–129, 39+76; Nichols v. Wiedemann, 72–344, 75+208, 76+41; Hicks v. Aultman, 108–327, 122+15.

[18] Penney v. Lynn, 58–371, 59+1043.

[19] Regents v. Hart, 7–61(45) (powers of board of regents of state university); Dodge v. N. W. etc. Co., 13–458(427) (authority of secretary to make affidavit for removal of cause to federal court); Borland v. Morrison, 22–40 (authority of overseer in factory to employ help); Peterson v. Mille Lacs L. Co., 51–90, 52+1082 (authority of general manager to sell products of a mill); Penney v. Lynn, 58–371, 59+1043 (authority of secretary and treasurer to assign and mortgage leasehold estate); Garabrant v. Jerrems, 63–396, 65+726 (authority of manager of newspaper to contract for advertising therein to be paid for in goods); Weikle v. Mpls. etc. Ry., 64–296, 66+963 (authority of freight agent of railway company to guarantee the debts of another); Grant v. Duluth etc. Ry., 66–349, 69+23 (authority of president of a railway company—construction contract); Burns v. Koochiching Co., 68–239, 71+26 (authority of officer to contract for cutting timber), Norwegian etc. Cong. v. U. S. etc. Co., 81–32, 83+487 (building committee of religious society); Legault v. Mpls. etc. Assn., 93–72, 100+666 (fire department relief association—authority of officer to employ physician).

[20] Brunswick etc. Co. v. Boutell, 45–21, 47+261; Souhegan Nat. Bank v. Boardman, 46–293, 48+1116; Nat. Protective Assn. v. Prentice, 49–220, 51+916; Pershing v. Swenson, 58–310, 59+1084; Kraniger v. People's B. Soc., 60–94, 61+904; Towers v. Stevens, 83–243, 86+88.

2116. Ratification of unauthorized acts—A corporation may ratify the unauthorized acts of its officers or agents so as to be bound thereby.[21] An officer cannot ratify his own unauthorized acts.[22] The power to ratify is presumptively in the board of directors.[23]

2117. Sufficiency of evidence to show authority—Cases are cited below involving the sufficiency of evidence to show the authority of officers or agents.[24]

2118. Contracting with corporation—Officers of a corporation may contract with it, but such contracts are viewed with suspicion by courts and will be scrutinized closely and set aside if not perfectly fair, and beneficial to the corporation. In such contracts officers are held to those rules of fairness and good faith which courts of equity impose upon trustees.[25] A note executed by an officer of a corporation and payable to himself is presumptively invalid, but such presumption may be rebutted by proof that it was made in the business and for the use and benefit of the corporation.[26] A stockholder in a corporation, acting as its president, may enter into a salary contract for his services with it; but he cannot use his position when making such contract to his own advantage, or to the disadvantage of the corporation; nor can he bind it to pay him a greater salary than his services are reasonably worth; a contract of this kind between such president and the acting secretary and treasurer of the corporation will be scrutinized with great care.[27]

2119. Notice to officers notice to corporation—Notice to an officer or agent of a corporation acting within the scope of his authority, concerning a matter which it is his duty to communicate to his principal, is notice to the corporation.[28] A corporation is not chargeable with notice when the character or circumstances of the agent's knowledge are such as to make it improbable that he would communicate it to his principal, as, for example, when he is dealing with the corporation in his own interest, or where for any reason his interest is adverse.[29] To render the knowledge of individual corporators the knowledge of the corporation it must be the knowledge of all of them.[30]

2120. Not chargeable with notice—The fact that one is a stockholder and attorney of a corporation does not charge him with notice of the contracts made by the corporation, and of their breach.[31]

2121. Compensation—Cases are cited below involving questions as to the compensation of officers.[32]

[21] Sanborn v. School Dist., 12–17(1, 13); East Norway Lake etc. Church v. Froislie, 37–447, 35+260; St. Croix L. Co. v. Mittlestadt, 43–91, 44+1079; Willis v. St. Paul S. Co., 53–370, 55+550; St. Paul etc. Co. v. Howell, 59–295, 61+141; Grant v. Duluth etc. Ry., 66–349, 69+23; Norwegian etc. Cong. v. U. S. etc. Co., 81–32, 83+487; Pinkus v. Mpls. L. Mills, 65–40, 67+643. See Bjorngaard v. Goodhue Co. Bank, 49–483, 52+48.

[22] Porter v. Winona etc. Co., 78–210, 80+965. But see Bjorngaard v. Goodhue Co. Bank, 49–483, 52+48.

[23] Western L. Assn. v. Ready, 24–350.

[24] Pratt v. Pioneer P. Co., 35–251, 28+708; Schreiber v. German etc. Co., 43–367, 45+708.

[25] Savage v. Madelia etc. Co., 98–343, 108+296; Rosemond v. N. W. etc. Co., 62–374, 64+925. See Welsh v. First Nat. Bank, 103–186, 114+765.

[26] Africa v. Duluth N. T. Co., 82–283, 84+1019; Porter v. Winona etc. Co., 78–210, 80+965; Third Nat. Bank v. Marine L. Co., 44–65, 46+145.

[27] Church v. Church C. Co., 75–85, 77+548.

[28] Robertson v. Anderson, 96–527, 105+972; First Nat. Bank v. Gustin, 42–327, 44+198; St. Paul etc. Co. v. Howell, 59–295, 61+141.

[29] Bang v. Brett, 62–4, 63+1067; Dorr v. Life etc. Co., 71–38, 73+635; Fort Dearborn Nat. Bank v. Seymour, 71–81, 73+724; Benton v. Mpls. etc. Co., 73–498, 76+265; First Nat. Bank v. Strait, 75–396, 78+101; Woodworth v. Carroll, 104–65, 112+1054; First Nat. Bank v. Persall, 125+506. See 15 Harv. L. Rev. 489.

[30] Mercantile Nat. Bank v. Parsons, 54–56, 55+825.

[31] Tarbox v. Gorman, 31–62, 16+466.

[32] Kryger v. Railway etc. Co., 46–500, 49+255 (verdict for general manager for services sustained); Raley v. Victor Co.,

DISSOLUTION AND FORFEITURE OF FRANCHISE

2122. Voluntary dissolution—Statute—A private business corporation cannot surrender its charter and effect a dissolution without the consent of the state expressed by previous authorization or subsequent acceptance of the surrender.[33] Provision is made by statute for the voluntary dissolution of corporations at the instance of the corporation or a majority of the stockholders.[34] The statute applies to both stock and non-stock corporations. When there is no stock the petition for dissolution must be presented by a majority in number of the members. When there is stock it must be presented by members holding a majority of the stock. In calculating the majority of the stock all outstanding stock must be included, though it may have been improperly issued. Upon an application for dissolution under the statute the court cannot pass upon the validity of outstanding stock.[35] A dissolution under the statute works a breach of the outstanding contracts of the corporation and gives rise to a cause of action for all resultant damages, present or prospective.[36] The statute is not an insolvency law, but for the purpose of securing a just distribution of the corporate assets among the creditors the court is authorized to appoint a receiver with powers similar to those of a receiver in insolvency. Claims are to be proved as directed by the court.[37] Prior to Laws 1899 c. 272 (R. L. 1905 § 3184), it was held that the liability of stockholders for corporate debts could not be enforced in proceedings under this statute.[38] Where a mutual endowment association, whose policies are to be paid from a fund 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.[39]

2123. Duty to wind up business and satisfy creditors—After a corporation has become insolvent it is its duty to wind up its business, call in its outstanding capital, and satisfy its creditors. Its shares have ceased to be the subject-matter of legitimate traffic. They are a burden to the owner, and a transfer would be merely a subterfuge to avoid liability.[40]

2124. Dissolution by court of equity at instance of minority stockholders—A court of equity has jurisdiction to wind up the affairs of a building and loan association, and for that purpose to appoint a receiver on the application of a minority of its stockholders, whenever the purposes for which it was organized have failed, and it is shown that such action is reasonably necessary for the protection of the interests of such stockholders.[41]

86–438, 90+973 (salary does not attach to office—must be earned—recovery for period covered by illness denied); Williams v. Little Falls etc. Co., 99–4, 108+289 (salary of president—services outside duties—authority of board of directors to fix compensation).

[33] Beyer v. Woolpert, 99–475, 109+1116. See Merchants' Nat. Bank v. Gaslin, 41–552, 43+483.

[34] R. L. 1905 §§ 2882, 3175–3178. See In re Youths' Temple of Honor, 73–319, 76+59 (statute cited as appropriate method of winding up corporation which is not insolvent).

[35] Beyer v. Woolpert, 99–475, 109+1116.

[36] Bowe v. Minn. M. Co., 44–460, 47+151; In re Educational End. Assn., 56–171, 57+463; Kalkhoff v. Nelson, 60–284, 62+332. See Mpls. B. Co. v. City Bank, 74–98, 102, 76+1024.

[37] Kalkhoff v. Nelson, 60–284, 62+332; Cone v. Wold, 85–302, 88+977. See, as to the necessity of establishing a claim by judgment, Mpls. P. Co. v. Swinburne, 66–378, 384, 69+144.

[38] In re People's etc. Co., 56–180, 57+468; Mpls. B. Co. v. City Bank, 66–441, 445, 69+331.

[39] In re Educational Endow. Assn., 56–171, 57+463.

[40] McConey v. Belton O. & G. Co., 97–190, 198, 106+900.

[41] Sjoberg v. Security S. & L. Assn., 73–203, 75+1116; Knutson v. N. W. Assn., 67–201, 206, 69+889.

2125. Discretion of court—When an act is expressly made a cause of forfeiture a court has no discretion but must render judgment accordingly. In other cases the court has some discretion—that is, may regard the facts of the particular case in determining whether the public interests require a forfeiture.[42]

2126. Direct proceeding necessary—A cause of forfeiture cannot be taken advantage of collaterally or incidentally, but only in a direct proceeding instituted for the purpose by the state.[43]

2127. Grounds for forfeiture—Nonuser and misuser—A failure to comply with a statute regulating corporations is a ground for forfeiture, if it works a substantial injury to the public.[44] Any nonuser or misuser of corporate powers or franchises materially prejudicial to the public interests is a ground for forfeiture.[45] Courts always proceed with great caution in declaring a forfeiture. To warrant a forfeiture for misuser, the misuser must be such as to work or threaten a substantial injury to the public. A distinction is to be observed between franchises and powers. Acts ultra vires, or in excess of powers, are not necessarily a misuser of franchises, such as will warrant their forfeiture. To justify such forfeiture the ultra vires acts must be so substantial and continued as to so derange or destroy the business of the corporation that it no longer fulfils the end for which it was created. Ultra vires acts may be such as to justify interference by the state by injunction to prevent a continuance of the excess of powers, while they would not be a sufficient ground for a forfeiture of the corporate franchises in proceedings by quo warranto.[46] To warrant a forfeiture for nonuser, the nonuser must relate to matters which are of the essence of the contract between the corporation and the state.[47]

2128. Duty of attorney general—Under a former statute it was made the duty of the attorney general to apply to the supreme court for leave to bring an action for a forfeiture.[48]

2129. Necessity of judicial determination—A corporation is not to be deemed dissolved by reason of any misuser or nonuser of its franchises, or for any breach of its duty to the public, without a judicial determination of the facts and a judgment,[49] unless the charter provides otherwise.[50]

2130. Procedure for forfeiture—Alternative remedies—The attorney general in seeking a forfeiture may proceed by information in the nature of quo warranto, or may bring a civil action under R. L. 1905 § 4544.[51] The remedy by civil action is more in accordance with the ordinary mode of civil 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.[52] The

[42] State v. Minn. C. Ry., 36–246, 258, 30+816. See State v. School Dist., 85–230, 88+751.

[43] State v. Minn. C. Ry., 36–246, 258, 30+816.

[44] State v. Park, 58–330, 59+1048 (failure to keep office in state).

[45] State v. St. P. etc. Ry., 35–222, 28+245 (failure to build railway); State v. Minn. C. Ry., 36–246, 30+816 (suspension of business by railway company); State v. Am. S. & L. Assn., 64–349, 67+1 (building and loan association—misuser—violations of law); State v. Cannon River etc. Assn., 67–14, 69+621 (failure to carry out object of corporation).

[46] State v. Minn. T. M. Co., 40–213, 41+1020.

[47] State v. Minn. C. Ry., 36–246, 259, 30+816.

[48] State v. Berry, 3–190.

[49] Minn. C. Ry. v. Melvin, 21–339, 344; State v. Minn. C. Ry., 36–246, 258, 30+816; Richards v. Minn. S. Bank, 75–196, 204, 77+822.

[50] State v. St. P. etc. Ry., 35–222, 28+245.

[51] State v. St. P. etc. Ry., 35–222, 28+245; State v. Minn. T. M. Co., 40–213, 224, 41+1020.

[52] State v. Minn. T. M. Co., 40–213, 41+1020.

statutory action has a somewhat broader scope than an information in the nature of quo warranto.[53] In the case of certain corporations the attorney general is authorized by statute to resort to a suit in equity to restrain the exercise of the corporate franchises, to have a receiver appointed, and to wind up the affairs of the corporation.[54]

2131. Effect on property—At common law the personal property of a corporation, upon its dissolution, escheats to the state and its realty reverts to the grantor or his heirs.[55] A corporation organized under the provisions of G. S. 1894, c. 34, title 3, has no power to divert a gift from the specific purpose designated by the donor, without his consent. When such corporation declines to carry out the purpose or object of a gift of money as impressed upon such gift when made, declines to use the money for the purpose for which it was donated, and by decree of a court voluntarily dissolves and terminates its corporate existence, the amount of the gift reverts to the donor. It is not to be distributed among the members of the organization.[56]

2132. Continuance for three years—Statute—It is provided by statute that "every corporation whose existence terminates by limitation, forfeiture, or otherwise, shall nevertheless continue for three years thereafter, for the purpose of prosecuting and defending actions, closing its affairs, disposing of its property, and dividing its capital, but for no other purpose." [57] At common law, dissolution implied that the corporation had wholly ceased to exist for any purpose, so that suits brought by or against it abated, and a judgment thereafter rendered against it was a nullity; that its title to its property ceased to exist, and all legal remedies to enforce debts due by or to it became extinguished. The equity rule, however, was that, while the corporation had ceased to exist, yet that its property was impressed with a trust in favor of creditors and stockholders as beneficiaries, whose interests equity would protect by appointing a trustee, if necessary, to execute the trust. Our statute was enacted to obviate the inconvenient consequences ensuing at common law, and even to a certain extent in equity, from the dissolution of corporations.[58]

2133. Waiver of forfeiture by state—The state may waive the right to declare a forfeiture.[59] It has been said that a waiver of forfeiture must be by legislative enactment, and that the state is not bound by the acts of its executive, officers.[60]

SEQUESTRATION AND DISSOLUTION PROCEEDINGS UNDER R. L. 1905 §§ 3179, 3180

2134. Application of R. L. 1905 § 3179—R. L. 1905 § 3179 is applicable to a building and loan association,[61] and to an insurance company on the co-operative or assessment plan.[62]

[53] State v. Parker, 25–215, 218; State v. Minn. T. M. Co., 40–213, 224, 41+1020; State v. Kent, 96–255, 268, 104+948.

[54] R. L. 1905 § 3180; State v. Am. S. & L. Assn., 64–349, 67+1; State v. Cannon River etc. Assn., 67–14, 69+621. See Sjoberg v. Security S. & L. Assn., 73–203, 75+1116.

[55] Robbins v. School Dist., 10–340 (268, 276).

[56] Cone v. Wold, 85–302, 88+977.

[57] R. L. 1905 § 2883; Minn. C. Ry. v. Donaldson, 38–115, 35+725; Bowe v. Minn. M. Co., 44–460, 47+151; In re People's etc. Co., 56–180, 184, 57+468; Kalkhoff v. Nelson, 60–284, 289, 62+332; Sage v. Crowley, 83–314, 320, 86+409; Norton v. Frederick, 107–36, 119+492; Hanan v. Sage, 58 Fed. 651.

[58] Bowe v. Minn. M. Co., 44–460, 47+151.

[59] State v. School Dist., 85–230, 88+751.

[60] State v. Minn. C. Ry., 36–246, 259, 30+816.

[61] State v. Am. S. & L. Assn., 64–349, 67+1.

[62] State v. Ed. Endow. Assn., 49–158, 51+908.

2135. Compared with proceedings under R. L. 1905 § 3173—Proceedings under R. L. 1905 §§ 3179, 3180 are more summary than those under section 3173. They may be initiated by a simple creditor while the proceedings under section 3173 can only be initiated by a judgment creditor after judgment returned unsatisfied.[63] They also differ from the proceedings under section 3173 in that they may be initiated by the attorney general and result in a dissolution of the corporation. When the proceedings are initiated by creditors they are substantially the same as those under section 3173. In both proceedings the liability of stockholders may be enforced.

2136. Who may maintain action—A simple contract creditor may maintain an action to sequester the assets of a corporation and enforce the liability of stockholders.[64] Section 5904 G. S. 1894 extended the remedy to such creditors as might choose to proceed to judgment against the corporation before resorting to the equitable proceeding provided by the statute.[65]

2137. Power of attorney general to prosecute—Whenever a corporation violates the provisions of its acts of incorporation, or any other law binding on it, and so misuses its franchises in matters which concern the essence of the contract between it and the state that it no longer fulfils the purpose for which it was created, the state has an interest in restraining the further exercise of its corporate rights, and may, by the attorney general, maintain an action so to restrain the corporation, and for a receiver for its property.[66]

2138. Appointment of receiver—When facts are admitted or proved which show a right to sequestration under the statute the appointment of a receiver is a matter of right. Prior to the establishment of a right to sequestration the appointment of a receiver is discretionary.[67]

2139. Effect of injunction—While an injunction issued as provided by the statute is in force the restrained corporation is as devoid of life and as completely disabled as if it were entirely out of existence. While it is possible for the corporation to survive sequestration proceedings it is not usual. Generally sequestration proceedings have the same practical result as a judgment of dissolution or forfeiture.[68]

2140. What constitutes insolvency—Where a building and loan association has no creditors or liabilities except its liability to its stockholders on account of their stock, and there is a deficiency in its assets, so that it cannot mature its stock, or pay back to its stockholders the actual money paid on their stock, it is not "insolvent," in the sense in which the word is used in G. S. 1894 c. 76, providing for the appointment of a receiver for corporations when they are insolvent.[69]

2141. Judgment of dissolution or forfeiture—The statute provides for a judgment of dissolution or forfeiture of charter under certain conditions.[70]

2142. Enforcement of stockholders' liability—If a creditor institutes sequestration proceedings but takes no steps to enforce the liability of stockholders another creditor may be allowed to intervene for that purpose. It was held, prior to 1905, that when a creditor has been allowed, upon application and by

[63] Am. S. & L. Assn. v. Farmers etc. Bank, 65–139, 67+800; Mpls. P. Co. v. Swinburne, 66–378, 69+144.

[64] Klee v. Steele, 60–355, 62+399; State v. Bell, 64–400, 67+212; Am. S. & L. Assn. v. Farmers etc. Bank, 65–139, 67+800; Mpls. P. Co. v. Swinburne, 66–378, 69+144.

[65] Am. S. & L. Assn. v. Farmers etc. Bank, 65–139, 67+800.

[66] State v. Am. S. & L. Assn., 64–349, 67+1.

[67] State v. Bank of N. E., 55–139, 56+575.

[68] Mpls. B. Co. v. City Bank, 74–98, 103, 76+1024.

[69] Sjoberg v. Security S. & L. Assn., 73–203, 75+1116.

[70] R. L. 1905 § 3180; Mpls. B. Co. v. City Bank, 74–98, 103, 76+1024.

order of the court, to intervene and file a complaint, and to bring stockholders into an action instituted under the provisions of sections 5900, 5901, and they have been brought in, there is but one action or proceeding pending. As the insolvent corporation is already a defendant therein, it need not be named as a defendant in the complaint just referred to, or again be served with a summons. After another creditor has been permitted to file a complaint which brings the stockholders into the action, it is too late for the creditor who instituted the action to amend his complaint to the same end.[71] A creditor may maintain a separate action to enforce the liability of stockholders during the pendency of an action by the attorney general for the forfeiture of the charter, or with leave of the attorney general may intervene in the latter action for that purpose.[72] The liability of stockholders may be enforced as an incident of sequestration proceedings under this statute.[73] Where receivers of insolvent banking corporations have been appointed under Laws 1895 c. 145 § 20, they have primarily the exclusive right to institute proceedings to enforce the stockholders' liability. Creditors cannot be permitted to supersede receivers in the exercise of this right, without first showing good cause, and obtaining leave of the court in which the insolvency proceedings are pending. To this extent the remedies of receivers under said section 20, and those of creditors under G. S. 1894, c. 76, are concurrent. The proceeding by either is properly by supplemental complaint in the original action.[74]

SEQUESTRATION PROCEEDINGS UNDER R. L. 1905 § 3173

2143. Preliminary statement—Caution—In reading the cases cited under this subdivision it is important to keep in mind the fact that they may have been overruled or materially modified by subsequent changes in the statutes. Laws 1899 c. 272, and in a lesser degree Laws 1897 c. 341, worked a fundamental change in the procedure for the enforcement of stockholder's liability. Another fundamental change was made by Revised Laws 1905, in repealing G. S. 1894 §§ 5904–5908, which authorized separate actions for the enforcement of stockholder's liability. Proceedings under R. L. 1905 § 3173 and under R. L. 1905 §§ 3179, 3180 are in most particulars governed by the same rules and many of the cases cited under this subdivision arose under the latter sections. It is important, therefore, to keep in mind the fact that the two proceedings are distinct, though similar.

2144. Construction of chapter 76 (R. L. 1905 §§ 3169–3183)—Prior to the revision of 1905 the statutes relating to this subject were found in chapter 76 of the various editions of the statutes. The history of this chapter will be found in the cases cited below.[75] All its provisions are applicable to all corporations except where expressly limited,[76] and are to be harmonized so far as possible.[77] The remedies afforded thereby for the enforcement of the constitutional liability of stockholders, were, prior to Laws 1897 c. 341 and Laws 1899 c. 272, exclusive.[78] These statutes are are of a remedial nature and to be construed liberally.[79]

71 Palmer v. Bank of Zumbrota, 65–90, 67+893.

72 State v. Merchants' Bank, 67–506, 70+803. Since the repeal of G. S. 1894 § 5905 by R. L. 1905 a creditor probably cannot maintain a separate action, though his right to intervene remains.

73 Allen v. Walsh, 25–543; Palmer v. Bank of Zumbrota, 65–90, 67+893; Id., 72–266, 75+380.

74 Anderson v. Seymour, 70–358, 73+171.

75 McKusick v. Seymour, 48–158, 50+1114; Mpls. P. Co. v. Swinburne, 66–378, 69+144.

76 Allen v. Walsh, 25–543, 555; McKusick v. Seymour, 48–158, 50+1114; Anchor I. Co. v. Columbia E. Co., 61–510, 63+1109.

77 Klee v. Steele, 60–355, 62+399.

78 Allen v. Walsh, 25–543; Johnson v. Fischer, 30–173, 14+799; In re Martin,

2145. General nature of action—The objects of the action are to wind up the affairs of the corporation; to collect and convert all the corporate assets, appropriating them ratably among all the creditors; and, if there is a deficiency of assets to satisfy all the corporate debts, to enforce the individual liability of stockholders and others to the extent of such deficiency. The action is governed by rules of equity practice except as otherwise provided by the statute. The proceedings are exceedingly flexible and capable of being moulded into almost any form necessary to accomplish their purpose of securing a full and final adjustment of the rights and liabilities of all parties growing out of the corporate business.[80] They are in the nature of insolvency proceedings [81]—of an attachment or execution on behalf of the creditors.[82] They are under the control of the court and not of the original plaintiff. After the action is begun and the complaint filed it is no more that of the plaintiff than it is of any other creditor who appears, files a claim, and thus takes part in the litigation. The court may at any time designate which creditor shall have general management of the proceedings.[83] A creditor cannot maintain the action solely for his own benefit. Whether the original complaint so states or not the action is in behalf of all creditors who may come in.[84] The creditors are the primary beneficiaries of the sequestered estate.[85]

2146. Effect to dissolve corporation—To dissolve the corporation is not one of the objects of the action, but a practical dissolution is generally one of its effects.[86]

2147. Return of sheriff—Conclusiveness—The return of the sheriff upon which the action is based is conclusive so long as it remains of record in force, and cannot be collaterally assailed by inquiries into the conduct of the officer in executing it, or into the existence of any property which he might have levied on by virtue of it.[87]

2148. Judgment on which action based—The judgment against the corporation on which the action is based is conclusive on the stockholders, in the absence of fraud or collusion.[88] A judgment against the corporation and another jointly for the recovery of money is a sufficient foundation for an action.[89]

2149. Effect of other proceedings to defeat action—After an assignment for the benefit of creditors under the assignment law of 1876 or the insolvency

56-420, 57+1065; Winnebago P. Mills v. N. W. etc. Co., 61-373, 63+1024; Willius v. Albrecht, 100-436, 111+387.

[79] Argall v. Sullivan, 83-71, 85+931.

[80] Arthur v. Willius, 44-409, 46+851; Allen v. Walsh, 25-543, 556; Merchants' Nat. Bank v. Bailey, 34-323, 327, 25+639; Farmers' L. & T. Co. v. Mpls. E. & M. Works, 35-543, 546, 29+349; Hospes v. N. W. etc. Co., 41-256, 43+180; Minn. T. M. Co. v. Langdon, 44-37, 39, 46+310; Spooner v. Bay St. L. Synd., 47-464, 466, 50+601; In re People's etc. Co., 56-180, 184, 57+468; N. W. Railroader v. Prior, 68-95, 99, 70+869; Mendenhall v. Duluth D. G. Co., 72-312, 315, 75+232; Hanson v. Davison, 73-454, 461, 76+254.

[81] Merrill v. Ressler, 37-82, 33+117; Spooner v. Bay St. L. Synd., 47-464, 466, 50+601.

[82] Farmers' L. & T. Co. v. Mpls. E. & M. Works, 35-543, 546, 29+349; Minn. T. M. Co. v. Langdon, 44-37, 39, 46+310.

[83] Maxwell v. N. T. Co., 70-334, 73+173; Mendenhall v. Duluth D. G. Co., 72-312, 75+232; Mpls. B. Co. v. City Bank, 66-441, 69+331.

[84] Pioneer F. Co. v. St. Peter etc. Co., 64-386, 388, 67+217; Allen v. Walsh, 25-543, 556; Farmers' L. & T. Co. v. Mpls. E. & M. Works, 35-543, 546, 29+349; Spooner v. Bay St. L. Synd., 47-464, 466, 50+601; Nat. G. A. Bank v. St. Anthony etc. Co., 61-359, 361, 63+1068; Hanson v. Davison, 73-454, 461, 76+254.

[85] Hospes v. N. W. etc. Co., 41-256, 43+180.

[86] McKusick v. Seymour, 48-158, 168, 50+1114.

[87] Spooner v. Bay St. L. Synd., 44-401, 46+848.

[88] Oswald v. Mpls. T. Co., 65-249, 68+15; Holland v. Duluth etc. Co., 65-324, 68+50; Mendenhall v. Duluth etc. Co., 72-312, 75+232; Hanson v. Davison, 73-454, 462, 76+254; Hinckley v. Kettle River Ry., 80-32, 82+1088.

[89] Frost v. St. P. etc. Co., 57-325, 59+308.

law of 1881, creditors cannot have a receiver appointed under this statute as of right.[90] A receivership under this statute is not defeated by a receivership in an action to foreclose a mortgage,[91] or by an action by a creditor to set aside a fraudulent transfer of corporate assets,[92] or by a subsequent assignment under the insolvency law of 1881,[93] or by an action by the attorney general for the forfeiture of the corporation's charter.[94] Prior to Laws 1899 c. 272 it was held that a creditor might maintain an action to enforce the liability of stockholders notwithstanding a prior assignment for the benefit of creditors.[95]

2150. Limitation of actions—Formerly the statute of limitations began to run against the constitutional liability of stockholders upon the insolvency of the corporation and before it was known or determined what amount, if any, the stockholders would be required to pay. Under the present statute it begins to run from the time the court makes an order determining the necessity for resorting to such liability and making an assessment. Where two forms of procedure exist to enforce the superadded liability of the stockholder in a corporation, the statute of limitations commences to run from the time when suit might have been brought against the stockholder under either form of procedure.[96] The mere commencement of an action by a judgment creditor under section 9, c. 76, G. S. 1878, for the sequestration of the property of a debtor and the appointment of a receiver, did not stop the running of the statute of limitations against the claims of other creditors. Each creditor might have brought an independent action upon his own claim, though the court might thereafter have consolidated all the actions upon an application properly made.[97] An action to charge the distributees of the estate of a deceased stockholder with his stockholder's liability, to the extent of the estate received by them, is not barred in one year after the corporation goes into insolvency.[98] The right of action in favor of creditors against the holders of bonus stock does not accrue until the corporation becomes insolvent.[99]

2151. Who may maintain action—The plaintiff must be a judgment creditor who has exhausted his legal remedies by having an execution returned unsatisfied,[1] or the assignee of such a creditor.[2] Prior to Revised Laws 1905 a simple contract creditor might maintain an action to enforce the liability of stockholders under certain circumstances.[3] A stockholder or director who is also a creditor may bring an action, but the court may turn its management over to another person.[4]

2152. Right of creditors to recover corporate assets—After a receiver has been appointed a creditor cannot maintain an action for the recovery of corporate assets.[5]

[90] International T. Co. v. Am. L. & T. Co., 62–501, 65+78, 632; Walther v. Seven Corners Bank, 58–434, 59+1077..

[91] St. Louis Car Co. v. Stillwater St. Ry., 53–129, 54+1064.

[92] Oswald v. St. P. etc. Co., 60–82, 61+902.

[93] State v. Bank of N. E., 55–139, 56+575; London etc. Co. v. St. P. etc. Co., 84–144, 86+872.

[94] State v. Merchants' Bank, 67–506, 70+803.

[95] International T. Co. v. Am. L. & T. Co., 62–501, 65+78, 632.

[96] Willius v. Albrecht, 100–436, 111+387; Willius v. Beyer, 100–548, 111+388; Hunt v. Doran, 92–423, 100+222; Harper v. Carroll, 66–487, 69+610, 1069; Id., 62–152, 157, 64+145.

[97] Downer v. Union L. Co., 103–392, 115+207.

[98] Markell v. Ray, 75–138, 77+788.

[99] Hospes v. N. W. etc. Co., 48–174, 50+1117.

[1] Klee v. Steele, 60–355, 62+399.

[2] Argall v. Sullivan, 83–71, 85+931.

[3] Mpls. P. Co. v. Swinburne, 66–378, 69+144; Sturtevant v. Mast, 66–437, 69+324. Section 5909 of G. S. 1894, upon which these cases are based, was repealed by R. L. 1905. See Willius v. Albrecht, 100–436, 111+387.

[4] Maxwell v. N. T. Co., 70–334, 73+173; Mendenhall v. Duluth D. G. Co., 72–312, 75+232; Janney v. Mpls. I. Expo., 79–488, 82+984.

[5] Farmers' L. & T. Co. v. Mpls. E. & M. Works, 35–543, 546, 29+349; Minn. T. M.

2153. Parties defendant—The plaintiff may in the first instance make the corporation the sole defendant, but the ordinary and correct practice is to make all the stockholders defendants at the outset.[6] All the stockholders within the jurisdiction of the court should be made defendants.[7] An ancillary action may be maintained against defendants omitted in the original action.[8] If the original plaintiff does not make stockholders defendants at the outset he may do so later by means of an amended or supplemental complaint,[9] and in that event other creditors cannot file supplemental complaints for the same purpose.[10] If the original plaintiff does not make all the stockholders defendants it may be done on leave of court by other creditors.[11] Stockholders may be made parties either before or after the time limited for filing claims.[12]

2154. Pleadings—Joinder of actions—Consolidation of actions—Setoff—Cases are cited below involving questions relation to pleadings,[13] joinder of actions,[14] consolidation of actions,[15] and setoff or counterclaim.[16]

Co. v. Langdon, 44–37, 40, 46+310; Merchants' Nat. Bank v. N. W. etc. Co., 48–361, 51+119.

[6] Arthur v. Willius, 44–409, 412, 46+851; Nat. G. A. Bank v. St. Anthony etc. Co., 61–359, 63+1068; Palmer v. Bank of Zumbrota, 65–90, 67+893.

[7] Allen v. Walsh, 25–543, 556; Clarke v. Cold Spring etc. Co., 58–16, 59+632; Hanson v. Davison, 73–454, 76+254.

[8] Hanson v. Davison, 73–454, 76+254.

[9] Palmer v. Bank of Zumbrota, 65–90, 95, 67+893.

[10] See Pioneer F. Co. v. St. Peter etc. Co., 64–386, 67+217; Maxwell v. N. T. Co., 70–334, 73+173.

[11] Arthur v. Willius, 44–409, 46+851; McKusick v. Seymour, 48–158, 50+1114; Nat. G. A. Bank v. St. Anthony etc. Co., 61–359, 63+1068; Pioneer F. Co. v. St. Peter etc. Co., 64–386, 67+217; Palmer v. Bank of Zumbrota, 65–90, 67+893.

[12] Nat. G. A. Bank v. St. Anthony, etc. Co., 61–359, 63+1068.

[13] International T. Co. v. Am. L. & T. Co., 62–501, 65+78, 632 (complaint under R. L. 1905 § 3173 held insufficient—failure to show any one of the defendants was a stockholder when the corporate debt in suit was contracted or at any subsequent time); Harper v. Carroll, 62–152, 64+145 (requisites of complaint in action by creditor to enforce liability of stockholder of bank); Pioneer Fuel Co. v. St. Peter etc. Co., 64–386, 67+217 (cross-bill by creditor filing claim—plaintiff's complaint limits issues unless court allows other issues to be formed); Maxwell v. Northern T. Co., 70–334, 73+173 (complaint by creditor who is also a stockholder—cross-bill by another creditor if original complaint does not truly state liability of plaintiff as stockholder — second supplemental complaint cannot be filed without leave of court); Mendenhall v. Duluth D. G. Co., 72–312, 75+232 (action under G. S. 1894 § 5905 to charge stockholders—complaint held not demurrable for defect of parties—assignee of claim as plaintiff—unnecessary to allege money consideration for assignment); Harper v. Carroll, 66–487, 507, 69+610, 1069 (defect of parties waived by failure to demur or answer); Densmore v. Shepard, 46–54, 48+528, 681 (id.); Arthur v. Willius, 44–409, 46+851 (id.); Smith v. Prior, 58–247, 59+1016 (action for unpaid subscription—complaint held insufficient—variance—application to amend on the trial properly denied); Hospes v. N. W. etc. Co., 48–174, 50+1117 (complaint in action to recover for bonus stock held insufficient); McKusick v. Seymour, 48–172, 50+1116 (supplemental complaint based on wrongful distribution of corporate assets among stockholders by the officers of a corporation held to state a cause of action); Moore v. St. P. Ice Co., 59–23, 60+816 (an answer alleging an estoppel as a defence to a claim held insufficient).

[14] Sturtevant v. Mast, 66–437, 69+324 (action to charge officer for misconduct cannot be joined with one to enforce constitutional liability of stockholders); N. W. Railroader v. Prior, 68–95, 70+869 (action to enforce constitutional liability of stockholders and action to recover for stock sold at a grossly inadequate price held properly joined).

[15] Pioneer F. Co. v. St. Peter etc. Co., 64–386, 67+217; Downer v. Union L. Co., 103–392, 115+207.

[16] Harper v. Carroll, 66–487, 69+610, 1069 (action to enforce stockholder's constitutional liability—stockholder as creditor—judgment—procedure); Seymour v. Burton, 78–79, 80+846 (action by receiver of insolvent bank on note—setoff against deposit); Richardson v. Merritt, 74–354, 77+234, 407, 968 (in action to enforce constitutional liability of stockholders a stockholder cannot set off claim which he holds against corporation); Markell v. Ray, 75–138, 77+788 (insolvency of creditor—liability of creditor as stockholder—setoff in equity); Helm v. Smith, 76–328, 79+313 (action to enforce constitutional liability

2155. Procedure—Miscellaneous cases—Cases are cited below relating to appeal;[17] findings;[18] levy on judgment against insolvent;[19] attachment of property of stockholders;[20] substitution of legatees and devisees of deceased stockholder;[21] compromise of stockholder's liability;[22] duty of court to supervise and scrutinize trust account;[23] distribution of fund among creditors;[24] redemption from receiver's sale;[25] interest on stockholder's liability;[26] compensation of creditor and attorney prosecuting action for benefit of all creditors;[27] reasonableness of counsel fees;[28] the scope of an order of court for the sale of "all assets" of an insolvent corporation.[29]

2156. Defences—Estoppel—In an action to charge a stockholder he may be estopped from denying that he is a stockholder,[30] or from questioning the legal existence of the corporation.[31] Cases are cited below involving various defences.[32]

2157. Appointment of receiver—When facts are admitted or proved which show a right to a sequestration under the statute the appointment of a receiver is a matter of right. Prior to the establishment of a right to sequestration the appointment of a receiver is a matter of discretion.[33] The appointment of a receiver is not subject to collateral attack.[34]

2158. Powers and duties of receivers—The receiver has substantially the same powers and functions as an assignee in bankruptcy, or a receiver upon a creditor's bill, or in proceedings supplementary to execution. He succeeds to the rights of the creditors as well as the rights of the insolvent corporation, and has the power to enforce the rights which the creditors, but for the proceedings, might have enforced in their own behalf. Everything becomes assets in his hands, and hence in the custody of the law, which were assets as to creditors, as well as what were assets as to the corporation.[35] He has a beneficial interest in the property in his custody for the purposes of his trust.[36] His duties are

of stockholders — claim of stockholder against corporation held not a proper counterclaim); Hale v. Calder, 113 Fed. 670 (claim of stockholder against corporation cannot be set off); Becker v. Seymour, 71–394, 73+1096 (insolvent bank —pledge of depositor's note—setoff by maker—duty of pledgee).

[17] Hospes v. N. W. etc. Co., 41–256, 43+180; Nelson v. Jenks, 51–108, 113, 52+1081; Oswald v. St. P. etc. Co., 60–82, 88, 61+902.

[18] Arthur v. Clarke, 46–491, 49+252; Commercial Bank v. Azotine Mfg. Co., 66–413, 416, 69+217; Winthrop Nat. Bank v. Mpls. T. El. Co., 77–329, 79+1010.

[19] Wheaton v. Spooner, 52–417, 54+372.

[20] Bailey v. Stearns, 80–354, 83+1118.

[21] Willoughby v. St. P. etc. Co., 80–432, 83+377. See Markell v. Ray, 75–138, 77+788.

[22] State v. Merchants' Bank, 74–175, 77+31.

[23] Olson v. State Bank, 72–320, 75+378.

[24] Palmer v. Bank of Zumbrota, 72–266, 75+380.

[25] Watkins v. Minn. T. M. Co., 41–150, 42+862.

[26] Palmer v. Bank of Zumbrota, 72–266, 75+380.

[27] Helm v. Smith, 79–297, 82+639; Dwinnell v. Badger, 74–405, 77+219.

[28] Olson v. State Bank, 72–320, 75+378.

[29] Minn. T. M. Co. v. Langdon, 44–37, 46+310.

[30] Blien v. Rand, 77–110, 79+606; Hunt v. Hauser, 90–282, 96+85; Id., 95–206, 103+1032. See Olson v. State Bank, 67–267, 69+904; Dunn v. State Bank, 59–221, 61+27.

[31] Hause v. Mannheimer, 67–194, 69+810.

[32] Oswald v. St. P. etc. Co., 60–82, 61+902 (pendency of another action); Basting v. Ankeny, 64–133, 66+266 (action by receiver to recover on unpaid subscriptions—certain equitable defences held unavailable); Gunnison v. U. S. Invest. Co., 70–292, 73+149 (transfer of stock); Winthrop Nat. Bank v. Mpls. T. El. Co., 77–329, 79+1010 (exhaustion of remedy against other stockholders on their contract of suretyship).

[33] State v. Bank of N. E., 55–139, 56+575.

[34] Basting v. Ankeny, 64–133, 66+266.

[35] Minn. T. M. Co. v. Langdon, 44–37, 46+310; Farmers' L. & T. Co. v. Mpls. E. & M. Works, 35–543, 546, 29+349; St. Louis Car Co. v. Stillwater St. Ry., 53–129, 132, 54+1064.

[36] See State v. Red River etc. Co., 69–131, 134, 72+60; Watkins v. Minn. T. M. Co., 41–150, 152, 42+862.

strictly administrative or executive. He is not required, because he happens to be an attorney, to perform legal services in behalf of the estate. He is bound to perform such duties in respect to the trust as any ordinarily competent business man is presumed to be capable of performing. It is only for services requiring special legal skill that he will be allowed counsel fees.[37] He has no power to allow or disallow claims.[38] It is his duty to file the claims presented to him,[39] and to contest improper claims.[40] He is a trustee of an express trust and should bring actions in his own name as such receiver.[41] He has authority to enforce the liability of stockholders and directors;[42] to recover on an undertaking entered into by him in violation of an order of court;[43] to recover on unpaid stock subscriptions;[44] to avoid unfiled chattel mortgages;[45] to recover capital wrongfully withdrawn;[46] to avoid a fraudulent mortgage to directors;[47] to avoid a fraudulent judgment;[48] and to enforce the other liabilities mentioned in section 2160. The refusal of a trial court to confirm a sale of corporate assets by a receiver for an inadequate price has been sustained.[49]

2159. Claims—Filing, proof, and allowance—The statute provides for an order limiting the time for the presentation of claims and for a publication of the order.[50] It is discretionary with the court to allow a claim to be filed after the time limited.[51] Claims filed are deemed controverted without an answer or reply and must be proved on the hearing unless expressly admitted.[52] If a claimant desires other relief than the allowance of his claim and such as cannot be had under the original complaint he must apply for leave to file a cross-bill.[53] The remedy afforded a creditor of filing his claim under the statute is exclusive. An independent action against the receiver is not allowable.[54] In proceedings under section 9, c. 76, G. S. 1878, the exhibition of a claim and the filing of a complaint by a creditor in pursuance of an order of court was equivalent to the commencement of an independent action, and tolled the statute of limitations as of that date. A claim cannot be filed which at the time of its exhibition is barred by the statute of limitations.[55] Creditors filing claims

[37] Olson v. State Bank, 72–320, 75+378.

[38] Palmer v. Bank of Zumbrota, 72–266, 280, 75+380; Buffum v. Hale, 71–190, 193, 73+856.

[39] Potts v. St. P. etc. Assn., 84–217, 220, 87+604.

[40] Danforth v. Nat. Chem. Co., 68–308, 311, 71+274.

[41] Ueland v. Haugan, 70–349, 355, 73+169.

[42] R. L. 1905 § 3184. See §§ 2163–2173. Prior to Laws 1897 c. 341 he could not do so. Mpls. B. Co. v. City Bank, 66–441, 69+331. Prior to Laws 1899 c. 272 he could not enforce the liability of stockholders by action in another state. Hale v. Allison, 188 U. S. 56; Finney v. Guy, 189 U. S. 335.

[43] O'Gorman v. Sabin, 62–46, 64+84. See Tozer v. O'Gorman, 65–1, 67+666.

[44] Basting v. Ankeny, 64–133, 66+266; Hause v. Newel, 60–481, 62+817.

[45] Farmers' L. & T. Co. v. Mpls. E. & M. Works, 35–543, 29+349.

[46] Minn. T. M. Co. v. Langdon, 44–37, 46+310.

[47] Taylor v. Mitchell, 80–492, 83+418.

[48] Taylor v. Fanning, 87–52, 91+269.

[49] Merchants' Bank v. Moore, 68–468, 71+671.

[50] R. L. 1905 §§ 3182, 3183. See Oswald v. St. Paul G. P. Co., 60–82, 61+902 (action held not one in which order authorized—collateral attack). Prior to R. L. 1905 the statute was treated as applying to proceedings under G. S. 1894 § 5897 as well as under G. S. 1894 §§ 5900, 5901. The insertion of the phrase "upon adjudication of dissolution" introduced in the revision of 1905 makes the application of the statute doubtful, for there is no "adjudication of dissolution" in proceedings under R. L. 1905 § 3173.

[51] Spooner v. Bay St. L. Synd., 48–313, 51+377; First Nat. Bank v. Northern T. Co., 69–176, 71+928; Hove v. Bankers' Exch. Bank, 75–286, 77+967; Straw v. Kilbourne, 92–399, 100+100.

[52] Pioneer F. Co. v. St. Peter etc. Co., 64–386, 67+217; Windham Co. S. Bank v. O'Gorman, 66–361, 368, 69+317; Helm v. Smith, 76–328, 331, 79+313.

[53] Pioneer F. Co. v. St. Peter etc. Co., 64–386, 67+217.

[54] Buffum v. Hale, 71–190, 73+856.

[55] Downer v. Union L. Co., 103–392, 115+207.

are parties without any formal order,[56] and are bound by the judgment.[57] They may contest the claims of other creditors.[58] Creditors not filing claims cannot share in the proceeds of the estate.[59] It is the duty of a receiver to file claims presented to him.[60] The presentation of a claim is not a cross-complaint.[61] The state is a preferred creditor.[62] It is for the court and not for the receiver to allow and disallow claims.[63] Cases are cited below involving various questions relating to claims.[64]

2160. What liabilities enforceable—In an action under the statute the following liabilities to creditors may be enforced: the constitutional liability of stockholders for corporate debts;[65] the liability of stockholders on bonus or watered stock;[66] the liability of stockholders on stock fraudulently issued at a grossly inadequate price;[67] the liability of stockholders on unpaid stock subscriptions;[68] the liability of stockholders on stock received for overvalued property;[69] the liability of stockholders on a guaranty of corporate bonds;[70] the liability of a transferrer of stock;[71] the liability of directors for capital wrongfully withdrawn;[72] and the liability of directors for unauthorized debts.[73] The liability of officers under R. L. 1905 § 2865(3) for misconduct resulting in injury to a particular creditor is not enforceable.[74]

2161. Enforcement of stockholders' liability—The enforcement of the individual liability of stockholders for corporate debts in sequestration proceedings is now regulated by a statute enacted in 1899.[75] Prior to Laws 1899 c. 272, it was held that such liability might be enforced upon the application or complaint of any creditor who had become a party to the proceedings, though the

[56] Palmer v. Bank of Zumbrota, 65–90, 99, 67+893.

[57] Nelson v. Jenks, 51–108, 52+1081.

[58] Danforth v. Nat. Chem. Co., 68–308, 71+274; Buffum v. Hale, 71–190, 73+856.

[59] Buffum v. Hale, 71–190, 73+856; Palmer v. Bank of Zumbrota, 72–266, 75+380.

[60] Potts v. St. P. etc. Assn., 84–217, 87+604.

[61] Spooner v. Bay St. L. Synd., 47–464, 50+601.

[62] State v. Bell, 64–400, 67+212.

[63] Buffum v. Hale, 71–190, 193, 73+856; Mercantile Nat. Bank v. Macfarlane, 71–497, 503, 74+287; Palmer v. Bank of Zumbrota, 72–266, 75+380.

[64] Moore v. St. P. Ice Co., 59–23, 60+816 (an answer held not to show a defence to a claim on the ground of estoppel); Freeman v. Children's Endow. Soc., 63–393, 65+626 (scope of review on appeal from disallowance of claim); Windham Co. S. Bank v. O'Gorman, 66–361, 69+317 (objection to claim on the ground that claimant had converted certain stock held by it as a pledgee—burden of proof); Danforth v. Nat. Chem. Co., 68–308, 71+274 (judgment on default against corporation after appointment of receiver held not allowable as a claim); Mercantile Nat. Bank v. Macfarlane, 71–497, 74+287 (claim on indorsement of note by insolvent corporation allowable without surrendering note); Becker v. Seymour, 71–394, 73+1096 (insolvent bank—pledge of depositor's note—setoff by maker—right of maker to balance paid by pledgee to receiver). Palmer v. Bank of Zumbrota, 72–266, 75+380 (buying up claims—right of purchaser to dividend); Mpls. B. Co. v. City Bank, 74–98, 76+1024 (claim on lease held by insolvent corporation—repudiation of lease by receiver—claim of landlord allowable—measure of damages for breach of lease); Helm v. Smith, 76–328, 79+313 (guaranty of corporation notes—joint and several note—part payment by one stockholder—claim for whole note disallowed); Thomas v. Hale, 82–423, 85+156 (proceeding by motion and order to show cause for allowance of claim held not to bar action against receiver on a foreign judgment against him).

[65] R. L. 1905 § 3184. See § 2161.

[66] Hospes v. N. W. etc. Co., 48–174, 50+1117. See § 2083.

[67] N. W. Railroader v. Prior, 68–95, 70+869.

[68] Spooner v. Bay St. L. Synd., 47–464, 50+601; Basting v. Ankeny, 64–133, 66+266.

[69] Hastings v. Iron Range B. Co., 65–28, 67+652.

[70] Winthrop Nat. Bank v. Mpls. T. El. Co., 77–329, 335, 79+1010.

[71] Harper v. Carroll, 62–152, 64+145.

[72] Minn. T. M. Co. v. Langdon, 44–37, 46+310.

[73] Citizens State Bank v. Story, 84–408, 414, 87+1016.

[74] Sturtevant v. Mast, 66–437, 69+324.

[75] R. L. 1905 § 3184. See §§ 2163–2173.

original complaint demanded no such relief.[76] Prior to Revised Laws 1905 provision was made by statute for the enforcement of such liability by a separate action,[77] but this did not require a separate action when sequestration proceedings were already pending.[78] The proceeding to ascertain and enforce the liability of stockholders is not an independent action, but an ancillary proceeding in the original action against the insolvent corporation for the sequestration of its property and the appointment of a receiver.[79] Prior to 1905 it was a curious feature of chapter 76 that it provided two actions on behalf of creditors —one commenced under section 9, primarily to sequestrate the corporate assets, and apply the proceeds in payment of debts, in which, at the election of creditors, might be supplemented a proceeding to enforce the statutory liability; the other, under section 17, primarily to enforce that liability, but as incident to which there might be a sequestration of the corporate assets.[80]

2162. Assessment—Judgment—Various cases, arising prior to Laws 1899 c. 272, relating to the assessment of stockholders and judgments to be rendered against stockholders, are cited below.[81]

ENFORCEMENT OF STOCKHOLDERS' LIABILITY UNDER R. L. 1905 §§ 3184–3190

2163. Statute constitutional—Laws 1899 c. 272 has been declared constitutional against various objections.[82]

2164. Nature of proceeding—The proceeding is not materially different from that authorized by the national banking act. It is a supplementary practice act formulated after the practice followed in this state for the collection of unpaid stock subscriptions.[83] The statute does not create the liability of the stockholder or the cause of action, but merely affords a remedy for its enforcement.[84]

[76] Arthur v. Willius, 44–409, 46+851; McKusick v. Seymour, 48–158, 50+1114; Nat. G. A. Bank v. St. Anthony etc. Co., 61–359, 63+1068.

[77] G. S. 1894 § 5905. This statute was repealed by R. L. 1905. Willius v. Albrecht, 100–436, 111+387. See, with reference to this statute, McKusick v. Seymour, 48–158, 50+1114; Olson v. Cook, 57–552, 59–635; Klee v. Steele, 60–355, 62+399; Mpls. P. Co. v. Swinburne, 66–378, 69+144; Sturtevant v. Mast, 66–437, 69+324; N. W. Railroader v. Prior, 68–95, 70+869; Mendenhall v. Duluth D. G. Co., 72–312, 75–232.

[78] McKusick v. Seymour, 48–158, 170, 50+1114.

[79] Ueland v. Haugan, 70–349, 352, 73+169; Palmer v. Bank of Zumbrota, 65–90, 67+893; Hospes v. N. W. etc. Co., 48–174, 190, 50+1117; Olson v. Cook, 57–552, 559, 59+635.

[80] Olson v. Cook, 57–552, 559, 59–635.

[81] Harper v. Carroll, 66–487, 69–610, 1069 (form and extent—successive executions—stay of docketing judgment on giving bond—execution against transferrer secondarily liable); Palmer v. Bank of Zumbrota, 72–266, 75+380 (new and old stockholders—stockholders as creditors—apportionment of liability—interest); Hanson v. Davison, 73–454, 76+254 (force and effect as determining amount of liability—judgment against part of stockholders does not release others—ancillary action by receiver against stockholder omitted in original action—judgment in original action conclusive in absence of fraud); Rogers v. Gross, 75–441, 78+12 (amendment on appeal—motion by non-appealing defendants); Spooner v. Bay St. L. Synd., 47–464, 50+601 (extent of on default—action by receiver on unpaid stock subscription); Nelson v. Jenks, 51–108, 52+1081 (creditors appearing cannot attack collaterally); Gallagher v. Irish Am. Bank, 79–226, 81+1057 (trial court may modify any time before time to appeal expires); First Nat. Bank v. Winona P. Co., 58–167, 59–997 (ratable assessment); Clarke v. Cold Spring etc. Co., 58–16, 59–632 (proportionate assessment when all stockholders are not brought in).

[82] Straw v. Kilbourne, 80–125, 83+36; London etc. Co. v. St. P. etc. Co., 84–144, 86+872; Bernheimer v. Converse, 206 U. S. 516.

[83] Straw v. Kilbourne, 80–125, 133, 83+36.

[84] Willius v. Albrecht, 100–436, 111+387. See, to same effect, under national banking act, Heneke v. Twomey, 58–550, 60+667.

2165. How far exclusive—Application of statute—Laws 1899 c. 272 did not repeal Laws 1897 c. 341. The latter act made it the duty of an assignee or receiver to enforce the liabilities of stockholders under certain conditions.[85] It has since been repealed.[86] Laws 1899 c. 272 did not repeal sections 16 and 17, c. 76, G. S. 1878, but they were repealed by Revised Laws 1905. From the time of the enactment of Laws 1899 c. 272, until Revised Laws 1905 went into effect, the remedies afforded by sections 16 and 17 c. 76 G. S. 1878 and Laws 1899, c. 272 were concurrent.[87] Laws 1899 c. 272 has been held applicable to proceedings begun prior to its enactment,[88] to corporations previously organized, and to stockholders who became such prior to its enactment.[89]

2166. Limitation of actions—The statute of limitations begins to run from the time the order of assessment is made.[90]

2167. Parties defendant—It has been held that an original stockholder was liable in an independent action; that it was unnecessary to make the transferee a party; and that if defendant desired to have him made a party upon the ground that execution might be enforced against him in the first instance, because of his primary liability, application should have been made for such purpose.[91]

2168. Pleading—Where the complaint states facts sufficient to establish a stockholder's liability under the constitution, by reason of his ownership of stock at a time when the corporation was in debt and insolvent, such issue is not waived by the additional allegation that the stock had subsequently been transferred in bad faith and without consideration.[92]

2169. Defences in action against stockholder—The defendant may assert in defence that he is not a stockholder, or that he is not the holder of so large amount of stock as alleged, or that he has a claim against the corporation which in law or equity he may be entitled to set off, or any other defence of a personal nature.[93] He may be estopped to deny that he is a stockholder.[94]

2170. Petition—Hearing—Assessment—Findings—Upon the hearing of the petition it is the duty of the court to inquire into the facts specified in the statute and to make such an assessment on each share of stock, within the limits of liability, as may be necessary.[95] It is unnecessary for the court to make findings of fact.[96]

2171. Order of assessment—Conclusiveness—The order of assessment is conclusive as to all matters relating to the amount, propriety, and necessity of the assessment, against all stockholders therein adjudged liable, whether appearing or being represented at the hearing or not, or having notice thereof or not. It is immaterial that the court has no personal jurisdiction of the stockholder. It is sufficient if it has jurisdiction of the corporation. He is bound on the

[85] Somers v. Dawson, 86–42, 90+119.

[86] R. L. 1905 § 5542.

[87] Willius v. Albrecht, 100–436, 111+387.

[88] Potts v. St. P. etc. Assn., 84–217, 87+604.

[89] Robinson v. Brown, 126 Fed. 429.

[90] Willius v. Albrecht, 100–436, 111+387. See State v. Germania Bank, 106–446, 119+61; Lagerman v. Casserly, 107–491, 120+1086.

[91] Tiffany v. Giesen, 96–488, 105+901.

[92] Id.

[93] Straw v. Kilbourne, 80–125, 83+36; Neff v. Lamm, 99–115, 108+849; Swing v. Humbird, 94–1, 101+938; Lagerman v. Casserly, 107–491, 120+1086. See Robinson v. Brown, 126 Fed. 429 as to right of setoff.

[94] See § 2063.

[95] R. L. 1905 § 3185; Straw v. Kilbourne, 80–125, 83+36 (scope of inquiry on hearing of petition defined—nature of evidence admissible); London etc. Co. v. St. P. etc. Co., 84–144, 86+872 (facts which court may take into consideration in making assessment—assessment held not excessive); Potts v. St. P. etc. Assn., 84–217, 87+604 (assessment held not excessive); Neff v. Lamm, 99–115, 108+849 (determination of assessability of stock).

[96] Straw v. Kilbourne, 80–125, 83+36; London etc. Co. v. St. P. etc. Co., 84–144, 86+872.

principle of representation by virtue of his membership in the corporation.[97] An order of assessment involves a determination that the corporation is of a class whose stock is assessable under the constitution, that is, that it is not a corporation organized for carrying on a manufacturing or mechanical business.[98] The order of assessment resembles the action of the comptroller of the currency in making an assessment under the national banking act. It is held that his action in making the assessment is essential to the receiver's right of action, but that it is not the ground of the stockholder's liability.[99]

2172. Enforcement in probate court—A proceeding in a probate court to enforce an assessment is an "action" within the statute.[1]

2173. Enforcement in another state—A receiver may enforce an assessment made under the statute by action in another state, either in the state or federal courts.[2]

PLEADING

2174. Unnecessary to allege incorporation—In an action by or against a corporation it is unnecessary to allege that it is a corporation, except in cases where the fact of corporate existence enters into and constitutes a part of the cause of action itself.[3]

2175. Mode of alleging corporate existence—Statute—By statute it is sufficient in case of either a domestic or foreign corporation to allege that it is a corporation duly organized and existing under the laws of a designated state, country, or place.[4] An allegation as to the corporate existence of a corporation may be stated in a complaint independent of the cause of action.[5]

2176. Necessity of naming officer or agent—In actions by or against corporations it is ordinarily unnecessary to name the officer or agent by whom a corporate act was done; it is enough to allege that it was done by the corporation.[6]

2177. Alleging authority to contract—A complaint by a corporation for the enforcement of a contract made by it with the defendant need not allege that the plaintiff was authorized to make the contract, or that the officer purporting to make it was authorized to do so.[7]

2178. Compliance by foreign corporation with state laws—In an action by a foreign corporation it is unnecessary for it to allege that it has complied with the laws of this state.[8]

[97] Straw v. Kilbourne, 80-125, 83+36; Swing v. Humbird, 94-1, 101+938; Neff v. Lamm, 99-115, 108+849; Swing v. Red River L. Co., 105-336, 117+442; Lagerman v. Casserly, 107-491, 120+1086; Bernheimer v. Converse, 206 U. S. 516; Robinson v. Brown, 126 Fed. 429.

[98] Neff v. Lamm, 99-115, 108+849.

[99] Hencke v. Twomey, 58-550, 60+667.

[1] Neff v. Lamm, 99-115, 108+849.

[2] Bernheimer v. Converse, 206 U. S. 516. See 23 Harv. L. Rev. 37.

[3] Holden v. G. W. El. Co., 69-527, 72+805; Hollister v. U. S. etc. Co., 84-251, 87+776; Howland v. Jeuel, 55-102, 56+581.

[4] R. L. 1905 § 4148; Northern T. Co. v. Jackson, 60-116, 61+908. See, as to rules independent of statute, Becht v. Harris, 4-504(394); St. Paul etc. S. of T. v. Brown, 9-157(144); Dodge v. Minn. etc. Co., 14-49(39); Mpls. etc. Ry. v. Morrison, 23-308.

[5] West v. Eureka Imp. Co., 40-394, 42+87.

[6] Gould v. Sub-Dist., 7-203(145); Todd v. Mpls. etc. Ry., 37-358, 35+5.

[7] St. Paul L. Co. v. Dayton, 37-364, 34+335; Baremore v. Selover, 100-23, 110+66. See Gebhard v. Eastman, 7-56(40); State of Wis. v. Torinus, 22-272; La Grange M. Co. v. Bennewitz, 28-62, 9+80; Baker v. N. W. etc. Co., 36-185, 30+464.

[8] Langworthy v. Garding, 74-325, 77+207; Langworthy v. Washburn, 77-256, 79+974; Rock Island P. Co. v. Peterson, 93-356, 101+616; Lehigh Valley C. Co. v. Gilmore, 93-432, 101+796; Mason v. Thompson, 94-472, 103+507; Krafve v. Roy, 98-141, 107+966.

2179. Denial of corporate existence—By statute there must be a specific denial of corporate existence to put the adverse party to proof of such existence.[9] The statute does not apply to condemnation proceedings.[10]

2180. Admissions in pleadings—The admission of the execution of a contract by a corporation includes an admission of the power of the corporation to make it and of the authority of the officer or agent who executed it in its behalf.[11] Cases are cited below in which it is held that the corporate existence of a party was admitted by the pleadings.[12]

PUBLIC SERVICE CORPORATIONS

2181. Nature—What have become known as "public service corporations" are organized and exist under the authority of the state to serve the public, by supplying the people on equal terms and for a reasonable compensation with services or commodities and articles which, because of their nature, location, or manner of production and distribution, can be best produced and distributed by some organized form of enterprise operating under state control.[13]

2182. Rates must be reasonable and uniform—A public service corporation must justly exercise its conferred powers so as to promote the purposes of its creation in the place at which it is to transact business and to render the service for which it is created for a compensatory and not excessive rate impartially determined, and so as not to discriminate improperly between different persons or property or classes of persons or property. The regulations must be reasonable and uniform in principle and operation.[14]

FOREIGN CORPORATIONS

2183. What constitutes—A corporation formed by a consolidation of a domestic and a foreign corporation, pursuant to Laws 1881 c. 94, is a domestic corporation.[15] A foreign corporation is defined by statute as one not organized under the laws of this state.[16]

2184. No extraterritorial existence—It is sometimes said that a corporation has no legal existence beyond the boundaries of the state which creates it,[17] but this is true only in a certain limited sense.

2185. Jurisdiction—Visitorial powers—The doctrine is well settled that courts will not exercise visitorial powers over foreign corporations, or interfere with the management of their internal affairs. Such matters must be settled by the courts of the state creating the corporation. This rule rests upon a broader and deeper foundation than the mere want of jurisdiction in the ordinary sense of that word. It involves the extent of the authority of the state (from which its courts derive all their powers) over foreign corporations. The only difficulty is in drawing the line of demarcation between matters which do and those which do not pertain to the management of the internal affairs of a corporation. An action may be maintained in the courts of this state by a

[9] R. L. 1905 § 4148; First Nat. Bank v. Loyhed, 28–396, 10+421 (denial on information and belief insufficient); State v. Ames, 31–440, 18+277 (argumentative denial insufficient); Crow River etc. Co. v. Strande, 104–46, 115+1038 (general denial insufficient).

[10] Chi. etc. Ry. v. Porter, 43–527, 46+75.

[11] Bausman v. Credit G. Co., 47–377, 50+496; Monson v. St. P. etc. Ry., 34–269, 25+595; St. Paul L. Co. v. Dayton, 39–315, 40+66.

[12] Woodson v. Mil. etc. Ry., 21–60; St. Anthony etc. Co. v. King, 23–186.

[13] Minn. C. & P. Co. v. Pratt, 101–197, 212. 112+395.

[14] State v. Board W. & L. Comrs., 105–472, 117+827.

[15] In re St. P. etc. Ry., 36–85, 30+432.

[16] R. L. 1905 § 2840.

[17] Sullivan v. La Crosse etc. Co., 10–386 (308).

stockholder against a foreign corporation to compel it to issue to him a new or duplicate stock certificate in place of one which has been lost or destroyed.[18] If a foreign corporation comes into the state, and does business here by permission of the state, the state may require it to give information concerning all of its business, whether within or without the state.[19] Mandamus will not be granted, upon the relation of a foreign holding corporation, to compel the secretary of another holding and 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]

2186. Exclusion and restriction—Powers of state—Except as restrained by the laws and constitution of the United States a state has absolute power to prescribe the conditions upon which foreign corporations may do business within its territory and to exclude them altogether. Corporations exist only in contemplation of law and their authority is primarily confined to the state of their creation. They exercise their powers elsewhere only by comity.[21] The restriction may take the form of a retaliatory statute.[22] A statute ought not to be held to exclude a corporation unless it will not reasonably bear any other construction.[23] A state cannot exclude a foreign corporation engaged in interstate commerce.[24]

2187. Prerequisites to doing business in this state—Statute—It is provided by statute that before a foreign corporation organized for pecuniary profit can do business in this state it must appoint a resident agent, file a copy of its charter or articles of incorporation, pay a license fee, etc.[25] The statute is constitutional.[26] Compliance with the statute after entering into a contract or after the commencement of an action thereon is ineffectual retroactively.[27] The statute is inapplicable to corporations not doing business here, but merely attempting to collect in our courts claims against our citizens.[28] Foreign corporations doing business here without first complying with the statute, cannot maintain an action in our courts on any contract or demand growing out of such unlawful business.[29] A foreign corporation having a warehouse here for convenience in distributing goods sold by its traveling agents has been held not to be doing business here within the statute.[30] A single, isolated transaction, such as the sale and delivery of a machine by a foreign corporation to a person in this state is not doing business within the statute.[31] A foreign corporation

[18] Guilford v. W. U. Tel. Co., 59–332, 61+324; Id., 62–544, 64+1021. See Selover v. Isle Harbor L. Co., 91–451, 98+344; Id., 100–253, 111+155; Ebert v. Mutual etc. Assn., 81–116, 127, 83+506, 84+457.

[19] State v. U. S. Ex. Co., 81–87, 83+465.

[20] State v. De Groat, 109–168, 123+417.

[21] Tolerton v. Barck, 84–497, 88+19; State v. Fidelity etc. Co., 39–538, 41+108; Seamans v. Christian, 66–205, 68+1065; State v. Canda C. C. Co., 85–457, 460, 89+66; Wold v. Colt, 102–386, 114+243; Cable v. U. S. L. Ins. Co., 191 U. S. 288; Security etc. Co. v. Prewitt, 202 U. S. 246; National Council v. State Council, 203 U. S. 151; Swing v. Weston, 205 U. S. 275.

[22] See R. L. 1905 § 1709; Laws 1907 c. 420; State v. Fidelity etc. Co., 39–538, 41+108.

[23] State v. Fidelity etc. Co., 39–538, 41+108.

[24] State v. Canda C. C. Co., 85–457, 89+66. See 23 Harv. L. Rev. 549.

[25] R. L. 1905 §§ 2888–2890.

[26] Tolerton v. Barck, 84–497, 88+19; Heileman v. Peimeisl, 85–121, 123, 88+441.

[27] Heileman v. Peimeisl, 85–121, 88+441. See 19 Harv. L. Rev. 619.

[28] Nat. L. & T. Co. v. Gifford, 90–358, 96+919; Mason v. Thompson, 94–472, 103+507.

[29] Heileman v. Peimeisl, 85–121, 88+441; Keystone Mfg. Co. v. Howe, 89–256, 94+723; Sherman v. Aughenbaugh, 93–201, 100+1101. See Dunlop v. Mercer, 156 Fed. 545.

[30] Rock Island P. Co. v. Peterson, 93–356, 101+616.

[31] Lutes v. Wysong, 100–112, 110+367.

selling farm machinery here through a resident agent has been held to be doing business here within the statute.[32] The statute is inapplicable to interstate commerce.[33] Its object is to place foreign corporations upon an equality with domestic corporations, both as to privileges and as to burdens.[34] It is to be given full effect and not emasculated by a technical construction.[35] In an action by a foreign corporation against its agent to recover money received by the agent for its use, the agent is not estopped to show that the corporation has not complied with the statute.[36] Compliance with the statute is presumed, and need not be pleaded by a corporation. Non-compliance is a matter of defence to be pleaded by the adverse party.[37] The proviso exempting certain corporations is to be strictly construed.[38] The statute is inapplicable to contracts made prior to its enactment.[39] It does not apply to actions or proceedings in the federal courts.[40]

2188. Rights, privileges, and liabilities—It was formerly provided by statute that a foreign corporation that had complied with the laws of the state were, unless otherwise provided by law, entitled to all the rights, privileges, and immunities of domestic corporations,[41] and subject to the same visitorial power.[42]

2189. Right to hold and enforce mortgages—A foreign banking corporation, whose charter imposes no restriction upon the character of its loans, whether upon real or personal security, may take and hold a mortgage upon lands in this state, and enforce the same in the courts upon the same footing as other creditors.[43]

2190. Resort to federal courts—There was formerly a statute in this state forbidding foreign corporations from resorting to the federal courts,[44] and there is still such a statute in relation to foreign insurance companies.[45]

2191. Application of domestic statutes—The franchises and privileges which a corporation may exercise within the jurisdiction of any state must in all cases be derived from the laws of that particular state; and this is equally true whether the corporation be admitted to act in the state by a statutory license, or by a grant of a complete charter. It has frequently been held that it is a reasonable construction of statutes purporting to regulate all corporations created or organized under the law of a state to hold that such statutes apply to foreign corporations re-incorporated by the state, or permitted by statutory license to exercise their franchises within its territory.[46]

2192. Application of foreign statutes—It is only the charter of the corporation, constituting the agreement between it and its stockholders, which will be

[32] Thomas v. Knapp, 101–432, 112+989.

[33] Rock Island P. Co. v. Peterson, 93–356, 101+616; Thomas v. Knapp, 101–432, 112+989. See Brown v. Peterson, 101–53, 111+733.

[34] Heileman v. Peimeisl, 85–121, 88+441; Thomas v. Knapp, 101–432, 112+989.

[35] Thomas v. Knapp, 101–432, 112+989.

[36] Id.

[37] Rock Island P. Co. v. Peterson, 93–356, 101+616; Lehigh Valley C. Co. v. Gilmore, 93–432, 101+796; Mason v. Thompson, 94–472, 103+507; Langworthy v. Garding, 74–325, 77+207; Krafve v. Roy, 98–141, 107+966; Langworthy v. Washburn, 77–256, 79+974.

[38] Sherman v. Aughenbaugh, 93–201, 205, 100+1101.

[39] Keystone Mfg. Co. v. Howe, 89–256, 94+723.

[40] Dunlop v. Mercer, 156 Fed. 545.

[41] G. S. 1894 § 3425; Eickhoff v. Fidelity etc. Co., 74–139, 142, 76+1030.

[42] State v. U. S. Ex. Co., 81–87, 89, 83+465.

[43] Lebanon S. Bank v. Hollenbeck, 29–322, 13+145.

[44] Laws 1885 c. 183. See N. W. etc. Co. v. Brown, 36–108, 31+54.

[45] Laws 1907 c. 155.

[46] State v. Sioux City etc. Ry., 43–17, 44+1032 (fees for filing articles—Laws 1889 c. 225 applicable to Iowa railway company accepting provisions of Laws 1877 c. 14); Guilford v. W. U. Tel. Co., 59–332, 344, 61+324 (Laws 1893 c. 45—issuance of new stock certificates in case of loss).

recognized as binding in other states, and not the general laws of the foreign state, affecting merely the remedy, which govern only within the state enacting them.[47]

2193. Liability of stockholders—Enforcement in this state—Where a person becomes a stockholder in a corporation organized under the laws of a foreign state, he contracts with reference to all the laws of that state which enter into the constitution of the corporation; hence the extent of his individual liability, as a shareholder, for corporate debts, must be determined by the laws of that state. This liability may be enforced by creditors wherever they can obtain jurisdiction of the necessary parties. The remedy, however, is governed by the law of the forum.[48] A creditor of an insolvent foreign corporation may maintain in this state, against its stockholders of whom the court has jurisdiction, an action in the nature of a creditors' bill to obtain payment of his claim against such corporation from the unpaid balances of subscriptions by such stockholders to its capital stock. Such creditor must first obtain judgment against the corporation, and have execution returned unsatisfied in the state where he brings his action to enforce such stockholders' subscription, or he must show that it was impossible to do so.[49]

CORPSE—See Dead Bodies.

CORPUS DELICTI—See Criminal Law, 2453, 2462.

CORROBORATION—See Abduction, 20; Abortion, 25; Bastardy, 838; Bribery, 1106; Criminal Law, 2457; Divorce, 2795; Perjury, 7478; Rape, 8232; Seduction, 8719; Witnesses, 10357.

CORRUPTION OF BLOOD—See note 50.

CORRUPTLY—See note 51.

[47] Guilford v. W. U. Tel. Co., 59–332, 61+324.

[48] First Nat. Bank v. Gustin, 42–327, 44+198. See Benson v. Silvey, 59–73, 60+847.

[49] Rule v. Omega etc. Co., 64–326, 67+60; McConey v. Belton O. & G. Co., 97–190, 106+900.

[50] Wellner v. Eckstein, 105–444, 468, 117+830.

[51] State v. Stein, 48–466, 470, 51+474.

COSTS

Cross-References

See Executors and Administrators, 3673; Justices of the Peace, 5312.

IN GENERAL

2194. Definition—Costs are certain sums allowed to the prevailing party for expenses in an action.[52] The costs thus defined by statute are in practice termed statutory costs.[53] As commonly used the term "costs" includes both statutory costs and disbursements.[54] Disbursements are the expenses necessarily paid or incurred by the prevailing party.[55]

2195. Statutory—The right to recover costs and disbursements in an action or judicial proceeding is purely statutory, so that, where no statute allows it, they cannot be recovered.[56]

2196. An incident of the judgment—Costs are a mere incident of the judgment and go as a matter of course with every judgment in an action of a legal nature, without special directions and regardless of the regularity or correctness of the judgment.[57] A judgment is not affected by the taxation of costs until they are entered in it.[58]

[52] R. L. 1905 § 4337.

[53] Van Meter v. Knight, 32–205, 20+142.

[54] Bayard v. Klinge, 16–249(221); Woolsey v. O'Brien, 23–71; Hennepin County v. Wright County, 84–267, 87+846; Brown v. Fitcher, 91–41, 43, 97+416.

[55] Hennepin County v. Wright County, 84–267, 87+846.

[56] Bayard v. Klinge, 16–249(221); Andrews v. Marion, 23–372; Johnson v. Chi. etc. Ry., 29–425, 13+673; State v. Cantieny, 34–1, 24+458; Kroshus v. Houston County, 46–162, 48+770; State v. Tetu, 98–351, 355, 107+953, 108+470.

[57] McRoberts v. McArthur, 66–74, 68+770.

[58] Leyde v. Martin, 16–38(24).

2197. Legislative control—The allowance and regulation of costs is a matter properly within the reasonable discretion of the legislature. At the common law no costs were allowed eo nomine, but in actions where the plaintiff recovered damages, the jury were allowed to include his expenses, though the defendant, in case he prevailed, had no indemnity for his. At an early day the matter became a subject of legislative enactment. The chief purpose of the allowance of costs is compensation or indemnity for expenses incurred in enforcing a legal, or resisting an illegal, claim, though in some cases the legislature is properly influenced by considerations of public policy. The principle that governs the allowance of costs does not require that they should be uniform in all actions, or the same to each of the litigants; and so double or extra costs are sometimes allowed to plaintiffs or defendants, as the case may be, because deemed proper from the nature and circumstances of certain species of litigation. Of the propriety and justice of such enactments, within reasonable limits, the legislature must judge.[59]

2198. Special proceedings—The general statutes relating to costs apply only to ordinary civil actions. No costs are allowable in special proceedings unless expressly authorized by statute. The court has no discretion in the matter.[60]

2199. Court without jurisdiction—It is the general rule that a court has no authority to award a judgment for costs when it is without jurisdiction of the subject-matter of the action.[61]

2200. Stipulations—The court cannot disregard a stipulation of the parties as to costs.[62]

2201. Ownership—A judgment for costs and disbursements is the property of the party recovering it and not of his attorney, subject, however, to the lien of the latter for his services.[63]

2202. In case of nominal damages—The right to costs does not ordinarily depend upon the amount of recovery. A party is entitled to costs though he recovers only nominal damages.[64]

2203. Where there are several parties—In an action for tort against several defendants upon a verdict in favor of some of them but against the others, those succeeding are entitled to costs. Where several defendants who appear by the same attorney unite in the same answer and there is one trial as to all they are entitled jointly to statutory costs and not severally.[65] Where several defendants in an action, whether ex contractu or ex delicto, in good faith appear by separate attorneys and interpose separate defences by separate answers, each is entitled, on a recovery in his favor, to a separate bill of costs.[66] In actions of an equitable nature our statute provides that "when there are several defendants, not united in interest, and making separate defences by separate answers, and plaintiff fails to recover judgment against all, the court may award costs to such of the defendants as have judgment in their favor, or any of them." [67]

[59] Johnson v. Chi. etc. Ry., 29–425, 13+673; Schimmele v. Chi. etc. Ry., 34–216, 25+347; Cameron v. Chi. etc. Ry., 63–384, 65+652.

[60] Bayard v. Klinge, 16–249(221); Andrews v. Marion, 23–372 (statute since enacted); Kroshus v. Houston County, 46–162, 48+770.

[61] McGinty v. Warner, 17–41(23). See Ross v. Evans, 30–206, 14+897; McRoberts v. McArthur, 66–74, 68+770.

[62] Dorr v. Steichen, 18–26(10); Herrick v. Butler, 30–156, 14+794.

[63] Davis v. Swedish etc. Bank, 78–408, 80+953, 81+210.

[64] Potter v. Mellen, 36–122, 30+438; Harris v. Kerr, 37–537, 35+379; Farmer v. Crosby, 43–459, 45+866; U. S. Ex. Co. v. Koerner, 65–540, 68+181.

[65] Barry v. McGrade, 14–286(214).

[66] Slama v. Chi. etc. Ry., 57–167, 58+989; Groomes v. Waterman, 59–258, 61+139.

[67] R. L. 1905 § 4342.

2204. Costs of prior trial—When a new trial is ordered, nothing being said about the costs of the first trial, such costs are recoverable by the party who ultimately succeeds.[68] There is neither a statute nor a rule of court requiring the payment of costs as a condition of granting a new trial on the merits.[69] The failure of the plaintiff to pay costs awarded against him in a former action is ground for a stay of proceedings.[70]

2205. Two actions tried together—Actions were brought by different plaintiffs, husband and wife, against the same defendant, to recover for injuries received in the same accident. By consent of all parties the cases were tried together, separate verdicts being rendered. The wife had a verdict. Her costs and disbursements were taxed, judgment entered and paid. In the other action the verdict was for the defendant. It was held that the defendant being the prevailing party in the latter action was entitled to recover ten dollars statutory costs. It was also held that the defendant was entitled to recover disbursements paid or incurred as fees for witnesses who were subpœnaed and attended in that action, though it was admitted that the witnesses were as necessary and material in one case as in the other, and would have been produced and sworn in both, had there been separate trials.[71]

2206. Who prevailing party—No general rule can be laid down as to who is the prevailing party.[72]

2207. Liability of state—The state is liable for costs and disbursements in civil actions brought by it,[73] but not in actions brought against it,[74] or in criminal prosecutions,[75] or in tax proceedings.[76]

2208. Security for costs—Statute—Provision is made by statute for security for costs in certain cases.[77] The remedy for a failure to file security is a motion for a stay of proceedings, or for a dismissal. The objection cannot be raised by answer. The court may allow a non-resident plaintiff to file security for costs nunc pro tunc after the action is commenced.[78]

2209. In equitable actions—In equitable actions the allowance of costs rests in the discretion of the trial court,[79] but the prevailing party is entitled to recover his disbursements as of right.[80]

2210. In criminal actions—In all criminal actions, upon conviction of defendant, in addition to the punishment prescribed and as a part of the sentence, the court may adjudge that defendant shall pay the whole or any part of the disbursements of the prosecution.[81] This applies only in the district court.[82]

[68] Myers v. Irvine, 4–553(435); Walker v. Barron, 6–508(353). See McRoberts v. McArthur, 66–74, 68+770.

[69] Park v. Electric Co., 75–349, 77+988.

[70] Gerrish v. Pratt, 6–53(14).

[71] Schuler v. Mpls. St. Ry., 76–48, 78+881.

[72] See Barry v. McGrade, 14–286(214); Dorr v. Steichen, 18–26(10); Harbo v. Blue Earth County, 63–238, 65+457; Schuler v. Mpls. St. Ry., 76–48, 78+881; Gilman v. Maxwell, 79–377, 82+669; Katz v. Am. B. & T. Co., 86–168, 90+376; Eberlein v. Randall, 99–528, 109+1133 (crossbill).

[73] State v. Buckman, 95–272, 104+240, 289.

[74] Nat. B. & S. Co. v. Hopkins, 69–119, 104+678, 680, 816. See Bartles Oil Co. v. Lynch, 124+994 (state officer held liable).

[75] State v. Buckman, 95–272, 104+240, 289; State v. Tetu, 98–351, 107+953, 108+470.

[76] State v. N. W. El. Co., 101–192, 196, 112+68.

[77] R. L. 1905 §§ 4355, 4356.

[78] Henry v. Bruns, 43–295, 45+444.

[79] R. L. 1905 § 4342; Wallrich v. Hall, 19–383(329).

[80] Van Meter v. Knight, 32–205, 20+142.

[81] R. L. 1905 § 4352. See Steenerson v. Polk County, 68–509, 71+687 (statute cited arguendo); Hennepin County v. Wright County, 84–267, 87+846 (change of venue); Mathews v. Lincoln County, 90–348, 351, 97+101 (statute cited arguendo).

[82] State v. Tetu, 98–351, 355, 107+953, 108+470.

2211. In actions by relator or petitioner in name of state—It is provided by statute that "whenever an action or proceeding is instituted in the name of the state on the relation or petition of any citizen, such relator or petitioner is entitled to, and liable for, costs and disbursements in the same cases and to the same extent as if such action or proceeding had been instituted in his own name." [83] Pursuant to the order directing the issuing of a writ of certiorari to the probate court, a citation was served upon the adverse party in interest to show cause why the action of that court should not be reversed. The relator prevailed. It was held that he was entitled to costs and disbursements against the adverse party in interest, though the writ was directed only to the probate court.[84]

2212. In actions for services—Double costs—Provision is made for double costs, under certain conditions, in actions for services.[85] They are recoverable by an assignee of the person rendering the services.[86]

2213. On motions, demurrers, etc.—The statute provides that "costs may be allowed on motion, demurrer, or appeal from taxation of costs, in the discretion of the court or judge, not exceeding ten dollars, and may be absolute, or directed to abide the event of the action." [87] The costs allowed a party on motion may be included in the costs allowed him upon the entry of judgment.[88] The allowance of costs to the prevailing party on a motion for a new trial rests in the discretion of the court and they cannot be recovered unless expressly allowed.[89]

2214. On dismissal—Where the court, when plaintiff rests, dismisses the action upon motion of defendant on the ground that no cause of action has been established, the judgment is one of dismissal and not upon the merits, and the defendant is entitled to only five dollars costs.[90] But where there is a regular trial of the cause and findings of fact and conclusions of law are made, upon which a judgment of dismissal is entered for the defendant, it is a judgment on the merits entitling the defendant to ten dollars costs.[91]

2215. On appeal from justice court—If the plaintiff appeals from a judgment in his favor and is the successful party in the district court but fails to enlarge the judgment the defendant is entitled to costs and disbursements; if on such an appeal the defendant is the successful party he is of course entitled to costs and disbursements. If the plaintiff appeals from a judgment against him, the party who recovers judgment in the district court is entitled to costs and disbursements without regard to any question as to the reduction of damages. If the defendant appeals from a judgment in his favor, the party who recovers judgment in the district court is entitled to costs and disbursements without regard to any question as to the reduction of damages. If the defendant appeals from a judgment against him and succeeds in reducing it one half or more, he is entitled to costs and disbursements though the unsuccessful party,[92] and though he made default in the justice court; [93] and if, on such an appeal,

[83] R. L. 1905 § 4350.

[84] State v. Probate Ct., 67–51, 69+609, 908.

[85] Laws 1907 c. 200.

[86] Clifford v. N. P. Ry., 55–150, 56+590.

[87] R. L. 1905 § 4346. See Brown v. Brown, 37–128, 33+546 (on motion to open default judgment); Olmstead v. Firth, 64–243, 66+988 (motion to vacate judgment); Ueland v. Johnson, 77–543, 80+700 (terms imposed on vacating judgment held not costs within this statute).

[88] Wentworth v. Griggs, 24–450; Horn v. Grand Rapids etc. Co., 80–146, 83+1118.

[89] Myers v. Irvine, 4–553(435); Siebert v. Mainzer, 26–104, 1+824. See Dunnell, Minn. Pr. § 985.

[90] Conrad v. Bauldwin, 44–406, 46+850. See Cameron v. Chi. etc. Ry., 51–153, 53+199.

[91] Winnebago P. Mills v. N. W. etc. Co., 61–373, 63+1024.

[92] R. L. 1905 § 4351; Conrad v. Swanke, 80–438, 83+383.

[93] Conrad v. Swanke, 80–438, 83+383.

he is the successful party he is entitled to costs and disbursements though he does not reduce the judgment one half;[94] but if the defendant, on such an appeal, is the unsuccessful party and does not reduce the judgment one half or more the plaintiff is entitled to costs and disbursements.[95] The clerk of the district court has no authority to review the taxation of costs by a justice of the peace. Any alleged error in such taxation should be brought to the notice of the court for correction upon the hearing of the appeal from the judgment.[96]

2216. Impounding money in court to pay costs—In an action to compel a redemption from a foreclosure sale by executing a certificate of redemption, plaintiff made a tender and subsequently paid into court, under the order of the court, an amount of money equal to that tendered. He had in the meantime failed to keep his tender good, and the court, for that reason, found for the defendant. It was held that the plaintiff was then entitled to withdraw the money so paid into court, but that the defendant might, by order of the court, impound sufficient of the money so on deposit to pay his costs.[97]

DISBURSEMENTS

2217. On appeal from justice court—The object of the statute[98] in relation to the allowance of disbursements on appeal from a justice court was obviously to discourage the bringing of actions in the district court of which a justice of the peace has concurrent jurisdiction. The intention of the legislature has been frustrated by the construction placed upon the statute. It is held that where the damages claimed exceed the jurisdiction of a justice of the peace a successful plaintiff is entitled to his costs and disbursements though he recover fifty dollars or less.[99]

2218. Witness fees—Where witnesses attend and are sworn, though not subpœnaed, their fees may be taxed.[1] The fees of witnesses in attendance, but not sworn, are taxable if their attendance was secured under a reasonable belief that their testimony would or might be necessary or material.[2] Much must be left to the integrity of counsel in requesting or compelling the attendance of witnesses.[3] If a party acts in good faith when requesting or compelling the attendance of his witnesses, the mere fact that their testimony is immaterial or inadmissible will not deprive him of the right to tax their fees. Bad faith in such a case will not be presumed on the taxation of costs before the clerk.[4] If a cause is set for trial on a particular day and the interval is short and the witnesses live at a considerable distance, a party may keep them in attendance. But if a considerable time is to elapse before the day of trial and the witnesses live but a short distance from the place of trial a party cannot charge for them on days when they are not needed.[5] An attorney in a cause is not entitled to a fee for attending as a witness.[6] A party to the action is entitled to fees as a

[94] Foster v. Hansman, 55–157, 56+592.
[95] Watson v. Ward, 27–29, 6+407; Closen v. Allen, 29–86, 12+146; Flaherty v. Rafferty, 51–341, 53+644; Thompson v. Ferch, 78–520, 81+520; Olson v. Rushfeldt, 81–381, 84+124 (the syllabus in this case is too broad).
[96] State v. Reckard, 21–47.
[97] Dunn v. Hunt, 76–196, 78+1110.
[98] R. L. 1905 § 4340.
[99] Greenman v. Smith, 20–418(370); Potter v. Mellen, 36–122, 30+438; Kimball v. Southern Land I. Co., 57–37, 58+868. See Turner v. Holleran, 8–451(401) (under old statute); Felber v. Southern Minn. Ry., 28–156, 9+635.

[1] Clague v. Hodgson, 16–329(291).
[2] Slama v. Chi. etc. Ry., 57–167, 58+989; Schuler v. Mpls. St. Ry., 76–48, 78+881; Berryhill v. Carney, 76–319, 79+170.
[3] Mankato L. & S. Co. v. Craig, 81–224, 83+983. See Barber v. Robinson, 82–112, 84+732.
[4] Mankato L. & S. Co. v. Craig, 81–224, 83+983; Merriam v. Johnson, 93–316, 101+308. See Merchants' S. Bank v. St. Anthony etc. Co., 96–37, 104+713.
[5] Andrews v. Cressy, 2–67(55).
[6] R. L. 1905 § 2718; Barry v. McGrade, 14–286(214).

witness only when he appears solely as a witness for other parties.[7] The fees of a party's own witnesses should not be taxed against him.[8] Special provision is made for the fees of experts.[9]

2219. Miscellaneous disbursements—The expense of procuring necessary documentary evidence is taxable as a general rule.[10] The fees of notaries in taking depositions for use on the trial are taxable.[11] The expense of procuring a copy of the stenographer's notes for use on a motion for a new trial may be taxed if a new trial is granted with the costs of the motion.[12] Where there were three trials in a cause, each resulting in a verdict for the plaintiff, who had paid the jury fee in each trial, it was held proper to tax all the fees on the entry of judgment upon the last verdict.[13] The expenses of a sheriff on attachment are taxable upon order of the court.[14] Plaintiff obtained judgment by default and levied upon the personal property of the defendant. On motion of the defendant the judgment was set aside, default opened, and leave given to answer on condition that such judgment, execution and levy should stand as security for plaintiff's claim to abide the event of the action. Subsequently, on stipulation of parties judgment was authorized to be entered and execution to be issued anew against defendant. It was held proper on entering the last judgment to tax the expenses of the sheriff on the first execution and in caring for the property.[15] The fees of the sheriff for serving a subpœna are taxable though the witness could not be found.[16] The expense of serving a summons cannot be taxed if the service was not made by the sheriff or some other proper officer.[17] When the same persons are defendants in different actions, and incur a joint expense for documentary evidence necessary for their defence in several actions, and use the same in such actions, they may charge such expense as a disbursement in either action, at their election, provided such charge is made in one action only.[18] No fees can be taxed for services not rendered, except when otherwise expressly provided, and upon entry of judgment or decree no prospective costs may be taxed except for docketing the same, unless the party demanding judgment shall require the costs of an execution or transcript of judgment to be taxed, in which case it may be done. The legal fees paid for certified copies of the depositions of witnesses filed in any clerk's office, or any documents or papers filed or recorded in any public office, necessarily used on trial of a cause or on the assessment of damages, must be allowed in the taxation of costs.[19] The expense of procuring a survey, plat, and abstract of title, has been held not taxable in a case where they were convenient, but not necessary.[20] The expense of procuring depositions has been held taxable, though they were not used.[21]

TAXATION

2220. Time—Ordinarily costs are taxed before the entry of judgment but this is not indispensable. The costs properly constitute a part of the judgment.

[7] R. L. 1905 § 2718; Barry v. McGrade, 14-286(214).
[8] Trigg v. Larson, 10-220(175); Payson v. Everett, 12-216(137).
[9] R. L. 1905 § 2711; Le Mere v. McHale, 30-410, 15+682; State v. Teipner, 36-535, 32+678; Kelly v. Kelly, 72-19, 22, 74+899; Farmer v. Stillwater W. Co., 86-59, 90+10; Anderson v. Mpls. etc. Ry., 103-184, 114+744.
[10] Andrews v. Cressy, 2-67(55); Barry v. McGrade, 14-286(214); Wentworth v. Griggs, 24-450.
[11] Wentworth v. Griggs, 24-450.
[12] In re Pinney's Will, 27-280, 6+791, 7+144; Linne v. Forrestal, 51-249, 53+547, 653.
[13] Schultz v. Bower, 66-281, 68+1080.
[14] Barman v. Miller, 23-458.
[15] Id.
[16] Id.
[17] R. L. 1905 § 4104.
[18] Barry v. McGrade, 14-286(214).
[19] R. L. 1905 §§ 2718, 2719.
[20] Thompson v. Germania etc. Co., 97-89, 94, 106+102.
[21] Barber v. Robinson, 82-112, 84+732.

and, unless they are waived or released by the prevailing party, he is entitled to have them included in the judgment as of right. A judgment is not perfected until the costs are inserted,[22] and hence the time of appeal does not run against the defeated party until they are properly taxed and included in the judgment.[23] But as respects the lien or validity of a judgment, the omission to include costs, or the insertion therein of costs taxed without notice, is to be treated as an irregularity merely. A party may enter and docket his judgment so as to secure a lien without waiting to give notice of taxation of costs, and, upon a re-taxation, the record may be amended, and, if the costs are reduced, the amount of such reduction may be indorsed on the execution if previously issued.[24]

2221. Notice—A judgment for costs entered without notice, or upon insufficient notice, is not void, but merely irregular, and subject to correction on motion.[25]

2222. Affidavits as to disbursements—It devolves upon the party claiming costs and disbursements to show, by his statement and affidavit, at least prima facie, that they are such as he is entitled to have taxed.[26] Hence, if a party claims traveling fees for witnesses, his affidavit should state the place of residence of each witness, and the number of miles they respectively traveled as such witnesses for the purpose of going from such place of residence to the place of trial and returning therefrom.[27] It should also state the number of days' attendance of each witness with the dates.[28] If witnesses are in attendance but not sworn an affidavit merely stating that they were "necessary and material" is not sufficient. There must be an affidavit stating facts which show the necessity of having them in attendance. This affidavit may be made after objection is raised.[29]

2223. Specification of objections—The statute provides that a party objecting to any items presented in the bill of costs and disbursements shall specify in writing the grounds of objection, and, in case of appeal, these objections are to be certified to the court by the clerk. The appeal is to be heard and determined by the court upon the objections so certified, "and no other." The object of this section is to prevent a party appealing from urging before the court any gound of objection which the clerk had not been called upon to determine. And on appeal to the supreme court a party is limited to the objections thus specifically taken before the clerk.[30]

2224. Appeal to district court—Costs and charges to be inserted in a judgment are taxed in the first instance by the clerk upon two days' notice. And an appeal therefrom may be taken to the court within ten days after such taxation by the clerk, but not afterwards. Such appeal must be taken by notice in writing, signed by the appellant, directed to and served upon the adverse party and the clerk, and must specify the items from which the appeal is taken When such appeal is taken, either party may bring the same on for determina-

[22] Fall v. Moore, 45–517, 48+404.

[23] Richardson v. Rogers, 37–461, 35+270; Mielke v. Nelson, 81–228, 83+836.

[24] Leyde v. Martin, 16–38(24); Richardson v. Rogers, 37–461, 35+270; Fall v. Moore, 45–517, 48+404.

[25] Jakobsen v. Wigen, 52–6, 53+1016; Lindholm v. Itasca L. Co., 64–46, 65+931.

[26] Andrews v. Cressy, 2–67(55).

[27] Merriman v. Bowen, 35–297, 28+921; Dallemand v. Swensen, 54–32, 55+815 (affidavit held sufficient).

[28] Andrews v. Cressy, 2–67(55).

[29] Osborne v. Gray, 32–53, 19+81; Berryhill v. Carney, 76–319, 79+170; Merchants' S. Bank v. St. Anthony etc. Co., 96–37, 104+713.

[30] R. L. 1905 § 4345; Barry v. McGrade, 14–286(214); Davidson v. Lamprey, 17–32(16); Schuler v. Mpls. St. Ry., 76–48, 78+881; Barber v. Robinson, 82–112, 84+732.

tion before the court on notice, or by an order to show cause. On such appeal the court will only review the items objected to, and upon the grounds specified before the clerk.[31] When costs are allowable in the discretion of the court, the court exercises its discretion in that regard when it affirms, on appeal, the taxation of such costs by the clerk.[32] And where the clerk improperly taxes costs which are only taxable upon application to the court, the irregularity is cured by the subsequent affirmance of the taxation of the court on appeal.[33] In passing upon the propriety of witness fees or other disbursements the court is not confined to the affidavits presented, but may act upon its own knowledge of the proceedings.[34]

2225. Appeal to the supreme court—Objection to the taxation of costs by the clerk cannot be raised for the first time on appeal.[35] An appeal does not lie from an order of the district court made on appeal from the taxation of costs by the clerk.[36] The only way in which such an order can be reviewed in the supreme court is on appeal from the judgment,[37] and it may be so reviewed even though made after the entry of judgment.[38] The supreme court will not review the action of the trial court on an appeal from the taxation of costs by the clerk unless the record fully discloses all the evidence upon which the action of the court was based.[39]

IN SUPREME COURT

2226. A creature of statute—The authority of the supreme court to award costs is regulated and limited by statute and it has no equitable or discretionary power over the subject, other than the statute itself confers.[40]

2227. No costs to the defeated party—The supreme court has no power to grant costs to the defeated party or to relieve him from the payment of the costs allowed to the prevailing party, except in the exercise of the discretion which the statute allows.[41]

2228. Who is the prevailing party—When the supreme court reverses, overrules, or modifies the judgment or order from which the appeal is taken, the appellant is the prevailing party and entitled to costs, in the absence of special circumstances rendering the appeal improper.[42] Where several plaintiffs or defendants join in an appeal and the judgment or order is modified as to some of the appellants and affirmed as to the others, the respondent is entitled to costs and disbursements against those as to whom it is affirmed, and those as to whom it is modified are entitled to costs and disbursements against the respondent.[43] Where the rights of several parties defendant, as related to the subject of the

[31] Rule 38, District Court. See, prior to adoption of rule, Andrews v. Cressy, 2-67(55); Davidson v. Lamprey, 17-32(16).

[32] Turner v. Holleran, 8-451(401).

[33] Barman v. Miller, 23-458.

[34] Valerius v. Richard, 57-443, 451, 59+534.

[35] See § 384.

[36] Minn. V. Ry. v. Flynn, 14-552(421); Felber v. Southern Minn. Ry., 28-156, 9+635; Closen v. Allen, 29-86, 12+146; Herrick v. Butler, 30-156, 14+794.

[37] Andrews v. Cressy, 2-67(55); Felber v. Southern Minn. Ry., 28-156, 9+635; Herrick v. Butler, 30-156, 14+794; Richardson v. Rogers, 37-461, 35+270.

[38] Fall v. Moore, 45-517, 48+404.

[39] Schultz v. Bower, 66-281, 68+1080; Gardner v. Leck, 52-522, 54+746; Peterson v. Storm, 96-247, 104+894. See Wentworth v. Griggs, 24-450.

[40] Atwater v. Russell, 49-57, 51+629, 52+26; Hess v. G. N. Ry., 98-198, 201, 108+7, 803; State v. Tetu, 98-351, 107+953, 108+470. See Kroshus v. Houston County, 46-162, 48+770.

[41] Atwater v. Russell, 49-57, 51+629, 52+26.

[42] Coit v. Waples, 1-134(110); Moody v. Stephenson, 1-401(289); Sanborn v. Webster, 2-323(277); Allen v. Jones, 8+202(172); Nelson v. Munch, 30-132, 14+578; Henry v. Meighen, 46-548, 49+323, 646; Anderson v. Itasca L. Co., 86-480, 91+12; Akin v. Lake Superior etc. Mines, 103 204, 212, 114+654, 837.

[43] Nelson v. Munch, 30-132, 14+578.

action, are conflicting, and the judgment is in favor of some and against others, a defeated party may serve his notice of appeal upon his codefendants as well as upon the plaintiff, and have the rights of the defendants, as between themselves, finally adjudicated in the supreme court. And if the judgment is affirmed, the respondents, whether plaintiffs or defendants, will be deemed prevailing parties for the purposes of the adjustment of costs.[44]

2229. Where there are several prevailing parties—Where there are several prevailing parties each is entitled to statutory costs, except where several appear by the same attorney or attorneys, in which case but one bill can be allowed to all so appearing.[45]

2230. Real party in interest liable—Where an attorney in a case was the real party in interest, it was held proper to tax costs and disbursements against him personally.[46]

2231. Payment of costs a condition of remittitur—It is provided by statute that in all cases, except where it is otherwise ordered by the court, the costs and disbursements together with the fees and charges of the clerk shall be paid before any remittitur of the case shall be made and such payment shall be a condition precedent to any further proceedings in the cause by the adverse or losing party in the district court.[47] It is held under this provision that whether the costs in any given case shall be paid as a condition precedent to remitting the case and its further prosecution in the court below, is a question exclusively for the supreme court. If the case is remitted without costs being paid, no matter whether it is on the application of the defendant or appellant, it goes down for further proceedings in accordance with the opinion of the court, without reference to the question whether the costs have been paid or not.[48]

2232. Appeal for delay—In an action for the recovery of money only, the supreme court may, if of opinion that the appeal was taken for delay merely, allow the plaintiff, in addition to his costs and disbursements, a sum not exceeding three per cent. on the judgment in the district court.[49]

2233. Actions against railroads for killing stock—The statute authorizing double costs in actions against railroads for the killing of stock is not applicable to costs in the supreme court.[50]

2234. Bastardy proceedings—There is no statute authorizing the defendant to tax costs and disbursements against a county or complaining witness in bastardy proceedings.[51]

2235. Violations of city ordinances—Upon appeals in suits for violations of the ordinances of the city of Minneapolis, though such suits are, under the charter, brought in the name of the state, and though in some respects quasi criminal, yet, as the state is only a nominal party, costs are recoverable as in civil actions between private persons.[52]

2236. Statutory costs when appeal from judgment and order—Where appeals were taken from certain judgments and also from orders made thereafter directing an amendment of the findings, it was held that the respondent, being the prevailing party, should be allowed statutory costs only on the appeals from the orders.[53]

[44] Atwater v. Russell, 49–57, 52+26.
[45] Menzel v. Tubbs, 51–364, 53+653, 1017.
[46] Anderson v. Itasca L. Co., 86–480, 91+12.
[47] R. L. 1905 § 4354.
[48] Fonda v. St. P. C. Ry., 72–1, 80+366.
[49] R. L. 1905 § 4354; West v. Eureka I. Co., 40–394, 42+87; Burr v. Crichton, 51–343, 53+645; Maxwell v. Schwartz, 55–414, 57+141; Bardwell v. Brown, 57–140, 58+872.
[50] Croft v. Chi. etc. Ry., 72–47, 74+898.
[51] State v. Spencer, 73–101, 75+893.
[52] State v. Harris, 50–128, 52+387, 531.
[53] State etc. Co. v. Adams, 47–399, 50+360.

2237. Setting off costs against judgment—On motion the costs of the prevailing party may be set off against an equal amount of the adverse party's recovery of damages.[54]

2238. Cases in which costs not allowed—Costs are not a matter of right but rest in the discretion of the court. They are not allowed if the appeal was improper under the circumstances. In the following cases the supreme court withheld costs from the prevailing party: where the amount involved was small and the prevailing party secured a reversal mainly by having induced the court to exclude competent evidence;[55] where an order overruling a demurrer was reversed but admissions were made at the argument showing a liability;[56] where an order sustaining a demurrer was reversed but there was little merit in the cause of action set up in the complaint;[57] where an order denying a new trial was affirmed but with directions to the lower court to allow the complaint to be amended to conform to the facts proved, there having been no application for leave to amend on the trial although objection to the variance was made by the defendant;[58] where there was no substantial error in the judgment;[59] where an order overruling a demurrer was reversed but it was considered that the demurrer was unnecessary for the protection of any of defendant's substantial rights;[60] where the court was of the opinion that the litigation was needless and would prove fruitless;[61] where a case was improperly set down for oral argument in violation of Rule 15;[62] where paper book and brief were not filed three days before the argument as required by Rule 9;[63] where the case went off on an important question of practice not only new but difficult;[64] where the only question involved was the right to costs in the court below and each party improperly proceeded with the appeal instead of applying promptly to have it dismissed;[65] where the amount involved was less than ten dollars and no important questions were involved;[66] where the only error in the judgment was the inclusion of certain trifling costs;[67] where an order was affirmed on grounds not urged by respondent;[68] where the decision went off on a point not clearly made by the appellant and was probably not considered by the trial court;[69] where the appellant failed to call the attention of the trial court to the fact that the damages assessed by the court were more than authorized by the complaint;[70] where the defeated party was justified in relying on a former decision of the court;[71] where the appeal was on a trifling question of pleading;[72] where the court failed to charge the jury as to any of the issues;[73] where there had

[54] Doud v. Duluth M. Co., 55–53, 56+463.
[55] Sauer v. Flynt, 61–109, 63+252.
[56] Marine Nat. Bank v. Humphreys, 62–141, 64+148; Vaule v. Steenerson, 63–110, 65+257.
[57] Plano Mfg. Co. v. Hallberg, 61–528, 63+1114.
[58] Adams v. Castle, 64–505, 67+637.
[59] Coit v. Waples, 1–134(110).
[60] Topping v. Clay, 62–3, 63+1038; Nat. L. & T. Co. v. Gifford, 90–358, 96+919.
[61] Nally v. Maley, 62–372, 64+927.
[62] Vaule v. Steenerson, 63–110, 65+257; Dickerman v. St. Paul, 72–332, 75+591; Ramgren v. McDermott, 73–368, 76+47; Olson v. Hanson, 74–337, 77+231; Larson v. Dukleth, 74–402, 77+220; Thompson v. Ferch, 78–520, 81+520; Ford v. Berg, 79–464, 82+1118; Taylor v. St. P. C. Ry., 80–331, 83+189; Powell v. Luders, 84–372, 87+940; Jenkinson v. Koester, 86–155, 90+382.
[63] Lehigh C. & I. Co. v. Scallen, 61–63, 63+245; Flanagan v. St. Paul, 65–347, 68+47.
[64] State v. Probate Ct., 28–381, 10+209.
[65] Thomas v. Craig, 60–501, 62+1133.
[66] Dunn v. Barton, 40–415, 42+289; Nally v. Maley, 62–372, 64+927; Danahey v. Pagett, 74–20, 76+949.
[67] Berryhill v. Carney, 76–319, 79+170.
[68] Bergh v. Warner, 47–250, 50+77; Duxbury v. Shanahan, 84–353, 87+944.
[69] Jones v. Chi. etc. Ry., 80–488, 83+446.
[70] Campbell v. Loeb, 72–76, 74+1024.
[71] State v. Nelson, 41–25, 42+548.
[72] Cordill v. Minn. El. Co., 89–442, 95+306.
[73] Greengard v. Burton, 88–252, 92+931.

been a miscarriage of justice; [74] where the appeal was brought to settle a question of practice.[75]

2239. Disbursements—Where a bill of exceptions or case is prepared for and used on a motion for a new trial which is granted, with costs of motion, the expense of preparing the same is not taxable as a disbursement in the supreme court on an appeal from the order granting the new trial. But where a bill of exceptions or case is prepared exclusively for use on appeal, and is in fact so used, the expenses incurred may be taxed in the supreme court.[76] The appellant, if the prevailing party, is entitled to tax disbursements for certifying and printing such matter as is reasonably necessary to present his assignment of errors, though he does not prevail upon all of them.[77] He may tax such reasonable sum as he may have paid to a surety company for an appeal bond.[78] Where a party requests the court to be allowed to use the paper book of the adverse party for the purposes of his appeal, the court may require him, as a condition to its use, to pay a just proportion of the cost of preparing it. There is no statute providing for a division of the expense in such a case, and unless the court imposes the condition, a part of the expense cannot be taxed.[79] Where matter that is irrelevant to any issue involved in the appeal is brought into the record, the appellant, though the prevailing party, will not be allowed to recover his disbursements for printing such matter.[80] In one case the court said, "the practice of including in the paper book a crude and undigested mass of irrelevant and immaterial matter has become so common in this day of stenographers and typewriters as to become a positive abuse, which adds greatly to the labors of this court; and we will not hesitate, whenever the subject is called to our attention to disallow any disbursements for the printing of all such unnecessary matter." [81] Objection that an excessive price was paid for printing the paper book will not be considered in the absence of an affidavit.[82] Disbursements will not be allowed for the printing of papers not required by statute or rule of court. As to the amount of matter that may be introduced into the briefs no hard and fast rule can be laid down. Wide latitute must necessarily be given counsel in the presentation of their cases but the unsuccessful party should not be charged with the cost of printing long duplicate arguments.[83] Unless papers are printed as required by rule of court the cost of preparing them cannot be recovered.[84] Disbursements for certain "blue prints" have been disallowed.[85] When several cases, involving precisely the same question, are briefed and argued together as one and by the same counsel, on records differing merely in names, dates, and amounts, counsel for appellant is bound to ask the court to dispense with a paper book in each case, and costs will be allowed appellant for only one.[86] If a brief contains improper reflections on the trial court it will be stricken from the files and no disbursements for printing the same be allowed in the taxation of costs.[87]

[74] Grimes v. Fall, 81–225, 83+835

[75] Merchants' S. Bank v. St. Anthony etc. Co., 96–37, 104+713.

[76] In re Pinney, 27–280, 6+791, 7+144; Linne v. Forrestal, 51–249, 53+547, 653; Wadleigh v. Duluth St. Ry., 92–415, 100+104, 362.

[77] Curry v. Sandusky F. Co., 88–485, 93+896.

[78] R. L. 1905 § 4528; Wadleigh v. Duluth St. Ry., 92–415, 100+104, 362.

[79] Hess v. G. N. Ry., 98–198, 108+7, 803.

[80] Hefferen v. N. P. Ry., 45–471, 48+1, 526; Henry v. Meighen, 46–548, 49+323, 646; Winston v. Hart, 65–439, 68+72.

[81] Henry v. Meighen, 46–548, 49+323, 646; Winston v. Hart, 65–439, 68+72.

[82] Hefferen v. N. P. Ry., 45–471, 48+1, 526.

[83] Hart v. Marshall, 4–552(434).

[84] Cooper v. Stinson, 5–522(416).

[85] Curry v. Sandusky F. Co., 88–485, 93+896.

[86] Fitzgerald v. Hennepin Co. etc. Assn., 56–424, 57+1066, 59+191. See Clay Co. L. Co. v. Alcox, 88–4, 92+464.

[87] Wood v. Chi. etc. Ry., 66–49, 68+462.

2240. How recovered—Loss by neglect—Costs are recoverable only in the manner prescribed by the rules of the supreme court. If a party neglects to have them taxed and inserted in the judgment, the adverse party may cause judgment to be entered without providing for them, and the right to them is lost.[88]

COTENANCY—See Joint Tenancy: Tenancy in Common.
COTTOLENE—See Food, 3779.
COULEES—See Waters, 10153, 10160.
COUNSEL FEES—See Appeal and Error, 413; Attorney and Client, 699; Damages, 2523; Evidence, 3465; Receivers, 8262.
COUNT—See Pleading, 7527.
COUNTERCLAIM—See Agency, 240; Judgments, 5044, 5197; Pleading, 7598.

[88] Osborne v. Paulson, 37–46, 33+12.

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IN GENERAL

2241. Nature—Counties are involuntary political corporations organized as subdivisions of the state for governmental purposes.[89] They are the agencies through which the functions of government are, to a certain extent, exercised within their territorial limits.[90] They are public corporations.[91] They are not strictly municipal corporations, but they are sometimes classed as such.[92] They are often incorrectly characterized as quasi corporations.[93]

2242. Control of legislature—Within constitutional limitations the control of the legislature over counties is absolute.[94] It may compel a county to pay an obligation which is not legally binding, but which it ought in equity to pay.[95] It cannot divert county money or property to private purposes.[96] The property of a county is as free from legislative confiscation as the property of an individual.[97]

ORGANIZATION

2243. What constitutes—There is a distinction between an organized and an established county. An established county is a territorial subdivision of the state set apart by the legislature for future organization as a county. An organized county is one which has been invested with the corporate powers of a county.[98] By Sp. Laws 1858 c. 64 Toombs county was not only established, but organized.[99] The legislature may give established counties such officers as it pleases. It may attach such a county to an organized county and extend the jurisdiction of the probate court of the latter over the former.[1]

2244. Disorganization—Sp. Laws 1876 c. 208, disorganizing Cass county and attaching it to Crow Wing county, was constitutional.[2]

89 R. L. 1905 § 409; Guilder v. Dayton, 22–366; State v. McFadden, 23–40; Henderson v. Sibley County, 28–515, 520, 11+91; State v. Foley, 30–350, 356, 15+375; Dosdall v. Olmsted County, 30–96, 14+458; Dowlan v. Sibley County, 36–430, 31+517; Gaare v. Clay County, 90–530, 97+422; State v. Olson, 107–136, 119+799.

90 Guilder v. Dayton, 22–366.

91 McDougal v. Hennepin County, 4–184 (130).

92 Dowlan v. Sibley County, 36–430, 31+517.

93 Williams v. Lash, 8–496(441); Goodnow v. Ramsey County, 11–31(12); Grannis v. Blue Earth County, 81–55, 83+495; State v. Smith, 84–295, 87+775, and cases supra.

94 Guilder v. Dayton, 22–366, 371; State v. McFadden, 23–40; State v. Falk, 89–269, 273, 94+879.

95 Coles v. Washington County, 35–124, 27+497; Fuller v. Morrison County, 36–309, 30+824; State v. Bruce, 50–491, 52+970; State v. Gunn, 92–436, 100+97.

96 State v. Foley, 30–350, 15+375; Gerken v. Sibley County, 39–433, 40+508; State v. Bruce, 50–491, 52+970.

97 State v. Foley, 30–350, 15+375.

98 State v. McFadden, 23–40; State v. Wilcox, 24–143; State v. Parker, 25–215; Smith v. Anderson, 33–25, 21+841; State v. Honerud, 66–32, 68+323; State v. Crow Wing County, 66–519, 68+767, 69+925, 73+631; First Nat. Bank v. Beltrami County, 77–43, 79+591; Hankey v. Bowman, 82–328, 333, 84+1002.

99 Thomas v. Hanson, 59–274, 61+135.

1 State v. Wilcox, 24–143.

2 State v. McFadden, 23–40; State v. Crow Wing County, 66–519, 68+767.

2245. De facto counties—After the governor's proclamation of the establishment of a county it is a de facto county. The legality of a de facto county cannot be questioned collaterally.[3]

2246. Unorganized county—Indebtedness—An organized county has no power to create an indebtedness against an unorganized county, attached to it for judicial and other purposes, which will bind the latter when it becomes organized.[4]

2247. Statutes—Effect of revision of 1905—The provision of R. L. 1905 § 380, and the following sections, relating to the creation and organization of new counties, are a continuation of previously existing statutes upon the subject, and not new, and independent enactments.[5]

CHANGE OF BOUNDARIES—NEW COUNTIES

2248. Legislative power—Since the adoption of the constitutional amendment of 1881 it is unnecessary to submit a law for the creation of a new county, or for the changing of county lines, to the electors of the counties affected. The provisions of section 1 of article 11 of the constitution in this regard were repealed by the amendment of 1881.[6] Except as limited by the constitution, the power of the legislature over the subject is absolute.[7]

2249. Contiguous territory—A new county must be formed by contiguous territory and leave the remaining part of the old county, out of which it is carved, a contiguous territory.[8]

2250. Petition—A withdrawal of a signature by letter has been held sufficient. A finding that the requisite number of electors signed a petition has been held not justified by the evidence.[9] Under Laws 1893 c. 143 an elector might sign two or more non-competing petitions.[10] The petition need not show the number of votes cast at the last preceding election.[11]

2251. Submission of proposition—Prior to R. L. 1905 § 382, more than one proposition might be submitted to the electors at the same election under certain conditions.[12] An improper separation of ballots has been held not fatal to an election.[13]

2252. Beginning of new county—The life of a new county dates from the governor's proclamation of its establishment except for judicial purposes.[14]

2253. Effect on indebtedness—Where a municipal corporation is divided, statutory provisions for apportioning the indebtedness of the old and new districts involve questions purely of legislative policy, and, if not in violation of any constitutional right, are in all respects final. Under the provisions of Laws 1893 c. 143, providing for the division of counties and the organization of new ones, the liability for the county buildings is to be exclusively assumed

[3] State v. Honerud, 66–32, 68+323; State v. Crow Wing County, 66–519, 529, 68+767, 69+925, 73+631; State v. Dist. Ct., 90–118, 95+591; Barnard v. Polk County, 98–289, 108+294.

[4] First Nat. Bank v. Beltrami County, 77–43, 79+591; First Nat. Bank v. Becker County, 81–95, 83+468.

[5] State v. McDonald, 101–349, 112+278.

[6] State v. Crow Wing County, 66–519, 68+767, 69+925, 73+631; State v. Pioneer Press Co., 66–536, 68+769.

[7] State v. McFadden, 23–40; State v. Falk, 89–269, 273, 94+879.

[8] Duckstad v. Polk County, 69–202, 71+933.

[9] State v. Crow Wing County, 66–519, 68+767, 69+925, 73+631.

[10] State v. Red Lake County, 67–352, 69+1083.

[11] State v. Crow Wing County, 66–519, 68+767, 69+925, 73+631.

[12] State v. Pioneer Press Co., 66–536, 68+769; State v. Red Lake County, 67–352, 69+1083; Duckstad v. Polk County, 69–202, 71+933; State v. Larson, 89–123, 94+226; State v. Falk, 89–269, 94+879.

[13] State v. Falk, 89–269, 94+879. See R. L. 1905 § 395.

[14] R. L. 1905 § 387; Meehan v. Zeh, 77–63, 79+655; State v. Dist. Ct., 90–118, 95+591.

by the parent county; the value of the same, to be ascertained under statutory provisions provided therefor, is to be deducted from the indebtedness apportioned between the counties so divided. Upon the division of the county in such cases the bonded and floating indebtedness of the old county (excluding the value of the county buildings) is to be apportioned upon the assessed valuation of the property in the two municipalities, whereupon it becomes the duty of the commissioners of the new county to provide by levy and taxation the necessary funds to pay its proportion of the same as it becomes due.[15] Where the attempt to create a new county out of a portion of the territory of an existing county results in the organization of a de facto corporation, which is subsequently dissolved in proceedings brought for that purpose, the original county is not liable for debts contracted by the de facto corporation during its existence. The old county is not the successor of the de facto county, nor does it, by such dissolution, receive territory or property from the de facto corporation, which carries with it the obligation to pay the debts.[16]

COUNTY SEAT

2254. Offices at—Most of the county officers are required to keep their offices at the county seat and they may be compelled to do so by mandamus at the instance of a private citizen.[17] The fact that a clerk of court did not keep his office at the county seat has been held not to invalidate the publication of a summons upon an affidavit filed with him.[18] The county board is required to provide suitable officers for certain officers at the county seat.[19]

REMOVAL OF COUNTY SEAT

2255. Historical statement—Constitutional provisions—Prior to the amendment of the constitution in 1881 [20] laws for the removal of county seats were required to be submitted to the electors of the county for their approval,[21] but the legislature might locate a county seat in the first instance without such submission.[22] By the adoption of the amendment of 1881 section 1 of article 11 of the constitution, so far as it relates to the removal of county seats, was abrogated.[23] The effect of the amendment was to require all laws relating to the change of county seats to be general and uniform throughout the state. Laws 1885 c. 272 was an attempt to provide such a general law, but it was held unconstitutional because special and not uniform throughout the state.[24] To remedy the defects of the act, Laws 1889 c. 174 was enacted, and was held constitutional.[25] The act of 1889 is the basis of our present statute.

2256. Petition—Where one sufficient petition has been presented no competing petition can be received or acted upon until an election has been held on the first petition, and until the expiration of five years thereafter, or until it has been withdrawn without an election.[26] In determining the requisite number of signers the number voting at the last general election is to be ascertained from the poll lists, and women voting for school officers are to be excluded from

[15] State v. Demann, 83–331, 86+352.
[16] Barnard v. Polk County, 98–289, 108+294; Beltrami County v. Clearwater County, 109–474, 124+372(statutory remedy to enforce liability by mandamus exclusive).
[17] R. L. 1905 § 602; State v. Weld, 39–426, 40+561.
[18] Crombie v. Little, 47–581, 50+823.
[19] R. L. 1905 § 430; Rogers v. Le Sueur County, 57–434, 438, 59+488.
[20] Const. art. 4 § 33.
[21] Const. art. 11 § 1; Roos v. State, 6–428(291); Taylor v. Taylor, 10–107(81); Bayard v. Klinge, 16–249(221); Everett v. Smith, 22–53.
[22] Jewell v. Weed, 18–272(247).
[23] Nichols v. Walter, 37–264, 33+800; Todd v. Rustad, 43–500, 46+73.
[24] Nichols v. Walter, 37–264, 33+800.
[25] Todd v. Rustad, 43–500, 46+73.
[26] Streissguth v. Geib, 67–360, 69+1097.

the computation.[27] A signer may withdraw his name any time before the county board completes its examination of the petition, but such withdrawal does not affect the duties of the county auditor in the premises. The withdrawal must be made by a demand on the county board at a session called to consider the petition and not on the auditor.[28] Where a demand for withdrawal was made by an attorney, and before action by the board the demand was withdrawn and the power of attorney revoked, it was held that the board could not strike the name from the petition.[29] The affidavits attached to the petition need not state that the affiants are signers of the petition.[30] After a petition has been filed with the county auditor, the county board alone has jurisdiction to determine whether the petition has been lost and the proceedings withdrawn and abandoned. Such a petition having been filed, the county auditor is required by statute to issue the proper notice for a meeting of the board, and cannot be enjoined from so doing by reason of the fact that the petition had been taken from his office, and could not be found. The filing of a second petition for the same purpose does not confer jurisdiction upon the board to consider it until it shall have been determined by that body that the petition had been lost, or that the proceedings under the first one had been withdrawn and abandoned.[31]

2257. Notice of petition—Publication of a notice of intention to circulate a petition for a change need be made in only one newspaper.[32]

2258. Duties of auditor—The duty of the auditor to proceed with a petition is unaffected by the withdrawal of signers.[33] The statute makes it the duty of the auditor under certain conditions to make his order fixing the time of a special election.[34]

2259. Duties of county board—The duties of the county board in passing on the sufficiency of the petition are prescribed by statute.[35] If it errs in striking names from the petition its error does not affect the duty of the auditor to call an election, or the validity of the election if sufficient names remain. Its determination in this regard is conclusive, at least in the absence of fraud.[36] The determination of the sufficiency of the notice by the board is not an act involving an exercise of judicial discretion. Where the proceedings are regular and the notice and proof of publication and posting are sufficient, which may be determined by an inspection of the record, it is the duty of the board to proceed and act upon the petition.[37] If the action of the board is illegal, fresh proceedings may be initiated by the auditor within a reasonable time on the original petition, if it is sufficient.[38] No valid certificate by the board of county commissioners to the effect that a proper petition has been filed can be issued by the board until after a hearing duly had, pursuant to the notice required by R. L. 1905 § 396.[39]

[27] Slingerland v. Norton, 59–351, 61+322; Smith v. Renville County, 64–16, 65+956.
[28] Slingerland v. Norton, 59–351, 61+322; State v. Geib, 66–266, 68+1081; Tucker v. Lincoln County, 90–406, 97+103.
[29] State v. Geib, 66–266, 68+1081.
[30] Foss v. Roseau County, 93–238, 101+71.
[31] Evenson v. O'Brien, 106–125, 118+364.
[32] R. L. 1905 § 397; Foss v. Roseau County, 93–238, 101+71.
[33] Slingerland v. Norton, 59–351, 61+322.
[34] R. L. 1905 § 399; Tucker v. Lincoln County, 90–406, 412, 97+103; Gile v. Stegner, 92–429, 433, 100+101.
[35] R. L. 1905 § 398. Statute cited: Smith v. Renville County, 64–16, 19, 65+956; State v. Geib, 66–266, 269, 68+1081; Streissguth v. Geib, 67–360, 69+1097; Tucker v. Lincoln County, 90–406, 97+103; Gile v. Stegner, 92–429, 100+101; Foss v. Roseau County, 93–238, 101+71; Evenson v. O'Brien, 106–125, 118+364.
[36] Currie v. Paulson, 43–411, 45+854.
[37] State v. Scott County, 43–322, 45+614; Tucker v. Lincoln County, 90–406, 97+103.
[38] Gile v. Stegner, 92–429, 100+101.
[39] Kaufer v. Ford, 100–49, 110+364.

2260. Notice of meeting of board—The statute provides for a notice of the meeting of the county board to pass on the sufficiency of the petition.[40] Publication and posting of the notice are jurisdictional, except as provided by statute.[41] Notice of a meeting to be held on May 27 published on May 15 and May 22 has been held insufficient.[42] The filing of a sufficient affidavit of due posting of the notice is jurisdictional and the failure to file cannot be cured by filing subsequent to the election. Notice must be posted in an incorporated village within a town.[43]

2261. Requisite vote for change—To carry an election for a change fifty-five per cent. of all the votes cast is necessary. In counting the vote all the ballots cast, whether intelligible or not, must be considered.[44]

2262. Limitation of elections—When an election has been had another cannot be had for five years,[45] unless the first is declared void.[46]

OFFICERS

2263. Election—Section 4 of article 11 of the constitution requires county officers ordinarily to be elected by the people, and the legislature cannot provide for passing by a general election, and allowing appointed officers to hold over to the next succeeding election, unless there is some substantial reason therefor. When a sparsely-settled unorganized county is first organized, there may be such a reason in the fact that it will take nearly all of that time to organize the county government and get it into fair working order.[47]

COUNTY BOARD

2264. Election—Under the provisions of G. S. 1894 § 661, an entire new board of county commissioners must be elected at the first election held after a county is redistricted, and the number of its commissioner districts increased from three to five.[48] The effect of a repeal of a special law, under which commissioners were elected in Aitkin county, has been determined.[49]

2265. A continuing body—The county board of Hennepin county is a continuing body, and its existence is not affected by the election of new members, and the election of a chairman and vice-chairman at the first session in each year.[50]

2266. Vacancy—A county board is not authorized to fill a vacancy in the board.[51] The repeal of a special law, under which commissioners were elected in Aitkin county, has been held not to create a vacancy.[52]

2267. Commissioner districts—Re-districting—The board may re-district a county after learning informally of the result of a federal census. The effect of a re-districting is prospective and does not deprive of office a commissioner already elected.[53]

2268. General powers—The general powers of the county board are prescribed by statute.[54] It has general supervision and control of the affairs of

[40] R. L. 1905 § 397.
[41] State v. Scott County, 42–284, 44+64; Id., 43–322, 45+614; State v. Butler, 81–103, 83+483. See R. L. 1905 § 407.
[42] State v. Scott County, 43–322, 45+614.
[43] Tucker v. Lincoln County, 90–406, 97+103.
[44] R. L. 1905 § 403; Smith v. Renville County, 64–16, 65+956.
[45] R. L. 1905 § 404; Smith v. Renville County, 64–16, 19, 65+956; Streissguth v. Geib, 67–360, 361, 69+1097.
[46] Gile v. Stegner, 92–429, 100+101.
[47] Spencer v. Griffith, 74–55, 76+1018.
[48] State v. Wilder, 75–547, 78+83; State v. Marr, 65–243, 68+8.
[49] State v. Marr, 65–243, 68+8.
[50] Manley v. Scott, 108–142, 121+628.
[51] Swedback v. Olson, 107–420, 120+753.
[52] State v. Marr, 65–243, 68+8. See R. L. 1905 § 426.
[53] Norwood v. Holden, 45–313, 47+971. See R. L. 1905 § 420.
[54] R. L. 1905 § 434.

the county.[55] The county acts through the board.[56] For the transaction of county business it is practically the county itself.[57] It has power to make necessary repairs in county buildings, regardless of the statutory debt limitations.[58] It has power to enter into a contract for the employment of such agents as may be necessary to oversee, superintend, and inspect work upon the highways of the county for which it has appropriated county money.[59] It is required to provide a suitable courthouse and jail, and is authorized under certain conditions to borrow money for that purpose.[60] In certain counties it has power to employ a morgue keeper and to enter into a contract with him to perform the services required for a period of one year, during which time he may only be discharged for causes which will justify the county in refusing to carry out the contract. The board may, on the last day of the year, employ a morgue keeper for a period of one year therefrom, regardless of the fact that two new members of the board, who were elected at the November election preceding, will qualify and enter upon their duties soon after the first of the year. Such contract, being reasonable and not contrary to public policy, cannot legally be rescinded without cause after such new members have qualified.[61]

2269. Powers limited—The powers of the board are purely statutory. They are such as are expressly granted, and such as may be fairly implied as necessary to the exercise of those expressly granted.[62]

2270. Must act as a body—The chairman has no authority to enter into any contracts for the county except as authorized by the board.[63] The unauthorized act of a single member may be ratified by the board.[64] An acceptance of a bridge by a committee of the board on bridges has been held sufficient.[65] Evidence held to show that certain work on the courthouse and city hall at St. Paul was authorized by the joint committee in charge.[66] An appeal cannot be taken from a judgment against the board involving its official powers and duties by individual members.[67]

2271. Acting through agents—The county board is authorized to employ such agents as may be reasonably necessary to carry into effect its powers. It may negotiate county bonds through an agent.[68]

2272. Issuance of bonds—The board has no implied power to issue bonds for a courthouse or other purpose.[69] Under the statutes of 1857 it could issue bonds for the erection or repair of county buildings.[70] Whenever a courthouse is destroyed by fire or other cause the county board is authorized, under Laws

[55] Grannis v. Blue Earth County, 81–55, 57, 83+495; Cushman v. Carver County, 19–295(252).

[56] R. L. 1905 § 411; Rogers v. Le Sueur County, 57–434, 438, 59+488.

[57] Cushman v. Carver County, 19–295 (252).

[58] Upton v. Strommer, 101–97, 111+956.

[59] Armstrong v. St. Louis County, 103–1, 114+89.

[60] Wall v. St. Louis County, 105–403, 117+611.

[61] R. L. 1905 § 435; Manley v. Scott, 108–142, 121+628.

[62] Chaska Company v. Carver County, 6–204(130); Goodnow v. Ramsey County, 11–31(12); Mitchell v. St. Louis County, 24–459; Henderson v. Sibley County, 28–515, 519, 11+91; Libby v. Anoka County, 38–448, 38+205; Bazille v. Ramsey County, 71–198, 73+845; Grannis v. Blue Earth County, 81–55, 83+495; State v. Smith, 84–295, 87+775; Schieber v. Von Arx, 87–298, 92+3.

[63] Gardner v. Dakota County, 21–33.

[64] Schmidt v. Stearns County, 34–112, 24+358.

[65] Evans v. Stanton, 23–368.

[66] Weber v. Ramsey County, 93–320, 101+296.

[67] State v. Johnson, 98–17, 107+404.

[68] Cushman v. Carver County, 19–295 (252); Armstrong v. St. Louis County, 103–1, 114+89.

[69] Goodnow v. Ramsey County, 11–31 (12); Rogers v. LeSueur County, 57–434, 59+488.

[70] Chaska Company v. Carver County, 6–204(130); Nininger v. Carver County, 10–133(106); Cushman v. Carver County, 19–295(252).

1905 c. 175, to issue bonds to a certain amount for the construction of a new courthouse.[71]

2273. Filling vacancies in county offices—The board is authorized by statute to fill vacancies in various county offices.[72] It cannot remove incumbents of such offices; its authority is limited to filling an office after it has been vacated by proper judicial proceedings, or by act of the incumbent.[73]

2274. Ratification of unauthorized contracts—The unauthorized employment of counsel by a sheriff can only be ratified by the official action of the county board.[74] The unauthorized action of a single member of the board may be ratified by the board.[75]

2275. Majority vote requisite—A majority vote is essential to all acts of the board, except adjournment.[76]

2276. Presumption in favor of board—The general presumptions in favor of the acts of public officers apply to the county board.[77]

2277. Liability of commissioners—Commissioners have been held not individually liable on an unauthorized offer of award for the finding of a missing man.[78]

2278. Sessions—Adjournment—A session need not be continuous from day to day. The board may adjourn a session to a date more than six days from its commencement.[79] But an adjournment cannot extend beyond the time fixed by law for the next session.[80] The statute provides for an annual meeting in January.[81]

2279. County auditor clerk of board—The county auditor is the clerk of the board and is generally the proper person to whom to deliver papers to be submitted to it for action.[82]

2280. Motives of board—Judicial investigation—As a general rule the motives of the members of the board cannot be the subject of judicial inquiry for the purpose of impeaching their official acts.[83]

POWERS AND LIABILITIES

2281. Powers limited—Counties have only such powers as are expressly granted by statute or are fairly implied as necessary to the exercise of the powers so granted.[84] The maxim expressio unius est exclusio alterius is applicable.[85] Its implied powers include such as are necessarily incident to those specified, or are essential to the purposes and objects of its corporate existence.[86]

2282. Powers as to realty—A county may acquire and hold realty "for the use of the county," etc.[87] Formerly its powers in this regard were more lim-

[71] Evenson v. Demann, 109–328, 123+930.

[72] R. L. 1905 § 425; State v. Benedict, 15–198(153); State v. Sanderson, 26–333, 3+984; Scott County v. Ring, 29–398, 13+181; State v. Dart, 57–261, 59+190; State v. McIntosh, 109–18, 122+462.

[73] State v. Hays, 105–399, 117+615.

[74] True v. Crow Wing County, 83–293, 86+102.

[75] Schmidt v. Stearns County, 34–112, 24+358.

[76] R. L. 1905 § 424. See Gardner v. Dakota County, 21–33, 38; Swedback v. Olson, 107–420, 120+753.

[77] Gillette v. Aitkin County, 69–297, 72+123; Curran v. Sibley County, 56–432, 57+1070; Armstrong v. St. Louis County, 103–1, 114+89.

[78] Schieber v. Von Arx, 87–298, 92+3.

[79] Banning v. McManus, 51–289, 53+635.

[80] Banning v. McManus, 51–289, 53+635; Finnegan v. Gronerud, 63–53, 56, 65+128, 348.

[81] R. L. 1905 § 424. See Reimer v. Newel, 47–237, 49+865.

[82] State v. Sanderson, 26–333, 3+984.

[83] Webster v. Washington County, 26–220, 2+697.

[84] Williams v. Lash, 8–496(441, 446); Henderson v. Sibley County, 28–515, 11+91; Dosdall v. Olmsted County, 30–96, 14+458; Breen v. Kelly, 45–352, 47+1067; Grannis v. Blue Earth County, 81–55, 83+495; State v. Smith, 84–295, 87+775.

[85] Williams v. Lash, 8–496(441).

[86] Chaska Co. v. Carver County, 6–204 (130, 137).

[87] R. L. 1905 § 409. See State v. Foley, 30–350, 356, 15+375.

ited.[88] It may acquire and hold realty in satisfaction of a claim.[89] Its power to sell its realty is unrestricted.[90] It cannot appropriate it to private purposes.[91]

2283. Implied power as to taxes—A county has implied power to incur necessary expenses, including attorney's fees, in connection with the collection of taxes.[92]

2284. Issuance of bonds—Popular vote—It is provided by statute that counties shall not issue bonds without submitting the question to the voters of the county. But the legislature may remove this restriction.[93]

2285. Limit of indebtedness—The statute places a limit on the amount of indebtedness which a county may incur and declares all contracts in violation thereof void.[94] The reasonable cost and expense of making repairs upon a courthouse is incidental to the management of the affairs of a county, and not unlawful, even though the amount thereof, added to other items of current expense, exceeds the statutory limitation of the taxing power of the county.[95]

2286. Liability for torts—A county is not liable for an injury caused by the negligence of the county board in failing to repair a courthouse or a sidewalk appurtenant thereto,[96] or to repair a ditch.[97] As a general rule a county is not liable for the torts of its officers, though done colore officii, but if it expressly authorizes such acts or adopts and ratifies them, and retains the benefits thereof, it is liable.[98] Persons dealing with a county are bound to know the extent of its powers, and cannot hold it liable for a false representation of its officers concerning matters not within its powers.[99]

2287. Liability for acts of officers—Ratification—As a general rule a county is not responsible for the unauthorized and unlawful acts of its officers though done colore officii, but if it expressly authorizes such acts, or when done, adopts and ratifies them and retains and enjoys the benefits thereof, it is liable in damages.[1]

2288. Ultra vires contracts—Contracts in excess of the power of the county are void. The doctrine of ultra vires is applied with strictness to the contracts of a county.[2] Persons dealing with the officers of a county are charged with notice of the extent of their authority.[3] But if a county receives the money of another upon an unauthorized contract and applies it to legitimate county

[88] Williams v. Lash, 8–496(441); Shelley v. Lash, 14–498(373); James v. Wilder, 25–305.

[89] Shepard v. Murray County, 33–519, 24+291.

[90] McKusick v. Washington County, 16–151(135); Blue Earth County v. St. P. etc. Ry., 28–503, 508, 11+73.

[91] State v. Foley, 30–350, 15+375; Blue Earth County v. St. P. etc. Ry., 28–503, 508, 11+73; Henderson v. Sibley County, 28–515, 519, 11+91.

[92] Washington County v. Clapp, 83–512, 86+775.

[93] R. L. 1905 § 784; Wall v. St. Louis County, 105–403, 117+611.

[94] R. L. 1905 § 780. See, under former statute, Johnston v. Becker County, 27–64, 6+411; Rogers v. Le Sueur County, 57–434, 59+488; Johnson v. Norman County, 93–290, 101+180.

[95] Upton v. Strommer, 101–97, 111+956.

[96] Dosdall v. Olmsted County, 30–96, 14+458.

[97] Gaare v. Clay County, 90–530, 97+422. See Thompson v. Polk County, 38–130, 36+267.

[98] Schussler v. Hennepin County, 67–412, 70+6; Viebahn v. Crow Wing County, 96–276, 104+1089.

[99] Sandeen v. Ramsey County, 109–505, 124+243.

[1] Schussler v. Hennepin County, 67–412, 70+6; Viebahn v. Crow Wing County, 96–276, 104+1089.

[2] Grannis v. Blue Earth County, 81–55, 83+495; Mitchell v. St. Louis County, 24–459; Breen v. Kelly, 45–352, 47+1067; Bazille v. Ramsey County, 71–198, 73+845. See Bell v. Kirkland, 102–213, 113+271; Moore v. Ramsey County, 104–30, 115+750.

[3] Mitchell v. St. Louis County, 24–459; Sandeen v. Ramsey County, 109–505, 124+243.

purposes, an action will lie for its recovery as for money had and received.[4] A county is not liable on an implied contract simply because it enjoyed the fruits of an unauthorized contract, where it had no other alternative.[5] Liability of a county on a contract cannot rest on a doubtful construction. Any doubt is to be resolved in favor of the county. Its liability cannot rest on a custom or usage.[6]

2289. Contracts held unauthorized—A contract for publishing a financial statement of the county;[7] to take a bond for the benefit of third persons;[8] to employ a person to search for untaxed property;[9] to purchase land to donate to a city;[10] to pay for the use of horses by a county surveyor;[11] to erect a county building jointly with a municipality.[12]

2290. Contract for county printing—Construction—The proprietor of a newspaper filed a bid for printing and publishing the official notices of the county proceedings of the county commissioners, and delinquent tax list, at certain specified rates, conditioned upon his doing all of the county job printing at certain rates. By written resolution the board of county commissioners awarded to him, at the specified rates, the printing and publication of "the delinquent tax lists and all other official notices and commissioners' proceedings." It was held that the contract was for the work mentioned in the resolution only.[13]

2291. Liability on lost orders—Where county orders are payable to bearer, and the treasurer pays them in good faith, and without notice of defects in the bearer's title, though they are then past due, it discharges the county. In the case of loss of such orders by the owner, to save his rights, notice of the loss must be brought home to the treasurer.[14]

2292. County held liable—Miscellaneous cases—A county has been held liable to a substitute for a county attorney when the latter was disqualified;[15] to a deputy clerk of court for his services under Sp. Laws 1891 c. 424;[16] to persons furnishing labor or material, the statutory bond not having been taken from the contractors;[17] to a surveyor for surveying and establishing a state road under Sp. Laws 1869 c. 110 and Sp. Laws 1870 c. 142.[18]

2293. County held not liable—Miscellaneous cases—A county has been held not liable to registers of deeds for keeping reception books;[19] to the clerk of court for administering oaths to jurors and witnesses in criminal cases for the purpose of verifying their accounts for per diem and mileage;[20] to the clerk of court for indexing the judgment records of his office in books provided for in Laws 1885 c. 181;[21] to an officer for the service of a subpœna on a witness for the defence, when the defendant in a criminal action, pending in a justice

[4] Henderson v. Sibley County, 28–515, 11+91; Sibley v. Pine County, 31–201, 17+337; Glencoe v. McLeod County, 40–44, 41+239. See Bell v. Kirkland, 102–213, 113+271.

[5] True v. Crow Wing County, 83–293, 86+102.

[6] State v. Smith, 84–295, 87+775.

[7] Mitchell v. St. Louis County, 24–459.

[8] Breen v. Kelly, 45–352, 47+1067.

[9] Grannis v. Blue Earth County, 81–55, 83+495.

[10] Bazille v. Ramsey County, 71–198, 73+845.

[11] State v. Smith, 84–295, 87+775.

[12] Henderson v. Sibley County, 28–515, 11+91.

[13] McKenzie v. Polk County, 61–145, 63+613.

[14] Sweet v. Carver County, 16–106(96).

[15] Mathews v. Lincoln County, 90–348, 97+101.

[16] Sortedahl v. Polk County, 84–509, 88+21.

[17] Black v. Polk County, 97–487, 107+560.

[18] Raymond v. Stearns County, 18–60 (40).

[19] Nordin v. Kandiyohi County, 23–171. See Hough v. Ramsey County, 9–23(11).

[20] Wilcox v. Sibley County, 34–214, 25+351.

[21] Rasmusson v. Clay County, 41–283, 43+3.

court, is acquitted;[22] to an attorney employed by a sheriff without authority;[23] to a county surveyor for the use of horses in his work;[24] to a sheriff for transportation of a prisoner under a warrant issued by a justice of the peace;[25] to the clerk of court in connection with tax judgments;[26] to assistant assessors in Ramsey county under Sp. Laws 1878 c. 216;[27] to the captor of a prisoner under an offer of reward by the sheriff.[28]

PRESENTATION AND ALLOWANCE OF CLAIMS

2294. Claims to be itemized and verified—The statute requires claims to be itemized and verified.[29] A compliance with the statute is a condition precedent to an action.[30] The statute has been held not to prevent the application of funds to satisfy an attorney's lien;[31] and not to be applicable when the liability and amount due are fixed by law.[32] A verification has been held a substantial compliance with the statute and sufficient.[33] A verification by an agent has been held sufficient.[34]

2295. Allowance—Finality—When the county board has once deliberately acted upon a claim against the county and definitely allowed or disallowed it, so that the time to appeal therefrom has begun to run, it cannot thereafter change its decision, at least in the absence of fraud or mistake.[35] A resolution of a board that a certain claim "be and hereby is rejected," shows that the claim was considered and disallowed. Under Sp. Laws 1881 c. 216 the authority of the board was exhausted when it considered and disallowed a claim.[36]

2296. Appeal from disallowance of claim—The statute gives a right of appeal to the district court from the disallowance of a claim.[37] Formerly the claimant might waive appeal and sue on his claim.[38]

2297. Appeal from allowance of claim—The right of the county to appeal is unaffected by the nature of the claim.[39] The statute is constitutional.[40]

2298. Practice on appeal in district court—The complaint on appeal must be substantially for the claim presented to the board. Costs and disbursements may be allowed the county upon judgment in its favor.[41] If on appeal by the county the claimant recovers part of his claim, costs cannot be awarded to the county.[42]

2299. Appeal to supreme court—An appeal from a judgment of the district court in proceedings on appeal from the action of the county board on a claim against the county must be taken within thirty days after the entry

[22] Hendershott v. Fillmore County, 45–281, 47+810.
[23] True v. Crow Wing County, 83–293, 86+102.
[24] State v. Smith, 84–295, 87+775; Kuhlo v. Hennepin County, 85–34, 88+2.
[25] Petrie v. Hubbard County, 96–64, 104+680. See R. L. 1905 § 2697(26).
[26] Armstrong v. Ramsey County, 25–344.
[27] Beaumont v. Ramsey County, 32–108, 19+727.
[28] Bemis v. Rice County, 23–73.
[29] R. L. 1905 § 438.
[30] State v. Dist. Ct., 90–457, 463, 97+132; Washington v. Clapp, 83–512, 86+775. The statute has been held inapplicable to a claim for damages for failure to perform a statutory duty. Mankato v. Barber, 142 Fed. 329.
[31] Washington County v. Clapp, 83–512, 86+775.
[32] Fergus Falls v. Otter Tail County, 88–346, 93+126.
[33] Bayne v. Wright County, 90–1, 95+456.
[34] Gillette v. Aitkin County, 69–297, 72+123.
[35] R. L. 1905 § 620; State v. Peter, 107–460, 120+896.
[36] Ryan v. Dakota County, 32–138, 19+653.
[37] R. L. 1905 § 415.
[38] Murphy v. Steele County, 14–67(51); Gutches v. Todd County, 44–383, 46+678; State v. Dist. Ct., 90–457, 463, 97+132. See State v. Peter, 107–460, 120+896.
[39] Ryan v. Dakota County, 32–138, 19+653.
[40] State v. Dist. Ct., 90–457, 97+132.
[41] Thomas v. Scott County, 15–324 (254).
[42] Kroshus v. Houston County, 46–162, 48+770.

thereof.[43] An appeal in an action against a board rendered in an action involving its official powers and duties can only be taken or authorized by the action of the board. Individual members cannot appeal.[44]

ACTIONS

2300. County may sue and be sued—A county may sue and be sued,[45] in its own name.[46] Formerly an action was brought by or against the board of county commissioners.[47]

2301. By taxpayers—A taxpayer may maintain an action against county commissioners to compel them to restore to the county treasury moneys which they have wrongfully drawn from it.[48]

2302. Pleading—Cases are cited below involving questions of pleading.[49]

2303. Judgments—Payment—The county treasurer is not authorized to pay a judgment against the county without an order or warrant of the county auditor.[50]

COUNTY ASSESSOR

2304. Appointment under special acts—Provision was made by Sp. Laws 1875 c. 90 § 1 for the appointment of a county assessor in Ramsey county.[51]

COUNTY ATTORNEY

2305. Eligibility—A county attorney need not be an attorney or member of the bar of the state.[52]

2306. Compensation—Under G. S. 1878 c. 7 § 3, the action of the county board in fixing the salary of the county attorney could not be revised by it during his term.[53] The statute authorizing the court on appeal to fix the salary of the county attorney is constitutional.[54] A county attorney has been held not entitled to extra compensation for services out of the county.[55]

2307. Duties—It is the duty of the county attorney to appear for the county in all cases in which it is a party, whether within or without the county;[56] to attend the examination of offenders, when requested by the court and furnished with a copy of the complaint;[57] and to give legal advice to county officers.[58] But the county is not estopped by such advice.[59] He is a quasi officer of the

[43] Brown v. Cook County, 82–542, 85+550.

[44] State v. Johnson, 98–17, 107+404.

[45] R. L. 1905 § 409; Murphy v. Steele County, 14–67(51); Mower County v. Smith, 22–97, 108; Carver County v. Bongard, 82–431, 85+214.

[46] R. L. 1905 § 414.

[47] Willard v. Redwood County, 22–61; Mower County v. Smith, 22–97, 108; Ramsey County v. Sullivan, 89–68, 93+1056.

[48] Bailey v. Strachan, 77–526, 80+694.

[49] Folsom v. Chisago County, 28–324, 9+881 (complaint in an action against a county for the publication of a delinquent tax list sustained); First Nat. Bank v. Becker County, 81–95, 83+468 (a complaint in an action against an organized county, on orders which its auditor had issued against the funds of an unorganized county attached to it, held insufficient); Mahlum v. Crow Wing County, 99–523, 109+1133 (complaint by county auditor to recover compensation for preparing certain records held insufficient); Armstrong v. St. Louis County, 103–1, 114+89 (action by road overseer for salary—counterclaim for recovery of difference between contract price paid and reasonable value of services held insufficient).

[50] State v. Foot, 98–467, 108+932.

[51] State v. Johnston, 61–56, 63+176. See § 9194.

[52] State v. Clough, 23–17. See State v. Nichols, 83–3, 85+717.

[53] Hawkins v. Watkins, 34–554, 27+65.

[54] Rockwell v. Fillmore County, 47–219, 49+690.

[55] Hennepin County v. Robinson, 16–381 (340).

[56] Hennepin County v. Robinson, 16–381 (340); Nobles County v. Sutton, 23–299.

[57] Day v. Putnam Ins. Co., 16–408(365, 374).

[58] State v. Wedge, 24–150, 154; True v. Crow Wing County, 83–293, 86+102.

[59] Hennepin County v. Dickey, 86–331, 90+775.

court.[60] The office of district attorney, for each county, established in 1851, was not superseded by the office of prosecuting attorney, in each judicial district established by the constitution, nor the duties of the former office changed, except so far as its duties in criminal proceedings were transferred to the office of prosecuting attorney.[61]

2308. Special counsel—By statute the county board is authorized to employ attorneys for the county either to assist, or to act independently of, the county attorney,[62] and the court is authorized to appoint an attorney to act as, or in the place of, or to assist the county attorney.[63] A sheriff has no implied authority to employ counsel to conduct litigation in behalf of the county.[64]

COUNTY AUDITOR

2309. Bonds—The sureties are liable for the acts of a deputy who fraudulently issues fictitious redemption and refundment orders for the purpose of obtaining money from the treasurer thereby. Their liability is unaffected by the negligence of the treasurer.[65]

2310. Salary—The salary of auditors is proportionate to the assessed value of the property of the county[66] and is in full compensation for their official services.[67]

2311. Seal—Auditors are provided with official seals.[68]

2312. Accounts—The auditor is required to keep an account of the receipts and disbursements of the treasurer, and unless the auditor issues a warrant and receives it back when paid it is impossible for him properly to perform his functions as a bookkeeper in keeping an account of the receipts and disbursements of the treasury.[69]

2313. Issuance of warrant—Action—An action will lie against an auditor to compel him to issue his warrant on the treasurer.[70]

2314. Deputy—A deputy may act for the auditor in canvassing election returns and issuing certificates of election.[71] Auditors are responsible for the acts of their deputies.[72] A deputy holding over has been held a de facto officer.[73]

COUNTY SURVEYOR

2315. Nature of office—The county surveyor is simply the surveyor of the county in the popular sense of the word. He is not its civil engineer.[74]

2316. Compensation—A county surveyor has been held not entitled to compensation for horses used in his official work.[75]

2317. Volunteer services—A county has been held not liable to a county surveyor for his volunteer services in connection with public improvements.[76]

[60] Rockwell v. Fillmore County, 47–219, 49+690.

[61] Nourse v. Hennepin County, 3–62(28).

[62] R. L. 1905 § 569; True v. Crow Wing County, 83–293, 86+102; Washington County v. Clapp, 83–512, 86+775.

[63] R. L. 1905 § 571; Rockwell v. Fillmore County, 47–219, 49+690; State v. Borgstrom, 69–508, 72+799, 975; True v. Crow Wing County, 83–293, 294, 86+102; Mathews v. Lincoln County, 90–348, 97+101.

[64] True v. Crow Wing County, 83–293, 86+102.

[65] Ramsey County v. Sullivan, 89–68, 93+1056; Id., 94–201, 102+723; Ramsey County v. Johnson, 94–526, 102+1133.

[66] R. L. 1905 § 492. See Bruce v. Dodge County, 20–388(339); Mower County v. Williams, 27–25, 6+377; Cook County v. Fisher, 79–380, 82+652.

[67] Bruce v. Dodge County, 20–388(339). See Mahlum v. Crow Wing County, 99–523, 109+1133.

[68] Everett v. Boyington, 29–264, 13+45.

[69] State v. Foot, 98–467, 108+932.

[70] Corbin v. Morrow, 46–522, 49+201.

[71] Crowell v. Lambert, 10–369(295).

[72] R. L. 1905 § 487. See § 2309.

[73] Ramsey County v. Sullivan, 94–201, 102+723.

[74] Haynes v. Blue Earth County, 65–384, 67+1005.

[75] State v. Smith, 84–295, 87+775; Kuhlo v. Hennepin County, 85–34, 88+2.

[76] Haynes v. Blue Earth County, 65–384, 67+1005.

2318. Turning over records—The record of a survey made for a town plat, including the field notes and calculations, has been held a public record which it was the duty of a surveyor to turn over to his successor.[77]

2319. Rules for surveys—In subdividing government subdivisions, and in re-establishing lost corners, the surveyor must follow the rules established by or pursuant to acts of Congress. His surveys must be made in conformity to the federal surveys.[78]

COUNTY TREASURER

2320. Eligibility—Resignation—Pending proceedings for his removal a treasurer may resign, but he is not eligible to reappointment by the county board until he is acquitted, or the proceedings are dismissed.[79]

2321. Failure to qualify—The failure of a treasurer to qualify, as provided by statute, creates a vacancy which it is the duty of the county board to fill.[80]

2322. Compensation—The salary provided by statute is in full satisfaction for all official services.[81] Where the term was shortened by constitutional amendment it was held that the treasurer was entitled to his salary pro rata.[82] Under Laws 1862 c. 4 the treasurer could not deduct his fees from money received for redemption.[83] Cases are cited below involving the construction of G. S. 1878 c. 8 § 172 relating to salaries of treasurers.[84]

2323. General duties—The treasurer is the custodian of the county money. It is his duty to receive, keep, and disburse all money belonging to his county in respect to which no specific provision is otherwise made.[85]

2324. Delivery of funds to successor—It is the duty of a treasurer to deliver to his successor all county funds without demand.[86]

2325. Liability independent of bond—The liability of the treasurer for public moneys received by him is absolute. He is not excused by the fact that such moneys are stolen from him without his fault.[87] He is liable to his county for moneys paid on forged orders, if he is negligent.[88] His liability is not affected by the fact that the county may look elsewhere for relief from loss.[89] By statute he is exempted from liability for moneys deposited with county depositaries.[90]

2326. Effect of payment to treasurer—Evidence—The treasurer is the authorized receiver and custodian of the county funds and payment to him is

[77] State v. Patton, 62–388, 64+922.

[78] R. L. 1905 §§ 578, 580; Chan v. Brandt, 45–93, 47+461; Beardsley v. Crane, 52–537, 54+740; Beltz v. Mathiowitz, 72–443, 75+699; Stadin v. Helin, 76–496, 79+537, 602; Ferch v. Konne, 78–515, 81+524; Kleven v. Gunderson, 95–246, 104+4.

[79] State v. Dart, 57–261, 59+190.

[80] R. L. 1905 § 496; Scott County v. Ring, 29–398, 13+181.

[81] R. L. 1905 § 527. See Yost v. Scott County, 25–366; Libby v. Anoka County, 38–448, 38+205; Gerken v. Sibley County, 39–433, 40+508; Bingham v. Winona County, 8–441(390).

[82] State v. Frizzell, 31–460, 18+316.

[83] Stuart v. Walker, 10–296(234).

[84] Doe v. Washington County, 30–392, 15+679; Beatty v. Sibley County, 32–470, 21+548; Gerken v. Sibley County, 39–433, 40+508.

[85] Libby v. Anoka County, 38–448, 38+205; Gerken v. Sibley County, 39–433, 40+508. Under the act "prescribing the duties of county treasurers," approved March 9, 1860, the county treasurer of Ramsey county had authority to collect the city taxes of the city of St. Paul, as well delinquent as other taxes, and was entitled to the possession of the sale books and records of sales of lands sold for delinquent taxes of said city. Morgan v. Smith, 4–104(64).

[86] Redwood County v. Tower, 28–45, 8+907. See R. L. 1905 § 529.

[87] McLeod County v. Gilbert, 19–214 (176).

[88] Ramsey County v. Nelson, 51–79, 52+991; Ramsey County v. Elmund, 89–56, 93+1054; Id., 94–196, 102+719; Ramsey County v. Arosin, 94–525, 102+1133.

[89] Ramsey County v. Nelson, 51–79, 52+991.

[90] R. L. 1905 § 510; State v. Bobleter, 83–479, 488, 86+461; Ramsey County v. Elmund, 94–196, 200, 102+719.

a payment to the county. He is a competent witness to such payment. Statements made to him at the time, by the persons paying, as to the accounts on which payment is made, are admissible as part of the res gestæ.[91]

2327. Bond—*a. In general*—The liability on a treasurer's bond is absolute. It extends to cases where money is stolen from him without his fault;[92] where he negligently pays forged county orders;[93] where he misapplies funds to cover a delinquency in a prior term;[94] where he neglects to deliver funds to his successor, though not demanded;[95] and where he neglects to account for and pay over the full amount of taxes collected.[96] It does not extend to funds derived from the sale of state school and university lands.[97]

b. Treasurer holding over—Where a treasurer, who was holding over after failure to qualify for a second term, defaulted, it was held that the liability of the sureties on his bond did not extend beyond his first term, at least beyond a reasonable time in which to appoint a successor for his failure to qualify.[98]

c. Defalcation in prior term—The burden of proving that a defalcation occurred in a prior term, and its effect on the liability of the treasurer's sureties, have been determined with reference to the facts of a particular case.[99]

d. Commingling county and state funds—In an action on a treasurer's bond, where he had failed to pay over all the funds coming into his hands, but had paid over a portion of such funds belonging to the county and state, it was held, that the court erred in directing a verdict for the county, for a certain amount as its share.[1] In another action between the same parties, a finding that the state and county funds were commingled was sustained.[2]

e. New bond—If a treasurer fails to give a new bound when required by the county board his office becomes vacant ipso facto, and the board may fill the vacancy.[3]

f. Defences—It is not a defence to an action on a bond that it was not sealed;[4] that the county board was negligent in supervising the treasurer or guilty of malfeasance in connection with his conversion of funds;[5] or that the county board knew when the bond was given that the treasurer had previously defaulted.[6]

2328. Bond under R. L. 1905 § 2429—The liability on the bond required by R. L. 1905 § 2429 is distinct from the liability on the bond required by R. L. 1905 § 495.[7] The failure to give the bond required by R. L. 1905 § 2429 does not affect the criminal liability of a treasurer for embezzlement.[8]

[91] Shelley v. Lash, 14–498(373).

[92] Hennepin County v. Jones, 18–199 (182); McLeod County v. Gilbert, 19–214(176); Redwood County v. Tower, 28–45, 8+907. See Board of Ed. v. Jewell, 44–427, 46+914; N. P. Ry. v. Owens, 86–188, 90+371.

[93] Ramsey County v. Nelson, 51–79, 52+991; Ramsey County v. Elmund, 89–56, 93+1054; Id., 94+196, 102+719; Ramsey County v. Arosin, 94–525, 102+1133.

[94] Pine County v. Willard, 39–125, 39+71.

[95] Redwood County v. Tower, 28–45, 8+907.

[96] Itasca County v. Miller, 101–294, 112+276.

[97] State v. Young, 23–551; Redwood County v. Tower, 28–45, 8+907; Scott County v. Ring, 29–398, 408, 13+181; Swift County v. Knudson, 71–461, 74+158.

[98] Scott County v. Ring, 29–398, 13+181.

[99] Pine County v. Willard, 39–125, 39+71.

[1] Swift County v. Knudson, 71–461, 74+158.

[2] Swift County v. Knudson, 82–151, 84+657.

[3] R. L. 1905 §§ 518, 519; State v. Sanderson, 26–333, 3+984; Mower County v. Smith, 22–97, 112.

[4] Redwood County v. Tower, 28–45, 8+907.

[5] Waseca County v. Sheehan, 42–57, 43+690. See Renville County v. Gray, 61–242, 249, 63+635; Scott County v. Ring, 29–398, 406, 13+181.

[6] Pine County v. Willard, 39–125, 39+71.

[7] State v. Young, 23–551; Redwood County v. Tower, 28–45, 8+907; Scott County v. Ring, 29–398, 408, 13+181; Swift County v. Knudson, 71–461, 74+158; Id., 82–151, 84+657.

[8] State v. Mims, 26–183, 2+494, 683.

2329. Bond of deputy—The provisions of Laws 1860 c. 3 for a deputy's bond were for the security of the treasurer and he might waive it.[9]

2330. Actions—*a. Who may sue*—The county may sue the treasurer, either on his bond or independent of it, for the conversion of funds belonging to the county treasurer and recover all funds converted—state, county, town, school and other funds.[10] The county may sue for funds not paid over or accounted for.[11]

b. Leave of court—The county may sue on the treasurer's bond without leave of court.[12]

c. Pleading—Cases are cited below involving questions of pleading.[13]

COUNTY ASSESSOR—See Counties, 2304; Taxation, 9194.
COUNTY ATTORNEY—See Counties, 2305–2308.
COUNTY AUDITOR—See Counties, 2309–2314.
COUNTY BOARD—See Counties.
COUNTY COMMISSIONERS—See Counties.
COUNTY SEAT—See Counties.
COUNTY SUPERINTENDENT OF SCHOOLS—See Schools and School Districts.
COUNTY SURVEYOR—See Counties, 2315–2319.
COUNTY TREASURER—See Counties, 2320–2330.
COUPONS—See note 14.
COURSE OF BUSINESS—See Evidence, 3243.
COURSE OF OFFICE—See Evidence, 3243.
COURSES AND DISTANCES—See Boundaries.

COURT COMMISSIONERS

2331. Powers—A court commissioner has the powers of a judge of the district court at chambers.[15] He has power to grant a writ of habeas corpus; to take acknowledgments of deeds and other written instruments; to take depositions and certify to the same; to perform the marriage ceremony; to take disclosures in garnishment proceedings pending in the district court; to examine

[9] McCormick v. Fitch, 14–252(185).
[10] Mower County v. Smith, 22–97.
[11] McLeod County v. Gilbert, 19–214 (176).
[12] Waseca County v. Sheehan, 42–57, 43+690; Carver County v. Bongard, 82–431, 85+214.
[13] Mower County v. Smith, 22–97 (in action by county against treasurer for conversion of public funds held unnecessary to allege that there was an accounting and settlement by the treasurer or to state wherein his accounts were incorrect); Redwood County v. Tower, 28–45, 8+907 (complaint on treasurer's bond sustained—averment as to successor in office); Carver County v. Bongard, 82–431, 85+214 (complaint on treasurer's bond sustained—unnecessary to allege resolution of county board authorizing action, or a settlement between the county auditor and defaulting treasurer, or authority from state auditor to bring suit); Itasca County v. Miller, 101–294, 112+276 (complaint by county board on treasurer's bond held to state a cause of action based upon the treasurer's failure to account for and to pay over the full amount of taxes collected—held to state a cause of action with respect to the treasurer's failure to collect penalties on delinquent taxes—held not to state a cause of action based upon the failure of the treasurer to collect all interest on county funds payable by the bank designated as a depositary).
[14] First Nat. Bank v. Scott County, 14–77(59).
[15] Const. art. 6 § 15; Laws 1909 c. 59; Gere v. Weed, 3–352(249); Pulver v. Grooves, 3–359(252); Prignitz v. Fischer, 4–366(275); State v. Hill, 10–63(45); Hempsted v. Cargill, 46–141, 48+686; Hoskins v. Baxter, 64–226, 66+969; Betts v. Newman, 91–5, 97+371.

debtors in supplementary proceedings;[16] to act as a committing magistrate;[17] to approve bonds;[18] and to authorize the issuance of writs of attachment.[19] Writs allowed by a court commissioner issue out of the district court under its seal. A court commissioner has no authority to "issue" a writ in the sense of having it run under his seal rather than the seal of the district court.[20]

2332. Appeal—Except as otherwise expressly provided the supreme court will not review the acts of a court commissioner until they have been passed upon by the district court.[21] An order made by a court commissioner, in a case where he has no power to act, is a nullity, and no appeal lies therefrom. To purge the record of the void order, the proper course is a motion in the district court.[22]

COURTS

Cross-References

See District Court; Federal Courts; Judges; Judgments, 5139, 5141, 5146; Justices of the Peace; Municipal Courts; Probate Court; Supreme Court.

IN GENERAL

2333. Definition—A court is a tribunal duly constituted, and present at a time and place fixed pursuant to law, for the judicial investigation and determination of controversies;[23] a body in the government, organized for the public administration of justice at the time and place prescribed by law;[24] a place wherein justice is judicially determined.[25]

2334. Name—The name of a court is fixed by the law establishing it, and the court must always be so designated without regard to the particular matters over which it may happen to be exercising jurisdiction.[26]

2335. Constitutional authorization—A court must exist by virtue of a constitution. It is a constituent part of the government, and can act only by virtue of power conferred by the constitution. The acceptance of judicial office is a recognition of the authority of the government from which it is derived, and if the authority of that government is overthrown the power of its courts and other offices is necessarily annulled. If a court should conclude that the government under which it is acting had been displaced by an opposing government, it would cease to be a court and be incapable of pronouncing a judicial decision upon the question. If it decided at all as a court, it must affirm the existence and authority of the government under which it exercised judicial power, and this would preclude all judicial action. It follows that it is not competent for a court to inquire into the validity of the government under which it exists. But this doctrine must not be misapplied. It is applicable and controlling only when the government's very right to exist is involved. It does not preclude the courts from determining judicial questions which do not involve the fundamental question of the legal existence of the government. Carried to the extreme, the doctrine would deprive a court of the power to try a person charged with treason, or any other crime, the essence of which consisted of a denial of the rightful and legal existence of the government.[27]

[16] Laws 1909 c. 59.
[17] R. L. 1905 § 5235; State v. Perry, 28–455, 10+778; Hoskins v. Baxter, 64–226, 66+969.
[18] Hempsted v. Cargill, 46–141, 48+686; Betts v. Newman, 91–5, 97+371.
[19] Clements v. Utley, 91–352, 98+188.
[20] State v. Barnes, 17–340(315); O'Farrell v. Heard, 22–189.
[21] Gere v. Weed, 3–352(249).
[22] Pulver v. Grooves, 3–359(252).
[23] Century Dict.
[24] 8 A. & E. Ency. of Law 22. See Fitzpatrick v. Simonson, 86–140, 149, 90+378.
[25] Fitzpatrick v. Simonson, 86–140, 149, 90+378.
[26] Chouteau v. Rice, 1–192(166).
[27] McConaughy v. Secretary of State, 106–392, 417, 119+408.

2336. Constitutional and statutory—There is no justification for classifying the courts of the state as constitutional and statutory, except for the purpose of noting that the courts which are named in the constitution cannot be abolished, or the nature of their jurisdiction affected, by legislative action. After a court is created by the legislature in the constitutional manner, it is a constitutional court, and in the exercise of its powers and jurisdiction is governed by the same general principles as the other courts of the state.[28]

2337. Establishment—Requisite vote—The constitution requires a two-thirds vote of the legislature to establish new courts.[29] This means a two-thirds vote in each house of all the members thereof.[30] An act establishing a new court may be amended as to matters of practice and procedure by less than a two-thirds vote.[31]

2338. Courts of record—A court of record is a court having a judge, clerk, and seal.[32] Justice courts are not generally regarded as courts of record.[33] Municipal courts, organized under the general statute, are courts of record.[34]

2339. Courts of common-law jurisdiction—A court having common-law jurisdiction is one whose powers are exercised "according to the course of the common law," and the phrase "according to the course of the common law," means a judicial determination of a controversy after due notice to the interested parties and an opportunity given to be heard.[35]

2340. Courts of superior jurisdiction—A court of record, which has by statute all the power that any court could have over a certain subject of jurisdiction, especially if it is a subject of jurisdiction under the general rules of law or equity, is, as to cases within that class of cases, to be regarded as a court of superior jurisdiction, within the rule that attaches to the judgments and decrees of such courts the presumption, in collateral proceedings, of jurisdiction in the particular case.[36]

2341. Court of common pleas—There was formerly in Hennepin county a court of common pleas. It had equal and concurrent jurisdiction with the district court in that county, and the same statutory procedure.[37] There was also for a time a court of common pleas in Ramsey county.[38]

2342. Territorial courts—In a limited sense the courts of the territory of Minnesota were United States courts, and it was held proper to entitle a territorial district court as "United States District Court."[39]

2343. State courts—All the courts of the state—supreme, district, probate, justice, and municipal—are state courts.[40]

2344. De facto courts—It is held in this state, contrary to the prevailing rule, that there may be a de facto court.[41]

JURISDICTION

2345. Definition—Jurisdiction is authority to hear and determine a cause.[42] It is not, in its essential nature, territorial.[43]

[28] State v. Dreger, 97-221, 225, 106+904. See Stahl v. Mitchell, 41-325, 332, 43+385

[29] Const. art. 6 § 1.

[30] State v. Gould, 31-189, 17+276.

[31] Dahlsten v. Anderson, 99-340, 109+697.

[32] State v. Weber, 96-422, 105+490.

[33] Petrie v. Hubbard County, 96-64, 104+680.

[34] Wellcome v. Berkner, 108-189, 121+882.

[35] State v. Weber, 96-422, 428, 105+490.

[36] Stahl v. Mitchell, 41-325, 43+385.

[37] Lane v. Innes, 43-137, 45+4.

[38] State v. Lautenschlager, 22-514.

[39] Chouteau v. Rice, 1-192(166).

[40] State v. Dreger, 97-221, 225, 106+904.

[41] Burt v. Winona etc. Ry., 31-472, 18+285, 289; State v. Bailey, 106-138, 118+676. See 20 Harv. L. Rev. 580; 21 Id. 153; Comstock v. Tracey, 46 Fed. 162.

[42] Montour v. Purdy, 11-384(278, 297); Wood v. Myrick, 16-494(447, 453); In re Mousseau, 30-202, 205, 14+887; State v.

2346. Of the subject-matter and of the person—There is an important distinction between jurisdiction of the subject-matter and of the person.[44] The latter can be conferred by consent, while the former cannot.[45] Jurisdiction of the subject-matter means, not only authority to hear and determine a particular class of actions, but authority to hear and determine the particular questions the court assumes to decide.[46] 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 jurisdiction of the precise question the judgment assumes to determine, or the particular relief which it assumes to grant.[47]

2347. Presumption—The jurisdiction of a superior court over the person and subject-matter in a case entertained by it will be presumed, unless the want of jurisdiction affirmatively appears on the face of the record. The mere absence from the record of jurisdictional facts does not overcome the presumption of jurisdiction.[48] A general adjudication is presumed to involve an adjudication of whatever minor facts may be necessary to authorize it.[49] It seems that there is no presumption in favor of the jurisdiction of courts of special and limited jurisdiction, such as justice courts.[50] 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.[51] The presumption in favor of the jurisdiction of superior courts does not apply where the record or proceedings themselves show the want of jurisdiction.[52]

2348. Consent to jurisdiction—Jurisdiction of the person may be given by consent,[53] but not jurisdiction of the subject-matter.[54]

2349. Dependent on amount in controversy—Where the jurisdiction of a court depends on the amount in controversy, it is to be determined by the amount claimed. If this 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 the court of jurisdiction. A party may waive a part of his claim so as to bring the case within the jurisdiction of the court.[55] In computing the amount in controversy the interest claimed is to be included,[56] but not the interest on the verdict or finding.[57]

2350. Interference—Where a court has acquired jurisdiction of a subject-matter, it should be allowed to proceed to a final determination without interference by another court of concurrent jurisdiction.[58]

Matter, 78–377, 379, 81+9; Fitzpatrick v. Simonson, 86–140, 146, 90+378; State v. Dreger, 97–221, 224, 106+904. In Holmes v. Campbell, 12–221(141, 146), jurisdiction is defined as the legal authority to administer justice. See, as to the meaning of "competent" jurisdiction, Montour v. Purdy, 11–384(278); and as to the meaning of "general" jurisdiction, Culver v. Hardenbergh, 37–225, 234, 33+792.

[43] State v. Dreger, 97–221, 224, 106+904.

[44] Wood v. Myrick, 16–494(447, 453); Rheiner v. Union Depot etc. Co., 31–289, 294, 17+623; Duluth v. Dibblee, 62–18, 25, 63+1117.

[45] See §§ 476, 9071.

[46] Sache v. Wallace, 101–169, 112+386.

[47] Id.

[48] Holmes v. Campbell, 12–221(141); Gemmell v. Rice, 13–400(371); State v. Becht, 23–411; Davis v. Hudson, 29–27, 11+136; In re Mousseau, 30–202, 14+887; Kipp v. Collins, 33–394, 23+554; Stahl v. Mitchell, 41–325, 43+385; Hempsted v. Cargill, 46–141, 48+686; Gulickson v. Bodkin, 78–33, 80+783. See §§ 5139, 5141.

[49] State v. Becht, 23–411.

[50] Barnes v. Holton, 14–357(275). See Barber v. Kennedy, 18–216(196); Vaule v. Miller, 69–440, 72+452.

[51] Ullman v. Lion, 8–381(338).

[52] In re Mousseau, 30–202, 14+887. See § 5141.

[53] See § 476.

[54] Ames v. Boland, 1–365(268); Rathbun v. Moody, 4–364(273); Marsh v. Armstrong, 20–81(66, 72); Johnson v. Clontarf, 98–281, 285, 108+521. See § 9071.

[55] Wagner v. Nagel, 33–348, 23+308. See § 5264.

[56] Crawford v. Hurd, 57–187, 58+985.

[57] Conger v. Nesbitt, 30–436, 15+875.

[58] Jacobs v. Fouse, 23–51, 54.

2351. Not lost by mere error—A jurisdiction once acquired by a court is not lost by mere error in the subsequent proceedings.[59]

COURTS-MARTIAL—See Militia.

COVENANTS

Cross-References

See Contracts; Deeds; Landlord and Tenant, 5393-5405; Mortgages, 6202, 6374; Vendor and Purchaser, 10018.

IN GENERAL

2352. Deed void covenants void—Covenants in a deed can have no greater validity than the deed itself, and if that is void the covenants are void.[60]

2353. None implied—By statute no covenants are implied in a deed or mortgage.[61]

2354. Outstanding title in grantee—The covenants in a deed extend to a title existing in a third person which may defeat the estate granted by the covenantor, and not to a title already vested in the covenantee.[62]

2355. Remedy on covenants how far exclusive—In the absence of mistake or fraud a grantee must rely on the covenants in his deed for his remedies.[63]

COVENANT OF SEIZIN

2356. What constitutes—At common law a covenant of seizin is not implied from the words, "grant, bargain, sell, convey, and warrant."[64] A covenant by grantors in a deed of conveyance, "for their heirs, executors, and administrators," has been held to import the personal obligation of the covenantors.[65]

2357. Force and effect—The covenant of seizin is taken for the protection and assurance of the title. It imports that the grantor is seized in fee simple; that he has the possession, the right of possession, and the complete legal title.[66]

2358. Personal—The covenant of seizin is personal.[67] A cause of action for its breach passes to the personal representative, not to the heirs, of the covenantee.[68]

2359. Subsequently acquired title—The covenantee is not required to take a title acquired by the covenantor after the commencement of an action for the breach of the covenant.[69]

2360. Breach—The covenant relates to the present and not to the future. If there is any breach, it is at the time of the execution of the deed, and the cause of action therefor is then complete.[70] There is a breach if the covenantor

[59] Carlson v. Phinney, 56-476, 58+38. See § 5145.

[60] Alt v. Banholzer, 39-511, 40+830.

[61] R. L. 1905 § 3342; Warner v. Rogers, 23-34; McNaughton v. Carleton College, 28-285, 9+805; Fritz v. McGill, 31-536, 18+753; Niggeler v. Maurin, 34-118, 24+369; Aiken v. Franklin, 42-91, 43+839; Sabledowsky v. Arbuckle, 50-475, 481, 52+920. See Van Bruut v. Mismer, 8-232 (202).

[62] Horrigan v. Rice, 39-49, 38+765.

[63] Brown v. Manning, 3-35(13); Maxfield v. Bierbauer, 8-413(367, 376). See § 10019.

[64] Aiken v. Franklin, 42-91, 43+839.

[65] Judd v. Randall, 36-12, 29+589.

[66] Kimball v. Bryant, 25 496; Allen v. Allen, 48-462, 51+473.

[67] Lowry v. Tilleny, 31-500, 18+452; Kimball v. Bryant, 25-496. See Clement v. Willett, 105-267, 117+491.

[68] Lowry v. Tilleny, 31-500, 18+452.

[69] Resser v. Carney, 52-397, 54+89. See Burke v. Beveridge, 15-205(160).

[70] Lowry v. Hurd, 7-356(282, 284); Kimball v. Bryant, 25-496, 499; Ogden v. Ball, 40 94, 99, 41+453; Allen v. Allen, 48-462, 51+473.

has not the possession, the right of possession, and the complete legal title.[71] A title in the covenantee is not a breach.[72] Eviction is unnecessary to constitute a breach.[73] A complaint has been held not to show a breach.[74]

2361. Damages—Prima facie the measure of damages is the consideration paid, with interest. But this may be varied by circumstances, as in case the covenantee acquires some estate of value, though not the one covenanted, or the outstanding title is taken up by him at a less cost than such consideration.[75] If the covenantee is in actual and peaceable possession only nominal damages are recoverable, in the absence of proof of actual loss.[76]

2362. Action by assignee—While the covenant does not run with the land, an assignee or grantee of the covenantee may sue thereon.[77]

COVENANT OF RIGHT TO CONVEY

2363. Force and effect—A covenant of right to convey is an admission of a right to convey, and of the existence of such facts as are necessary to the right.[78] It is generally of the same force and effect as a covenant of seizin.[79]

2364. Breach—The covenant relates to the present and not to the future. If there is any breach, it is at the time of the execution of the deed, and the cause of action therefor is then completed.[80] Facts constituting a breach of a covenant of seizin are generally a breach of the covenant of right to convey.[81]

2365. Damages—The measure of damages is apparently the same as for the breach of a covenant of seizin.[82]

OF WARRANTY AND QUIET ENJOYMENT

2366. Force and effect—A covenant of warranty undertakes to warrant and defend the title against all persons whomsoever.[83] In this state the covenant of warranty and quiet enjoyment are substantially cumulative.[84] A covenant of warranty relates to the future and not to the present. Its obligation is to defend the title against any who shall lawfully claim the premises in opposition thereto.[85] A covenant for quiet enjoyment goes only to the possession, and not to the title.[86] It is an assurance against disturbance consequent upon a defective title.[87] A deed to a railway company, with covenants of warranty and quiet enjoyment, has been held to license an existing embankment obstructing the flow of surface water and to release a claim for damages therefor.[88]

2367. Qualified—A covenant of warranty, qualified by an express exception as to taxes for a certain year, has been held not further qualified by an exception in a preceding covenant against incumbrances.[89]

[71] Allen v. Allen, 48–462, 51+473; Long v. Howard, 51–571, 53+1014; Resser v. Carney, 52–397, 54+89; Bradley v. Norris, 63–156, 65+357.

[72] Horrigan v. Rice, 39–49, 38+765.

[73] Lowry v. Hurd, 7–356(282).

[74] Wagner v. Finnegan, 54–251, 55+1129.

[75] Burke v. Beveridge, 15–205(160); Kimball v. Bryant, 25–496, 500; Ogden v. Ball, 38–237, 36+344; Huntsman v. Hendricks, 44–423, 46+910; Bradley v. Norris, 63–156, 65+357; Vallentyne v. Immigration L. Co., 95–195, 200, 103+1028.

[76] Ogden v. Ball, 38–237, 36+344; Sable v. Brockmeier, 45–248, 47+794.

[77] Kimball v. Bryant, 25–496. See Clement v. Willett, 105–267, 117+491.

[78] Clague v. Washburn, 42–371, 44+130.

[79] Sandwich Mfg. Co. v. Zellmer, 48–408, 418, 51+379.

[80] Ogden v. Ball, 40–94, 99, 41+453.

[81] Burke v. Beveridge, 15–205(160); Long v. Howard, 51–571, 53+1014. See § 2360.

[82] Burke v. Beveridge, 15–205(160). See § 2361.

[83] Johnston v. Piper, 4–192(133). See, as to what constitutes a warranty deed, State v. Butler, 47–483, 50+532.

[84] See Fritz v. Pusey, 31–368, 370, 18+94; Ogden v. Ball, 40–94, 99, 41+453.

[85] Allis v. Nininger, 25–525; Brown v. Manning, 3–35(13).

[86] Moore v. Frankenfield, 25–540.

[87] Ogden v. Ball, 40–94, 96, 41+453.

[88] McCarty v. St. P. etc. Ry., 31–278, 17+616.

[89] Merritt v. Byers, 46–74, 48+417.

2368. Rebutter by collateral warranty—The doctrine of rebutter by collateral warranty does not obtain in this state.[90]

2369. Title subsequently acquired—If land is conveyed by a deed of general warranty, any superior outstanding title subsequently acquired by the grantor will inure to the benefit of the grantee and his assigns.[91]

2370. Effect of other covenants—A covenant of warranty is not restricted by an exception in a preceding covenant against incumbrances.[92]

2371. Quantity of land covered—A warranty deed of a definite quantity of land (no boundaries or monuments being given) on a designated side of a larger tract, which is duly described, conveys and warrants the full quantity named.[93]

2372. Breach—Eviction—To constitute a breach there must be an eviction, either actual or constructive, under a paramount title. The mere existence of such a title is insufficient. There must be a hostile assertion of such title by the holder. It is unnecessary that there be an actual ouster and dispossession of the covenantee under judgment or process. It is sufficient if the holder of a paramount title asserts his right and demands possession and that the covenantee yields under the pressure of such demand. So, also, if the title is so asserted that he must submit to the terms of the demandant or leave, he need not await the result of a lawsuit, but may purchase the title and this will amount to a breach. If he purchases the title the burden is on him to establish it in an action against his covenantor. If the convenantee is refused possession by one in actual possession, under a paramount title, there is a breach without any further act by the covenantee or occupant.[94] A judgment merely establishing an adverse paramount title does not amount to a constructive eviction, at least, unless the premises are vacant and unoccupied.[95] A judgment, in an action to determine adverse claims, adjudging that the defendant, by virtue of a paramount title, is the owner in fee simple and in possession of the land, and that the plaintiff has no title to or interest therein, is evidence of a constructive eviction of the plaintiff.[96] A covenant for quiet enjoyment goes only to the possession, and does not go to the title; and in case the covenantee, or his assignee, takes and holds possession under the deed, there must be an actual lawful eviction from the premises, or some disturbance of that possession, to constitute a breach of the covenant. So long as the actual possession of the property remains in the covenantee or his assignee, an action for a breach of the covenant will not lie, though there may exist in fact an outstanding paramount title, the enforcement of which would work a change in the possession.[97]

2373. Damages—If there is a total failure of title the full amount of the consideration paid, with interest from the date of payment, is recoverable.[98] The reasonable expenses of defending the title are recoverable.[99] In an action

[90] Goodwin v. Kumm, 43–403, 45+853.

[91] Burke v. Beveridge, 15–205(160); Sandwich Mfg. Co. v. Zellmer, 48–408, 51+379; Rooney v. Koenig, 80–483, 83+399; Bradley E. Co. v. Bradley, 97–161, 106+110. See Thielen v. Richardson, 35–509, 29+677.

[92] Merritt v. Byers, 46–74, 48+417; Sandwich Mfg. Co. v. Zellmer, 48–408, 51+379; Rooney v. Koenig, 80–483, 83+399; Tappan v. Huntington, 97–31, 106+98.

[93] Larson v. Goettl, 103–272, 114+840.

[94] Maxfield v. Bierbauer, 8–413(367, 376); Burke v. Beveridge, 15–205(160); Allis v. Nininger, 25–525; Moore v. Frankenfield, 25–540; Fritz v. Pusey, 31–368, 18+94; Ogden v. Ball, 40–94, 41+453; Bruns v. Schreiber, 48–366, 51+120; Wagner v. Finnegan, 54–251, 55+1129; Id., 65–115, 67+795; Brooks v. Mohl, 104–404, 116+931.

[95] Wagner v. Finnegan, 54–251, 55+1129.

[96] Larson v. Goettl, 103–272, 114+840. See Brooks v. Mohl, 104–404, 116+931; 21 Harv. L. Rev. 628.

[97] Moore v. Frankenfield, 25–540.

[98] Devine v. Lewis, 38–24, 35+711; Brooks v. Mohl, 104–404, 116+931. See, as to the measure of damages for a partial failure of title, Reynolds v. Franklin, 44–30, 46+139.

[99] Allis v. Nininger, 25–525; Brooks v. Mohl, 104–404, 116+931.

by an assignee of the covenantee the measure of damages is the amount paid by him, not exceeding the amount paid to the covenantor, with interest from the time of the eviction.[1] If the breach is due to an unexpired term or lease the measure of damages will ordinarily be the value of the use of the premises.[2] If the plaintiff has not been disturbed in his possession only nominal damages are recoverable.[3] The measure of damages for the breach of covenants of warranty and quiet enjoyment is the same.[4] Where the vendee buys the paramount title, the measure of damages is the amount paid therefor, and interest, provided the sum does not exceed the consideration money and interest. If the purchaser has been actually deprived of part only of the subject of his bargain, his damages correspond.[5]

2374. Vendee may buy outstanding title—If, at the date of the execution of a warranty deed, a superior title is outstanding in a third person, the covenants of that deed are broken whenever that title is actually asserted against the covenantee, the premises are claimed under it, and the covenantee is compelled to yield and does yield his claim to the superior title. The vendee in such a case may extinguish the paramount title by purchase.[6]

2375. Release and discharge—The owner of an estate to which a covenant of warranty is incident may release and discharge it, and thereby terminate all rights under it, either in favor of himself or of any subsequent grantee of the land.[7]

2376. Election—A plaintiff has been held not bound to elect between a breach of a covenant of quiet enjoyment and a breach of a covenant against incumbrances.[8]

2377. Limitation of actions—The vendee's right of action against the warrantor does not date from the time when the deed was delivered, so as to be barred by the statute of limitations at the end of six years thereafter.[9]

2378. Complaint—In an action for the breach of a covenant of warranty the complaint must allege facts showing an eviction, actual or constructive.[10]

COVENANT AGAINST INCUMBRANCES

2379. Force and effect—A covenant against incumbrances is a covenant of indemnity.[11] It is personal and passes to the personal representative, and not to the heirs, of the covenantee.[12]

2380. Qualified—The covenant may be qualified by excepting a specified incumbrance.[13]

2381. Action by assignee—While the covenant does not run with the land, in the full sense of that term, yet an action will lie thereon by an assignee or grantee of the covenantee,[14] and such action is not subject to setoff or defence by the covenantor.[15]

[1] Moore v. Frankenfield, 25–540.
[2] Fritz v. Pusey, 31–368, 18+94.
[3] Sable v. Brockmeier, 45–248, 47+794.
[4] Ogden v. Ball, 40–94, 99, 41+453.
[5] Maxfield v. Bierbauer, 8–413(367, 376); Brooks v. Mohl, 104–404, 116+931.
[6] Brooks v. Mohl, 104–404, 116+931.
[7] Merritt v. Byers, 46–74, 77, 48+417.
[8] Bruns v. Schreiber, 48–366, 51+120.
[9] Brooks v. Mohl, 104–404, 116+931.
[10] Wagner v. Finnegan, 54–251, 55+1129.
[11] Hawthorne v. City Bank of Mpls., 34–382, 384, 26+4; Security Bank v. Holmes, 65–531, 534, 68+113.
[12] Randall v. Macbeth, 81–376, 378, 84+119.
[13] Calkins v. Copley, 29–471, 13+904; Merritt v. Byers, 46–74, 48+417; Sandwich Mfg. Co. v. Zellmer, 48–408, 51+379; Walther v. Briggs, 69–98, 71+909; Rooney v. Koenig, 80–483, 83+399; Tappan v. Huntington, 97–31, 106+98.
[14] Hawthorne v. City Bank of Mpls., 34–382, 384, 26+4; Security Bank v. Holmes, 65–531, 68+113; Id., 68–538, 71+699; Clement v. Willett, 105–267, 117+491. See 15 Harv. L. Rev. 150.
[15] Randall v. Macbeth, 81–376, 84+119.

2382. Breach—The covenant relates to the present and not to the future. If there is any breach it is at the time of the execution of the deed and the cause of action therefor is then complete.[16] But the right to substantial damages may not accrue until later.[17] An incumbrance within the meaning of the covenant is any right or interest in the land which may subsist in third persons to the diminution of the value of the land, but consistent with the passing of the fee by the conveyance,[18] such as an outstanding lease,[19] an easement for a party-wall;[20] a railway right of way;[21] or the statutory interest of a wife.[22] By statute a recovery may be had for an incumbrance appearing of record, though it is not an incumbrance in fact.[23]

2383. Damages—The general rule is that damages should be estimated according to the real injury from the incumbrance. In the case of an unexpired term or lease the measure of damages is ordinarily the value of the use of the premises.[24] If the incumbrance cannot be removed, as in the case of a railway right of way, the measure of damages is the consequent depreciation in the value of the land.[25] If the covenantee loses the land by reason of the incumbrance he may recover the consideration paid, with interest.[26] Generally the cost of removing or securing the release of an incumbrance is recoverable.[27]

MISCELLANEOUS COVENANTS

2384. Of non-claim—A covenant of non-claim does not preclude the covenantor from asserting a subsequently acquired title.[28]

2385. To stand seized—A covenant to stand seized must rest on a consideration of blood or marriage.[29]

2386. For further assurance—A covenant for further assurance has been held operative.[30]

2387. Of quantity—Certain words have been held not to amount to a covenant as to quantity.[31]

2388. To remove incumbrances—Liquidated damages, stipulated for a breach of a covenant to remove an incumbrance, have been sustained.[32]

2389. Various covenants construed—A covenant by a grantee to pay the debts of his grantor;[33] a covenant to keep a dam in repair:[34] a covenant to protect and save harmless against a mortgage given by a former owner on the land conveyed and other land.[35]

COVENANTS RUNNING WITH THE LAND

2390. Definition—A covenant runs with the land when either the liability to perform it, or the right to take advantage of it, passes to the assignee of the

[16] Ogden v. Ball, 40–94, 99, 41+453; Wills v. Summers, 45–90, 92, 47+463; Randall v. Macbeth, 81–376, 378, 84+119.

[17] Dana v. Goodfellow, 51–375, 53+656; Security Bank v. Holmes, 65–531, 534, 68+113.

[18] McNaughton v. Carleton College, 28–285, 290, 9+805; Fritz v. Pusey, 31–368, 18+94; Mackey v. Harmon, 34–168, 172, 24+702; Crowley v. Nelson, 66–400, 407, 69+321.

[19] Fritz v. Pusey, 31–368, 18+94.

[20] Mackey v. Harmon, 34–168, 24+702.

[21] Bruns v. Schreiber, 48–366, 51+120.

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

[23] R. L. 1905 § 3345; Hawthorne v. City Bank of Mpls., 34–382, 26+4; Fasler v. Beard, 39–32, 34, 38+755.

[24] Fritz v. Pusey, 31–368, 18+94.

[25] Mackey v. Harmon, 34–168, 24+702.

[26] Sherwood v. Wilkins, 50–152, 52+394. See Bruns v. Schreiber, 43–468, 45+861.

[27] Dana v. Goodfellow, 51–375, 53+656.

[28] Hope v. Stone, 10–141(114). See Holcombe v. Richards, 38–38, 44, 35+714.

[29] Hope v. Stone, 10–141(114).

[30] Id.

[31] Austrian v. Dean, 23–62; Ward v. Dean, 69–466, 72+710.

[32] Fasler v. Beard, 39–32, 38+755.

[33] Bell v. Mendenhall, 71–331, 73+1086.

[34] Stanton v. Sauk Rapids Co., 74–286, 77+1.

[35] Dana v. Goodfellow, 51–375, 53+656.

land.[36] It is termed a real covenant, while one which does not run with the land is termed a personal covenant.[37] The right of action upon a covenant which runs with the land passes with the estate, and does not remain in a covenantee after the estate has been transferred.[38]

2391. General principles—Whether a covenant runs with the land must be determined from the nature and subject-matter of the covenant itself, and not from the language used by the parties. The parties cannot by agreement make a covenant run with the land, if it is not in its nature a real covenant.[39] To enable a covenant to run with the land, so as to give the assignee its benefit, the covenantee must be the owner of the land, to which the covenant relates; but the covenantor may be either a person in privity of estate with the covenantee, or a stranger; while, with reference to the subject of the covenant, it is sufficient if it is for something to be done or refrained from, about, touching, concerning, or affecting the covenantee's land, though not necessarily upon it, if the thing covenanted for be for the benefit of the same, or tend to increase its value in the hands of the holder.[40] The covenant must concern the land or estate. It must inhere in or be attached to the land, or relate to its mode of occupation or enjoyment.[41]

2392. Covenants creating easements—In some cases covenants are construed as equivalent to the grant of an easement or servitude, and as such held to attach to the land and run with it.[42]

2393. In equity—In equity covenants relating to land, or its mode of use, or enjoyment, are frequently enforced against grantees with notice, though there is no privity of estate, and they are not such as, in strict legal contemplation, run with the land.[43]

2394. Covenants of seizin, right to convey, and against incumbrances—These covenants are in praesenti and do not strictly run with the land.[44]

2395. Covenants of warranty and quiet enjoyment—These covenants run with the land.[45]

2396. Held to run with land—A covenant to maintain water in a lake at a certain stage, etc.;[46] a covenant for partial releases as lots should be sold;[47] a covenant relating to a party-wall;[48] a covenant against prior incumbrances.[49]

2397. Held not to run with land—A covenant for exclusive transportation by a particular railway of all product of a stone quarry;[50] a covenant to maintain a roof;[51] a covenant to keep a dam in repair;[52] a covenant against the sale of intoxicating liquors;[53] a covenant for the assumption of a mortgage.[54]

[36] Shaber v. St. Paul W. Co., 30–179, 182, 14+874; Kettle River Ry. v. Eastern Ry., 41–461, 471, 43+469; First Nat. Bank v. Security Bank, 61–25, 28, 63+264; Kimm v. Griffin, 67–25, 29, 69+634; Sjoblom v. Mark, 103–193, 114+746.

[37] Kimball v. Bryant, 25–496.

[38] Resser v. Carney, 52–397, 407, 54+89.

[39] Vawter v. Crafts, 41–14, 42+483; Kettle River Ry. v. Eastern Ry., 41–461, 471, 43+469.

[40] Shaber v. St. Paul W. Co., 30–179, 183, 14+874; Vawter v. Crafts, 41–14, 42+483; Clement v. Willett, 105–267, 117+491.

[41] Kettle River Ry. v. Eastern Ry., 41–461, 471, 43+469; Clement v. Willett, 105–267, 117+491.

[42] Kettle River Ry. v. Eastern Ry., 41–461, 472, 43+469.

[43] Kettle River Ry. v. Eastern Ry., 41–461, 473, 43+469. See Klemer v. Sheffield, 78–224, 80+1055; Sjoblom v. Mark, 103–193, 114+746.

[44] See §§ 2362, 2364, 2381.

[45] Shaber v. St. Paul W. Co., 30–179, 184, 14+874; Merritt v. Byers, 46–74, 77, 48+417.

[46] Shaber v. St. Paul W. Co., 30–179, 14+874.

[47] Vawter v. Crafts, 41–14, 42+483.

[48] 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.

[49] Stewart v. Parcher, 91–517, 520, 98+650.

[50] Kettle River Ry. v. Eastern Ry., 41–461, 43+469.

[51] Rochester Lodge v. Graham, 65–457, 68+79.

[52] Stanton v. Sauk Rapids Co., 74–286, 77+1.

[53] Sjoblom v. Mark, 103–193, 114+746.

[54] Clement v. Willett, 105–267, 117+491.

CREAM—See Food, 3776, 3777.

CREDIBILITY OF WITNESSES—See New Trial, 7145; Trial, 9764, 9786; Witnesses, 10344–10357.

CREDIT INSURANCE—See Insurance, 4644.

CREDITOR—One who has a right to require the fulfilment of an obligation or contract for the payment of money; one who has a debt or demand against another upon contract, express or implied, for the payment of money.[55]

CREDITORS' BILL—See Creditors' Suit.

CREDITORS' SUIT

Cross-References

See Execution, 3499.

2398. Definition—A creditors' suit or bill is an equitable action to enforce a judgment or other general lien out of property of the debtor not subject to levy and sale on execution.[56]

2399. When lies—A creditors' suit will lie to reach property not subject to levy and sale on execution,[57] including property interests too contingent to be sold on execution.[58] It has been held to lie to enforce an agreement of creditors with their debtor.[59] It will not lie to enforce a lost mortgage.[60]

2400. Prior exhaustion of legal remedies—Equity will not grant relief by entertaining a creditors' suit where the plaintiff has an adequate remedy at law. A creditors' suit will not lie unless the plaintiff has exhausted his legal remedies by recovering judgment and having an execution thereon returned unsatisfied.[61] This rule is relaxed as against an absconding or non-resident debtor.[62] A creditors' suit will not lie where there is other available property out of which the judgment can be satisfied.[63]

2401. Property out of state—Receiver—To reach land lying out of the state, the court may appoint a receiver and compel the debtor to execute to him such conveyances as may be necessary to pass the title.[64]

2402. Effect on execution sale—The pendency of a creditors' suit has been held not to affect the validity of an execution sale under the judgment which the suit was brought to enforce.[65]

2403. Intervening creditors—Cross bill—If an intervening creditor desires, besides the allowance of his claim, to demand other relief which cannot

[55] Tinkcom v. Lewis, 21–132; First Nat. Bank v. How, 28–150, 9+626; Adamson v. Cheney, 35–474, 29+71; Lake v. Albert, 37–453, 35+177; Mohr v. Minn. El. Co., 40–343, 348, 41+1074; Daniels v. Palmer, 41–116, 121, 42+855; Murch v. Swensen, 40–421, 42+290; Buchanan v. Reid, 43–172, 45+11; Atwater v. Manchester S. Bank, 45–341, 346, 48+187; Olsen v. O'Brien, 46–87, 48+453; In re Nicolin, 55–130, 133, 56+587; Kalkhoff v. Nelson, 60–284, 290, 62+332; Rosemond v. N. W. etc. Co., 62–374, 375, 64+925; Scheibel v. Anderson, 77–54, 79+594.

[56] Wadsworth v. Schisselbauer, 32–84, 19+390. See §§ 2399, 2400.

[57] Wadsworth v. Schisselbauer, 32–84, 19+390.

[58] Fryberger v. Berven, 88–311, 316, 92+1125.

[59] First S. Bank v. Sibley Co. Bank, 93–317, 101+309.

[60] Gale v. Battin, 16–148(133).

[61] Banning v. Armstrong, 7–40(24); Massey v. Gorton, 12–145(83); Wadsworth v. Schisselbauer, 32–84, 19+390; Moffatt v. Tuttle, 35–301, 28+509; Spooner v. Travelers Ins. Co., 76–311, 79+305; Fryberger v. Berven, 88–311, 92+1125; Williams v. Kemper, 99–301, 109+242. See Note, 23 L. R. A. (N. S.) 1.

[62] Overmire v. Haworth, 48–372, 51+121; Rule v. Omega S. & G. Co., 64–326, 67+60.

[63] See Johnston v. Piper, 4–192(133); Spooner v. Travelers Ins. Co., 76–311, 317, 79+305.

[64] Towne v. Campbell, 35–231, 28+254.

[65] Kumler v. Ferguson, 22–117.

be had under the allegations of the original complaint, he must obtain leave of court to file a cross bill.[66] Creditors may contest the claims of each other.[67]

2404. Limitation of actions—The life of a judgment cannot be extended by a creditors' suit. If the ten years, during which a judgment lien continues, expire during the pendency of a creditors' suit on the judgment, the suit falls.[68]

2405. Pleading—The complaint must show the exhaustion of legal remedies.[69] If it is alleged that the creditor has recovered a judgment against the debtor, and that an execution thereon has been returned unsatisfied, it is unnecessary to allege that the debtor is insolvent and has no other property out of which to satisfy the judgment.[70] It is proper to allege that the action is brought on behalf of the plaintiff and all other creditors who may choose to come in,[71] but such an allegation is doubtless unnecessary.

CREDITS—See Taxation, 9129.
CRIME—See Criminal Law, 2406.
CRIMINAL COMPLAINT—See Criminal Law, 2432; Indictment; Justices of the Peace, 5343; Municipal Corporations, 6804.
CRIMINAL CONVERSATION—See Husband and Wife, 4297.
CRIMINAL INTENT—See Criminal Law, 2454.

[66] Pioneer F. Co. v. St. Peter St. I. Co., 64–386, 67+217.
[67] Keith v. Mellenthin, 92–527, 530, 100+366.
[68] Newell v. Dart, 28–248, 9+732.
[69] See cases under § 2400.
[70] Williams v. Kemper, 99–301, 109+242. See Spooner v. Travelers Ins. Co., 76–311, 79+305.
[71] Goncelier v. Foret, 4–13(1).

CRIMINAL LAW

IN GENERAL

JURISDICTION

VENUE

FORMER JEOPARDY—FORMER CONVICTION OR ACQUITTAL

PRELIMINARY EXAMINATION

ARRAIGNMENT

PLEAS

VARIOUS DEFENCES

BURDEN AND DEGREE OF PROOF

EVIDENCE

TIME OF TRIAL AND CONTINUANCE

TRIAL

Cross-References

See Arrest; Bail; Convicts; Grand Jury; Indictment; Pardon; Prisons; Reformatories.

IN GENERAL

2406. Definition of "crime," "offence," etc.—By statute a crime is defined as an act or omission forbidden by law and punishable upon conviction by death, imprisonment, fine, or other penal discipline.[72] The terms "crime," "offence" and "criminal offence" are all synonymous, and include any breach of law established for the protection of the public, as distinguished from an infringement of mere private rights, for which a penalty is imposed or punishment inflicted in any judicial proceeding.[73] The term "offence" in criminal law, is not identical in meaning with the word "act." It imports, in its legal sense, an infraction or transgression of a law—the wilful doing of an act which is forbidden by a law or omitting to do what it commands.[74] It includes any punishable violation of law—the doing that which a penal law forbids or omitting to do what it commands—and hence includes all violations of municipal ordinances punishable by fine or imprisonment.[75] It does not include violations of the military code.[76] It includes misdemeanors.[77] When an offence is not a felony it is necessarily a misdemeanor.[78] The word "felonious" means "criminal." An infamous crime is any offence punishable with death or imprisonment in the state prison.[79]

2407. Legislative discretion—It is within the exclusive power of the legislature to declare what acts shall constitute a crime, to define the same, and to provide such punishment therefor as may be deemed appropriate.[80]

2408. No common-law offences—Prior to the Penal Code the common law as to crime was in force in this state except where abrogated or modified by statute.[81] The Code abolished all common-law offences and now no act or omission is criminal except as prescribed by statute.[82] The common law may be referred to in aid of the construction of common-law terms used in statutes;[83] but statutory definitions must control. The legislature has endeavored to do

[72] R. L. 1905 § 4747.
[73] State v. West, 42–147, 43+845.
[74] State v. Oleson, 26–507, 517, 5+959.
[75] State v. Cantieny, 34–1, 24+458; St. Paul v. Stamm, 106–81, 118+154.
[76] State v. Wagener, 74–518, 77+424.
[77] State v. Sauer, 42–258, 44+115.
[78] State v. Shaw, 39–153, 39+305.
[79] R. L. 1905 § 5514(3); State v. Hogard, 12–293(191).
[80] State v. Shevlin, 99–158, 108+935.
[81] State v. Pulle, 12–164(99); State v. Crummey, 17–72(50).
[82] G. S. 1894 § 6286; State v. Holong, 38–368, 37+587; State v. Shaw, 39–153, 39+305; State v. Sargent, 71–28, 73+626.
[83] Benson v. State, 5–19(6).

away with the refinements and technicalities of the common law and it is the duty of the courts to further the reform.[84]

2409. Intent—It is sometimes said that a criminal intent is an essential element of all crimes.[85] The expression is misleading and ought never to be used before a jury. It would be a distinct gain to clear thinking in this connection if its use were entirely abandoned. It is certainly not true that there must always be a culpable intent. A guilty mind—mens rea—is not essential in all cases. Intent appears in the criminal law in a twofold aspect. It means either (1) doing an unlawful act intentionally—that is, freely, purposely, and not accidentally; or (2) doing an indifferent act with a specific unlawful intent.[86] It is not essential that the wrongdoer should intend to commit the crime to which his act amounts, but it is essential that he should intend to do the act which constitutes the crime.[87] The legislature may forbid the doing of an act and make its commission criminal without regard to the intention, knowledge, or motive of the doer.[88] Acts, in themselves innocent and indifferent, are sometimes made criminal when done under circumstances which experience has taught will probably result in harm which the law seeks to prevent.[89] The rules as to the burden of proving intent are stated elsewhere.[90]

2410. Wilful—Good faith—The word "wilful," as used in penal statutes, often embodies an element of maliciousness. Courts will sometimes spell the defence of good faith into a statute.[91]

2411. Acts constituting different offences—The same acts may constitute or be parts of different offences.[92] They may be offences under different statutes,[93] or under different sections of the same statute.[94]

2412. Acts punishable under general law and ordinance—An act may be punishable under both the general law and a municipal ordinance and the punishment need not be the same.[95] In such a case a conviction under the ordinance is not a bar to a prosecution under the general law.[96]

2413. Acts punishable by federal and state authority—An act may be at the same time an offence against the United States and against the state.[97]

2414. Attempts to commit crime—An act done with intent to commit a crime, and tending, but failing, to accomplish it, is an attempt to commit that crime.[98]

2415. Principal and accessory—An accessory before the fact is "one who, though absent at the time of the commission of the felony, doth yet procure, counsel, command, or abet another to commit such felony." [99] An accessory

[84] Bonfanti v. State, 2–123(99); Benson v. State, 5–19(6); State v. Holong, 38–368, 37+587.

[85] See State v. Welch, 21–22, 26; State v. Quackenbush, 98–515, 521, 108+953.

[86] See 2 Stephen, History Criminal Law, 112; Holmes, Common Law, c. 2; State v. Welch, 21–22, 26; State v. Hair, 37–351, 34+893.

[87] State v. Quackenbush, 98–515, 521, 108+953.

[88] State v. Welch, 21–22; State v. Heck, 23–549; State v. Edwards, 94–225, 102+697; State v. Quackenbush, 98–515, 108+953. See State v. Coleman, 99–487, 110+5.

[89] State v. Quackenbush, 98–515, 521, 108+953.

[90] See § 2454.

[91] State v. Stein, 48–466, 51+474; Hobe v. Swift, 58–84, 59+831; State v. Dahlstrom, 90–72, 95+580; Price v. Denison, 95–106, 103+728.

[92] State v. Dineen, 10–407(325).

[93] State v. Holt, 69–423, 72+700.

[94] State v. Barry, 77–128, 79+656.

[95] State v. Charles, 16–474(426); State v. Ludwig, 21–202; State v. Oleson, 26–507, 5+959; Mankato v. Arnold, 36–62, 30+305; State v. West, 42–147, 43+845; State v. Harris, 50–128, 52+387; State v. Lindquist, 77–540, 80+701; Jordan v. Nicolin, 84–367, 87+916.

[96] State v. Lee, 29–445, 13+913; State v. Harris, 50–128, 52+387.

[97] State v. Oleson, 26–507, 5+959; State v. Lee, 29–445, 13+913.

[98] R. L. 1905 § 4771; State v. Miller, 103–24, 114+88. See 16 Harv. L. Rev. 437, 491.

[99] State v. McCartey, 17–76(54); State

after the fact is defined by statute.[1] In treason and misdemeanors there is no distinction between principals and accessories; all concerned in the commission of the offence are deemed principals, and indicted and punished accordingly.[2] The distinction between principals and accessories before the fact is abolished by statute and all persons concerned in the commission of a crime may be indicted and punished as principals.[3] One who gives a bribe is not an accomplice of the bribe-taker so that he can be convicted as a principal for bribery.[4] The mode of charging an accessory in an indictment is stated elsewhere.[5]

2416. Conspirators—When two or more conspire to commit a felony and engage in its commission all are alike guilty.[6]

2417. Construction of criminal laws—It is a general rule at common law that penal statutes are to be construed strictly.[7] A criminal offence should not be created by an uncertain and doubtful construction.[8] A statute is ineffectual to make criminal an act otherwise innocent, unless it clearly appears that such act is within the prohibition of the statute, the statute being reasonably construed for the purpose of arriving at the expressed intention of the legislature. It is not enough that the case be within the apparent reason and policy of the statute.[9] But a criminal statute is to have a reasonable construction and such as is best suited to accomplish the purposes to be arrived at, consistently with the meaning of the language used.[10] The construction cannot be contrary to the language used.[11] By statute the common-law rule of strict construction is abolished so far as certain provisions of Revised Laws 1905 are concerned.[12]

2418. Private prosecutor—It has been held discretionary with a trial court to permit, at the request of the attorney general, a private attorney to appear and prosecute a criminal action.[13]

2419. Merger—There is no such thing as a merger of different offences.[14]

JURISDICTION

2420. In general—The courts of this state have jurisdiction over an offence committed on a bridge across a river which separates the state from Wisconsin.[15] Where an injury to the person is inflicted in this state followed by death in another state the courts of this state have jurisdiction.[16] A district court has jurisdiction to indict for a misdemeanor even though the statute gives a justice of the peace or municipal court jurisdiction of the offence.[17] The subject of jurisdiction, as determined by the place in the state where the offence was committed, is considered elsewhere.[18]

v. Beebe, 17-241(218); State v. Quinlan, 40-55, 41+299. See R. L. 1905 § 4758.

[1] R. L. 1905 § 4759. See State v. King, 88-175, 92+965.

[2] G. S. 1894 § 6312; State v. Beebe, 17-241(218); State v. Wellman, 34-221, 25+395.

[3] R. L. 1905 § 4758; State v. Johnson, 37-493, 35+373; State v. Floyd, 61-467, 63+1096; State v. Briggs, 84-357, 87+935; State v. Renswick, 85-19, 88+22; State v. Whitman, 103-92, 114+363.

[4] State v. Sargent, 71-28, 73+626.

[5] See §§ 4402, 4403.

[6] State v. Barrett, 40-77, 41+463. See State v. Lucy, 41-60, 42+697.

[7] U. S. v. Gideon, 1-292(226); State v. Mims, 26-191, 2+492; State v. Small, 29-216, 12+703. See § 8989.

[8] U. S. v. Gideon, 1-292(226).

[9] State v. Finch, 37-433, 34+904; State v. Small, 29-216, 12+703.

[10] State v. Deusting, 33-102, 22+442.

[11] State v. Cooke, 24-247. Aliter in case of manifest mistake, State v. Small, 29-216, 12+703.

[12] R. L. 1905 § 4749. See State v. Small, 29-216, 12+703; State v. Rollins, 80-216, 83+141; State v. Smith, 82-342, 85+12.

[13] State v. Rue, 72-296, 75+235.

[14] State v. Dineen, 10-407(325).

[15] State v. George, 60-503, 63+100.

[16] State v. Gessert, 21-369; State v. Smith, 78-362, 81+17.

[17] State v. Kobe, 26-148, 1+1054; State v. Bach, 36-234, 30+764; State v. Russell, 69-499, 72+832. See also, State v. Crummey, 17-72(50).

[18] See §§ 2423, 2424.

2421. Waiver of objection to jurisdiction of person—A party waives objection to the jurisdiction of the court over his person by pleading to an indictment without objecting to the manner of his arrest or of his being brought before the court.[19]

VENUE

2422. Change of venue—A change of venue is authorized in certain cases, when a fair and impartial trial cannot be had, not only in favor of the accused [20] but also in favor of the state.[21] There can be but one change.[22] An application for a change of venue is addressed to the discretion of the trial court and its action will not be reversed on appeal except for a clear abuse of discretion.[23] Counter affidavits may be received in opposition to the application.[24] An order denying a change cannot be reviewed on certiorari.[25] The expenses of the prosecution are payable by the county in which the offence was committed.[26]

2423. Place of trial—A criminal prosecution is generally triable in the county where the offence was committed.[27] Special statutory provisions regulate the place of trial where the offence is committed on the boundary between two counties or within one hundred rods of the dividing line; [28] where the offence is committed in one county and death ensues in another; [29] where the offence is committed in this state and death ensues in another; [30] and where the offence is committed on a vessel.[31] It is for his acts that the defendant is responsible. They constitute his offence. The place where they are committed is the place where his offence is committed, and there the place where he should be indicted and tried.[32] An act authorizing a change in the place of holding court in the district, but not changing the district, is not unconstitutional.[33]

2424. Proof—Proof of the place of the commission of an offence need not be direct and positive.[34] Where an act, to be an offence, must have been done within a particular place, though there is no actual proof of the place where the act was done, if it is apparent from the whole case that, in the trial, it was taken for granted that the act, if done at all, was done within the place, and there was no objection on the trial to the absence of formal proof of it, the judgment will not be reversed, merely because there was no such formal proof.[35]

FORMER JEOPARDY—FORMER CONVICTION OR ACQUITTAL

2425. In general—The constitutional provision that no person shall be twice put in jeopardy of punishment for the same offence applies only to criminal

[19] State v. Fitzgerald, 51–534, 53+799.

[20] R. L. 1905 § 5354. See, under former statute restricting change to adjoining county, State v. Gut, 13–341(315); State v. Miller, 15–344(277).

[21] R. L. 1905 § 5357; State v. Miller, 15–344(277).

[22] State v. Gardner, 88–130, 92+529.

[23] State v. Gut, 13–341(315); State v. Miller, 15–344(277); State v. Stokely, 16–282(249); State v. Nelson, 91–143, 97+652.

[24] State v. Stokely, 16–282(249).

[25] State v. Weston, 23–366.

[26] R. L. 1905 § 5355. See, prior to amendment of 1902, Hennepin County v. Wright County, 84–267, 87+846.

[27] Const. art. 1 § 6; R. L. 1905 § 5354; State v. Gut, 13–341(315).

[28] R. L. 1905 § 5316; State v. Robinson, 14–447(333); State v. Anderson, 25–66; State v. Masteller, 45–128, 47+541.

[29] R. L. 1905 § 5317. See State v. Gessert, 21–369; State v. Smith, 78–362, 81+17.

[30] R. L. 1905 § 5319; State v. Gessert, 21–369; State v. Smith, 78–362, 81+17.

[31] R. L. 1905 § 5314; State v. Timmens, 4–325(241).

[32] State v. Gessert, 21–369; State v. Smith, 78–362, 81+17; State v. Justus, 85–114, 88+415.

[33] State v. Gut, 13–341(315).

[34] State v. New, 22–76; State v. Grear, 29–221, 13+140; State v. Cantieny, 34–1, 24+458.

[35] State v. Tosney, 26–262, 3+345.

prosecutions.[36] The accused is "put in jeopardy of punishment" in the legal and constitutional sense, when a jury is impaneled and sworn to try his case, upon a valid indictment, or, as it was expressed at common law, "when the jury is charged with the defendant." After a jury is thus charged with the defendant he is entitled to have it proceed to verdict unless some intervening necessity prevents. Inability of the jury to agree is such a necessity, yet, in a prosecution for a felony, the defendant has a right to be present throughout the trial and if a jury is discharged for inability to agree without the consent of the defendant and during his enforced absence in prison he cannot be tried again for the same offence.[37] A former judgment of conviction or acquittal will not bar a subsequent prosecution for the same offence unless it was on the merits. If a former acquittal was for want of substance in setting forth the offence it will not operate as a bar.[38] A dismissal, on motion of the accused, for insufficiency of the indictment, is not a bar.[39] A judgment allowing a demurrer is 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 opinion that the objection on which the demurrer is allowed may be avoided in a new indictment, shall direct the case to be resubmitted to the same or another grand jury.[40] A dismissal of an indictment, on 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 resubmitted to the same or another grand jury without an order of court.[41] A former conviction fraudulently obtained is not a bar.[42] A conviction in a court without jurisdiction is not a bar.[43] Nor is a conviction under an invalid law.[44] An erroneous judgment is a bar if the court had jurisdiction.[45] If, after a conviction, the defendant obtains a new trial, he waives the immunity.[46] A verdict must possibly pass into judgment before it can operate as a bar.[47] A criminal prosecution, pending and undetermined before a justice of the peace at the time of his death, terminates 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.[48] A violation of a municipal ordinance has been held an "offence" within the constitutional provision.[49]

2426. What constitutes same offence—The term "offence," in criminal law, is not identical in meaning with the word "act." It imports, in its legal sense, an infraction of a law—the wilful doing of an act which is forbidden by law or omitting to do what the law commands. The same act may transgress two distinct laws, as, for example, a state and a federal law or a municipal ordinance and a state law. If so there are two offences and both may be punished.[50] A former conviction or acquittal of a higher offence is a bar to a prosecution for the same act charged as a less offence, if, on the trial of the former, the defendant might have been, upon any competent evidence, legally convicted of the latter.[51] Conversely, a former conviction or acquittal of a minor offence is a bar to a prosecution for the same act, charged as a higher crime, whenever the

[36] State v. Shevlin, 99–158, 108+935; Id., 102–470, 113+634.
[37] State v. Sommers, 60–90, 61+907.
[38] Gerrish v. Pratt, 6–53(14, 16).
[39] State v. Holton, 88–171, 92+541.
[40] R. L. 1905 § 5345; State v. McGrorty, 2–224(187); State v. Comfort, 22–271; State v. Holton, 88–171, 92+541.
[41] State v. Peterson, 61–73, 63+171.
[42] State v. Simpson, 28–66, 9+78.
[43] State v. Charles, 16–474(426).
[44] State v. Oleson, 26–507, 5+959.
[45] State v. Bowen, 45–145, 47+650.
[46] State v. Coon, 18–518(464); State v. Brecht, 41–50, 42+602.
[47] State v. Moore, 86–422, 90+787.
[48] State v. Miesen, 96–466, 105+555.
[49] St. Paul v. Stamm, 106–81, 118+154.
[50] State v. Oleson, 26–507, 5+959; State v. Lee, 29–445, 13+913; State v. Harris, 50–128, 52+387, 531.
[51] State v. Hackett, 47–425, 50+472

defendant, on trial of the latter, might be legally convicted of the former, had there been no other prosecution.[52] Burglary and larceny are distinct offences.[53] The uttering as true of a forged mortgage and a forged note, which the mortgage purports to secure at one time and to the same party, is a single act, and constitutes only one offence. A conviction on an indictment for uttering the mortgage is a bar to a subsequent conviction for uttering the note.[54] The making of a forged written instrument and the uttering of it by the same person, at the same time, as one transaction, constitute but one offence.[55] An acquittal for an assault with intent to murder is a bar to a subsequent prosecution for the assault only.[56] A conviction for a lesser degree of a crime is a bar to a subsequent prosecution for the other degrees.[57] Where several articles belonging to the same person are stolen at the same time, a conviction or acquittal for the larceny of some of them is a bar to a subsequent prosecution for the larceny of the others.[58]

2427. Sufficiency of plea—A plea of former acquittal is sufficient whenever it shows on its face that the second indictment is based upon the same single criminal act which was the basis of the indictment upon which the defendant was acquitted.[59] A plea of former conviction must show authority to convict by the court in which it was had.[60]

PRELIMINARY EXAMINATION

2428. Who are committing magistrates—All judges of courts of record, court commissioners, and justices of the peace, are conservators of the peace and authorized to examine persons charged with a criminal offence and to commit them for trial.[61]

2429. Nature and object of proceedings—A preliminary examination is a judicial proceeding, but it is not an action or trial. The word "trial," which means the judicial hearing upon the issues in a cause for the purpose of determining it, cannot properly be applied to such an examination, which is a mere preliminary inquiry to ascertain if the evidence is such that the accused ought to be put upon trial for the offence charged. If he is discharged, new proceedings may be at once commenced against him for the same offence; if he is held, that fact can have no influence on his guilt when he is put on his trial to have it determined.[62] The proceeding is of a very ancient origin.[63]

2430. To what offences applicable—The statutes relating to the preliminary examination of offenders are applicable to all criminal offences, whether felonies or misdemeanors.[64] Though not necessary, an examination may be had for offences punishable by a justice of the peace.[65]

2431. Waiver—An accused person may waive a preliminary examination.[66]

2432. Complaint—A complaint is the initial proceeding in examination and must be on oath.[67] A complaint which contains a substantial statement of the

[52] State v. Lessing, 16–75(64); State v. Wiles, 26–381, 4+615.
[53] State v. Hackett, 47–425, 50+472.
[54] State v. Moore, 86–422, 90+787.
[55] State v. Klugherz, 91–406, 98+99.
[56] Boyd v. State, 4–321(237).
[57] State v. Lessing, 16–75(64).
[58] State v. Moore, 86–422, 90+787.
[59] State v. Klugherz, 91–406, 98+99.
[60] State v. Charles, 16–474(426).
[61] R. L. 1905 § 5235; State v. Perry, 28–455, 10+778 (court commissioner); Hoskins v. Baxter, 64–226, 66+969(id.); Flanigan v. Minneapolis, 36–406, 31+359 (municipal court).
[62] State v. Bergman, 37–407, 34+737; Wagener v. Ramsey County, 76–368, 79+166.
[63] Chapman v. Dodd, 10–350(277, 283).
[64] State v. Sweeney, 33–23, 21+847; State v. Sargent, 71–28, 32, 73+626.
[65] State v. Sargent, 71–28, 73+626.
[66] State v. Grant, 10–39(22, 30).
[67] State v. Richardson, 34–115, 24+354. See State v. Bates, 96–150, 104+890.

offence in positive terms is sufficient.[68] A complaint and warrant for the arrest of a person who has been released from a commitment by habeas corpus need not be any different from what they would be if there had been no prior arrest and discharge.[69]

2433. Warrant of arrest—The only function of a warrant in a criminal case is to enable the court to acquire jurisdiction of the person of the accused by bringing him before the court to answer the charge against him. If he voluntarily appears there is no need of issuing a warrant for his arrest in order to confer jurisdiction over his person.[70]

2434. Examination—A criminal complaint subscribed and sworn to before a magistrate and purporting to have been made after the complaint had been duly sworn is a sufficient "examination" of the complainant under the statute.[71]

2435. Discharge of prisoner—If the evidence shows the accused probably not guilty of the offence charged, but probably guilty of a different offence, the magistrate may hold him a reasonable time until a new warrant may be issued.[72] A discharge is not a bar to a subsequent prosecution for the same offence.[73]

2436. Commitment—Submission of charge to grand jury—If the magistrate is a justice of the peace, and the offence is within his jurisdiction, he is not bound to turn the case over to the district court, but may set it down for immediate trial in his own court. If he does so, the accused should be informed that he is to be subjected to trial, rather than to a mere preliminary examination, for he may wish to demand a jury trial. If the offence charged is not within the jurisdiction of the justice, the accused cannot be placed on trial without indictment, and hence must necessarily be bound over or committed to await the action of the grand jury. If the grand jury is not in session, or is not to be impaneled within a short time, a person charged with an offence cognizable by a justice of the peace cannot be bound over to await the action of the grand jury.[74] When one is held by an examining magistrate to answer in the district court for a felony, a prosecution for a felony is pending in that court.[75] When a person has been held to answer for a public offence, if an indictment is not found against him at the next term of the court at which he is held to answer, the court must order the prosecution to be dismissed, unless good cause to the contrary be shown.[76] Where the accused was charged with having committed perjury in giving testimony before a grand jury which was still in session at the time of his arrest, it was held that he was not entitled to have the charge submitted to that grand jury and that there was no error in continuing the hearing before the committing magistrate under the circumstances.[77]

2437. Warrant of commitment—It is unnecessary that a warrant of commitment, under which one is confined in jail to await the action of a grand jury, set forth, as in an indictment, all of the facts essential to constitute a crime. It is enough if it clearly designates the offence of which the prisoner is accused, and shows that, upon examination before the committing justice, it had appeared that such offence had been committed, and that there was probable cause to believe the accused to be guilty thereof.[78]

[68] See State v. Messolongitis, 74-165, 77+29; State v. Bates, 96-150, 104+890; State v. Swanson, 106-288, 119+45.
[69] State v. Holm, 37-405, 34+748.
[70] State v. Nugent, 108-267, 121+898.
[71] State v. Nerbovig, 33-480, 24+321; State v. Richardson, 34-115, 24+354.
[72] State v. Sargent, 71-28, 73+626.
[73] State v. Bergman, 37-407, 34+737; State v. Holm, 37-405, 34+748. See Chapman v. Dodd, 10-350(277, 280).
[74] State v. Sargent, 71-28, 73+626.
[75] State v. Grace, 18-398(359).
[76] R. L. 1905 § 4786; State v. Grace, 18-398(359). See State v. Radoicich, 66-294, 69+25.
[77] State v. Riley, 109-434, 124+11.
[78] Collins v. Brackett, 34-339, 25+708; State v. Hoolihan, 104-63, 115+1037.

2438. Return—All examinations and recognizances must be certified and returned to the clerk of the court before which the party charged is bound to appear, within ten days after the examination or the recognizance is taken, and must be filed in that court.[79] If a recognizance is of record in the proper court, at the time when the parties who entered into it are called upon to perform its conditions, it is in time as respects filing. The statute is merely directory as to time of filing.[80] When one is held by an examining magistrate to answer in the district court for a felony a prosecution for a felony is pending in that court, though the return has not been filed.[81]

2439. Change of venue—Provision is made by statute for a transfer of the proceedings from one magistrate to another on account of prejudice.[82] The general statute, authorizing the transfer of an action from one justice to another, is inapplicable.[83]

ARRAIGNMENT

2440. Time—It is the duty of the county attorney to bring on the arraignment immediately after the filing of the indictment, and an unreasonable delay is a ground for the dismissal of the indictment.[84] That there is ground for postponing the trial is not an excuse for postponing the arraignment.[85]

2441. Copy of indictment for accused—Where the accused was served with a defective copy of the indictment, it was held proper for the court to set aside the arraignment and order a new arraignment before entertaining a motion to set aside the indictment.[86] Where a defective copy of the indictment is served upon the defendant at the time of his arraignment, he is entitled to a second arraignment; but where, having knowledge of the defect, he pleads to the indictment, and waits till after the jury is sworn before raising the objection, his motion to dismiss the action on that ground should be denied.[87]

PLEAS

2442. Former conviction or acquittal or jeopardy—A plea of former jeopardy has been sustained, though not expressly authorized.[88] The subject of former conviction or acquittal is considered elsewhere.[89]

2443. Effect in giving court jurisdiction—By entering a plea a defendant waives objection to the jurisdiction of the court over his person.[90]

2444. Withdrawal of plea—It is discretionary with the trial court to allow a defendant to withdraw a plea of not guilty, for the purpose of moving to set aside the indictment.[91]

2445. In abatement—Benefit of clergy—In our practice there is no plea in abatement. A motion to quash or set aside the indictment takes its place.[92] The common-law plea of benefit of clergy is not recognized here.[93]

VARIOUS DEFENCES

2446. Insanity—The Penal Code defines the degree of insanity which will relieve a person of criminal liability, following, substantially, the language of the judges in McNaghten's Case.[94] Practically the same test was applied in

[79] R. L. 1905 § 5251; Laws 1905 c. 179.
[80] State v. Perry, 28-455, 10+778.
[81] State v. Grace, 18-398(359).
[82] R. L. 1905 § 5260.
[83] State v. Bergman, 37-407, 34+737.
[84] State v. Thompson, 32-144, 19+730; State v. Radoicich, 66-294, 69+25.
[85] State v. Thompson, 32-144, 19+730.
[86] State v. Gut, 13-341(315).
[87] State v. Comings, 54-359, 56+50.
[88] State v. Sommers, 60-90, 61+907.
[89] See § 2425.
[90] State v. Fitzgerald, 51-534, 53+799.
[91] State v. Arbes, 70-462, 73+403.
[92] State v. Brecht, 41-50, 42+602.
[93] State v. Bilansky, 3-246(169).
[94] R. L. 1905 § 4756; State v. Scott, 41-365, 43+62; State v. Kluseman, 53-541,

this state before the Code, it being held that a person was not entitled to an acquittal on the ground of insanity, if at the time of the alleged offence he had capacity sufficient to enable him to distinguish between right and wrong, and understand the nature and consequences of his act, and had mental power sufficient to apply that knowledge to his own case.[95] Under the Penal Code an uncontrollable and insane impulse to commit crime, in the mind of one who is conscious of the nature and quality of the act, or that it is wrong, is not allowed as a defence.[96] If a person has an insane delusion upon any one subject, but commits crime in relation to a matter not connected with that particular delusion, he is criminally liable.[97] If a person is acquitted on the ground of insanity, the statute requires the jury to state in their verdict that it was given for that cause.[98] The burden of proving insanity is on the defendant.[99]

2447. Intoxication—No act committed by a person while in a state of voluntary intoxication is less criminal by reason of his having been in such condition.[1] Thus it has been held that intoxication is no defence to a charge of double voting.[2] But whenever the actual existence of any particular purpose, motive, or intent is a necessary element to constitute a particular species or degree of crime, the jury may take into consideration the fact that the accused was intoxicated at the time, in determining the purpose, motive, or intent with which he committed the act.[3] Thus intoxication has been held admissible on a charge of assault with intent to do great bodily harm;[4] on a charge of larceny;[5] on a charge of murder;[6] and on a charge of passing counterfeit money.[7] Intoxication cannot be considered by the jury unless it was of such a degree that the accused did not know what he was doing or could not distinguish right from wrong.[8] Where it appeared that a killing was intentional, or as a matter of revenge, it was held immaterial that the accused was intoxicated.[9] The burden of proving intoxication as a defence is on the accused. He must establish the defence by a fair preponderance of the evidence.[10] In no case can an accused person, by proof of intoxication, rebut the legal presumption that he knows and intends his voluntary acts.[11]

2448. Alibi—Evidence in support of an alibi ought generally to be subjected to very searching scrutiny, as it is so readily fabricated.[12]

BURDEN AND DEGREE OF PROOF

2449. In general—If the commission of a crime is directly in issue in any criminal proceeding, it must be proved beyond a reasonable doubt, and the burden of proving that any person has been guilty of a crime is on the person who asserts it.[13] In other words "the burden of proof is upon the prosecutor.

55+741; State v. Towers, 106-105, 118+361. See State v. Heenan, 8-44(26) (a defence of insanity held to have been made out in a prosecution for perjury).

[95] State v. Shippey, 10-223(178); State v. Gut, 13-341(315).

[96] State v. Scott, 41-365, 43+62.

[97] State v. Gut, 13-341(315).

[98] R. L. 1905 § 5376; Bonfanti v. State, 2-123(99).

[99] See § 2452.

[1] R. L. 1905 § 4755; State v. Garvey, 11-154(95); State v. Welch, 21-22; State v. Grear, 29-221, 13+140; State v. Corrivau, 93-38, 100+638.

[2] State v. Welch, 21-22.

[3] R. L. 1905 § 4755.

[4] State v. Garvey, 11-154(95); State v. Welch, 21-22; State v. Grear, 28-426, 10+472; Id., 29-221, 13+140; State v. Herdina, 25-161.

[5] State v. Welch, 21-22. See State v. Riggs, 74-460, 462, 77+302.

[6] State v. Gut, 13-341(315); State v. Welch, 21-22; State v. Grear, 29-221, 13+140; State v. Corrivau, 93-38, 100+638.

[7] State v. Welch, 21-22.

[8] State v. Garvey, 11-154(95); State v. Gut, 13-341(315); State v. Herdina, 25-161; State v. Riggs, 74-460, 462, 77+302.

[9] State v. Gut, 13-341(315).

[10] State v. Grear, 29-221, 13+140; State v. Corrivau, 93-38, 100+638.

[11] State v. Welch, 21-22.

[12] State v. Minot, 79-118, 81+753. See State v. Rose, 47-47, 49+404.

[13] Stephen, Ev. art. 94.

All the presumptions of law, independent of evidence, are in favor of innocence and every person is presumed to be innocent until he is proved guilty. If upon such proof there is a reasonable doubt remaining the accused is entitled to the benefit of it by an acquittal." [14] The doubt entitling to acquittal must result from a consideration of all the evidence; each evidentiary fact need not be proved beyond a reasonable doubt.[15] But the state has the burden of proving beyond a reasonable doubt every essential ingredient of the crime charged.[16] The foregoing rules apply to prosecutions for all grades of crime,[17] to actions for the recovery of a penalty or forfeiture,[18] and to proceedings for criminal contempt.[19] They are inapplicable to bastardy proceedings,[20] or to civil actions involving a charge of crime.[21]

2450. Statutory statement of rule—Every defendant in a criminal action is presumed innocent until the contrary is proved, and in case of a reasonable doubt is entitled to acquittal; and when an offence has been proved against him, and there exists a reasonable doubt as to which of two or more degrees he is guilty, he shall be convicted only of the lowest.[22]

2451. Presumption of innocence not evidence—The rule that every person is presumed innocent until he is proved guilty is simply a form of stating one part of the rule as to the burden of proof in criminal cases.[23] It is sometimes incorrectly stated to be an item of evidence to be weighed by the jury in favor of the defendant.[24]

2452. Irresponsibility—Insanity and drunkenness—It is provided by statute that "every person is presumed to be responsible for his acts, and the burden of rebutting such presumption is upon him." [25] Insanity is held to be a matter of defence which the accused must prove by a fair preponderance of evidence; it is not enough to raise a reasonable doubt of his sanity.[26] The rule is otherwise in the federal courts.[27] So irresponsible drunkenness as a defence must be proved by the accused by a fair preponderance of the evidence.[28]

2453. Corpus delicti—The state has the burden of proving the corpus delicti beyond a reasonable doubt, and by evidence other than the confessions of the accused.[29]

2454. Burden of proving criminal intent—When an act is in itself unlawful the criminal intent is presumed from the intentional doing of the act and this presumption makes out a prima facie case for the state. When an act is in itself indifferent, and becomes criminal only when done with a specific unlawful intent, there is no presumption of law that the act was done with such intent, and the state has the burden of proving such intent affirmatively and beyond a reasonable doubt.[30]

[14] Shaw, C. J. 5 Cush. 320; 10 Am. Law Rev. 642; 17 Am. Law Rev. 894; Thayer, Ev. 551.

[15] State v. Smith, 29–193, 197, 12+524; State v. Johnson, 37–493, 35+373.

[16] State v. Dineen, 10–407(325); State v. Lautenschlager, 22–514.

[17] State v. Dineen, 10–407(325).

[18] U. S. v. Shapleigh, 54 Fed. 126.

[19] State v. Dist. Ct., 65–146, 67+796.

[20] State v. Nichols, 29–357, 13+153.

[21] Burr v. Willson, 22–206; Thoreson v. N. W. etc. Co., 29–107, 12+154; State v. Nichols, 29–357, 13+153.

[22] R. L. 1905 § 4784; State v. Laliyer, 4–368(277) (duty to convict of lowest degree in case of doubt); State v. Bragg, 90–7, 95+578 (general rule applied).

[23] Thayer, Ev. 551; 4 Wigmore, Ev. § 2511; Taft, Present Day Problems, 346. See, as to the effect of the presumption on other presumptions, State v. Sager, 99–54, 58, 108+812.

[24] Coffin v. U. S., 156 U. S. 432.

[25] R. L. 1905 § 4754.

[26] Bonfanti v. State, 2–123(99); State v. Brown, 12–538(448); State v. Gut, 13–341(315); State v. Hanley, 34–430, 26+397.

[27] Lewis v. U. S., 160 U. S. 469.

[28] State v. Grear, 29–221, 13+140; State v. Corrivau, 93–38, 100+638.

[29] State v. Laliyer, 4–368(277); State v. Hogard, 12–293(191); State v. Grear, 29–221, 13+140; State v. Schreiber, 126+536.

[30] State v. Kortgaard, 62–7, 16, 64+51;

2455. Definition of reasonable doubt—Though it is quite customary for judges to attempt an explanation of the phrase "reasonable doubt" it is better not to do so unless requested by the jury.[31] As our court has said "it is difficult to make the meaning of this expression more clear by any circumlocution." [32] It is well settled that it is sufficient to instruct the jury simply that they must be satisfied of the defendant's guilt beyond a reasonable doubt, without any explanation of the phrase.[33] If the court desires to explain the meaning of the phrase, or the jury request an explanation, the following approved statement should be given: "Proof beyond a reasonable doubt is such as would impress the judgment of ordinarily prudent men with a conviction upon which they would act without hesitation in their own most important affairs and concerns of life." [34] The court is not required to explain to the jury the reason for the rule.[35]

EVIDENCE

2456. Necessity of calling certain witnesses—The state is not required to call and examine as its witnesses all persons whose names are indorsed on the indictment. It may call or refuse to call any competent witness. As a prosecuting officer represents the public interest and should try a case rather as a minister of justice than as a partisan, there may be circumstances where it would be his duty to call a witness favorable to the defendant, and doubtless, in such a case, the court, on its own motion, might require the witness to be called and examined.[36] The old common-law rule that on a trial for a felony the state is bound to call and examine all the eyewitnesses of the transaction probably does not prevail in this state.[37]

2457. Necessity of corroborating an accomplice—It is provided by statute that "a conviction cannot be had upon the testimony of an accomplice, unless it is corroborated by such other evidence as tends to convict the defendant of the commission of the offence, and the corroboration is not sufficient if it merely shows the commission of the offence or the circumstances thereof." [38] While the corroborating evidence must be such as tends to show some connection of the defendant with the acts constituting the crime charged yet it is unnecessary that there should be corroboration as to every probative fact. The statute does not require a case to be made out against the prisoner sufficient for his conviction, before the testimony of an accomplice can be considered. The corroborating evidence must, independent of the testimony of the accomplice, tend in some degree to establish the guilt of the accused, but need not be sufficiently weighty or full, as, standing alone, to justify a conviction.[39] It

State v. Borgstrom, 69–508, 72+799; State v. McGregor, 88–77, 92+458; State v. Poole, 93–148, 100+647; State v. Coleman, 99–487, 110+5. See, also, Bonfanti v. State, 2–123(99); State v. Dineen, 10–407(325); State v. Garvey, 11–154(95); State v. Brown, 12–538(448); State v. Welch, 21–22, 26; State v. Lautenschlager, 22–514, 524; State v. Hair, 37–351, 34+893; State v. Brown, 41–319, 43+69.

[31] 1 Bishop, Crim. Pro. § 1094; 2 Thompson, Trials, § 2463; State v. Sauer, 38–438, 38+355.

[32] State v. Staley, 14–105(75). To same effect, State v. Sauer, 38–438, 38+355; State v. Newman, 93–393, 101+499.

[33] Com. v. Costley, 118 Mass. 25.

[34] State v. Pearce, 56–226, 57+652, 1065. See, for various instructions held sufficient or insufficient, State v. Dineen, 10–407 (325); State v. Hogard, 12–293(191); State v. Staley, 14–105(75); State v. Shettleworth, 18–208(191); State v. Johnson, 37–493, 35+373; State v. Sauer, 38–438, 38+355; State v. Rue, 72–296, 75+235; State v. Ames, 90–183, 96+330; State v. Newman, 93–393, 101+499.

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

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

[37] State v. Smith, 78–362, 81+17.

[38] R. L. 1905 § 4744; State v. Gordon, 105–217, 117+483. See Note, 98 Am. St. Rep. 158.

[39] State v. Lawlor, 28–216, 9+698; State v. Brin, 30–522, 16+406; State v. Barrett,

need not be direct and positive, but may be circumstantial.[40] Whether a witness is an accomplice is a question for the jury unless the evidence is conclusive.[41] The test as to whether a witness is an accomplice is, could he himself have been indicted for the offence, either as principal or as accessory?[42] The following persons have been held not to be accomplices: a person purchasing beer on Sunday;[43] a person paying money for the suppression of evidence of a crime;[44] a woman submitting to an abortion;[45] a person giving or offering a bribe.[46] An inmate of a brothel is not an accomplice of the keeper.[47] A person who steals property and one who afterwards receives it from him, knowing it to have been stolen, are guilty of separate offences, and without more neither is the accomplice of the other.[48] Corroboration is not necessary in a prosecution for rape[49] or under the bastardy act.[50] If, in the prosecution of a party for subornation of perjury, it is sought to establish the fact that perjury was committed by the person suborned, his testimony must be corroborated as to such fact. But the alleged fact that he was induced to commit the crime by the accused may be established by his uncorroborated testimony if it satisfies the jury beyond a reasonable doubt.[51]

2458. Character of defendant—In every criminal prosecution evidence that the defendant has a good character is admissible,[52] but evidence that he has a bad character is generally inadmissible,[53] except to rebut evidence of his good character.[54] Such evidence is to be considered by the jury in connection with all the other evidence in the case, whether such other evidence is strong or weak, direct or circumstantial. It is not to be put aside by the jury in order first to ascertain whether the other evidence, considered by itself, does not prove guilt beyond a reasonable doubt. It may create a doubt as well as solve one.[55] Its effect is not determined by any presumptions of law. It is for the jury to give it such weight as they think proper, under the circumstances of the particular case.[56] Evidence of good character is not limited to good moral character in general, but particular traits of character may be shown when they are pertinent to the crime charged. Thus character for honesty is admissible on a charge of larceny or fraud;[57] character for peace and quietness, on a charge of rape;[58] and character for honesty, integrity, and truthfulness, on a charge of receiving bribes.[59] The character of an accused person may be proved indirectly by witnesses who testify to his reputation or directly by witnesses who, from personal knowledge of the accused, are able to testify as to his actual disposition. A witness who is shown to have been acquainted with the accused

40–77, 41+463; State v. Adamson, 73–282, 76+34; State v. Clements, 82–434, 85+229; Clark v. Clark, 86–249, 90+390; State v. Nelson, 91–143, 97+652; State v. Whitman, 103–92, 96, 114+363; State v. Berman, 108–534, 122+161.

40 See State v. Brin, 30–522, 16+406; State v. Brinkhaus, 34–285, 25+642.

41 State v. Lawlor, 28–216, 9+698.

42 State v. Durnam, 73–150, 75+1127; State v. Gordon, 105–217, 117+483.

43 State v. Baden, 37–212, 34+24.

44 State v. Quinlan, 40–55, 41+299.

45 State v. Owens, 22–238; State v. Pearce, 56–226, 57+652, 1065.

46 State v. Sargent, 71–28, 73+626; State v. Durnam, 73–150, 75+1127.

47 State v. Smith, 29–193, 12+524.

48 State v. Gordon, 105–217, 117+483.

49 State v. Connelly, 57–482, 59+479.

50 State v. Nichols, 29–357, 13+153.

51 State v. Renswick, 85–19, 88+22.

52 State v. Dumphey, 4–438(340, 349); State v. Miller, 10–313(246); State v. Hogard, 12–293(191); State v. Beebe, 17–241(218); State v. Sauer, 38–438, 38+355; State v. Holmes, 65–230, 68+11.

53 State v. Stone, 96–482, 105+187.

54 State v. Dumphey, 4–438(340, 349).

55 State v. Sauer, 38–438, 38+355; State v. Holmes, 65–230, 68+11; State v. Ames, 90–183, 96+330, and cases supra.

56 State v. Hogard, 12–293(191); State v. Beebe, 17–241(218). See State v. Ames, 90–183, 96+330 (held unnecessary to charge jury that they must consider the evidence of good character).

57 State v. Beebe, 17–241(218).

58 State v. Lee, 22–407.

59 State v. Ames, 90–183, 96+330.

for a considerable time under such circumstances that he would be likely to have heard anything said against him may testify that he never heard anything said against the character of the accused.[60]

2459. Evidence of other crimes—Upon the trial of a person charged with the commission of a crime, evidence that he has committed other crimes is generally inadmissible.[61] Evidence of the commission of other crimes is admissible, however, if it tends directly or corroboratively to prove him guilty of the crime charged, or some essential ingredient thereof.[62] Another crime may be proved if it shows a motive for the commission of the crime charged;[63] if it shows a criminal intent;[64] if it shows guilty knowledge;[65] if it identifies the defendant;[66] if it is a part of a common scheme or plan embracing the crime charged;[67] or if it is a part of the same transaction as the crime charged.[68] It is commonly said that the reason for the rule is that it would raise collateral issues and compel the accused to defend himself against a charge without notice.[69] But this is not a very satisfactory explanation of the rule. Collateral crimes are always admitted if they have a direct bearing on the case, and it is not thought necessary to give the accused notice. The fact that an accused person is of criminal associations and fixed criminal habit is so highly relevant in a logical sense, that it would never have been excluded merely because it might raise collateral issues. The common-law rule probably owes its origin to judicial distrust of the jury and that love of fair play so characteristic of the English race. It has been said that if there is doubt as to whether evidence of another crimes falls within any of the exceptions to the general rule it should be excluded.[70]

2460. Acts and declarations of fellow conspirators—Where two or more persons conspire together to commit a crime everything said, done, or written by any one of them in the execution or furtherance of the common purpose, is admissible against each of them;[71] but statements as to measures taken in the execution or furtherance of the common purpose—mere narratives of past events—are inadmissible against any conspirators except those by whom or in whose presence such statements were made.[72] Evidence of the acts or declarations of fellow conspirators should not ordinarily be admitted until the existence of the conspiracy is proved prima facie, apart from them,[73] but the order

[60] State v. Lee, 22–407. See Bingham v. Bernard, 36–114, 30+404; State v. Lockerby, 50–363, 52+958.

[61] State v. Hoyt, 13–132(125); State v. Austin, 74–463, 77+301; State v. Gardner, 88–130, 92+529; State v. Fitchette, 88–145, 92+527; State v. Towers, 106–105, 118+361; State v. Fournier, 108–402, 122+329. See Hoberg v. State, 3–262(181); Farnham v. Thompson, 32–22, 18+833; State v. Masteller, 45–128, 47+541; Note, 105 Am. St. Rep. 976.

[62] State v. Madigan, 57–425, 59+490; State v. Hayward, 62–474, 65+63; State v. Ames, 90–183, 96+330.

[63] State v. Lawlor, 28–216, 9+698.

[64] State v. Rose, 70–403, 73+177; State v. Wilson, 72–522, 75+715; State v. Durnam, 73–150, 75+1127; State v. Southall, 77–296, 79+1007; State v. Bourne, 86–426, 90+1105.

[65] Payson v. Everett, 12–216(137); State v. Rose, 70–403, 73+177; State v. Southall, 77–296, 79+1007; State v. Sodini, 84–444, 87+1130; State v. Bourne, 86–426, 90+1105.

[66] State v. Barrett, 40–65, 41+459; State v. Ames, 90–183, 96+330.

[67] State v. Ames, 90–183, 96+330; State v. Peterson, 98–210, 108+6.

[68] State v. Mueller, 38–497, 38+691.

[69] State v. Fitchette, 88–145, 92+527.

[70] Id.

[71] State v. Beebe, 17–241(218); State v. Thaden, 43–253, 45+447; Nicolay v. Mallery, 62–119, 64+108; State v. Wilson, 72–522, 75+715; State v. Palmer, 79–428, 82+685; Carson v. Hawley, 82–204, 84+746; State v. King, 88–175, 92+965; State v. Evans, 88–262, 92+976; State v. Ames, 90–183, 96+330. See State v. Gardner, 88–130, 92+529.

[72] Adler v. Apt, 30–45, 14+63; State v. Thaden, 43–253, 45+447; Nicolay v. Mallery, 62–119, 64+108; State v. Palmer, 79–428, 82+685.

[73] Matthews v. Hershey L. Co., 65–372, 67+1008; State v. Palmer, 79–428, 82+685; State v. Gardner, 88–130, 92+529.

of proof is a matter of discretion with the trial court, and if the conspiracy is subsequently proved there is no error.[74]

2461. Dying declarations—In prosecutions for homicide the dying declarations of the deceased as to the cause of his injury or as to the circumstances of the transactions which resulted in his injury, are admissible, if it be shown, to the satisfaction of the trial court, that they were made when the deceased was in actual danger of death and had given up all hope of recovery at the time of making the declarations.[75] Dying declarations in writing are admissible. though the facts were drawn out from the deceased and afterwards written down by another and read to him, he assenting to the truth of the written statements.[76] The weight to be given dying declarations is for the jury to determine.[77]

2462. Confessions—A confession involves the idea of criminality. It applies only to a direct or implied acknowledgment of guilt, after an offence committed, but does not extend to admissions of fact which in themselves are innocent and involve no criminal intent.[78] A confession is admissible against the person making it, though it was made in answer to a question assuming his guilt, or was obtained by artifice, falsehood, or deception, or was preceded by a caution to tell the truth if he said anything,[79] or was made while drunk.[80] No confession is deemed to be voluntary if it appears to the judge to have been caused by any inducement, threat, or promise, proceeding from a person in authority, and having reference to the charge against the accused person, whether addressed to him directly or brought to his knowledge indirectly; and if, in the opinion of the judge, such inducement, threat, or promise, gave the accused person reasonable grounds for supposing that by making a confession he would gain some advantage or avoid some evil in reference to the proceedings against him. A confession is not involuntary, only because it appears to have been caused by the exhortations of a person in authority to make it as a matter of religious duty, or by an inducement collateral to the proceedings, or by inducements held out by a person not in authority. The prosecutor, officers of justice having the prisoner in custody, magistrates, and other persons in similar positions, are persons in authority. The master of the prisoner is not as such a person in authority if the crime of which the person making the confession is accused was not committed against him. A confession is deemed to be voluntary if, in the opinion of the judge, it is shown to have been made after the complete removal of the impression produced by an inducement, threat, or promise which would otherwise render it involuntary. Facts discovered in consequence of confessions improperly obtained, and so much of such confessions as distinctly relate to such facts, may be proved.[81] It is provided by statute that "a confession of the defendant shall not be sufficient to warrant his conviction without evidence that the offence charged has been committed; nor can it be given in evidence against him, whether made in the course of judicial proceedings or to a private person, when made under the influence of fear produced by threats."[82] The corpus delicti must be proved beyond a reasonable doubt by evidence other than the confessions of the defendant.[83] Under the statute evidence that the

[74] State v. Evans, 88–262, 92+976. See St. Paul D. Co. v. Pratt, 45–215, 47+789.

[75] See Stephen, Ev. art. 26; State v. Cantieny, 34–1, 24+458; State v. Pearce, 56–226, 57+652.

[76] State v. Cantieny, 34–1, 24+458.

[77] State v. Pearce, 56–226, 57+652.

[78] State v. Mims, 26–183, 2+494.

[79] State v. Staley, 14–105(75, 82).

[80] State v. Grear, 28–426, 10+472.

[81] Stephen, Ev. art. 22; State v. Staley, 14–105(75); State v. Holden, 42–350, 44+123.

[82] R. L. 1905 § 4743.

[83] State v. Laliyer, 4–368(277); State v. Hogard, 12–293(191, 195); State v. New, 22–76, 80.

offence charged has been committed by some person is all that is required in order that the confession of the defendant may be sufficient to warrant his conviction. The order of proof is discretionary with the trial court. It is unnecessary that evidence of the commission of the crime should be introduced before the confession is received.[84] Whether a confession was made under such circumstances as to render it admissible is a question for the determination of the trial court, and its action will not be reversed on appeal unless manifestly contrary to the evidence.[85] The admission of confessions rests somewhat in the discretion of the trial court. Whether the state has the burden of showing affirmatively that a confession was voluntary, is an open question in this state. It is for the jury to determine what weight shall be given to a confession, but it is not their province to reject it.[86] The weight which ought to be accorded to a confession depends upon the circumstances under which it was made and the mental state of the person making it.[87]

2463. Admissions—A statement of the defendant, from which, in connection with other facts his guilt might be inferred, is admissible as an admission, though it is not so clearly indicative of guilt as to amount to a confession.[88]

2464. Flight—Evidence that after the commission of the crime the defendant left the locality is admissible.[89]

2465. Suppression or concealment of evidence—Evidence that the defendant has suppressed or concealed evidence which might be used against him is admissible.[90]

2466. Preparatory acts—Evidence of any act showing a preparation for the commission of the crime is admissible, and it is no objection that such act is in itself a crime.[91]

2467. Motive—Evidence showing a motive,[92] or want of motive,[93] for the commission of the crime is admissible.

2468. Threats—Evidence that the defendant has made threats against the person assailed is admissible.[94] Where, upon an indictment for murder, evidence of threats and the exhibition of malice by the accused against the deceased is introduced on behalf of the state, the defendant may contradict or explain such evidence, but may not, in extenuation or justification, introduce independent evidence of instances of personal immorality on the part of the deceased, or his general bad character.[95]

TIME OF TRIAL AND CONTINUANCE

2469. Right to a speedy trial—The accused has a constitutional right to a speedy trial.[96]

2470. Continuance—Provision is made by statute for the granting of a continuance for cause.[97] An application for a continuance is addressed to the dis-

[84] State v. Grear, 29–221, 13+140.
[85] State v. Staley, 14–105(75); State v. Holden, 42–350, 44+123.
[86] State v. Staley, 14–105(75).
[87] Tozer v. Hershey, 15–257(197, 200); State v. Grear, 28–426, 10+472.
[88] State v. Hogard, 12–293(191); State v. Mims, 26–183, 2+494. See State v. Holden, 42–350, 44+123 (inculpatory and contradictory statements); State v. Day, 108–121, 121+611 (report of accused as a teacher showing his knowledge of the age of an applicant for a marriage license).
[89] State v. Johnson, 33–34, 21+843; State v. Nelson, 91–143, 154, 97+652.
[90] State v. Keith, 47–559, 50+691 (sending witnesses out of the state).
[91] State v. Hayward, 62–474, 65+63; Com. v. Robinson, 146 Mass. 571.
[92] State v. Lawlor, 28–216, 9+698; State v. Lentz, 45–177, 47+720.
[93] See State v. Lentz, 45–177, 47+720.
[94] State v. Henn, 39–476, 40+572; State v. Rose, 47–47, 49+404; State v. Smith, 56–78, 57+325. See, as to remoteness of threats, State v. Dee, 14–35(27).
[95] State v. Rose, 47–47, 49+404.
[96] Const. art. 1 § 6; State v. Sargent, 71–28, 32, 73+626.
[97] R. L. 1905 § 5359.

cretion of the trial court, and its action will not be reversed on appeal except for a clear abuse of discretion.[98] A continuance should not be granted upon the verbal statements of counsel that it is necessary, or upon the mere suspicion that absent witnesses may be needed at the trial. A substantial reason for a continuance must be properly shown.[99]

TRIAL

2471. Presence of accused—It is provided by statute that "if the indictment be for a misdemeanor, the trial may be had in the absence of the defendant, if he shall appear by counsel; but, if it be for a felony, he shall be personally present." [1] And it is provided by the constitution that "in all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him." [2] The statute is merely an affirmation of the common-law rule.[3] In a prosecution for a felony the accused has a right to be present at every stage of the trial. In his absence a jury cannot be properly discharged for inability to agree.[4] The mere fact that the record does not show that he was present is not fatal to a verdict or judgment.[5] A different rule prevails in the federal courts.[6] Objection that the accused was not present cannot be raised by habeas corpus.[7]

2472. Right to a public trial—The accused has a constitutional right to a public trial.[8] A "public trial" means a trial by jury, including, perhaps, the rendition of judgment. But after the accused is convicted and sentenced the trial is over. He is not entitled to a public execution.[9] He is entitled to have his family, relatives, and friends present, subject to reasonable limitations imposed by the court.[10] When the spectators at a criminal trial of lascivious or immoral character are so obtrusive as to embarrass a witness during the examination, and it becomes apparent to the trial court that the due administration of justice is being impeded, the court may temporarily clear the courtroom of all persons except court officers, counsel, and witnesses, and the defendant, without infringing upon defendant's right to a public trial. Though the record does not expressly show a withdrawal or limitation of the order, it will be inferred that it was made for a temporary purpose only, and that it was not enforced after the reason calling it into existence ceased to exist.[11] The trial judge may, in his discretion, exclude the witnesses, or any particular witness or spectator from the courtroom while witnesses are being examined.[12]

2473. Right to fair trial—The accused is entitled to a fair, temperate, and impartial trial; [13] but he cannot demand an absolutely impartial jury, for that is rarely, if ever, obtainable.[14]

2474. Separate trial of defendants jointly indicted—At common law it was discretionary with the trial court to grant a separate trial, whether the crime charged was a felony or misdemeanor.[15] Under our statute a defendant

[98] State v. McCartey, 17-76(54); State v. Nerbovig, 33-480, 24+321; State v. Fay, 88-269, 92+978.
[99] State v. Fay, 88-269, 92+978.
[1] R. L. 1905 § 5358.
[2] Const. art. 1 § 6. See Note, 129 Am. St. Rep. 23.
[3] State v. Reckards, 21-47; Hopt v. Utah, 110 U. S. 574.
[4] State v. Sheriff, 24-87; State v. Sommers, 60-90, 61+907.
[5] State v. Brown, 41-319, 43+69.
[6] Lewis v. U. S., 146 U. S. 370; Crain v. U. S., 162 U. S. 646.
[7] State v. Sheriff, 24-87.
[8] Const. art. 1 § 6.
[9] State v. Pioneer Press Co., 100-173, 110+867.
[10] See State v. Reid, 39-277, 39+796.
[11] State v. Callahan, 100-63, 110+342. See 20 Harv. L. Rev. 489.
[12] State v. Quirk, 101-334, 112+409.
[13] State v. Briggs, 84-357, 363, 87+935.
[14] State v. Ronk, 91-419, 428, 98+334.
[15] State v. Thaden, 43-325, 45+614.

jointly indicted with another has an absolute right to a separate trial if the charge is for a felony.[16] If the charge is for a misdemeanor the matter rests in the discretion of the trial court.[17] The court may always direct a separate trial on the application of the state.[18]

2475. Granting a view—It is discretionary with the trial court to grant a view of the locus in quo by the jury. If the accused wishes the jury instructed as to the purposes of a view and their conduct thereon, he should make a timely request therefor.[19]

2476. Procedure when juror becomes sick—If, after the impaneling of a jury and before a verdict, 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.[20]

2477. Province of court and jury—Law and fact—It is provided by statute that "on the trial of an indictment for any offence, questions of law shall be decided by the court, except in cases of libel, saving the right of the defendant to except, and questions of fact by the jury; and, although the jury may find a general verdict which shall include questions of law as well as of fact, they shall receive as law what shall be laid down by the court as such." [21] It is the duty of the court to declare the law in criminal cases as well as in civil, and the jury have no right in either class of cases to present a verdict without regard to the law so declared, and by which their judgment should be controlled. Whether the evidence has a tendency to prove any fact in issue is a question for the court, but its weight is for the jury.[22] The court cannot direct the jury to return a verdict of guilty.[23] All questions of issuable fact are for the jury as, for example, whether the circumstances warranted the use of force in self-defence and the degree of force necessary; [24] whether an accused person charged with the murder of an officer knew that the deceased was an officer and as such was attempting the arrest of the accused; [25] whether a peace officer had reasonable cause to believe that a felony had been committed and the person arrested guilty of the offence; [26] whether a witness is an accomplice in the commission of a crime for which the accused is on trial; [27] whether the accused is insane; [28] whether a crime was committed with premeditation; [29] whether there was cooling time; [30] whether there was provocation.[31] Intent appears in the criminal law in the twofold aspect of (1) doing an act with specific unlawful intent and (2) intent to do the act constituting the offence.[32] When an act becomes criminal only in case it was done with a certain intention the existence of such intention is always for the jury, as, for example, embezzlement of public funds; [33] intent to defraud in uttering a forged instrument; [34] assault with intent to do great bodily harm; [35] mayhem; [36] assault with intent to murder.[37]

[16] R. L. 1905 § 5360.
[17] State v. Sederstrom, 99–234, 109+113.
[18] State v. Thaden, 43–325, 45+614.
[19] R. L. 1905 § 5362; Chute v. State, 19–271(230).
[20] State v. Ronk, 91–419, 98+334.
[21] R. L. 1905 § 5363.
[22] State v. Rheams, 34–18, 24+302.
[23] State v. Nelson, 91–143, 146, 97+652.
[24] Gallagher v. State, 3–270(185). See State v. Rheams, 34–18, 24+302; State v. O'Neil, 58–478, 59+1101.
[25] State v. Spaulding, 34–361, 25+793.
[26] Cochran v. Toher, 14–385(293).
[27] State v. Lawlor, 28–216, 9+698.
[28] State v. Hanley, 34–430, 26+397.
[29] State v. Brown, 41–319, 43+69.
[30] State v. Hoyt, 13–132(125).
[31] State v. Hoyt, 13–132(125). See State v. Shippey, 10–223(178); State v. Gut, 13–341(315); State v. Hanley, 34–430, 26+397.
[32] See § 2409.
[33] State v. Kortgaard, 62–7, 64+51; State v. Borgstrom, 69–508, 72+799, 975; State v. Rue, 72–296, 75+235.
[34] State v. Bjornaas, 88–301, 92+980.
[35] State v. Dineen, 10 407(325); State v. Garvey, 11–154(95).
[36] State v. Hair, 37–351, 34+893.
[37] Bonfanti v. State, 2–123(99).

Intent in the sense of doing the act constituting the crime purposely, and not accidentally or involuntarily, is a question for the jury. But in the absence of evidence tending to prove that the act was done accidentally or involuntarily, the court may instruct the jury that it is their duty to draw the inference of intent in accordance with the presumption that men intend their voluntary acts.[38] In prosecutions for libel the jury are judges both of the law and the facts.[39]

2478. Argument of counsel—The statute provides that the state shall have the opening and the defendant the closing argument to the jury.[40] It is inapplicable to trials in municipal and justice courts.[41]

2479. Charging the jury—*a. In general*—The general rules governing instructions, applicable alike to civil and criminal cases, are stated elsewhere.[42] The court should instruct the jury as to all the defences which are properly presented by the evidence,[43] but a failure to charge on a particular point is not error in the absence of a timely request.[44] The propriety of instructions in relation to such matters as the burden of proof,[45] the presumption of innocence,[46] the meaning of reasonable doubt,[47] the credibility of the accused as a witness,[48] the effect of evidence of good character,[49] the corroboration of the testimony of accomplices,[50] and other specific matters is considered in connection with the particular subject.

b. Reviewing the evidence—Under the statute of this state, it is not improper for the court, in its charge, to review and analyze the evidence. It is not error for the court to state to the jury that certain evidence is material, or that it tends to prove certain facts, or to comment upon the testimony, when it is done fairly and the jury are fully advised of their duty and responsibility in the premises. An intelligent analysis and review of the testimony, as circumstances may require, by the presiding judge, is eminently proper to aid the jury in their investigation of the truth, provided their independence and responsibility, subject to the law given them, are in no way interfered with.[51] But it is error for the court in its charge to indicate to the jury its opinion of the facts unless it informs them that they are the exclusive judges of all questions of fact.[52] It will be presumed on appeal that the court so informed the jury.[53] In reviewing the evidence the court should not single out and give undue prominence to particular items of evidence, and instruct the jury that they might or might not create in their minds a reasonable doubt of the guilt of the defendant.[54] A review of the evidence by the court should not be argumentative, but should be of a general nature to the end that all the facts may be laid before the jury impartially, and their minds not confused or led to a particular result, either by singling out and emphasizing parts of the testimony, or by laying special stress upon particular contentions or theories.[55]

2480. Discharge of jury for inability to agree—The trial court is authorized to discharge the jury for inability to agree to a verdict. How long a jury

[38] State v. Welch, 21-22; State v. Lautenschlager, 22-514; State v. Brown, 41-319, 43+69; State v. Lentz, 45-177, 4 720.

[39] State v. Ford, 82-452, 85+217; State v. Shippman, 83-441, 86+431.

[40] R. L. 1905 § 5364. See, prior to statute, State v. Beebe, 17-241(218).

[41] State v. Wagner, 23-544.

[42] See §§ 9781-9800.

[43] State v. Quirk, 101-334, 112+409.

[44] State v. Lawlor, 28-216, 224, 9+698; State v. Ronk, 91-419, 98+334; State v. Zempel, 103-428, 115+275.

[45] See § 2449.

[46] See § 2451.

[47] See § 2455.

[48] See § 10307.

[49] See § 2458.

[50] See § 2457.

[51] State v. Taunt, 16-109(99); State v. Rose, 47-47, 49+404.

[52] State v. Kobe, 26-150, 1+1051.

[53] State v. Taunt, 16-109(99).

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

[55] State v. Yates, 99-461, 109+1070.

should be kept together in the endeavor to reach an agreement is a matter resting in the discretion of the trial court.[56]

2481. Separation of jury—It is discretionary with the trial court to allow the jury, even in a capital case, to separate during the trial and before final submission of the case.[57] If the court has any doubts as to the propriety of permitting the jury to separate in a capital case, it should keep them together, especially in the larger cities.[58]

2482. Polling the jury—Provision is made by statute for polling the jury.[59]

2483. Verdict—Sufficiency generally—In an early case it was said that a verdict "should be certain, positive, and free from all ambiguity; any obscurity which renders it at all doubtful will be fatal to it."[60] But this is not in harmony with modern doctrine. There is no set form of words in which a verdict is required to be rendered, and therefore the only rational general rule that can be adopted is, does it show clearly and without any doubt, the intention of the jury and their finding on the issues submitted to them? If it does it cannot be declared bad without sacrificing substance and justice to form.[61] A general verdict of "guilty" convicts a defendant of all that the indictment well alleges against him. Hence, where the charge is of larceny of several articles of values specified, such a verdict is a finding that the defendant stole every one of them and that their several values were as averred.[62] It is unnecessary that a verdict should be entitled at all and any slight defect in entitling is immaterial.[63] Upon an indictment for a crime of which there are several degrees a general verdict of "guilty" is sufficient. It is necessary for the verdict to specify the degree only when the jury find a verdict for a lesser degree than the one charged.[64]

2484. Sealed verdict—The court cannot direct the jury to return a sealed verdict if the defendant objects.[65]

2485. Acquittal for insanity—Verdict—When a jury acquit a person on the ground of insanity they are required by statute to assign the ground in their verdict.[66]

2486. Verdict for lesser offences or lesser degrees of offences than charged—If the jury have a reasonable doubt whether the accused is guilty of a higher or lower degree of crime they must find him guilty of the latter.[67] If evidence is introduced reasonably tending to reduce the crime charged to one of a lesser degree, it is the duty of the court to instruct the jury as to the different degrees and their right to find the accused guilty of the lesser crime;[68] and they should be instructed that if they find for a lesser degree than charged they must specify in their verdict of what degree they find the accused guilty.[69] The court may refuse to instruct the jury as to lesser degrees if there is no evidence reasonably tending to justify a verdict for such lesser degrees.[70] In an unequivocal case the court may instruct the jury that there is no evidence in the

[56] R. L. 1905 § 5369; State v. Sheriff, 24–87.

[57] 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. See § 7112.

[58] State v. Williams, 96–351, 105+265.

[59] R. L. 1905 § 5373; McNulty v. Stewart, 12–434(319).

[60] State v. Coon, 18–518(464).

[61] State v. Ryan, 13–370(343) (verdict for murder); State v. New, 22–76 (verdict for embezzlement); State v. Snure, 29–132, 12+347 (bastardy proceedings).

[62] State v. Colwell, 43–378, 45+847.

[63] State v. Framness, 43–490, 45+1098.

[64] Bilansky v. State, 3–427(313); State v. Eno, 8–220(190).

[65] State v. Anderson, 41–104, 42+786.

[66] R. L. 1905 § 5376; Bonfanti v. State, 2–123(99, 109).

[67] State v. Laliyer, 4–368(277).

[68] State v. Miller, 45–521, 48+401; State v. Smith, 56–78, 57+325.

[69] State v. Eno, 8–220(190).

[70] State v. Smith, 56–78, 57+325; State v. Corrivau, 93–38, 100+638; State v. Towers, 106–105, 118+361.

case justifying a verdict for a lesser degree than the one charged or that it is their duty either to find the accused guilty as charged or to acquit him.[71] Upon an indictment for a crime of which there are several degrees a general verdict of guilty is sufficient. It is necessary for the verdict to specify the degree only when the jury find the accused guilty of a lesser degree than charged.[72] The accused may be found guilty of an assault, upon an indictment for assault with intent to murder;[73] of an assault with intent to commit rape, upon an indictment for rape;[74] of taking indecent liberties, upon an indictment for assault with intent to carnally know and abuse a child;[75] of assault in the second degree, upon an indictment for rape;[76] of simple larceny, upon an indictment for larceny from the person;[77] of an attempt to carnally know and abuse a child, upon an indictment for unlawfully and carnally knowing a child;[78] of robbery in second degree, upon an indictment for robbery in the first degree;[79] of manslaughter in any degree, upon an indictment for murder;[80] of the offence specified in section 2 of Laws 1873 c. 9, upon an indictment for the offence specified in section 1 of the same act;[81] of assault, upon an indictment for an assault with intent to do great bodily harm.[82] Upon an indictment for burglary a party cannot be convicted of the crime of larceny.[83]

2487. Sentence or judgment—Where a person has been convicted, upon several indictments for several similar but distinct offences the court may sentence him to the full extent allowed by law for such offences, upon each conviction, and it is not a case of cumulative sentences. A sentence to imprisonment ought to be certain as to the time when it shall commence and end; but where the court has to punish by imprisonment upon each of several convictions, to make one term commence at the expiration, by lapse of time or otherwise, of a preceding term, makes the sentence as certain as is possible under the circumstances and is sufficient.[84] If the sentence does not name the date when the term of imprisonment is to commence it is to be computed from the time of the commitment.[85] The statute requiring the term to expire between the first day of April and the first day of November is directory merely.[86] Without express statutory authority the court cannot impose a fine and commit the convict to prison until the fine is paid so as to exceed the limit of imprisonment prescribed by statute for the offence.[87] A convict cannot be committed to state prison merely to enforce the payment of a fine and not by way of punishment for the crime; for such purpose imprisonment in the county jail is alone warranted.[88] The place of imprisonment must be specified in the judgment and sentence of the court.[89] In all cases where the defendant is sentenced and adjudged to pay a fine the court may, as part of the judgment, order the defendant to be committed to the county jail until such fine is paid, not exceeding a reasonable time, to be graduated according to the amount of such fine.[90] In a

[71] State v. Cantieny, 34-1, 24+458; State v. Rheams, 34-18, 24+302; State v. Hanley, 34-430, 26+397; State v. Lentz, 45-177, 47+720; State v. Nelson, 91-143, 97+652; State v. Corrivau, 93-38, 100+638.

[72] Bilansky v. State, 3-427(313); State v. Eno, 8-220(190).

[73] Boyd v. State, 4-321(237).

[74] O'Connell v. State, 6-279(190); State v. Bagan, 41-285, 43+5.

[75] State v. West, 39-321, 40+249.

[76] State v. Vadnais, 21-382; State v. Bagan, 41-285, 43+5.

[77] State v. Eno, 8-220(190); State v. Wiles, 26-381, 4+615.

[78] State v. Masteller, 45-128, 47+541.

[79] State v. O'Neil, 71-399, 73+1091.

[80] State v. Lessing, 16-75(64); State v. Cantieny, 34-1, 24+458.

[81] State v. Owens, 22-238.

[82] State v. Gummell, 22-51.

[83] State v. Hackett, 47-425, 50+472.

[84] R. L. 1905 § 4773; Mims v. State, 26-498, 5+374.

[85] Mims v. State, 26-494, 5+369.

[86] R. L. 1905 §§ 4775, 5413; Mims v. State, 26-494, 5+369.

[87] Mims v. State, 26-494, 5+369.

[88] State v. Framness, 43-490, 45+1098.

[89] R. L. 1905 § 4775.

[90] R. L. 1905 § 4776; State v. Peterson, 38-143, 36+443; State v. Framness, 43-

capital case the time of execution is not an essential part of the judgment.[91] Whenever a sentence may be imprisonment in a county jail, the offender may be sentenced to and imprisoned in a workhouse, if there be one in the county where he is tried or where the offence was committed.[92] In every case in which punishment in the state prison is awarded against any convict, the form of the sentence shall be, that he be punished by confinement at hard labor.[93] A judgment for a less [94] or greater [95] punishment than authorized is not void and cannot be attacked on habeas corpus. If the conviction is right an erroneous sentence or judgment is not a ground for a new trial; the supreme court will either correct the error by a proper judgment and sentence or order a correction by the court below.[96] Where sentence is a fine and costs the omission of costs in the judgment is not a ground for reversal.[97] On appeal from justice court the sentence of the district court is not limited to the sentence of the justice.[98] The court cannot impose costs unless expressly authorized.[99]

ARREST OF JUDGMENT

2488. Grounds—The only objections that can be raised on motion in arrest of judgment are (1) that the court has not jurisdiction of the subject of the indictment, and (2) that the facts stated in the indictment do not constitute a public offence.[1] The motion cannot be predicated upon matter not appearing upon the face of the record.[2]

NEW TRIALS

2489. In general—A new trial may be granted the defendant in all criminal cases. The common-law distinction between felonies and misdemeanors in this connection does not prevail in this state.[3] A new trial cannot be granted the state.[4] Formerly an application for a new trial might be made directly to the supreme court.[5] In general, the law of new trials is the same in civil and criminal cases. The general subject, including both civil and criminal cases, is considered elsewhere.[6]

2490. Granted only for substantial error—If substantial error is committed on the trial of a defendant in a criminal case, it is a ground for a new trial, unless it appears that the defendant could not have been prejudiced thereby; but, if it affirmatively appears from the whole record that the defendant could not have been prejudiced by the error, it is not a ground for a new trial.[7] Where the evidence clearly shows the guilt of the defendant, alleged errors not affecting his constitutional and substantial rights, are not a ground for a new trial.[8] In other words, a new trial should be granted only where the substantial rights of the defendant have been so violated as to make it reasonably clear that a fair trial was not had.[9] Technical errors in the admission or

490, 45+1098; Jordan v. Nicolin, 84-367, 87+916.

[91] State v. Gut, 13-341(315).

[92] R. L. 1905 § 4775.

[93] R. L. 1905 § 5413; State v. Wolfer, 68-465, 71+681.

[94] In re Williams, 39-172, 39+65. See Elbow Lake v. Holt, 69-349, 72+564.

[95] Id.; State v. Wolfer, 68-465, 71+681.

[96] See § 2501.

[97] Elbow Lake v. Holt, 69-349, 72+564.

[98] Id.

[99] State v. Cantieny, 34-1, 24+458.

[1] R. L. 1905 §§ 5338, 5347; State v. McIntyre, 19-93(65); State v. Lautenschlager, 23-290; State v. Conway, 23-291; State v. Loomis, 27-521, 8+758. See Bilansky v. State, 3-427(313).

[2] State v. Conway, 23-291.

[3] State v. Miller, 10-313(246).

[4] State v. McGrorty, 2-224(187). See Thayer, Ev. 175.

[5] State v. Heenan, 8-44(26).

[6] See §§ 7068-7224.

[7] State v. Williams, 96-351, 105+265.

[8] State v. Nelson, 91-143, 97+652; State v. Crawford, 96-95, 104+822, 768; State v. Williams, 96-351, 105+265.

[9] State v. Nelson, 91-143, 97+652; State v. Crawford, 96-95, 104+822, 768; State v. Yates, 99-461, 109+1070.

exclusion of evidence, in instructions to the jury, and in matters of procedure generally, which clearly did not affect the result, or which could not reasonably have affected it, are not a ground for a new trial.[10] This, however, does not mean that a new trial should be denied, no matter what errors were committed, if the trial judge, or the supreme court, is convinced of the guilt of the defendant. It does not mean that there can be no "substantial error" where the guilt of the defendant is clearly proved. An accused person, however clear his guilt, is entitled to a fair trial, and a trial according to law, free, not from all error, but from substantial error. Obviously it is impossible to define "substantial" error. Each case necessarily depends largely on its own facts.[11] Public policy demands that the criminal law be administered firmly, without unreasonable delay, and without undue fondness for technicality—that new trials be granted cautiously and sparingly.[12] At a certain period of English history, when an accused person had no right to be represented by counsel, and when the punishments for crimes were so severe as to shock the sense of justice of many judges who administered the criminal law, it was natural that technical objections which, perhaps, alone stood between the criminal and the enforcement of a most severe, if not cruel, penalty, should be accorded great weight, and that forms and modes of procedure, having really no connection with the merits of a particular case, should be insisted upon as a sort of bulwark of defence against prosecutions which might otherwise be successful, and which at the same time ought not to succeed. These times have passed and the reasons for the strict and slavish adherence to mere form have passed with them.[13]

APPEAL

2491. When lies—Waiver—Criminal cases may be removed by the defendant to the supreme court, by appeal or writ of error, at any time within six months after judgment, or after the decision of a motion denying a new trial; but, if the order denying a new trial is affirmed upon hearing upon the merits, no appeal is allowed from the judgment.[14] An appeal does not lie from intermediate orders; the only means by which they may be reviewed are an appeal from the final judgment, an appeal from an order denying a new trial and a report.[15] An appeal does not lie from a verdict.[16] An order overruling a demurrer is not appealable.[17] The state cannot appeal or sue out a writ of error.[18] An appeal lies only from final judgments—such as determine the measure of punishment to be inflicted and are to be enforced without further judicial action.[19] Upon an appeal from a final judgment no questions will be considered which might have been raised on a prior appeal from an order denying a new trial.[20] A party may waive his right to appeal by giving a bond to abide the

[10] State v. Brown, 12–538(448); State v. Matakovich, 59–514, 61+677; State v. Nelson, 91–143, 97+652; State v. Crawford, 96–95, 104+822, 768; State v. Gardner, 96–318, 104+971; State v. Cowing, 99–123, 136, 108+851; State v. Touri, 101–370, 112+422.

[11] State v. Williams, 96–351, 364, 105+265; State v. Yates, 99–461, 109+1070. See State v. Cowing, 99–123, 108+851; State v. Halverson, 103–265, 114+957; State v. Alton, 105–410, 117+617.

[12] State v. Nelson, 91–143, 97+652.

[13] Peckham, J., Crain v. U. S., 162 U. S. 646.

[14] R. L. 1905 § 5400. See Bonfanti v. State, 2–123(99).

[15] State v. Noonan, 24–174; State v. Abrisch, 42–202, 43+1115.

[16] State v. Ehrig, 21–462.

[17] State v. Abrisch, 42–202, 43+1115.

[18] State v. McGrorty, 2–224(187); St. Paul v. Stamm, 106–81, 118+154. See Kennedy v. Raught, 6–235(155) (action for a penalty).

[19] State v. Abrisch, 42–202, 43+1115.

[20] Mims v. State, 26–494, 5+369.

[21] State v. Sawyer, 43–202, 45+155.

judgment.[21] Whether a party waives the right to appeal by accepting a commutation of sentence from the board of pardons is an open question.[22]

2492. Writ of error—A second application for a writ has been allowed.[23] On the issuance of a writ the plaintiff in error is required to give notice to the attorney general and to the county attorney of the county in which the action is triable.[24]

2493. Certifying questions to supreme court—The statute authorizes a trial court to certify questions arising in criminal cases to the supreme court under specified conditions.[25] It is inapplicable to prosecutions in justice or municipal courts.[26] The record on appeal must show affirmatively that the question arose in one of the ways specified in the statute and that it was passed upon and determined by the lower court.[27] A question arising on a demurrer or a motion cannot be certified after a trial and verdict upon an issue of not guilty. The obvious purpose of the statute was to enable the trial court, before the trial of any issue upon the indictment under a plea of not guilty, to procure, for its guidance in the subsequent proceedings, an authoritative decision of any doubtful and important question raised by the demurrer or motion, thereby saving, perhaps, much of the labor and expense that might otherwise arise in the final disposition of the case on the merits.[28] The statute contemplates that the report and certificate of the trial judge should indicate the particular questions of law which he deems so important and doubtful as to require the decision of the supreme court.[29] No bill of exceptions is necessary.[30] An attorney appointed by the court to defend the accused is authorized to appear for him in the supreme court upon questions being certified.[31] The court will answer only those questions which are argued.[32] A great variety of questions have been carried to the supreme court by this means.[33]

2494. Notice of appeal—Immaterial defects in a notice of appeal will be disregarded.[34] In a prosecution for the violation of a city ordinance the notice should be served on the city attorney rather than on the attorney general.[35]

2495. Stay—There is no stay except as expressly ordered.[36] A stay, even in a capital case, is a matter of discretion.[37]

2496. Bill of exceptions—The county attorney cannot be ignored in the settlement of a bill of exceptions. After a bill has been settled by the judge he cannot correct mistakes in it without calling in both parties and allowing them to be heard.[38] A case or bill of exceptions is conclusive on appeal. The only

[22] State v. Corrivau, 93–38, 100+638.
[23] Bilansky v. State, 3–427(313).
[24] Rule 27, Supreme Court.
[25] R. L. 1905 § 5409.
[26] Duluth v. Orr, 109–431, 124+4.
[27] State v. Byrud, 23–29; State v. Hoag, 23–31; State v. N. P. Ex. Co., 58–403, 59+1100; State v. Billings, 96–533, 104+1150.
[28] State v. Loomis, 27–521, 8+758; State Billings, 96–533, 104+1150.
[29] State v. Corbett, 57–345, 59+317; State v. Cornhauser, 74 Wis. 42 (Bonfanti v. State, 2–123(99), is overruled on this point).
[30] Bonfanti v. State, 2–123(99).
[31] State v. Wenther, 76 Wis. 89.
[32] State v. Mrozinski, 59–465, 61+560.
[33] In addition to above cases see State v. Sweeney, 33–23, 21+847; State v. Larson, 40–63, 41+363; State v. Abrisch, 42–202, 43+1115; State v. Stein, 48–466, 51+474; State v. Musgang, 51–556, 53+874; State v. Campbell, 53–354, 55+553; State v. Bannock, 53–419, 55+558; State v. Kluseman, 53–541, 55+741; State v. Herges, 55–464, 57+205; State v. Hawks, 56–129, 57+455; Wykoff v. Healey, 57–14, 58+685; State v. Rodman, 58–393, 59+1098; State v. Farrington, 59–147, 60+1088; State v. Mrozinski, 59–465, 61+560; State v. George, 60–503, 63+100; State v. Goodrich, 67–176, 69+815; State v. Erickson, 81–134, 83+512.
[34] State v. Jones, 55–329, 56+1068.
[35] State v. Sexton, 42–154, 43+845.
[36] State v. Levy, 24–362.
[37] State v. Holong, 38–368, 37+587; State v. Hayward, 62–114, 64+90; State v. Chounard, 93–176, 100+1125. See, for a form of stay, State v. Crawford, 96–95, 104+822, 768.
[38] State v. Laliyer, 4–379(286).

method of correcting mistakes is a direct proceeding by mandamus to secure a further return. Upon the settlement of a bill of exceptions, the minutes of the clerk of the court during the trial are not conclusive evidence of what transpired therein, but the trial judge may, of his own knowledge, or from references to the reporter's transcript, determine the true facts.[39]

2497. Return—The statute provides that on "an appeal being perfected, or a writ of error filed with him, the clerk shall transmit to the supreme court a copy of the judgment roll, and of the bill of exceptions, if any." [40] The minutes of the trial are a part of the judgment roll.[41] So is a settled case.[42] Minutes of the evidence are not a part of the judgment roll unless incorporated in a bill of exceptions or case.[43] Laws 1903 c. 333 § 10, relating to fees of clerks in certain counties, has no application in this connection. The supreme court will order a return to be made without a payment of the clerk's fees by the appellant, if he is unable to do so.[44]

2498. Assignments of error—Assignments of error are proper, but not essential. The supreme court is bound to examine the record and render judgment thereon.[45] If assignments are made they are not waived by failing to urge them in the brief.[46]

2499. Dismissal of appeal—An appeal will be dismissed if the return is insufficient to justify a consideration of any of the assignments of error.[47] In will not be dismissed for immaterial defects in the notice of appeal.[48]

2500. Scope of review—Sufficiency of record—Where the subject of contention on appeal is presented by a bill of exceptions, a reversal can only be secured when the facts under review exclude every reasonable hypothesis consistent with the verdict or result reached. Upon such review in the appellate court, error will not be presumed, but must be affirmatively shown.[49] The sufficiency of the evidence will not be considered unless the record on appeal contains all the evidence introduced on the trial.[50] When the record on appeal contains no bill of exceptions or case the only question that can be considered is the sufficiency of the indictment to support the judgment.[51] Intermediate orders or rulings will not be considered on appeal unless incorporated in a bill of exceptions or case.[52] The burden is upon the defendant to make error appear affirmatively upon the face of the return, for the presumption of regularity applies to criminal as well as civil actions.[53] And in general the rules as to the sufficiency of the record on appeal in civil proceedings apply to criminal proceedings.[54]

2501. Powers of supreme court—Modification of judgment—Directing execution—The supreme court may modify, as well as reverse or affirm judg-

[39] State v. Ronk, 91-419, 98+334.
[40] R. L. 1905 § 5403. See, as to what is included in the judgment roll, R. L. 1905 § 5410.
[41] State v. Lessing, 16-75(64).
[42] State v. Fellows, 98-179, 107+542.
[43] State v. Wyman, 42-182, 43+1116.
[44] State v. Fellows, 98-179, 107+542.
[45] R. L. 1905, § 5405.
[46] State v. Hjerpe, 109-270, 123+474.
[47] State v. Anderson, 59-484, 61+448.
[48] State v. Jones, 55-329, 56+1068.
[49] State v. Ronk, 91-419, 98+334.
[50] State v. Owens, 22-238; State v. Conway, 23-291; State v. Graffmuller, 26-6, 46+445.
[51] State v. Miller, 23-352; State v. Wyman, 42-182, 43+1116.
[52] State v. Noonan, 24-174; State v. Sackett, 39-69, 38+773.
[53] State v. Brown, 12-538(448); State v. Ryan, 13-370(343); State v. Staley, 14-105(75); State v. Lessing, 16-75(64); State v. Taunt, 16-109(99); State v. Beebe, 17-241(218); State v. Owens, 22-238; State v. Brecht, 41-50, 42+602; State v. Brown, 41-319, 43+69; State v. Adamson, 43-196, 45+152; State v. Framness, 43-490, 45+1098; State v. Ronk, 91-419, 98+334.
[54] State v. Anderson, 59-484, 61+448; Elbow Lake v. Holt, 69-349, 72+564; State v. Durnam, 73-150, 75+1127.

ments. If the conviction is right, and the judgment and sentence thereon wrong, the supreme court may correct the error by a proper judgment and sentence or order its correction by the trial court.[55] A judgment may be affirmed in part and reversed in part.[56] If the judgment is affirmed the court is required to direct the sentence pronounced to be executed.[57] If the judgment is reversed a new trial must be ordered or the defendant ordered discharged.[58] Where a case is reversed on the ground that the verdict and judgment were not justified by the evidence, and remanded to the trial court, a new trial follows as of course, in the absence of a contrary direction.[59]

PUNISHMENT AND EXECUTION

2502. Punishment in absence of express provision—The statute prescribes the punishment for a felony[60] or misdemeanor[61] when there is no punishment specifically prescribed for the particular offence.[62] There is also a provision that "whenever no punishment shall be provided by statute, the court shall award such sentence as, in view of the degree and aggravation of the offence, shall not be cruel, unusual, or repugnant to the constitutional rights of the party."[63] A penal statute is not void merely because it does not fix a maximum penalty.[64]

2503. Fine or imprisonment—We have no constitutional provision granting to offenders the right to liquidate or discharge their violations of law by a fine, instead of imprisonment, or which extends to them any option whatever as to the mode of punishment. An ordinance is not invalid merely because it provides for a fine or imprisonment.[65]

2504. Capital punishment—Mitigation under exceptional circumstances—Certifying to the existence of exceptional circumstances in a capital case, whereby the punishment is mitigated to imprisonment for life, is a matter peculiarly within the province of a trial court. The appellate tribunal should not interfere with its conclusions unless there has been a palpable abuse of discretion.[66]

2505. Warrant by governor—A sentence of death cannot be executed until the issuance of a warrant by the governor as provided by statute.[67] In a capital case the time of execution is not an essential part of the judgment. If for any reason the governor does not issue his warrant for execution immediately on the expiration of the time fixed by the court for the solitary confinement, he may afterwards issue it.[68]

2506. Publication of details of execution—The statute[69] forbidding a publication of the details of an execution is constitutional.[70]

[55] Mims v. State, 26–494, 5+369; State v. Framness, 43–490, 45+1098. See State v. Bilansky, 3–246(169).

[56] Mims v. State, 26–498, 5+374.

[57] R. L. 1905 § 5405; State v. Crawford, 96–95, 104, 104+822, 768; State v. Weiss, 97–125, 130, 105+1127; State v. Hjerpe, 109–270, 123+474.

[58] R. L. 1905 § 5405; State v. Ames, 93–187, 100+889; State v. Gardner, 96–318, 329, 104+971; State v. Cowing, 99–123, 136, 108+851.

[59] State v. Ames, 93–187, 100+889.

[60] R. L. 1905 § 4762; State v. Borgstrom, 69–508, 521, 72+799, 975; State v. Kunz, 90–526, 97+131.

[61] State v. Shaw, 39–153, 39+305; State v. Sargent, 71–28, 31, 73+626; State v. Grosofski, 89–343, 94+1077; State v. Kight, 106–371, 119+56.

[62] See State v. Lautenschlager, 22–514, 524.

[63] R. L. 1905 § 5414.

[64] State v. Kight, 106–371, 119+56.

[65] State v. Collins, 107–500, 120+1081.

[66] State v. Barrett, 40–65, 41+459.

[67] R. L. 1905 § 5412; State v. Holong, 38–368, 37+587; State v. Barrett, 40–65, 41+459. See Holden v. Minnesota, 137 U. S. 483.

[68] State v. Gut, 13–341(315).

[69] R. L. 1905 § 5422.

[70] State v. Pioneer Press Co., 100–173, 110+867.

CRIMINAL PLEADING—See Indictment.
CRIMINAL PROCEDURE—See Criminal Law; Indictment; Justices of the Peace.

CROPS

Cross-References

See Chattel Mortgages, 1427; Damages, 2577; Ejectment, 2908; Execution, 3508, 3515; Fraudulent Conveyances, 3892; Homestead, 4208; Improvements, 4330; Landlord and Tenant, 5484; Malicious Mischief; Mortgages, 6218, 6220, 6242, 6371, 6373; Nuisance, 7288; Public Lands, 7936; Waters, 10196.

2507. Fructus industriales and fructus naturales—Crops requiring annual cultivation such as grain, garden vegetables, and the like, are termed fructus industriales. Crops which grow from perennial roots, such as the fruit of trees, perennial bushes, and grasses growing from perennial roots, are termed fructus naturales.[71]

2508. Realty or personalty—At common law fructus industriales are regarded as personalty, whether separated from the soil or not; and fructus naturales, while unsevered from the soil, are regarded as a part of the realty.[72] But all unsevered crops are regarded as a part of the realty in the sense that they will pass by a deed thereof, without special mention, unless excepted.[73] By virtue of statute growing crops are subject to levy.[74]

2509. Title of trespasser—A trespasser who sows and gathers a crop is the owner of it, after it is gathered, even against the owner of the land.[75] But a trespasser who gathers a crop which he did not sow is not the owner of it, and he is not the owner of a crop which he sows and cultivates, until he gathers it.[76]

CROSS-BILL—See Pleading, 7538.
CROSS-COMPLAINT—See Pleading, 7538.
CROSS-EXAMINATION—See Witnesses.
CROSSINGS—See Railroads, 8119.
CRUEL AND UNUSUAL PUNISHMENT—See Constitutional Law, 1661.
CRUELTY TO ANIMALS—See Animals, 279.
CULLS—See note 77.
CUMULATIVE EVIDENCE—See Evidence, 3250; New Trial, 7130.
CURATIVE ACTS—See Constitutional Law, 1620.
CURING ERROR BY STRIKING OUT—See Trial, 9749.
CURING ERROR IN INSRUCTIONS—See Trial, 9796.
CURRENCY—See note 78.
CURRENT MONEY—See note 79.

[71] Sparrow v. Pond, 49-412, 52+36; Kirkeby v. Erickson, 90-299, 96+705.
[72] State v. Williams, 32-537, 21+746; Sparrow v. Pond, 49-412, 52+36.
[73] Erickson v. Paterson, 47-525, 50+699; Cummings v. Newell, 86-130, 90+311; Kammrath v. Kidd, 89-380, 95+213; Kirkeby v. Erickson, 90-299, 96+705.
[74] See § 3508.
[75] Lindsay v. Winona etc. Ry., 29-411, 13+191; Woodcock v. Carlson, 41-542, 546, 43+479; Aultman v. O'Dowd, 73-58, 75+756. See Mercil v. Brou'ette, 66-416, 69+218; Lake v. Lund, 92-280, 99+884.
[76] Lindsay v. Winona etc. Ry., 29-411, 13+191.
[77] Chandler v. De Graff, 27-208, 215, 6+611.
[78] Butler v. Paine, 8-324(284, 289).
[79] State v. Quackenbush, 98-515, 520, 108+953.

CURTESY

Cross-References

See Dower; Husband and Wife, 4279.

2510. In general—Curtesy, at common law, is the estate to which a man is entitled, on the death of his wife, in the lands or tenements of which she was seized in possession in fee simple or in tail during their coverture, provided they have had lawful issue born alive which might have been capable of inheriting the estate.[80] Curtesy was abolished in this state by Laws 1875 c. 40. The statutory interest which was given in lieu of curtesy is considered elsewhere.[81] It is so essentially different that it ought not to be compared with curtesy except to distinguish it.[82]

CUSTOMARY PRACTICE—See Evidence, 3234, 3318; Negligence, 6982, 7049.

CUSTOMS AND USAGES

Cross-References

See Statutes, 8993.

2511. Requisites of valid custom—To be valid in law a custom must be reasonable;[83] it must be in accord with good morals;[84] it must not be contrary to law;[85] it must be established, general, and uniform;[86] and it must be certain.[87]

2512. Attitude of courts toward—The modern tendency is to regard evidence of customs with more favor than formerly.[88] But a custom ought not to be admitted, especially to add an incident to a contract, unless it is clearly applicable.[89] Especial caution should be exercised in allowing a custom to affect the construction of a deed.[90] Business usages become incorporated into the law by the progressive course of judicial legislation.[91] According to the better

[80] Bouvier, Law Dict. See Note, 128 Am. St. Rep. 479.

[81] See § 2726.

[82] See § 4279.

[83] Merchants' Ins. Co. v. Prince, 50–53, 52+131; Mpls. S. & D. Co. v. Met. Bank, 76–136, 78+980.

[84] Merchants' Ins. Co. v. Prince, 50–53, 52+131; Baxter v. Sherman, 73–434, 76+211.

[85] Johnson v. Gilfillan, 8–395(352); Osborne v. Nelson, 33–285, 22+540; Globe M. Co. v. Mpls. El. Co., 44–153, 46+306; Lovejoy v. Itasca L. Co., 46–216, 48+911; Merchants' Ins. Co. v. Prince, 50–53, 52+131; State v. Oftedal, 72–498, 514, 75+692; Baxter v. Sherman, 73–434, 76+211; Deering v. Kelso, 74–41, 76+792; Healey v. Mannheimer, 74–240, 76+1126; Mpls. S. & D. Co. v. Met. Bank, 76–136, 78+980; State v. Smith, 84–295, 87+775; Dartt v. Sonnesyn, 86–55, 90+115; State v. Edwards, 94–225, 102+697.

[86] Borup v. Nininger, 5–523(417, 438); Walker v. Barron, 6–508(353); Johnson v. Gilfillan, 8–395(352); Janney v. Boyd, 30–319, 15+308; Taylor v. Mueller, 30–343, 15+413; Pevey v. Schulenburg, 33–45, 21+844; Flatt v. Osborne, 33–98, 22+440; Thompson v. Mpls. etc. Ry., 35–428, 29+148; McManus v. Louden, 53–339, 55+139; Nippolt v. Firemen's Ins. Co., 57–275, 59+191; Earl v. Thurston, 60–351, 62+439; Finance Co. v. Old P. C. Co., 65–442, 68+70; Powell v. Luders, 84–372, 87+940.

[87] Nippolt v. Firemen's Ins. Co., 57–275, 59+191.

[88] Paine v. Smith, 33–495, 500, 24+305. See, for contrary expressions, Johnson v. Gilfillan, 8–395(352, 359); Cogan v. Cook, 22–137, 141.

[89] See Dike v. Pool, 15–315(245).

[90] Cogan v. Cook, 22–137.

[91] Brown v. Equitable L. A. Soc., 75–412, 421, 78+103, 671, 79+968.

view a custom does not have the force of law until it has received the sanction of judicial decision.[92]

2513. Who may invoke—One cannot invoke a custom unless he himself is bound by it. One who is ignorant of a custom cannot take advantage of it.[93]

2514. Upon whom binding—A custom is binding on those who contract with reference to it, actually or presumptively.[94] Parties are presumed to contract with reference to a custom which is so well established in the particular locality, trade, profession, or business, that all men transacting the business to which it relates must be presumed to have knowledge of it and to contract with reference to it.[95] A person is not ordinarily presumed to contract with reference to a custom of a trade or business in which he is not himself engaged,[96] but if the custom is so notorious and of such a character that from the course of his business it must have been known to him he will be charged with knowledge.[97] A person is not presumed to be acquainted with the local customs of a place of which he is not a resident. Knowledge must be brought home to him.[98] But where one employs a broker or factor to deal in a particular market he gives him implied authority to deal in accordance with the local customs of that market.[99]

2515. Effect upon contracts—A custom may be proved not only to explain the words or terms of a contract, but also to annex to it those customary incidents which were presumptively in the minds of the parties when contracting.[1] If parties enter into a contract by virtue whereof something is to be done by one or both, and this thing is often done in their neighborhood, or by persons of like occupation with themselves, and is always done in a certain way, it must be supposed that they intended it should be done in that way.[2] But a custom cannot vary or contradict the express terms of a contract.[3] It has been said that custom is admissible "to explain what is doubtful, but never to contradict what is plain."[4] This must be taken with the qualification that a custom is admissible to prove that words having a well defined meaning in common use were used by the parties to a contract in a peculiar or technical sense, though the contract is unambiguous on its face.[5] In a commercial community many words or phrases acquire a technical meaning, well understood by those in a particular trade or business. Certain business customs and usages also become well established and understood by business men, who, in making their con-

[92] 19 Harv. L. Rev. 308.

[93] Nippolt v. Firemen's Ins. Co., 57–275, 59+191.

[94] Johnson v. Gilfillan, 8–395(352).

[95] Walker v. Barron, 6–508(353); Johnson v. Gilfillan, 8–395(352); Janney v. Boyd, 30–319, 15+308; Taylor v. Mueller, 30–343, 15+413; Clarke v. Hall, 41–105, 42+785; Merchant v. Howell, 53–295, 55+131.

[96] Pettit v. State Ins. Co., 41–299, 43+378; Keavy v. Thuett, 47–266, 50+126; Nippolt v. Firemen's Ins. Co., 57–275, 59+191; Earl v. Thurston, 60–351, 62+439.

[97] Nippolt v. Firemen's Ins. Co., 57–275, 59+191; Earl v. Thurston, 60–351, 62+439; Hostetter v. Park, 137 U. S. 30.

[98] Baxter v. Sherman, 73–434, 76+211; 115 Mass. 23; Chateaugay etc. Co. v. Blake, 144 U. S. 476.

[99] Van Dusen v. Jungeblut, 75–298, 77+970; Nichols v. Howe, 43–181, 45+14; Baxter v. Sherman, 73–434, 76+211.

[1] Paine v. Smith, 33–495, 500, 24+305; Walker v. Barron, 6–508(353); Clarke v. Hall, 41–105, 42+785; Breen v. Moran, 51–525, 53+755; Merchant v. Howell, 53–295, 55+131; Taylor v. Security M. F. Ins. Co., 88–231, 92+952; Florence Mach. Co. v. Daggett, 135 Mass. 582.

[2] St. Anthony etc. Co. v. Eastman, 20–277(249, 256); Johnson v. Gilfillan, 8–395(352); Bixby v. Wilkinson, 25–481.

[3] Paine v. Smith, 33–495, 24+305; Johnson v. Gilfillan, 8–395(352); Manson v. Grand Lodge, 30–509, 16+395; Globe M. Co. v. Mpls. El. Co., 44–153, 46+306; Healey v. Mannheimer, 74–240, 76+1126; Torpey v. Murray, 93–482, 101+609; N. W. etc. Co. v. Conn. etc. Co., 105–483, 117+825.

[4] Paine v. Smith, 33–495, 24+305; Manson v. Grand Lodge, 30–509, 16+395.

[5] Whitney v. Boardman, 118 Mass. 242. See McManus v. Louden, 53–339, 55+139; Cogan v. Cook, 22–137, 141.

tracts, assume them for granted, and contract with reference to them, without taking time to incorporate them into the express terms of their bargains.[6] Where a written contract contains characters, abbreviations, or apparently ambiguous terms, parol evidence is admissible to show that they have a recognized and generally understood meaning in the trade or business to which the subject of the contract relates. Such evidence does not vary or add to the writing, but merely translates it from the language of the trade into the language of people generally.[7]

2516. Inadmissible to prove contract—A custom is inadmissible to prove the making or existence of a contract.[8]

2517. Proof—It must be clearly proved that the custom existed at the place where, and at the time when, the contract or act sought to be affected by it was made or performed.[9] Whether a custom so existed is a question for the jury, unless the evidence is conclusive.[10]

2518. Pleading—As a general rule it is unnecessary to plead a custom in order to render it admissible.[11]

CUSTOMS DUTIES

2519. Entry of goods—Duty of carrier—The agent of a carrier has been held justified, under the circumstances, in entering goods as for "immediate consumption," and in paying the duty fixed by the customs officials, and in not entering them for "transportation" to St. Paul, another port of entry.[12]

CY-PRES—See Charities, 1419.
DAIRIES—See Food, 3776.

[6] Paine v. Smith, 33–495, 24+305; Merchant v. Howell, 53–295, 55+131.
[7] Maurin v. Lyon, 69–257, 72+72.
[8] Bowe v. Hyland, 44–88, 46+142; Smith v. Barringer, 37–94, 33+116. Contra, Walker v. Barron, 6–508(353).
[9] Walker v. Barron, 6–508(353); Cogan v. Cook, 22–137, 142; Taylor v. Mueller, 30–343, 15+413.
[10] McManus v. Louden, 53–339, 55+139; Finance Co. v. Old P. C. Co., 65–442, 68+70; Deering v. Kelso, 74–41, 76+792; Powell v. Luders, 84–372, 87+940; Steinbauer v. Stone, 85–274, 88+754.
[11] Breen v. Moran, 51–525, 53+755.
[12] Mitchelson v. Mpls. etc. Ry., 67–406, 69+1106.

DAMAGES

IN GENERAL

NATURAL AND PROXIMATE CONSEQUENCES

PROSPECTIVE DAMAGES AND SUCCESSIVE ACTIONS

MITIGATION

UNCERTAIN, CONTINGENT, AND SPECULATIVE DAMAGES

LIQUIDATED DAMAGES

EXEMPLARY DAMAGES

MEASURE OF DAMAGES FOR BREACH OF CONTRACT

MEASURE OF DAMAGES FOR TORT

PLEADING

ASSESSMENT

EXCESSIVE AND INADEQUATE DAMAGES

Cross-References

See Conflict of Laws, 1550; New Trial, 7132.

IN GENERAL

2520. General damages—General damages are such as result necessarily and by implication of law—such as result directly and proximately and without reference to the special character, condition, or circumstances of the person wronged.[13] The distinction between general and special damages does not relate to their essential nature, but to pleading and proof.[14]

2521. Special damages—Special damages are such as result directly, but not necessarily and by implication of law.[15] Special damages must be such as ordinarily and in the natural course of things might fairly be expected to result, and such as have in fact resulted, from the wrong complained of.[16]

2522. Nominal damages—Nominal damages are damages of a trifling amount.[17] While the law as a general rule only gives compensation for actual injury, yet, whenever the breach of a contract or the invasion of a legal right is established, the law infers some damage, and, if no evidence is given of any particular amount of loss, it declares the right by awarding nominal damages. Every injury imports a damage.[18] A complaint is not demurrable if it shows the plaintiff entitled to nominal damages.[19] In actions ex contractu no more than nominal damages are recoverable in the absence of proof of actual loss, unless the contract itself shows the amount of loss.[20] For every trespass to realty the party injured is entitled to nominal damages at least.[21]

2523. Expenses of action—Counsel fees—It is the general rule that the expenses of the action, including attorney's fees, are not recoverable as damages,[22] and this is so even where exemplary damages are recoverable.[23] In actions for malicious prosecution such expenses are recoverable as damages, if proved.[24] The expenses of an action defended by a party secondarily liable may be recovered against the party primarily liable.[25]

2524. Interest—Interest is always recoverable as damages for the breach of a contract to pay money. In such cases interest is the measure of damages.[26] It is recoverable as damages for the breach of other contracts, though the demand is unliquidated, if the amount does not depend upon any contingency, and is ascertainable by computation, or by reference to generally recognized standards, such as the market value.[27] It is also recoverable as damages where prop-

[13] Smith v. St. P. etc. Ry., 30–169, 14+797; Chamberlain v. Porter, 9–260 (244, 251); Brackett v. Edgerton, 14–174 (134, 139); Hinkle v. Mpls. etc. Ry., 31–434, 18+275; Ennis v. Buckeye Pub. Co., 44–105, 46+314; Rauma v. Bailey, 80–336, 83+191.

[14] Hinkle v. Mpls. etc. Ry., 31–434, 18+275.

[15] Rauma v. Bailey, 80–336, 83+191; Spencer v. St. P. etc. Ry., 21–362; Ferguson v. Hogan, 25–135. See § 2581.

[16] Cushing v. Seymour, 30–301, 15+249.

[17] See Harris v. Kerr, 37–537, 35+379 (one cent or five cents); Moe v. Chesrown, 54–118, 55+832 (one dollar); Sable v. Brockmeier, 45–248, 47+794 (one dollar).

[18] Larson v. Chase, 47–307, 50+238; Dorman v. Ames, 12–451(347); Bradford v. Neill, 46–347, 49+193.

[19] Cowley v. Davidson, 10–392(314); Wilson v. Clarke, 20–367(318); Burns v. Jordan, 43–25, 44+523; Sprague v. Wells, 47–504, 50+535; Sloggy v. Crescent C. Co., 72–316, 75+225.

[20] Ogden v. Ball, 38–237, 36+344 (covenant of seizin); Sable v. Brockmeier, 45–248, 47+794 (covenant of seizin).

[21] Moe v. Chesrown, 54–118, 55+832.

[22] Seeman v. Feeney, 19–79(54); Kelly v. Rogers, 21–146; Frost v. Jordan, 37–544, 36+713.

[23] Kelly v. Rogers, 21–146.

[24] Mitchell v. Davies, 51–168, 53+363.

[25] Erickson v. Brandt, 53–10, 55+62.

[26] Mason v. Callender, 2–350(302); Talcott v. Marston, 3–339(238); Cooper v. Reaney, 4–528(413); McCutchen v. Freedom, 15–217(169); Lash v. Lambert, 15–416(336); Owsley v. Greenwood, 18–429 (386); Moreland v. Lawrence, 23–84; Palmer v. Degan, 58–505, 60+342; Ormond v. Sage, 69–523, 72+810.

[27] Cowley v. Davidson, 13–92(86); Brack-

erty is lost, destroyed, injured or converted by the wrongful act of another.[28] It is not allowable where the damages claimed are not only unliquidated, but cannot be ascertained by reference to any generally recognized standard, or where they are contingent or prospective, or where the amount allowable rests largely in the discretion of the jury. Thus, it is not allowable in actions for personal injury, seduction, libel, slander, false imprisonment, etc.[29] 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.[30] A party is entitled to interest by way of damages on money due on contract from the commencement of the action to the time of trial, though not expressly demanded in his complaint; such damages being implied by law.[31] Interest is always recoverable on money wrongfully detained.[32] It is recoverable as damages only in case of a default.[33] A note or other instrument containing an express promise to pay money, without any time specified, is in law payable immediately, and interest runs from its date, while a promise to pay upon demand requires at least a judicial demand to set interest running.[34] The interest recoverable as damages on a note or other instrument after maturity is the legal rate of interest, and not the rate fixed in the instrument for interest before maturity.[35]

2525. Stipulations against—It is competent for the parties to a contract to stipulate against liability for damages.[36]

2526. Mental suffering—Wounded feelings—There seems to be no general rule as to when damages for mental suffering may be recovered in actions ex delicto.[37] In an action for personal injury the mental suffering which can be proved is such only as is endured by the plaintiff as the direct consequence of injury to himself. Anxiety of mind about the safety of others who may be in danger of injury from the same cause cannot be considered.[38] Damages for mental suffering have been held recoverable in an action for the mutilation of a dead body;[39] for seduction;[40] for ejection from a train;[41] and for a wrongful eviction.[42] They are not recoverable for a breach of contract for the transportation of a dead body.[43] There can be no recovery of damages for mere fright, unless the fright is caused directly by the infringement of a right of the party.[44]

ett v. Edgerton, 14–174(134); Mpls. H. Works v. Bonnallie, 29–373, 13+149; Perine v. Grand Lodge, 51–224, 53+367; Brown v. Doyle, 69–543, 72+814; Swanson v. Andrus, 83–505, 86+465; Grand Forks L. Co. v. McClure, 103–471, 115+406.

[28] Varco v. Chi. etc. Ry., 30–18, 13+921; Sanborn v. Webster, 2–323(277); Triggs v. Jones, 46–277, 48+1113.

[29] Swanson v. Andrus, 83–505, 86+465; Grand Forks L. Co. v. McClure, 103–471, 115+406.

[30] Sibley v. Pine County, 31–201, 17+337; Corse v. Minn. G. Co., 94–331, 102+728.

[31] Ormond v. Sage, 69–523, 72+810.

[32] Auerbach v. Gieseke, 40–258, 41+946.

[33] Schrepfer v. Rockford Ins. Co., 77–291, 79+1005.

[34] Horn v. Hansen, 56–43, 57+315.

[35] Talcott v. Marston, 3–339(238); Kent v. Bown, 3–347(246); Daniels v. Bradley, 4–158(105); Daniels v. Ward, 4–168 (113); Hollinshead v. Von Glahn, 4–190 (131); Chapin v. Murphy, 5–474(383); McCutchen v. Freedom, 15–217(169); Lash v. Lambert, 15–416(336).

[36] Hollister v. Sweeney, 88–100, 92+525.

[37] See Beaulieu v. G. N. Ry., 103–47, 114+353; Francis v. W. U. Tel. Co., 58–252, 262, 59+1078; Larson v. Chase, 47–307, 311, 50+238.

[38] Keyes v. Mpls. etc. Ry., 36–290, 30+888; Bahr v. N. P. Ry., 101–314, 112+267. See Stone v. Evans, 32–243, 20+149.

[39] Larson v. Chase, 47–307, 50+238.

[40] Fox v. Stevens, 13–272(252).

[41] Carsten v. N. P. Ry., 44–454, 47+49; Hoffman v. N. P. Ry., 45–53, 47+312; Serwe v. N. P. Ry., 48–78, 50+1021.

[42] Rauma v. Bailey, 80–336, 83+191.

[43] Beaulieu v. G. N. Ry., 103–47, 114+353.

[44] Sanderson v. N. P. Ry., 88–162, 92+542.

2527. Law and fact—It is for the court to determine the proper measure of damages in a case, and whether damages are speculative.[45]

NATURAL AND PROXIMATE CONSEQUENCES

2528. In general—Remote damages are not recoverable. Only such damages are recoverable as are the natural and proximate, or immediate and direct, result of the wrong. The rule is the same whether the action is ex contractu or ex delicto.[46]

PROSPECTIVE DAMAGES AND SUCCESSIVE ACTIONS

2529. Actions ex contractu—For the total breach of an entire contract a recovery may be had for all damages suffered, both present and prospective.[47]

2530. Actions ex delicto—For a single trespass upon realty all damages, whether present or prospective, are recoverable.[48] The test whether an injury to realty by the wrongful act of another is permanent, in the sense of permitting a recovery of prospective damages therefor, is not necessarily the character, as to permanency, of the structure or obstruction causing the injury, but the test is whether the whole injury results from the original wrongful act, or from the wrongful continuance of the state of facts produced by such act.[49] In an action for personal injury prospective damages are recoverable, when they can be proved with reasonable certainty.[50]

2531. Successive actions—Splitting causes of action—A party cannot split a single cause of action and have several recoveries of damages therefor in successive actions. One recovery, though it is for only a part of the damages actually suffered, will bar a future action.[51] Within this rule 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 but one cause of action.[52]

MITIGATION

2532. Duty of injured party to mitigate damages—It is the duty of a person injured by the wrongful act of another to make reasonable efforts to mitigate the resulting damages; and he cannot recover damages which might have been prevented by such efforts.[53] When a party is injured by non-performance

[45] Miss. etc. Co. v. Prince, 34–71, 24+344.

[46] North v. Johnson, 58–242, 59+1012; Schumaker v. St. P. & D. Ry., 46–39, 48+559; Beaupre v. Pacific etc. Co., 21–155, 158; Shartle v. Minneapolis, 17–308(284, 295); Swinfin v. Lowry, 37–345, 34+22; Bucknam v. G. N. Ry., 76–373, 79+98; Simonson v. Mpls. etc. Ry., 88–89, 92+459; Chamberlain v. Porter, 9–260(244); Brackett v. Edgerton, 14–174(134); Marsh v. Webber, 16–418(375); Cochrane v. Quackenbush, 29–376, 13+154; Wilson v. Reedy, 32–256, 20+153; Osborne v. Poket, 33–10, 21+752; Carsten v. N. P. Ry., 44–454, 47+49; Loudy v. Clarke, 45–477, 48+25; Hoffman v. N. P. Ry., 45–53, 47+312; O'Neill v. Johnson, 53–439, 55+601; Ironton L. Co. v. Butchart, 73–39, 51, 75+749; Landquist v. Swanson, 78–444, 448, 81+1.

[47] Ennis v. Buckeye Pub. Co., 44–105, 46+314; Bowe v. Minn. Milk Co., 44–460, 47+151; Rathborne v. Wheelihan, 82–30, 84+638.

[48] Pierro v. St. P. etc. Ry., 39–451, 40+520; Ziebarth v. Nye, 42–541, 44+1027. See § 9694.

[49] Bowers v. Miss. etc. Co., 78–398, 81+208.

[50] Chamberlain v. Porter, 9–260(244, 251); Johnson v. N. P. Ry., 47–430, 50+473; Cooper v. St. P. C. Ry., 54–379, 56+42; L'Herault v. Minneapolis, 69–261, 72+73; McBride v. St. P. C. Ry., 72–291, 75+231; Olson v. Chi. etc. Ry., 94–241, 102+449.

[51] See § 5167.

[52] King v. Chi. etc. Ry., 80–83, 82+1113.

[53] Graves v. Moses, 13–335(307); Marsh v. Webber, 16–418(375); Morrill v. Mpls. St. Ry., 103–362, 115+395; Nelson v. West Duluth, 55–497, 500, 57+149. See Gibbons v. Bente, 51–499, 505, 53+756; Cargill v. Thompson, 57–534, 547, 59+638.

of a contract, the other party, if he has it in his power, is bound to lessen the damages if he can do so by reasonable exertions, and, if he is necessarily compelled to perform more labor or put to greater expense, these are matters which are properly chargeable against the party in default; and, if a party who is entitled to the benefits of a contract receives notice from the other party that he cannot perform its conditions, then it is the duty of such party to save the party in default, as far as it is in his power to do so, all further damages, though the performance of this duty may call for affirmative action.[54] Consequences of an injury which one can avoid by acting as prudent men ordinarily act are not to be considered, for it is optional with him to suffer or avoid them.[55]

2533. Evidence in mitigation—Cases are cited below involving the admissibility of evidence in mitigation of damages.[56]

UNCERTAIN, CONTINGENT, AND SPECULATIVE DAMAGES

2534. General rule—As a general rule damages which are uncertain, contingent, or speculative are not recoverable.[57]

2535. Profits—The law as to the recovery of anticipated profits as damages is in a state of great confusion.[58] It is settled that upon the breach of an executory contract, whereby the injured party is prevented from performing on his part, and from realizing a profit which was contemplated by the terms of the contract as a result of its performance, a recovery of damages may be had equal to the profit which would have accrued directly from a performance of the contract. The fact that the contemplated profit would have been realized but for the breach complained of, and its amount, need not be proved to an absolute certainty. Proof to a reasonable certainty is sufficient.[59] Where the performance of a special contract involves the furnishing of both material and labor,

[54] Hewson v. Minn. B. Co., 55-530, 57+129; Crowley v. Burns, 100-178, 110+969.

[55] Gniadek v. N. W. etc. Co., 73-87, 75+894.

[56] Borup v. Nininger, 5-523(417) (action for negligence in failing to charge indorser—solvency of maker—insolvency of indorser—security); Lynd v. Picket, 7-184(128, 136) (wrongful levy—fact that plaintiff had no use for property); Jacobs v. Hoover, 9-204(189) (eviction—fraud in getting possession); Judson v. Reardon, 16-431(387) (false imprisonment—fact that defendant supposed he was acting lawfully); Lobdell v. Geib, 18-106(86) (trespass by wife—provocation—acts of plaintiff toward husband of defendant); Hewitt v. Pioneer Press Co., 23-178 (libel—prior publication); Jellett v. St. P. etc. Ry., 30-265, 15+237 (conversion by carrier—subsequent payment by third party to plaintiff); Russell v. Chambers, 31-54, 16+458 (seduction—gifts by seducer); Howard v. Manderfield, 31-337, 17+946 (wrongful levy—subsequent levy and sale); Warner v. Lockerby, 31-421, 18+145, 821 (slander—provocation—plaintiff's bad reputation); Yallop v. Mpls. etc. Ry., 33-482, 24+185 (replevin—delivery of part of goods to a receiver); Welsh v. Wilson, 34-92, 24+327 (wrongful levy—sale under levy and payment of proceeds to execution creditor); Larrabee v. Minn. T. Co., 36-141, 30+462 (libel—common repute); Beyersdorf v. Sump, 39-495, 41+101 (wrongful levy—subsequent levy and sale); Hoxsie v. Empire L. Co., 41-548, 43+476 (trespass on realty—good faith of trespasser); West v. St. P. Nat. Bank, 54-466, 56+54 (action for negligence in not serving notice to charge indorser—fact that lands mortgaged by the maker of the note to the plaintiff exceeded in value amount bid at foreclosure); Sharpe v. Larson, 74-323, 77+233 (libel—facts disproving malice); Davis v. Hamilton, 88-64, 92+512 (libel—bad reputation of plaintiff); Hoyt v. Duluth etc. Co., 103-396, 115+263 (trespass—cutting timber—good faith).

[57] Miss. etc. Co. v. Prince, 34-71, 76, 24+344; Beaupre v. Pacific etc. Co., 21-155, 158; O'Neill v. Johnson, 53-439, 55+601; Chamberlain v. Porter, 9-260(244, 251); Bolles v. Sachs, 37-315, 33+862; Conheim v. Chi. etc. Ry., 104-312, 116+581.

[58] See Emerson v. Pacific etc. Co., 96-1, 104+573.

[59] Fairchild v. Rogers, 32-269, 20+191; Miss. etc. Co. v. Prince, 34-71, 24+344; Cargill v. Thompson, 57-534, 59+638; Emerson v. Pacific etc. Co., 96-1, 104+573; Ennis v. Buckeye Pub. Co., 44-105, 46+314; Swanson v. Andrus, 83-505, 86+465.

and the contract is entire, and the breach total, loss of such profits as would have accrued from the contract as the direct result of its fulfilment may be recovered in an action for a breach thereof. Such profits may be proved by showing the difference between the contract price and what it would have cost to have performed; but no inflexible rule as to how such cost is to be ascertained can be laid down, for the profits must be determined according to the circumstances of each case and the subject-matter of the contract.[60] Profits which were to have accrued in collateral contracts or undertakings are not recoverable unless they arise naturally, that is, in the usual course of things, from the breach itself, or are such as may reasonably be supposed to have been contemplated by the parties, when making the contract, as the probable result of the breach.[61] Only such profits are recoverable in any case as are shown with reasonable certainty to have resulted directly and proximately from the breach.[62] It has been suggested that a distinction should be observed in this connection between actions ex contractu and actions ex delicto.[63] Cases are cited below holding profits recoverable,[64] or the reverse.[65]

LIQUIDATED DAMAGES

2536. Definition—Liquidated damages are damages the amount of which has been determined by anticipatory agreement between the parties.[66]

2537. When enforceable—As a general rule, where the injury is susceptible of a definite measurement, as in all cases where the breach consists in the nonpayment of money, the parties will not be allowed to make a stipulation for a further amount, whether in the form of a penalty or liquidated damages. But where, on the other hand, the injury in question is uncertain in itself, and not susceptible of being reduced to a certainty by a legal computation, it may be settled beforehand by a special agreement. And where the damages are uncertain, and not capable of being ascertained by any certain or known rule, it will be inferred that the parties intended the sum as liquidated damages.[67] If the

[60] Silberstein v. Duluth N. T. Co., 68–430, 71+622.

[61] Lovejoy v. Morrison, 10–136(108); Fairchild v. Rogers, 32–269, 20+191; Cargill v. Thompson, 57–534, 548, 59+638.

[62] Cargill v. Thompson, 57–534, 59+638; Swanson v. Andrus, 83–505, 86+465; Emerson v. Pacific etc. Co., 92–523, 100+365; Loudy v. Clarke, 45–477, 48+25; Todd v. Mp'ls. etc. Ry., 39–186, 39+318.

[63] Emerson v. Pacific etc. Co., 96–1, 4, 104+573.

[64] Morrison v. Lovejoy, 6-319(224) (contract to furnish logs for manufacture into lumber); Goebel v. Hough, 26–252, 2+847 (interruption of tenant's business by landlord); Fairchild v. Rogers, 32–269, 20+191 (breach of contract for exclusive agency for sale of realty); Miss. etc. Co. v. Prince, 34–71, 24+344 (failure to turn loose logs in a boom); Cargill v. Thompson, 57–534, 59+638 (contract to furnish a specified power of water for flour mill); Singer Mfg. Co. v. Potts, 59–240, 61+23 (contract for the collection of notes); Silberstein v. Duluth N. T. Co., 68–430, 71+622 (contract to furnish and set up a motor); Swanson v. Andrus, 83–505, 86+465 (contract for construction of building); Emerson v. Pacific etc. Co., 92–523, 100+365; Id., 96–1, 104+573 (contract for exclusive agency to sell defendant's catch and pack of fish for two years); Independent B. Assn. v. Burt, 109–323, 123+932 (sale of goods—delivery of unmarketable goods).

[65] Simmer v. St. Paul, 23–408 (negligence in construction of sewer—cutting off access to plaintiff's grocery store); Cushing v. Seymour, 30–301, 15+249 (conversion of threshing machine outfit—anticipated profits from performance of particular threshing contracts); Doud v. Duluth M. Co., 55–53, 56+463 (contract to build cooper shop and make barrels for prospective flour mill); Williams v. Wood, 55–323, 56+1066 (anticipated profits of threshing machine outfit—replevin); Casper v. Klippen, 61–353, 63+737 (conversion of stock of groceries).

[66] Bouvier L. Dict.

[67] Fasler v. Beard, 39–32, 38+755; Mason v. Callender, 2–350(302); Taylor v. Times N. Co., 83–523, 86+760; Ferguson v. Hogan, 25–135, 141; Spear v. Snider, 29–463, 13+910; Williston v. Mathews, 55–422, 56+1112; Maudlin v. Am. S. & L. Assn., 63–358, 65+645; Walsh v. Curtis, 73–254;

actual damages resulting from a failure to comply with a contract are definitely fixed by some rule of law, and may be easily determined and ascertained by the application of appropriate rules of evidence, and the sum stipulated in the contract is greatly out of proportion to the actual pecuniary injury, the sum named is to be treated as a penalty, and the injured party put to the proof of his actual loss. But where the damages are uncertain, speculative, and difficult of ascertainment, and the contract furnishes no data, the sum named therein is ordinarily to be treated and held as liquidated damages.[68] An intention to liquidate damages, in order to be controlling, must be an intention to do so in the sense of making just compensation for the breach of the contract, and of basing the stipulated amount on that principle; and, in determining that fact, courts will disregard the form of words used and consider the nature of the entire contract with all concomitant facts and circumstances,—as, for example, whether the actual damages were or were not uncertain and difficult of ascertainment, and whether the stipulated amount was or was not disproportionate to the probable actual damages.[69] Where it is doubtful whether a sum fixed by the parties should be regarded as a penalty or liquidated damages it will be held to be a penalty.[70] If a provision for stipulated damages is indefinite it will not be enforced.[71] Liquidated damages cannot be recovered except in accordance with the contract of the parties.[72] Where a contract, specifying one certain sum as liquidated damages, contains various stipulations, to all of which the clause as to damages is clearly applicable, such stipulations either varying greatly in their character and importance, or being of such a nature that the damages from a breach of some of them could be easily and certainly measured, and especially if such damages would obviously be inconsiderable as compared with the sum stated in the agreement as damages, the latter should be regarded as a penalty, and not as liquidated damages.[73] A plaintiff is entitled to recover prima facie the damages expressly stipulated in the contract, unless it shall appear, after issue joined or upon the trial, that they are largely in excess of the actual injury suffered by him, in which event the stipulated damages should be treated as a penalty, and plaintiff limited in his recovery to his actual loss.[74]

2538. Payment of as a discharge—In all cases where a party relies on the payment of liquidated damages as a discharge, it must clearly appear that they were to be paid and received absolutely, in lieu of performance.[75]

EXEMPLARY DAMAGES

2539. Nature and object—Exemplary damages are punitive and not compensatory. They are given to punish the party for his wrongful act and to deter him and others from the commission of similar acts. The interests of society and of the aggrieved individual are blended.[76]

76+52; Swallow v. Strong, 83–87, 85+942; State v. Larson, 83–124, 86+3; Hollister v. Sweeney, 88–100, 92+525; Taylor v. Times N. Co., 89–12, 93+659; Womack v. Coleman, 89–17, 93+663; Id., 92–328, 100+9; Fitchette v. Victoria L. Co., 93–485, 489, 101+655; Robertson v. Grand Rapids, 96–69, 104+715; Case v. Fronk, 105–39, 117+229. See Sun etc. Assn. v. Moore, 183 U. S. 642; U. S. v. Bethlehem S. Co., 205 U. S. 105; Note, 108 Am. St. Rep. 46.

[68] Taylor v. Times N. Co., 83–523, 86+760; Blunt v. Egeland, 104–351, 116+653; Case v. Fronk, 105–39, 117+229.

[69] State T. Co. v. Duluth, 70–257, 262, 73+249; Case v. Fronk, 105–39, 117+229.

[70] Mason v. Callender, 2–350(302); Williston v. Mathews, 55–422, 56+1112. But see U. S. v. Bethlehem S. Co., 205 U. S. 105.

[71] Robertson v. Grand Rapids, 96–69, 104+715.

[72] Cook v. Finch, 19–407(350).

[73] Carter v. Strom, 41–522, 43+394.

[74] Blunt v. Egeland, 104–351, 116+653.

[75] Higbie v. Farr, 28–439, 10+592.

[76] Lynd v. Picket, 7–184(128, 142); Kelly v. Rogers, 21–146, 153; Boetcher v. Staples, 27–308, 7+263; North v. Johnson,

2540. When allowable—To justify an award of exemplary damages the wrongful act must have been done wilfully, wantonly, or maliciously.[77] The mere fact that an act is wrongful, or unlawful does not justify such damages.[78] The fact that an act was done maliciously may be inferred from the fact that it was done with insult, cruelty, oppression, or other aggravating circumstances.[79] It has been said that the word "malice" in this connection implies that the act complained of was done in a spirit of mischief, or of criminal indifference to civil obligation;[80] that it must have been malevolently done, or in wanton indifference to the rights invaded.[81] 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.[82] But inasmuch as it is well settled that exemplary damages may be recovered for a wilful or wanton injury, irrespective of actual malice, it seems desirable to use the term malice in this connection in its ordinary, popular sense.

2541. Only in actions ex delicto—It is the general rule that exemplary damages are recoverable only in actions ex delicto, and not in actions ex contractu.[83] An exception to this rule is made in favor of actions for breach of promise.[84]

2542. Wilful injury—Exemplary damages are recoverable for a wilful injury.[85]

2543. Wanton injury—Exemplary damages are recoverable for a wanton injury, that is, an injury inflicted in conscious disregard of the rights of the plaintiff and a reckless indifference to consequences.[86] In the older cases wantonness was included in malice.[87]

2544. Negligence—Exemplary damages are never recoverable for mere negligence. They are recoverable for what is often called "wilful or wanton" negligence.[88] But as pointed out elsewhere this is not negligence in any proper sense of the term.[89] The discredited expression "gross negligence" is often found in this connection.[90]

2545. For criminal acts—Exemplary damages may be awarded for an act punishable as a crime.[91]

2546. Fraud—Fraud is sometimes mentioned as a ground for awarding exemplary damages.[92]

58-242, 246, 59+1012; State v. Buckman, 95-272, 104+240, 289; Lake Shore etc. Ry. v. Prentice, 147 U. S. 101.

[77] Vine v. Casmey, 86-74, 90+158; Carli v. Union Depot etc. Co., 32-101, 20+89; Craig v. Cook, 28-232, 9+712; Fox v. Stevens, 13-272(252); Anderson v. International H. Co., 104-49, 116+101; Baumgartner v. Hodgdon, 105-22, 116+1030; Lake Shore etc. Ry. v. Prentice, 147 U. S. 101.

[78] Vine v. Casmey, 86-74, 90+158; Hoffman v. N. P. Ry., 45-53, 47+312; Seeman v. Feeney, 19-79(54). See Anderson v. International H. Co., 104-49, 116+101.

[79] Vine v. Casmey, 86-74, 90+158; McCarthy v. Niskern, 22-90; Mitchell v. Mitchell, 54-301, 55+1134.

[80] Seeman v. Feeney, 19-79(54); Baumgartner v. Hodgdon, 105-22, 116+1030.

[81] Hoffman v. N. P. Ry., 45-53, 47+312.

[82] Anderson v. International H. Co., 104-49, 116+101.

[83] North v. Johnson, 58-242, 59+1012; Boetcher v. Staples, 27-308, 7+263; Beaulieu v. G. N. Ry., 103-47, 114+353.

[84] Johnson v. Travis, 33-231, 22+624.

[85] Fox v. Stevens, 13-272(252); Beaulieu v. G. N. Ry., 103-47, 53, 114+353.

[86] Craig v. Cook, 28-232, 9+712; Carli v. Union Depot etc. Co., 32-101, 20+89; Hoffman v. N. P. Ry., 45-53, 47+312; Cohen v. Goldberg, 65-473, 67+1149; Berg v. St. P. C. Ry., 96-513, 105+191.

[87] See Lynd v. Picket, 7-184(128, 144).

[88] Peterson v. W. U. Tel. Co., 72-41, 74+1022; Mil. etc. Ry. v. Arms, 91 U. S. 489.

[89] See § 7036.

[90] Lynd v. Picket, 7-184 (128, 142).

[91] Boetcher v. Staples, 27-308, 7+263; State v. Shevlin, 99-158, 108+935.

[92] Lynd v. Picket, 7-184(128, 142); Boetcher v. Staples, 27-308, 7+263; Gardner v. Minea, 47-295, 50+199; Berg v. St. P. C. Ry., 96-513, 105+191. See Kelly v. Rogers, 21-146.

2547. Necessity of actual damages—Where a party is not entitled to any actual or compensatory damages he cannot recover exemplary damages.[93]

2548. Discretionary with jury—Exemplary damages are not a matter of right. Awarding them is a matter of discretion with the jury.[94]

2549. Intent and motive—A party's intent and motive in doing a wrongful act are always material upon a question of exemplary damages.[95]

2550. Both parties at fault—Where the conduct of both parties was reprehensible it was held, in an action for breach of promise, that exemplary damages could not be awarded.[96]

2551. Recoverable by state—The state may recover exemplary damages. In matters involving its proprietary or business functions the state occupies the same position in the courts as private suitors.[97]

2552. Must be reasonable in amount—Exemplary damages must be reasonable in amount.[98]

2553. Liability of master or principal—A telegraph company has been held liable for exemplary damages where its agent maliciously transmitted a libelous message.[99]

2554. Liability of sureties—Exemplary damages are not recoverable against the sureties on a bond, though the act of the principal constituting the breach of its condition is a wilful tort.[1]

2555. Expenses of suit—In awarding exemplary damages the jury cannot include compensation for an attorney, or other expenses of the action.[2]

2556. Evidence—Admissibility—The pecuniary condition of the defendant may be shown,[3] but not that of the plaintiff.[4]

2557. Instructions—It is the duty of the court to explain to the jury the meaning of exemplary damages, and to state the circumstances and conditions under which they may be awarded, but the court has no right in any case to direct that such damages be awarded.[5]

2558. Cases classified—Cases are cited below involving the question of the right to exemplary damages in an action for wrongful levy;[6] for trespass to realty;[7] for trespass to personalty;[8] for malicious prosecution;[9] for assault and battery;[10] for conversion;[11] for seduction;[12] for indecent assault;[13] for li-

[93] Erickson v. Pomerank, 66-376, 69+39.
[94] Berg v. St. P. C. Ry., 96-513, 105+191; Sneve v. Lunder, 100-5, 110+99.
[95] Seeman v. Feeney, 19-79(54); Tamke v. Vangsnes, 72-236, 75+217.
[96] Clement v. Brown, 57-314, 59+198.
[97] State v. Shevlin, 99-158, 108+935.
[98] Germolus v. Sausser, 83-141, 144, 85+946; Berg v. St. P. C. Ry., 96-513, 105+191; Woodward v. Glidden, 33-108, 22+127.
[99] Peterson v. W. U. Tel. Co., 72-41, 74+1022; Id., 75-368, 77+985. See Lake Shore etc. Ry. v. Prentice, 147 U. S. 101.
[1] North v. Johnson, 58-242, 59+1012.
[2] Kelly v. Rogers, 21-146; Frost v. Jordan, 37-544, 36+713.
[3] McCarthy v. Niskern, 22-90; Peck v. Small, 35-465, 29+69; Cronfeldt v. Arrol, 50-327, 52+857; Cohen v. Goldberg, 65-473, 67+1149.
[4] Griser v. Schoenborn, 109-297, 123+823.
[5] Sneve v. Lunder, 100-5, 110+99.
[6] Lynd v. Picket, 7-184(128); Gardner v. Minea, 47-295, 50+199; Cronfeldt v. Arrol, 50-327, 52+857; Dallemand v. Janney, 51-514, 53+803; Haugen v. Youngren, 57-170, 58+988; Matteson v. Munro, 80-340, 83+153; Grimestad v. Lofgren, 105-286, 117+515.
[7] Craig v. Cook, 28-232, 9+712; Carli v. Union Depot etc. Co., 32-101, 20+89; Michaelis v. Michaelis, 43-123, 44+1149; Mitchell v. Mitchell, 54-301, 55+1134; Lesch v. G. N. Ry., 97-503, 508, 106+955.
[8] Kemmitt v. Adamson, 44-121, 46+327; Gardner v. Minea, 47-295, 50+199.
[9] Peck v. Small, 35-465, 29+69.
[10] Boetcher v. Staples, 27-308, 7+263; Crosby v. Humphreys, 59-92, 60+843; Gorstz v. Pinske, 82-456, 85+215; Rauma v. Lamont, 82-477, 85+236; Germolus v. Sausser, 83-141, 85+946; Faber v. Schiwek, 93-417, 101+1133; Berg v. St. P. C. Ry., 96-513, 105+191; Anderson v. International H. Co., 104-49, 116+101; Baumgartner v. Hodgdon, 105-22, 116+1030.
[11] Jones v. Rahilly, 16-320(283); Seeman v. Feeney, 19-79(54); Heartz v. Klinkhammer, 39-488, 40+826; Cohen v. Goldberg, 65-473, 67+1149.
[12] Fox v. Stevens, 13-272(252).
[13] Gardner v. Kellogg, 23-463.

bel;[14] for false imprisonment;[15] for refusing to entertain a guest at an inn;[16] for breach of promise to marry;[17] for ejecting a passenger from a train;[18] for lowering a natural watercourse;[19] for abuse of process.[20]

MEASURE OF DAMAGES FOR BREACH OF CONTRACT

2559. General rules—Rule of Hadley v. Baxendale—The rule of the common law is that where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed.[21] He is entitled to recover such damages as are the natural and proximate consequences of the breach.[22] The leading case of Hadley v. Baxendale, which is followed in this state, lays down the rule that the damages which one party to a contract ought to recover for a breach thereof by the other are (1) such as either arise naturally, that is, in the usual course of things, from the breach itself, or (2) such as may reasonably be supposed to have been contemplated by the parties, when making the contract, as the probable result of the breach.[23] What was in the contemplation of the parties may be shown by oral evidence when the contract is in writing.[24]

2560. Contemplated damages—Theory of rule—It is sometimes contended that liability for damages ex contractu arises from the intention of the parties, and Hadley v. Baxendale gives some countenance to this view. In fact, such liability is imposed by law and is in no way consensual. How, indeed, could it be when ordinarily the parties to a contract have in mind its performance, not its breach? When the damages are assessed as those which it is reasonable to suppose that the parties had in mind, what is really meant is that the law, aiming at compensation, but proceeding upon principles of justice, considers it fair to hold a defendant for damages which as a reasonable man he ought to have foreseen as likely to follow from a breach. What he in fact foresaw or contemplated is immaterial.[25]

2561. Compensation the aim—What is sought to be effected by allowance of damages for breach of a contract is to place the party wronged, as nearly as can be done, in the same situation with respect to the subject of the contract as its performance would have placed him in. Damages are substituted, from necessity, in the place of the contract performance, and are, in theory, an equivalent for performance. But compensation in money can rarely be an

[14] Peterson v. W. U. Tel. Co., 72-41, 74+1022; Id., 75-368, 77+985.

[15] Rauma v. Lamont, 82-477, 85+236; Woodward v. Glidden, 33-108, 22+127.

[16] McCarthy v. Niskern, 22-90.

[17] Johnson v. Travis, 33-231, 22+624; Clement v. Brown, 57-314, 59+198; Tamke v. Vangsnes, 72-236, 75+217; Sneve v. Lunder, 100-5, 110+99.

[18] Du Laurans v. First Div. etc. Ry., 15-49(29); Pine v. St. P. C. Ry., 50-144, 52+392.

[19] Erickson v. Pomerank, 66-376, 69+39.

[20] Grimestad v. Lofgren, 105-286, 117+515.

[21] Paine v. Sherwood, 21-225, 232.

[22] Graves v. Moses, 13-335(307).

[23] Hadley v. Baxendale, 9 Exch. 341; Paine v. Sherwood, 19-315(270); Beaupre v. Pacific etc. Co., 21-155; Paine v. Sherwood, 21-225; Frohreich v. Gammon, 28-476, 11+88; Fairchild v. Rogers, 32-269, 20+191; Wilson v. Reedy, 32-256, 20+153; Miss. etc. Co. v. Prince, 34-71, 24+344; Liljengren v. Mead, 42-420, 44+306; Cargill v. Thompson, 57-534, 59+638; Francis v. W. U. Tel. Co., 58-252, 260, 59+1078; Day v. Gravel, 72-159, 75+1; Sloggy v. Crescent C. Co., 72-316, 75+225; Ironton L. Co. v. Butchart, 73-39, 75+749; Crowley v. Burns, 100-178, 110+969; Sargent v. Mason, 101-319, 112+255; Hall v. Parsons, 105-96, 117+240; Wessel v. Wessel, 106-66, 118+157; Globe etc. Co. v. Landa etc. Co., 190 U. S. 540.

[24] Am. B. Co. v. Am. D. S. Co., 107-140, 119+783; Globe etc. Co. v. Landa etc. Co., 190 U. S. 540.

[25] 19 Harv. L. Rev. 531. See, however, Emerson v. Pacific etc. Co., 96-1, 104+573 (holding that liability for damages ex contractu are, in a measure, consensual).

actual and exact equivalent. To come as near to it as possible is the object of the rules of law governing the rates of damages allowable under various circumstances.[26] The general principle that governs the entire subject of damages is that when a wrong is done the party wronged should be indemnified by the wrongdoer to the extent of the injury done, and no further.[27] If the application of a particular rule for measuring damages to a given state of facts results in more than compensation, it is at once apparent that the wrong rule has been adopted.[28]

2562. Damages for tort and for breach of contract distinguished—An important distinction is to be noted between the extent of responsibility for a tort, and that for breach of contract. The wrongdoer is answerable for all the injurious consequences of his tortious act which, according to the usual course of events and general experience, were likely to ensue, and which, therefore, when the act was committed, he may reasonably be supposed to have foreseen and anticipated. But for breaches of contracts the parties are not chargeable with damages on this principle. Whatever foresight at the time of the breach the defaulting party may have of the probable consequences, he is not generally held for that reason to any greater responsibility. He is liable only for the direct consequences of the breach, such as usually occur from the infraction of like contracts and were within the contemplation of the parties when the contract was entered into as likely to result from its non-performance.[29]

2563. Pecuniary loss alone considered—Mental suffering—The law looks only to the pecuniary value of a contract and for its breach awards only pecuniary damages. Damages for mental suffering resulting from the breach of a contract are not recoverable except in the case of a promise of marriage,[30] and where the breach amounts, in substance, to an independent wilful tort.[31]

2564. Difference between cost of performance and contract price—The difference between the cost of performance and the contract price is often the proper measure of damages.[32]

2565. Cost of completing work—Where work is left incomplete the measure of damages is generally the reasonable cost of completing it.[33]

2566. Losses on collateral contracts—The damages recoverable for the breach of a contract do not ordinarily include losses from collateral contracts, though they were entered into upon the faith of the principal contract.[34]

2567. Value of thing—The rights of contracting parties are controlled and measured by the terms of their contracts; and when, by agreement, a special mode of compensation has been fixed, the measure of recovery for a refusal to deliver or to do the particular thing agreed upon, is the value of what was thus to have been received. This rule is generally available as a measure of damages for the breach of the contract, and affords just compensation by giving in place

[26] Carli v. Seymour, 26–276, 3+348; Glaspie v. Glassow, 28–158, 9+699.

[27] Glaspie v. Glassow, 28–158, 9+699; Hewson v. Minn. B. Co., 55–530, 534, 57+129; Dana v. Goodfellow, 51–375, 380, 53+656; Crowley v. Burns, 100–178, 110+969.

[28] Crowley v. Burns, 100–178, 110+969.

[29] Sargent v. Mason, 101–319, 112+255. See also, Emerson v. Pacific etc. Co., 96–1, 104+573.

[30] Francis v. W. U. Tel. Co., 58–252, 59+1078; Beaulieu v. G. N. Ry., 103–47, 114+353.

[31] Beaulieu v. G. N. Ry., 103–47, 114+353.

[32] Glaspie v. Glassow, 28–158, 9+699; Pevey v. Schulenburg, 33–45, 21+844; Dunn v. Barton, 40–415, 42+289; Ennis v. Buckeye Pub. Co., 44–105, 46+314; Anderson v. Nordstrom, 60–231, 61+1132. See Olson v. Nonenmacher, 63–425, 65+642.

[33] Carli v. Seymour, 26–276, 3+348; King v. Nichols, 53–453, 55+604; Winona v. Jackson, 92–453, 100+368.

[34] Lovejoy v. Morrison, 10–136(108); Fairchild v. Rogers, 32–269, 20+191; Cargill v. Thompson, 57–534, 548, 59+638.

of the thing stipulated its full and ascertainable equivalent in money. But this rule has been adopted because it is a just and practical measure of damages. It can be of no avail when, from the very nature of the case, its application would afford no measure for a recovery. It then becomes necessary to resort to some other mode of determining the sum to be awarded for the breach complained of.[35]

2568. Payment in kind—A custom cannot authorize the payment of damages in kind instead of in money.[36]

2569. Particular contracts—Cases are cited below involving the measure of damages for the breach of a contract to pay money;[37] to transport and deliver wheat;[38] to pay the debt of another;[39] to build a road;[40] to make an excavation;[41] to print and fold a publication;[42] to purchase all the milk plaintiff's cows might produce within a certain time and to furnish cans for its shipment;[43] to build an ore dock;[44] to furnish water-power for a mill;[45] to move a building;[46] to drill and sink a well;[47] to dig a ditch;[48] to furnish, set up and wire an arc motor;[49] to construct a part of a building;[50] to execute a note;[51] to put in a system of waterworks;[52] to give security;[53] to tow logs;[54] to heat a building;[55] to deliver personal property;[56] to deliver a relinquishment of a timber-culture claim;[57] to redeem corporate stock at par;[58] to rebuild a house destroyed by fire;[59] to lease a building;[60] to maintain a factory on land;[61] to manufacture clothing;[62] to employ another as agent.[63]

MEASURE OF DAMAGES FOR TORT

2570. General rule—One who commits a tort is responsible for the direct and immediate consequences thereof, whether they may be regarded as natural or probable, or whether they might have been contemplated, foreseen, or expected, or not. It is not necessary to the liability of a wrongdoer that the result which actually follows should have been anticipated by him. It is the general character of the act, and not the general result, that the law primarily regards in this connection.[64] A wrongdoer should not be allowed to apportion

[35] Brown v. St. P. etc. Ry., 36–236, 31+941.

[36] Johnson v. Gilfillan, 8–395(352).

[37] Snow v. Johnson, 1–39(24); Mason v. Callender, 2–350(302); Bailly v. Weller, 2–384(338); Kent v. Brown, 3–347(246); Daniels v. Ward, 4–168(113); Hollinshead v. Von Glahn, 4–190(131).

[38] Cowley v. Davidson, 13–92(86).

[39] Merriam v. Pine City L. Co., 23–314.

[40] Carli v. Seymour, 26–276, 3+348.

[41] Tantholt v. Ness, 35–370, 29+49.

[42] Ennis v. Buckeye Pub. Co., 44–105, 46+314.

[43] Bowe v. Minn. Milk Co., 44–460, 47+151.

[44] Williston v. Mathews, 55–422, 56+1112.

[45] Cargill v. Thompson, 57–534, 59+638.

[46] Anderson v. Nordstrom, 60–231, 61+1132.

[47] Olson v. Nonenmacher, 63–425, 65+642.

[48] Swank v. Barnum, 63–447, 65+722.

[49] Silberstein v. Duluth N. T. Co., 68–430, 71+622.

[50] Swanson v. Andrus, 83–505, 86+465.

[51] Am. Mfg. Co. v. Klarquist, 47–344, 50+243; Deering v. Johnson, 86–172, 90+363; Wasser v. Western L. S. Co., 97–460, 107+160.

[52] Gray v. New Paynesville, 89–258, 94+721.

[53] Barron v. Mullin, 21–374; Dye v. Forbes, 34–13, 24+309.

[54] Pevey v. Schulenburg, 33–45, 21+844.

[55] Sargent v. Mason, 101–319, 112+255.

[56] Whalon v. Aldrich, 8–346(305).

[57] Palmer v. March, 34–127, 24+374.

[58] Browne v. St. Paul P. Works, 62–90, 64+66.

[59] Longfellow v. McGregor, 61–494, 63+1032.

[60] Knowles v. Steele, 59–452, 61+557.

[61] Ironton L. Co. v. Butchart, 73–39, 75+749.

[62] Schloss v. Josephs, 98–442, 108+474.

[63] Newhall v. Journal P. Co., 105–44, 117+228.

[64] Watson v. Rinderknecht, 82–235, 84+798; Schumaker v. St. P. & D. Ry., 46–39, 48+559; Nelson v. Chi. etc. Ry., 30–74, 14+360; Cushing v. Seymour, 30–301, 15+249; Sargent v. Mason, 101–319, 112+255. See § 2562.

or qualify his wrong; and, if a loss occurs while his wrongful act is in operation, and which is attributable thereto, he should be held liable.[65] In actions for personal injury damages are not subject to mathematical calculation and are governed by no very satisfactory rules. Much must be left to the discretion of the jury, subject to the supervisory power of the court.[66]

2571. Person in diseased or weakened condition—A person who is injured by the negligent act of another may recover the resulting damage, though damage would not have resulted, or would have been much less, but for his diseased or weakened condition, before and at the time of his accident.[67]

2572. Medical treatment—In an action by a wife for personal injury she is not entitled to recover expenses for medical treatment, because her husband, and not she, is liable therefor.[68]

2573. Negligent medical treatment—Where a person is injured by the wrong or neglect of another, and he is not himself negligent in the selection of a medical attendant, the wrongdoer is liable for all the proximate results of his own act, though the consequences of the injury would have been less serious than they proved to be if the attendant had exercised proper professional skill and care.[69]

2574. Miscarriage—When an injury to a woman results in a miscarriage, she is entitled to recover such damages as will fairly compensate her for the pain and suffering occasioned by the miscarriage, but not for the pain and suffering occasioned by the loss of the child. The pain and suffering which the mother would have suffered when the child was born in the natural course of events cannot be deducted from the pain and suffering occasioned by the miscarriage, which resulted from the defendant's wrongful act.[70]

2575. Injury to nervous system—When damages are sought to be recovered for injuries to the nervous system, alleged to have been caused by actionable negligence, the utmost circumspection must be exercised to avoid the injustice which is likely to result from the denial of substantial compensation for real injuries and in the award of damages in case of honest mistake or of cunning fraud.[71]

2576. Loss of time—Plaintiff's pecuniary condition—In an action for personal injury the fact that the plaintiff is rendered incapable of pursuing his regular employment by his injury may be considered as an element of damage.[72] Evidence of wages received is admissible as bearing upon the value of time lost on account of injuries, but in the absence of a definite contract of service, or facts from which it may be inferred that the wage was actually lost, no damages can be collected for loss of time.[73] The plaintiff's pecuniary condition cannot be shown directly, though it may be disclosed incidentally by evidence as to his age, occupation, and earning capacity before and after the injury.[74]

2577. Injury or destruction of crops or trees—The measure of damages for the loss or destruction of a growing annual crop is its value at the time of the injury, to be determined by facts then existing. If it is impracticable to show such value, the diminution in the rental value of the land by reason of the

[65] Bibb v. Atchison etc. Ry., 94–269, 276, 102+709.
[66] Viou v. Brooks, 99–97, 108+891.
[67] Ross v. G. N. Ry., 101–122, 111+951; Purcell v. St. P. C. Ry., 48–134, 50+1034.
[68] Belyea v. Mpls. etc. Ry., 61–224, 63+627.
[69] Goss v. Goss, 102–346, 113+690.
[70] Morris v. St. P. C. Ry., 105–276, 117+500.
[71] Johnson v. G. N. Ry., 107–285, 119+1061.
[72] Dahlberg v. Mpls. St. Ry., 32–404, 21+545.
[73] Anderson v. Young, 98–355, 108+298.
[74] Griser v. Schoenborn, 109–297, 123+823.

injury may be taken as the measure of damages.[75] The measure of damages for the destruction or injury of trees, or perennial crops such as growing grass, is the difference in the market value of the land immediately before and immediately after the injury, and, when ascertaining this difference, evidence that another crop of some character and value may be grown on the land the same growing period, and of the average yield of like crops of the average market price, the ordinary expense of harvesting and marketing such crops, the condition of that particular crop before the injury, and any other fact existing at the time of the loss tending to show how and to what extent the injury decreased and diminished the value of the land, may be considered. But evidence of matters occurring subsequent to the injury is not competent.[76]

2578. Particular torts—Cases are cited below involving the measure of damages for negligence in discharging a mortgage;[77] for a wrongful disposition of property;[78] for negligence in failing to serve notice to charge an indorser of a note;[79] for removal of soil;[80] for interruption of business;[81] for injury to animals.[82]

PLEADING

2579. Necessity of pleading—In general—Except in actions where damages are the very gist of the action, failure to allege damages does not render a complaint demurrable. An ad damnum clause is not essential.[83] Where damages are the gist of the action they must be alleged in an issuable form.[84]

2580. General damages—A general allegation of damage in a specified amount is sufficient for the recovery of general damages.[85]

2581. Special damages—Damages not resulting necessarily from the act complained of, and therefore not implied by law, must be pleaded specially.[86]

[75] Lommeland v. St. P. etc. Ry., 35–412, 29+119; Byrne v. Mpls. etc. Ry., 38–212, 36+339; Ward v. Chi. etc. Ry., 61–449, 63+1104; Jungblum v. Mpls. etc. Ry., 70–153, 72+971; Burnett v. G. N. Ry., 76–461, 79+523; Larson v. Lammers, 81–239, 83+981. See Howard v. Rugland, 35–388, 29+63.

[76] Ward v. Chi. etc. Ry., 61–449, 63+1104. See Huetson v. Miss. etc. Co., 76–251, 79+72.

[77] Sanborn v. Webster, 2–323(277).

[78] Chase v. Blaisdell, 4–90(60).

[79] Borup v. Nininger, 5–523(417).

[80] Karst v. St. P. etc. Ry., 22–118.

[81] Goebel v. Hough, 26–252, 2+847.

[82] Keyes v. Mpls. etc. Ry., 36–290, 30+888.

[83] Cowley v. Davidson, 10–392(314); Wilson v. Clarke, 20–367(318); Weaver v. Miss. etc. Co., 28–542, 11+113; Burns v. Jordan, 43–25, 44+523.

[84] McNair v. Toler, 21–175; Simmer v. St. Paul, 23–408; Wilson v. Dubois, 35–471, 29+68; Parker v. Jewett, 52–514, 55+56.

[85] Andrews v. Stone, 10–72(52) (assault and battery); Bast v. Leonard, 15–304 (235) (negligence—fall of building); Lindholm v. St. Paul, 19–245(204) (personal injury); Partridge v. Blanchard, 23–69 (sale); Smith v. St. P. etc. Ry., 30–169, 14+797 (personal injury); Barnum v. Chi. etc. Ry., 30–461, 16+364 (death by wrongful act); Stone v. Evans, 32–243, 20+149 (malpractice—action by husband); Mallory v. Pioneer Press Co., 34–521, 26+904 (libel); Meacham v. Cooper, 36–227, 30+669 (warranty of horse); Collins v. Dodge, 37–503, 35+368 (personal injury); Ennis v. Buckeye Pub. Co., 44–105, 46+314 (breach of contract—loss of profits); Pioneer Press Co. v. Hutchinson, 63–481, 65+938 (breach of covenant in lease); Hershey L. Co. v. St. Paul etc. Co., 66–449, 69+215 (sale); Palmer v. Winona etc. Co., 78–138, 80+869 (personal injury); Rathborne v. Wheelihan, 82–30, 84+638 (breach of contract—prospective damages); Palmer v. Winona etc. Co., 83–85, 85+941 (personal injury); Reed v. Bernstein, 103–66, 114+261 (setting fire to building).

[86] Chase v. Blaisdell, 4–90(60) (conversion); Ward v. Haws, 5–440(359) (assault and battery); Brackett v. Edgerton, 14–174(134) (contract to deliver wheat); Spencer v. St. P. etc. Ry., 21–362 (trespass on land); Wampach v. St. P. etc. Ry., 21–364 (trespass on land); Gray v. Bullard, 22–278 (trespass de bonis); Ferguson v. Hogan, 25–135 (replevin); Isaacson v. Mpls. etc. Ry., 27–463, 8+600 (trespass on land); Frohreich v. Gammon, 28–476, 11+88 (warranty of harvester); Cushing v. Seymour, 30–301, 15+249 (con-

As the object of stating special damages is to let the adverse party know what charges he must prepare to meet, the statement must be as full and specific as the facts will admit of.[87] The objection that special damages are not pleaded is waived unless seasonably made on the trial.[88]

2582. Prospective damages—In actions on contract prospective damages are recoverable under a general allegation of damages. Where, however, the complaint in such an action contains no general allegation of damages, but specifically itemizes the breaches of the contract complained of, and alleges that by reason of such specific breaches plaintiff has been damaged in a stated amount, recovery must be limited to the particular damages so claimed.[89]

2583. Profits—A general allegation of damages in a certain amount is not sufficient to justify a recovery of anticipated profits.[90]

2584. Matter in mitigation—The general rule is that matter in mitigation of damages need not be pleaded, at least when it could not be used as a bar to the cause of action.[91]

2585. Matter in aggravation—In actions for slander or libel matter in aggravation of damages is admissible without being specially pleaded,[92] but the general rule is that matter to justify exemplary damages must be specially pleaded.[93]

2586. Exemplary damages—If exemplary damages are sought facts justifying their allowance must be alleged. This is properly done by alleging that the wrongful act was done wilfully, wantonly, or maliciously.[94]

2587. Interest—To recover damages in the form of interest no demand therefor is necessary.[95]

2588. Allegations of unliquidated damages not traversable—In an action for unliquidated damages an allegation of their amount is not traversable.[96]

2589. How pleaded—Itemizing—Damages may be stated in gross. It is unnecessary to itemize them.[97]

ASSESSMENT

2590. Assessment by jury—Statute—The statute provides that "when a verdict is found for the plaintiff in an action for the recovery of money, or for the defendant when a counterclaim for the recovery of money is established

version); Stone v. Evans, 32-243, 20+149 (malpractice—action by husband); Meacham v. Cooper, 36-227, 30+669 (warranty of horse); Liljengren v. Mead, 42-420, 44+306 (contract to furnish building material); Hitchcock v. Turnbull, 44-475, 47+153 (contract to furnish boiler plates); Loudy v. Clarke, 45-477, 48+25 (sale of defective manufactured goods); Holston v. Boyle, 46-432, 49+203 (libel); Rauma v. Bailey, 80-336, 83+191 (wrongful eviction of tenant); Qualy v. Johnson, 80-408, 83+393 (replevin); Independent B. Assn. v. Burt, 109-323, 123+932 (sale of goods—damage from delivery of unmarketable goods—profits).

[87] Ward v. Haws, 5-440(359).

[88] Isaacson v. Mpls. etc. Ry., 27-463, 8+600; Qualy v. Johnson, 80-408, 83+393.

[89] Rathborne v. Wheelihan, 82-30, 84+638.

[90] Singer Mfg. Co. v. Potts, 59-240, 61+23; Independent B. Assn. v. Burt, 109-323, 123+932.

[91] Hoxsie v. Empire L. Co., 41-548, 43+476; Hoyt v. Duluth etc. Co., 103-396, 115+263. See Jellett v. St. P. etc. Ry., 30-265, 15+237.

[92] Fredrickson v. Johnson, 60-337, 62+388.

[93] Vine v. Casmey, 86-74, 90+158.

[94] Vine v. Casmey, 86-74, 90+158. See Carli v. Union Depot etc. Co., 32-101, 20+89; Tamke v. Vangsnes, 72-236, 75+217.

[95] Talcott v. Marston, 3-339(238); Cooper v. Reaney, 4-528(413); Ormond v. Sage, 69-523, 72+810; Brown v. Doyle, 69-543, 72+814.

[96] German-Am. Bank v. White, 38-471, 38+361.

[97] Allis v. Day, 14-516(388); Bast v. Leonard, 15-304(235); Lindholm v. St. Paul, 19-245(204); Wilson v. Clarke, 20-367(318). See, as to effect of itemizing damages, Rathborne v. Wheelihan, 82-30, 84+638.

beyond the amount of the plaintiff's claim as established, the jury shall assess the amount of the recovery." [98] In cases where the amount of plaintiff's recovery is in issue, or where, as in actions in tort, the damages are unliquidated, an assessment by the jury is essential. It is not essential where no assessment is necessary in order to determine the amount of plaintiff's recovery, because the amount, if he recovers at all, is not in issue, but depends wholly upon the construction of the pleadings, and involves a pure question of law over which the jury have no control.[99] From the mere fact that the jury assessed the plaintiff's damages at a specified sum "plus" another specified sum, the latter being the amount demanded in the complaint for special damages, it is not to be conclusively presumed that this was awarded as special damages.[1] The jury cannot assess special damages not pleaded,[2] unless the evidence in proof thereof is introduced without objection.[3] They cannot exceed the amount demanded in the complaint.[4] If the jury bring in a verdict in which the damages are not assessed or are improperly assessed it is the right and the duty of the court to send them out again under proper instructions.[5] The subject of improper methods of arriving at an assessment is considered elsewhere.[6] A general verdict is presumed to include all damages to which the successful party is entitled.[7]

2591. Proof—One seeking substantial damages must show by proof both his right to recover, and the measure or extent of the loss or injury for which he demands compensation. It is sufficient if the proof is made out with reasonable certainty.[8] In the absence of proof of actual loss no more than nominal damages are ordinarily recoverable.[9]

2592. Against several tortfeasors—As against those who are guilty of a known and meditated trespass, a jury should estimate damages according to the amount which they think the most culpable should pay. But where the jury have improperly apportioned and severed such damages between defendants, the plaintiff may cure the irregularity by entering a nolle prosequi as to all but one, taking judgment against him alone.[10]

2593. In gross—Where a single trespass is committed on two contiguous lots of the plaintiff, it is proper to assess the damages to both lots together, though they may not have been so used by the owner in connection with each other that they would be considered one tract in condemnation proceedings by a railway company.[11]

2594. Difficulty of assessment—Mere difficulty in assessing damages is no reason for denying them to a party who has a right to them as a substitute for that of which he has been deprived by the default of another. In cases where it is incompetent to give opinion evidence tending to establish the amount of damages, they are to be assessed in such reasonable sum as, in the judgment of the court or jury, the evidence warrants.[12]

[98] R. L. 1905 § 4180. See Dunnell, Minn. Pr. § 913.
[99] Jones v. King, 30-368, 15+670.
[1] Bishop v. St. Paul C. Ry., 48-26, 50+927.
[2] See § 2581.
[3] See § 2581.
[4] See § 7537.
[5] Aldrich v. Grand Rapids C. Co., 61-531, 63+1115.
[6] See § 7116.
[7] Tait v. Thomas, 22-537.
[8] Fairchild v. Rogers, 32-269, 20+191; Hubbard v. Mpls. etc. Co., 47-393, 50+349; Mitchell v. Davies, 51-168, 53+363. See Egan v. Faendel, 19-231(191).
[9] Ogden v. Ball, 38-237, 36+344; Sable v. Brockmeier, 45-248, 47+794; Potter v. Mellen, 36-122, 30+438; McKinnon v. Palen, 62-188, 64+387; Nickerson v. Wells, 71-230, 73+959.
[10] Warren v. Westrup, 44-237, 46+347.
[11] Lamm v. Chi. etc. Ry., 45-71, 47+455.
[12] First Nat. Bank v. St. Cloud, 73-219, 75+1054.

EXCESSIVE AND INADEQUATE DAMAGES

2595. Precedents—In determining whether a verdict is excessive or not regard should be had to decisions based on similar facts. Counsel have a right to consider decisions as precedents to guide them in negotiations for settlement.[13]

2596. Held excessive—Cases are cited below in which damages for personal injuries were held excessive by the trial or appellate court and reduced or a new trial granted.[14]

[13] Campbell v. Ry. T. Co., 95-375, 382, 104+547.

[14] Dunn v. Burlington etc. Ry., 35-73, 27+448 (child eight years old completely crippled and rendered helpless, both eyes burned out, both ears burned off and hands burned to a crisp—verdict, $50,000—reduced to $25,000); Hall v. Chi. etc. Ry., 46-439, 49+239 (able-bodied young man made a cripple and invalid for life—verdict, $40,143.33—reduced to $25,000); Slette v. G. N. Ry., 53-341, 55+137 (sectionman—thirty years old—transverse fracture of thigh bone—verdict, $4,100—reduced on appeal to $2,100); Kennedy v. Chi. etc. Ry., 57-227, 58+878 (laborer—hearing as to one ear destroyed—sight impaired—memory weakened—general health and strength broken—verdict, $5,000—reduced to $4,000); Kennedy v. St. Paul C. Ry., 59-45, 60+810 (laundryman—injury to ankle—verdict, $3,100—reduced on appeal to $2,100); Lawson v. Truesdale, 60-410, 62+546 (serious internal injuries—verdict, $7,150—reduced to $5,000); Howe v. Mpls. etc. Ry., 62-71, 64+102 (young man rendered a physical wreck for life—permanently deformed—verdict, $20,000—reduced to $14,500); Barg v. Bousfield, 65-355, 68+45 (boy sixteen years old—loss of three fingers—verdict, $5,125—reduced to $4,000); Gahagan v. Aermotor Co., 67-252, 69+914 (boy eight years old—two fingers mangled so that they had to be amputated—verdict, $1,800—reduced on appeal to $1,200); Johnson v. St. Paul C. Ry., 67-260, 69+900 (woman seventy-five years old—fracture of one of the bones on the outer side of the left ankle—tearing of lateral ligaments of the ankle and injury to joint—crutches permanently necessary—verdict, $4,000—reduced on appeal to $2,500); Thompson v. Chi. etc. Ry., 71-89, 73+707 (locomotive fireman—working power of right hand practically destroyed and internal injuries of uncertain extent—verdict, $10,500—reduced by trial court to $8,000—reduced by supreme court to $6,500); Bennett v. Backus, 77-198, 79+682 (laborer—sprained ankle—crutches necessary for a month—unable to work for several months—verdict, $2,000—reduced on appeal to $1,250); Stiller v. Bohn Mfg. Co., 80-1, 82+981 (young man twenty years old—injury to hand—verdict, $4,500—reduced to $3,500 by trial court—reduced to $2,500 on appeal); Weiner v. Mpls. St. Ry., 80-312, 83+181 (business man thrown from street car—no injuries requiring a physician—verdict, $350—reduced on appeal to $200); Durose v. St. Paul C. Ry., 80-512, 83+397 (a boy fifteen years old—thrown from a wagon by a street car—slight abrasions on hip—no serious injury—verdict, $700—reduced on appeal to $400); Lammers v. G. N. Ry., 82-120, 84+728 (married woman—collision at railway crossing—no bones broken—no permanent injury—shoulder dislocated—cut on ear—confined to bed four weeks—verdict, $4,000—reduced on appeal to $2,500); Palmer v. Winona etc. Co., 83-85, 85+941 (capacity for earning wages reduced from $60 to $40 per month—verdict, $1,800—reduced to $1,200); Torske v. Com. L. Co., 86-276, 90+532 (boy—loss of first joint of second and third toes of right foot and tendon of big toe severed—verdict, $2,500—reduced on appeal to $1,500); Dieters v. St. P. G. Co., 86-474, 91+15 (laborer—one finger broken—hand otherwise injured and its usefulness greatly impaired for life—verdict, $2,700—reduced to $2,000); Skelton v. St. P. C. Ry., 88-192, 92+960 (woman thrown to floor of street car—injury to knee—verdict, $4,000—reduced on appeal to $2,500); Plaunt v. Ry. T. Co., 90-499, 97+433 (woman falling on railway track and receiving substantial injuries—verdict, $600—reduced by trial court to $150—reversed on appeal and judgment ordered on the verdict); Bredeson v. Smith, 91-317, 97+977 (boy eighteen years old—cut across wrist by circular saw—year after unable to use second, third, or fourth finger of injured hand—action by father for self and son—verdict, $3,500 for son and $500 for father—first reduced to $2,500 and second to $300); Wadleigh v. Duluth St. Ry., 92-415, 100+104, 362 (woman twenty-three years old thrown to floor of vestibule of street car by collision—confined to bed two weeks—several hemorrhages—verdict, $5,500—reduced on appeal to $3,500); Fry v. G. N. Ry., 95-87, 103+733 (locomotive fireman—injury to hip bone—fracture of rib—traumatic neurosis—verdict, $5,000—reduced on appeal to $3,500); McKnight v. Mpls. etc. Ry., 96-480, 105+673 (nerv-

2597. Held not excessive—Cases are cited below in which damages for personal injuries were held not excessive, or at least not so excessive as to justify the granting of a new trial.[15]

ous exhaustion—vomiting—general debility —verdict, $4,500—reduced to $3,000); Viou v. Brooks, 99-97, 108+891 (foreman in lumber mill—hip dislocated—back and legs hurt—hip bone reset—extreme agony —injuries permanent—steel brace necessary to support leg—verdict, $12,500—reduced to $8,500); Northrup v. Hayward, 99-299, 109+241 (laborer—fracture of both bones of right leg near ankle—ligaments and flesh torn loose—use of leg probably impaired for life—verdict, $2,500 —reduced to $2,000); Masteller v. G. N. Ry., 100-236, 110+869 (sectionman—thrown to ground—internal injuries not serious—confined to bed several months—verdict, $12,500—reduced by trial court to $9,000—held still excessive by supreme court and new trial granted); Koepsel v. Mpls. etc. Ry., 100-202, 110+974 (brakeman—oblique fracture of left tibia bone between ankle and knee—body bruised—good recovery of leg—loss of ten months—verdict, $4,610—reduced to $3,500); Frigstad v. G. N. Ry., 101-40, 111+838 (woman caught cold in railway car not properly heated—verdict, $2,000—held excessive on appeal and new trial granted); Strand v. G. N. Ry., 101-85, 111+958 (fireman on locomotive—twenty-six years old—severely burned—crippled for life—in hospital six months—unable to do physical work—subject to pain and irritation for life—verdict, $30,000—reduced on appeal to $20,000); Murphy v. South St. Paul, 101-341, 112+259 (injuries at first apparently slight—a week after accident required to quit work—traumatic neurosis — verdict, $6,448 — reduced to $2,500); Goss v. Goss, 102-346, 113+690 (teamster—leg and foot crushed—large bone of leg broken and driven through flesh—verdict, $4,000—reduced to $3,000); Whitehead v. Wis. C. Ry., 103-13, 114+254 (brakeman twenty-seven years old—loss of both legs—verdict, $35,000—reduced to $30,000); Masteller v. G. N. Ry., 103-244, 114+757 (sectionman — thrown from handcar—serious internal injuries—verdict, $15,000—reduced to $10,000); Miller v. Chi. etc. Ry., 103-443, 115+269 (pump repairer on railway—two fingers on right hand so seriously injured as to require amputation—other two fingers practically useless—verdict $6,500—reduced to $5,000); Sheldon v. Mpls. St. Ry., 103-520, 114+1134 (plaintiff injured by log rolling upon him—verdict, $1,476.25—reduced to $1,060); Sprague v. Wis. C. Ry., 104-58, 116+104 (brakeman—young man—run over by car—loss of both legs—verdict, $40,000—reduced to $30,000); Lohman v. Swift, 105-148, 117+418 (hand caught in machine and severely injured—verdict, $3,000—reduced to $2,000); Liabraaten v. Mpls. etc. Ry., 105-207, 117+423 (young woman thrown from carriage and seriously injured—collision with train —verdict, $9,500—reduced to $7,500); Barrett v. Mpls. etc. Ry., 106-51, 117+1047 (boy nineteen years old—jumping from train in motion—serious injury—verdict, $26,000—new trial granted); Ewing v. Stickney, 107-217, 119+802 (switchman—loss of first and second fingers about one inch above knuckle—hand otherwise injured so as to be useless for manual labor—verdict, $9,125—reduced by trial court to $7,000—held on appeal that new trial should have been granted); Webb v. Mpls. St. Ry., 107-282, 119+955 (woman dragged by street car—caught in gates—miscarriage—verdict, $4,250—new trial ordered on appeal); Johnson v. G. N. Ry., 107-285, 119+1061 (stock-buyer thrown from car—injury to nervous system—verdict, $4,060—new trial granted on appeal); Putz v. St. Paul G. Co., 108-243, 121+1109 (bruising and scalding skin of left leg—failure of plaintiff to secure proper treatment—verdict, $3,000—reduced on appeal to $1,925).

[15] St. Paul v. Kuby, 8-154(125) (injury to child from defective sidewalk—verdict, $511); Keller v. Sioux City etc. Ry., 27-178, 6+486 (woman sixty-seven years old injured while alighting from train—injuries not serious—verdict, $975); Greene v. Mpls. etc. Ry., 31-248, 17+378 (locomotive engineer—collision—injuries very serious and probably permanent—verdict, $5,900); Waldron v. St. Paul, 33-87, 22+4 (defective sidewalk—accident resulted in an incurable affection of the spinal cord seriously impairing the physical powers of the plaintiff and causing permanent suffering—verdict, $2,000); Tierney v. Mpls. Ry., 33-311, 23+229 (trainman—loss of one leg—verdict, $10,000); Macy v. St. P. etc. Ry., 35-200, 28+249 (yard-master—serious and permanant injury to spine rendering him forever incapable of performing ordinary manual labor and subjecting him to constant pain—verdict, $2,500); Treise v. St. Paul, 36-526, 32+857 (woman thrown from carriage—rendered permanently weak—verdict, $3,000); Lowe v. Mpls. St. Ry., 37-283, 34+33 (serious injuries resulting from unsafe street railway tracks—verdicts, $5,000 and $2,000); Hannon v. Pence, 40-127, 41+657 (plaintiff walking along street—ice from gutter fell on his head—injuries serious and permanent—verdict, $5,500); Sobieski v. St. Paul etc. Ry., 41-169, 42+863 (man thirty years old with

family—loss of one arm below elbow—verdict, $7,000); Watson v. St. P. C. Ry., 42–46, 43+904 (business man forty-five years old—serious and painful injuries—capacity for business greatly impaired permanently—verdict, $4,000); Allen v. Chi. etc. Ry., 44–165, 46+306 (young man—seriously ruptured—leg shortened—lost five or six months' time—unable to do manual labor—verdict, $2,000); Koch v. St. P. C. Ry., 45–407, 48+191 (market-gardener — struck by street car—kept from business two or three weeks—felt hurt for eleven months—used cane for two months—verdict, $1,000); Olson v. St. P. etc. Ry., 45–536, 48+445 (carpenter earning good wages—injury to foot requiring amputation — verdict, $10,000); Njus v. Chi. etc. Ry., 47–92, 49+527 (laborer—loss of left thumb—verdict, $1,500); Johnson v. N. P. Ry., 47–430, 50+473 (cut and bruised about head—severe shock to nervous system—verdict, $1,500); Bishop v. St. Paul C. Ry., 48–26, 50+927 (passenger on street car—thrown down and injured about head—paralysis supervened involving whole left side of body—verdict, $15,000); Moran v. Eastern Ry., 48–46, 50+930 (laborer—loss of arm and permanant injury to back—verdict, $13,000); Graham v. Albert Lea, 48–201, 50+1108 (plaintiff rendered a physical wreck and permanently unable to perform labor—verdict, $4,000); Brusch v. St. P. C. Ry., 52–512, 55+57 (passenger on street car thrown from car while going around a curve—internal injuries requiring several months to cure—verdict, $1,000); Watson v. Mpls. St. Ry., 53–551, 55+742 (laborer—injuries severe, lasting, and liable to terminate fatally—verdict, $6,000); Cooper v. St. Paul C. Ry., 54–379, 56+42 (party injured stepping from street car—fifty-eight years of age—bookkeeper constantly employed—earning $70 per month—unable to work after accident—constant pain—condition incurable—verdict, $8,800); Delude v. St. Paul C. Ry., 55–63, 56+461 (conductor of street car—leg jammed while coupling grip car and trailer—verdict, $2,750); Galloway v. Chi. etc. Ry., 56–346, 57+1058 (woman wounded in knee—nervous shock resulted—became a permanent invalid—verdict, $10,000); Burrows v. Lake Crystal, 61–357, 63+745 (shortening of left leg—sciatic nerve diseased—verdict, $1,000); Rogers v. Chi. etc. Ry., 65–308, 67+1003 (locomotive engineer—injury resulted in chronic inflammation of the knee joint—verdict, $3,000); Miller v. St. P. C. Ry., 66–192, 68+862 (injury causing septicaemia — verdict, $2,500); Olson v. G. N. Ry., 68–155, 71+5 (laborer—forty-six years old—earning $40 to $50 per month—nervous system permanently diseased—recovery so as to be able to perform manual labor doubtful—verdict, $6,500); Christian v. Minneapolis, 69–530, 72+815 (woman—sprained ankle—confined to her bed for several months—had to use crutches or canes for a long time—verdict, $3,000); Donnelly v. St. Paul C. Ry., 70–278, 73+157 (woman thrown against a seat in street car—rib broken, penetrating the pleural cavity and the tissue of the lung—hemmorhages—blood poisoning — diseased condition of lung—verdict, $2,500); Joyce v. St. P. C. Ry., 70–339, 73+158 (woman thrown to ground from street car—sick in bed two weeks—side, head and hip bruised—arm numb, lame and stiff—unable to work for several months—irregular menstruations—verdict, $1,000); Fulmore v. St. Paul C. Ry., 72–448, 75+589 (woman thirty-five years old—mother of six children—a rib torn from cartilage—neuralgia of the tenth intercostal nerve—permanent weakness of side—verdict, $2,750); Hall v. Austin, 73–134, 75+1121 (laboring woman supporting a family—confined to bed seven weeks—great suffering—unable to walk five months after injury—injury permanent—chronic inflammation—verdict, $1,000); Jackson v. St. Paul C. Ry., 74–48, 76+956 (boy eight years old thrown from street car and quite seriously injured—full recovery uncertain—verdict, $750); Sloniker v. G. N. Ry., 76–306, 79+168 (loss of leg by young girl—verdict, $12,000); Fonda v. St. Paul C. Ry., 77–336, 79+1043 (loss of both legs—verdict, $20,000); Harding v. G. N. Ry., 77–417, 80+358 (business man — extent of injuries uncertain—verdict, $2,000); Thompson v. G. N. Ry., 79–291, 82+637 (loss of leg—conductor forty years old earning $90 a month—verdict, $7,500); Thompson v. Mpls. etc. Ry., 79–413, 82+670 (head badly cut and bruised—verdict, $800); Durose v. St. P. C. Ry., 80–512, 83+397 (father and son thrown from wagon by street car—bruised but not seriously—verdict, $900 for father and $400 for son); Schultz v. Faribault, etc. Co., 82–100, 84+631 (laborer—arm paralyzed from shoulder to tips of fingers—injury permanent—verdict, $7,200); Gray v. Red Lake Falls L. Co., 85–24, 88+24 (laborer—foot crushed—two amputations necessary—verdict, $3,000); Herbert v. St. Paul C. Ry., 85–341, 88+996 (woman—slipped on icy street car step—internal injuries—severe nervous shock—considerable impairment of health—verdict, $1,000); Gray v. Commutator Co., 85–463, 89+322 (laborer—hand and wrist torn—permanently injured—verdict, $5,000); Ljungberg v. North Mankato, 87–484, 92+401 (unmarried woman twenty-nine years old—music teacher—injury to ankle—leg in cast for twelve weeks—confined to bed eight weeks—suffered pain for two years—verdict, $1,250); Stauning v. G. N. Ry., 88–480, 93+518 (engine wiper—arm paralyzed—verdict, $5,000); Bruhn v. Guthrie, 88–503, 93+1134 (one of the bones of

a leg broken—ankle joint partially dislocated—verdict, $2,000); Isham v. Broderick, 89–397, 95+224 (broken leg—in hospital two months—unable to work for several months—verdict, $1,000); Hunt v. St. P. C. Ry., 89–448, 95+312 (girl ten years old—sight and hearing seriously impaired—general health impaired—verdict, $6,000); Vant Hul v. G. N. Ry., 90–329, 96+789 (boy eighteen years old—vision of one eye destroyed and vision of other eye seriously impaired—total blindness probable—verdict, $14,400); Perry v. Tozer, 90–431, 97+137 (boy fourteen years old—injury requiring amputation of leg below knee — much suffering — verdict, $7,750) Ray v. Jones, 92–101, 99+782 (injury from falling through coal hole in sidewalk—sprain of back—injury to nerves—verdict, $1,500); Bernier v. St. P. G. Co., 92–214, 99+788 (boy twenty years old—laborer—loss of thumb of left hand and index finger of right hand — verdict, $3,250); Clarke v. Phil. etc. Co., 92–418, 100+231 (shoemaker forty-three years old—left collar bone broken—portions of body severely bruised—use of left arm permanently impaired—verdict, $2,500); Cameron v. Duluth etc. Co., 94–104, 102+208 (boy four years old—severe scalp wound—leg fractured and shortened—verdict, $2,000); Olson v. Chi. etc. Ry., 94–241, 102+449 (woman fifty-nine years old—curvature of spine—floating kidney—verdict, $2,000); Berger v. St. P. C. Ry., 95–84, 103+724 (woman thrown to ground by street car and dragged—severely bruised—miscarriage—anaemia—traumatic neurasthenia—verdict, $5,000); Campbell v. Ry. T. Co., 95–375, 104+547 (switchman—compound, comminuted fracture of right leg—permanent injury—some injury to left leg—verdict, $3,000); Shalgren v. Red Cliff L. Co., 95–450, 104+531 (laborer—hand cut and crushed—extreme pain—use of fingers permanently impaired—verdict, $1,995); McCord v. Mpls. etc. Ry., 96–517, 105+190 (shock resulting in traumatic neurosis—verdict, $7,500); Carlin v. Kennedy, 97–141, 106+340 (woman twenty-two years old—left hand so badly crushed and deformed as to render it practically useless for life—verdict, $7,500); Antletz v. Smith, 97–217, 106+517 (laborer—index and middle fingers of right hand seriously and permanently injured—verdict, $1,500); Costello v. Frankman, 97–522, 107+739 (laborer twenty-one years old—concussion of spinal cord—unconscious for long time—unable to walk without crutches—verdict, $5,000); De Maries v. Jameson, 98–453, 108+830 (laborer thrown to ground—shoulder blade broken and other injuries not serious—verdict, $1,500); Johnson v. St. P. G. Co., 98–512, 108+816 (laborer slightly injured by horse falling into ditch where he was working—verdict, $600); De Blois v. G. N. Ry., 99–18, 108+293 (man forty years old—severely bruised in railway accident—permanent injury to urinary organs and bladder—verdict, $8,500); Ludwig v. Spicer, 99–400, 109+832 (girl eighteen years old—hand crushed in laundry mangle—verdict, $6,222); Kohout v. Newman, 99–519, 109+1133 (laborer injured by bank of earth falling upon him—verdict, $2,400); Ross v. G. N. Ry., 101–122, 111+951 (brakeman—injury to foot—verdict, $2,500); Dobsloff v. Nichols, 101–267, 112+218 (laborer—loss of finger—permanent injury to hand—verdict, $1,000); Bahr v. N. P. Ry., 101–314, 112+267 (brakeman—hurt in back and hips—back sprained—unable to work up to time of trial—pains in back—verdict, $1,775); Baggett v. St. P. C. Ry., 101–532, 111+1132 (woman thrown against seat in street car accident—floating kidney—pain and inability to work for several months—verdict, $2,600); Kundar v. Shenango F. Co., 102–162, 112+1012 (miner—serious injury—verdict, $1,999.90); Dizonno v. G. N. Ry., 103–120, 114+736 (railway laborer—compound, comminuted fracture of left leg below knee—leg permanently shortened two inches—in hospital three months—unable to work up to time of trial—verdict,, $3,000); Larson v. Haglin, 103–257, 114+958 (plasterer—compound, comminuted fracture of right arm necessitating its amputation—scalp wound—wound on shoulder—verdict, $10,500); Clay v. Chi. etc. Ry., 104–1, 115+949 (brakeman—injuries causing extreme suffering and death—verdict, $35,000); Anderson v. Smith, 104–40, 115+743 (laborer—explosion of dynamite—concussion of brain—wounds on face, legs and body—melancholia—in hospital for insane—verdict, $6,000); Fitzgerald v. International F. T. Co., 104–138, 116+475 (girl sixteen years old—serious and permanent injury to hand—verdict, $4,000); Eckert v. G. N. Ry., 104–435, 116+1024 (freight-handler—leg broken and ankle dislocated—leg permanently shortened—verdict, $2,000); Goess v. Chi. etc. Ry., 104–495, 116+1115 (car inspector—permanently weakened ankles and wrists—verdict, $1,500); Coughlin v. Barnett, 104–533, 116+1133 (woman thrown from "roller coaster"—knees bruised—ankle wrenched—nervous shock—irregular menstruations—unable to do housework—verdict, $750); Heidemann v. St. P. C. Ry., 105–48, 117+226 (woman thrown from carriage by street car and seriously injured—confined to bed for six weeks—unable to do housework—verdict, $2,500); Nustrom v. Shenango F. Co., 105–140, 117+480 (laborer—explosion of dynamite in blasting rock—injury to face and eyes—verdict, $1,500); Morris v. St. P. C. Ry., 105–276, 117+500 (woman struck by street car—miscarriage—verdict, $4,000);

2598. Inadequate damages—The award of inadequate damages is ground for a new trial. Where a party is entitled to substantial damages, if any, and he is awarded only nominal damages, it is error for which a judgment may be reversed or a new trial granted.[16]

DAMS—See Logs and Logging, 5697; Waters, 10183.
DANGEROUS PREMISES—See Negligence, 6984.
DANGEROUS WEAPON—See note 17.
DATE—See note 18.
DAY—See note 19.
DAYS OF GRACE—See Bills and Notes, 900.

DEAD BODIES

Cross-References

See Carriers, 1335; Implied or Quasi Contracts, 4305.

2599. Right to possession—Mutilation—Damages—The right to the possession of a dead body for the purposes of preservation and burial belongs, in the absence of any testamentary disposition, to the surviving husband or wife or next of kin, and the right of the surviving wife, if living with the husband at the time of his death, is paramount to that of the next of kin. This right is one which the law recognizes and will protect, and for any infraction of it, such as an unlawful mutilation of the remains, an action for damages will lie. In such an action a recovery may be had for injury to the feelings and mental

McQuade v. Golden Rule, 105-326, 117+484 (woman—stenographer—struck by bundle-carrying apparatus in store—six weeks in hospital suffering from neurasthenia—verdict, $2,000); Froeberg v. Smith, 106-72, 118+57 (laborer—loss of one eye and sight of other impaired—twelve teeth knocked out—serious injury to body and legs—verdict, $8,000); Crozier v. Mpls. St. Ry., 106-77, 118+256 (young woman—bookkeeper—five weeks in hospital—severe pains—unable to dress herself—requiring attendance at time of trial five months after accident—verdict, $9,500); Carlson v. G. N. Ry., 106-254, 118+832 (freight clerk—injury to leg from hook in nose of hog—serious injury—verdict, $1,750); Arseneau v. Sweet, 106-257, 119+46 (woman struck by automobile—verdict, $225); Patterson v. Melchior, 106-437, 119+402 (teamster nineteen years old—one leg broken and possibly the other—verdict, $2,500); Davidson v. Flour City O. I. Works, 107-17, 119+483 (laborer—compound fracture of thigh bone—verdict, $4,000); Olson v. Pike, 107-411, 120+378 (laborer—fall from staging—serious and permanent injuries—verdict, $6,000); Waligora v. St. Paul F. Co., 107-554, 119+395 (laborer—fractured pelvis—other serious injuries—unable to work year from accident—verdict, $5,000); Brough v. Baldwin, 108-239, 121+1111 (laborer—sight of eye practically destroyed—verdict, $5,250); Anderson v. Pittsburgh C. Co., 108-455, 112+794 (laborer—permanent injury to hip and spine—leg shortened—permanently incapable of manual labor—verdict, $8,000); Wyman v. Pike, 108-481, 122+310 (carpenter—injury to head—eyesight and hearing affected—verdict, $4,000); Holden v. Gary, 109-59, 122+1018 (lineman—breaking of ankle and other minor injuries—verdict, $1,500); Newbury v. G. N. Ry., 109-113, 122+1117 (aged and very heavy woman pulled from train—fell and sustained serious and permanent internal injuries—hemorrhages of stomach—intense pain—verdict, $2,000); Shaver v. Neils, 109-376, 123+1076 (mechanic—loss of eye—verdict, $4,500); Anderson v. Foley, 124+987 (laborer—loss of leg—verdict, $11,000).

[16] See § 7141.

[17] State v. Dineen, 10-407(325).

[18] McLean v. Sworts, 69-128, 130, 71+925.

[19] Sewall v. St. Paul, 20-511(459); State v. Brown, 22-482. See Time.

suffering resulting directly and proximately from the wrongful act, though no actual pecuniary damage is alleged or proved.[20]

DEATH—See Abatement and Revival, 14; Agency, 229; Contracts, 1729; Death by Wrongful Act; Evidence, 3434; Execution, 3493; Judgments, 5046, 5072, 5133; Parties, 7331; Subscriptions, 9056.

DEATH BY WRONGFUL ACT

Cross-References

See Conflict of Laws, 1543; Master and Servant; Negligence.

2600. Right of action statutory—At common law a cause of action arising out of injury to the person dies with the death of the party injured. The right of action for death by wrongful act is purely statutory—a new cause of action created by statute. Hence it can be prosecuted only as the statute provides.[21]

2601. Nature and source of statute—Our statute [22] is unlike those in some states which simply provide that a cause of action, for the benefit of his estate, shall survive the death of the person entitled to the same.[23] It derives from the English statute of 1846, commonly known as Lord Campbell's Act.[24] It is not in the nature of a penalty upon the party charged with negligence.[25] The right of action is given for the benefit of the surviving spouse and next of kin. The theory of the statute is that they have a pecuniary interest in the life of the decedent, and its object is to compensate them for their loss caused by his death.[26]

2602. Statute construed liberally—The statute is of a remedial nature and is to be given a liberal construction.[27]

2603. Jurisdiction—Conflict of laws—An action will lie in this state to enforce a cause of action given by a statute in another state where the injury was inflicted; and it is unnecessary that such statute should be the same as or similar to our own, if it is not contrary to our public policy.[28] The law of the place where the injury was inflicted governs as to whether there is a right of action or not.[29] Our statute applies only when the injury was inflicted within

[20] Larson v. Chase, 47–307, 50+238; Brown v. Maplewood C. Assn., 85–498, 513, 89+872; Lindh v. G. N. Ry., 99–408, 109+823. See Sacks v. Minneapolis, 75–30, 77+563; Beaulieu v. G. N. Ry., 103–47, 114+353.

[21] R. L. 1905 § 4503; Nash v. Tousley, 28–5, 5+875; Rugland v. Anderson, 30–386, 15+676; Scheffler v. Mpls. etc. Ry., 32–125, 19+656; Watson v. St. P. C. Ry., 70–514, 73+400; Negaubauer v. G. N. Ry., 92–184, 99+620; Aho v. Jesmore, 101–449, 112+538; Swift v. Johnson, 138 Fed. 867.

[22] R. L. 1905 § 4503.

[23] Schwarz v. Judd, 28–371, 10+208.

[24] Schwarz v. Judd, 28–371, 10+208; Watson v. St. P. C. Ry., 70–514, 73+400; Renlund v. Commodore M. Co., 89–41, 93+1057.

[25] Renlund v. Commodore M. Co., 89–41, 93+1057.

[26] Schwarz v. Judd, 28–371, 10+208; Barnum v. Chi. etc. Ry., 30–461, 16+364; Foot v. G. N. Ry., 81–493, 84+342.

[27] Bolinger v. St. P. & D. Ry., 36–418, 31+856.

[28] Herrick v. Mpls. etc. Ry., 31–11, 16+413; Myers v. Chi. etc. Ry., 69–476, 72+694; Nicholas v. Burlington etc. Ry., 78–43, 80+776; Negaubauer v. G. N. Ry., 92–184, 99+620; Powell v. G. N. Ry., 102–448, 113+1017; Stewart v. G. N. Ry., 103–156, 114+953; Stangeland v. Mpls. etc. Ry., 105–224, 117+386; N. P. Ry. v. Babcock, 154 U. S. 190. See Slater v. Mexican etc. Ry., 194 U. S. 120.

[29] Negaubauer v. G. N. Ry., 92–184, 99+620; Stewart v. G. N. Ry., 103–156, 114+953; Slater v. Mexican etc. Ry., 194 U. S. 120.

this state.[30] An action will lie in this state under our statute for an injury suffered here by a non-resident,[31] and for an injury suffered on a boundary river.[32]

2604. Abatement by death of tortfeasor—A cause of action under the statute does not survive the death of the tortfeasor.[33]

2605. Who may be sued—An action will lie under the statute against a steamboat by name.[34]

2606. For what action lies—The word "wrongful" in the statute is not used in the sense of wilful or malicious. An action will lie under the statute for the same kind of an act or omission causing death for which the decedent might have maintained an action if the resulting injury had fallen short of death.[35]

2607. Who may maintain action—No one is authorized to maintain an action under the statute except the administrator or executor of the decedent.[36] A special administrator may do so.[37]

2608. Who are beneficiaries—Aside from funeral expenses and claims for support of the decedent, the action is exclusively for the benefit of the surviving spouse and next of kin. If there are no such persons no action can be maintained.[38] Prior to the revision of 1905 a husband was not a beneficiary. It was held that he was not next of kin of his wife. Next of kin in this connection means the nearest blood relation.[39] The damages recovered are not assets of the estate of the decedent.[40] A non-resident alien who is next of kin may have the benefit of the statute.[41] Under the statute of North Dakota the term "heirs at law," includes the father of a decedent who leaves no widow or child.[42]

2609. Amount recovered not an asset of estate—The amount recovered in an action under the statute is not a general asset of the estate of the decedent, but is for the exclusive benefit of the persons designated in the statute.[43]

2610. Distribution of funds—The distribution of the funds recovered is under the jurisdiction of the district court in which the recovery is had. The probate court has no jurisdiction. The distribution may properly be made in accordance with R. L. 1905 § 3653.[44]

2611. Compromise and settlement—Releases—A release given, for a valuable consideration, to the person liable, by those entitled to the benefits of the statute, is a bar to a subsequent action by the personal representative of the decedent.[45] The personal representative of the decedent may compromise and settle the claim arising under the statute with the party liable, without the consent of the next of kin or the probate court. Such settlement may be effected either before or after the action is brought.[46] If, in such a case, a release is

[30] Herrick v. Mpls. etc. Ry., 31–11, 14, 16+413.

[31] Hutchins v. St. P. etc. Ry., 44–5, 46+79.

[32] Opsahl v. Judd, 30–126, 14+575.

[33] Green v. Thompson, 26–500, 5+376.

[34] Boutiller v. St. Milwaukee, 8–97(72).

[35] McLean v. Burbank, 12–530(438).

[36] Boutiller v. St. Milwaukee, 8–97(72); Nash v. Tousley, 28–5, 5+875; Scheffler v. Mpls. etc. Ry., 32–125, 19+656; Foot v. G. N. Ry., 81–493, 84+342; Aho v. Jesmore, 101–449, 112+538; Aho v. Republic I. & S. Co., 104–322, 116+590.

[37] Jones v. Minn. T. Co., 108–129, 121+606.

[38] Schwarz v. Judd, 28–371, 10+208; Foot v. G. N. Ry., 81–493, 84+342; Lahti v. Oliver, 106–241, 118+1018.

[39] Watson v. St. P. C. Ry., 70–514, 73+400. See Mageau v. G. N. Ry., 103–290, 115+651, 946.

[40] Aho v. Republic I. & S. Co., 104–322, 116+590.

[41] Renlund v. Commodore M. Co., 89–41, 93+1057; Mahoning O. & S. Co. v. Blomfelt, 163 Fed. 827; Romano v. Capital etc. Co., 101 N. W. (Iowa) 437; Alfson v. The Bush Co., 182 N. Y. 393; 19 Harv. L. Rev. 215.

[42] Stangeland v. Mpls. etc. Ry., 105–224, 117+386.

[43] Schwarz v. Judd, 28–371, 10+208; Mayer v. Mayer, 106–484, 119+217.

[44] Mayer v. Mayer, 106–484, 119+217.

[45] Sykora v. Case, 59–130, 60+1008.

[46] Foot v. G. N. Ry., 81–493, 84+342. See Johnson v. Mpls. etc. Ry., 101–396, 112+

fraudulently given, it will not bar a subsequent action by a succeeding representative.[47] A release fraudulently obtained from a father has been held not to bar an action.[48] A settlement with one of several next of kin is not a bar to an action under the statute. The proper practice in such a case is for the defendant to apply to the trial court and have that portion of the fund which would otherwise be distributed to the heir with whom settlement was made applied pro tanto in satisfaction of the judgment.[49]

2612. Funeral expenses and claims for support—A claim for the support of the decedent must be limited to support after the injury.[50] An award for funeral expenses and support has been held not justified by the evidence.[51]

2613. Notice to municipality—No notice is necessary before bringing suit under the statute against a municipality.[52]

2614. Limitation of actions—An action must be commenced within two years after the act or omission by which the death was caused. The period intervening the death and the appointment of a personal representative is not excluded in the computation.[53] The limitation in a foreign statute has been held to govern an action thereunder in this state.[54] The two-year limitation of the statute has been held inapplicable to an action on contract by a stage company against a ferry company for negligence resulting in the death of a stage passenger.[55]

2615. Pleading—The complaint must allege that the decedent left a spouse or next of kin.[56] It need not allege that the spouse or next of kin had a pecuniary interest in the decedent.[57] It must allege the existence and amount of claims for the support of the decedent or for funeral expenses, if a recovery therefor is sought.[58] A general allegation of damages is sufficient.[59] In an action under a foreign statute the statute must be pleaded.[60]

2616. Defences—Contributory negligence on the part of the decedent is a defence.[61] The fellow-servant doctrine applies.[62] The fact that the decedent was violating a Sunday law at the time of the injury is not a defence.[63] The authority of the personal representative bringing the action may be questioned.[64] The doctrine of assumption of risk applies.[65]

534; Picciano v. Duluth etc. Ry., 102–21, 112+885.

[47] Aho v. Jesmore, 101–449, 112+538; Aho v. Republic I. & S. Co., 104–322, 116+590.

[48] Erickson v. Northwest P. Co., 95–356, 104+291.

[49] McVeigh v. Mpls. etc. Ry., 124+971.

[50] State v. Probate Ct., 51–241, 53+463; Sykora v. Case, 59–130, 60+1008.

[51] Sieber v. G. N. Ry., 76–269, 79+95.

[52] Maylone v. St. Paul, 40–406, 42+88; Orth v. Belgrade, 87–237, 91+843; Senecal v. West St. Paul, 126+826.

[53] Rugland v. Anderson, 30–386, 15+676. See 19 Harv. L. Rev. 458. The time runs from the act or omission; not from the death. Anderson v. Fielding, 92–42, 51, 99+357.

[54] Negaubauer v. G. N. Ry., 92–184, 99+620.

[55] Blakeley v. LeDuc, 22–476.

[56] Schwarz v. Judd, 28–371, 10+208; Sykora v. Case, 59–130, 60+1008; Lahti v. Oliver, 106–241, 118+1018 (a complaint which alleges that the decedent left surviving him a certain person as his next of kin and heir at law, without stating the relation of this person, or that the decedent left no widow, is good as against a demurrer).

[57] Barnum v. Chi. etc. Ry., 30–461, 16+364; Johnson v. St. P. & D. Ry., 31–283, 17+622.

[58] Sykora v. Case, 59–130, 60+1008.

[59] Barnum v. Chi. etc. Ry., 30–461, 16+364; Johnson v. St. P. & D. Ry., 31–283, 17+622.

[60] Myers v Chi. etc. Ry., 69–476, 72+694; Stewart v. G. N. Ry., 103–156, 114+953.

[61] Judson v. G. N. Ry., 63–248, 65+447; Nelson v. St. P. & D. Ry., 76–189, 78+1041; Collins v. Davidson, 19 Fed. 83.

[62] See Renlund v. Commodore M. Co., 89–41, 93+1057.

[63] Opsahl v. Judd, 30–126, 14+575.

[64] In re Hardy, 35–193, 28+219; Hutchins v. St. P. etc. Ry., 44–5, 46+79.

[65] See Sieber v. G. N. Ry., 76–269, 79+95; Johnson v. Atwood, 101–325, 112+262 (caution to be observed in applying doctrine where witnesses are prejudiced).

2617. Damages—The damages awarded must be solely by way of compensation for pecuniary loss. Exemplary damages are not allowed. No compensation can be awarded for wounded feelings, for the loss of the companionship and comfort of the decedent or for his pain and suffering. The true test is, what, in view of all the facts in evidence, was the probable pecuniary interest of the beneficiaries in the continuance of the life of the decedent? The proper estimate may be arrived at by taking into account the calling of the decedent and the income derived therefrom, his health, age, probable duration of life, talents, habits of industry, success in life in the past and the amount of aid in money or services which he was accustomed to furnish the beneficiaries. If the decedent was the head of a family the value of his services to the family cannot be limited in a pecuniary sense to the amount of his daily wages earned for their support. His constant daily services, attention, and care in their behalf, in the relation which he sustained to them, may be considered as well, and the jury must judge of the circumstances in each case.[66] In an action prosecuted for the benefit of a father, under the statute of North Dakota, the loss by the death of a son, of the prospect and expectation of the payment of a debt due from the son to the father, has been held a proper element of damages.[67]

[66] Hutchins v. St. P. etc. Ry., 44–5, 46+79 (decedent an unmarried man thirty-nine years old—small earning capacity and thriftless—mother next of kin—had given mother only trifling amounts—verdict for $3,500 held excessive); Clapp v. Mpls. etc. Ry., 36–6, 29+340 (decedent a railway engineer and married—verdict for $2,500 sustained); Bolinger v. St. P. & D. Ry., 36–418, 31+856 (decedent forty-eight years old—strong and healthy—day laborer—married—three children—verdict for $5,000 sustained); Phelps v. Winona etc. Ry., 37–485, 35+273 (decedent a married man—verdict for $5,000 sustained); Deisen v. Chi. etc. Ry., 43–454, 45+864 (decedent a laboring man—verdict for $3,500 sustained); Jacobson v. St. P. & D. Ry., 41–206, 42+932 (decedent a laboring man and married—verdict for $5,000 sustained); Gunderson v. N. W. El. Co., 47–161, 49+694 (decedent a boy six and one-half years old—his father sole heir forty years old—verdict for $5,000—reduced by trial court to $3,000—latter amount held excessive by supreme court); Strutzel v. St. P. C. Ry., 47–543, 50+690 (decedent a boy five years and ten months old—verdict for $2,300 sustained with apparent reluctance); Sieber v. G. N. Ry., 76–269, 79+95 (decedent twenty-eight years old—unmarried—locomotive fireman—father sixty years old—verdict for $2,500 sustained—verdict for $500 for funeral expenses and support during last sickness held excessive); Gray v. St. P. C. Ry., 87–280, 91+1106 (decedent a boy five years and nine months old—verdict for $2,750 sustained); Swanson v. Oakes, 93–404, 101+949 (decedent a laboring man twenty-six years old and unmarried—mother somewhat dependent on him—verdict for $2,700 reduced to $2,000 sustained); Bremer v. Mpls. etc. Ry., 96–469, 105+494 (decedent forty-six years old and unmarried—railway engineer—father seventy-four years old sole beneficiary—verdict for $3,000 held excessive and reduced to $2,000); Johnson v. Smith, 99–343, 109+810 (decedent fifty-four years old—good health and habits—wife and two children—verdict for $5,000 sustained); Milton v. Biesanz, 99–439, 109+999 (boy sixteen years old—laborer—verdict, $1,700—held not excessive by both courts); O'Malley v. St. P. etc. Ry., 43–289, 45+440 (decedent a boy six years old—verdict for $3,000 sustained. See Gunderson v. N. W. El. Co., 47–161, 49+694); Youngquist v. Mpls. St. Ry., 102–501, 114+259 (decedent a boy seventeen years old—father not shown to be dependent upon him—verdict for $1,000 sustained); Balder v. Zenith F. Co., 103–345, 114+948 (decedent young man—laborer—good health—widow and infant child—verdict for $5,000 sustained); Holden v. G. N. Ry., 103–98, 114+365 (decedent twenty-three years old—unmarried—good health and habits—shared his earnings with his father and mother—verdict for $3,000 sustained). See Swift v. Johnson, 138 Fed. 867 (beneficiary a father who had abandoned his family—nominal damages only recoverable); Beaulieu v. G. N. Ry., 103–47, 114+353 (damages for mental suffering not recoverable); Kerling v. Van Dusen, 109–481, 124+235 (decedent a boy seventeen years old—had contributed but slightly to family support—verdict, $4,500—held excessive and new trial granted); McVeigh v. Mpls. etc. Ry., 124+971 (decedent left no wife or children—mother and father next of kin—verdict, $1,500—held excessive and new trial granted).

[67] Stangeland v. Mpls. etc. Ry., 105–224, 117+386.

2618. Necessity of proving damages—Where the next of kin are so related to the decedent as to be entitled to his services or to support from him the law presumes some loss, but where the beneficiaries are not so related no substantial recovery can be had without proof of such facts as render it probable that actual and substantial pecuniary benefit would have accrued to them from his continued life.[68]

2619. Evidence as to damages—Evidence as to the amount of property decedent had acquired, his habits of industry, his ability to make money and his success in business is admissible.[69] The probable duration of life is a proper element to be considered and the Carlisle and other similar tables are admissible to prove it, but they are not conclusive.[70] Nor are they essential. The jury may make its estimate from the age, health, habits and physical condition of the decedent at the time of his death.[71]

2620. Proximate cause—The negligence of the defendant must have been the proximate cause of the death.[72] The casual connection between the defendant's negligence and the injury must be established by satisfactory evidence as in other actions for negligence.[73]

2621. Substitution of personal representative—The substitution of the personal representative authorized by the statute is not for the purpose of continuing the prosecution of the original cause of action, but it is for the purpose of converting the action, by an amendment of the pleadings, into one under the statute for the benefit of a surviving spouse or next of kin.[74]

DEBT—A contractual obligation to pay a certain sum of money; an obligation.[75]

DEBTOR—See note 76.

DEBTS OF DECEDENTS—See Executors and Administrators.

DECEDENTS' ESTATES—See Executors and Administrators.

DECEIT—See Fraud.

DECLARATIONS—See Evidence, 3292–3306; Conspiracy, 1566a; Criminal Law, 2460, 2461; Fraudulent Conveyances, 3916–3918.

DECREE OF DISTRIBUTION—See Executors and Administrators, 3652.

[68] Robel v. Chi. etc. Ry., 35–84, 27+305; Youngquist v. Mpls. St. Ry., 102–501, 114+259. See Swift v. Johnson, 138 Fed. 867.

[69] Shaber v. St. P. etc. Ry., 28–103, 9+575; Opsahl v. Judd, 30–126, 14+575; Phelps v. Winona etc. Ry., 37–485, 35+273.

[70] Scheffler v. Mpls. etc. Ry., 32–518, 21+711; Deisen v. Chi. etc. Ry., 43–454, 45+864; Gunderson v. N. W. El. Co., 47–161, 49+694; Johnson v. Smith, 99–343, 109+810.

[71] Deisen v. Chi. etc. Ry., 43–454, 45+864.

[72] Mageau v. G. N. Ry., 102–399, 113+1016 (railway accident—woman thrown from seat—died five days after childbirth and five months after accident—evidence held insufficient to prove proximate cause).

[73] Bruckman v. Chi. etc. Ry., 125+263.

[74] Anderson v. Fielding, 92–42, 99+357; Clay v. Chi. etc. Ry., 104–1, 115+949.

[75] State v. Becht, 23–1; Cole v. Aune, 40–80, 41+934; Daniels v. Palmer, 41–116, 121, 42+855; Frost v. St. Paul B. & I. Co., 57–325, 59+308; Bell v. Mendenhall, 78–57, 80+843; Dunham v. Johnson, 85–268, 88+737. See Conflict of Laws, 1539; Constitutional Law, 1665; Payment.

[76] Kinney v. Sharvey, 48–93, 96, 50+1025.

DEDICATION

Cross-References

See Public Lands, 7948; Roads, 8444.

IN GENERAL

2622. Definition—Dedication is the giving of land, or an easement therein, to the public for a public use [77]—a voluntary surrender or appropriation of land by the owner to public use.[78]

2623. Nature—History—The rule that a right in the public to use the land of an individual may be vested by dedication, by acts in pais, when such a right can vest in an individual only by grant, is anomalous and grows out of the necessity of the case—the fact that there is no grantee in esse capable of taking. The origin of the doctrine is traceable to customary rights of the public.[79]

2624. To whom and for what purposes—Private property cannot be acquired by dedication. A common-law dedication cannot be made to a railway company for public use for railway purposes.[80] It may be made for streets, alleys, parks, walks, pleasure grounds, squares, and public levees or landings.[81] It may be made for a street, though it is a cul de sac.[82] A dedication cannot be made to take a profit out of the land, or to use it for purposes of profit.[83]

2625. Intended use—The public takes secundum formam doni. What the nature of the dedication is must, therefore, in some way be made to appear by proper evidence.[84]

2626. Diversion from intended use—Legislative control—Where land has been dedicated to a specific, limited, and definite public use, the legislature has no power to destroy the trust, or divert the property to any other purpose inconsistent with the particular use to which it was dedicated. The state holds such property, not in a proprietary, but in a sovereign capacity, in trust for the use to which it was dedicated. While much must be left to the discretion of the legislature as to the best manner of regulating that use, yet its power of control over such property must be exercised in conformity to the purpose of the dedication. A grant of special privileges on land dedicated to a particular public use is always subject to the implied condition that it may be revoked whenever the needs of the public require, and the state or municipality has a large discretion in determining when such a condition has arisen; but such a grant, rightfully made, is not revocable at the mere arbitrary pleasure of the state or municipality. When such a grant has been acted on, the licensee has vested rights in the license which are subject only to the paramount interests of the public.[85]

2627. Pleading—Cases are cited below involving questions of pleading.[86]

[77] See Mankato v. Willard, 13–13(1); Watson v. Chi. etc. Ry., 46–321, 48+1129.

[78] Hurley v. West St. Paul, 83–401, 86+427.

[79] Watson v. Chi. etc. Ry., 46–321, 48+1129. See Mankato v. Willard, 13–13(1, 9); 16 Harv. L. Rev. 330.

[80] Watson v. Chi. etc. Ry., 46–321, 48+1129.

[81] Mankato v. Willard, 13–13(1); Poudler v. Minneapolis, 103–479, 115+274.

[82] Hanson v. Eastman, 21–509.

[83] Watson v. Chi. etc. Ry., 46–321, 48+1129.

[84] Hurley v. Miss. etc. Co., 34–143, 24+917.

[85] St. Paul v. Chi. etc. Ry., 63–330, 63+267, 65+649, 68+458. See Schurmeier v. St. P. etc. Ry., 10–82(59); Flaten v. Moorhead, 51–518, 53+807; Sanborn v. Van Duyne, 90–215, 96+41.

[86] Case v. Favier, 12–89(48) (trespass quare clausum fregit—defence of dedication new matter—answer held to plead a statutory and a common-law dedication); Buffalo v. Harling, 50–551, 52+931 (general allegation of dedication sufficient without showing whether dedication was a

BY PLATTING UNDER STATUTE

2628. Effect of platting—Where plats are executed and recorded as provided by the statute "every donation to the public or any person or corporation noted thereon shall operate to convey the fee of all land so donated, for the uses and purposes named or intended, with the same effect, upon the donor and his heirs, and in favor of the donee, as though such land were conveyed by warranty deed." [87] The operation of the plat as a grant cannot be extended beyond this.[88] The statute provides that "land donated for any public use in any municipality shall be held in the corporate name in trust for the purposes set forth or intended." [89]

2629. Fee does not pass—The fee does not pass by a statutory dedication.[90]

2630. Operates as a grant—A statutory dedication operates as a grant, and not by way of estoppel, as in the case of common-law dedications.[91]

2631. Compliance with statute—To effect a statutory dedication the statute authorizing it must be substantially, if not strictly complied with.[92]

2632. Acknowledgment—To entitle a plat to be recorded, or to constitute a statutory dedication, it must be acknowledged as required by the statute.[93]

2633. Approval by public authorities—Provision is made by statute for the approval of plats by public authorities before they can be recorded.[94]

2634. Stone or iron monuments—The statute provides that "at least three iron or stone monuments shall be placed at some corners in the ground, in such way that the lines between said monuments form two or more base lines from which to make future surveys. The monuments and the angles between said base lines shall be shown on the plat, as well as the north and south lines." [95]

2635. Plat must locate lands—A plat not showing the location of the platted lands cannot operate as a statutory dedication.[96]

2636. Donations must be noted on plat—Donations must be clearly noted on a plat in order to operate as a dedication or grant. The intention to donate or grant must clearly appear from the plat itself. A statutory dedication cannot rest partly upon a plat and partly in parol.[97]

2637. Title of dedicator—Our statute proceeds on the assumption that the dedicator has a title in fee.[98] A trustee to whom lands are patented under the town site act of 1844 has no power to dedicate them to public use.[99]

statutory or common-law dedication); Benson v. St. P. etc. Ry., 62–198, 64+393 (complaint held not to show a common-law dedication for a public street).

[87] R. L. 1905 § 3365; Schurmeier v. St. P. etc. Ry., 10–82(59, 78); Winona v. Huff, 11–119(75, 85); Hennepin County v. Dayton, 17–260(237, 241); Patterson v. Duluth, 21–493, 496. See Betcher v. Chi. etc. Ry., 124+1096.

[88] Patterson v. Duluth, 21–493. See State v. Chi. etc. Ry., 85–416, 89+1.

[89] R. L. 1905 § 3365; Winona v. Huff, 11–119(75, 86).

[90] Schurmeier v. St. Paul etc. Ry., 10–82(59); Winona v. Huff, 11–119(75); Harrington v. St. P. etc. Ry., 17–215(188, 200); White v. Jefferson, 124+373; Betcher v. Chi. etc. Ry., 124+1096.

[91] Downer v. St. P. etc. Ry., 22–251.

[92] Downer v. St. P. etc. Ry., 22–251; Menage v. Minneapolis, 104–195, 116+575.

[93] Baker v. St. Paul, 8–491(436); Winona v. Huff, 11–119(75).

[94] Laws 1907 c. 438; Nagel v. Dean, 94–25, 101+954. See Rice v. Highland I. Co., 56–259, 57+452 (general law inapplicable in Duluth—Sp. Laws 1889 c. 19 § 3 construed).

[95] Laws 1907 c. 438; Downer v. St. P. etc. Ry., 22–251; Buffalo v. Harling, 50–551, 52+931.

[96] Buffalo v. Harling, 50–551, 52+931. See Downer v. St. P. etc. Ry., 22–251.

[97] Hennepin County v. Dayton, 17–260 (237) (words "county block" held insufficient); Watson v. Chi. etc. Ry., 46–321, 48+1129 (words "reserved for right of way, line of S. M. R. R." held insufficient); Menage v. Minneapolis, 104–195, 116+575 (street).

[98] R. L. 1905 § 3365; Weisberger v. Tenny, 8–456(405); Carson v. Smith, 12–546(458, 480); Buffalo v. Harling, 50–551, 52+931.

[99] Buffalo v. Harling, 50–551, 52+931.

2638. Several owners joining—Where several persons, owning different lands in severalty, join in making a town plat of them, no one of such owners acquires by the plat alone, any easement or right of way, distinct from that granted to the public, in that part of the public streets marked on the plat, over lands of the owners.[1]

2639. Revocation—One making a statutory dedication cannot revoke it by his own act, though it has not been accepted by the public.[2]

2640. Failure to record plat—Penalty—The statute requires plats to be recorded in the office of the register of deeds, and imposes a penalty for noncompliance.[3] It does not, however, invalidate sales, or contracts for sales, of land by reference to unrecorded plats.[4] There can be no statutory dedication without recording the plat.[5]

2641. Construction of plats—The construction of plats is for the court.[6] Where a person surveys and plats his land into blocks, lots, streets, and alleys, all the lines upon such plat represent the intent of the owner, and the meaning expressed by such lines should be deemed as effectual as that of the words or language found thereon.[7] Where there is a discrepancy between a town plat, and the certificate attached to it, as to the block intended for a public square, the block which the entire plat shows to have been intended, will prevail over that indicated in the certificate.[8] In the construction of plats no part is to be regarded as superfluous or meaningless. Courts will give effect to the meaning expressed by their outlines as well as by their language.[9] Cases are cited below involving the construction of particular plats.[10]

2642. Vacation and correction of plats—Provision is made by statute for the vacation and correction of plats by judgment of court.[11]

AT COMMON LAW

2643. Statutory modes not exclusive—Statutory modes of dedication are not exclusive unless so expressly provided.[12]

2644. Requisites—The requisites of a common-law dedication are an intention on the part of the owner to dedicate the land to public use, an act or acts by him in pursuance of such intention, and an acceptance by the public.[13] No general abstract rule can be laid down as to what acts will constitute a dedica-

[1] Patterson v. Duluth, 21–493.

[2] See Weisberger v. Tenny, 8–456(405, 408); Baker v. St. Paul, 8-491(436, 438).

[3] R. L. 1905 § 3368; Laws 1907 c. 438.

[4] De Mers v. Daniels, 39–158, 39+98.

[5] Sanborn v. Minneapolis, 35–314, 29+126.

[6] Hanson v. Eastman, 21–509.

[7] G. N. Ry. v. St. Paul, 61–1, 63+96.

[8] Winona v. Huff, 11–119(75).

[9] Gilbert v. Emerson, 60–62, 61+820.

[10] Hanson v. Eastman, 21–509; Wilder v. De Cou, 26–10, 1+48; White Bear v. Stewart, 40–284, 41+1045; Middleton v. Wharton, 41–266, 43+4; Gilbert v. Eldridge, 47–210, 49+679; Duluth v. St. P. & D. Ry., 49–201, 51+1163; Buffalo v. Harling, 50–551, 52+931; Scranton v. Minneapolis, 58–437, 60+26; Smith v. St. Paul, 72–472, 75+708; State v. Chi. etc. Ry., 85–416, 89+1.

[11] R. L. 1905 § 3369; Laws 1909 c. 503; Weisberger v. Tenny, 8–456(405, 408) (statute affords remedy for determining whether public or private rights were acquired by platting); Rice v. Kelset, 42–511, 44+535 (statute authorizes court to alter plat); Kiewert v. Anderson, 65–491, 493, 67+1031 (necessity of recording order in office of register of deeds); Fowler v. Vandal, 84–392, 87+1021 (vacation largely discretionary—right to vacation not limited to owners who executed plat—vacation of streets or alleys connecting separate tracts—damages—judgment); Townsend v. Underwood's Second Addition, 91–242, 97+977 (power of district court under statute prior to Laws 1909 c. 503 unaffected by charter provisions); Koochiching Co. v. Franson, 91–404, 98+98 (judgment appealable within thirty days from notice).

[12] Sanborn v. Minneapolis, 35–314, 29+126.

[13] Wilder v. St. Paul, 12–192(116); Morse v. Zeize, 34–35, 24+287; Klenk v. Walnut Lake, 51–381, 53+703; Hurley v. West St. Paul, 83–401, 86+427.

tion.[14] A dedication may be either express or implied. In either case it is essential that there be a surrender or an appropriation of the land by the owner to the public use.[15]

2645. Intention to dedicate—Dedication is a question of intention. To constitute a dedication it must clearly appear that the owner intended to surrender or appropriate the land to a public use—to give it, or an easement therein, to the public for a public use.[16] Sometimes the intention is manifested by express declarations oral or written. But ordinarily it is to be inferred from acts and conduct other than declarations.[17] In other words, common-law dedications are either express or implied.[18]

2646. Evidence of intention to dedicate—Admissibility—Every fact tending to prove or disprove the intent is material.[19] Acts and declarations of the owner indicative of an intention to make a dedication, or the reverse, are admissible.[20] Any act of control or ownership over the land by the alleged dedicator or his grantees, about the time of the alleged dedication, is admissible.[21] The fact of the conveyance of the land by the owner as private property about the time of the alleged dedication is admissible.[22] Upon an issue as to the dedication of land for a highway, it may be shown that the landowner desired a public highway at or near the place in question and made efforts to secure its establishment. It may be shown that he invited or encouraged the public to use the place as a public highway.[23] It may be shown that he has worked out his road tax on the place, or performed, or suffered to be performed, work upon it at public expense, or acted upon the assumption of its existence, as by attempting to have it changed or vacated.[24] An intent to dedicate may be inferred from a long acquiescence in the public use.[25] A plat of the land, not executed in conformity to the statute, is admissible,[26] but the oral declarations of the parties signing it as to what they intended to offer by it to the public are inadmissible.[27] The non-payment of taxes by the landowner may be shown.[28] Records and files of a town clerk, showing an abortive attempt to establish a highway under the statute, have been held inadmissible.[29] Cases are cited below involving the admissibility of various forms of evidence.[30]

2647. Acceptance—Evidence—To constitute a common-law dedication an acceptance by the public is essential.[31] It need not be in any particular form.[32]

[14] Morse v. Zeize, 34–35, 24+287; Skjeggerud v. Mpls. etc. Ry., 38–56, 60, 35+572; Boye v. Albert Lea, 93–121, 100+642.

[15] Hurley v. West St. Paul, 83–401, 86+427.

[16] Case v. Favier, 12–89(48); Wilder v. St. Paul, 12–192(116); Mankato v. Meagher, 17–265(243, 247); Brisbine v. St. P. etc. Ry., 23–114, 131; Morse v. Zeize, 34–35, 24+287; Skjeggerud v. Mpls. etc. Ry., 38–56, 60, 35+572; White Bear v. Stewart, 40–284, 41+1045; Benson v. St. P. etc. Ry., 62–198, 201, 64+393; Benson v. St. P. etc. Ry., 73–481, 76+261; Hurley v. West St. Paul, 83–401, 86+427; Boye v. Albert Lea, 93–121, 100+642.

[17] Morse v. Zeize, 34–35, 24+287; Hurley v. West St. Paul, 83–401, 86+427.

[18] Hurley v. West St. Paul, 83–401, 86+427.

[19] Case v. Favier, 12–89(48); Mankato v. Meagher, 17–265(243).

[20] Wilder v. St. Paul, 12–192(116); Downer v. St. P. etc. Ry., 23–271; Morse v. Zeize, 34–35, 24+287; White Bear v. Stewart, 40–284, 41+1045; Hurley v. West St. Paul, 83–401, 86+427; Boye v. Albert Lea, 93–121, 100+642.

[21] Case v. Favier, 12–89(48).

[22] Id.

[23] Morse v. Zeize, 34–35, 24+287. See St. Paul etc. Ry. v. Minneapolis, 44–149, 46+324.

[24] Kennedy v. Le Van, 23–513; Brakken v. Mpls. etc. Ry., 29–41, 11+124; Morse v. Zeize, 34–35, 24+287.

[25] Klenk v. Walnut Lake, 51–381, 53+703; Boye v. Albert Lea, 93–121, 100+642.

[26] Mankato v. Meagher, 17–265(243); Downer v. St. P. etc. Ry., 23–271.

[27] Wayzata v. G. N. Ry., 46–505, 49+205.

[28] Menage v. Minneapolis, 104–195, 116+575.

[29] Klenk v. Walnut Lake, 51–381, 53+703.

[30] Wilder v. St. Paul, 12–192(116) (map made by third party showing land as a street held inadmissible); Ellsworth v. Lord, 40–337, 42+389 (record of public highway held inadmissible).

[31] Baker v. St. Paul, 8–491(436); Wilder

It may be express, in the form of a resolution of a municipal council.[33] It may be inferred from the acts of the public authorities in repairing, improving, or otherwise assuming control over the land, or from user by the public for such a length of time that the public accommodation and private rights would be materially affected by an interruption of the enjoyment.[34] The fact that the land is assessed as private property is admissible to disprove acceptance.[35] The fact that municipal authorities deflected the course of a sewer so as to avoid the premises has been held inadmissible to disprove acceptance.[36] A failure for about sixteen years to take actual possession of land dedicated for a park has been held not necessarily to prove a refusal to accept the dedication.[37]

2648. Operates by estoppel not by grant—A common-law dedication operates by estoppel and not by grant. Its effect is not to deprive a party of title to his land, but to estop him, while the dedication continues in force, from asserting a right of possession inconsistent with the uses and purposes for which it was made.[38]

2649. Title of dedicator—An owner may make a common-law dedication though he has not the legal title in fee.[39]

2650. Revocation—Until an acceptance by the public the dedicator may revoke his act of dedication. After acceptance it is irrevocable.[40]

2651. Element of time—Though time is often a material element, a dedication may be made instanter.[41]

2652. Platting and sale of lots—If an owner conveys land with reference to an unrecorded or defective plat, on which are marked streets and alleys, or other public places, he is taken to have dedicated such places to the public for the purposes indicated. He is estopped from denying the dedication as against his grantees, and the public authorities may accept the dedication,[42] or they may reject it.[43] His grantees are likewise estopped.[44]

2653. Fee does not pass—Reserved rights of dedicator—The fee does not pass by a common-law dedication. In a dedication for a highway the public

v. St. Paul, 12-192(116, 124); Benson v. St. P. etc. Ry., 73-481, 76+261. See Haramon v. Krause, 93-455, 101+791; Nagel v. Dean, 94-25, 101+954; Poudler v. Minneapolis, 103-479, 115+274. See Note, 129 Am. St. Rep. 576.

[32] Baker v. St. Paul, 8-491(436); Shartle v. Minneapolis, 17-308(284); Kennedy v. Le Van, 23-513; Brakken v. Mpls. etc. Ry., 29-41, 11+124.

[33] State v. St. P. etc. Ry., 62-450, 64+1140.

[34] Baker v. St. Paul, 8-491(436); Case v Favier, 12-89(48); Shartle v. Minneapolis, 17-308(284); Mankato v. Warren, 20-144(128); Kennedy v. Le Van, 23-513; Kelly v. Southern Minn. Ry., 28-98, 100, 9+588; Brakken v. Mpls. etc. Ry., 29-41, 11+124; Morse v. Zeize, 34-35, 24+287; State v. Eisele, 37-256, 33+785; St. Paul etc. Ry. v. Minneapolis, 44-149, 46+324; G. N. Ry. v. St. Paul, 61-1, 63+96; Boye v. Albert Lea, 93-121, 100+642; Jeppson v. Almquist, 94-403, 103+10.

[35] Wilder v. St. Paul, 12-192(116); Case v. Favier, 12-89(48). See Mankato v. Meagher, 17-265(243); Menage v. Minneapolis, 104-195, 116+575.

[36] Mankato v. Meagher, 17-265(243).

[37] Poudler v. Minneapolis, 103-479, 115+274.

[38] Schurmeier v. St. P. etc. Ry., 10-82 (59, 78); Wilder v. St. Paul, 12-192 (116); Mankato v. Willard, 13-13(1).

[39] Wilder v. St. Paul, 12-192(116); Mankato v. Willard, 13-13(1); Mankato v. Meagher, 17-265(243); Mankato v. Warren, 20-144(128).

[40] Baker v. St. Paul, 8-491(436); Wilder v. St. Paul, 12-192(116).

[41] White Bear v. Stewart, 40-284, 287, 41+1045; Benson v. St. P. etc. Ry., 62-198, 201, 64+393. See Morse v. Zeize, 34-35, 36, 24+287.

[42] Hurley v. Miss. etc. Co., 34-143, 24+917; Borer v. Lange, 44-281, 46+358; G. N. Ry. v. St. Paul, 61-1, 63+96; State v. St. P. etc. Ry., 62-450, 64+1140; Smith v. St. Paul, 69-276, 279, 72+104. See Wilder v. St. Paul, 12-192(116); Smith v. St. Paul, 72-472, 75+708; Nagel v. Dean, 94-25, 101+954; Poudler v. Minneapolis, 103-479, 115+274; Budds v. Frey, 104-481, 117+158.

[43] Nagel v. Dean, 94-25, 101+954.

[44] Poudler v. Minneapolis, 103-479, 115+274.

acquires a mere easement for public use as a highway, and the landowner retains the right to use the land for any lawful purpose compatible with the full enjoyment of the public easement. The purpose and use for which the dedication is made determines the extent of the right acquired by the public.[45] The public, or the authorities representing the public, cannot, under a common-law dedication, question the title of a claimant to the fee of the land, but may maintain an action to establish the public right where a claimant threatens to invade it, at a time or under such circumstances as may be unfavorable to its defence.[46]

2654. Use by public on business with owner—Where a way is kept open by the owner of lands for his own use and necessities, and as a means of access to his mill, factory, or other industry, and without which persons could not patronize him, the presumption arises that the way is kept and maintained by him for his own use and that of his patrons, and there is no presumption that he has dedicated it to public use, simply because he has left it open, and has not captiously prevented others from traveling it.[47]

2655. Evidence—Sufficiency—Evidence of a common-law dedication must be clear and strong.[48] Cases are cited below holding evidence sufficient,[49] or insufficient [50] to show a dedication.

2656. Law and fact—The question of dedication is one of fact, and for the jury unless the evidence is conclusive.[51]

[45] Schurmeier v. St. P. etc. Ry., 10–82 (59, 78); Wilder v. St. Paul, 12–192 (116); Mankato v. Willard, 13–13(1); Ellsworth v. Lord, 40–337, 42+389; Marchand v. Maple Grove, 48–271, 51+606; St. Paul v. Chi. etc. Ry., 63–330, 63+267, 65–649, 68+458; Hurley v. West St. Paul, 83–401, 408, 86+427. See St. Anthony Falls etc. Co. v. King, 23–186; Glencoe v. Reed, 93–518, 101+956.

[46] Mankato v. Willard, 13–13(1).

[47] Skjeggerud v. Mpls. etc. Ry., 38–56, 35+572.

[48] White Bear v. Stewart, 40–284, 41+1045; Benson v. St. P. etc. Ry., 73–481, 76+261.

[49] Ellsworth v. Lord, 40–337, 42+389; St. Paul etc. Ry. v. Minneapolis, 44–149, 46+324; Klenk v. Walnut Lake, 51–381, 53+703; State v. Woll, 51–386, 53+759; Hurley v. West St. Paul, 83–401, 86+427; Boye v. Albert Lea, 93–121, 100+642; Jeppson v. Almquist, 94–403, 103+10; Hruska v. Mpls. etc. Ry., 107–98, 119+491.

[50] White Bear v. Stewart, 40–284, 41+1045; Benson v. St. P. etc. Ry., 73–481, 76+261; Bellevue v. Hunter, 105–343, 117+445.

[51] Case v. Favier, 12–89(48); Brisbine v. St. P. etc. Ry., 23–114, 131; Downer v. St. P. etc. Ry., 23–271; Morse v. Zeize, 34–35, 24+287; Skjeggerud v. Mpls. etc. Ry., 38–56, 35+572; Boye v. Albert Lea, 93–121, 100+642.

DEEDS

Cross-References

See Covenants; Estoppel, 3176; Mortgages; Recording Act.

IN GENERAL

2657. Parties—A deed signed and sealed by two, only one of whom is described in it as grantor, is the deed of that one only.[52] A grantee is necessary and must be named in the deed.[53] Doubt as to the identity of a grantor arising from the omission of a middle initial of his name has been held resolved by his description in the body of the deed and the certificate of acknowledgment.[54] A grantee need not be named if he is described with sufficient definiteness and certainty, as where he is indicated by a title, or an office and there is but one such.[55] In the absence of fraud or mistake, the grantor cannot assert that the deed was intended for some one other than the grantee.[56]

2658. Date—The date of a deed is ordinarily not conclusive. A deed takes effect from the day of its delivery, not from the day of its date.[57]

2659. Consideration—Where, as one transaction, A executes a deed to B and B agrees to reconvey there is a sufficient consideration.[58] A grantor in a

[52] Merrill v. Nelson, 18–366(335).
[53] Allen v. Allen, 48–462, 51+473; Clark v. Butts, 73–361, 76+199; Mankato v. Willard, 13–13(1). See Clark v. Butts, 78–373, 81+11.
[54] Blomberg v. Montgomery, 69–149, 72+56.
[55] Gille v. Hunt, 35–357, 360, 29+2.
[56] Gray v. Stockton, 8–529(472).
[57] Swedish etc. Bank v. Germania Bank, 76–409, 79+399; Banning v. Edes, 6–402 (270).
[58] Wilson v. Fairchild, 45–203, 47+642.

deed with a covenant against incumbrances has been held bound by the statement in the deed as to the consideration, in an action on the covenant by a subsequent grantee without notice of the true consideration.[59] Parol evidence is generally admissible to show the true consideration.[60] A covenant by the grantee to deliver one-third of the crops to the grantor has been held a sufficient consideration.[61]

2660. Signing—The grantor need not sign with his own hand. A signature is sufficient if made by the grantor's authority or if adopted by him.[62] If the true owner executes a deed it is valid between the parties though the grantor signs an assumed name or the scrivener makes a mistake in the Christian name of the grantor.[63] A signing by an infant under the attestation clause has been held not an execution.[64] A signing by an attorney in fact of the grantor has been held sufficient.[65] A signing by an executor as "A. B., Executor" has been held to show that the deed was executed by him in his representative capacity.[66]

2661. Attestation—A deed without witnesses, or with but one witness, is valid between the parties, and as to third parties with notice.[67] Two witnesses are necessary to entitle a deed to record.[68]

DELIVERY AND ACCEPTANCE

2662. Necessity of delivery—A deed does not take effect until it is delivered.[69] But a sale of realty may be complete before the delivery of the deed.[70]

2663. Presumption—It is presumed that a deed was delivered at its date,[71] or at least not later than the date of its acknowledgment.[72] The presumption is rebuttable.[73] The production of a deed by the grantee,[74] or by an attorney or heir of the grantee,[75] makes a prima facie case as to delivery. By virtue of statute, a duly acknowledged deed, with the certificate of the proper officer indorsed thereon, in possession of and produced on the trial by a party claiming under it, is, if relevant to the issue, admissible in evidence without other proof, and is prima facie evidence, not only that it was signed by the grantor, but also that it was delivered.[76]

2664. What constitutes delivery—No particular ceremony is necessary to the delivery of a deed. It may consist in an act without words, or in words without any act; and if in words, it is immaterial whether they are spoken or written. Manual possession of the deed by the grantee is not essential. Whether there has been a delivery is rather a question of fact than of law, depending upon the intent of the grantor to vest an estate in the grantee. If a

[59] Randall v. Macbeth, 81–376, 84+119.
[60] See § 3373.
[61] Somerdorf v. Schliep, 43–150, 44+1084.
[62] Schmitt v. Schmitt, 31–106, 16+543; Conlan v. Grace, 36–276, 30+880; Woodcock v. Johnson, 36–217, 30+894; Lennon v. White, 61–150, 152, 63+620.
[63] Wakefield v. Brown, 38–361, 37+788.
[64] Shillock v. Gilbert, 23–386.
[65] Tidd v. Rines, 26–201, 2+497; Bigelow v. Livingston, 28–57, 9+31; Berkey v. Judd, 22–287.
[66] Babcock v. Collins, 60–73, 61+1020.
[67] Morton v. Leland, 27–35, 6+378; Johnson v. Sandhoff, 30–197, 14+889; Conlan v. Grace, 36–276, 30+880; Dobbin v. Cordiner, 41–165, 42+870; Roberts v. Nelson, 65–240, 68+14.
[68] R. L. 1905 §§ 3346, 3348; Parret v. Shaubhut, 5–323(258). See § 8280.
[69] Comer v. Baldwin, 16–172(151); Schwab v. Rigby, 38–395, 38+101; Babbitt v. Bennett, 68–260, 262, 71+22; Hooper v. Vanstrum, 92–406, 409, 100+229.
[70] Cummings v. Newell, 86–130, 90+311.
[71] Schweigel v. Shakman, 78–142, 145, 80–871, 81+529; Kammrath v. Kidd, 89–380, 95+213.
[72] Windom v. Schuppel, 39–35, 38+757; Banning v. Sabin, 51–129, 140, 53+1.
[73] Windom v. Schuppel, 39–35, 38+757; Banning v. Edes, 6–402(270).
[74] Hathaway v. Cass, 84–192, 87+610.
[75] Tucker v. Helgren, 102–382, 113+912.
[76] Id.

deed is so disposed of as to evince clearly the intention of the parties that it should take effect as such, it is sufficient.[77] The delivery of a deed is complete only when the grantor has put it beyond his power to revoke or reclaim it. The decisive question is, did the grantor intend that the instrument should presently and unconditionally pass out of his control and operate as a conveyance.[78] But it is not essential that the deed pass out of the hands or beyond the control of the grantor if, by acts or words, he expresses his will that it is for the use and benefit of the grantee, and the latter assents to the transaction.[79] A delivery to the grantee merely for examination is insufficient.[80] The question of delivery depends on the facts of the particular case.[81] A delivery may either be actual, that is, by doing something and saying nothing, or verbal, that is, by saying something and doing nothing, or it may be by both. But it must be by something answering to one or the other or both these, and with intent thereby to give effect to the deed.[82]

2665. Delivery to real party in interest—A delivery to the real party in interest is sufficient without a delivery to the person named as grantee.[83]

2666. Delivery to third person—The unconditional delivery of a deed by the grantor to a third party for the grantee is, when accepted by the latter, a complete delivery.[84] A delivery to a third person authorized by the grantee is sufficient.[85]

2667. Delivery after death—A valid delivery cannot be made after the death of the grantor.[86] But a grantor may deliver a deed to a third person to hold until the grantor's death and then to deliver to the grantee.[87]

2668. Recording—If a grantor leaves a deed with the register for recording, there is presumptively a delivery though it is done without the knowledge of the grantee.[88] But recording alone is not conclusive evidence of delivery.[89] If by agreement between the parties the grantor leaves a deed for record there is a delivery.[90]

2669. Return to grantor for correction—A delivery has been held not affected by a return of the deed to the grantor for correction.[91]

2670. Necessity of acceptance—Acceptance of the deed by the grantee is essential,[92] but where the delivery is to a third person for the use and benefit of

[77] Nazro v. Ware, 38–443, 38+359; Stevens v. Hatch, 6–64(19); Thompson v. Easton, 31–99, 16+542; Schmitt v. Schmitt, 31–106, 16+543; Gaston v. Merriam, 33–271, 275, 22+614; Tatge v. Tatge, 34–272, 275, 25+596, 26+121; Conlan v. Grace, 36–276, 281, 30+880; Lee v. Fletcher, 46–49, 48+456; James v. St. Paul, 72–138, 75+5; Hathaway v. Cass, 84–192, 87+610; Cummings v. Newell, 86–130, 90+311; Barnard v. Thurston, 86–343, 347, 90+574; Hooper v. Vanstrum, 92–406, 100+229; Chastek v. Souba, 93–418, 101+618; Dodsworth v. Sullivan, 95–39, 103+719.

[78] Babbitt v. Bennett, 68–260, 71+22; Barnard v. Thurston, 86–343, 347, 90+574; Streissguth v. Kroll, 86–325, 90+577.

[79] Stevens v. Hatch, 6–64(19).

[80] Comer v. Baldwin, 16–172(151).

[81] Cummings v. Newell, 86–130, 132, 90+311.

[82] Heiman v. Phoenix etc. Co., 17–153 (127).

[83] Holcombe v. Richards, 38–38, 35+714. See Crowley v. Nelson, 66–400, 69+321; Newell v. Cochran, 41–374, 43+84.

[84] Gaston v. Merriam, 33–271, 276, 22+614; Hathaway v. Cass, 84–192, 87+610; Barnard v. Thurston, 86–343, 347, 90+574.

[85] Freeman v. Lawton, 58–546, 60+667.

[86] Sauter v. Dollman, 46–504, 49+258; Barnard v. Thurston, 86–343, 90+574.

[87] Haeg v. Haeg, 53–33, 55+1114; Logenfiel v. Richter, 60–49, 53, 61+826; Wicklund v. Lindquist, 102–321, 113+631.

[88] Lee v. Fletcher, 46–49, 48+456; Gaston v. Merriam, 33–271, 276, 22+614. See Branch v. Dawson, 36–193, 198, 30+545.

[89] Babbitt v. Bennett, 68–260, 71+22; Hooper v. Vanstrum, 92–406, 100+229; Dodsworth v. Sullivan, 95–39, 103+719. See Woolson v. Kelley, 73–513, 516, 76+258; Nazro v. Ware, 38–443, 38+359.

[90] Schmitt v. Schmitt, 31–106, 16+543; Tatge v. Tatge, 34–272, 25+596, 26+121.

[91] Barkey v. Johnson, 90–33, 95+583.

[92] Comer v. Baldwin, 16–172(151); Streissguth v. Kroll, 86–325, 90+577; Bingham v. Bingham, 105–271, 117+488. See Lee v. Fletcher, 46–49, 48+456.

the grantee, his acceptance may be presumed if the grant is beneficial to him.[93] The acceptance may be subsequent to the delivery.[94]

EXCEPTIONS AND RESERVATIONS

2671. Definitions and distinctions—An exception is a clause in a deed whereby the grantor excepts something in esse at the time of the grant out of that which he has granted, so that the thing excepted does not pass at all. A reservation is something newly created or reserved out of the thing granted, that was not in esse before, as, for example, an easement. The two terms are used indiscriminately and the real intention of the grantor controls. An exception may be made in the form of a reservation, or a reservation in the form of an exception.[95]

2672. Exceptions—Words of inheritance are not essential to an exception. The exception need not be in the granting clause.[96] An exception of a fee must be expressed; it is never implied.[97] An exception is good where the granting part of the deed is in general terms. It is void when the exception is as large as the grant, or the excepted part is specifically granted.[98] An exception by reference to an unrecorded plat has been sustained.[99]

2673. Reservations—A deed has been construed as reserving an easement for a street; [1] a right to use grounds for a railway station and tracks for terminal facilities; [2] a railway right of way; [3] an alley; [4] a lien in the nature of a purchase-money mortgage; [5] a slip or waterway; [6] a raceway; [7] a right to flow lands; [8] mining privileges; [9] a passageway for teams and cattle.[10]

2674. Construction—While a reservation is to be more strictly construed than a grant, it includes the use of such means as are indispensably necessary to the exercise of the right reserved.[11] Where the parties to a reservation for an easement have failed sufficiently to express their meaning, their intent becomes a question of fact, to be ascertained by a court; and, in order to arrive at this intent, all of the surrounding circumstances may be inquired into and taken into consideration, including the fact, if it be one, that the estate was once held by the parties as tenants in common, was then partitioned, and that the reservation was incorporated into a deed of partition.[12]

CONDITIONS

2675. Conditions subsequent—It is well settled that if the act required does not necessarily precede the vesting of the estate, but may accompany or follow it, and if the act may as well be done after as before the vesting of the estate, or if, from the nature of the act to be performed and the time required for its performance, it is evidently the intention of the parties that the estate

[93] Barnard v. Thurston, 86–343, 90+574. See Holcombe v. Richards, 38–38, 35+714.
[94] Lee v. Fletcher, 46–49, 48+456; Gaston v. Merriam, 33–271, 276, 22+614.
[95] Elliot v. Small, 35–396, 29+158; Winston v. Johnson, 42–398, 45+958; Carlson v. Duluth etc. Ry., 38–305, 37+341.
[96] Babcock v. Latterner, 30–417, 15+689.
[97] Elliot v. Small, 35–396, 29+158; Carlson v. Duluth etc. Ry., 38–305, 37+341; Winston v. Johnson, 42–398, 401, 45+958.
[98] Witt v. St. P. etc. Ry., 38–122, 128, 35+862.
[99] Ambs v. Chi. etc. Ry., 44–266, 46+321.
[1] Elliot v. Small, 35–396, 29+158.
[2] St. Paul U. D. Co. v. St. P. etc. Ry., 35–320, 29+140.
[3] Carlson v. Duluth etc. Ry., 38–305, 37+341; Bendikson v. G. N. Ry., 80–332, 83+194. See Hedderly v. Johnson, 42–443, 44+527; Heinzman v. Winona etc. Ry., 75–253, 77+956.
[4] Winston v. Johnson, 42–398, 45+958.
[5] Doescher v. Spratt, 61–326, 63+736; Fryberger v. Berven, 88–311, 92+1125; Childs v. Rue, 84–323, 87+918.
[6] N. P. Ry. v. Duncan, 87–91, 91+271.
[7] Wilder v. De Cou, 26–10, 1+48.
[8] St. Anthony etc. Co. v. Minneapolis, 41–270, 43+56.
[9] See Farrell v. Howard, 52–76, 53+801.
[10] Callan v. Hause, 92–270, 97+973.
[11] St. Anthony etc. Co. v. Minneapolis, 41–270, 43+56.
[12] Callan v. Hause, 91–270, 97+973.

shall vest and the grantee perform the act after taking possession, then the condition is subsequent.[13] Conditions subsequent are not favored. A deed will not be construed to create a condition subsequent if it is susceptible of any other reasonable construction.[14] If parties intend to create a condition subsequent, the breach of which will result in a forfeiture, they must use language which clearly expresses such intention.[15] It is often said that conditions subsequent are to be strictly construed and taken most strongly against the grantor.[16] This rule applies more particularly in interpreting the contract, and in ascertaining whether the proper construction of the language thereof creates a condition subsequent or a mere covenant. When the intent of the parties is clear, their rights and liabilities in respect to such conditions are determined and enforced precisely as in other contracts.[17] It has been said that a court of equity will not lend its aid to divest an estate for the breach of a condition subsequent.[18] A condition subsequent may be created without an express provi the estate continues in the grantee until defeated by actual entry, or by some act equivalent to entry at common law, made for the purpose of claiming a forfeiture by some one having a right to terminate the estate.[20] The common-law sion for re-entry.[19] A deed upon condition subsequent conveys the fee, with all its qualities of transmission. Notwithstanding a breach of the condition ceremony of re-entry is unnecessary.[21] Cases are cited below holding various conditions either subsequent [22] or the reverse.[23]

2676. Restrictions on use of property—Cases are cited below involving the construction of conditions restricting the use of the property conveyed.[24]

2677. Conditions for support of grantor during life—A parent, who conveys realty to a child in consideration of the child's agreement to support and maintain the parent during the remainder of his life, whether the agreement of support constitutes a condition subsequent or not, may for a breach of the agreement, in a proper action, have the deed or conveyance canceled or set aside, or the amount due under the agreement made a charge or lien against the land, or such other relief as the equities between the parties, as shown by the evidence, may justify.[25]

[13] Chute v. Washburn, 44–312, 46+555.

[14] Farnham v. Thompson, 34–330, 26+9; Chute v. Washburn, 44–312, 46+555; Doescher v. Spratt, 61–326, 63+736; Bruer v. Bruer, 109–260, 123+813.

[15] Mpls. T. M. Co. v. Hanson, 101–260, 112+217.

[16] McCue v. Barrett, 99–352, 109+594; Chute v. Washburn, 44–312, 46+555.

[17] Hamel v. Mpls. etc. Ry., 97–334, 107+139; Mpls. T. M. Co. v. Hanson, 101–260, 112+217

[18] Chute v. Washburn, 44–312, 46+555.

[19] Johnson v. Paulson, 103–158, 114+739.

[20] Little Falls etc. Co. v. Mahan, 69–253, 72+69; Mpls. etc. Ry. v. Duluth etc. Ry., 45–104, 47+464.

[21] Sioux City etc. Ry. v. Singer, 49–301, 51+905.

[22] Chute v. Washburn, 44–312, 46+555; Mpls. etc. Ry. v. Duluth etc. Ry., 45–104, 47+464; Sioux City etc. Ry. v. Singer, 49–301, 51+905; Little Falls etc. Co. v. Mahan, 69–253, 72+69; Hamel v. Mpls. etc. Ry., 97–334, 107+139; McCue v. Barrett, 99–352, 109+594; Mpls. T. M. Co. v. Hanson, 101–260, 112+217; Johnson v. Paulson, 103–158, 114+739.

[23] Farnham v. Thompson, 34–330, 26+9; Soukup v. Topka, 54–66, 55+824; Doescher v. Spratt, 61–326, 63+736. See Hone v. Woodruff, 1–418(303); Mpls. etc. Ry. v. Duluth etc. Ry., 45–104, 47+464.

[24] Farnham v. Thompson, 34–330, 26+9 (a conveyance of land "for the purpose of erecting a church thereon only"); Chute v. Washburn, 44–312, 46+555 (use of land for railway terminal purposes); Sioux City etc. Ry. v. Singer, 49–301, 51+905 (condition against sale of intoxicating liquors on premises); Rowe v. Minneapolis, 49–148, 51+907 ("for the purpose of erecting the district schoolhouse upon, and for holding the school of said district in, and, when abandoned for such purpose, to revert back" to the grantors); Soukup v. Topka, 54–66, 55+824 ("for a road to and from said premises first above described"); Little Falls etc. Co. v. Mahan, 69–253, 72+69 (condition for use of land for manufacturing plant); Hamel v. Mpls. etc. Ry., 97–334, 107+139 (condition that land should be used for a railway station).

[25] Doescher v. Spratt, 61–326, 63+736; Childs v. Rue, 84–323, 87+918; Mpls. T. M. Co. v. Hanson, 101–260, 112+217; Johnson

2678. Nominal—By statute a merely nominal condition, without substantial benefit to the party to whom or in whose favor it is to be performed, may be disregarded.[26]

2679. Wavier of forfeiture—A forfeiture for a breach of a condition subsequent may be waived by acts as well as by express agreement, and once waived the grantor can never take advantage of it; but mere silence of the grantor after the breach is not sufficient to constitute a waiver of forfeiture. A waiver, however, may result from the failure of the grantor for an unreasonable time to act after knowledge of the breach, or where he consents to the breach.[27]

CONSTRUCTION AND EFFECT

2680. Grant of uses and dominion—Land passes—A grant of the uses of and dominion over land carries the land itself.[28]

2681. Implied grants—A grant carries with it by implication everything essential to the beneficial enjoyment of the thing granted.[29]

2682. Conveyance of buildings—If a deed conveys a building, without referring to the land on which it stands, the land will pass.[30]

2683. Quantity of land conveyed—No boundaries—A warranty deed of a definite quantity of land (no boundaries or monuments being given) on a designated side of a larger tract, which is duly described, conveys and warrants the full quantity named.[31]

2684. Contract of parties—Notice of terms—A deed is the contract between the grantor and the grantee, though the grantee does not sign it. If a grantee accepts a deed without reading it, and there is no fraud on the part of the grantor or mutual mistake as to its terms, he is bound by it.[32]

2685. Partial invalidity—The provisions of a deed have been held to be independent so that one was valid though the other was invalid.[33]

2686. Construction—The general principles of construction[34] are stated elsewhere.[35] Uncertainty in a deed is to be resolved in favor of the grantee.[36] Clauses are to be given effect though not in their technically proper place.[37] A deed and another instrument may be so connected as to be construed together.[38] A deed should not be so construed as to render the grant nugatory.[39] Where a

v. Paulson, 103–158, 114+739; Ebert v. Gildemeister, 106–83, 118+155; Bruer v. Bruer, 109–260, 123+813. See Pinger v. Pinger, 40–417, 42+289; Somerdorf v. Schliep, 43–150, 44+1084; Peters v. Tunell, 43–473, 45+867; Note, 130 Am. St. Rep. 1039.

[26] R. L. 1905 § 3234; Sioux City etc. Ry. v. Singer, 49–301, 51+905. See Morse v. Blood, 68–442, 444, 71+682.

[27] McCue v. Barrett, 99–352, 109+594.

[28] Soukup v. Topka, 54–66, 55+824.

[29] St. Anthony etc. Co. v. Minneapolis, 41–270, 274, 43+56; Gravel v. Little Falls I. & N. Co., 74–416, 423, 77+217; Swedish etc. Bank v. Conn. etc. Co., 83–377, 382, 86+420; Pine Tree L. Co. v. McKinley, 83–419, 86+414. See Rasicot v. Little Falls I. & N. Co., 65–543, 546, 68+212.

[30] McDonald v. Mpls. L. Co., 28–262, 9+765.

[31] Larson v. Goettl, 103–272, 114+840.

[32] Parsons v. Lane, 97–98, 117, 106+485; Blinn v. Chessman, 49–140, 145, 51+666.

[33] Sabledowsky v. Arbuckle, 50–475, 52+920.

[34] See Lawton v. Joesting, 96–163, 104+830; Witt v. St. P. etc. Ry., 38–122, 35+862; Grueber v. Lindenmeier, 42–99, 43+964; Cannon v. Emmans, 44–294, 46+356; Flaten v. Moorhead, 51–518, 53+807; Cogan v. Cook, 22–137; Austrian v. Davidson, 21–117; Bass v. Veltum, 28–512, 11+65; Rasicot v. Little Falls I. & N. Co., 65–543, 68+212; Thompson v. Baxter, 107–122, 119+797.

[35] See §§ 1816–1841.

[36] Witt v. St. P. etc. Ry., 38–122, 127, 35+862; Austrian v. Davidson, 21–117; Elliot v. Small, 35–396, 29+158; Winston v. Johnson, 42–398, 401, 45+958; Hedderly v. Johnson, 42–443, 44+527; Colter v. Mann, 18–96(79); Thompson v. Germania etc. Co., 97–89, 106+102; Eastman v. St. Anthony Falls etc. Co., 43–60, 44+882; Rasicot v. Little Falls I. & N. Co., 65–543, 68+212; White v. Jefferson, 124+373.

[37] Flaten v. Moorhead, 51–518, 53+807; Scofield v. Quinn, 54–9, 55+745.

[38] Scofield v. Quinn, 54–9, 55+745.

[39] St. Anthony etc. Co. v. Minneapolis, 41–270, 43+56.

deed conveys land, and as appurtenant thereto certain enumerated rights, privileges, and easements, but further provides that no rights, privileges, easements, or appurtenances shall pass by intendment or implication, the restrictive clause must be construed as merely excluding a grant by implication or intendment of any principal easements in grantor's land, but as not excluding those ancillary or secondary easements or rights which are necessary to the enjoyment of the rights or easements expressly granted. While a reservation in a deed in favor of the grantor is to be construed more strictly than a grant, yet such a reservation will include the use of such means as are indispensably necessary to the exercise of the right reserved.[40]

2687. Time of execution—Relation—All the several parts and ceremonies to complete a conveyance are to be taken together as one act and operate from the substantial part by relation.[41]

2688. Passing of interest—Delivery—Contingency—If by the terms of a deed the right or interest passes upon its delivery, subject to a contingency over which the grantor has no control, it is irrevocable, even if the enjoyment of the thing granted be postponed until his death.[42]

2689. When takes effect—A deed generally takes effect at the time of its delivery.[43] The time at which a deed was to take effect has been held a question for the jury.[44]

2690. Entry unnecessary—A deed passes the grantor's seizin without any actual entry by the grantee.[45]

2691. Collateral personal agreements—The effect of a deed to pass the title has been held not affected by the breach of a personal obligation of the grantee, which was the consideration for the deed.[46]

2692. Grantor to make known incumbrances—By statute it is the duty of the grantor to make known to the grantee, by an exception in the deed or otherwise, any incumbrances on the land.[47] The statute does not apply to a deed which passes no title or interest.[48]

2693. Particular deeds construed as to estate conveyed—A deed has been construed to grant a mere easement of a right of way for an alley, and not an estate in the land;[49] to grant a life estate;[50] to grant the fee;[51] to grant a right for a public park, and not the fee;[52] to grant an interest in land and not merely a license to cut timber thereon;[53] to grant certain boomage rights.[54]

QUITCLAIM DEEDS

2694. Nature—A quitclaim deed is a form of conveyance in the nature of a release, with words of grant as well as release. It is the mode of conveyance usually adopted when the grantor does not wish to be responsible for the title.[55]

2695. Force and effect—Under the present statute a quitclaim deed is sufficient to pass all the estate which the grantor could convey by a deed of bargain

[40] St. Anthony etc. Co. v. Minneapolis, 41–270, 43+56.

[41] Musser v. McRae, 44–343, 347, 46+673; Rogers v. Clark, 104–198, 222, 116+739.

[42] Thomas v. Williams, 105–88, 117+155.

[43] Swedish etc. Bank v. Germania Bank, 76–409, 79+399. See Cummings v. Newell, 86–130, 90+311 and § 2662.

[44] Kammrath v. Kidd, 89–380, 95+213.

[45] Smith v. Dennett, 15–81(59, 65).

[46] Peters v. Tunell, 43–473, 45+867.

[47] R. L. 1905 § 3344; Sandwich Mfg. Co. v. Zellmer, 48–408, 419, 51+379.

[48] McNaughton v. Carleton College, 28–285, 9+805.

[49] Sanborn v. Minneapolis, 35–314, 29+126.

[50] Grueber v. Lindenmeier, 42–99, 43+964.

[51] Hope v. Stone, 10–141(114); Soukup v. Topka, 54–66, 55+824.

[52] Flaten v. Moorhead, 51–518, 53+807.

[53] Bolland v. O'Neal, 81–15, 83+471.

[54] Rasicot v. Little Falls I. & N. Co., 65–543, 68+212.

[55] Brame v. Towne, 56–126, 57+454. See Note, 105 Am. St. Rep. 854.

and sale.[56] Prior to Laws 1875 c. 51 its force was more restricted.[57] It is now on the same footing as other deeds within the recording act.[58] It passes such rights and interests as the grantor possesses at the time, but he does not affirm that he is possessed of any title whatsoever. Such a deed is in legal effect a refusal to fix the extent of the interest held by the grantor and the grantee takes accordingly.[59] If a deed of bargain and sale, or quitclaim, on its face bears evidence that the grantors intended to convey, and the grantees expected to be invested with, a particular estate, the legal operation and effect of the instrument will be as binding upon the grantor and those claiming under him as if a formal covenant to that effect had been inserted.[60] It gives color of title within the occupying claimant's act.[61] A quitclaim deed has been held to release a contract to convey and causes of action thereon;[62] to release a mortgage;[63] to pass the interest of a purchaser at a foreclosure sale;[64] to pass the statutory interest of a wife;[65] to operate as an assignment of the statutory interest of a wife;[66] to pass the fee, a prior deed between the same parties being void for failure to describe the land.[67]

2696. Risks of title on grantee—Purchase price—The risks of title are on the grantee and he cannot recover back the purchase price if the title fails,[68] or refuse to pay the purchase price, in the absence of fraud, or mistake.[69]

2697. Subsequently acquired title—A quitclaim deed does not ordinarily pass a subsequently acquired title.[70] But if it clearly appears on the face of the deed that the grantor intended to convey, and the grantee expected to be invested with a particular estate, the legal operation and effect of the instrument will be as binding upon the grantor and those claiming under him as if a formal covenant to that effect had been inserted.[71]

DE FACTO ADMINISTRATORS—See Executors and Administrators, 3585.

DE FACTO CORPORATIONS—See Corporations, 1981, 2092.

DE FACTO COUNTIES—See Counties, 2245, 2253.

DE FACTO COURTS—See Courts, 2344.

DE FACTO JUDGES—See Judges, 4955.

DE FACTO JUSTICES OF THE PEACE—See Justices of the Peace, 5262.

DE FACTO OFFICE—See Public Officers, 8014.

[56] R. L. 1905 § 3340; Camp v. Smith, 2-155(131, 145); Wheeler v. Merriman, 30-372, 378, 15+665; Strong v. Lynn, 38-315, 37+448; Mueller v. Jackson, 39-431, 40+565; Caughie v. Brown, 88-469, 473, 93+656.

[57] Martin v. Brown, 4-282(201); Hope v. Stone, 10-141(114); Everest v. Ferris, 16-26(14); Marshall v. Roberts, 18-405(365); Gesner v. Burdell, 18-497(444); Johnson v. Robinson, 20-189(169). See Cogan v. Cook, 22-137, 143.

[58] See § 8302.

[59] Caughie v. Brown, 88-469, 473, 93+656. See Bremis v. Bridgman, 42-496, 44+793.

[60] Bradley E. Co. v. Bradley, 97-161, 106+110.

[61] Northern Invest. Co. v. Bargquist, 93-106, 100+636; Wheeler v. Merriman, 30-372, 15+665.

[62] Wood v. Rusher, 42-389, 44+127.

[63] Gille v. Hunt, 35-357, 29+2; Benson v. Markoe, 41-112, 42+787. See Benson v. Markoe, 37-30, 33+38.

[64] Tuttle v. Boshart, 88-284, 92+1117; Martin v. Fridley, 23-13.

[65] Dobberstein v. Murphy, 44-526, 47+171. Ortman v. Chute, 57-452, 59+533.

[66] Dobberstein v. Murphy, 64-127, 66+204.

[67] McKusick v. Washington County, 16-151(135).

[68] Bemis v. Bridgman, 42-496, 44+793.

[69] Hulett v. Hamilton, 60-21, 61+672; Washington etc. Co. v. Marshall, 56-250, 57+658; Mitchell v. Chisholm, 57-148, 153, 58+873; Maxfield v. Bierbauer, 8-413(367, 375).

[70] Swedish etc. Bank v. Germania Bank, 76-409, 79+399.

[71] Bradley E. Co. v. Bradley, 97-161, 106+110.

DE FACTO OFFICERS—See Corporations, 2111; Counties, 2314; Elections, 2916; Public Officers, 8012; Sheriffs and Constables, 8736; Towns, 9662.

DE FACTO ROAD—See Roads, 8442.

DE FACTO SCHOOL DISTRICTS—See Schools and School Districts, 8665.

DE FACTO STATE GOVERNMENT—See State, 8825.

DE FACTO VILLAGES—See Municipal Corporations, 6528.

DEFAULT—See note 72.

DEFAULT JUDGMENTS—See Judgments, 4989-5035, 5181.

DEFEASANCE—A condition relating to a deed or other instrument, on performance of which the instrument is to be defeated or rendered void; a collateral deed, made at the same time with a conveyance, containing conditions on the performance of which the estate created may be defeated.[73]

DEFECT—See note 74.

DEFECT OF PARTIES—See Parties, 7323.

DEGREE OF PROOF—See Evidence, 3473.

DELEGATE—See note 75.

DELEGATION OF JUDICIAL POWER—See Constitutional Law, 1590.

DELEGATION OF LEGISLATIVE POWER—See Constitutional Law, 1597-1599.

DELIBERATE—See note 76.

DELIVERY—See note 77.

DE MINIMIS NON CURAT LEX—See Appeal and Error, 417; New Trial, 7074; Taxation, 9175, 9424.

DEMISE—See Landlord and Tenant, 5383.

DEMONSTRATIVE EVIDENCE—See Evidence, 3255.

DEMONSTRATIVE LEGACY—See Wills, 10276.

DEMURRAGE—See Carriers, 1339a; Shipping, 8763.

DEMURRER—See Indictment, 4415; Judgments, 5183; Pleading, 7539.

DEMURRER TO EVIDENCE—See Dismissal, 2740.

DENSE—See note 78.

DENTISTRY—See Physicans and Surgeons, 7486.

DEPARTMENTS OF GOVERNMENT—See Constitutional Law, 1587.

DEPARTURE—See Pleading, 7627.

[72] Mason v. Aldrich, 36-283, 30+884. See Motions and Orders, 6501.

[73] Century Dict. See Butman v. James, 34-547, 27+66.

[74] Pye v. Mankato, 38-536, 38+621.

[75] Manston v. McIntosh, 58-525, 528, 60+672.

[76] Zearfoss v. Switchmen's Union, 102-56, 65, 112+1044.

[77] Thompson v. Easton, 31-99, 16+542. See Deeds, 2662.

[78] St. Paul v. Haugbro, 93-59, 62, 100+470.

DEPOSITARIES

2698. In general—Depositaries of public funds under the statutes are quasi public officers.[79] The relation between a depositary and the municipality is that of debtor and creditor. The money deposited does not remain the money of the municipality but becomes the property of the depositary. The depositary need not keep it in specie, but may lend or use it in any way desired.[80] Laws 1873 c. 38, providing for depositaries of county funds, was constitutional.[81]

2699. Designation—A depositary cannot be duly designated before his bond is given and approved. But he may be conditionally designated, the designation to become operative when the bond is given and approved.[82] The sureties on the bond of a de facto depositary cannot assert that he was not properly designated.[83]

2700. Exemption of public officer—Treasurers are exempted from liability for the loss of public funds deposited with depositaries.[84]

2701. Bonds—In general—The bond required of depositaries by statute is the exclusive security for deposits.[85] It is not the contract between the municipality and the depositary, but a security collateral to such contract. If it is not sufficient under the statute it may be enforceable as a common-law obligation.[86] The statute does not prescribe the conditions of the bonds of county depositaries. The county board may prescribe such conditions as will effect the purposes of the statute in providing for depositaries. The bond may be made to cover interest on deposits,[87] but it is not invalid if it fails to do so.[88] It has been held to cover deposits represented by time certificates of deposit.[89] That a bond is made payable to the county board instead of the county does not invalidate it. It is not operative until it is approved.[90] A bond signed by the cashier of a bank has been held the bond of the bank.[91] Bonds of county depositaries do not cover state funds.[92] Private depositaries are sometimes required to give bonds.[93]

2702. Liability of sureties—Sureties on the bond of a de facto depositary cannot assert that their principal was not properly designated,[94] or that their

[79] Hennepin County v. State Bank, 64–180, 66+143; St. Louis County v. Security Bank, 75–174, 77+815.

[80] Redwood County v. Citizens' Bank, 67–236, 69+912; St. Louis County v. Am. L. & T. Co., 67–112, 69+704.

[81] First Nat. Bank v. Shepard, 22–196.

[82] St. Louis County v. Am. L. & T. Co., 67–112, 69+704; Id., 75–489, 78+113. See Meeker County v. Butler, 25–363.

[83] Meeker County v. Butler, 25–363; Renville County v. Gray, 61–242, 63+635; Hennepin County v. State Bank, 64–180, 66+143; St. Louis County v. Am. L. & T. Co., 67–112, 69+704; Id., 75–489, 78+113.

[84] R. L. 1905 §§ 51, 510, 651, 774; State v. Bobleter, 83–479, 86+461 (statute since changed); Ramsey County v. Elmund, 94–196, 102+719.

[85] Vlissingen v. Clay County, 54–555, 56+251.

[86] St. Louis County v. Manufacturers' Bank, 69–421, 72+701.

[87] Fillmore County v. Greenleaf, 80–242, 83+157.

[88] Meeker County v. Butler, 25–363.

[89] Board v. Irish Am. Bank, 68–470, 71+674; St. Louis County v. Security Bank, 75–174, 77+815; St. Louis County v. Am. L. & T. Co., 75–489, 78+113.

[90] St. Louis County v. Am. L. & T. Co., 67–112, 69+704.

[91] St. Louis County v. Manufacturers' Bank, 69–421, 72+701.

[92] Swift County v. Knudson, 71–461, 74+158.

[93] See Nelson v. Armstrong, 93–449, 101+968, 102+207, 731 (bond of depositary of funds of creamery association—consideration—duration—findings as to deposits and amount due upon bankruptcy of depositary sustained).

[94] Meeker County v. Butler, 25–363; Renville County v. Gray, 61–242, 63+635; Hennepin County v. State Bank, 64–180, 66+143; St. Louis County v. Am. L. & T. Co.,

bond was deposited in the wrong place.[95] The general principles applicable to suretyship,[96] and official bonds,[97] are applicable here.[98]

2703. Pleading—Cases are cited below involving questions of pleading.[99]

2704. Evidence—Admissibility—A pass book kept by a depositary, containing its account with a county, has been held admissible.[1]

DEPOSITIONS

2705. Who may be compelled to give his deposition—The statute provides that "any witness may be subpoenaed and compelled to give his deposition, at any place within twenty miles of his abode, in like manner and under the same penalties as in the case of a witness in court." [2] The adverse party may be compelled to give his deposition,[3] but it is an open question whether he may be examined as if upon cross-examination.[4]

2706. Use as evidence—Objections—The statute regulates the use of depositions as evidence and objections thereto.[5] A party offering a deposition taken in this state in evidence must prove that a statutory cause existed for its being taken and still exists.[6] Objection to a deposition, upon the ground that the necessity for taking the same is not shown to exist at the time it is offered on the trial, should be made before the same is read in evidence; if not then made, it is waived.[7] A party is not bound to introduce a deposition which he has caused to be taken.[8] A deposition taken at the instance of one party and not used by him may be introduced by the adverse party. The latter makes such deposition his own, and as respects matters of substance the party at whose instance it was taken may raise objections to the interrogatories and answers as if the deposition had been taken at the instance of the adverse party.[9] Where the party at whose instance a deposition is taken has used the answers to the direct interrogatories, he may, if the adverse party declines to do so, read the answers to the cross-interrogatories.[10] A party offering evidence taken by

67–112, 69+704; Id., 75–489, 78+113.

[95] Renville County v. Gray, 61–242, 63+635.

[96] See §§ 9075–9113.

[97] See §§ 8018–8027.

[98] State v. Bobleter, 83–479, 86+461 (successive terms); Renville County v. Gray, 61–242, 63+635 (alteration of bond—knowledge of alteration—estoppel); Fillmore County v. Greenleaf, 80–242, 83+157 (alteration of bond—release of sureties); St. Louis County v. Security Bank, 75–174, 77+815 (insolvency of principal—failure to file claim—sureties not released); Redwood County v. Citizens' Bank, 67–236, 69+912 (successive terms—application of payments); Cosgrove v. McKasy, 65–426, 68+76 (payment by sureties—setoff against note to insolvent principal—contribution—equitable setoff); State v. Farmers' etc. Bank, 66–301, 69+3 (deposit in treasurer's name instead of name of state—sureties not released).

[99] Meeker County v. Butler, 25–363 (complaint on bond of county depositary sustained); St. Louis County v. Am. L. & T. Co., 67–112, 69+704 (complaint on bond of county depositary held insufficient in failing to allege a designation of the depositary before the approval of his bond or the receipt of deposits thereafter); St. Louis County v. Manufacturers' Bank, 69–421, 72+701 (id.).

[1] St. Louis County v. Am. L. & T. Co., 75–489, 78+113.

[2] R. L. 1905 § 4676.

[3] Hart v. Eastman, 7–74(50); Couch v. Steele, 63–504, 65+946.

[4] Couch v. Steele, 63–504, 65+946. See Leuthold v. Fairchild, 35–99, 27+503, 28+218; Turnbull v. Crick, 63–91, 65+135.

[5] R. L. 1905 § 4677. See Utley v. Clements, 79–68, 81+739 (withdrawal of objections).

[6] Atkinson v. Nash, 56–472, 58+39; Davison v. Sherburne, 57–355, 59+316; State v. Elliott, 75–391, 77+952.

[7] Schlag v. Gooding, 98–261, 108+11.

[8] Chapman v. Dodd, 10–350(277).

[9] Lowry v. Harris, 12–255(166); In re Smith, 34–436, 26+234; Byers v. Orenstein, 42–386, 44+129.

[10] Lowry v. Harris, 12–255(166).

deposition is not obliged to offer or to read the whole deposition. He may offer and read parts, subject to the order of the court that the whole be read at the same time.[11] Where depositions were taken on a stipulation which waived all objections except to the competency, relevancy, and materiality of the testimony, and the parties appeared, examined and cross-examined the witnesses and took and had noted certain objections to the testimony, it was held that one of the parties could not, on the trial, take other objections to other parts of the testimony.[12] A deposition taken at the instance of one of two interveners has been held admissible in favor of the other.[13] That an interrogatory and answer in a deposition are excluded for any sufficient reason is, as a general rule, no ground for excluding the whole deposition.[14] Where an answer in a deposition is in part proper and in part inadmissible, a party objecting must limit his objection to the part which is inadmissible.[15] Answers to interrogatories must be full, frank, explicit, and responsive, and if they are not their admission may be objected to on the trial.[16] It is held, for reasons that are manifest, that when the evidence of a witness is presented to the court in the form of a deposition it must appear that the answers to the cross-interrogatories are fully and fairly given, without the suppression of any fact material to the case. But to determine in any case whether an answer is full and responsive, reference must be had to the interrogatory. If that is general, the answer may be general. If the answer is as full and minute as the interrogatory, naturally and fairly interpreted, calls for, it is sufficient.[17] Where, in answer to a cross-interrogatory, as to the grounds of witness' opinion given in answer to a direct interrogatory, the witness merely refers to his answer to the direct interrogatory, in which he states such grounds fully, it is sufficient.[18] At common law depositions could not be received in evidence and can only be admitted by virtue of the statute or of a stipulation when all the requirements of the same are complied with. They are at best considered an unsatisfactory species of evidence, and courts have uniformly scrutinized them closely and exercised caution in their admission.[19]

2707. Necessity of use at time of trial—The statute provides that "no deposition shall be used if it appears that the reason for taking it no longer exists; but, if the party producing the deposition in such case shows sufficient cause then existing for using the same, it may be admitted."[20] A deposition of a witness, since deceased, may be read though after it was taken, and on the first trial of the action, he was sworn and examined as a witness.[21] Proof that the cause for taking the deposition assigned in the certificate of the justice no longer exists throws the burden of proof on the proponent to show that some sufficient cause exists at the time of the trial for using the deposition.[22]

2708. Use in other actions and on new trials—Different parties—Provision is made by statute for the use of depositions in a subsequent action for the same cause after the dismissal of the action in which they were taken.[23] The

[11] Watson v. St. P. C. Ry., 76-358, 79+308.
[12] Pioneer S. & L. Co. v. St. Paul etc. Co., 68-170, 70+979.
[13] Lougee v. Bray, 42-323, 44+194.
[14] Lowry v. Harris, 12-255(166); St. Anthony Falls, etc. Co. v. Eastman, 20-277 (249).
[15] Day v. Raguet, 14-273(203).
[16] McMahon v. Davidson, 12-357(232); Lowry v. Harris, 12-255(166); St. Anthony Falls etc. Co. v. Eastman, 20-277 (249); Stone v. Evans, 32-243, 20+149.
[17] McMahon v. Davidson, 12-357(232).
[18] St. Anthony Falls etc. Co. v. Eastman, 20-277(249).
[19] Walker v. Barron, 4-253(178); Chapman v. Dodd, 10-350(277); State v. Elliott, 75-391, 77+952.
[20] R. L. 1905 § 4680.
[21] Lamberton v. Windom, 18-506(455).
[22] Atkinson v. Nash, 56-472, 58+39.
[23] R. L. 1905 § 4681. See Gravelle v. Mpls. etc. Ry., 16 Fed. 435.

general rule is that the admissibility on the trial of a second action of a deposition taken in a former one is made to turn upon the identity of the matters in issue, and the opportunity of the party against whom the deposition is offered to cross-examine the witness, rather than upon the perfect mutuality between the parties.[24] Depositions taken in a cause may be used on a new trial without any order of court.[25] The deposition of a witness since deceased may be used on a second trial, though after it was taken, and on the first trial, he was sworn and examined as a witness.[26] A deposition has been held admissible against an intervener taken prior to his intervention, where he was given an opportunity to take further testimony for the purpose of fully meeting the effect of the deposition.[27]

2709. Taking under stipulation—It is provided by statute that "the parties to any action or proceeding, by stipulation in writing, may agree upon any other mode of taking depositions, either within or without the state, and, when taken pursuant to such stipulation, they may be used upon a trial with like force and effect in all respects as if taken upon notice or under commission."[28]

2710. Taking upon notice to adverse party—Provision is made by statute for the taking of the deposition of a witness within the state, or without the state and within any state or territory of the United States, upon a notice to the adverse party.[29] Originally the statute applied only to depositions to be taken out of the state, but by Laws 1885 c. 53 it was made applicable within the state and the amendment was held constitutional.[30]

2711. Taking under a commission—Provision is made by statute for the taking of the deposition of a witness without the state under a commission.[31] The procedure is largely regulated by rules of court.[32] Neither party has a right to be present or to have any one present for him, unless by consent, at the execution of a commission to take testimony in another state.[33] The testimony of a party to the action may be taken under a commission.[34] When a commission names several commissioners the return must show that all were present, or notified of the time and place of executing it.[35] The certificate should state directly that the witnesses were sworn before the commissioner, but this may be inferred from the whole certificate.[36] Where the same commissioner takes several depositions under one commission it is unnecessary to attach a certificate to each deposition.[37] When, in a commission to take testimony, an interrogatory is to be put if a previous question is answered in a particular way, and the question is not answered in that way, the interrogatory ought not to be put, and if put the answer ought not to be admitted.[38] Rules of court respecting the taking and return of depositions must be followed,[39] but a substantial com-

[24] Lougee v. Bray, 42-323, 44+194; Watson v. St. P. C. Ry., 76-358, 79+308; Alexander v. Edgerly, 92-263, 99+896. See Chapman v. Dodd, 10-350(277); Kosmerl v. Mueller, 91-196, 97+660.

[25] Chouteau v. Parker, 2-118(95).

[26] Lamberton v. Windom, 18-506(455).

[27] Kosmerl v. Mueller, 91-196, 97+660.

[28] R. L. 1905 § 4671. See, for forms of stipulations, Tyson v. Kane, 3-287(197); Day v. Raguet, 14-273(203); Molm v. Barton, 27-530, 8+765; In re Smith, 34-436, 26+234; Pioneer S. & L. Co. v. St. Paul etc. Co., 68-170, 70+979; Kosmerl v. Mueller, 91-196, 97+660.

[29] R. L. 1905 § 4666.

[30] Carner v. Chi. etc. Ry., 43-375, 45+713; Atkinson v. Nash, 56-472, 58+39.

[31] R. L. 1905 § 4669.

[32] Rules 26-28, District Court.

[33] Claflin v. Lawler, 1-297(231); Tyson v. Kane, 3-287(197); Hart v. Eastman, 7-74(50).

[34] Walker v. Barron, 4-253(178).

[35] Mair v. January, 4-239(169).

[36] Cooper v. Stinson, 5-201(160).

[37] Day v. Raguet, 14-273(203).

[38] Selden v. Bank of Commerce, 3-166 (108).

[39] Mair v. January, 4-239(169); Beatty v. Ambs, 11-331(234).

[40] Tyson v. Kane, 3-287(197); Cooper v. Stinson, 5-201(160).

pliance is generally sufficient.[40] The interrogatories and cross-interrogatories can neither be added to or diminished at the time of taking the deposition.[41] Where, upon the request of a party a cause is held open to permit application for a commission to obtain the evidence of a witness in a foreign country, the application should be made within a reasonable time, and with proper diligence thereafter.[42]

2712. Taking upon notice by a justice of the peace—Prior to the revision of 1905 provision was made by statute for taking depositions upon a notice served by a justice of the peace.[43]

2713. Taking de bene esse—Perpetuation of testimony—Statute—Our statutes provide for the taking of depositions to perpetuate the testimony of witnesses.[44] They are intended to take the place of the old equitable bill in perpetuam rei memoriam. Its object was to preserve evidence, to assist courts, and prevent future litigation, and especially to secure and preserve such testimony as might be in danger of being lost before the matter to which it related could be made the subject of judicial investigation. The origin of this practice, it is said, has been traced to the canon law, which, taking hold of men's consciences, extended its right to all cases in which it was important, in the interests of justice, to register testimony which would otherwise be lost. It was necessary, however, in the proceedings by bill in equity, to show some reason and necessity for perpetuating the testimony; as that the facts could not be investigated in a court of law, or that some impediment had been interposed to an immediate trial of the suit, or that there was danger that the evidence of a material witness might be lost by his absence or death. For these purposes, the common law did not afford any or sufficient remedy, and hence litigants, or intended litigants, invoked the auxiliary jurisdiction of equity in perpetuating the desired testimony as to some matters which would likely be necessary at some future time, if litigation therein should be instituted. An application under the statute in an election contest, has been held not to show any ground for taking the deposition of a city clerk with reference to an election and the ballot boxes therein.[45]

2714. Return of deposition—The statute prescribes the mode in which a deposition shall be returned to the court.[46] An irregular return has been held by a trial court a ground for suppressing a deposition on the trial.[47]

2715. Informalities—Motion to suppress—Waiver—By virtue of statute most defects or informalities in a deposition are waived, if objection is not made by a motion to suppress before trial.[48] Defects of a purely formal nature which could not have misled or prejudiced the adverse party are not a ground for suppressing a deposition or for excluding it at the trial.[49] The omission of the official seal to the certificate of authentication of a deposition taken before a notary in another state is an "informality" merely under the first part of the section and not sufficient to warrant the rejection of the deposition on the trial, though no notice of the return was served.[50] The effect of a failure to give notice of the return of a deposition is not to render it inadmissible but simply to leave the adverse party at liberty to make at the trial any objections that he

[41] Walker v. Barron, 4–253(178).
[42] Coombs v. Bodkin, 81–245, 83+986.
[43] G. S. 1894 §§ 5669–5678; Atkinson v. Nash, 56–472, 58+39.
[44] R. L. 1905 §§ 4685–4696.
[45] State v. Eliott, 75–391, 77+952.
[46] R. L. 1905 § 4674.
[47] Qualy v. Johnson, 80–408, 83+393.
[48] R. L. 1905 § 4678.
[49] Molm v. Barton, 27–530, 8+765; Osgood v. Sutherland, 36–243, 31+211; Smith v. Groneweg, 40–178, 41+939; Beckett v. Gridley, 67–37, 69+622; Rock Island P. C. v. Schoening, 104–163, 116+356.
[50] Rachac v. Spencer, 49–235, 51+920. See Everett v. Boyington, 29–264, 13+45.

could have made on a motion to suppress.[51] Where the time elapsing between notice of the filing of a deposition and the trial is less than ten days so that the adverse party has not the statutory time within which to move to suppress before the trial the effect is not to render the deposition inadmissible, but to leave the adverse party in the same position as if no notice had been given; that is to say, he may make at the trial all objections that he could have made upon a motion to suppress.[52] The following objections must be made by a motion to suppress, if an opportunity was given and cannot be raised on the trial: that the depositions contain the testimony of witnesses not named in the notice;[53] that the name of a witness was not properly given in the notice;[54] that the notice was not signed by the firm name of the attorneys appearing for the party taking the depositions;[55] that the deposition was written out in the third person;[56] that a notice did not state the residence of the witness or grounds for taking the deposition; that the certificate of the notary did not state that the testimony of the witness, which was taken down by a stenographer, was read over to the witness after being transcribed; and that the pages of the testimony were not properly signed by the witness.[57] Where a party is represented at the taking of a deposition and cross-examines the witness without any objection to the manner of taking the deposition he waives the objection that it was taken in a narrative form.[58] An objection that a deposition was taken without due notice may be raised for the first time on the trial.[59] Where depositions are taken upon notice of the party and the parties attend and take part in the examination of the witnesses, and there is no suggestion that the depositions are not full and complete and returned in the same condition in which they were taken, the omission of the witnesses to sign or mark each separate sheet containing the evidence may be treated as an irregularity merely, and the decision of the trial judge, who had an opportunity to inspect the original record, refusing to suppress the deposition, will not ordinarily be disturbed by the supreme court.[60]

DEPOSITS IN COURT

2716. Necessity of rule or order of court—In order to constitute a payment into court at common law, the payment must be made under a rule or order of the court to that effect, the reason for this being that a payment made under such rule is a judicial admission by the party making the payment of the facts implied by the payment in favor of his adversary. In the absence of such rule, it is no such admission.[61] A mere deposit with the clerk of court without any order of court or statutory authority is not a deposit in court and does not place the money in custodia legis.[62]

2717. Under statute—Conflicting claims—It is provided by statute that "when money or other personal property in the possession of any person, as bailee or otherwise, is claimed adversely by two or more other persons, and the

[51] Tancre v. Reynolds, 35–476, 29+171; Osgood v. Sutherland, 36–243, 31+211; Smith v. Groneweg, 40–178, 41+939.
[52] Tancre v. Reynolds, 35–476, 29+171.
[53] Thompson v. St. P. C. Ry., 45–13, 47+259.
[54] Waldron v. St. Paul, 33–87, 22+4.
[55] Osgood v. Sutherland, 36–243, 31+211.
[56] Hahn v. Bettingen, 81–91, 83+467.
[57] Rock Island P. C. v. Schoening, 104–163, 116+356.
[58] Paterson v. Chi. etc. Ry., 95–57, 103+621.
[59] Bergenthal v. Security S. Bank, 98–414, 108+301.
[60] Smith v. Groneweg, 40–178, 41+939.
[61] Davidson v. Lamprey, 16–445(402).
[62] Marine Nat. Bank v. Whiteman P. Mills, 49–133, 51+665.

right thereto as between such claimants is in doubt, the person so in possession, though no action be commenced against him by any of the claimants, may place the property in the custody of the court." [63] The statute applies to a bailee or custodian who makes no personal claim to the money or property. The relief provided is analogous to that granted by courts of equity at common law by the proceeding known as interpleader, and the rules and principles of law applicable thereto govern and control the statutory proceeding.[64]

DEPOTS—See Carriers, 1205.
DEPUTY—See Public Officers, 7991.

DESCENT AND DISTRIBUTION

Cross-References

See Conflict of Laws, 1555; Executors and Administrators; Homestead, 4220.

IN GENERAL

2718. Definition—Descent is the devolution of the realty of an intestate to his heirs. Distribution is the devolution of the personalty of an intestate to his heirs.[65]

2719. Statutory—The descent and distribution of the property of a decedent is a matter within the exclusive control of the legislature, which may give or withhold the right to inherit as it sees fit.[66]

2720. Presumption of intestacy—The presumption is that a person died intestate.[67]

2721. Heirs tenants in common—The heirs of an intestate take as tenants in common.[68]

2722. When title passes—The title to the realty of a decedent passes immediately upon his death to the heirs or devisees, subject to the claims of administration. The heirs or devisees have the right to the immediate possession, but the representative may take possession under the statute, if it is necessary to sell the property to satisfy the claims of creditors or the expenses of administration. The property is a secondary fund for that purpose.[69] The title to the personalty of a decedent passes to his personal representative when appointed, and constitutes the primary fund for the payment of the claims of administration.[70] The title to the personalty of an intestate passes immediately upon his death to his heirs, but if an administrator is appointed he becomes at once invested with the title.[71]

[63] R. L. 1905 § 4139.
[64] Austin v. March, 86–232, 90+384.
[65] State v. Willrich, 72–165, 75+123.
[66] Streeter v. Wilkinson, 24–288, 291; Wellner v. Eckstein, 105–444, 448, 117+830. See cases under § 4280.
[67] Sherin v. Larson, 28–523, 525, 11+70.
[68] Id.
[69] Paine v. First Div. etc. Ry., 14–65(49); State v. Probate Ct., 25–22, 25; Greenwood v. Murray, 26–259, 261, 2+945; Noon v. Finnegan, 29–418, 420, 13+197; Farnham v. Thompson, 34–330, 336, 26+9; Sloggy v. Dilworth, 38–179, 183, 36+451; Hill v. Townley, 45–167, 47+653; Sparrow v. Pond, 49–412, 418, 52+36; Scott v. Wells, 55–274, 277, 56+828; Byrnes v. Sexton, 62–135, 138, 64+155; Fleming v. McCutcheon, 85–152, 156, 88+433; Kern v. Cooper, 91–121, 97+648; Jenkins v. Jenkins, 92–310, 100+7; Lightbody v. Lammers, 98–203, 204, 108+846; Hanson v. Nygaard, 105–30, 38, 117+235; Wellner v. Eckstein, 105–444, 470, 117+830; Kolars v. Brown, 108–60, 121+229.
[70] State v. Probate Ct., 25–22, 25; Greenwood v. Murray, 26–259, 261, 2+945; Wellner v. Eckstein, 105–444, 470, 117+830.
[71] Granger v. Harriman, 89–303, 94+869; Kern v. Cooper, 91–121, 123, 97+648. See

2723. Contract—The statutes of descent and distribution may be superseded by contract.[72]

2724. Inheritance by murderer—Whether a murderer may inherit from his victim under the statute in an open question in this state.[73]

2725. Determination of descent without administration—Provision is made by statute for a proceeding to determine the descent of property where no administration has been had for five years after the death of the intestate, or property has been omitted in a final decree of distribution in administration.[74] It has been held that this statute is constitutional; that it is to be liberally construed; that it operates retroactively; that the decree provided for is conclusive on all parties interested;[75] that the probate court of any county wherein lies any part of the lands of a decedent in which a proper petition is first filed for a decree of distribution has jurisdiction to determine the descent of all lands of the decedent in this state and decree distribution thereof, though a part of them may lie in other counties; and that it is unnecessary that the land should be described in the order fixing the time and place of hearing the petition.[76] Laws 1885 c. 50, merely established a rule of evidence by which a "decree of heirship" was made prima facie evidence of certain facts, and cast the burden of disproving them upon the adverse party. After the repeal of that statute by the Probate Code, such "decrees" ceased to have any probative force whatever, and, even though admitted without objection, proved nothing.[77]

DESCENT OF REALTY OTHER THAN HOMESTEAD

2726. To surviving spouse—A surviving spouse is entitled to an undivided one-third of all lands other than a homestead of which the decedent at any time during coverture was seized, to the disposition whereof, by will or otherwise, such survivor did not consent in writing, except such as have been appropriated to the payment of decedent's debts by either execution or judicial sale, by general assignment for the benefit of creditors, or by insolvency or bankruptcy proceedings, and subject to all judgment liens.[78] If there are no surviving children, or issue of deceased children, a surviving spouse takes the entire estate,[79] unless there is a will, in which event, a surviving spouse, electing to take under the statute, is entitled to only one-third.[80] The interest of a surviving spouse under the statute is not the same thing as common-law dower or curtesy.[81] Our cases show that nothing but confusion and error result from construing the statute with reference to the rules relating to dower and curtesy. Some of our cases very inappropriately speak of the estate of a widow as a mere enlargement of dower, or otherwise assimilate it to dower.[82] It vests immediately upon the

Vail v. Anderson, 61–552, 64+47; Cooper v. Hayward, 71–374, 74+152; Wheeler v. Benton, 71–456, 74+154.

[72] Appleby v. Appleby, 100–408, 419, 111+305.

[73] Wellner v. Eckstein, 105–444, 117+830.

[74] R. L. 1905 §§ 3654–3657.

[75] Fitzpatrick v. Simonson, 86–140, 90+378.

[76] Chadbourne v. Alden, 98–118, 107+148.

[77] Irwin v. Pierro, 44–490, 47+154.

[78] R. L. 1905 § 3648; Laws 1907 c. 36. See, for the history of legislation on the subject in this state, Desnoyer v. Jordan, 27–295, 298, 7+140; Washburn v. Van Steenwyk, 32–336, 20+324; In re Gotzian, 34–159, 24+920; Morrison v. Rice, 35–436, 29+168; Roach v. Dion, 39–449, 40+512; Lindley v. Groff, 42–346, 44+196; Griswold v. McGee, 102–114, 126, 112+1020.

[79] R. L. 1905 § 3648(2); Laws 1907 c. 36 § 1(2).

[80] Kelly v. Slack, 93–489, 101+797.

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

[82] In re Gotzian, 34–159, 24+920; In re Rausch, 35–291, 28+920; Dayton v. Corser, 51–406, 53+717; Holmes v. Holmes, 54–352, 56+46; Griswold v. McGee, 102–114, 128, 112+1020; Stromme v. Rieck, 107–177, 119+948.

death of the decedent.[83] It is a freehold estate [84]—an estate in fee simple.[85] It is liable for the debts of the decedent,[86] but this liability is enforceable only in administration.[87] It is cut off by an execution sale prior to the death of the decedent.[88] It may possibly be lost by fraud, or by the murder of the decedent.[89] The election of a spouse to take under a will rather than under the statute is considered elsewhere.[90] So is the inchoate interest which one spouse has in the reality of another by virtue of this statute, while both are living.[91]

2727. Assent in writing to other disposition—The signature of the wife as a witness to an executory contract by the husband for the sale of his realty, she being in no way referred to in the body of the contract as a party thereto, does not constitute on her part a written consent to the sale within the meaning of R. L. 1905 § 3648.[92]

2728. To father and mother—If an intestate leaves no issue or spouse, his estate descends to his father and mother in equal shares, or, if but one survives, then to such survivor.[93] Prior to the revision of 1905 the father took the entire estate to the exclusion of the mother.[94]

2729. To next of kin—Nephews and nieces—The conditions under which an estate descends to next of kin and the order of its descent among them is prescribed by statute.[95] Next of kin in equal degree take per capita; in unequal degree per stirpes. Where the next of kin were six nephews and nieces, two of them being children of one deceased brother and four of them of another deceased brother, it was held that they all took equal shares.[96]

2730. Death of minor child—Descent to brothers and sisters—If any person dies leaving several children, or leaving one child and the issue of one or more other children, and such surviving child dies under age and not having been married, all the estate that came to the deceased child by inheritance from such deceased parent descends in equal share to the other children of the same parent, and to the issue of any such other children, who have died, by right of representation. If, at the death of such child, who dies under age and not having been married, all the other children of his said parent being also dead, and any of them having left issue, the estate that came to such child by inheritance from his said parent descends to all the issue of the other children of the same parent, according to the right of representation.[97]

DISTRIBUTION OF PERSONALTY

2731. Wearing apparel—Furniture, etc.—The statute provides that "the widow shall be allowed the wearing apparel of her deceased husband, his household furniture not exceeding five hundred dollars in value, and other personal property not exceeding the same amount, both to be selected by her; and she shall receive such allowances when she takes the provisions made for her by her

[83] Scott v. Wells, 55–274, 277, 56+828; Byrnes v. Sexton, 62–135, 138, 64+155.
[84] Griswold v. McGee, 102–114, 127, 112+1020.
[85] Hamilton v. Detroit, 85–83, 89, 88+419.
[86] Scott v. Wells, 55–274, 56+828; Lake Phalen L. & I. Co. v. Lindeke, 66–209, 68+974; Merrill v. Security T. Co., 71–61, 73+640; Johnson v. Minn. L. & T. Co., 75–4, 77+421; Kelly v. Slack, 93–489, 101+797.
[87] Goodwin v. Kumm, 43–403, 45+853; Johnson v. Minn. L. &. T. Co., 75–4, 77+421.
[88] See § 4280.
[89] Wellner v. Eckstein, 105–444, 117+830.
[90] See § 10301.
[91] See § 4279.
[92] Stromme v. Rieck, 107–177, 119+948.
[93] R. L. 1905 § 3648(3).
[94] Fox v. Hicks, 81–197, 206, 83+538.
[95] R. L. 1905 § 3648(5); Laws 1907 c. 36 § 1(5); Yates v. Shern, 84–161, 86+1004; Hemenway v. Draper, 91–235, 97+874. See, under a former statute, Lindley v. Groff, 42–346, 44+196.
[96] Staubitz v. Lambert, 71–11, 73+511.
[97] Laws 1907 c. 36 § 1(6, 7). See, under former statute, St. Paul G. Co. v. Kenny, 97–150, 106+344.

husband's will as well as when he dies intestate." [98] The right to this allowance is absolute and vests immediately upon the death of the husband, and without any selection by the widow. A selection is necessary only as a designation of the particular property she elects to claim. The abandonment of the husband by the wife, whether with or without cause, does not, in the absence of a divorce, forfeit her right to the allowance. If the widow dies before the property "allowed" to her by the statute referred to has been set apart by order of the probate court, or before she has selected the same, the property passes and right of selection survives to her personal representative. She may possibly waive her rights by declining or refusing to make a selection, or be estopped from asserting them by standing by and without protest permitting the property to be disposed of in administration proceedings.[99] A selection by a widow of such property as she was entitled to under this provision and a sale thereof, without any allowance by the probate court, has been sustained.[1]

2732. Allowance to widow and children pending administration—Provision is made by statute for an allowance to widow and children for living expenses pending administration proceedings.[2] It may be allowed before an inventory or appraisal of the estate,[3] and before an election to take under a will. It may be made out of rents and profits of the realty. A widow electing to take under a will is not entitled to an allowance in addition to the provisions of the will, as against other devisees.[4] She is not entitled to an allowance if she has deserted her husband without cause.[5] Certain statutory allowances received during administration, have been held not payments upon a widow's annuity under an antenuptial contract.[6]

2733. Residue to surviving spouse—Consent to other disposition—The statute provides that one-third of the residue shall descend "to the surviving spouse, if any, free from any testamentary disposition thereof to which such survivor shall not have consented in writing." [7] Prior to Laws 1903 c. 334, one spouse might disinherit the other as regards personalty.[8]

LIABILITY OF HEIRS

2734. Action against distributees on debts of decedent—Statute—By statute next of kin, heirs, devisees, and legatees are liable, in an action by a creditor, for the debts of the decedent.[9] An action will not lie under the statute on a claim which was provable in the probate court,[10] or on a claim which has been disallowed by commissioners.[11] It will lie on a contingent claim not provable in the probate court.[12] Recovery can be had against a distributee only in proportion to the part of the estate he has received.[13] The statute formerly provided that no action should be maintained unless commenced

[98] R. L. 1905 § 3653(1). See, as to effect of a disposition by will under former statute, In re Rausch, 35–291, 28+920.

[99] Sammons v. Higbie's Estate, 103–448, 115+265.

[1] Benjamin v. Laroche, 39–334, 40+156.

[2] R. L. 1905 § 3653(3). See State v. Steele, 62–28, 63+1117 (review of allowance).

[3] Strauch v. Uhler, 95–304, 104+535.

[4] Blakeman v. Blakeman, 64–315, 67+69.

[5] Sammons v. Higbie's Estate, 103–448, 452, 115+265.

[6] Desnoyer v. Jordan, 30–80, 14+259.

[7] R. L. 1905 § 3653(6); Hayden v. Lamberton, 100–384, 111+278.

[8] Johnson v. Johnson, 32–513, 515, 21+725; In re Rausch, 35–291, 28+920; State v. Hunt, 88–404, 93+314; Hayden v. Lamberton, 100–384, 111+278.

[9] R. L. 1905 §§ 4507–4522.

[10] Bryant v. Livermore, 20–313(271); Hill v. Nichols, 47–382, 50+367.

[11] Bryant v. Livermore, 20–313(271).

[12] McKeen v. Waldron, 25–466; Hantzch v. Massolt, 61–361, 63+1069; Lake Phalen L. & I. Co. v. Lindeke, 66–209, 68+974; Dent v. Matteson, 70–519, 73+416; Id., 73–170, 75+1041; Hunt v. Burns, 90–172, 95+1110.

[13] Hunt v. Grant, 87–189, 91+485. See Lake Phalen L. & I. Co. v. Lindeke, 66–209, 68+974.

within one year from the time the claim was allowed or established.[14] A judgment against two next of kin, and each of them, for a gross sum, has been held proper.[15] The liability of distributees is purely statutory, and the statute is strictly construed.[16]

2734a. Accounting between heirs—A testator bequeathed his property to his widow for life, and after her death to his three children. In an action for an accounting, brought by one of the children after the death of the widow, the absence of all evidence as to the nature and provisions of the final decree entered in probate proceedings in the estate does not, of itself, bar the right to an accounting between the heirs.[01]

DETACHED—See note 17.
DETECTIVES—See Witnesses, 10346.
DEVASTAVIT—See Executors and Administrators, 3581.
DEVICE—See note 18.
DEVISES—See Wills, 10275.
DIAGRAMS—See Evidence, 3259.
DICTIONARIES—See Statutes, 8968.
DIRECT, DIRECTLY—See note 19.
DIRECTED VERDICT—See Judgments, 5184; Trial, 9764–9770.
DIRECTION—See note 20.
DIRECTLY OR INDIRECTLY—See note 21.
DIRECTORY PROVISIONS—See Constitutional Law, 1580; Statutes, 8954; Taxation, 9178.
DISBURSEMENTS—See Costs, 2217, 2239.
DISCHARGE—See note 22.
DISCONTINUANCE—See Dismissal, 2740.
DISCOUNTING COMMERCIAL PAPER—See Usury, 9979, and note 23.

DISCOVERY

2735. Inspection of documents—Statute—The statute provides for an inspection and copy of documents in the possession of the adverse party.[24] An order for inspection may be granted before issue is joined.[25] It will not be granted for the inspection of inadmissible evidence.[26] An order is not appealable.[27]

2736. Bills of discovery—The courts of this state cannot entertain bills of discovery,[28] or order a party to answer written interrogatories prepared by the adverse party.[29]

DISCRETION—Judicial discretion is that part of the judicial power which depends, not upon the application of rules of law or the determination of questions of strict right, but upon personal judgment to be exercised in view

[14] G. S. 1894 § 5927; Markell v. Ray, 75–138, 77+788; Holden v. Turrell, 86–214, 90+395.
[15] Dent v. Matteson, 73–170, 75+1041.
[16] Hunt v. Burns, 90–172, 95+1110.
[01] Hart v. Hart, 126+133.
[17] Broadwater v. Lion etc. Co., 34–465, 26+455.
[18] State v. Smith, 82–342, 345, 85+12.
[19] McLean v. Burbank, 11–277(189, 199); Ermentraut v. Girard etc. Co., 63–305, 308, 65+635.
[20] Waite v. Frisbie, 45–361, 365, 47+1069.
[21] Nelson v. Johnson, 38–255, 36+868.
[22] Forrest v. Henry, 33–434, 438, 23+848.
[23] Farmers' etc. Bank v. Baldwin, 23–198; Stolze v. Bank of Minn., 67–172, 69+813; First S. Bank v. Thuet, 88–364, 93+1.
[24] R. L. 1905 § 4729.
[25] Harris v. Richardson, 92–353, 100+92.
[26] Powell v. N. P. Ry., 46–249, 48+907.
[27] Harris v. Richardson, 92–353, 100+92.
[28] Turnbull v. Crick, 63–91, 65+135.
[29] Leuthold v. Fairchild, 35–99, 27+503.

of the circumstances of each case.[30] It is a fundamental rule of appellate procedure that the determination of a trial court of a matter resting in its discretion will not be reversed on appeal except for a clear abuse of discretion.[31] If a trial court exercises its discretionary power wilfully, arbitrarily, or capriciously, or contrary to well established legal usage, its action may be reversed on appeal, for the power is not absolute but judicial.[32] It is sometimes said that judicial discretion must be guided and controlled by fixed legal principles,[33] but this is misleading.[34] A court is bound to exercise its discretion upon a proper application,[35] and it may be compelled to do so by mandamus.[36] Upon a motion addressed to the discretion of the court, an order which would have been sustained, if made in the exercise of discretion, is erroneous if made upon an incorrect apprehension of the law, and without the exercise of such discretion.[37] If relief lying in the discretion of the court is denied on the ground of want of power to grant it, the case will ordinarily be remanded with directions to the court to exercise its discretion.[38]

DISEASED ANIMALS—See Animals, 278.

DISMISSAL AND NONSUIT

Cross-References

See Judgments, 5180; Justices of the Peace, 5333; Trial, 9750–9763.

2737. Unknown at common law—A judgment of dismissal was unknown at the common law. Under our practice a judgment of dismissal has the same effect as a judgment of nonsuit at common law and not the effect of the dismissal of a bill in equity.[39]

2738. Form of judgment—It is usual, in entering a judgment of dismissal, to follow the language of the statute—"It is therefore adjudged that this action be and it is hereby dismissed." [40] But a judgment that plaintiff "take nothing" by his action is sufficient.[41] When the plaintiff is nonsuited it is improper to enter a judgment of dismissal "on the merits." [42] Where, in unlawful detainer proceedings before a justice, the plaintiff recovered possession, but on appeal to the district court the action was dismissed, it was held proper in the judgment of dismissal to award restitution of possession to the defendant.[43]

2739. To defeat plea of another action pending—When a defendant in his answer sets up the defence of a former action pending, the plaintiff may thereupon dismiss the first action and set up the fact of such dismissal in his reply: and this will constitute a good answer to such defence.[44]

[30] Century Dict. The absence of fixed rules is a characteristic of discretion. See Watkins v. Bigelow, 96–53, 55, 104+683. It has been said that judicial discretion, properly understood, requires a court in exercising it, to give effect, not to the will of the judge, but to the law. State v. McDonald, 101–349, 353, 112+278. See Appeal and Error, 399, 400; Judgments, 5012; Motions and Orders, 6494.

[31] See § 399.

[32] Id.

[33] Potter v. Holmes, 74–508, 77+416.

[34] See Dunnell, Minn. Pr. § 1890.

[35] Johnson v. Howard, 25–558; Leonard v. Green, 30–496, 16+399; Keyes v. Clare, 40–84, 41+453; Seibert v. Mpls. etc. Ry., 58–58, 57+1068; Nornborg v. Larson, 69–344, 72+564; Cornish v. Coates, 91–108, 97+579. See § 400.

[36] See § 5753.

[37] Leonard v. Green, 30–496, 16+399.

[38] Seibert v. Mpls. etc. Ry., 58–58, 57+1068; Nornborg v. Larson, 69–344, 72+564.

[39] Boom v. St. P. etc. Co., 33–253, 22+538; Collins v. Waggoner, 20 Wis. 48.

[40] See Andrews v. School Dist., 35–70, 27+303; McCune v. Eaton, 77–404, 80+355.

[41] Mast v. Matthews, 30–441, 16+155; Katz v. Am. B. & T. Co., 86–168, 90+376. See Andrews v. School Dist., 35–70, 27+303.

[42] McCune v. Eaton, 77–404, 80+355.

[43] Fish v. Toner, 40–211, 41+972.

[44] Page v. Mitchell, 37–368, 34+896; Nichols v. State Bank, 45–102, 47+462;

2740. Other modes of terminating action abolished—The statute provides that all other modes of dismissing an action, by nonsuit or otherwise, are abolished.[45] Discontinuance, retraxit, demurrer to the evidence and withdrawing a juror are all illegitimate modes of terminating an action in our practice. A directed verdict is a determination of the action on the merits and hence is not prohibited.[46]

2741. Dismissal by plaintiff before trial—Statute—At any time before the trial the plaintiff has an absolute right to dismiss his action, at least once, if a provisional remedy has not been allowed or counterclaim made or affirmative relief demanded in the answer.[47] The rule applies upon an appeal from a justice court [48] and after a new trial is granted.[49] He may dismiss without the consent of his attorney.[50] Where a cause has so far proceeded that the defendant has obtained a favorable decision or verdict on the merits of the action, plaintiff cannot, as a matter of right, after obtaining an order vacating the decision or verdict and granting a new trial, dismiss the action to the prejudice of defendant's right to review the order on appeal.[51] The phrase "before the trial" means before the commencement of the trial and not before the final submission of the case to the court or jury.[52] When a cause has been called for trial in its order, and a jury has been called to try the cause, the trial has been begun, even though the jury has not been sworn.[53] Merely calling a cause for trial is not the commencement of a trial.[54] The plaintiff cannot dismiss as of right after demurrer, and the due submission by both parties of the issues presented thereby to the court.[55] The entry of dismissal may be made either by the clerk at the request of the plaintiff or by the attorney of the plaintiff.[56] It is unnecessary that there should be an entry of judgment or payment of costs.[57] An entry in the clerk's register signed by the plaintiff's attorney that, "The above action is hereby dismissed" is sufficient.[58] To defeat a plea of a former action pending such an entry without a notice is sufficient.[59] In an action of claim and delivery, where the property is taken by the plaintiff and returned to the defendant on the proper bond a provisional remedy has been allowed and the plaintiff cannot dismiss of right even though the attorney for the defendant retains the notice of dismissal.[60] The rule is otherwise if the property is not taken by the plaintiff.[61] Where, in an action to recover certain personal property, the defendant obtained an order of interpleader and the appointment of a receiver to take possession of the property, the question whether plaintiff could dismiss of right was raised but not determined.[62] The relief to which the statute refers as affirmative is only that for which the defendant might maintain an action entirely independent of plaintiff's claim, and which he might proceed to

Althen v. Tarbox, 48–18, 50+1018; Wolf v. G. N. Ry., 72–435, 75+702.

[45] R. L. 1905 § 4195.

[46] Hunsden v. Churchill, 20–408(360); Walker v. St. P. C. Ry., 52–127, 53+1068.

[47] R. L. 1905 § 4195; Fallman v. Gilman, 1–179(153); Phelps v. Winona etc. Ry., 37–485, 35+273; Koerper v. St. P. etc. Ry., 40–132, 41+656.

[48] Fallman v. Gilman, 1–179(153).

[49] Phelps v. Winona etc. Ry., 37–485, 35+273.

[50] Anderson v. Itasca L. Co., 86–480, 91+12.

[51] Floody v. G. N. Ry., 104 517, 116+107.

[52] Bettis v. Schreiber, 31–329, 17+863. See Deuel v. Hawke, 2–50(37).

[53] St. Anthony Falls etc. Co. v. King, 23–186.

[54] Scheffer v. Nat. Life Ins. Co., 25–534; Mathews v. Taaffe, 44–400, 46+850.

[55] Day v. Mountin, 89–297, 94+887.

[56] Blandy v. Raguet, 14–491(368); Nichols v. State Bank, 45–102, 47+462.

[57] Blandy v. Raguet, 14–491(368); Page v. Mitchell, 37–368, 34+896; Nichols v. State Bank, 45–102, 47+462; Althen v. Tarbox, 48–18, 50+1018.

[58] Nichols v. State Bank, 45–102, 47+462.

[59] Id.

[60] Williams v. McGrade, 18–82(65).

[61] Blandy v. Raguet, 14–491(368).

[62] Hooper v. Balch, 31–276, 17+617.

establish and recover even if plaintiff abandoned his cause of action, or failed to establish it. In other words, the answer must be in the nature of a cross-action, thereby rendering the action defendant's as well as plaintiff's. Relief which is simply conditioned on recovery by the plaintiff is not affirmative.[63] A demand of affirmative relief without allegations of facts authorizing it is not enough to defeat the right to a dismissal.[64] The plaintiff cannot dismiss as of right if affirmative relief is demanded in the answer,[65] or a counterclaim made.[66] Where the defendant pleads a counterclaim the plaintiff cannot dismiss as of right.[67] The proviso in the statute against more than one dismissal as of right is merely prohibitory and a dismissal forbidden thereby does not in itself operate as a determination of the action on the merits.[68]

2742. Dismissal by the court before trial—The court may dismiss an action upon the application of either party, after notice to the other, and sufficient cause shown, at any time before the trial.[69] It may do so regardless of whether a provisional remedy has been allowed, a counterclaim made, or affirmative relief demanded in the answer.[70] If a plaintiff, after a demurrer to his complaint is overruled, unreasonably neglects to perfect judgment to which he is entitled, the defendant may have an order of dismissal.[71] An order of dismissal will be presumed to have been properly made in the absence of a complete record on appeal.[72] When the action is dismissed by the court before trial a formal order is of course necessary. A mere entry in the clerk's docket by the attorney of a party would be insufficient.

2743. Dismissal by consent before trial—The parties may always stipulate before trial for a dismissal and the sanction of the court is unnecessary. The only limitation is that the stipulation must be in writing. Upon the filing of such a stipulation the dismissal is effected by an entry in the clerk's register, made either by the clerk or one of the attorneys.[73] The effect of such a dismissal depends so completely on the wording of the stipulation that it is useless to do more than cite a few illustrative cases.[74]

2744. Voluntary nonsuit—At any time before final submission the plaintiff has an absolute right to "abandon" his action, that is, to take a voluntary nonsuit or dismissal.[75] If the plaintiff asks the court to be permitted to dismiss, it is of course discretionary with the court to grant or deny the application.[76] But if the plaintiff "abandons" his action—walks out of court at any time before final submission—the court is helpless to render any judgment against him except one of dismissal. It is not a contempt of court to refuse to go on with an action. A party cannot be compelled to submit proof.[77] By implication

[63] Koerper v. St. P. etc. Ry., 40–132, 41+656. See Kremer v. Chi. etc. Ry., 54–157, 55+928.

[64] Curtiss v. Livingston, 36–312, 30+814.

[65] R. L. 1905 § 4195; La Fond v. La Fond, 102–344, 113+896.

[66] R. L. 1905 § 4195; Griffin v. Jorgenson, 22–92; Holmgren v. Isaacson, 104–84, 87, 116+205.

[67] Griffin v. Jorgenson, 22–92.

[68] Walker v. St. P. C. Ry., 52–127, 53+1068.

[69] R. L. 1905 § 4195(2).

[70] Mathews v. Taaffe, 44–400, 46+850.

[71] Deuel v. Hawke, 2–50(37). See Sherrerd v. Frazer, 6–572(406).

[72] Mathews v. Taaffe, 44–400, 46+850.

[73] R. L. 1905 § 4195(2).

[74] Rogers v. Greenwood, 14–333(256); Eastman v. St. Anthony Falls etc. Co., 17–48(31); Hunsden v. Churchill, 20–408 (360); Grant v. Schmidt, 22–1; Herrick v. Butler, 30–156, 14+794; Rolfe v. Burlington etc. Ry., 39–398, 40+267; Banning v. Sabin, 41–477, 43+329; Cameron v. Chi. etc. Ry., 51–153, 53+199.

[75] R. L. 1905 § 4195(3). The right to take a voluntary nonsuit is not so great under the statute as at common law. See Schleuder v. Corey, 30–501, 16+401; Floody v. G. N. Ry., 104–517, 116+107, 932.

[76] Althen v. Tarbox, 48–1, 50+828; Lando v. Chi. etc. Ry., 81–279, 83+1089. See Kremer v. Chi. etc. Ry., 51–15, 52+977 (as to withdrawal of counterclaim); In re Iron Bay Co., 57–338, 59+346.

[77] If this is not the rule, the word "abandons" in the statute is meaningless. See,

our statutes give a party pleading a counterclaim an absolute right to have it tried without regard to the wishes of the adverse party. The plaintiff cannot defeat this right by taking a voluntary nonsuit. But he may nevertheless take a dismissal as to his own cause, leaving the cause of the adverse party for trial.[78]

2745. Dismissal on failure of plaintiff to appear—The statute provides that the court may dismiss an action "when the plaintiff fails to appear on the trial, and the defendant appears and asks for the dismissal." [79] A trial and judgment on the merits are not authorized.[80] A demurrer to the complaint cannot be ruled upon in the absence of the plaintiff.[81] If the defendant sets up a counterclaim the court cannot grant judgment for the defendant without proof if the plaintiff fails to appear.[82]

2746. Dismissal on demurrer—When a demurrer to a complaint is sustained without leave to amend the defendant is entitled to a judgment of dismissal.[83] Such a judgment is not a bar to a subsequent action on the same cause between the same parties based on a good complaint.[84]

2747. Dismissal for failure to obey order of court—A trial court has a general power to dismiss an action for the failure of the plaintiff to comply with its orders,[85] as, for example, when the plaintiff fails to bring in additional parties,[86] or to serve a summons and amended complaint in interpleader proceedings,[87] or to enter judgment.[88]

2748. Miscellaneous grounds for dismissal—The court may dismiss an action on the following grounds: that the complaint does not state facts sufficient to constitute a cause of action;[89] that an answer by way of counterclaim does not state a cause of action;[90] misjoinder of parties;[91] want of jurisdiction over the subject-matter of the action;[92] tender of rent and costs in unlawful detainer proceedings;[93] when the reply is a departure from the complaint;[94] want of capacity to sue;[95] defect of parties;[96] another action pending;[97] complaint in intervention not showing a right to intervene.[98]

2749. Who may move for dismissal—A non-resident defendant whose property has been attached cannot have an action dismissed on the ground that he has no interest in the property.[99] The fact that an action is dismissed as to the original defendant is not alone a reason for dismissing it as to an intervening defendant.[1] A stranger to an action cannot intervene and move for a dismissal.[2]

2750. Effect—There can be no valid judgment without an action or proceeding in which to render it, and a dismissal of the action, though a previous judg-

however, Floody v. G. N. Ry., 104–517, 116+107, 932.

[78] Adams v. Osgood, 55 Neb. 766, 76 N. W. 446; Grignon v. Black, 76 Wis. 674. See Griffin v. Jorgenson, 22–92.

[79] R. L. 1905 § 4195.

[80] Keator v. Glaspie, 44–448, 47+52; Diment v. Bloom, 67–111, 69+700.

[81] Boyle v. Adams, 50–255, 52+860.

[82] Newman v. Newman, 68–1, 70+776.

[83] Deuel v. Hawke, 2–50(37).

[84] See § 5183.

[85] Sherrerd v. Frazer, 6–572(406).

[86] Johnson v. Robinson, 20–170(153); N. W. etc. Co. v. Norwegian etc. Seminary, 43–449, 45+868.

[87] Hooper v. Balch, 31–276, 17+617.

[88] Deuel v. Hawke, 2–50(37); Sherrerd v. Frazer, 6–572(406).

[89] Osborne v. Johnson, 35–300, 28+510. See § 7682.

[90] See § 7686.

[91] See § 7326.

[92] See Ames v. Boland, 1–365(268); Stratton v. Allen, 7–502(409); Hagemeyer v. Wright County, 71–42, 73+628.

[93] George v. Mahoney, 62–370, 64+911.

[94] Webb v. Bidwell, 15–479(394); Townsend v. Mpls. etc. Co., 46–121, 48+682; Hoxsie v. Kempton, 77–462, 80+353.

[95] Dunham v. Byrnes, 36–106, 30+402.

[96] Rudd v. Fosseen, 82–41, 84+496; Mason v. St. P. etc. Ins. Co., 82–336, 85+13.

[97] Merriam v. Baker, 9–40(28). See §§ 4–12.

[98] Lewis v. Harwood, 28–428, 10+586.

[99] Whitney v. Sherin, 74–4, 76+787.

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

[2] Hunt v. O'Leary, 84–200, 87+611.

ment has been rendered therein, extinguishes action, judgment, and all, leaving the parties in the position they were in before the action was commenced.[3] The effect of a judgment of dismissal as a bar or estoppel is considered elsewhere.[4]

DISORDERLY CONDUCT

2751. Complaint—A complaint under an ordinance charging disorderly conduct, but failing to specify the acts constituting the offence, has been held insufficient.[5]

DISORDERLY HOUSE

2752. Definitions—A "house of ill fame" is a synonym for "bawdy house."[6] The term "disorderly house," as defined by the common law, is one of very wide meaning, and includes any house or place, the inmates of which behave so badly as to make it a nuisance, such as bawdy houses, houses of ill fame, gambling houses, dancing houses, and other like places.[7] A house of assignation is one form of a house of ill fame.[8]

2753. What constitutes keeping a disorderly house—The offence of keeping a house of ill fame consists in the public nuisance. The house need not have the reputation of being a house of ill fame. The illicit intercourse need not be carried on for gain. The keeper need not have the sole control of the house or have actual knowledge of specific acts of lewdness and give his consent thereto.[9] The keeping of a disorderly house, under Laws 1899 c. 158, may consist in its drawing together, idle, vicious, dissolute, and disorderly persons engaged in unlawful or immoral practices, thereby endangering the public peace and also promoting immorality. The keeper cannot excuse himself by alleging that the public has not been openly disturbed and has made no complaint. The decency of a neighborhood is habitually disturbed and disgraced when unfit and unbecoming acts are of common occurrence at a house therein, though they may not be so open and notorious as to disturb the public peace or quiet in that vicinity. It is enough that the acts performed are contrary to law and subversive of public morals.[10] Permitting acts of disorder for a single day in a house which has not acquired the character of a disorderly house may not be an offence.[11]

2754. Indictment—A warrant for keeping a disorderly place has been held sufficient though it charged the keeping but for a single day and did not refer particularly to the ordinance on which it was based.[12]

2755. Evidence—Admissibility—Cases are cited below involving the admissibility of evidence.[13]

[3] Sammons v. Pike, 105–106, 117+244.
[4] See § 5180.
[5] State v. Swanson, 106–288, 119+45.
[6] State v. Smith, 29–193, 12+524.
[7] State v. Grosofski, 89–343, 94+1077.
[8] State v. Bresland, 59–281, 61+450.
[9] State v. Smith, 29–193, 12+524. See R. L. 1905 § 4958.
[10] State v. Ireton, 89–340, 94+1078. See White v. Western A. Co., 52–352, 54+195 (a "sporting house" not necessarily a disorderly house).
[11] State v. Reckards, 21–47.
[12] Id.
[13] State v. Reckards, 21–47 (general disorderly character of a place held admissible under a charge of keeping it for a single day); State v. Smith, 29–193, 12+524 (reputation of house—lease of house from owner to accused—fact that accused lived in the house and exercised control over its inmates—indecent conduct of inmates and visitors—indecent acts of accused in presence of inmates and visitors); State v. Bresland, 59–281, 61+450 (reputation of house). See Egan v. Gordon, 65–505, 68+103 (id.).

2756. Evidence—Sufficiency—Evidence held sufficient to warrant a conviction.[14]

2757. Punishment—A defendant convicted under Laws 1899 c. 158 has been held punishable under G. S. 1894 § 6297 and not under Laws 1897 c. 108.[15]

DISSEIZOR—See note 16.

DISTRAINING ANIMALS—See Animals, 277.

DISTRESS FOR RENT—See Landlord and Tenant, 5435.

DISTRESS WARRANT—See Taxation, 9268.

DISTRIBUTEES (LIABILITY TO CREDITORS)—See Descent and Distribution, 2734.

DISTRICT COURT

Cross-References

See Justices of the Peace, 5320–5338; Municipal Courts; Probate Court, 7785.

2758. One district court throughout state—In a sense the several district courts constitute one court of general jurisdiction coextensive with the boundaries of the state. This one general court is divided into districts as a matter of convenience. With consent of the parties any civil action may be tried in any district of the state. So far as jurisdiction over the subject-matter is concerned, the several district courts stand upon perfect equality in civil cases.[17] So far as civil actions are concerned there is nothing in the constitution to prevent the legislature from authorizing the judge of one judicial district to hear and determine controversies which arise anywhere within the state, provided jurisdiction can be obtained over the defendant by service within the state.[18] It is provided by statute that with consent of the parties any judge of the district court may act in all matters brought before him from another district.[19]

2759. Jurisdiction—Original—The district court has original jurisdiction of all civil and criminal actions, regardless of the amount in controversy or the character of the offence, except in cases where exclusive original jurisdiction is given by the constitution to the supreme or probate courts.[20] It succeeds historically to the English court of King's Bench.[21] It is the one great court of general jurisdiction to which all may apply to have justice judicially administered, in every case where the constitution itself does not direct application to be made elsewhere. The authority possessed by the legislature to confer on other courts a portion of the jurisdiction vested by the constitution in the district court, does not imply the right to deprive the latter of such jurisdiction, but simply to authorize other courts to exercise it concurrently with the district court in such cases.[22] It has jurisdiction of civil actions though the amount in

[14] State v. Smith, 29–193, 12+524.

[15] State v. Grosofski, 89–343, 94+1077; State v. Ireton, 89–340, 94+1078.

[16] Carpenter v. Coles, 75–9, 77+424.

[17] State v. Dist. Ct., 52–283, 53+1157; Flowers v. Bartlett, 66–213, 68+976; Darelius v. Davis, 74–345, 77+214; Smith v. Barr, 76–513, 79+507; State v. Dreger, 97–221, 224, 106+904. See Gowan v. Fountain, 50–264, 266, 52+862.

[18] State v. Dreger, 97–221, 224, 106+904.

[19] R. L. 1905 § 94.

[20] Agin v. Heyward, 6–110(53); Fowler v. Atkinson, 6–503(350); Cressey v. Gierman, 7–398(316); Thayer v. Cole, 10–215 (173); Barber v. Kennedy, 18–216(196); State v. Kobe, 26–148, 1+1054; State v. Bach, 36–234, 30+764; State v. Russell, 69–499, 72+832.

[21] State v. Kent, 96–255, 256, 104+948; Lauritsen v. Seward, 99–313, 321, 109+404.

[22] Agin v. Heyward, 6–110(53); State v. Kent, 96–255, 256, 104+948; Lauritsen v. Seward, 99–313, 321, 109+404.

controversy is less than one hundred dollars.[23] It has jurisdiction in equity as well as at law.[24] Its equity jurisdiction is such as existed in the courts of this state at the time of the adoption of the constitution, and not such as the court of chancery of England formerly possessed.[25] It has jurisdiction of an action to recover the purchase price on the sale of land of minors under guardianship; [26] of an action to enforce a trust in the case of a purchase by a guardian with his ward's money, the guardian having died; [27] of an action for the specific performance of parol contracts for the conveyance of real or personal property; [28] of an action on an administrator's bond; [29] of an action against a county; [30] of an action by an executor against a co-executor to determine the amount of a disputed claim, or to force an account, or to foreclose a mortgage, or in any other case where justice requires it; [31] of an action involving a trust in which infants are beneficiaries.[32] It has no jurisdiction of matters over which the probate court has jurisdiction.[33]

2760. Power to issue writs—The district courts have power to issue writs of injunction, ne exeat, certiorari, habeas corpus, mandamus, quo warranto, and all other writs, processes, and orders necessary to the complete exercise of the jurisdiction vested in them by law, including writs for the abatement of a nuisance. Any judge thereof may order the issuance of such writs, and direct as to their service and return.[34]

2761. Power to pass title by judgment—The district court is authorized by statute to pass the title to realty by a judgment, without any other act to be done on the part of the defendant, when such appears to be the proper mode to carry its judgment into effect.[35] The statute is only applicable where it is necessary to pass title in order to carry the judgment of the court into effect.[36] Ordinarily a judgment in an action to quiet title does not operate proprio vigore to transfer title.[37]

2762. Jurisdiction in vacation or at chambers—In our practice the "court" as well as the "judge" may sit at chambers. When a court acts in vacation, that is, not at a regular session in term, it acts at chambers. In vacation or at chambers the court has jurisdiction to hear and determine all matters except the trial of issues of fact,[38] and it may try such issues with the consent of the parties.[39]

[23] Agin v. Heyward, 6–110(53); Fowler v. Atkinson, 6–503(350); Cressey v. Gierman, 7–398(316); Thayer v. Cole, 10–215 (173).

[24] Gates v. Smith, 2–30(21).

[25] State v. Ueland, 30–277, 281, 15+245.

[26] Peterson v. Baillif, 52–386, 54+185.

[27] Bitzer v. Bobo, 39–18, 38+609.

[28] Svanburg v. Fosseen, 75–350, 78+4; Stellmacher v. Bruder, 89–507, 95+324; Laird v. Vila, 93–45, 100+656.

[29] McAlpine v. Kratka, 98–151, 107+961.

[30] Bingham v. Winona County, 6–136 (82).

[31] Peterson v. Vanderburgh, 77–218, 79+828.

[32] Mayall v. Mayall, 63–511, 65+942.

[33] Boltz v. Schutz, 61–444, 64+48; Betcher v. Betcher, 83–215, 86+1; Duxbury v. Shanahan, 84–353, 87+944; Appleby v. Watkins, 95–455, 104+301, and cases under § 7770.

[34] R. L. 1905 § 92; Gowan v. Fountain, 50–264, 266, 52+862 (effect of former statute on territorial jurisdiction of court); Flowers v. Bartlett, 66–213, 68+976 (effect of former statute on jurisdiction of court to hear demurrer in action in another county); Schultz v. Talty, 71–16, 73+521 (authority to issue writ of certiorari); State v. Willrich, 72–165, 75+123 (id.); State v. Kent, 96–255, 104+948 (authority to issue writ of quo warranto).

[35] R. L. 1905 § 4391; Barton v. Drake, 21–299, 305; St. P. etc. Ry. v. Brown, 24–517, 575; Gowen v. Conlow, 51–213, 216, 53+365; Corson v. Shoemaker, 55–386, 394, 57+134; Minn. D. Co. v. Johnson, 94–150, 154, 102+381; Sache v. Wallace, 101–169, 179, 112+386.

[36] Sache v. Wallace, 101–169, 179, 112+386.

[37] Minn. D. Co. v. Johnson, 94–150, 154, 102+381.

[38] Rollins v. Nolting, 53–232, 54+1118; Hoskins v. Baxter, 64–226, 66+969; John-

2763. Terms of court—In this state terms of court have no such importance as at common law. A jury trial can only take place at a general or special term, but all other judicial business may be transacted at any time. The court is always open for the transaction of all business except the trial of issues of fact and such issues may be tried by the court at any time with consent of all the parties. Orders may be made at any time and judgments entered. Jury trials begun in term may be concluded after the term. The term, in our practice, is simply a convenience for the massing of business and does not go to the authority of the court to act, except in jury trials.[40] At common law the jurisdiction of the court in vacation was extremely limited. 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. In our practice the term has comparatively little significance. The summons is not made returnable at any term; the cause need not be brought on for trial at a term unless there is an issue of fact to be tried, and not even then if the adverse party will consent to a trial by the court out of term; and the judgment is not entered as of any term.[41]

2764. Court always open for certain business—The court is always open for the transaction of all business except the trial of issues of fact,[42] and with the consent of the parties the court may try such issues at any time.[43] All matters except the trial of issues of fact may be brought on before the court at chambers at any time either in or out of term, and without the consent of the adverse party.[44]

2765. Adjourned and special terms—The statute provides that "the judges of each district may adjourn court from time to time during any term thereof, and may appoint special terms for the trial of issues of law and fact, and, when necessary, direct grand or petit juries to be drawn therefor. Three weeks' published notice of every such special term shall be given in the county wherein it is to be held. They may also appoint special terms for the hearing of all matters except issues of fact, the order for which shall be filed with the clerk, and a copy posted in his office for three weeks prior to such term." [45] The district court has authority, under the statute, to discharge the grand jury impaneled at a regular general term, adjourn the term to a future day, and order a new venire of grand jurors to be summoned for such adjourned term. Such new venire may be drawn from the regular jury list selected by the county commissioners and certified and filed with the clerk of the court.[46] The judge or judges of the district court have no authority under our statutes to provide by a standing order for the holding, year after year, of regular terms of court for the trial of issues of fact. Their authority is limited to the appointment of special terms for that purpose [47] and for the hearing and determination of all matters except issues of fact.[48]

2766. Place of holding court—The district courts of this state have no authority or jurisdiction to convene for the trial of actions or proceedings involv-

son v. Velve, 86–46, 90+126; Bell v. Jarvis, 98–109, 112, 107+547. See Betts v. Newman, 91–5, 7, 97+371.

[39] R. L. 1905 § 4189.

[40] See R. L. 1905 §§ 4160, 4187–4189.

[41] Grant v. Schmidt, 22–1.

[42] R. L. 1905 § 4187.

[43] R. L. 1905 § 4189.

[44] Rollins v. Nolting, 53–232, 54+1118.

[45] R. L. 1905 § 99.

[46] State v. Peterson, 61–73, 63+171.

[47] Flanagan v. Borg, 64–394, 67+216.

[48] See Hoffman v. Parsons, 27–236, 6+797 (order for special term filed nunc pro tunc); Northwestern F. Co. v. Kofod, 74–448, 77+206 (order appointing special

ing issues of fact at any place in the county other than the county seat, except by the consent of the parties, or where expressly authorized by statute.[49]

2767. Several judges sitting together—Two or more judges of the same district may sit together in the trial of any cause or matter before the court. If there is a difference of opinion, that of the majority prevails. If the division is equal, that of the presiding judge, or, if he is not sitting, that of the judge senior in age, prevails.[50] Where two judges sit together the remaining judge may decide the case after his associate resigns.[51]

2768. Judge acting in another district—It is provided by statute that "whenever, in his judgment, the convenience or interest of the public for any reason shall require it, the governor may designate a judge of the district court to hold, or to assist in holding, a general or special term of such court in any county of a district other than his own, or to try and determine a particular motion, action, or proceeding pending therein." [52] The power of a judge to make orders in a matter pending in another district is considered elsewhere.[53]

2769. Effect on proceedings of change of judge or vacancy in office—It is provided by statute that "no process, proceeding, or writ shall abate or be discontinued by reason of any alteration in the time or place of holding court, or of any vacancy or change in the office of judge." [54]

2770. Change of district—A change in a judicial district by detaching a county therefrom has been held not to deprive a judge of the district of power to hear and determine, after the change, a motion for a new trial in an action pending before him in the detached county at the time of the change.[55]

2771. Term of judges—The term of office of a judge of the district court is six years.[56] He does not hold over until his successor is elected and qualified.[57]

2772. Compensation of judges—The constitution provides that the judges of the district court shall receive such compensation at stated times as may be prescribed by the legislature; which compensation shall not be diminished during their continuance in office, but they shall receive no other fee or reward for their services.[58]

2773. Rules of court—Provision is made by statute for the judges of the district court to meet at the state capitol each year and revise the rules of the court.[59] Under this statute the judges have no authority to prescribe a rule of practice which shall have the effect of depriving the supreme court of supervision and control over the records of the courts below, which are made with reference to a probable appeal to the supreme court, and which may result in incumbering the returns with much that is wholly unnecessary and useless.[60]

term in Ramsey county twenty years ago, and ever since acted upon, sustained in absence of proof of posting).

[49] Bell v. Jarvis, 98–109, 107+547.

[50] R. L. 1905 § 105; In re State Bank, 57–361, 59+315.

[51] Darelius v. Davis, 74–345, 77+214.

[52] R. L. 1905 § 94. See Ingram v. Conway, 36–129, 30+447 (what constitutes "convenience"—former statute); Drake v. Sigafoos, 39–367, 369, 40+257 (presumption of regularity and existence of facts warranting judge to act in another district); Darelius v. Davis, 74–345, 77+214 (change of judicial district—judge in former district held authorized to make and file a decision in new district); McCord v. Knowlton, 76–391, 79+397 (change of judicial district—judge of another district appointed to hear motion for a new trial in an action pending at time of change).

[53] See § 6498.

[54] R. L. 1905 § 101. See Darelius v. Davis, 74–345, 77+214.

[55] McCord v. Knowlton, 76–391, 79+397.

[56] Const. art. 6 § 4.

[57] State v. O'Leary, 64–207, 66+264.

[58] Const. art. 6 § 6. See Steiner v. Sullivan, 74–498, 77+286.

[59] R. L. 1905 § 104. See Jordan v. White, 20–91(77) (rules adopted under Laws 1862 c. 16 ceased with the repeal of that act by G. S. 1866 c. 122).

[60] State v. Otis, 71–511, 74+283.

In furtherance of justice rules may be relaxed or modified in any case, or a party relieved from the effect thereof, on such terms as may be just.[61] As to modes of procedure it is competent for the court to make and alter its rules as the ends of justice may require, when there are no statutory directions. But rules of court cannot override statutes.[62] In cases where no provision is made by statute or rule of court, the practice which has prevailed in the district courts of the state is followed.[63]

DISTURBANCE OF RELIGIOUS MEETING

2774. Malice essential—The word "wilfully" as used in G. S. 1894 § 6521 (R. L. 1905 § 4985), involves an element of maliciousness.[64]

DITCHES—See Drains.
DIVIDENDS—See Corporations, 2072.
DIVISIBLE CONTRACTS—See Contracts, 1727.

DIVORCE

Cross-References

See Appearance, 477; Judgments, 5131, 5189; Marriage.

GROUNDS

2775. Adultery—Illicit intercourse between a husband and an unmarried woman is adultery, within the statute regulating divorce.[65]

2776. Desertion—A desertion is a wilful abandonment by one party of the other without sufficient cause or excuse.[66] A denial of sexual intercourse is not a desertion.[67] A separation authorized by the judgment of a competent court is not a desertion,[68] nor is a separation consented to or acquiesced in.[69] Where the plaintiff refused to provide any other house for his wife than at his father's, where she could not live happily, and both parties showed a disinclination to live together, a divorce was denied.[70] The misconduct of one of the parties to the marriage contract, which will so far justify the injured party in leaving that the separation will not constitute wilful desertion, need not necessarily be such as to entitle the injured party to a divorce. It is sufficient if the party withdrawing from the cohabitation has reasonable grounds for believing, and does honestly believe, that by reason of the actual misconduct of the other it cannot be longer continued with health, safety, or self-respect. Wilful desertion in such a case does not begin until after the offending party has in good faith exhausted all reasonable efforts to right the wrong, and to satisfy the injured spouse that there will be no recurrence of the causes which induced the separa-

[61] R. L. 1905 § 104; Sheldon v. Risedorph, 23–518; Gale v. Seifert, 39–171, 39+69; Nye v. Swan, 42–243, 44+9; Gillette v. Ashton, 55–75, 56+576; Fitzpatrick v. Campbell, 58–20, 59+629; Rhodes v. Walsh, 58–196, 59+1000.

[62] Fagebank v. Fagebank, 9–72(61); State v. Parrant, 16–178(157).

[63] Rule 44, District Court. See Berkey v. Judd, 14–394(300, 303).

[64] State v. Dahlstrom, 90–72, 95+580.

[65] Pickett v. Pickett, 27–299, 7+144.

[66] Weld v. Weld, 27–330, 7+267.

[67] Segelbaum v. Segelbaum, 39–258, 39+492.

[68] Weld v. Weld, 27–330, 7+267.

[69] Hosmer v. Hosmer, 53–502, 55+630.

[70] Grant v. Grant, 64–234, 66+983.

tion, nor until the lapse of a reasonable time for a consideration of the overtures for a reconciliation.[71] A separation pending an action for divorce on another ground is not a desertion and cannot be reckoned as a part of the one-year limitation. Such a separation does not become wrongful until the entry of judgment denying the divorce sought.[72] A desertion by a wife has been held not interrupted by an action for divorce against her by her husband for adultery alleged to have been committed after the separation.[73] The desertion must continue for a full year next before the commencement of the action,[74] and must be continuous.[75]

2777. Habitual drunkenness—Habitual drunkenness must be proved to have existed for one year immediately preceding the commencement of the action.[76] An action for divorce on this ground has been held not barred by a prior limited divorce.[77] A divorce has been denied because both parties were at fault.[78]

2778. Cruel and inhuman treatment—Cruelty justifying a divorce may consist in actual or threatened personal violence;[79] or a malicious and groundless charge of adultery;[80] or a systematic course of ill treatment, consisting of continued scolding and fault-finding, using unkind language, studied contempt and petty acts of a malicious nature, resulting in injury to health;[81] or any serious misconduct which, unjustified in fact, is so plainly subversive of the relationship of husband and wife as to make it impossible to discharge the duties of married life and to obtain its objects, and to be so hopelessly inimical to the health or the personal welfare of the injured party as to render continuance of the relationship intolerable.[82] A denial of sexual intercourse is not sufficient.[83] Whether excessive sexual intercourse is sufficient is undetermined.[84] A sentence to the state reformatory is not "cruelty" within the statute.[85] Provocation which is disproportionate to the cruelty inflicted is no justification.[86] Where both parties are at fault a divorce will be denied.[87] Cases are cited below holding evidence sufficient,[88] or insufficient,[89] to justify a divorce for cruelty.

2779. Imprisonment—Prior to Revised Laws 1905, sentence to imprisonment in the state reformatory was not a ground for divorce.[90]

2780. Impotency—Impotency means an incurable incapacity to copulate or procreate.[91]

[71] Stocking v. Stocking, 76–292, 79+172, 668.
[72] Hurning v. Hurning, 80–373, 83+342.
[73] Wagner v. Wagner, 39–394, 40+360.
[74] Stocking v. Stocking, 76–292, 79+172, 668.
[75] Wagner v. Wagner, 39–394, 396, 40+360.
[76] Reynolds v. Reynolds, 44–132, 46+236.
[77] Evans v. Evans, 43–31, 44+524.
[78] Reibeling v. Reibeling, 85–383, 88+1103; Colahan v. Colahan, 88–94, 92+1130.
[79] Westphal v. Westphal, 81–242, 83+988; Cochran v. Cochran, 93–284, 101+179; Williams v. Williams, 101–400, 112+528.
[80] Wagner v. Wagner, 36–239, 30+766; Clark v. Clark, 86–249, 90+390. See Colahan v. Colahan, 88–94, 92+1130; Williams v. Williams, 101–400, 112+528.
[81] Marks v. Marks, 56–264, 57+651; Id., 62–212, 64+561; Williams v. Williams, 101–400, 112+528.
[82] Williams v. Williams, 101–400, 112+528; Bechtel v. Bechtel, 101–511, 112+883. See Heinze v. Heinze, 107–43, 119+489.
[83] Segelbaum v. Segelbaum, 39–258, 39+492.
[84] Grant v. Grant, 53–181, 54+1059.
[85] Dion v. Dion, 92–278, 100+4, 1101.
[86] Segelbaum v. Segelbaum, 39–258, 39+492.
[87] Reibeling v. Reibeling, 85–383, 88+1103; Colahan v. Colahan, 88–94, 92+1130.
[88] Westphal v. Westphal, 81–242, 83+988; Cochran v. Cochran, 93–284, 101+179; Williams v. Williams, 101–400, 112+528; Bechtel v. Bechtel, 101–511, 112+883.
[89] Reibeling v. Reibeling, 85–383, 88+1103; Baier v. Baier, 91–165, 97+671; Colahan v. Colahan, 88–94, 92+1130; Haver v. Haver, 102 235, 113+382.
[90] Dion v. Dion, 92–278, 100+4, 1101.
[91] Payne v. Payne, 46–467, 49+230.

DEFENCES

2781. Collusion—Collusion and agreement between the parties as to the judgment to be rendered does not render the judgment void.[92]

2782. Condonation—Condonation is applicable to cruelty as well as to adultery. It may be implied from a voluntary resumption of discontinued cohabitation. It is not to be so readily inferred against a wife as against a husband.[93] Condoned cruelty will be revived by subsequent misconduct by the guilty party of such a nature as to create a reasonable apprehension that the cruelty will be repeated, even if such misconduct is not in itself sufficient to warrant a divorce.[94] Subsequent adultery will revive condoned adultery.[95]

2783. Connivance—Connivance will defeat a right to divorce.[96]

2784. Recrimination—In an action for divorce upon any other ground than that of adultery, the adultery of the plaintiff is not a bar.[97]

ACTION FOR DIVORCE

2785. Separation pending action—The parties should live separately pending an action for divorce.[98]

2786. State interested—The state is an interested party in every action for divorce.[99]

2787. In rem—An action for divorce is in rem.[1]

2788. Venue—The statute requires actions for divorce to be brought in the county where the plaintiff resides,[2] but the requirement is not jurisdictional.[3] The court may order a change of venue for cause, but the defendant is not entitled to a change of venue as of right under R. L. 1905 § 4096.[4]

2789. Residence of plaintiff—The statutory requirement [5] that the plaintiff must have resided in this state for one year prior to the action is jurisdictional, and must be pleaded and proved. A judgment upon a complaint and findings that do not show such residence is void.[6] The statute is applicable to an action for annulment of a fraudulent marriage.[7] An "actual resident," within the meaning of the statute, is one having a legal domicil or established residence in this state, as distinguished from one having only a temporary abode here. Whether a departure from an established domicil in this state to and a residence in some other state results in an abandonment of the same as a legal residence depends upon the circumstances of each case, and the question is controlled largely by the intention of the person making the change.[8]

2790. Summons—The statute provides that copies of the summons and complaint shall be served on the defendant personally, whether within or without the state; but, if personal service cannot well be made, the court may order service by publication.[9] Orders for publication of summons will be granted

[92] In re Ellis, 55–401, 56+1056.
[93] Clague v. Clague, 46–461, 49+198.
[94] Cochran v. Cochran, 93–284, 101+179. See Peterson v. Peterson, 68–71, 70+865.
[95] Sodini v. Sodini, 96–329, 104+976.
[96] Wellner v. Eckstein, 105–444, 460, 117+830.
[97] Buerfening v. Buerfening, 23–563.
[98] Hurning v. Hurning, 80–373, 83+342.
[99] Olmstead v. Olmstead, 41–297, 43+67; True v. True, 6–458(315).
[1] Thurston v. Thurston, 58–279, 285, 59+1017.
[2] R. L. 1905 § 3577: Young v. Young, 18–90(72); Sprague v. Sprague, 73–474, 479, 76+268.
[3] Cochran v. Cochran, 93–284, 101+179.
[4] State v. Dist. Ct., 126+133. See, under former statute, Hurning v. Hurning, 80–373, 83+342.
[5] R. L. 1905 § 3575; Sprague v. Sprague, 73–474, 479, 76+268.
[6] Thelen v. Thelen, 75–433, 78+108; Salzbrun v. Salzbrun, 81–287, 83+1088.
[7] Wilson v. Wilson, 95–464, 104+300.
[8] Bechtel v. Bechtel, 101–511, 112+883.
[9] R. L. 1905 § 3579; Laws 1909 c. 434; Fowler v. Cooper, 81–19, 83+464 (proof of service—amendment of records); McHenry

only upon affidavit of the plaintiff stating facts showing that personal service cannot well be made.[10]

2791. Complaint—A complaint in an action for divorce must allege that the plaintiff has resided in the state for the statutory period.[11] It is unnecessary to allege that the plaintiff resides in the county where the action is brought, or to anticipate and negative the defences of condonation, procurement, or connivance.[12] In charging adultery the time, place, and person should be definitely alleged.[13] In charging cruelty it is unnecessary to allege every act of cruelty which the plaintiff wishes to prove.[14] In charging desertion it is necessary to allege wilful desertion for a full year next before the commencement of the action.[15] It is unnecessary to anticipate a claim for alimony or make any allegations as to the property.[16] It is allowable to allege facts as to fitness for the custody of children.[17] Facts justifying a limited divorce may be joined with facts justifying an absolute divorce and relief may be sought in the alternative.[18] Under a complaint for an absolute divorce on the ground of cruel and inhuman treatment, a court may grant a limited divorce. Good practice requires that a complaint should make it clear what kind of a divorce is sought.[19] A complaint has been held not to state a cause of action for habitual drunkenness, but to state a cause of action for cruel and inhuman treatment.[20]

2792. Answer—The unfitness of the plaintiff for the custody of children may be alleged.[21] An adultery committed after an answer may be set up by supplemental answer, and a divorce granted therefor without proof of the facts alleged in the original answer.[22] The defendant has thirty days in which to answer.[23] If the plaintiff seeks alimony the defendant may plead her adultery as a defence in whole or in part, to such claim.[24] Condonation is new matter to be pleaded by the defendant.[25]

2793. Trial at general terms—It is provided by rule of court that "all divorce cases shall be tried at general term in all counties wherein three or more general terms of court are appointed to be held during any one year." [26]

v. Bracken, 93–510, 101+960 (similar Wisconsin statute—order for publication held sufficient—proof of publication for "six successive weeks" held sufficient); Sodini v. Sodini, 94–301, 102+861 (personal service out of state authorized by statute—return of service sustained); Wilson v. Wilson, 95–464, 104+300 (service on insane defendant—appointment of guardian ad litem), Becklin v. Becklin, 99–307, 109+243 (publication of summons—revision of 1905 made no change in statutes—affidavit for publication showing that personal service cannot well be made, and containing the statements required by R. L. 1905 § 4111, with the return of the sheriff that the defendant cannot be found, is sufficient to justify the making of an order by the court directing service by publication and to authorize the publication of the summons without any other or further affidavit after the order has been made); State v. Doyle, 107–498, 120+902 (service by publication—fact that judgment roll does not show that personal service could not well be made does not render judgment subject to collateral attack—order allowing alimony held erroneous).

[10] Rule 20, District Court.
[11] See § 2789.
[12] Young v. Young, 18–90(72).
[13] Freeman v. Freeman, 39–370, 40+167.
[14] Segelbaum v. Segelbaum, 39–258, 39+492; Westphal v. Westphal, 81–242, 83+988.
[15] Stocking v. Stocking, 76–292, 79+172, 668.
[16] Sprague v. Sprague, 73–474, 483, 76+268.
[17] Vermilye v. Vermilye, 32–499, 18+832, 21+736.
[18] Wagner v. Wagner, 36–239, 30+766; Grant v. Grant, 53–181, 54+1059; Heinze v. Heinze, 107–43, 119+489.
[19] Heinze v. Heinze, 107–43, 119+489.
[20] Newman v. Newman, 68–1, 70+776.
[21] Vermilye v. Vermilye, 32–499, 18+832, 21+736.
[22] Sodini v. Sodini, 96–329, 104+976.
[23] R. L. 1905 § 3580; Fagebank v. Fagebank, 9–72(61).
[24] Buerfening v. Buerfening, 23–563.
[25] Williams v. Williams, 101–400, 112+528.
[26] Rule 21, District Court.

2794. Burden of proof—The defendant has been held to have the burden of proving that he had probable cause for making charges of adultery and that he made them in good faith.[27]

2795. Corroboration—Divorces cannot be granted on the sole confession, admissions, or testimony of the parties.[28] It is unnecessary that the plaintiff be corroborated as to each item of evidence. It is sufficient if the corroborating evidence tends in some degree to confirm the allegation relied upon for a divorce.[29]

2796. Evidence—Admissibility—In an action for divorce on the ground of cruelty the relations of the parties, their conduct and manner of life and acts of cruelty antedating those pleaded may be shown, not as a ground for divorce, but as confirmatory and cumulative evidence in support of the facts pleaded.[30] In such an action the whole conduct of the defendant toward the plaintiff may be shown.[31] On a charge of habitual drunkenness evidence of habitual drunkenness prior to the year alleged is admissible.[32] Acts of cruelty prior to a former action have been held inadmissible.[33]

2797. Either absolute or limited—Upon proper pleadings and findings the court may grant either an absolute or limited divorce.[34]

2798. Limited divorces—Facts justifying a limited divorce may be joined in a complaint with facts justifying an absolute divorce and relief may be sought in the alternative.[35] Upon findings of cruel and inhuman treatment that would support a judgment for either limited or absolute divorce it is a matter resting in the discretion of the trial court which relief should be granted. If it grants an absolute divorce the supreme court cannot modify the judgment on appeal so as to grant a limited divorce.[36] A judgment for a limited divorce is not a bar to an action for absolute divorce,[37] but a judgment denying an absolute divorce will bar an action for limited divorce upon the same grounds.[38] Cases are cited below involving various questions of pleading and practice in actions for limited divorce.[39]

2799. Judgment—Conclusiveness—A judgment of divorce is governed by the same rules as a judgment in an ordinary civil action, as regards conclusiveness and collateral attack.[40] A party may be estopped by his conduct from

[27] Wagner v. Wagner, 36–239, 242, 30+766.

[28] R. L. 1905 § 4746; True v. True, 6–458(315).

[29] Clark v. Clark, 86–249, 90+390; Westphal v. Westphal, 81–242, 83+988.

[30] Segelbaum v. Segelbaum, 39–258, 39+492; Westphal v. Westphal, 81–242, 83+988; Haver v. Haver, 102–235, 113+382.

[31] Marks v. Marks, 56–264, 57+651; Haver v. Haver, 102–235, 113+382.

[32] Reynolds v. Reynolds, 44–132, 135, 46+236.

[33] Peterson v. Peterson, 68–71, 70+865.

[34] Salzbrun v. Salzbrun, 81–287, 83+1088.

[35] Wagner v. Wagner, 36–239, 30+766; Grant v. Grant, 53 181, 54+1059; Salzbrun v. Salzbrun, 81–287, 83+1088; Heinze v. Heinze, 107–43, 119+489.

[36] Salzbrun v. Salzbrun, 81–287, 83+1088.

[37] Evans v. Evans, 43–31, 44+524.

[38] Wagner v. Wagner, 36 239, 30+766.

[39] Grant v. Grant, 53–181, 54+1059 (complaint held to show desertion and conduct rendering it unsafe and improper for plaintiff to cohabit with defendant); Smith v. Smith, 77–67, 79+648 (judgment modifying a prior judgment for allowances to wife, and releasing husband from future payments, sustained); Widstrand v. Widstrand, 87–136, 91+432 (divorce for cruel and inhuman treatment, and an allowance for separate support and attorney's fees, sustained); Baier v. Baier, 91–165, 97+671 (answer held not to bring case within statute authorizing court to grant judgment for separate support of wife, though denying divorce); Heinze v. Heinze, 107–43, 119+489 (under complaint on the ground of cruel and inhuman treatment, a court may grant a limited divorce—certain findings held not to justify a judgment for limited divorce).

[40] State v. Armington, 25–29; Morey v. Morey, 27–265, 6+783; In re Ellis, 55–401, 56+1056; Thurston v. Thurston, 58–279, 59+1017; Mahoney v. Mahoney, 59–347, 61+334; Kern v. Field, 68–317, 71+393; State v. Jamison, 69–427, 72+451; Thelen v. Thelen, 75–433, 78+108; McHenry

questioning the validity of a judgment.[41] A judgment for divorce may be vacated for cause.[42]

CUSTODY OF CHILDREN

2800. Custody of minor children—Children within the state are within the jurisdiction of the court, though the defendant is not within the state.[43] A proceeding to secure a modification of an order or judgment respecting the custody of children should be by petition and not by action. In such a proceeding the court is not restricted by the strict rules of evidence and procedure applicable to ordinary actions. An order placing a child in a boarding school has been sustained.[44] Where unrestricted custody of a child is given to the wife her domicil fixes that of the child.[45] A judgment awarding the custody of a child to the wife without allowance for its support may be subsequently modified so as to require the father to support the child.[46]

EFFECT

2801. Effect on property rights—Adultery or imprisonment of husband—Prior to Laws 1909 c. 292, the statute provided that "when a divorce is granted because of the husband's imprisonment or because of his adultery, the wife shall be entitled to the same interest in his lands as if he was dead, to be allowed in the same manner." [47]

ALIMONY

2802. Pendente lite—The allowance of alimony pendente lite is largely a matter of discretion with the trial court.[48] It may be allowed though the wife has some means of her own.[49] It is not allowable after judgment for the defendant, and it should not be allowed where it is obvious that the action cannot be sustained.[50] It may be allowed for the purpose of prosecuting or defending an appeal.[51] A motion for alimony pendente lite is collateral to the action for divorce. It is a special proceeding.[52]

2803. Permanent—The allowance of permanent alimony is largely discretionary with the trial court,[53] but it cannot exceed one-third the value of the husband's estate or income.[54] Prior to Laws 1901 c. 144 an allowance could not be made out of the professional income of a husband.[55] If the divorce is granted for the adultery of the wife no alimony can be allowed;[56] and if it is granted on another ground, the adultery of the wife may bar or diminish the allowance.[57] In fixing the amount of alimony the court may take into consider-

v. Bracken, 93–510, 101+960; Sodini v. Sodini, 94–301, 102+861; Sammons v. Pike, 108–291, 120+540.

41 Marvin v. Foster, 61–154, 63+484; Sammons v. Pike, 108–291, 120+540.

42 See § 5131.

43 Sprague v. Sprague, 73–474, 76+268.

44 Arne v. Holland, 85–401, 89+3.

45 Fox v. Hicks, 81–197, 83+538.

46 McAllen v. McAllen, 97–76, 106+100.

47 R. L. 1905 § 3591; Holmes v. Holmes, 54–352, 56+46; Keith v. Mellenthin, 92–527, 100+366; Sodini v. Sodini, 96–329, 104+976; Linse v. Linse, 98–243, 108+8; Glaser v. Kaiser, 103–241, 114+762.

48 Wagner v. Wagner, 34–441, 26+450; Id., 39–394, 40+360; Stiehm v. Stiehm, 69–461, 72+708; Baier v. Baier, 91–165, 97+671; Sodini v. Sodini, 94–301, 102+861.

49 Stiehm v. Stiehm, 69–461, 72+708.

50 Wagner v. Wagner, 34–441, 26+450. See Baier v. Baier, 91–165, 168, 97+671.

51 Wagner v. Wagner, 36–239, 30+766.

52 Schuster v. Schuster, 84–403, 407, 87+1014.

53 Segelbaum v. Segelbaum, 39–258, 39+492; Peterson v. Peterson, 68–71, 70+865; Widstrand v. Widstrand, 87–136, 91+432; Sodini v. Sodini, 96–329, 104+976.

54 R. L. 1905 § 3590; Wilson v. Wilson, 67–444, 70+154; Conklin v. Conklin, 93–188, 101+70. See Glaser v. Kaiser, 103–241, 114+762.

55 Wilson v. Wilson, 67–444, 70+154; State v. Jamison, 69–427, 72+451.

56 R. L. 1905 § 3590.

57 Buerfening v. Buerfening, 23–563.

ation the value of property fraudulently conveyed by the defendant.[58] An illegal contract to facilitate divorce has been held to bar a right to alimony.[59]

2804. Attorney's fees and suit money—The allowance of attorney's fees and other expenses of litigation is largely a matter of discretion with the trial court.[60] Proof of the value of the services of counsel need not be made where the allowance thereof is made at the close of the trial. The court may act on its own knowledge.[61] An allowance for the services of an attorney on a prior trial of the action has been sustained.[62] An allowance cannot be made after judgment for the defendant.[63]

2805. Revision of order or judgment—A court has discretionary power at any time to modify an order or judgment awarding alimony, whether it be for a gross amount, or payable in instalments. The power is to be exercised cautiously and only upon clear proof of facts showing that the changed circumstances of the parties render the proposed modification equitable. A modification will not be granted on account of facts occurring prior to the original order or judgment, unless it is shown that the applicant was excusably ignorant of them at the time.[64] The power is not enlarged by a reservation in the original order or judgment.[65] Findings of fact are unnecessary.[66]

2806. Independent of divorce—A wife who is justifiably living apart from her husband may maintain an action against him for her separate support, independent of an action for divorce.[67] By statute, in an action for limited divorce, the court may order an allowance for the separate support of a wife and her children, though it denies a divorce.[68]

2807. Action for alimony—Jurisdiction—Where a husband who was a resident of this state went into another state and secured a divorce which was voidable, but not void, it was held that the wife, who remained a resident of this state, might maintain an action for alimony to be awarded out of the property of her husband in this state, and that jurisdiction might be secured by making third parties, who were holding the property for the husband, defendants.[69] Where a husband who was a resident of this state secured a divorce while his wife was temporarily in another state, and alimony was awarded to her in the action, it was held that she could not subsequently maintain an independent action for alimony.[70]

2808. Exemptions—Alimony is not a debt or liability within the meaning of either the constitution or statute relating to exemptions.[71]

2809. As a lien—Homestead—The court is not authorized to make the amount of alimony a lien on personalty.[72] In making an adjustment or division of the property of the husband between the parties in an action for divorce, the court may set off to the wife a whole or a part of the homestead, or may, in lieu thereof, allow her alimony, and make it a specific lien on the homestead.[73]

[58] Dougan v. Dougan, 90–471, 97+122.
[59] McAllen v. McAllen, 97–76, 106+100; McAllen v. Hodge, 94–237, 102+707.
[60] Peterson v. Peterson, 68–71, 70+865; Stiehm v. Stiehm, 69–461, 72+708; Widstrand v. Widstrand, 87–136, 91+432; Baier v. Baier, 91–165, 97+671.
[61] Cochran v. Cochran, 93–284, 101+179.
[62] Schuster v. Schuster, 84–403, 87+1014.
[63] Wagner v. Wagner, 34–441, 26+450.
[64] R. L. 1905 § 3592; Semrow v. Semrow, 23–214; Weld v. Weld, 28–33, 8+900; Smith v. Smith, 77–67, 79+648; Barbaras v. Barbaras, 88–105, 92+522; Holmes v. Holmes, 90–466, 97+147; Bowlby v. Bowlby, 91–193, 97+669; McAllen v. McAllen, 97–76, 106+100.
[65] Weld v. Weld, 28–33, 8+900.
[66] Barabas v. Barabas, 88–105, 92+522.
[67] Baier v. Baier, 91–165, 97+671. See Thurston v. Thurston, 58–279, 286, 59+1017.
[68] R. L. 1905 § 3603. See Weld v. Weld, 27–330, 7+267; Id., 28–33, 8+900; Baier v. Baier, 91–165, 168, 97+671.
[69] Thurston v. Thurston, 58–279, 59+1017.
[70] Sprague v. Sprague, 73–474, 76+268.
[71] Mahoney v. Mahoney, 59–347, 350, 61+334.
[72] Conklin v. Conklin, 93–188, 101+70.
[73] Mahoney v. Mahoney, 59–347, 61+334.

In an action for divorce and alimony, and to have the amount of recovery declared a specific lien upon certain realty alleged to have been placed by defendant in the name of a third person, impleaded as a party to the action, to conceal his ownership and defraud plaintiff, the findings of the trial court were held justified by the evidence.[74]

2810. Pleading—Alimony is allowable without any foundation in the pleadings.[75] That the question of alimony was voluntarily litigated will be presumed on appeal, in the absence of a bill of exceptions or case.[76]

2811. Judgment for alimony—Enforcement—The statute provides that a judgment for alimony may be enforced by execution.[77]

DOCTORS—See Physicians and Surgeons.
DOCUMENTARY EVIDENCE—See Evidence, 3345.
DOCUMENTS—See Evidence, 3237.
DOGS—See Animals, 274, 275; Street Railways, 9022.

DOMICIL

Cross-References

See Attachment, 632; Limitation of Actions, 5610; Process, 7812.

2812. Definition—A person's domicil is the place of his fixed abode—his home.[78] Residence and domicil are not synonymous.[79] Residence is an act. Domicil is an act coupled with an intent. A person may have his domicil in one state and his residence in another.[80]

2813. Infants—The domicil of an infant is generally the domicil of its father.[81] In case of divorce or abandonment the domicil of an infant may be that of its mother.[82]

2814. Married women—The domicil of a husband is generally the domicil of his wife and family.[83]

2815. Presumptions—The place where one lives is presumptively his domicil.[84] A domicil, once shown to exist, is presumed to continue until the contrary is shown.[85]

2816. Change—An absence of intention to abandon a residence is equivalent to an intention to retain the existing one.[86] A domicil of choice is more easily changed than one of origin.[87] A domicil once acquired does not necessarily continue until another has been acquired.[88]

2817. Evidence—Admissibility—A person's statements of intention are admissible.[89]

DOMINION—See Property, 7851.
DOUBLE VOTING—See Elections, 2995.

[74] Rand v. Rand, 103-5, 114+87.
[75] Sprague v. Sprague, 73-474, 76-268.
[76] Conklin v. Conklin, 93-188, 101+70.
[77] Maki v. Maki, 106-357, 119-51.
[78] Venable v. Paulding, 19-488(422); Kerwin v. Sabin, 50-320, 322, 52+642. See 19 Harv. L. Rev. 135.
[79] Keller v. Carr, 40-428, 42+292; Lawson v. Adlard, 46-243, 48+1019; Albion v. Maple Lake, 71-503, 74+282; Bechtel v. Bechtel, 101-511, 112+883.
[80] Keller v. Carr, 40-428, 42-292. See Lusk v. Belote, 22-468.
[81] Williams v. Moody, 35-280, 28+510; State v. Streukens, 60-325, 327, 62+259; Kramer v. Lamb, 84-468, 471, 87+1024.
[82] Fox v. Hicks, 81-197, 83+538.
[83] Williams v. Moody, 35-280, 28+510; Kramer v. Lamb, 84-468, 471, 87+1024.
[84] Venable v. Paulding, 19-488(422).
[85] See Lusk v. Belote, 22-468.
[86] State v. Hays, 105-399, 402, 117+615.
[87] Venable v. Paulding, 19-488(422).
[88] Missouri etc. Co. v. Norris, 61-256, 258, 63+634. See, as to status of person in act of moving out of state to acquire a home elsewhere, Grimestad v. Lofgren, 105-286, 117+515.
[89] King v. McCarthy, 54-190, 55+960.

DOWER

Cross-References

See Curtesy; Husband and Wife, 4279.

2818. In general—Dower, at common law, was an estate for life, to which a wife was entitled on the death of her husband, in a third part of all the lands and tenements of which he was seized, in fee simple or fee tail, at any time during the coverture, and to which any issue which the wife might have had might by any possibility have been heir.[90] Dower was abolished in this state by Laws 1875 c. 40.[91] The statutory interest which was given to a wife in lieu of dower is considered elsewhere.[92] It is so essentially different that it ought not to be compared with dower except to distinguish it.[93] Cases are cited below in which the nature of dower at common law is touched upon.[94]

DRAINS

Cross-References

See Municipal Corporations, 6653; Waters.

IN GENERAL

2819. Basis of right to establish—A proper drainage act is justifiable as an exercise of the police power, the power of eminent domain, and the taxing power.[95]

2820. Constitutionality of statutes—The drainage acts of 1887,[96] 1897,[97] 1901,[98] 1902,[99] and 1907,[1] have been held constitutional against various objections. Laws 1907 c. 191, providing for the construction of a ditch over lands adjoining those of the owner seeking to drain his own wet lands, has been held unconstitutional.[2] Section 40, of chapter 448, Laws 1907, has been held unconstitutional,[3] and so has section 26, of chapter 230, Laws 1905.[4]

2821. Construction of statutes—The statutes regulating the construction of public drains are to be liberally construed to carry out their object,[5] but provisions designed for the protection of landowners must be strictly followed.[6]

[90] Griswold v. McGee, 102–114, 112+1020.

[91] See Desnoyer v. Jordan, 27–295, 298, 7+140; Washburn v. Van Steenwyk, 32–336, 20+324; In re Gotzian, 34–159, 24+920; Morrison v. Rice, 35–436, 29+168; Roach v. Dion, 39–449, 40+512.

[92] See §§ 4279, 4280.

[93] Id.

[94] Guerin v. Moore, 25–462 (alienation by husband—enhancement in value—valuation in assigning to wife); In re Gotzian, 34–159, 24+920 (release to husband); Morrison v. Rice, 35–436, 29+168 (not vested prior to death of husband); Roach v. Dion, 39–449, 40+512 (priority between mortgage and dower); Fairchild v. Marshall, 42–14, 43+563 (election to take under will); Dobberstein v. Murphy, 44–526, 47+171 (release by quitclaim deed); Sandwich Mfg. Co. v. Zellmer, 48–408, 416, 51+379 (in nature of an incumbrance); Dayton v. Corser, 51–406, 53+717 (unaffected by sale on execution against husband during coverture); Dobberstein v. Murphy, 64–127, 66+204 (assignable before admeasurement); Stitt v. Smith, 102–253, 113+632 (not vested prior to death of husband).

[95] Curran v. Sibley County, 47–313, 50+237; Witty v. Nicollet County, 76–286, 289, 79+112; Lien v. Norman County, 80–58, 82+1094; State v. Polk County, 87–325, 335, 92+216; Minn. C. & P. Co. v. Koochiching Co., 97–429, 448, 107+405; State v. Rockford, 102–442, 114+244.

[96] Lien v. Norman County, 80–58, 82+1094.

[97] Gaare v. Clay County, 90–530, 97+422.

[98] State v. Polk County, 87–325, 92+216.

[99] State v. Crosby, 92–176, 99+636; McMillan v. Freeborn County, 93–16, 100–384.

[1] Miller v. Jensen, 102–391, 113+914.

[2] State v. Rockford, 102–442, 114+244.

[3] Lyon County v. Lien, 105–55, 116+1017.

[4] State v. McGuire, 109–88, 122+1120.

[5] State v. Polk County, 87–325, 92+216; State v. Isanti County, 98–89, 107+730; Backus v. Conroy, 104–242, 116+484; State

2822. Drainage of meandered lakes—The drainage act of 1887 does not authorize the drainage of public meandered lakes.[7] The statute making it a criminal offence for any person to drain a meandered body of water is not applicable to limit the effect of a later statute authorizing the draining of wet and overflowed lands, through legal proceedings therein prescribed.[8]

2823. Obstruction—Criminal liability—In a prosecution for obstructing a drain it has been held error to admit an order establishing the drain because of insufficiency of the description.[9]

ESTABLISHMENT, CONSTRUCTION, AND REMEDIES

2824. Nature of proceedings—Proceedings for the establishment of public drains are statutory,[10] in rem,[11] and in invitum.[12]

2825. Parties—The provisions of the statute relating to parties to drainage proceedings are to be liberally construed. The right of landowners affected to appear before the board and to be heard by it is not confined to those who are strictly parties in the drainage proceedings but extends to landowners with a well-grounded claim for damage resulting from the construction of the drain, though it may not certainly appear that such damages are recoverable at law.[13]

2826. Petition—A petition in proper form, filed as required by Laws 1901 c. 258, is a jurisdictional prerequisite to the authority of the county board to entertain a proceeding thereunder, but the description of a proposed ditch need not be stated with precise accuracy. It is sufficient that the starting point, course, and terminus be stated with approximate accuracy; the board, in ordering the construction of a ditch under such statute, being finally guided by the description as contained in the surveyor's report.[14] A petition need not describe the land by subdivisions to correspond with individual ownership. If an entire section is within a district, it may be described as a section, though the subdivisions are owned by different persons.[15]

2827. Notice of hearing on petition—The notice required by Laws 1887 c. 97 § 8, to be given by the auditor, of the time set for the hearing of the petition for the construction of a ditch and of the report of the viewers thereon, is jurisdictional, and without it the county board has no power to proceed. The publication of the notice for three weeks, or twenty-one days, must be fully completed before the day fixed for the hearing.[16] Where, at the first hearing in ditch proceedings under Laws 1907 c. 448, the court has appointed an engineer and viewers, and required the filing of their respective reports, notice of the second and final hearing must be given and an opportunity afforded to parties interested of supporting by competent evidence valid objections to the laying out of the ditch.[17]

v. Baxter, 104–364, 116+646; Interstate D. & I. Co. v. Freeborn County, 158 Fed. 270.

[6] Curran v. Sibley County, 47–313, 50+237; Lager v. Sibley County, 100–85, 110+355. See McMillan v. Freeborn County, 93–16, 100+384.

[7] Witty v. Nicollet County, 76–286, 79+112. See Dressen v. Nicollet County, 76–290, 79+113.

[8] Dowlan v. Sibley County, 36–430, 31+517.

[9] State v. Lindig, 96–419, 105+186.

[10] Lager v. Sibley County, 100–85, 110+355.

[11] McMillan v. Freeborn County, 93–16, 22, 100+384.

[12] Curran v. Sibley County, 47–313, 50+237.

[13] State v. Isanti County, 98–89, 107+730. See Bilsborrow v. Pierce, 101–271, 112+274.

[14] State v. Polk County, 87–325, 92+216; State v. Lindig, 96–419, 105+186; Johnson v. Morrison County, 107–87, 119+502.

[15] State v. Quinn, 108–528, 121+898.

[16] Curran v. Sibley County, 47–313, 50+237; Johnson v. Morrison County, 107–87, 119+502.

[17] Heinz v. Buckham, 104–389, 116+736.

2828. Hearing on petition—Upon a second and final hearing, under Laws 1907 c. 448, interested parties must be given an opportunity to be heard and to introduce competent evidence in objection to the establishment of the proposed ditch.[18] The court is required to determine the utility of the proposed ditch.[19]

2829. Appointment of viewers—The provisions of Laws 1901 c. 258, directing the county board to appoint viewers within a specified time, are merely directory.[20]

2830. Laying out—Order—In proceedings to lay out and establish a ditch, under the provisions of Laws 1905 c. 230, the county board is limited in its final order establishing the ditch to the description thereof as set forth in the petition, subject to such reasonable departures in the course, distance, and terminals as are necessary to render the improvement of practical utility. An extension of a proposed ditch for the distance of seven miles beyond the terminus named in the petition is unauthorized.[21] A radical departure from the line of a public ditch as demanded by the petition may render the order laying out the ditch and all subsequent proceedings entirely void. Where a petition, under the provisions of Laws 1901 c. 258 § 3, as amended, calls for the laying out of a public ditch, and designates the source and a proper outlet, the engineer and county board have no authority to abandon the terminus as petitioned, and establish the same upon the land of a private owner.[22] Under Laws 1905 c. 230 § 1, if waters are to be diverted from their natural course, the ditch must follow the general direction of the watercourse and terminate therein, whenever it is practicable to do so; otherwise there may be, so far as reasonably necessary, a departure from the watercourse in the route and termination of the ditch.[23] The order required by Laws 1905 c. 230 § 10, establishing a ditch, must in itself, or by reference to the engineer's report, which is itself sufficient, definitely locate the ditch, by giving the proper starting point, route, and terminus.[24] An order laying out a ditch has been sustained on certiorari against objection that the drainage district was unlawfully split; that as good or better drainage could be obtained by other routes at less expense, and with less, if any, damages; that the ditch ordered was inadequate to its responsibilities; and other objections.[25]

2831. What lands damaged—Certain findings of a trial court that lands bordering on Bald Eagle lake would be damaged by a proposed ditch, have been held not justified by the evidence.[26]

2832. Irregularities—Curative act—A judgment restraining a county board from collecting a tax for benefits under irregular drainage proceedings, has been held not to prevent the board from instituting fresh proceedings under a curative act.[27]

2833. Bond of petitioners—Provision is made by statute for a bond to be executed by petitioners for a ditch to indemnify the county for preliminary expenses in case the ditch is not established.[28]

[18] Heinz v. Buckham, 104–389, 116+736.

[19] Wheeler v. Almond, 124+227 (court's determination on final hearing may differ from that on preliminary hearing—fact that petitioners have expended money on faith of first determination immaterial—duty of court in passing on question of utility—sufficiency of evidence).

[20] McMillan v. Freeborn County, 93–16, 100+384.

[21] Lager v. Sibley County, 100–85, 110+355.

[22] Jurries v. Virgens, 104–71, 116+109.

[23] State v. Baxter, 104–364, 116+646.

[24] Johnson v. Morrison County, 107–87, 119+502.

[25] State v. Buckham, 108–8, 121+217.

[26] Backus v. Conroy, 104–242, 116+484.

[27] Curran v. Sibley County, 56–432, 57+1070.

[28] Gugisberg v. Eckert, 101–116, 111+945 (bond under Laws 1901 c. 258—obligors not liable in proportion to benefits they would have received if the ditch had been constructed—each of five obligors is bond to pay only one-fifth of the preliminary expenses); Freeborn County v. Helle, 105–92, 117+153 (bond under Laws 1901 c. 258—

2834. Bond of contractors—Provision is made by statute for a bond to be executed by contractors, conditioned for the faithful performance of contracts for the construction of ditches.[29]

2835. Contracts—Extra services—Powers of county surveyor and county board—Under the drainage act of 1887, the authority of the county surveyor is limited to inspecting the work of the contractor, when completed, and, if he finds the same in accordance with the specifications of the viewers, to accept it and give the contractor a certificate of acceptance to that effect. He has no authority to authorize the contractor to incur extra expenses which are not embraced within the original specifications. The expense of constructing a ditch under this drainage act must be assessed against the property to be benefited, and the county board has no authority to incur any liability on behalf of the county for material and services. Though the county board accepts a ditch as complete, knowing that the contractor, by direction of the county surveyor, has expended money for services and materials not embraced within the specifications, such acceptance does not ratify the same and make the county liable therefor.[30] Under Laws 1905 c. 230 § 17, authorizing partial payments on contracts, such payments may be made without the concurrence or approval of the county board.[31] Mere irregularity in the award of a contract has been held not to defeat a recovery against a county.[32]

2835a. Enlargement of ditches—Repairs—A law authorizing the enlargement of ditches and the assessment of the cost on adjacent property without notice to the owners has been held unconstitutional. Ordinary repairs may be made without notice.[33]

2836. Appeal to district court—Trial de novo—An informal notice of appeal and bond, given under Laws 1887 c. 97, have been sustained.[34] An appeal, under Laws 1887 c. 97 § 11, from an order of the county board laying out a public ditch, does not bring up for review the question whether the board has exceeded its authority by establishing the ditch so as to drain a public meandered lake.[35] A notice of appeal otherwise specific, directed to a county board, is sufficient in form, and, after bond filed, operates to perfect an appeal to the district court from an order of said board dismissing an application for the establishment and construction of drainage ditches made pursuant to Laws 1901 c. 258, as amended, and vests the district court with jurisdiction. The district court upon appeal is vested with jurisdiction to try all issues both of fact and law de novo.[36]

2837. Appeal to supreme court—An order of the court on appeal from the assessment of damages in ditch proceedings, under Laws 1905 c. 230, assessing the appellant's damages and directing judgment to be entered accordingly, is not a final order and appealable within the terms of that statute.[37]

obligors not liable where order establishing ditch was set aside for irregularity—bond not designed to indemnify county against failure of its officers to comply with the law).

[29] Eidsvik v. Foley, 99–468, 109+993 (landowner entitled to sue on bond under Laws 1902 c. 38 § 10—bond held authorized by statute—complaint on bond sustained); Grams v. Murphy, 103–219, 114+753 (under Laws 1901 c. 258 landowners whose lands are included in a drainage district are not entitled to recover from the contractor and his bondsmen for the loss of profits arising from failure to complete the ditch within the time specified).

[30] Bowler v. Renville County, 105–26, 116+1028.

[31] Moody v. Brasie, 104–463, 116+941.

[32] Interstate D. & I. Co. v. Freeborn County, 158 Fed. 270.

[33] State v. McGuire, 109–88, 122+1120.

[34] Anderson v. Mecker County, 46–237, 48+1022.

[35] Dressen v. Nicollet County, 76–290, 79+113.

[36] McMillan v. Freeborn County, 93–16, 100+384; Schumacher v. Wright County, 97–74, 105+1125.

[37] Prahl v. Brown County, 104–227, 116+483.

2838. Certiorari—Where no provision is made for an appeal, certiorari is a proper remedy to secure a judicial review of drainage proceedings.[38]

2839. Injunction—Injunction will lie to restrain drainage proceedings where a landowner has no adequate remedy at law;[39] otherwise, if there is an adequate remedy at law.[40]

ASSESSMENTS

2840. Constitutionality—The constitutional amendment empowering the legislature to authorize "municipal corporations" to levy assessments for local improvements, without regard to cash valuation of the property assessed, has been held to authorize such legislation in respect to counties.[41] It is competent for the legislature, in the enactment of laws providing for public improvements in the interests of the public health, comfort, and convenience, to provide that the cost and expense of such improvements be assessed against lands benefited and improved thereby, and Laws 1887 c. 97 is not open to the objection that such assessment is unequal taxation.[42] Laws 1907 c. 448 § 40, providing, in effect, that the owners of lands benefited by the construction of a new ditch and its connection with a ditch already constructed, for which their lands were not assessed, shall pay into the county treasury the same proportion of benefits received by their lands that the lands assessed for the original ditch were forced to pay, is unconstitutional, in that it deprives a class of landowners of their property for a public purpose without any compensation and without due process of law.[43]

2841. Necessity—The expense of constructing a ditch under the drainage act of 1887 must be assessed against the property to be benefited, and the county board has no authority to incur any liability on behalf of the county for material and services.[44]

2842. Exemptions—The right of way of a railway company, paying a gross earnings tax in lieu of all taxes and all assessments as provided by Sp. Laws 1873 c. 111, is exempt from assessments for special benefits accruing thereto by the construction of a public ditch.[45]

2843. Additional assessments—The power to assess property for local improvements is coextensive with the benefits received. It is a continuing one, and may be exercised to cover the expense of maintaining an improvement.[46]

2844. Lien for assessment—When attaches—Under the law authorizing the construction of drains and ditches by counties, whereby the cost of the same is made a charge upon the lands benefited, and a lien is imposed thereon to secure the county, such lien attaches at the time provided for in the statute, and the privilege given to the landowner to pay the same in subsequent assessments does not change the nature of such lien, nor control the time when the lien takes effect, which is upon the auditor's statement under G. S. 1894 §§ 7810, 7811.

[38] Dressen v. Nicollet County, 76–290, 79+113; Schumacher v. Wright County, 97–74, 105+1125; State v. Isanti County, 98–89, 107+730; Bilsborrow v. Pierce, 101–271, 112+274; Heinz v. Buckham, 104–389, 116+736; State v. Posz, 106–197, 118+1014; State v. Buckham, 108–8, 121+217.

[39] Dressen v. Nicollet County, 76–290, 79+113; Bilsborrow v. Pierce, 101–271, 112+274; Miller v. Jensen, 102–391, 113+914; Jurries v. Virgens, 104–71, 116+109; Johnson v. Morrison County, 107–87, 119+502.

[40] Schumacher v. Wright County, 97–74, 105+1125.

[41] Dowlan v. Sibley County, 36–430, 31+517.

[42] Lien v. Norman County, 80–58, 82+1094. See Swenson v. Hallock, 95–161, 103+895.

[43] Lyon County v. Lien, 105–55, 116+1017.

[44] Bowler v. Renville County, 105–26, 116+1028.

[45] Patterson v. Chi. etc. Ry., 99–454, 109+993.

[46] McMillan v. Freeborn County, 93–16, 21, 100+384.

The provisions of G. S. 1894 § 1623, for the attachment of liens for ordinary taxes as between the state and the landowner as well as between the grantor and grantee, do not affect or control the assessments provided for in the state drainage law by virtue of the fact that such assessments are collected in the same manner as ordinary taxes. The liens provided for in section 1623 and in section 7811 are distinct, created for different purposes, attach at different times, and impose different conditions upon the landowner under a covenant against incumbrances upon the sale of the land by him.[47] The duty of a county auditor to file a lien statement, under Laws 1905 c. 230, is mandatory. A delay of four years in filing such a statement has been held not fatal to the rights of the county.[61]

2845. Judgment—A judgment of the district court upon appeal, affirming the order of commissioners in assessment proceedings, is not defective because the lands affected are not described therein; the same being sufficiently described in other parts of the record.[48]

DRAMSHOP—See note 49.

DRUGGISTS

2846. Regulation—The practice of pharmacy is a proper subject for legislative regulation under the police power. Several statutes upon the subject have been held constitutional against various objections.[50]

2847. Selling without license—The owner of a drug store has been held not criminally liable for a sale by one in his employ, not a registered pharmacist or assistant, made without his knowledge or consent.[51]

DRUNKENNESS—See Assault and Battery, 538; Criminal Law, 2447; Homicide, 4238; Master and Servant, 6003; Negligence, 7028.

DUE—See note 52.

DUE BILL—See note 53.

DUE CARE—See Negligence, 6969.

DUE DILIGENCE—See note 54.

DUE PROCESS OF LAW—See Constitutional Law, 1637; Process, 7835.

DULY—See Pleading, 7517, 7533.

DUPLICATE ORIGINALS—See Evidence, 3279.

DUPLICITY—See Indictment, 4405; Pleading, 7536.

[47] Clapp v. Minn. G. T. Co., 81–511, 84+344. See Meeker County v. Schultz, 125+901 (recording of assessment list and statement as required by Laws 1901 c. 258 held essential to the creation of a lien).

[61] State v. Johnson, 126+479.

[48] Dowlan v. Sibley County, 36–430, 31+517.

[49] State v. Minn. Club, 106–515, 522, 119+494.

[50] State v. Donaldson, 41–74, 42+781 (Laws 1885 c. 147—title sufficient—sale of patent medicines); State v. Hovorka, 100–249, 110+870 (R. L. 1905 §§ 2327–2341—nature of license fee—amount of fee reasonable); Minn. S. P. Assn. v. State Board, 103–21, 114+245 (Laws 1907 c. 346, relating to the registration of pharmacists, sustained). See State v. Griffin, 69–311, 72+117 (G. S. 1894 § 7926, relating to appointment of members of state board of pharmacy, held unconstitutional).

[51] State v. Robinson, 55–169, 56+594.

[52] Gies v. Bechtner, 12–279(183); Fowler v. Johnson, 26–338, 3+986; Gilfillan v. Chatterton, 38–335, 37+583; Bowers v. Hetchman, 45–238, 47+792; Ball v. N. W. etc. Assn., 56–414, 57+1063.

[53] Rhodes v. Pray, 36–392, 32+86; Alexander v. Thompson, 42–498, 44+534.

[54] Dewey v. Clark, 48–130, 50+1032.

DURESS

Cross-References

See Cancelation of Instruments, 1190; Fraud; Payment, 7462; Undue Influence.

2848. Definition—Duress is coercion amounting to a destruction of one's free will, by means of physical restraint or threat of serious injury, or by dealing with one's property so that he is forced to comply with an unlawful demand. Exact definition is impossible. Each case must necessarily be determined largely by its own facts.[55] A mere threat to withhold from a party a legal right, which he has an adequate remedy to enforce, is not duress.[56] A threat of arrest may constitute duress.[57] Duress is a species of fraud.[58] The distinction between duress and undue influence is not well defined.[59] The only difference between fraud, undue influence, and duress is in the means employed to overcome the will. Duress is a species of fraud in which compulsion in some form is the means employed.[60]

2849. Effect—Remedies—The effect of duress on contracts and deeds is the same as fraud. The injured party may sue in equity for a rescission by the court, or he may rescind by his own act and sue at law, or he may allow the contract or deed to stand and sue at law for damages.[61]

2850. Pleading—In pleading duress the ultimate facts constituting the duress must be specifically alleged. A general charge of duress is insufficient.[62] It is unnecessary to allege the evidentiary facts by which the ultimate facts are to be proved.[63]

DYING DECLARATIONS—See Criminal Law, 2461.

EASEMENTS

Cross-References

See Adjoining Landowners; Adverse Possession, 121; Eminent Domain, 3037; Mortgages, 6377; Party Walls.

2851. Definition—An easement is the right of an owner of one parcel of land, by reason of such ownership, to use the land of another for a special purpose, not inconsistent with a general property in the owner.[64] It is otherwise defined as a liberty, privilege, or advantage, in land, without profit, existing

[55] See Tapley v. Tapley, 10–448(360); Fargusson v. Winslow, 34–384, 25+942; Flanigan v. Minneapolis, 36–406, 31+359; Kraemer v. Deustermann, 37–469, 35+276; State v. Nelson, 41–25, 42+548; Joannin v. Ogilvie, 49–564, 52+217; State v. Ladeen, 104–252, 116+486. Evidence held not to show duress. Perkins v. Trinka, 30–241, 15+115; Nell v. Dayton, 43–242, 45+229; Mpls. L. Co. v. McMillan, 79–287, 82+591.

[56] Cable v. Foley, 45–421, 47+1135.

[57] Flanigan v. Minneapolis, 36–406, 31+359.

[58] Tapley v. Tapley, 10–448(360, 369); Neibuhr v. Gage, 99–149, 108+884.

[59] Tapley v. Tapley, 10–448(360, 368); Kraemer v. Deustermann, 37–469, 472, 35+276.

[60] Neibuhr v. Gage, 99–149, 156, 108+884.

[61] Neibuhr v. Gage, 99–149, 108+884. See, as to the necessity of an action to avoid a mortgage obtained by duress, Semrow v. Semrow, 23–214.

[62] Taylor v. Blake, 11–255(170); Kraemer v. Deustermann, 37–469, 35+276; Rand v. Hennepin County, 50–391, 52+901.

[63] Johnson v. Velve, 86–46, 90+126.

[64] Warner v. Rogers, 23–34; Mackey v. Harmon, 34–168, 24+702. An easement is an obligation between two estates. 17 Harv. L. Rev. 182.

distinct from an ownership of the soil. Such a privilege or liberty, open to the community, is a public easement.[65] It is an incorporeal hereditament.[66] It is property.[67] The holder of an easement is not the owner or occupant of the servient estate, and is not entitled to the profits thereof.[68] An easement always implies an interest in the land upon which it is imposed.[69] An executed license is not an easement.[70]

2852. Not favored—Construed strictly—The law is jealous of a claim to an easement, and the party asserting such a claim must prove his right to it clearly. It cannot be established by intendment or presumption.[71] It is to be construed strictly.[72]

2853. Acquisition—An easement can only be acquired by grant, express or implied, or by prescription.[73] It is within the statute of frauds.[74] It passes by a deed or mortgage of the dominant estate without express mention.[75] The grant of an easement carries with it by implication any other easements that may be reasonably necessary to effectuate the purpose of the express grant.[76]

2854. Release—A deed without reservation has been held to operate at a release of an easement.[77]

2855. Abandonment—Easements may be lost by abandonment.[78]

2856. Easement for support of building—Where the owner of premises, who has constructed a permanent building so that most of it was on one tract of land and a part on a second tract of land, sells the first tract, his vendee has an implied easement in the second tract to the extent necessary to support the building.[79]

PRIVATE WAYS

2857. Acquisition—Deeds construed—A right of way may arise by implication from a grant.[80] Cases are cited below involving the construction of deeds with reference to rights of way.[81]

2858. Appurtenant or in gross—It is competent for a grantor in a deed to create a right of way over the land conveyed, in his own favor, either appurtenant or in gross, by a reservation inserted in his deed. And it may be done though in terms it is an exception. A grant in gross is never presumed when it can fairly be construed as appurtenant to some other estate. When there is

[65] Winona v. Huff, 11–119(75, 85).

[66] Warner v. Rogers, 23–34; Mackey v. Harmon, 34–168, 24+702; Winston v. Johnson, 42–398, 45+958.

[67] Adams v. Chi. etc. Ry., 39–286, 290, 39+629.

[68] Sanborn v. Minneapolis, 35–314, 29+126.

[69] Mpls. W. Ry. v. Mpls. etc. Ry., 58–128, 131, 59+983; Warner v. Rogers, 23–34.

[70] Johnson v. Skillman, 29–95, 12+149.

[71] Mpls. W. Ry. v. Mpls. etc. Ry., 58–128, 131, 59+983.

[72] Thompson v. Germania etc. Co., 97–89, 106+102.

[73] Olson v. St. P. etc. Ry., 38–479, 482, 38+490; Johnson v. Skillman, 29–95, 12+149; Mpls. W. Ry. v. Mpls. etc. Ry., 58–128, 131, 59+983; Mankato v. Willard, 13–13(1).

[74] Mankato v. Willard, 13–13 (1, 9); Johnson v. Skillman, 29–95, 12+149.

[75] Swedish etc. Bank v. Conn. etc. Co., 83–377, 382, 86+420; St. Anthony etc. Co. v. Minneapolis, 41–270, 274, 43+56; Schlag v. Gooding, 98–261, 108+11. See N. P. Ry. v. Duncan, 87–91, 91+271.

[76] Gravel v. Little Falls etc. Co., 74–416, 77+217; St. Anthony etc. Co. v. Minneapolis, 41–270, 274, 43+56.

[77] Flaten v. Moorhead, 58–324, 59+1044.

[78] Smith v. Glover, 50–58, 75, 52+210, 912.

[79] Smith v. Lockwood, 100–221, 110+980.

[80] Krueger v. Ferrant, 29–385, 13+158; Pine Tree L. Co. v. McKinley, 83–419, 86+414. See Note, 95 Am. St. Rep. 318.

[81] Dawson v. St. Paul etc. Co., 15–136 (102); Patterson v. Duluth, 21–493; Sanborn v. Minneapolis, 35–314, 29+126; Winston v. Johnson, 42–398, 45+958; Long v. Fewer, 53–156, 54+1071; Soukup v. Topka, 54–66, 55+824; Lidgerding v. Zignego, 77–421, 80+360; N. P. Ry. v. Duncan, 87–91, 91+271; Callan v. Hause, 91–270, 97+973; Thompson v. Germania etc. Co., 97–89, 106+102.

in the deed no declaration of intention of the parties in regard to the nature of the way, it will be determined by its relation to other estates of the grantor, or its want of such relation. Resort may also be had in such case to other circumstances surrounding the transaction, for the purpose of ascertaining the intent and the effect to be given the instrument. An easement is appurtenant and not in gross, when it appears that it was granted for the benefit of the grantee's land. A right of way is appurtenant to the land of the grantee if so in fact, though not declared to be so in the deed. If the way leads to the grantee's land, and is useless except for use in connection with it, and after the grant was used solely for access to such land, it is appurtenant to it. Where it appears by a fair interpretation of the words of a grant, in connection with surrounding circumstances, that it was the intention of the parties to create or reserve a right in the nature of an easement in the property granted, for the benefit of other land of the grantor and originally forming, with the land conveyed, one parcel, such right will be deemed appurtenant to the land of the grantor and binding on that conveyed. The right and burden thus created will pass to and be binding on all subsequent grantees of the respective parcels of land.[82] An easement may be appurtenant though the deed creating it contains no words of inheritance.[83] A traveled track, or roadway, running from one to another tract of the lessor's land, and over the property of another, is not an easement appurtenant to the premises leased.[84]

2859. Of necessity—A way of necessity is a way of strict necessity.[85]

2860. Transfer of land—If land to which a right of way is attached is divided, the right of way passes to each portion into whosesoever hands it may come, but only so far as applicable to such portion.[86]

2861. Selection by grantor—If a deed reserves a right of way, but does not locate it, the grantor or his assigns may locate it.[87]

2862. When exclusive—An easement of way is not necessarily exclusive. Whether or not it is of that character depends upon the nature of the occasion, the use shown, and the terms of the agreement whereby it is created.[88]

2863. Abandonment—A right of way may be lost by abandonment.[89]

2864. Repair—It is the right and duty of a grantee of a private way to keep it in repair.[90]

EDUCATION—See Schools and School Districts.
EFFECTS—See note 91.

[82] Winston v. Johnson, 42–398, 45+958; Long v. Fewer, 53–156, 54+1071; Lidgerding v. Zignego, 77–421, 80+360; N. P. Ry. v. Duncan, 87–91, 91+271; Callan v. Hause, 91–270, 97+973; Thompson v. Germania etc. Co., 97–89, 106+102.

[83] Lidgerding v. Zignego, 77–421, 80+360.

[84] Ahern v. Hindman, 101–34, 111+734.

[85] Dawson v. St. Paul etc. Co., 15–136 (102, 109); Pine Tree L. Co. v. McKinley, 83–419, 86+414; Hurley v. Miss. etc. Co., 34–143, 24+917. See 12 Harv. L. Rev. 54, 422.

[86] Dawson v. St. Paul etc. Co., 15–136 (102, 109).

[87] Callan v. Hause, 91–270, 97+973.

[88] Thompson v. Germania etc. Co., 97–89, 106+102.

[89] Smith v. Glover, 50–58, 75, 52+210, 912.

[90] Reed v. Board Park Comrs., 100–167, 110+1119.

[91] Ide v. Harwood, 30–191, 14+884.

EJECTMENT

Cross-References

See Eminent Domain, 3125; Judgments, 5191; New Trial, 7209; Vendor and Purchaser, 10089.

IN GENERAL

2865. Nature of action—Ejectment is a possessory action. Its ostensible object is the recovery of actual possession of the land and not to try the title thereto.[92] It has been described as a "mixed action," [93] but the expression is hardly proper in our practice.

2866. Common-law action abolished—The common-law action of ejectment, with its fictions and distinctive rules has been abolished in this state.[94]

2867. For what action will lie—Ejectment will lie wherever a right of entry exists and the interest is tangible so that possession can be delivered, but not where the thing to be recovered is incorporeal.[95] It will lie in case of an encroachment by one owner of a party wall upon the property of the other owner,[96] or to determine the rights of the parties when land is overflowed by a dam.[97]

2868. Re-entry—The common-law ceremony of re-entry is unnecessary.[98]

2869. Demand before suit—No demand of possession or notice to quit before suit is necessary where the defendant holds adversely.[99]

PARTIES

2870. Who may maintain action—It is the general rule that ejectment can be maintained only against a person in possession, by one having a present exclusive right of possession.[1] The following persons have been held entitled to maintain an action: a vendor against a vendee in default;[2] a landlord against a tenant;[3] a tenant in common against a stranger;[4] a tenant in common against his cotenant;[5] a grantor, against a successor to the grantee, upon breach of a condition subsequent;[6] a municipality, to recover land dedicated to the public for streets, etc.;[7] a tribal Indian, to recover land outside a reservation;[8] a dedicator of land to the public, as against one to whom a municipality had wrongfully leased the land for private purposes;[9] a "mortgagee in possession," as against a third party;[10] an owner of a party wall, as against the other owner;[11] an executor;[12] a purchaser from the state of school lands which have

[92] Winona v. Huff, 11–119(75); Atwater v. Spalding, 86–101, 90+370.

[93] Winona v. Huff, 11–119(75).

[94] Sioux City etc. Ry. v. Singer, 49–301, 51+905; Doyle v. Hallam, 21–515; Lewis v. Hogan, 51–221, 53+367.

[95] Winona v. Huff, 11–119 (75). See Pence v. St. P. etc. Ry., 28–488, 11+80.

[96] Johnson v. Minn. T. Co., 91–476, 98+321; Dickerson v. Minn. T. Co., 98–230, 107+1132.

[97] Reynolds v. Munch, 100–114, 110+368.

[98] Sioux City etc. Ry. v. Singer, 49–301, 51+905.

[99] McClane v. White, 5–178(139).

[1] Eastman v. Lamprey, 12–153(89); Pence v. St. P. etc. Ry., 28–488, 11+80; Kremer v. Chi. etc. Ry., 54–157, 161, 55+928; Norton v. Frederick, 107–36, 119+192. See Betcher v. Chi. etc. Ry., 124+1096.

[2] Thompson v. Ellenz, 58–301, 59+1023; Williams v. Murphy, 21–534.

[3] State v. Dist. Ct., 53–483, 55+630.

[4] Sherin v. Larson, 28–523, 11+70; Easton v. Scofield, 66–425, 429, 69+326.

[5] Cameron v. Chi. etc. Ry., 60–100, 61+814; Cook v. Webb, 21–428.

[6] Sioux City etc. Ry. v. Singer, 49–301, 51+905.

[7] Winona v. Huff, 11–119(75).

[8] Bem-Way-Bin-Ness v. Eshelby, 87–108, 91+291.

[9] Sanborn v. Van Duyne, 90–215, 96+41. See Betcher v. Chi. etc. Ry., 124+1096.

[10] Law v. Citizens' Bank, 85–411, 89+320.

[11] Johnson v. Minn. T. Co., 91–476, 98+321; Dickerson v. Minn. T. Co., 98–230, 107+1132.

[12] Miller v. Hoberg, 22–249. See § 3567.

been submerged by the maintenance of a dam across a stream.[13] Bare possession will enable one to maintain an action against another having no title.[14] The following persons have been held not entitled to maintain an action: a mortgagor, or one in privity with him, against a mortgagee lawfully in possession after condition broken;[15] a mortgagee, against his mortgagor, his mortgage being a deed absolute in form;[16] a mortgagee, against his mortgagor, before foreclosure;[17] a lessor, against a railway company;[18] a party to a party-wall agreement, against the other party to the agreement.[19]

2871. Equitable owner—An equitable owner may maintain ejectment against the holder of the legal title or a stranger.[20]

2872. Parties defendant—Ejectment will lie only against one in possession.[21] A servant or agent is not in possession within this rule.[22] An action will lie against an executor who has taken possession under the statute.[23] The possession of a tenant is the possession of his landlord, while the relation of landlord and tenant exists, but not after it has been terminated by an execution sale.[24]

JOINDER OF ACTIONS

2873. In general—An action of ejectment, with or without damages for the withholding of the property, may be joined with a claim for the rents and profits, that is, mesne profits.[25] A cause of action for damages for the withholding of one parcel of land cannot be united with a cause of action to recover the possession of another parcel, with damages for the withholding thereof.[26] A cause of action for injuries to the estate may be joined with one for the recovery of the land and for the use and occupation thereof.[27]

COMPLAINT

2874. In general—A complaint which alleges that the plaintiff is the owner in fee of the premises sought to be recovered, and that the defendant is in possession thereof and withholds the same from the plaintiff, is sufficient.[28] A complaint which in substance alleges that the plaintiff is the owner in fee and entitled to the immediate possession of the premises sought to be recovered and that the defendant is in possession thereof, and unlawfully withholds the same from the plaintiff, is sufficient.[29] A complaint must allege ownership or right

[13] Kinney v. Munch, 107–378, 120+374.

[14] Sherin v. Brackett, 36–152, 30+551.

[15] Pace v. Chadderdon, 4–499(390); 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; Martin v. Fridley, 23–13.

[16] Meighen v. King, 31–115, 16+702.

[17] See § 6227.

[18] Pence v. St. P. etc. Ry., 28–488, 11+80.

[19] Houghton v. Mendenhall, 50–40, 52+269.

[20] Merrill v. Dearing, 47–137, 49+693; Freeman v. Brewster, 70–203, 72+1068.

[21] Pence v. St. P. etc. Ry., 28–488, 11+80; Bagley v. Sternberg, 34–470, 26+602; Gowan v. Bensel, 53–46, 54+934; Allis v. Nininger, 25–525.

[22] Marks v. Jones, 71–274, 73+961; Bagley v. Sternberg, 34–470, 26+602; Hodgson v. St. Paul P. Co., 78–172, 80+956.

[23] Pabst v. Small, 83–445, 86+450.

[24] Gowan v. Bensel, 53–46, 54+934.

[25] R. L. 1905 § 4154(5); Armstrong v. Hinds, 8–254(221); Holmes v. Williams, 16–164(146); Merrill v. Dearing, 22–376; Lord v. Dearing, 24–110.

[26] Holmes v. Williams, 16–164(146).

[27] Pierro v. St. P. etc. Ry., 37–314, 34+38; Id., 39–451, 40+520.

[28] Bena T. Co. v. Sauve, 104–472, 116+947.

[29] Merrill v. Dearing, 22–376. See McClane v. White, 5–178(139); Wells v. Masterson, 6–566(401); Pinney v. Fridley, 9–34(23); May v. First Div. etc. Ry., 26–74, 1+584; Hennessy v. St. P. etc. Ry., 30–55, 14+269; Schultz v. Hadler, 39–191, 39+97; Curtiss v. Livingston, 36–380, 31+357; Atwater v. Spalding, 86–101, 90+370.

of immediate possession in the plaintiff.[30] A complaint by a purchaser of school lands for the state against a railway company held sufficient.[31]

2875. Allegation of title—To prove a legal title, it is sufficient to allege that the plaintiff is the "owner," without disclosing the nature of his estate.[32] Such a general allegation will admit proof of title by adverse possession.[33] But it will not admit proof of an equitable title. In pleading an equitable title the plaintiff must set out all the facts with as much particularity as if he were drawing a bill for equitable relief under the old practice.[34] It is proper practice to allege title as an ultimate fact without alleging the facts by which it was acquired. If such facts are alleged and an essential fact in the chain of title is omitted the complaint is bad though it contains a general allegation of title.[35] If the plaintiff alleges ownership in general terms he may prove a legal title acquired in any way, but if he alleges title as acquired in a particular way he is restricted in his proof accordingly.[36] Title must be alleged as of the time of the commencement of the action as well as of the time of the ouster.[37]

2876. Equitable title—In pleading an equitable title all the facts must be alleged as fully as in a bill in equity under the old practice.[38]

2877. Allegation of right of possession—The plaintiff must have the immediate right of possession.[39] It is customary to allege that he has this right,[40] but it is unnecessary to do so if the right otherwise appears, as from an allegation of ownership. An allegation that plaintiff is the owner in fee of the property sought to be recovered carries with it by inference an immediate right of possession, and the latter fact need not be expressly averred.[41] An allegation that the plaintiff is entitled to the immediate possession is a conclusion of law and ineffectual without an allegation of facts giving rise to the right.[42]

2878. Alleging possession—Possession by the defendant is an essential fact and must be alleged unequivocally.[43] A general allegation that defendant wrongfully detains the possession is of no effect against specific facts showing that he is not in possession.[44]

2879. Wrongful detention—It is often alleged that the defendant "wrongfully" or "unlawfully" withholds possession from the plaintiff.[45] This is unnecessary if it otherwise appears that the withholding is wrongful. A general allegation that the defendant withholds possession from the plaintiff, the pleading showing a right of possession in the plaintiff, is sufficient to require the defendant to show his right, if any he has.[46] If a complaint shows that the de-

[30] Armstrong v. Hinds, 8-254(221); Schultz v. Hadler, 39-191, 39+97.

[31] Lawver v. G. N. Ry., 97-36, 105+1129.

[32] McArthur v. Clark, 86-165, 90+369; Atwater v. Spalding, 86-101, 90+370; Curtiss v. Livingston, 36-380, 31+357; Parker v. Mpls. etc. Ry., 79-372, 82+673.

[33] McArthur v. Clark, 86-165, 90+369.

[34] Merrill v. Dearing, 47-137, 49+693. See § 2876.

[35] Pinney v. Fridley, 9-34(23); Schultz v. Hadler, 39-191, 39+97; Bartleson v. Munson, 105-348, 117+512. See § 7524.

[36] Pinney v. Fridley, 9-34(23); O'Malley v. St. P. etc. Ry., 43-289, 294, 45+440. See Miller v. Natwick, 125+1022 (unnecessary to plead judgment as source of title).

[37] Armstrong v. Hinds, 8-254(221); Holmes v. Williams, 16-164(146); Miller v. Hoberg, 22-249. See Rhone v. Gale, 12-54(25).

[38] Merrill v. Dearing, 47-137, 49+693; Freeman v. Brewster, 70-203, 72+1068; Stuart v. Lowry, 49-91, 51+662; Olson v. Minn. etc. Ry., 89-280, 94+871.

[39] Pace v. Chadderdon, 4-499(390); Schultz v. Hadler, 39-191, 39+97.

[40] See cases under § 2874.

[41] Bena T. Co. v. Sauve, 104-472, 116+947. See Wells v. Masterson, 6-566(401); Norton v. Frederick, 107-36, 119+492.

[42] See Schultz v. Hadler, 39-191, 39+97.

[43] See Gowan v. Bensel, 53-46, 54+934; Pence v. St. P. etc. Ry., 28-488, 11+80; Allis v. Nininger, 25-525.

[44] Gowan v. Bensel, 53-46, 54+934.

[45] See Pinney v. Fridley, 9-34(23); Merrill v. Dearing, 22-376; Wells v. Masterson, 6-566(401).

[46] Bena T. Co. v. Sauve, 104-472, 116+

fendant's possession was originally lawful it must allege facts showing that it subsequently became unlawful.[47]

2880. Description of premises—In describing the premises by reference to monuments it is unnecessary to allege positively the existence of such monuments.[48]

2881. Recording deeds—It is unnecessary to allege that deeds in a chain of title were recorded.[49]

2882. Demand of possession—If a demand of possession is a condition precedent to an action it must be alleged.[50]

2883. For undivided interest—In an action to recover an undivided interest it is unnecessary to allege that the defendant is not the owner of the other undivided interest, or in possession under such owner.[51]

ANSWER

2884. General denial—Evidence admissible—Where the plaintiff alleges his title in general terms the defendant, under a general denial, may prove any fact which tends to defeat the title which the plaintiff attempts to prove on the trial. He may controvert the facts sought to be proved by the plaintiff or introduce new matter tending to defeat the title sought to be proved by the plaintiff.[52] He may prove an equity which, without any affirmative relief, defeats plaintiff's right of possession.[53] If the plaintiff pleads the source of his title the defendant cannot, under a mere denial, prove facts in the nature of confession and avoidance.[54]

2885. Particular answers construed—Cases are cited below involving construction of particular answers.[55]

DEFENCES

2886. Title in third party—As a general rule the defendant may defeat the action by proof of title in a third party, even though he does not connect himself with such title. He may do so under a general denial when the plaintiff pleads his title in general terms.[56] But a mere intruder or trespasser cannot defeat an action by proof of title in a third party unless he connects himself with such title.[57]

947. See Adams v. Corriston, 7–456 (365); Cordill v. Minn. El. Co., 89–442, 95+306.

[47] Holmes v. Williams, 16–164(146).

[48] May v. First Div. etc. Ry., 26–74, 1+584.

[49] Fifield v. Norton, 79–264, 82+581.

[50] McClane v. White, 5–178(139).

[51] Sherin v. Larson, 28–523, 11+70; Hennessy v. St. P. etc. Ry., 30–55, 14+269.

[52] Kipp v. Bullard, 30–84, 14+364 (that land acquired under execution was a homestead); Com. Title etc. Co. v. Dokko, 72–229, 75+106 (that a mortgage was usurious); Cool v. Kelly, 78–102, 80+861 (a tax certificate); McArthur v. Clark, 86–165, 90+369 (adverse possession); Brasie v. Mpls. B. Co., 87–456, 462, 92+340 (statute of limitations); Rogers v. Clark, 104–198, 116+739 (title in third party). See Wakefield v. Day, 41–344, 43+71 (that a deed absolute in form was a mortgage).

[53] Travelers' Ins. Co. v. Walker, 77–438, 80+618.

[54] Kennedy v. McQuaid, 56–450, 48+35 (conveyance to third party); Travelers' Ins. Co. v. Walker, 77–438, 80+618 (an equity requiring affirmative relief); Dickson v. St. Paul, 105–165, 117+426; Bartleson v. Munson, 105–348, 117+512.

[55] Curtiss v. Livingston, 36–312, 30+814 (not a counterclaim); Bendikson v. G. N. Ry., 80–332, 83+194 (held to allege sufficiently that defendant leased the land from the owner and was occupying it under the lease); Yorks v. Mooberg, 84–502, 87+1115 (held to admit possession of the premises as alleged in the complaint).

[56] Rogers v. Clark, 104–198, 116+739; Kinney v. Munch, 107–378, 120+374; Henderson v. Wanamaker, 79 Fed. 736.

[57] Kinney v. Munch, 107–378, 120+374.

2887. Equitable defences—An equitable defence may be interposed in ejectment, as in other actions, at least if it relates to the right of possession and is a proper one to be litigated in the action. To prevail against the plaintiff's legal right to the possession an equity must be such that, under the former practice, a court of equity, upon a bill filed setting up the facts, would have enjoined an action of ejectment.[58]

2888. Disclaimer—Where a defendant disclaims any interest in the property he is not entitled to litigate the title with the plaintiff. He is simply entitled to a judgment of dismissal, with costs.[59]

2889. Waiver of vacancy—A party sued in ejectment may waive the objection that he is not in possession.[60]

2890. Miscellaneous defences—The fact that one of two defendants was acting as the agent of the other has been held no defence as to either.[61] The lien of a purchaser at a void guardian's sale, has been held no defence to an action by a ward.[62]

PROOF

2891. Exactness—The law requires exactness in the derivation of title.[63]

2892. Burden on plaintiff—The plaintiff must recover upon the strength of his own title and not upon the weakness of that of the defendant. The burden of proof is on the plaintiff and the defendant may "fold his arms and await the establishment of the plaintiff's title." If the plaintiff fails in his proof of title he cannot recover however weak or defective the defendant's title may be.[64] He must prove some title or interest in himself carrying the right of immediate possession.[65] Title must be proved more strictly in ejectment than when it is only collaterally or incidentally involved.[66]

2893. Prima facie proof—The plaintiff may make out a prima facie case by showing a paper title running back to the government;[67] by introducing a United States land office certificate or receipt;[68] by showing a paper title from a grantor who is admitted by the defendant to have been an owner;[69] by showing a paper title from the defendant;[70] by proof of possession under color of title by his ancestor;[71] as against a disseizor, by proof, of actual and peaceable possession, under color of title at the time of the ouster by the defendant;[72] by tracing title from the person under whom the defendant claims;[73] by proving adverse possession for the statutory period;[74] or by proving facts which estop the defendant from disputing the title of the plaintiff.[75] It is unneces-

[58] Williams v. Murphy, 21–534; McClane v. White, 5–178(139); Coolbaugh v. Roemer, 32–445, 21+472; McKinney v. Bode, 33–450, 454, 23+851; Probstfield v. Czizek, 37–420, 34+896; Freeman v. Brewster, 70–203, 72+1068; Travelers' Ins. Co. v. Walker, 77–438, 80+618. See O'Connor v. Gertgens, 85–481, 89+866.

[59] Marks v. Jones, 71–274, 73+961.

[60] Allis v. Nininger, 25–525.

[61] Wells v. Atkinson, 24–161.

[62] Montour v. Purdy, 11–384(278).

[63] Morin v. St. P. etc. Ry., 33–176, 22+251; Philbrook v. Smith, 40–100, 41+545.

[64] Minn. Deb. Co. v. Johnson, 94–150, 102+381; Pace v. Chadderdon, 4–499 (390); Greve v. Coffin, 14–345(263); Barber v. Robinson, 78–193, 197, 80+968; O'Connor v. Gertgens, 85–481, 489, 89+866; Jenkins v. Jenkins, 92–310, 100+7; Sherwin v. Bitzer, 97–252, 106+1046.

[65] See § 2870.

[66] Morin v. St. P. etc. Ry., 33–176, 22+251.

[67] Baxter v. Newell, 88–110, 92+525; Rogers v. Clark, 104–198, 116+739 (introduction of patent).

[68] See § 7982.

[69] Horning v. Sweet, 27–277, 6+782.

[70] Esty v. Cummings, 75–549, 78+242.

[71] Sherin v. Larson, 28–523, 11+70.

[72] Sherin v. Brackett, 36–152, 30+551. See 14 Harv. L. Rev. 625.

[73] Horning v. Sweet, 27–277, 6+782; Thompson v. Ellenz, 58–301, 59+1023; McRoberts v. McArthur, 62–310, 64+903; Preiner v. Meyer, 67–197, 69+887.

[74] McArthur v. Clark, 86–165, 90+369.

[75] See §§ 5363, 10089.

sary for him to show that he has been in actual possession within fifteen years before the commencement of the action. Title and right of possession within the time limited are all that need be shown.[76]

2894. Presumption of continuance—Proof that the title was in a party at a certain date, and that at a subsequent date he conveyed to another, is prima facie evidence of title in the latter. He need not prove affirmatively that his grantor had not in the meanwhile conveyed to a third party.[77]

2895. Ouster—Tenants in common—In an action for an undivided interest the burden is on the defendant to allege and prove that he is a tenant in common with the plaintiff, before he can put the plaintiff to proof of denial of his right or acts amounting to an ouster.[78]

2896. Good faith—Unrecorded deeds—Where the plaintiff claims title under a junior deed of record to which he is a party he is bound, as against a defendant claiming under a senior unrecorded deed from the same grantor, to prove that he purchased in good faith and for a valuable consideration. The rule is otherwise where the defendant is a stranger to the unrecorded deed.[79]

2897. Identity of persons—In proving a title identity of names is sufficient prima facie evidence of identity of persons.[80] Names in which the initials are different are not identical within this rule.[81]

DAMAGES AND MESNE PROFITS

2898. Definitions and distinctions—Mesne profits are the profits or other pecuniary benefits which one who dispossesses the true owner receives between disseizin and the restoration of possession.[82] In our practice a claim of damages for withholding, a claim for rents and profits, and a claim for use and occupation, are used synonymously in this connection. A party cannot recover substantial damages for withholding and also for mesne profits. The statute has not changed the measure of damages but only the mode of recovering them.[83]

2899. Modes of recovery—At common law, after ejectment proceedings became fictitious and the plaintiff merely nominal, only nominal damages were recoverable. The real damages from being deprived of possession, called mesne profits, were only recoverable after judgment in ejectment, in a separate action, either of trespass for damages, or, in case the party elected to waive the tort, of assumpsit for the use and occupation of the land. In this state, by virtue of statute, mesne profits, or damages for withholding, are recoverable in ejectment if the complaint lays a proper foundation therefor. But a party may seek only nominal damages in ejectment and after judgment therein pursue his separate remedies as at common law.[84] Where a disseizor surrenders or abandons possession before suit and the rightful owner is in possession, the latter may maintain trespass for the wrongful entry and recover damages therefor in the nature of mesne profits.[85]

[76] Norton v. Frederick, 107–36, 119+492.
[77] Mueller v. Jackson, 39–431, 40+565.
[78] Sherin v. Larson, 28–523, 11+70.
[79] See § 8303.
[80] Horning v. Sweet, 27–277, 6+782.
[81] Ambs v. Chi. etc. Ry., 44–266, 46+321.
[82] Nash v. Sullivan, 32–189, 20+144.
[83] Lord v. Dearing, 24–110.
[84] R. L. 1905 § 4154; Lord v. Dearing, 24–110; Nash v. Sullivan, 32–189, 20+144; Armstrong v. Hinds, 8–254(221); Merrill v. Dearing, 22–376; Holmes v. Williams, 16–164(146). At common law the judgment in ejectment had the effect, by relation, of determining that the person found to be the owner of the land had possession at the time when he acquired his title, and upon this theory his action of trespass for mesne profits was sustained. Cook v. Webb, 21–428; Woodcock v. Carlson, 41–542, 43+479; Blew v. Ritz, 82–530, 85+548.
[85] Blew v. Ritz, 82–530, 85+548.

2900. Measure of damages—The measure of damages for withholding the property, that is, for mesne profits, is the fair value of its use, in other words its rental value, exclusive of the use of improvements made by the defendant, during the time it is withheld, not exceeding six years. This, whether recovery is had in ejectment or in a separate action.[86] The value of the use of the property for any legitimate purpose may be recovered.[87] The peculiar location and conditions surrounding the property may be shown in determining its rental value.[88]

2901. For waste—Under appropriate allegations recovery may be had for injuries to the estate, by the defendant, while in possession.[89]

2902. To what time assessed—Damages should be assessed up to the day of trial.[90]

2903. From what time assessed—In an action by a vendee, under an executory contract, it has been held that the damages were properly calculated from the date of the contract.[91]

2904. Offsetting improvements—The statute provides for offsetting improvements against damages under certain conditions.[92]

VERDICT AND JUDGMENT

2905. Verdict—A verdict is sufficient, though informal, if it can be made certain by a reference to the pleadings and record.[93]

2906. Judgment—A judgment in general terms for the defendant is sufficient. A judgment may define the line between plaintiff and defendant when such line is a fact in issue and decided.[94] Facts found showing only that the defendant is the present owner of the legal title, with the right of possession, do not warrant a judgment barring all claims of the plaintiff to the land.[95] A judgment for a plaintiff claiming under an execution sale which, in effect, allowed the defendant to redeem from the sale, has been held erroneous.[96] A defendant, in possession as a servant, disclaiming any interest in the land, has been held entitled only to a judgment of dismissal. But a judgment against him for the possession has been held not prejudicial.[97] A defendant in possession under a bond for a deed has been held entitled to an accounting and judgment thereon.[98] In an action by a corporation of which there are contesting claimants to the offices, upon an answer alleging that the defendant is in possession under one set of claimants, the court, while it cannot render judgment, as between the claimants, so as to exclude one set and put another into the offices, will determine whether the set which let defendant in were officers of the corporation.[99] A judgment in ejectment may be but a preparatory step to other appropriate remedies.[1]

[86] R. L. 1905 § 4432; Nash v. Sullivan, 32–189, 20+144; Noyes v. French, 80–397, 83+385; Yorks v. Mooberg, 84–502, 87+1115. See Poehler v. Reese, 78–71, 80+847 (evidence that the fair rental value of a tract of land for a specified year is a certain sum will not support a finding that the rents, issues, and profits of the tract for that year were the sum stated); Campbell v. Loeb, 72–76, 74+1024 (findings as to damages held not justified by the evidence); Gould v. Alton, 93–448, 101+965 (findings as to damages sustained).

[87] Curry v. Sandusky F. Co., 88–485, 93+896.

[88] Noyes v. French, 80–397, 83+385.

[89] Pierro v. St. P. etc. Ry., 37–314, 34+38; Id., 39–451, 40+520.

[90] Abrahamson v. Lamberson, 68–454, 71+676.

[91] Ferguson v. Trovaten, 94–209, 102+373.

[92] R. L. 1905 § 4432; O'Mulcahy v. Florer, 27–449, 8+166; McLellan v. Omodt, 37–157, 33+326.

[93] Cohues v. Finholt, 101–180, 112+12.

[94] Laramy v. Ruschke, 46–125, 48+561.

[95] King v. Kindred, 38–354, 37+794.

[96] Coolbaugh v. Roemer, 30–424, 15+869.

[97] Marks v. Jones, 71–274, 73+961.

[98] Coolbaugh v. Roemer, 32–445, 21+472.

[99] Trustees v. Halvorson, 42–503, 44+663.

[1] Reynolds v. Munch, 100–114, 110+368.

REMOVAL OF BUILDINGS AND CROPS

2907. Removal of buildings—The statute provides for the removal of buildings erected by an occupant in good faith.[2]

2908. Removal of crops—The statute authorizes an occupant to enter the premises for the removal of crops after a judgment against him though it is adjudged that he was not entitled to possession when the crops were sown.[3]

EJUSDEM GENERIS—See Contracts, 1837; Statutes, 8977.

ELECTION

Cross-References

See Indictment, 4414; Pleading, 7536; Wills, 10299.

2909. Definition—The equitable doctrine of election is an obligation imposed upon a party to choose between two inconsistent or alternative rights or claims, in cases where there is a clear intention of the person from whom he derives one that he should not enjoy both.[4]

ELECTION OF REMEDIES

2910. Definition—Election of remedies is the adoption of one of two or more coexisting and inconsistent remedies which the law affords upon the same state of facts.[5]

2911. Distinguished from estoppel—The doctrine of election of remedies differs from that of estoppel in its broadest sense, in that the party invoking it need not show that he will suffer some material disadvantage, unless his adversary be required to abide by his election.[6]

2912. Necessity—A party is put to an election only where his remedies are inconsistent, and not where they are consistent and concurrent.[7]

2913. Forms of action at common law—At common law a party frequently had a choice of various forms of action on the same state of facts, and success or failure often depended upon the choice.[8]

2914. Finality of election—One who has voluntarily chosen and carried into effect an appropriate legal remedy, with full knowledge of the facts and of his rights, is barred from pursuing another inconsistent remedy, even though no injury has been done by his choice or would result from resorting to the other remedy.[9] But a futile attempt to enforce a right or remedy which one does not

[2] R. L. 1905 § 4433; Reed v. Lammel, 40–397, 42+202.

[3] R. L. 1905 § 4438; Bloemendal v. Albrecht, 79–304, 82+585.

[4] Washburn v. Van Steenwyk, 32–336, 350, 20+324; In re Gotzian, 34–159, 24+920; Brown v. Brown, 42–270, 44+250; Sherman v. Lewis, 44–107, 46+318; Sorenson v. Carey, 96–202, 104+958; Appleby v. Appleby, 100–408, 111+305. See 23 Harv. L. Rev. 138.

[5] See cases under §§ 2912, 2914.

[6] Pederson v. Christofferson, 97–491, 106+958; Aho v. Republic I. & S. Co., 104–322, 116+590.

[7] Barnes v. Hekla etc. Co., 56–38, 57+314; Bell v. Mendenhall, 71–331, 337, 73+1086. See Smith v. Carlson, 36–220, 222, 30+761; Piper v. Sawyer, 78–221, 223, 80+970; Aho v. Republic I. & S. Co., 104–322, 324, 116+590.

[8] Folsom v. Carli, 6–420(284, 289).

[9] Rheiner v. Union Depot etc. Co., 31–289, 295, 17+623; Thomas v. Joslin, 36–1, 29+344; Dyckman v. Sevatson, 39–132, 39+73; Quimby v. Shearer, 56–534, 58+155; John-

possess, is not a bar to the enforcement of rights or remedies he does possess.[10] One who has sought a legal remedy, but has withdrawn or discontinued the proceedings before any action has been had upon it, is not barred from pursuing a different remedy, at least if the adverse party is not thereby prejudiced.[11] If an election is based on a justifiable ignorance of material facts it will not be conclusive.[12]

son v. Johnson, 62–302, 64+905; Wright v. Robinson, 79–272, 82+632; Pederson v. Christofferson, 97–491, 106+958; Johnson v. Clontarf, 98–281, 108+521; Aho v. Republic I. & S. Co., 104–322, 116+590.

[10] In re Van Norman, 41–494, 43+334; Marshall v. Gilman, 52–88, 53+811; Cumbey v. Ueland, 72–453, 458, 75+727; Schrepfer v. Rockford Ins. Co., 77–291, 79+1005; Pederson v. Christofferson, 97–491, 106+958. See Christianson v. Norwich etc. Soc., 84–526, 533, 88+16.

[11] Bitzer v. Bobo, 39–18, 38+609; Spurr v. Home Ins. Co., 40–424, 42+206; Cumbey v. Ueland, 72–453, 75+727; Mulcahy v. Dieudonne, 103–352, 115+636.

[12] Kraus v. Thompson, 30–64, 14+266; Bitzer v. Bobo, 39–18, 38+609.

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See Evidence, 3462.

IN GENERAL

2915. Construction of statutes—There is a clear distinction between the provisions and prohibitions in election laws which are personal to the elector, who is personally at fault if he violates them, and those which apply to elective officers, over whose conduct he has no control. In the former case they are to be construed as mandatory, as a general rule, and his vote will be rejected if he intentionally fails to comply with them, while in the latter case they are to be construed as directory, unless otherwise expressly, or by necessary implication, so declared by statute.[13] Election laws are to be construed so as to secure to every voter reasonable opportunity to vote and to have his vote counted as cast, when his intention can be ascertained from the ballot without violating statutory provisions. No man should be disfranchised upon a doubtful construction of statutes.[14] Election laws should be liberally construed so as to secure to the people their right to express freely their choice.[15] They should not be construed so as to discourage the formation of new parties,[16] or independence in voting.[17]

2916. Officers—Irregularity in the appointment of election officers is not generally fatal.[18] The disqualification of a judge of election has been held not a ground for rejecting the vote of the precinct.[19] The failure of officers to qualify by taking an oath is not fatal.[20] The acts of de facto election officers, being in under color of election or appointment, are valid as to third parties and the public.[21]

2917. Damages for debarring voter—An action for damages may be maintained for wrongfully debarring one from his right to vote.[22]

2918. Pleading—Certain allegations in a complaint as to the holding of an election have been held sufficient.[23]

RIGHT TO VOTE

2919. Constitutional rights—The constitution provides that "no member of this state shall be defranchised * * * unless by the law of the land, or the judgment of his peers."[24] It defines the persons who are entitled to vote.[25] A citizen cannot be deprived of his right to vote by a change of election districts.[26]

2920. Determined by state constitution and laws—The right to vote depends on the constitution and laws of the state, and was not conferred by the fourteenth amendment to the federal constitution.[27] The legislature has no power to impose disabilities upon an elector.[28]

2921. Naturalized citizens—The provisions of section 1 of article 7 of our state constitution, as amended in 1895, limiting the right of suffrage, as respects naturalized citizens, to such as are admitted to citizenship three months preceding the election at which they tender their vote, is not in conflict with the fourteenth amendment of the federal constitution, which provides that no state

[13] Pennington v. Hare, 60–146, 150, 62+116; Truelsen v. Hugo, 87–139, 144, 91+434.
[14] Bloedel v. Cromwell, 104–487, 116+947. See State v. Gay, 59–6, 19, 60+676.
[15] Quealy v. Warweg, 106–145, 118+673; Snortum v. Homme, 106–464, 119+59. See State v. Gay, 59–6, 19, 60+676.
[16] Davidson v. Hanson, 87–211, 219, 91+1124, 92+93.
[17] Quealy v. Warweg, 106–145, 118+673.
[18] Hankey v. Bowman, 82–328, 84+1002.
[19] Quinn v. Markoe, 37–439, 35+263.
[20] Taylor v. Taylor, 10–107(81).
[21] Quinn v. Markoe, 37–439, 35+263.
[22] Brisbin v. Cleary, 26–107, 1+825.
[23] Wiley v. Board of Ed., 11–371(268).
[24] Const. art. 1 § 2; State v. Falk, 89–269, 94+879.
[25] Const. art. 7 §§ 1–9.
[26] State v. Fitzgerald, 37–26, 32+788.
[27] State v. Weber, 96–422, 105+490.
[28] State v. Bates, 102–104, 111, 112+1026.

shall enact or enforce any law abridging the privileges or immunities of citizens of the United States.[29]

2922. Women—Women, possessing the requisite qualifications of male voters, are entitled to vote for school officers and members of library boards and upon any measure relating to libraries and school boards.[30]

ELECTION DISTRICTS

2923. What constitutes—Each town,[31] each village that is separated from the town for election purposes,[32] and each city ward,[33] is a separate election district, but cities and villages of less than two thousand population may provide a single voting place.[34]

2924. In Indian reservations—Election districts may be created in the White Earth Indian reservation upon petition to the proper authorities by the requisite number of legal voters.[35]

2925. Establishment by governor—Under a former statute the governor was authorized to establish election districts is unorganized counties. And for many years it was the practice of the governors to establish new election districts, in counties fully organized, but containing territory not organized into township and election districts, and extending into remote parts and into Indian reservations.[36]

2926. Changing—Effect on right to vote—An act of the legislature, assuming to establish a second election district in an organized town, has been held unconstitutional on the ground that it deprived an elector of his constitutional right to vote in his election district, there being no law under which an election might be had in the new district.[37] A special act of 1887, detaching the city of Ortonville from the township of Ortonville, was held not unconstitutional as depriving the people of the opportunity of holding the general town election for that year.[38]

NOMINATION OF CANDIDATES

2927. Control of legislature—The legislature may recognize the existence of political parties, and within reasonable limits regulate the means by which partisan efforts should be protected in exercising individual preferences for party candidates, which is the general purpose of the primary election law of this state. Under the constitution every person who is entitled to vote is eligible to office, but eligibility does not entitle a candidate to equal advantages in all practical conditions under which he may seek office, or prohibit the legislature from imposing fair and reasonable restrictions on an aspirant in soliciting the support of his fellow citizens at the polls.[39]

2928. By voters—Petition—Candidates for state offices may be nominated by a petition of electors. The secretary of state is required to recognize a peti-

[29] State v. Weber, 96–422, 105+490.

[30] Const. art. 7 § 8; State v. Gorton, 33–345, 23+529; Stadtler v. School Dist., 71–311, 317, 73+956; Trautmann v. McLeod, 74–110, 112, 76+964.

[31] R. L. 1905 § 156; Laws 1907 c. 365; Laws 1909 cc. 125, 175; State v. Fitzgerald, 37–26, 32+788; Brattland v. Calkins, 67–119, 123, 69+699.

[32] R. L. 1905 §§ 156, 708; Laws 1909 cc. 125, 175. See, under prior statutes, State v. Spaude, 37–322, 34+164; Bradish v. Lucken, 38–186, 36+454; Stemper v. Higgins, 38–222, 37+95.

[33] R. L. 1905 § 156; Laws 1907 c. 365; Laws 1909 cc. 125, 175.

[34] Laws 1909 c. 175.

[35] Hankey v. Bowman, 82–328, 84+1002. See Brattland v. Calkins, 67–119, 69+699.

[36] G. S. 1894 §§ 10, 11; Hankey v. Bowman, 82–328, 84+1002; Brattland v. Calkins, 67–119, 69+699.

[37] State v. Fitzgerald, 37–26, 32+788.

[38] State v. Gurley, 37–475, 35+179.

[39] State v. Moore, 87–308, 92+4.

tion or certificate of electors having two thousand or more qualified voters thereon as a means of nominating candidates for state offices, with the incidental right of the petitioners on the certificate of nomination to designate a proper party name for the candidate placed on the ballot.[40] The provision of the election law which requires that the certificate of nomination shall contain the name of the person nominated, the office for which he is nominated, and the party or political principle which he represents, should be liberally, and not technically construed, so as to effectuate the legislative intention, and to secure to the people their right to freely express their choice. A certificate signed by voters, which recites that the voter was sworn and knew the contents and the purposes of the certificate, and signed the same of his own free will, in which the form of jurat is "subscribed and sworn to before me," is valid. The fact that it did not appear upon a certificate that the persons signing it had not voted at a primary election for any nominee to an office for which a nominee was voted for at that election does not invalidate the certificate. The expression "Independent Party" has been held to be a proper emblem for a candidate nominated by petition.[41] A certificate which makes no attempt to comply with the provision requiring a statement of the party or political principle of the nominee is void.[42]

2929. By direct vote—Primary election—Our primary law [43] has been sustained against various constitutional objections,[44] but the provision which attempts to confer upon the supreme court original jurisdiction to hear and determine election contests,[45] is unconstitutional.[46] As regards the offices to which the law applies it affords the exclusive mode of nomination.[47] It does not apply to state officers.[48] The law provides a summary remedy for the correction of errors or omissions in the primary ballot, and for contesting nominations.[49] Contests for nomination as candidates for election to public office

[40] R. L. 1905 §§ 213-216; Davidson v. Hanson, 87-211, 91+1124, 92+93; In re Official Ballot, 99-517, 109+1.

[41] Quealy v. Warweg, 106-145, 118+673.

[42] State v. Grift, 106-29, 117+921.

[43] R. L. 1905 §§ 181-203; State v. Bates, 102-104, 108, 112+1026.

[44] State v. Jensen, 86-19, 89+1126 (provision requiring a political party to have at least ten per cent. of the total vote cast at the last preceding election for its leading candidate, or a petition containing at least ten per cent. of the qualified electors of the county, held constitutional); State v. Johnson, 87-221, 91+604, 840 (no space provided on ballot for writing names of candidates, held constitutional); State v. Moore, 87-308, 92+4 (provision against unsuccessful candidate at primary election having his name on the official ballot, held constitutional); State v. Scott, 99-145, 108+828 (provision requiring payment of fees upon filing for nomination, held constitutional); State v. Scott, 126+70 (classification of communities sustained—provision as to affidavit of candidate sustained).

[45] R. L. 1905 § 203.

[46] Lauritsen v. Seward, 99-313, 109+404; State v. Scott, 105-513, 117+845, 1044. See State v. Scott, 105-525, 117+846; Id., 105-526, 117+846; Id., 105-527, 117+846.

[47] State v. Jensen, 86-19, 89+1126; State v. Scott, 87-313, 91+1101.

[48] Davidson v. Hanson, 87-211, 91+1124, 92+93.

[49] R. L. 1905 §§ 202, 203; Lauritsen v. Seward, 99-313, 109+404 (remedy in nature of mandamus—election contest must be initiated in district court); Whaley v. Bayer, 99-397, 109+596, 820 (district court has jurisdiction to hear and determine election contest—court may adopt such procedure as may be necessary to make the jurisdiction effective—procedure of the general election law for the trial of election contest may be properly followed); Johnson v. Dosland, 99-518, 109+1133 (order denying relief under statute reversed and trial court directed to hear and determine contest upon the merits); State v. Scott, 105-513, 117+845, 1044 (supreme court has jurisdiction under section 202—a proceeding by petition and order to show cause, under R. L. 1905 § 202, is the proper proceeding to test the question whether members of the legislature which enacts a law increasing the compensation of senators and representatives are disqualified from becoming candidates for such office for the ensuing term).

must be brought to trial and final determination before the general election at which the office contended for is to be filled by the electors, and the courts will not, where no questions of general public importance are involved, hear or determine them after the general election has been held.[50] The affidavit required of the candidate is sufficient if it shows his residence is such as to render him eligible to the office he seeks.[01]

2930. By party convention—Candidates whose nominations are not required to be made by a primary election may be nominated by a delegate convention called for that purpose.[51] Nominations for offices covered by the primary election law cannot be made by party conventions.[52] Under a former statute a nomination might be made by a mass convention, but apparently such a convention is no longer authorized.[53] A political convention for the nomination of candidates, in the absence of statutory regulations to the contrary, has control over its own proceedings; and a majority of the delegates may, if there is no fraud or oppression, control its action, and correct or reverse any action previously taken by it. Unless such convention acts arbitrarily, oppressively, or fraudulently in the premises, its final determination as to candidates, or any other question within its jurisdiction, will be followed by the courts. The mere fact that in such a convention a person receives a majority of the votes on a ballot taken for the purpose of nominating a candidate does not make him absolutely the party nominee; but the convention, in the absence of fraud or oppression, may declare the ballot irregular, and proceed to the naming of a candidate in such manner as the majority may direct.[54] Candidates selected by a small remnant of a defunct party of "Independent Democrats," which was a mere bolt or temporary movement rather than a permanent political party, have been held not entitled to a place on an official ballot.[55]

2931. By campaign committee in case of vacancy—Provision is made by statute for nomination by campaign committees in case of a vacancy after a regular nomination.[56] A campaign or party committee cannot nominate or designate a candidate, and compel the proper officer to place his name upon the general election ballot as a candidate, under a party name, where it stands admitted that no such party candidate was named upon the primary election ballot, and that no nomination was made by or in behalf of said party at the primary election.[57]

2932. By committee of party convention—A duly assembled convention of a political party may delegate its power, and confer upon a duly selected or properly designated committee full authority to nominate candidates for office, to be voted for at an ensuing election; and such candidates, when so nominated, are entitled to have their names placed on the official ballots as the regular nominees of the party represented by the convention, upon complying with the provisions of the election law in respect to filing certificates of nomination and the payment of nominating fees. The certificates of nomination in such cases may be executed by the presiding officer and secretary of the nominating committee.[58]

2933. Party names—Independent party—The statutes of this state recognize and protect the right to the exclusive use of a party name.[59] The expres-

[50] Johnson v. Dosland, 103–147, 114+465.
[01] State v. Scott, 126+70.
[51] R. L. 1905 §§ 204–212; Davidson v. Hanson, 87–211, 91+1124, 92+93.
[52] State v. Jensen, 86–19, 89+1126.
[53] Manston v. McIntosh, 58–525, 60+672.
[54] Phillips v. Gallagher, 73–528, 76+285. See Jennings v. Board, (Mich.) 100+995.
[55] State v. Dist. Ct., 74–177, 77+28.
[56] R. L. 1905 § 217; White v. Sanderson, 74–118, 122, 76+1021.
[57] State v. Scott, 87–313, 91+1101.
[58] White v. Sanderson, 74–118, 76+1021. See State v. Scott, 87–313, 91+1101.
[59] R. L. 1905 § 176; Brown v. Jensen, 86–138, 90+155; Davidson v. Hanson, 87–

sion "Independent Party" is a proper emblem for a candidate nominated by petition.[60]

BALLOTS

2934. Constitutional mode of election—It is provided by the constitution that all elections shall be by ballot, except for such town officers as may be directed by law to be otherwise chosen.[61] The object of this provision was to secure to the elector the privilege of voting secretly and effectively, and this object may be constitutionally attained by the use of voting machines.[62]

2935. Secrecy of ballot—Waiver—As a general rule secrecy of the ballot is a personal privilege of the elector, which he may waive, except as the law imposes secrecy on grounds of public policy.[63]

2936. What constitutes voting by ballot—Voting machines—As applied to elections of public officers, voting by ballot signifies a mode of designating an elector's choice of a person for an office by the deposit of a ticket bearing the name of such person in a receptacle provided for the purpose, in such a way as to secure to the elector the privilege of complete and inviolable secrecy in regard to the person voted for.[64] Voting by means of a voting machine may be voting by ballot within the constitution.[65]

2937. Provision for numbering unconstitutional—The provisions of Laws 1878 c. 84 § 8, providing for the numbering of ballots to correspond with the number of the voter on the poll-list, was unconstitutional as in violation of the secrecy of the ballot.[66]

2938. Form—Certain ballots used in a municipal election to authorize the issuance of bonds, have been held not so complex and misleading as to invalidate the election. The placing of the words "yes" and "no" after the proposition to be voted on, has been held unobjectionable.[67]

2939. Blank spaces—In making up the ballots for primary election, blank spaces or lines need not be left after the name of the last candidate for each office, and under the title of each office for which candidates are to be selected, wherein an elector of a party can write the name of the candidate of his choice.[68]

2940. Party precedence—In arranging the names, or groups of names, of candidates of different parties, precedence is given according to the vote polled by the parties at the last preceding general election.[69]

2941. Party cut or device—A "sticker" or "paster" has been held not within a statute forbidding the use of a cut or device to distinguish one ballot from another.[70]

2942. Candidate of two or more parties—A person cannot be named on an official ballot as the candidate of more than one party, or of any party other than that whose certificate of his nomination was first properly filed.[71]

211, 91+1124, 92+93; Lind v. Scott, 87–316, 92+96; Morledge v. Redington, 92–98, 99+355. See State v. Hanson, 93–178, 100+1124, 102+209.

[60] Quealy v. Warweg, 106–145, 118+673.

[61] Const. art. 7 § 6; Brisbin v. Cleary, 26–107, 1+825; Elwell v. Comstock, 99–261, 109+113, 698.

[62] Elwell v. Comstock, 99–261, 109+113, 698.

[63] Pennington v. Hare, 60–146, 151, 62+116.

[64] Brisbin v. Cleary, 26–107, 1+825.

[65] Elwell v. Comstock, 99–261, 109+113, 698.

[66] Brisbin v. Cleary, 26–107, 1+825.

[67] Janeway v. Duluth, 65–292, 68+24; Truelsen v. Duluth, 61–48, 63+714.

[68] State v. Johnson, 87–221, 91+604, 840.

[69] R. L. 1905 § 173; Higgins v. Berg, 74–11, 76+788 (mode of determining the highest number of votes polled—duplicate nominations by two parties—rule laid down in this case embodied in present statute).

[70] Quinn v. Markoe, 37–439, 35+263.

[71] R. L. 1905 § 176. See, prior to adoption of R. L. 1905, State v. Hanson, 93–178, 100+1124, 102+209.

2943. Right to use party name on ballots—It is provided by statute that "a political party which has adopted a party name, and whose state candidates, or any of them, polled at the preceding general election at least one per cent. of the vote cast, shall be entitled to the exclusive use of such name for the designation of its candidate on the official ballot, and no candidate of any other party shall be entitled to have printed thereon as a party designation any part of such name." [72]

2944. Powers of officers in preparing ballots—The functions of the officer required by law to prepare the official ballot are purely ministerial, and he is not authorized to exercise his discretion in the selection of party names for candidates, or to determine which of two party names should be chosen as the most appropriate designation thereon.[73] Where a matter connected with the preparation of ballots is not regulated by statute, the courts will not interfere with the action of the officer in charge, unless he acts fraudulently, or unfairly, or on a clearly improper and prejudicial basis.[74]

2945. Correction—Who may move—The statute provides a summary proceeding for the correction of error in official ballots.[75] Any duly qualified elector may proceed thereunder.[76] The constitutionality of the statute has been questioned, but not determined.[77]

2946. Aid in marking for incompetents—Provision is made by statute for aid to a voter who is unable to read English or physically unable to mark a ballot.[78]

2947. Intention of voter controls—The intention of the voter controls, so far as such intent can be clearly ascertained from the ballot itself. His intention does not control, regardless of the manner of expressing it. It must be expressed on a ballot, substantially in the manner required by statute.[79] The statute prescribes certain rules to be followed in determining the intention of the voter.[80] Strained efforts to ascertain the intention of the voter in any manner other than by following the rules prescribed by the statute are to be avoided.[81]

2948. Immaterial markings—Irregular or impertinent markings on a ballot, which do not create uncertainty as to the voter's choice of candidates or serve to identify the voter, do not vitiate the ballot.[82]

2949. Indefinite and conflicting markings—If a ballot is marked with a cross mark opposite the names of two opposing candidates for an office, it is to be rejected as to that office, but not as to other offices for which the marking is proper.[83] Where a voter writes the name of a person eligible to the office, but not a candidate, on the ballot in the space provided for writing in the name of a candidate, and also makes a cross mark opposite the name of the official candi-

[72] R. L. 1905 § 176; Brown v. Jensen, 86–138, 90+155; Davidson v. Hanson, 87–211, 91+1124, 92+93; Lind v. Scott, 87–316, 92+96; Morledge v. Redington, 92–98, 99+355.

[73] Lind v. Scott, 87–316, 92+96.

[74] Higgins v. Berg, 74–11, 16, 76+788.

[75] R. L. 1905 § 220; Phillips v. Gallagher, 73–528, 533, 76+285; Lind v. Scott, 87–226, 91+1125.

[76] State v. Dist. Ct., 74–177, 77+28.

[77] Higgins v. Berg, 74–11, 76+788; Pottgieser v. Dist. Ct., 81–420, 84+1115.

[78] R. L. 1905 §§ 278, 279; State v. Gay, 59–6, 60+676 (oath to voter mandatory—form of oath—fact that voter cannot read without glasses and has left his glasses at home not a disability—fact that elector marked ballots for more than three voters held not fatal).

[79] R. L. 1905 § 302; Truelsen v. Hugo, 81–73, 83+500; Hughes v. Upson, 84–85, 86+782; Bloedel v. Cromwell, 104–487, 116+947.

[80] R. L. 1905 § 302; Lannon v. Ring, 107–453, 120+1082 (erasures).

[81] Bloedel v. Cromwell, 104–487, 490, 116+947.

[82] Truelsen v. Hugo, 81–73, 83+500; Elwell v. Comstock, 99–261, 109+113; Bloedel v. Cromwell, 104–487, 116+947.

[83] Pennington v. Hare, 60–146, 62+116.

date for the office, printed on the ballot, the ballot should not be counted as to that office.[84] Cases are cited below involving various indefinite markings.[85]

2950. Excess of names—Section 19 of G. S. 1878 c. 1, declaring that if a ballot contains a greater number of names for any one office than the number of persons required to fill the same, it shall be considered void as to all the names designated to fill such office, is peremptory. Whenever the fact of the excess of names exists, the ballot is pro tanto void, and cannot be counted. Ballots upon which, for a particular office, one name is printed but not in any way obliterated, and another name is written, cannot be counted for the person of either name for such office.[86]

2951. Misnomer of person voted for—If, for a certain office, there is but one person running of a given name, say the name of Frank E. Newell, a ballot for "Newell," simply, should be counted for him. So should a ballot for Frank Newell or F. E. or F. Newell. So, if, to designate the person voted for, letters are used in a ballot, which do not properly spell the name Newell, but do spell a word which is idem sonans, such ballot should be counted for Newell. But unless the ballot is one of these kinds, or of equivalent certainty, it should be rejected.[87]

2952. Writing names of persons voted for—A voter is not required to vote for persons whose names are printed on the official ballot. He may write other names in the blank spaces under the printed names of candidates, and the names so written must be counted as balloted for, whether marked in the small square or not.[88]

2953. What constitutes a cross mark—There is no inflexible rule as to what constitutes a cross mark. Any mark, however crude and imperfect in form, is sufficient, if it is apparent that it was honestly intended as a cross mark, and for nothing else.[89] Ballots with unintelligible marks, or without any marks, are not to be counted.[90]

2954. Erasures—Erasures do not vitiate a ballot,[91] and an improper marking may be rendered harmless by an erasure.[92] The statute provides that when a ballot shows that marks have been made against the names of two candidates, and an attempt made to erase one of such marks, it shall be counted for the candidate for whom it was evidently intended.[93]

2955. Pasters—A "sticker" or "paster," containing the name of a candidate, and attached to the face of a ballot, is not a "cut or device to distinguish one ballot from another," within the meaning of G. S. 1878 c. 1 § 82.[94] Its use is authorized under the present statute.[95]

2956. Marking to identify voter—A ballot so marked by a voter that it may be identified as his ballot by any person other than the voter is void. The voter cannot be heard to say that he did not make the mark for purposes of identification. It is not the voter's intention, but the natural inference from what he

[84] Hughes v. Upson, 84–85, 86+782.

[85] Pennington v. Hare, 60–146, 62+116; Truelsen v. Hugo, 81–73, 83+500; Hopkins v. Duluth, 81–189, 83+536; Hughes v. Upson, 84–85, 86+782; Lannon v. Ring, 107–453, 120+1082.

[86] Newton v. Newell, 26–529, 6+346.

[87] Id.

[88] R. L. 1905 §§ 275(3), 302(2); State v. Moore, 87–308, 92+4; Snortum v. Homme, 106–464, 119+59. See Quinn v. Markoe, 37–439, 35+263; Truelsen v. Hugo, 81–73, 78, 83+500; Hughes v. Upson, 84–85, 86+782.

[89] Pennington v. Hare, 60–146, 62+116; Truelsen v. Hugo, 81–73, 83+500; Hughes v. Upson, 84–85, 86+782.

[90] Hopkins v. Duluth, 81–189, 83+536.

[91] See Truelsen v. Hugo, 81–73, 83+500; Hughes v. Upson, 84–85, 86+782; Truelsen v. Hugo, 87–139, 91+434; Lannon v. Ring, 107–453, 120+1082.

[92] Elwell v. Comstock, 99–261, 270, 109+113, 698.

[93] R. L. 1905 § 302(8); Lannon v. Ring, 107–453, 120+1082.

[94] Quinn v. Markoe, 37–439, 35+263.

[95] Snortum v. Homme, 106–464, 119+59.

has done, which controls. Names and initials on a ballot are a natural means of identification and vitiate it. So do any marks so distinct and individual in character as to furnish means of identifying the ballot as that of the particular voter.[96]

2957. Folding by voter—The provision of the statute [97] that the voter shall fold each ballot separately, is merely directory.[98]

2958. Improper numbering by judges—Where judges of election, acting under a misapprehension of the law, improperly numbered certain ballots, without the knowledge of the voters casting them, it was held that the ballots should be counted as cast.[99]

2959. Initialing by judges of election—The provision of the statute [1] requiring judges of elections to place their initials on the back of ballots is merely directory. A ballot without such initials,[2] or with the initials of two judges of the same party,[3] is not void.

CONDUCT OF ELECTION

2960. Irregularity—Effect in general—Elections conducted fairly and honestly, where no fraud or illegal voting is charged or shown, will not be set aside for mere irregularity in the manner of the appointment of the election officers or in the conduct of the election.[4]

2961. Posting list of electors—A failure to post a list of the electors ten days prior to the election, as required by statute, has been held not a ground for rejecting the votes of the precinct.[5]

2962. Time of closing polls—The fact that polls were kept open after the hour for closing, has been held not a ground for rejecting the votes of the precinct, in the absence of any evidence that any votes were cast after that hour.[6]

2963. Presence of elector as challenger—The fact that the judges of election refused to allow an elector to be present in the room as a challenger of voters, has been held not a ground for rejecting the votes of the precinct, in the absence of any evidence that any injustice resulted.[7]

2964. Sealing ballot boxes—The provision of the statute requiring ballot boxes to be sealed after the ballots have been canvassed,[8] is merely directory.[9]

2965. Poll lists—The fact that no registry poll lists were used at an election has been held no ground for rejecting the vote.[10]

COUNT OF VOTE, RETURNS, AND CANVASS

2966. Disqualification of candidate having plurality of votes—A person who receives less than a plurality of the votes cast is not entitled to the office,

[96] Pennington v. Hare, 60–146, 62+116; Hopkins v. Duluth, 81–189, 83+536; Elwell v. Comstock, 99–261, 109+113, 698; Bloedel v. Cromwell, 104–487, 116+947; Lannon v. Ring, 107–453, 120+1082.

[97] R. L. 1905 § 275(5).

[98] Truelsen v. Hugo, 87–139, 91+434.

[99] Pennington v. Hare, 60–146, 62+116.

[1] R. L. 1905 § 266.

[2] Truelsen v. Hugo, 87–139, 91+434.

[3] State v. Gay, 59–6, 60+676.

[4] Taylor v. Taylor, 10–107(81); O'Gorman v. Richter, 31–25, 16+416; Quinn v. Markoe, 37–439, 35+263; Stemper v. Higgins, 38–222, 226, 37+95; Soper v. Sibley County, 46–274, 48+1112; State v. Gay, 59–6, 60+676; Pennington v. Hare, 60–146, 62+116; Janeway v. Duluth, 65–292, 68+24; Hankey v. Bowman, 82–328, 84+1002; State v. Falk, 89–269, 275, 94+879; Lodgord v. East Grand Forks, 105–180, 117+341. See State v. Bernier, 98–1, 38+368.

[5] Soper v. Sibley County, 46–274, 48+1112.

[6] Soper v. Sibley County, 46–274, 48+1112. See R. L. 1905 § 286.

[7] Soper v. Sibley County, 46–274, 48+1112. See R. L. 1905 § 263.

[8] R. L. 1905 § 311; State v. Elliott, 75–391, 77+952.

[9] O'Gorman v. Richter, 31–25, 16+416.

[10] Taylor v. Taylor, 10–107(81); Edson v. Child, 18–64(43); Id., 18–351(323).

though the next highest candidate, who receives such plurality, is ineligible to the office—the fact of such ineligibility not appearing upon the ballots which he so received.[11]

2967. Unlawful nominee on official ballot—Electors voting for a candidate whose name appears upon the official ballot as the regular nominee will not be disfranchised by rejecting their ballots on the ground that the candidate's nomination was secured by unlawful means.[12]

2968. Meaning of "vote"—A "vote of the electors" generally means the expressed will of a majority of electors voting on a question.[13]

2969. Return of lists of electors—The fact that lists of electors are not included in returns to the county auditor does not invalidate the election or the returns.[14]

2970. Errors neutralizing each other—Errors on both sides may neutralize each other.[15]

2971. Acts of election judges not judicial—The acts of judges of election are not judicial or quasi judicial and cannot be reviewed on certiorari.[16]

2972. Returns—The word "returns" generally means an official statement of votes cast at an election, transmitted to some authorized custodian, for the purpose of being canvassed by some proper authority.[17]

2973. Excluded ballot cannot be counted—Where a qualified elector offers to vote, but is prevented from casting his ballot by an erroneous decision of the judges of election, his ballot cannot be counted for the candidate for whom the elector subsequently declares he intended to vote.[18]

2974. Record of voters—Conclusiveness—The poll list, a record of the names of voters made by election officers during the progress of the election as they appear and cast their ballots, is, in the absence of clear proof to the contrary, conclusive of the names and number of persons who voted.[19]

2975. County canvassing board—In canvassing the returns the board acts in a mere ministerial capacity. It is not authorized to pass on the regularity or validity of the election. Its duty is the mere mathematical one of summing up the returns made to the auditor, and declaring the result.[20] When a board has met, canvassed the returns, and adjourned sine die, it is functus officio. It cannot reconvene.[21] A deputy county auditor may act on the board in place of the auditor.[22]

2976. State canvassing board—Provision is made by statute for a state canvassing board.[23] Its duty is merely to tabulate and sum up the reports received from the various county boards, and certify the result. Its decision is not conclusive on the courts.[24]

2977. Municipal canvassing boards—City charters often provide that the city council shall be the canvassing board in municipal elections.[25] Where no other canvassing board is expressly provided for municipal elections it is proper for the council to act as such.[26] A provision in a city charter that the city

[11] Barnum v. Gilman, 27–466, 8+375. See Taylor v. Sullivan, 45–309, 47+802.
[12] Johnson v. Dosland, 103–147, 114+465.
[13] Board of Ed. v. Moore, 17–412(391).
[14] Taylor v. Taylor, 10–107(81).
[15] Elwell v. Comstock, 99–261, 271, 109+113, 698.
[16] State v. McIntosh, 95–243, 103+1017.
[17] State v. St. Paul, 25–106.
[18] Pennington v. Hare, 60–146, 62+116.
[19] Lannon v. Ring, 107–453, 120+1082.
[20] O'Ferrall v. Colby, 2–180(148); Taylor v. Taylor, 10–107(81); State v. Churchill, 15–455(369); State v. St. Paul, 25–106. See R. L. 1905 § 318.
[21] Clark v. Buchanan, 2–346(298). See State v. Lamberton, 37–362, 34+336.
[22] Crowell v. Lambert, 10–369(295).
[23] R. L. 1905 § 326, as amended by Laws 1909 c. 76.
[24] McConaughy v. Secretary of State, 106–392, 119+408.
[25] Duryea v. Sibley, 76 55, 78+865; State v. Gates, 35–385, 28+927; State v. Dowlan, 33–536, 24+188.
[26] State v. St. Paul, 25–106.

council shall "be the judges of the election and qualification of their own members," without anything else to indicate an intention to exclude the jurisdiction of the courts to try the question of such election, does not exclude it.[27] Laws 1895 c. 8 § 114, which confers upon the city council the power to canvass the results of votes cast at all city elections and declare the results thereof, and makes the council the judge of the election and qualification of its own members, was not repealed by Laws 1901 c. 365 or by R. L. 1905 § 336. The council and the district court have concurrent jurisdiction to hear and determine election contests of this character.[28] A re-canvassing of votes by a village council three months after an election, has been held unauthorized and void.[29]

2978. Certificate of election by county auditor—The statute provides for the issuance of a certificate of election by the county auditor.[30] In issuing the certificate, the auditor acts in a mere ministerial capacity and cannot go behind the return of the county canvassing board.[31] A deputy auditor may issue a certificate.[32] Upon a direct attack the certificate is prima facie evidence of election and right to the office,[33] and in other cases it is conclusive evidence.[34]

CONTESTS

2979. Nature—An election contest is a special proceeding,[35] in which the issues are formed by notices of contest and tried as issues are tried in an ordinary civil action by the court.[36]

2980. Application of statutes—The general statute regulating contests is applicable to municipal elections.[37]

2981. Statutory modes of contest exclusive—Election controversies must be determined by the tribunal constituted by the legislature for that purpose.[38] But a provision in a city charter that the city council shall "be the judges of the election and qualification of their own members," without anything else to indicate an intention to exclude the jurisdiction of the courts to try the question of such election, does not exclude it.[39]

2982. Who may contest—Any voter may contest the election of any person for or against whom he had the right to vote.[40]

2983. Notice of appeal—Filing notice of appeal and serving the same in the manner and within the time prescribed by the statute are jurisdictional prerequisites.[41] A contest bond has been held not equivalent to notice.[42] The notice must specify the points upon which the contest will be made.[43] Notices must be served in the same manner as a summons in a civil action.[44] A notice

[27] State v. Gates, 35–385, 28+927. See State v. Dowlan, 33–536, 24+188.
[28] State v. Craig, 100–352, 111+3.
[29] State v. Lamberton, 37–362, 34+336.
[30] R. L. 1905 § 322.
[31] Crowell v. Lambert 10–369(295, 300); State v. Churchill, 15–455(369).
[32] Crowell v. Lambert, 10–369(295).
[33] Taylor v. Taylor, 10–107(81); Crowell v. Lambert, 10–369(295); State v. Sherwood, 15–221(172). See State v. Williams, 25–340.
[34] State v. Churchill, 15–455(369).
[35] Bell v. Jarvis, 98–109, 112, 107+547; Ford v. Wright, 13–518(480).
[36] R. L. 1905 § 336.
[37] Truelson v. Duluth, 60–132, 61+911; Duryea v. Sibley, 76–55, 78+865; State v. Dist. Ct., 107–437, 120+894.
[38] State v. McIntosh, 95–243, 103+1017.
[39] State v. Gates, 35–385, 28+927.
[40] R. L. 1905 § 336; State v. Dist. Ct., 74–177, 77+28. See Taylor v. Sullivan, 45–309, 47+802.
[41] Baberick v. Magner, 9–232(217); Borer v. Kolars, 23–445; Seeley v. Killoran, 53–290, 55+132; Duryea v. Sibley, 76–55, 78+865; Odegard v. Lemire, 107–315, 119+1057. See Newton v. Newell, 26–529, 6+346.
[42] Duryea v. Sibley, 76–55, 78+865.
[43] R. L. 1905 § 336; Taylor v. Taylor, 10–107(81); Newton v. Newell, 26–529, 6+346; O'Gorman v. Richter, 31–25, 16+416; Soper v. Sibley County, 46–274, 48+1112; Lee v. Kratka, 94–524, 102+1134.
[44] R. L. 1905 § 336; Truelson v. Duluth, 60–132, 61+911 (service on mayor and member of city council).

of contest is in the nature of a complaint in an ordinary action, setting forth the facts upon which the contestant relies to sustain his contest.[45] Objection to defects in a notice must be made in the trial court.[46]

2984. Amendment of notices or points—Notices or "points" of contest may be amended in the discretion of the court.[47] An order denying an amendment is not appealable.[48]

2985. Time and place of trial—The issues are not triable in vacation. They must be tried at a regular general or special term, and at the county seat, unless all the parties agree otherwise.[49]

2986. Inspection of ballots before trial—The statute provides for an inspection of ballots before trial to enable the parties to prepare for trial.[50] The statute is constitutional and applies to contests over election to the legislature.[51] It requires an applicant for an inspection to execute a bond to pay the expenses thereof.[52] There is no right of inspection prior to the service of a notice of appeal.[53]

2987. Reference to ballots—The ballots cast at an election may, in a contest under G. S. 1878 c. 1 § 52, be resorted to for the purpose of investigating and ascertaining the actual state of the vote. But, to entitle them to be used for this purpose, it must affirmatively appear that they have been so carefully preserved as to place their identity beyond all reasonable doubt. If they have been so carelessly cared for as readily to afford frequent or continued opportunity to interested parties, or the friends of interested parties, to tamper with them or alter them, or to add to or take from their number, unless all reasonable doubts as to their integrity are removed by an affirmative showing, they should not be received for the purpose of disputing the returns of the board of canvassers.[54]

2988. Recounting ballots—It has been held that evidence showing that the judges did not count the ballots, as required by law, by reading and announcing each ballot by itself, but divided them into parcels or lots of ten or twenty, and then read and announced them in the aggregate as so many votes for each candidate whose name was supposed to be upon all the ballots, justified the ordering of a recount, provided the genuineness of the ballots was first sufficiently proved.[55]

2989. Loose ballot—A ballot found in the ballot box by referees appointed in contest proceedings to recount the ballots cast at a particular precinct, which was not attached to the string of ballots counted by the officers of the election, and which, if counted, exceeded the number of ballots cast as shown by the poll list, has been held not sufficiently identified as a lawfully cast ballot.[56]

2990. Burden and degree of proof—The burden of proof is on the contestant.[57] Facts invalidating an election must be clearly proved.[58]

[45] Hanley v. Cass County, 87-209, 91+756.

[46] State v. Dist. Ct., 107-437, 120+894.

[47] R. L. 1905 § 336; Soper v. Sibley County, 46 274, 48+1112. See, under former statute, Ford v. Wright, 13-518(480).

[48] Hanley v. Cass County, 87-209, 91+756.

[49] R. L. 1905 § 336; Bell v. Jarvis, 98-109, 107+547. See Whallon v. Bancroft, 4-109(70).

[50] R. L. 1905 § 337; Laws 1907 c. 475.

[51] State v. Searle, 59-489, 61+553.

[52] Moede v. Haines, 66-419, 69+216 (inspector entitled to sue on bond though not named as obligee—joint action by inspectors, to recover compensation for their services and for money expended by them in connection therewith, held not to lie); Nehring v. Haines, 70-233, 72+1061 (wrongful neglect of contestant to have bond approved and filed cannot be taken advantage of by him or his sureties—delivery of bond held sufficient); Duryea v. Sibley, 76-55, 78+865 (bond held not equivalent to notice of appeal).

[53] O'Gorman v. Richter, 31-25, 16+416.

[54] Newton v. Newell, 26-529, 6+346; O'Gorman v. Richter, 31-25, 16+416; Stemper v. Higgins, 38-222, 37+95.

[55] O'Gorman v. Richter, 31-25, 16+416.

[56] Lannon v. Ring, 107-453, 120+1082.

[57] Taylor v. Taylor, 10-107(81); Blake v. Hogan, 57-45, 58+867. See Brattland v. Calkins, 67-119, 125, 69+699.

[58] Blake v. Hogan, 57-45, 58+867.

2991. Evidence—Admissibility—Cases are cited below involving the admissibility of evidence.[59]

2992. Possession of office pending appeal—Under G. S. 1866 c. 1 § 49. the person adjudged to be duly elected was, pending an appeal from the judgment, entitled, upon qualifying, to possession of the office.[60]

2993. Legislative contest—Testimony before justices of the peace—The judiciary has no control or supervision over the action of the two justices named to take testimony in case of a contest as to an election to either house of the legislature, under R. L. 1905 §§ 332–334, and a writ of prohibition will not issue to restrain them from taking the testimony.[61]

CORRUPT PRACTICES ACT

2994. Affidavit of expenses—Within the meaning of the corrupt practices act, a political aspirant becomes a candidate at the time of filing his affidavit of intention of becoming a candidate for a specified office, in accordance with R. L. 1905 § 184. The verified statement which he is required by law to file need not include items of expenses incurred or paid anterior to the time of filing such affidavit.[62]

CRIMINAL OFFENCES

2995. Double voting—Double voting is a felony under our statutes. Intoxication is no defence. The criminal intent is presumed from the mere doing of the act. The only question for the jury is, did the accused, having already voted, voluntarily cast a second vote at the same election.[63]

ELECTRICITY

2996. Electric companies—Liability for negligence—Electric companies are bound to use reasonable care in the construction and maintenance of their lines and apparatus. The degree of care varies with the danger involved. Where wires carry strong and dangerous currents of electricity a high degree of care must be exercised.[64] Electric companies are not insurers of safety.[65] The doctrine of res ipsa loquitur is sometimes applied.[66]

[59] Taylor v. Taylor 10–107(81) (canvassing board's certificate—prima facie evidence of facts recited); Ford v. Wright, 13–518(480) (oral evidence admissible); Newton v. Newell, 26–529, 6+346 (ballots); O'Gorman v. Richter, 31–25, 16+416 (id.); Stemper v. Higgins, 38–222, 37+95 (return of judges of election not conclusive—parol evidence of judges of election as to the result of the ballot as counted and declared at the polls, held admissible).

[60] Allen v. Robinson, 17–113(90).

[61] State v. Peers, 33–81, 21+860.

[62] State v. Bates, 102–104, 112+1026.

[63] R. L. 1905 § 360; State v. Welch, 21–22 (indictment sustained—accused may be convicted of the felony of double voting though it appears from the indictment that, in casting the second vote, he also committed a misdemeanor, by voting in an election district in which he did not actually reside—intoxication no defence—criminal intent presumed); State v. Davis, 22–423 (indictment sustained).

[64] Gilbert v. Duluth G. E. Co., 93–99, 100+653 (person killed by shock received in taking hold of an electric light fixture with one hand and a water faucet with another—crossing of primary and secondary wires—installing defective electric socket in house held not contributory negligence). See Schultz v. Faribault etc. Co., 82–100, 84+631 (pole with electric transformer in street—ground about pole charged with electricity—horses and man near pole receiving shock); Klages v. Gillette, 86–458, 90+1116 (cable to derrick coming in contact with primary wire of electric company in street—person killed by coming in contact with cable); Steindorff v. St. Paul G. Co., 92–496, 100+221 (person killed by contact with uninsulated wire while working on roof of building—wire ran along street near roof); Bardon

ELEMENTS—See note 67.
ELEVATORS—See Carriers, 1210; Landlord and Tenant, 5369; Master and Servant, 5896, 6021; Warehousemen.
ELIGIBLE—See note 68.
ELISOR—See Jury, 5244.

EMBEZZLEMENT

Cross-References

See Larceny, 5486.

2997. Nature—In general—The two essential elements of the offence are: first, the appropriation of the property of another by the offender to his own use, or to that of some other person than the true owner; secondly, such appropriation must have been made with the intent to deprive or defraud the true owner of the property, or of the use or benefit thereof. To constitute the statutory crime the appropriation of the property must be made with the same intent to deprive the owner of it with which the taking must be done to constitute larceny at common law. The form or method of appropriation is immaterial.[69] An element that enters into the definition of embezzlement is the fiduciary and confidential relation between the owner and the custodian of the property. Embezzlement may consist of a series of acts running through a considerable period of time.[70] The Penal Code repealed prior statutes and enacted a single provision covering all forms of embezzlement.[71] Under the present statutes there is no such offence as embezzlement, eo nomine. It is treated as a form of larceny.[72]

2998. By officer, agent, clerk, servant or bailee—There must be an intent to defraud.[73] The offence differs from common-law larceny in that the property must have already been in the lawful possession or control of the accused under or by virtue of some employment, trust, or agency under and with the consent of the owner; while common-law larceny involves the element of an unlawful taking of the property from the actual or constructive possession of the owner.[74] By virtue of statute there may be an embezzlement of the common

v. N. W. etc. Co., 93-421, 101+1132 (person injured by shock of electricity while using a telephone receiver—wires crossing—poles so far apart as to cause sagging of wires); Smith v. Twin City R. T. Co., 102-4, 112+1001 (person injured while painting trolley poles—iron caps on poles charged with electricity); Parmelee v. Tri-State T. & T. Co., 103-530, 115+1135 (pedestrian in street coming in contact with wire of telephone company that had been blown down by a severe storm); Musolf v. Duluth E. E. Co., 108-369, 122+499 (wires of telephone and electric companies strung on same poles—employee of telephone company working on wires of his company above wires of defendant electric company killed by shock from wire coming in contact with wires of defendant which were not properly insulated—employee not a trespasser or licensee but on premises of his master—electric company owed to him affimative duty—degree of care required of company—proximate cause—employee not guilty of contributory negligence). See Note, 100 Am. St. Rep. 515.

[65] Musolf v. Duluth E. E. Co., 108-369, 122+499.

[66] See Gould v. Winona G. Co., 100-258, 267, 111+254; Parmelee v. Tri-State T. & T. Co., 103-530, 115+1135.

[67] Harris v. Corlies, 40-106, 41+940.

[68] Taylor v. Sullivan, 45-309, 311, 47+802.

[69] State v. Kortgaard, 62-7, 64+51.

[70] State v. Holmes, 65-230, 68+11.

[71] State v. Kortgaard, 62-7, 64+51.

[72] R. L. 1905 § 5078; State v. Henn, 39-464, 40+564; State v. Kortgaard, 62-7, 64+51.

[73] State v. Cowdery, 79-94, 81+750.

[74] State v. Kortgaard, 62-7, 64+51.

property by one of two joint owners.[75] Where there has been an actual embezzlement and fraudulent appropriation by a servant of money intrusted to him for delivery, a demand and refusal to return the same are unnecessary to constitute a conversion punishable as larceny under G. S. 1866 c. 95 § 23.[76] If a bank officer appropriates to his own use the funds of the bank intrusted to his custody, with intent to deprive the bank of its property, it is none the less embezzlement because done under the guise or form of a loan to himself or an overdraft of his account. An officer of a bank has been held to have such possession, custody, or control of the bank funds as to render him liable for embezzlement.[77] A person has been held an agent or trustee of a principal, though he was also employed by another principal who paid his services for both. As such agent he procured the maker of his principal's notes to renew the same, and make the new notes payable to a third party, who never owned or held them, and subsequently converted them to his own use. He was held properly indicted for embezzling the new notes.[78] One who is employed, upon a commission basis, to sell the capital stock of a corporation, and is required to report all sales, and to forward to his principal all moneys received, less his commission, is an "agent," within the meaning of the statute. Such an agent, who, in the regular course of business of his agency, receives money from a purchaser of stock, and fails to report the same to his principal, and fails to deliver to his principal the money so received, but appropriates such money to his own use, with the intent to deprive his principal of the same, is guilty of embezzlement.[79]

2999. By public officer—Under section 12 of article 9 of the constitution a conversion of public money by an officer of the state is embezzlement. No legislation is needed to reinforce the constitutional provision. Though the constitution makes the neglect or refusal of a public officer to pay over funds prima facie embezzlement the legislature may declare such offence to be embezzlement per se.[80] A redemption by a county treasurer of a county order which he knew had been paid by his predecessor, has been held to warrant a conviction for embezzlement.[81] The improper neglect or refusal of a public officer to deliver to his successor all money remaining in his hands, on demand therefor, is embezzlement per se of such moneys, though no particular sum is demanded.[82] Under G. S. 1878 c. 95 § 36, where the default in paying over funds is clearly the result of negligence or mismanagement, no actual or deliberate purpose to defraud the city or county need be shown.[83]

3000. Indictment—Embezzlement by public officer—An indictment of a state treasurer has been held sufficient against the objections that there was no direct averment that he was such treasurer; that the manner of the conversion was not stated; that the offence was not described properly and that the character or amount of the funds were not stated and no averment that the same were unknown to the jury. But it was held insufficient for a failure to allege a demand by his successor.[84] In an indictment against a county treasurer the appointment and qualification of his successor has been held sufficiently averred. It is unnecessary to state the whole amount of money received by the treasurer, a part of which has been embezzled. Under an indictment alleging the receipt

[75] R. L. 1905 § 5079; State v. Kent, 22-41; Turle v. Sargent, 63-211, 65+349.
[76] State v. New, 22-76. See State v. Comings, 54-359, 56+50.
[77] State v. Kortgaard, 62-7, 64+51.
[78] State v. Rue, 72-296, 75+235.
[79] State v. Phillips, 105 375, 117+508.
[80] State v. Munch, 22-67; State v. Ring, 29-78, 11+233; State v. Czizek, 38-192, 36+457.
[81] State v. Baumhager, 28-226, 9+704.
[82] State v. Ring, 29-78, 11+233.
[83] State v. Czizek, 38-192, 36+457.
[84] State v. Munch, 22-67. See State v Baumhager, 28-226, 9+704.

of a gross sum "exceeding" a sum named, proof may be made of the receipt of any amount, though it greatly exceeds the amount thus named.[85]

3001. Indictment—Embezzlement by officer, agent, clerk, servant or bailee—It is unnecessary to allege that the property was embezzled without the consent of the owner.[86] The goods and the ownership must be alleged with the same exact completeness as in an indictment for simple larceny. An indictment of an assignee in insolvency has been held insufficient for failure to show the ownership of the property.[87] An indictment of a bailee must allege the name of the bailor and in concise terms the purpose or use for which the property was intrusted to the accused.[88] An indictment of a bailee need not allege a demand in addition to an actual conversion.[89] An indictment of a bailee has been held sufficient though it did not set out the particular facts constituting the bailment.[90] An indictment charging the accused with having unlawfully and wrongfully appropriated to his own use certain money and property in his hands and in his control as "agent, servant and bailee," has been held to charge sufficiently the crime of larceny by an agent.[91] The use of the superfluous words "steal and carry away" does not render an indictment subject to the objection that it states two offences. The omission of the words "and defraud" after the word "deprive" has been held not fatal.[92] An indictment of an employee of an express company for the embezzlement of money entrusted to his care has been held sufficient.[93] An indictment of an agent of a firm for the embezzlement of money collected by him for the firm on a note owned by the firm, has been held sufficient as respects the name of the maker of the note and the name of the firm.[94] An indictment under G. S. 1878 c. 95 § 33 has been held insufficient for failure to allege that the conversion was without the consent of the owner.[95] In an indictment of a bank officer it has been held sufficient, under G. S. 1894 § 7262, to allege generally an embezzlement of a certain sum without specifying the particulars.[96] An indictment for the embezzlement of notes has been held sufficient though it did not state the name of the payee.[97] An indictment under G. S. 1866 c. 95 § 23 for the embezzlement and fraudulent conversion of money properly accuses the person indicted of the crime of larceny.[98] An indictment of a carrier under G. S. 1878 c. 95 § 24(34) has been held insufficient for failure to allege that the property was to be carried "for hire."[99]

3002. Proof of embezzlement as of what time—Evidence that the offence was committed before the time laid in the indictment is competent, if the state does not avail itself of R. L. 1905 § 5320. In such case the state can introduce evidence and secure conviction of only one act of embezzlement as constituting the substantive offence, evidence of other acts being in such case admissible only for the purpose of showing the intent with which the act relied on was committed.[1] If the state avails itself of R. L. 1905 § 5320, it cannot prove that the offence charged was committed prior to the date laid, but it may prove any

[85] State v. Ring, 29–78, 11+233.
[86] State v Rue, 72 296, 75+235.
[87] State v. Nelson, 79–373, 82+674.
[88] State v. Holton, 88–171, 92+541; State v. Schoemperlen, 101–8, 111+577. See State v. Fellows, 98–179, 107+542, 108+825.
[89] State v. Comings, 54–359, 56+50.
[90] State v. Barry, 77–128, 79+656.
[91] State v. Fellows, 98–179, 107+542, 108+825.
[92] State v. Comings, 54–359, 56+50.
[93] State v. New, 22–76.
[94] State v. Butler, 26–90, 1+821.
[95] State v. Mims, 26–191, 2+492. See State v. Rue, 72–296, 75+235.
[96] State v. Kortgaard, 62–7, 64+51.
[97] State v. Rue, 72–296, 75+235.
[98] State v. New, 22–76; State v. Butler, 26–90, 1+821.
[99] State v. Mims, 26–191, 2+492.
[1] State v. New, 22–76; State v. Holmes, 65–230, 68+11.

number of acts within six months after that date and the accused may be convicted of the whole.[2] It may prove an act committed on the day named or within six months thereafter.[3]

3003. Right to commission or part ownership no defence—It is no defence that the accused was entitled to a commission out of the money or property appropriated.[4] Neither is part ownership a defence.[5]

3004. The criminal intent—An intent to defraud or deprive another of his property is an essential element of the offence.[6] An intent to convert the property to the use of the accused is not essential.[7] When the act is in itself unlawful the fraudulent intent may be inferred from the intentional commission of the act.[8] The question of intent is for the jury.[9] When the original possession is lawful, the mental act of fraudulent appropriation has to be inferred from the conduct of the accused.[10] Upon the trial of an officer of a trust company, charged under R. L. 1905 § 5078(2), with larceny in misappropriating its funds, guilty intent cannot be inferred from the mere fact of possession thereof by the officer; but the state is required to prove, beyond a reasonable doubt, that the funds were taken with intent to appropriate the same. Upon the trial of an officer of a trust company, charged under R. L. 1905 § 3045, with appropriating the company's funds to his own use by becoming indebted to it, a guilty intent may be inferred from the mere fact of the indebtedness.[11]

3005. How proved in general—Prima facie case—The first possession being lawful, the act of embezzlement consists, in a certain sense, in a mere act of the mind, without any outward and visible trespass as in the case of ordinary larceny. That this mental act of fraudulent appropriation has taken place has to be inferred from the conduct of the defendant. Hence, the wilful making of false entries is a kind of proof commonly relied on and held sufficient to make out an embezzlement. The usual evidence given of embezzlement is that, having received the money, the defendant denied the receipt of it, or did not account for it when he ought, or accounted for other moneys received by him at the same time or afterwards, and not for it, or rendered a false account, or practiced some other deceit.[12] Proof of demand and refusal makes a prima facie case against a bailee.[13] There can be no conviction merely by showing an unsettled account between principal and agent. The state must, in order to justify conviction, prove beyond a reasonable doubt the wrongful and unlawful appropriation of funds belonging to the principal.[14] Under the constitution the failure of a state officer to pay over or account for public funds on demand as required by law constitutes prima facie evidence of embezzlement.[15]

3006. Variance—Cases are cited below involving the effect of variances.[16]

[2] State v. Holmes, 65–230, 68+11.
[3] State v. Kortgaard, 62–7, 64+51.
[4] R. L. 1905 § 5079; State v. Fellows, 98–179, 107+542, 108+825. See State v. Kent, 22–41; State v. Herzog, 25–490.
[5] R. L. 1905 § 5079; Turle v. Sargent, 63–211, 65+349. See State v. Kent, 22–41.
[6] State v. Kortgaard, 62–7, 64+51; State v. Cowdery, 79–94, 81+750; State v. Rue, 72–296, 75+235; State v. White, 108–346, 122+448.
[7] State v. Rue, 72–296, 75+235.
[8] State v. Kortgaard, 62–7, 64+51; State v. McGregor, 88–77, 92+458. See § 2454.
[9] State v. Rue, 72–296, 75+235.
[10] State v. Baumhager, 28–226, 9+704.
[11] State v. Barnes, 108–227, 122+4.
[12] State v. Baumhager, 28–226, 9+704; State v. Hayden, 35–283, 28+659; State v. Fisher, 38–378, 37+948; State v. Rue, 72–296, 75+235; State v. Salverson, 87–40, 91+1.
[13] State v. Cowdery, 79–94, 81+750.
[14] State v. Fellows, 98–179, 107+542, 108+825.
[15] State v. Mims, 26–183, 2+494, 683.
[16] State v. Brame, 61–101, 63+250 (variance as to capacity in which money was received—agent or attorney); State v. Rue, 72–296, 75+235 (indictment stated that principal of accused was a corpora-

3007. Evidence—Admissibility—Cases are cited below involving the admissibility of evidence.[17]

3008. Evidence—Sufficiency—Evidence held sufficient to justify the conviction of a county treasurer;[18] of an attorney at law;[19] of a bailee of a watch;[20] of a city treasurer;[21] of an employee of an express company;[22] of the president of a bank;[23] of the agent of a corporation;[24] of a bailee of merchandise for sale on commission;[25] of a bank cashier;[26] of a register of deeds;[27] of a vice-president of an insurance company.[28] Evidence held insufficient to warrant a conviction of a warehouseman;[29] of a loan agent.[30]

3009. Verdict—Sufficiency—A verdict finding the defendant guilty and assessing the value of the property embezzled, has been held proper.[31]

3010. Venue—Evidence held sufficient to justify a finding that the offence was committed in the county as charged.[32]

3011. Punishment—Under G. S. 1878 c. 95 §§ 36, 37, the court cannot sentence the accused to stand committed to the state prison until the fine imposed is paid. A fine of about twenty-nine thousand dollars, being double the amount of public funds embezzled, has been held not excessive.[33] A sentence of a register of deeds for misappropriating public funds to pay a fine of five hundred dollars and be confined at hard labor in the state prison for one year has been held not cruel and unusual punishment.[34]

EMBLEMENTS—See Execution, 3508.

tion—proof that it was at least a corporation de facto).

[17] State v. Mims, 26–183, 2+683 (embezzlement by county treasurer—indorsement of certificate of settlement with auditor—admissions); State v. Force, 100–396, 111+297 (embezzlement by vice-president of an insurance company—circumstantial evidence throwing light on charge).

[18] State v. Mims, 26–183, 2+494, 683; State v. Baumhager, 28–226, 9+704; State v. Ring, 29–78, 11+233.

[19] State v. Brame, 61–101, 63+250.

[20] State v. McGregor, 88–77, 92+458.

[21] State v. Czizek, 38–192, 36+457.

[22] State v. New, 22–76.

[23] State v. Kortgaard, 62–7, 64+51; State v. Holmes, 65–230, 68+11.

[24] State v. Rue, 72–296, 75+235; State v. Fellows, 98–179, 107+542, 108+825.

[25] State v. Fisher, 38–378, 37+948.

[26] State v. Salverson, 87–40, 91+1.

[27] State v. Borgstrom, 69–508, 72+799, 975.

[28] State v. Force, 100–396, 111+297.

[29] State v. Cowdery, 79–94, 81+750.

[30] State v. White, 108–346, 122+448.

[31] State v. New, 22–76.

[32] State v. New, 22–76; State v. Fisher, 38–378, 37+948.

[33] Mims v. State, 26–494, 5+369.

[34] State v. Borgstrom, 69–508, 72+799, 975.

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IN GENERAL

3012. Definition—Eminent domain is the right of the state to appropriate private property to public uses.[35]

3013. Nature—Eminent domain is an inherent and essential attribute or prerogative of sovereignty.[36] It is not conferred by the constitution.[37] Private property is held subject to the control of the sovereign power of the state, exercised through the legislature, for public uses.[38] The foundation idea upon which the right of eminent domain rests is public necessity.[39] The right can be restricted by the constitution alone.[40]

3014. Legislative discretion—Except as provided by statute and as limited by the constitution[41] the necessity, propriety, or expediency of exercising the power of eminent domain is exclusively for the legislature. It is a political or legislative question not open to judicial review.[42] The mode of exercising the power is also a matter of legislative discretion,[43] and so is the extent of the interest to be acquired.[44] Where the power of a municipality or private corporation to exercise the right of eminent domain in a particular case depends, not upon an express grant of power, but upon the existence of an alleged necessity from which the disputed power is to be implied, its decision upon the existence of such necessity is not conclusive upon the courts.[45]

3015. Effect of proceedings on title—The institution and pendency of condemnation proceedings does not deprive the owner of the right of alienation. He may sell and convey his entire estate wholly unrestrained thereby.[46] A title

[35] Bouvier L. Dict.; Weir v. St. P. etc. Ry., 18-155(139); Davidson v. Ramsey County, 18-482(432)

[36] Weir v. St. P. etc. Ry., 18-155(139); Langford v. Ramsey County, 16-375(333); Winona etc. Ry. v. Waldron, 11-515(392; State v. Dist. Ct., 87-146, 91+300; Fairchild v. St. Paul, 46-540, 49+325; In re St. Paul etc. Ry., 37-164, 33+701.

[37] Winona etc. Ry. v. Waldron, 11-515 (392, 414); State v. Dist. Ct., 87-146, 91+300.

[38] Commissioners v. Henry, 38-266, 36 874.

[39] In re St. Paul etc. Ry., 37-164, 33+701.

[40] Weir v. St. P. etc. Ry., 18-155(139).

[41] See § 3047.

[42] Weir v. St. P. etc. Ry., 18-155(139); Milwaukee etc. Ry. v. Faribault, 23-167; St. Paul etc. Ry. v. Minneapolis, 35-141, 27+500; In re St. Paul etc. Ry., 37-164, 33+701; State v. Rapp, 39-65, 38+926; Fairchild v. St. Paul, 46-540, 49+325; State v. Ensign, 55-278, 285, 56+1006; Knoblauch v. Minneapolis, 56-321, 57+928; Stewart v. G. N. Ry., 65-515, 68+208; Fohl v. Sleepy Eye Lake, 80-67, 82+1097; Mpls. etc. Ry. v. Hartland, 85-76, 88+423; State v. Dist. Ct., 87-146, 91+300; Minn. C. & P. Co. v. Koochiching Co., 97-429, 107+405. See 22 L. R. A. (N. S.) 1.

[43] Wilkin v. First Div. etc. Ry., 16-271 (244).

[44] Fairchild v. St. Paul, 46-540, 49+325.

[45] Milwaukee etc. Ry. v. Faribault, 23-167; In re St. Paul etc. Ry., 37-164, 33+701; Cotton v. Miss. etc. Co., 22-372.

[46] Duluth Tr. Ry. v. N. P. Ry., 51-218, 53-366.

affected by the pendency of condemnation proceedings has been held "defective," and not a "good" title.[47]

3016. When title passes—The title passes when the award of the commissioners or the judgment on appeal is paid or secured, and in all cases it relates back to the date of the filing of the award.[48] When the taking is by the state or a municipality the bargain is not deemed closed, or the property actually taken, until the compensation is paid or secured by being made a lawful claim upon the public treasury.[49] Under the charter of the city of Minneapolis (Sp. Laws 1881, c. 76, subc. 10), when no appeal has been taken from an order of the city council confirming an award of damages for taking private property for public use, the title to such property vests absolutely in the city for all purposes when the city council appropriates and sets apart in the city treasury the amount of such award. And such appropriation and setting apart operate to divest and release the lien of a mortgage then existing on the property so taken.[50]

3017. What constitutes a taking—It is unnecessary that the property should be absolutely taken and the possession directly assumed. A serious interruption to the common and necessary use of property may constitute a taking within the constitution.[51] The mere commencement of condemnation proceedings is not a taking.[52] An additional servitude in a highway such as a commercial railway is a taking.[53] A street railway is not an additional servitude within this rule,[54] nor is a telephone line.[55] The removal of the lateral support of land may be a taking.[56] Overflowing lands with water may be a taking,[57] even though the overflow is occasional.[58] The rights of riparian owners in navigable waters are property and there may be such an invasion thereof as to constitute a taking.[59] Compelling railway companies to allow others to construct elevators on their right of way has been held a taking.[60] Changing the grade of a street is not a taking, but it may be a damage within the constitution as amended.[61] Assessing property for a local improvement in substantial excess of the benefits accruing to the property has been held a taking.[62] An excavation in a street which did not cut off all access to the property of the plaintiff has been held not a taking.[63] Compelling railway companies to make connections has been held not a taking.[64] To require a license fee for the sale of

[47] Cavenaugh v. McLaughlin, 38–83, 35+576.

[48] Obst v. Covell, 93–30, 100+650; State v. Chi. etc. Ry., 85–416, 89+1; Commissioners v. Henry, 38–266, 36+874; Carli v. Stillwater etc. Ry., 16–260(234); Lake Superior etc. Ry. v. Greve, 17–322(299); Hursh v. First Div. etc. Ry., 17–439(417); Mathews v. St. P. etc. Ry., 18–434(392); St. Paul etc. Ry. v. Murphy, 19–500(433); Whitacre v. St. P. etc. Ry., 24–311.

[49] Commissioners v. Henry, 38–266, 36+874.

[50] Boutelle v. Minneapolis, 59–493, 61+554.

[51] Weaver v. Miss. etc. Co., 28–534, 11+114.

[52] Duluth T. Ry. v. N. P. Ry., 51–218, 53+366.

[53] See § 8111.

[54] Elfelt v. Stillwater St. Ry., 53–68, 55+116.

[55] Cater v. N. W. etc. Co., 60–539, 63+111.

[56] McCullough v. St. P. etc. Ry., 52–12, 53+802.

[57] Weaver v. Miss. etc. Co., 28–534, 11+114; McKenzie v. Miss. etc. Co., 29–288, 13+123; In re Minnetonka L. L., 56–513, 58+295; Carlson v. St. Louis etc. Co., 73–128, 75+1044; Gravel v. Little Falls etc. Co., 74–416, 77+217; Hueston v. Miss. etc. Co., 76–251, 79+92. See Coyne v. Miss. etc. Co., 72–533, 75+748.

[58] McKenzie v. Miss. etc. Co., 29–288, 13+123.

[59] Brisbine v. St. P. etc. Ry., 23–114; Crali v. Stillwater, etc. Co., 28–373, 10+205; Union etc. Co. v. Brunswick, 31–297, 17+626; Hanford v. St. P. etc. Ry., 43–104, 114, 42+596, 44+1144 and cases under (57) supra.

[60] State v. Chi. etc. Ry., 36–402, 31+365.

[61] See § 6650.

[62] State v. Pillsbury, 82–359, 85+175.

[63] Rochette v. Chi. etc. Ry., 32–201, 20+140.

[64] Jacobson v. Wis. etc. Ry., 71–519, 74+893.

liquors is not a taking.[65] To require railway companies to construct cattle guards upon the laying out of highways across their tracks is not a taking.[66] The use of the tracks of one railway company by another company for terminal facilities is not an additional servitude.[67] Appropriating a public street for the use of an ordinary commercial railway is a taking of the easement of the abutting owner.[68] If one is deprived of his property it is a taking though the right of which he is deprived is not and cannot be employed in the public use.[69] Whether the diversion of a small stream by a municipality in connection with its drainage system is a taking, as regards one through whose land it originally ran, is an open question.[70] A bridge approach in a street is not an additional servitude.[71]

WHO MAY EXERCISE

3018. In general—The state may exercise the right of eminent domain directly, as when land is taken for a fort, public building, or park; or it may delegate it to individuals or corporations. When so delegated the right can be exercised only within the strict terms of the grant and subject to constitutional restrictions.[72] The Territory of Minnesota had the right of eminent domain.[73]

3019. Statutory authority must be clear—A delegated authority to exercise the right of eminent domain must be granted expressly or by necessary implication. Any doubt must be resolved against a delegation of the right. In such a case to doubt is to deny.[74] Grants of corporate power, being in derogation of common right, are to be strictly construed and this is especially the case where the power claimed is a delegation of the right of eminent domain, one of the highest powers of sovereignty pertaining to the state itself, and interfering most seriously, and often vexatiously, with the ordinary rights of property.[75]

3020. Public service corporations generally—By general statute all public service corporations are given the right of eminent domain to acquire "such private property as may be necessary or convenient" for their business.[76] Such corporations thereby become subject to governmental regulation and control.[77] Before telephone companies were expressly included in the statute they were held to have the right of eminent domain on the ground that a telephone was a species of telegraph.[78]

3021. Railway companies—The right to exercise the power of eminent domain, conferred upon a corporation organized under title 1, c. 34, G. S. 1894, was not abrogated, but recognized, continued, confirmed, and re-enacted, by the

65 Rochester v. Upman, 19-108(78).
66 State v. Dist. Ct., 42-247, 44+7; State v. Shardlow, 43-524, 46+74.
67 Miller v. Green Bay etc. Ry., 59-169, 60+1006.
68 Adams v. Chi. etc. Ry., 39-286, 39+629; Papooshek v. Winona etc. Ry., 44-195, 46+329; Gray v. First Div. etc. Ry., 13-315 (289); Schurmeier v. St. P. etc. Ry., 10-82(59).
69 Adams v. Chi. etc. Ry., 39-286, 39+629.
70 Sherwood v. Duluth, 40-22, 41+234.
71 Willis v. Winona, 59-27, 60+814.
72 Minn. C. & P. Co. v. Koochiching Co., 97-429, 107+405; Commissioners v. Henry, 38-266, 36+874; Weir v. St. P. etc. Ry., 18-155(139); Wilkin v. First Div. etc. Ry., 16-271(244); Olson v. St. P. etc. Ry., 38-419, 37+953.
73 Warren v. First Div. etc. Ry., 18-384 (345).
74 Minn. C. & P. Co. v. Koochiching Co., 97-429, 107+405; Mpls. etc. Ry. v. Nicolin, 76-302, 79+304; Fletcher v. Chi. etc. Ry., 67-339, 345, 69+1085; St. Paul U. D. Co. v. St. Paul, 30-359, 15+684; Olson v. St. P. etc. Ry., 38-419, 37+953.
75 Chambers v. G. N. P. Co., 100-214, 110+1128.
76 R. L. 1905 § 2842.
77 Minn. C. & P. Co. v. Pratt, 101-197, 112+395. See, under former statute, Minn. C. & P. Co. v. Koochiching Co., 97-429, 107+405.
78 N. W. etc. Co. v. Chi. etc. Ry., 76-334, 79+315.

provisions of the Revised Laws of 1905.[79] It is competent for the legislature, by a general law, to authorize a railway company to construct a railway in such place as it may determine for itself, and for such purpose to exercise the right of eminent domain.[80] The general statute defines the purposes for which such a company may condemn land.[81] The right extends to new lines.[82] A railway company cannot condemn land for a common public highway.[83] When land is taken for a railway, it is taken under authority of the state, to be applied under the same authority to a public use—to a highway, public in a certain sense.[84] A railway company may take land for a bridge or viaduct, and the approaches thereto, for the purpose of carrying its road over or under a street.[85] A statute has been held to authorize a railway company to re-locate its lines and to exercise the right of eminent domain to acquire its new right of way.[86]

3022. Municipalities—Municipalities are generally invested with the right of eminent domain by their charters,[87] but a general statute gives the right to all cities and villages for certain purposes,[88] and home rule charters may provide for the exercise of the right.[89] A general statutory power, conferred by a city charter, to take lands for public streets does not authorize the city to take land already lawfully appropriated for a depot building and appurtenances, by a corporation duly empowered to acquire lands for such purposes.[90]

3023. Special grant—A boom company has been held authorized by its charter to exercise the right of eminent domain.[91]

THE PUBLIC USE

3024. What constitutes—In general—The term "public use" is flexible and cannot be limited to the public uses known at the time of the adoption of the constitution.[92] It has been held in this state that a public use means a use by the public and that a use is not public, unless, under proper regulations, the public has the right to resort to the property for the use for which it was acquired, independent of the will or caprice of the corporation in which the title vests upon condemnation.[93] According to the better view a public use includes whatever is of benefit to any considerable portion of the public, as regards health, material prosperity, or other welfare.[94] Any use of anything which will satisfy a reasonable public demand for public facilities for travel or for transmission of intelligence or commodities, is a public use.[95] If all the public has a right to use a thing its use is public though the number who re-

[79] Mpls. etc. Ry. v. Manitou F. Synd., 101-132, 112+13.

[80] Weir v. St. P. etc. Ry., 18-155(139); Wilkin v. First Div. etc. Ry., 16-271(244); Warren v. First Div. etc. Ry., 18-384 (345). See In re St. Paul etc. Ry., 37-164, 33+701.

[81] R. L. 1905 §§ 2842, 2917. See Kettle River Ry. v. Eastern Ry., 41-461, 43+469 (side track to stone quarry); Chicago etc. Ry. v. Porter, 43-527, 46+75 (switch track to lumber mills); Mpls. etc. Ry. v. Nicolin, 76-302, 79+304 (spur track to gravel pit).

[82] Fletcher v. Chi. etc. Ry., 67-339, 69+1085.

[83] Curtis v. St. P. etc. Ry., 20-28(19).

[84] Crolley v. Mpls. etc. Ry., 30-541, 16+422.

[85] State v. St. P. etc. Ry., 35-131, 28+3.

[86] Hewitt v. St. P. etc. Ry., 35-226, 28+255.

[87] State v. Dist. Ct., 87-146, 153, 91+300.

[88] R. L. 1905 § 766; Mpls etc. Ry. v. Hartland, 85-76, 88+423.

[89] State v. Dist. Ct., 87-146, 91+300.

[90] St. Paul U. D. Co. v. St. Paul, 30-359, 15+684.

[91] Weaver v. Miss. etc. Co., 30-477, 16+269.

[92] Stewart v. G. N. Ry., 65-515, 68+208.

[93] Minn. C. & P. Co. v. Koochiching Co., 97-429, 107+405. In its construction of the statute this case seems satisfactory, but in its view of what constitutes a public use it is narrow, impractical, and reactionary.

[94] 15 Harv. L. Rev. 400; 19 Id. 535; Lien v. Norman County, 80-58, 82+1094; State v. Polk County, 87-325, 92+216. See 22 L. R. A. (N. S.) 1; 102 Am. St. Rep. 809.

[95] Stewart v. G. N. Ry., 65-515, 68+208.

quire its use may be small.[96] It is unnecessary that all should participate in the use or be equally benefited.[97] It is the purpose for which the land is taken, and not the particular corporation which the state authorizes to take it, that determines whether the use is public or not.[98]

3025. Held a public use—The flowage of lands by a milldam;[99] the booming of logs in a navigable river;[1] a public park;[2] a railway side track to a stone quarry;[3] a railway switch track to lumber mills;[4] a grain warehouse or elevator on a railway right of way;[5] a railway spur track to a gravel pit;[6] the drainage of wet lands;[7] the generation and distribution of electricity and gas for use of the public.[8]

3026. Held not a public use—The destruction of a building to arrest the progress of a fire;[9] the creation of a water power and water-power plant for the purpose of supplying water power from the wheels thereof to the public;[10] the drainage of wet lands.[11]

3027. Province of courts and legislature—What is a public use is a judicial, not a legislative question.[12] The legislature cannot by its mere fiat make a private use a public one.[13]

3028. Private use forbidden—Private property cannot be taken for a private use either directly or indirectly. After property has been acquired for a public use it cannot be diverted to a private use.[14]

3029. Streets, etc.—The condemnation of land for streets, etc., is an essential incident of municipal government.[15] The legislature may authorize the taking of the fee for street purposes.[16] The property of the municipality itself may be taken.[17] A municipality may be authorized to take easements for slopes in grading streets.[18]

WHAT MAY BE TAKEN

3030. State lands—It has been held that certain lots of the state university, not used for public purposes, might be condemned for railway purposes.[19]

3031. Municipal lands—Lands owned in fee by a municipality are subject to the right of eminent domain.[20]

[96] Kettle River Ry. v. Eastern Ry., 41-461, 43+469; Chicago etc. Ry. v. Porter, 43-527, 46+75. But see Minn. C. & P. Co. v. Koochiching Co., 97-429, 107+405.

[97] Lien v. Norman County, 80-58, 82+1094.

[98] Crolley v. Mpls. etc. Ry., 30-541, 16+422.

[99] Miller v. Troost, 14-365(282).

[1] Cotton v. Miss. etc. Co., 22-372.

[2] Commissioners v. Henry, 38-266, 36+874.

[3] Kettle River Ry. v. Eastern Ry., 41-461, 43+469.

[4] Chicago etc. Ry. v. Porter, 43-527, 46+75.

[5] Stewart v. G. N. Ry., 65-515, 68+208.

[6] Mpls. etc. Ry. v. Nicolin, 76-302, 79+304.

[7] Lien v. Norman County, 80-58, 82+1094; State v. Polk County, 87-325, 92+216; McMillan v. Freeborn County, 93-16, 100+384. See State v. Rockford, 102-442, 114+244.

[8] Minn. C. & P. Co. v. Koochiching Co., 97-429, 107+405; Minn. C. & P. Co. v. Pratt, 101-197, 112+395.

[9] McDonald v. Red Wing, 13-38(25).

[10] Minn. C. & P. Co. v. Koochiching Co., 97-429, 107+405. See Minn. C. & P. Co. v. Pratt, 101-197, 112+395; 20 Harv. L. Rev. 649.

[11] State v. Rockford, 102-442, 114+244.

[12] Stewart v. G. N. Ry., 65-515, 68+208; In re St. Paul etc. Ry., 34-227, 25+345; Fairchild v. St. Paul, 46-540, 49+325; Minn. C. & P. Co. v. Koochiching Co., 97-429, 107+405; McGee v. Hennepin County, 84-472, 88+6. See 15 Harv. L. Rev. 400.

[13] Minn. C. & P. Co. v. Koochiching Co., 97-429, 107+405; State v. Rockford, 102-442, 114+244.

[14] Sanborn v. Van Duyne, 90-215, 96+41; U. S. v. Minn. etc. Ry., 1-127(103).

[15] State v. Dist. Ct., 87-146, 91+300.

[16] Fairchild v. St. Paul, 46-540, 49+325.

[17] State v. Dist. Ct., 77-248, 79+971.

[18] Nichols v. St. Paul, 44-494, 47+168; Kuschke v. St. Paul, 45-225, 47+786.

[19] In re St. Paul etc. Ry., 34-227, 25+345. See University v. St. P. etc. Ry., 36-447, 31+936.

[20] State v. Dist. Ct., 77-248, 79+971.

3032. Land already devoted to public use—Land already devoted to a public use may be taken for another public use.[21] But where the second use is inconsistent with the first use, or would materially impair it, authority to take for the second use must be granted expressly or by necessary implication, and such implication never arises except as a necessary condition to the beneficial enjoyment and efficient exercise of the power expressly granted, and then only to the extent of the necessity.[22] Where the second use would not materially impair the first use authority to take it may be implied from a general grant.[23] Whether a second use would be inconsistent with or impair a first use is a judicial question.[24] It is immaterial in this connection whether property devoted to a public use was acquired by purchase or by condemnation.[25] It is a question for the legislature whether property already appropriated to a public use shall be taken for another public use.[26] Property already devoted to a public use cannot be taken for another public use without compensation.[27]

3033. Streets across railways—A general grant of authority to a municipality over streets carries an implied authority to extend them across a railway, when such extension would not destroy or materially impair the railway right of way.[28]

3034. Railways across streets—A general grant of authority to condemn land for a railway carries an implied authority to condemn roads and streets for that purpose.[29] Express authority is given by statute.[30]

3035. Railways across railways—The right of eminent domain may be exercised to enable one railway to cross another.[31] The subject is regulated by statute.[32] One railway company has no authority, under the general statutes of this state, to condemn the lands of another railway company occupied or used or necessary for the prosecution of its railway business, except for crossing purposes.[33]

3036. Telephone on railway right of way—Facts held not to give a telephone company implied authority to exercise the right of eminent domain to enable it to string its wires over and across the right of way of a railway company.[34] A general authority is now given by statute.[35]

3037. Easements—An easement is property and may be "taken" within the meaning of the constitution.[36]

3038. Franchises—A franchise is subject to condemnation.[37]

RIGHTS ACQUIRED

3039. Legislative discretion—The estate or interest to be acquired by condemnation is a matter of which the legislature is the exclusive judge. It may authorize the taking of the fee.[38]

[21] See §§ 3033–3036.

[22] Milwaukee etc. Ry. v. Faribault, 23–167; St. Paul U. D. Co. v. St. Paul, 30–359, 15+684; Mpls. W. Ry. v. Mpls. etc. Ry., 61–502, 63+1035; N. W. etc. Co. v. Chi. etc. Ry., 76–334, 79+315.

[23] Mpls. etc. Ry. v. Hartland, 85–76, 88+423; St. Paul etc. Ry. v. Minneapolis, 35–141, 27+500.

[24] Milwaukee etc. Ry. v. Faribault, 23–167; In re St. Paul etc. Ry., 34–227, 25+345.

[25] St. Paul U. D. Co. v. St. Paul, 30–359, 15+684.

[26] Stewart v. G. N. Ry., 65–515, 68+208.

[27] State v. Chi. etc. Ry., 36–402, 31+365.

[28] St. Paul U. D. Co. v. St. Paul, 30–359, 15+684; St. Paul etc. Ry. v. Minneapolis, 35–141, 27+500; Mpls. etc. Ry. v. Hartland, 85–76, 88+423.

[29] St. Paul U. D. Co. v. St. Paul, 30–359, 15+684.

[30] R. L. 1905 § 2916.

[31] In re Mpls. etc. Ry., 36–481, 32+556.

[32] See § 8105.

[33] Mpls. St. Ry. v. Mpls. etc. Ry., 61–502, 63+1035

[34] N. W. etc. Co. v. Chi. etc. Ry., 76–334, 79+315.

[35] R. L. 1905 § 2926.

[36] Adams v. Chi. etc. Ry., 39–286, 39+629.

[37] McRoberts v. Washburne, 10–23(8, 13).

[38] Fairchild v. St. Paul, 46–540, 49+325; Reed v. Board, 100–167, 110+1119.

3040. Construction of grants—Upon the principle that statutes conferring compulsory powers to take private property are to be strictly construed, it follows that when the estate or interest to be taken is not defined by the legislature, only such an estate or interest can be taken as is necessary to accomplish the purpose in view, and, when an easement is sufficient, no greater estate can be taken.[39]

3041. In streets—In condemning land for streets a municipality ordinarily acquires a mere easement.[40] The legislature may, however, authorize the taking of the fee. But the title which the municipality acquires in such cases is what may be termed a "qualified or terminable fee" for street purposes only, and which it holds, not as proprietor, but as an agency of the state, in trust for the public for street purposes, and which it can neither sell nor devote to a private use.[41]

3042. Railways—Whether section 4 of article 10 of the constitution prevents a railway company from acquiring the fee by condemnation is undetermined, but at all events, it may acquire a perpetual easement for railway purposes.[42] The section does not limit the right to take to a right of way.[43] Unless otherwise provided, the company acquires a right to the exclusive possession and use of the property.[44] In condemning a lot on a street the company takes presumptively to the center of the street, and, subject to the public easement and control by the proper public authorities, the company acquires the same interest in that portion of the lot so taken lying in the street as to the remainder thereof, and may apply it to the same uses.[45] A company does not acquire by implication a right to remove the lateral support of land along its right of way.[46] The rights acquired at street crossings are defined elsewhere.[47] The lands acquired by a railway company for the purposes of its enterprise are, so far as the right of property is concerned, private property.[48] A railway acquiring a right of way acquires it for railway purposes, in the manner and to the extent that rights of way are ordinarily used by railway companies, and as the public interest may require.[49] The title acquired to lands in condemnation proceedings for right of way purposes by the Lake Superior & Mississippi Railroad Company under its charter (chapter 93, Laws 1857, and amendments) was in the nature of an easement or terminable fee, and the lands reverted to the original owner when abandoned by the railway company for the purposes acquired—the maintenance and operation of a railroad.[50]

3043. Riparian rights—Riparian rights may be acquired as an incident of the land without express mention in the condemnation proceedings.[51]

3044. Right to transfer—A party not affected cannot question the right of a railway company to transfer its right of way to another company.[52]

[39] Fairchild v. St. Paul, 46-540, 49+325; Reed v. Board, 100-167, 110+1119; Chambers v. G. N. P. Co., 100-214, 110+1128.

[40] See § 3041.

[41] Fairchild v. St. Paul, 46-540, 49+325.

[42] Scott v. St. P. etc. Ry., 21-322; Cotton v. Miss. etc. Co., 22-372; Gurney v. Mpls. U. E. Co., 63-70, 65+136.

[43] Cotton v. Miss. etc. Co., 22-372.

[44] Lake Superior etc. Ry. v. Greve, 17-322 (299); Hopkins v. Chi. etc. Ry., 76-70, 78+969.

[45] Witt v. St. P. etc. Ry., 38-122, 35+862.

[46] McCullough v. St. P. etc. Ry., 52-12, 53+802.

[47] See § 8106.

[48] State v. Chi. etc. Ry., 36-402, 31+365.

[49] Miller v. Green Bay etc. Ry., 59-169, 60+1006.

[50] Chambers v. G. N. P. Co., 100-214, 110+1128.

[51] Hanford v. St. P. etc. Ry., 43-104, 42+596, 44+1144.

[52] Crolley v. Mpls. etc. Ry., 30-541, 16+422. See N. P. Ry. v. Townsend, 84-152, 86+1007.

ABANDONMENT OF PUBLIC USE

3045. What constitutes—A transfer of a right of way from one railway company to another has been held not an abandonment.[53] The erection and operation of a public warehouse or grain elevator on a railway right of way is not a misuser or abandonment.[54] An intention to abandon an easement for a street grade is not established by the mere fact that the municipality built a retaining wall along the street line.[55] Evidence held to show an abandonment of a railway right of way.[56]

COMPENSATION

3046. Necessity—In general—The state itself cannot take private property for a public use without compensation and it cannot authorize another to do so.[57] A statute authorizing a railway company to enter upon and hold and use land for railway purposes before making compensation is void.[58]

3047. Constitutional provision—Construction—The constitutional provision requiring compensation, being for the protection of the citizen ought to have a liberal construction, so as to effect its general purpose. All property, whatever its character, comes within its protection. An easement is property and protected accordingly.[59] In view of the fact that the state is so much delegating the right of eminent domain to private or quasi public corporations, in theory for public purposes, but often practically in part for private benefit, the constitutional guaranty ought to be jealously guarded.[60] It guarantees full compensation—not only the value of the land taken, but also the damages caused by taking it.[61] The word "compensation" as used in the constitution means an "equivalent." [62] In reading cases construing this constitutional provision it is very important to keep in mind the radical change made by the amendment of 1896.

3048. Provision for—Security—The constitution provides that property shall not be taken without just compensation therefor first paid or secured.[63] What is adequate security within this provision? Compensation is sufficiently "secured" if the amount when determined is made a charge upon the public treasury, either of the state or of some municipal subdivision thereof.[64] Where the property is taken by the state or a municipality, the fact that payment is postponed for a reasonable time to make an assessment and collect a tax to pay the amount due, or to enable the legislature to decide finally, or make an appropriation, does not invalidate the proceedings.[65] The statutory bond given by

[53] Crolley v. Mpls. etc. Ry., 30-541, 16+422.

[54] Gurney v. Mpls. U. E. Co., 63-70, 65+136.

[55] Kuschke v. St. Paul, 45-225, 47+786.

[56] Chambers v. G. N. P. Co., 100-214, 110+1128.

[57] U. S. v. Minn. etc. Ry., 1-127(103); Teick v. Carver County, 11-292(201); Weaver v. Miss. etc. Co., 28-534, 11+114; State v. Chi. etc. Ry., 36-402, 31+365; State v. Isanti County, 98-89, 93, 107+730; Vanderburgh v. Minneapolis, 98-329, 338, 108+480.

[58] Hursh v. First Div. etc. Ry., 17-439 (417); Warren v. First Div. etc. Ry., 21-424; Weaver v. Miss. etc. Co., 30-477, 16+269.

[59] Adams v. Chi. etc. Ry., 39-286, 39+629; Winona etc. Ry. v. Waldron, 11-515 (392, 414).

[60] Weaver v. Miss. etc. Co., 28-534, 11+114.

[61] Winona etc. Ry. v. Waldron, 11-515 (392, 414).

[62] Winona etc. Ry. v. Denman, 10-267 (208).

[63] Const. art. 1 § 13; Langford v. Ramsey County, 16-375(333, 337).

[64] State v. Messenger, 27-119, 6+457; Woodruff v. Glendale, 26-78, 1+581; State v. Bruggerman, 31-493, 18+454; State v. Otis, 53-318, 55+143; Johnson v. Clontarf, 98-281, 108+521. See In re Lincoln Park, 44-299, 46+355; State v. Brill, 58-152, 59+989.

[65] Commissioners v. Henry, 38-266, 36+874; State v. Otis, 53-318, 55+143. See

the condemnor to prevent an appeal from stopping work on an improvement is a sufficient security.[66] A "park fund" of a municipality has been held insufficient security.[67] The mere commencement of condemnation proceedings is not a "taking" so as to require security for compensation.[68] Where property is not actually taken, but is merely damaged, the compensation need not be paid or secured before the taking. The landowner has his remedy by action for damages.[69] A legislative act providing for taking property for public use is not unconstitutional merely because it does not itself provide for compensation to be made, if there is another statute under which it must be made or secured before the property can be taken, and which does secure it as a condition of the taking.[70] In some states the retention of possession by the landowner is deemed a sufficient security, but the rule is otherwise in this state.[71]

3049. What constitutes a damage—A landowner may be injured by the exercise of the right of eminent domain, and still not be entitled to compensation.[72] To entitle a party to compensation on the ground that his property has been "damaged" for a public use he must have sustained special damage with respect to his property, different in kind from that sustained by the public generally, and which, by common law, would have given him a private right of action.[73] Within this rule property has been held to be damaged by the vacation of a street,[74] and by a change in the grade of a street.[75]

3050. What is compensation—Market value—The owner is entitled to such sum as the property is worth in the market—that is, to persons generally.[76] The inquiry is, what is the property worth in the market, viewed not merely with reference to the uses to which it is at the time applied, but with reference to the uses to which it is plainly adapted, having regard to the existing business or wants of the community, or such as may be reasonably expected in the immediaite future? The owner is entitled to the market value of the land for the use to which it may be most advantageously applied, and for which it would sell for the highest price in the market.[77] In determining the value of the property the same considerations are to be regarded as in a sale of property between private parties.[78] The state simply requires the owner to sell, "and the public is to be considered as an individual treating with an individual for an exchange." [79] While the adaptability of the land to the use for which it is sought may be considered so far as it affects market value,[80] the injury is not what the land is worth to the condemnor. The necessities of the condemnor are not a measure of market value.[81]

Duluth T. Ry. v. N. P. Ry., 51-218, 53+366.

[66] Weir v. St. P. etc. Ry., 18-155(139); Curtis v. St. P. etc. Ry., 21-497.

[67] In re Lincoln Park, 44-299, 46+355. See State v. Brill, 58-152, 59+989.

[68] Duluth T. Ry. v. N. P. Ry., 51-218, 53+366.

[69] Vanderburgh v. Minneapolis, 98-329, 108+480.

[70] State v. Shardlow, 43-524, 46+74. See Warner v. Hennepin County, 9-139(130).

[71] Warren v. First Div. etc. Ry., 21-424; Minneapolis v. Wilkin, 30-140, 14+581; Commissioners v. Henry, 38-266, 36+874.

[72] Cameron v. Chi. etc. Ry., 42-75, 43+785; Rochette v. Chi. etc. Ry., 32-201, 20+140; Carroll v. Wis. Cent. Co., 40-168, 41+661.

[73] Rochette v. Chi. etc. Ry., 32-201, 20+140.

[74] Vanderburgh v. Minneapolis, 98-329, 108+480.

[75] Dickerman v. Duluth, 88-288, 92+1119.

[76] Blue Earth County v. St. P. etc. Ry., 28-503, 11+73; Winona etc. Ry. v. Waldron, 11-515(392).

[77] King v. Mpls. U. Ry., 32-224, 20+135; Conan v. Ely, 91-127, 97+737; Russell v. St. P. etc. Ry., 33-210, 22+379; Stinson v. Chi. etc. Ry., 27-284, 6+784; Cameron v. Chi. etc. Ry., 51-153, 53+199; Covill v. St. P. etc. Ry., 19-283(240).

[78] Conan v. Ely, 91-127, 131, 97+737.

[79] Langford v. Ramsey County, 16-375 (333, 338); Commissioners v. Henry, 38-266, 36+874.

[80] Conan v. Ely, 91-127, 97+737.

[81] Stinson v. Chi. etc. Ry., 27-284, 6+

3051. Measure of compensation—The value of the land taken is not always the measure of compensation. When necessary to make the compensation just, fair, and equitable, as required by the constitution, the sum allowed may be more or less than the value of the land taken.[82]

3052. Part of a tract taken—General rule—When part of a tract is taken the owner is entitled to compensation, not only for the part taken, but also for damages to the part not taken. In other words, he is entitled to the difference between the market value of the entire tract immediately before the taking and the market value of what is left after the taking,[83] excluding from consideration general benefits,[84] and deducting special benefits.[85] But an owner is not entitled to receive compensation for the land actually taken, equal to its market value for a use or purpose wholly distinct from the use to which the remainder of the land is applied, and at the same time receive compensation for damages to such remainder.[86]

3053. What constitutes a single tract—To constitute unity of property between two contiguous, but prima facie distinct, parcels of land, there must be such a connection or relation of adaptation, convenience, and actual and permanent use, as to make the enjoyment of the parcel taken reasonably and substantially necessary to the enjoyment of the parcel left, in the most advantageous and profitable manner in the business for which it is used.[87] Tracts which are separated physically are not to be considered as a single tract merely because they are owned by the same person and are or might be profitably and appropriately used for a single purpose.[88] A tract may be single though it is separated by a highway or railway.[89] Tracts may be distinct though they are near, owned by a single person, and used by him for a farm.[90] Unoccupied city lots are prima facie distinct though owned by one person.[91] Distinct lots or governmental subdivisions, joining each other and used as a single farm, may be a single tract.[92] Where tracts are prima facie distinct the burden is on the owner to show them a single tract.[93] Whether physically distinct tracts are substantially a single tract is a question for the jury, unless the evidence is conclusive.[94]

784; Union etc. Co. v. Brunswick, 31-297, 17+626. But see Conan v. Ely, 91-127, 97+737.

[82] Greve v. First Div. etc. Ry., 26-66, 1+816.

[83] Winona etc. Ry. v. Denman, 10-267 (208); Winona etc. Ry. v. Waldron, 11-515(392); St. Paul etc. Ry. v. Matthews, 16-341(303); Minn. V. Ry. v. Doran, 15-230(179); Hursh v. First Div. etc. Ry., 17-439(417); Simmons v. St. P. etc. Ry., 18-184(168); Scott v. St. P. etc. Ry., 21-322; Greve v. First Div. etc. Ry., 26-66, 1+816; Wilmes v. Mpls. etc. Ry., 29-242, 13+39; Sheldon v. Mpls. etc. Ry., 29-318, 13+134; Cedar Rapids etc. Ry. v. Ryan, 36-546, 33+35; Id., 37-38, 33+6; Redmond v. St. P. etc. Ry., 39-248, 40+64; Adolph v. Mpls. etc. Ry., 42-170, 43+848; Haynes v. Duluth, 47-458, 50+693; Kremer v. Chi. etc. Ry., 51-15, 52+977; Duluth etc. Ry. v. West, 51-163, 53+197; State v. Dist. Ct., 66-161, 68+860; Owatonna v. Christianson, 83-52, 85+909; Mpls. etc. Co. v. Harkins, 108-478, 122+450.

[84] Haynes v. Duluth, 47-458, 50+693; State v. Dist. Ct., 66-161, 68+860.

[85] See § 3056.

[86] Cameron v. Chi. etc. Ry., 51-153, 53+199.

[87] Peck v. Superior S. L. Ry., 36-343, 31+217.

[88] Cameron v. Chi. etc. Ry., 42-75, 43+785.

[89] St. Paul etc. Ry. v. Murphy, 19-500 (433); Sherwood v. St. P. etc. Ry., 21-127; Wilcox v. St. P. etc. Ry., 35-439, 29+148; Peck v. Superior S. L. Ry., 36-343, 31+217; Cameron v. Chi. etc. Ry., 42-75, 43+785; Redmond v. St. P. etc. Ry., 39-248, 40+64; Colvill v. St. P. etc. Ry., 19-283(240).

[90] Minn. V. Ry. v. Doran, 15-230(179); Cameron v. Chi. etc. Ry., 42-75, 43+785.

[91] Wilcox v. St. P. etc. Ry., 35-439, 29+148; Peck v. Superior S. L. Ry., 36-343, 31+217; Koerper v. St. P. etc. Ry., 42-340, 44+195.

[92] Cedar Rapids etc. Ry. v. Ryan, 36-546, 33+35; Wilmes v. Mpls. etc. Ry., 29-242, 13+39; Kremer v. Chi. etc. Ry., 51-15, 52+977.

[93] Wilcox v. St. P. etc. Ry., 35-439, 29+148; Peck v. Superior S. L. Ry., 36-343, 31+217.

[94] St. Paul etc. Ry. v. Murphy, 19-500

A tract may be single though part of it is occupied by a tenant.[95] Several city lots may be occupied and used as an entirety so as to constitute a single tract.[96]

3054. Elements of value—It has been held allowable to consider, in determining the value of land, that it was specially suited for a manufacturing plant and had been improved for that purpose;[97] that it was specially fitted for warehouse or elevator purposes by reason of its proximity to a railway;[98] that it was fitted for suburban residences;[99] that it had a valuable spring fitted to supply water to a near city;[1] that provision had been made by law for bringing it within the limits of a city in the near future;[2] that it was valuable as a gravel pit;[3] that a business had been long established on the land;[4] that a warehouse for the storage and shipment of grain possessed superior facilities over similar warehouses in the vicinity because of its construction and nearness to a navigable river;[5] that it afforded the only route by which the condemning railway company could make connections with other railways at a city;[6] that it was naturally adapted for truck farming and had a suitable site for a basement barn.[7]

3055. Benefits from improvements—In determining the amount of compensation the increased value of the land which will be caused by the improvement cannot be considered for the purpose of increasing the damages,[8] but any increase in market value already caused in anticipation of the improvement may be considered.[9] And where a railway company constructs its road over land, without acquiring the right to do so, the increased value of the land caused by the construction may be considered;[10] but it has been held that in such a case the value of the roadbed, ties, etc., cannot be considered.[11] In railway cases the difference in the value of the land with the road running over it, and its value with the road running near it, is an incorrect basis for the damages.[12]

3056. Allowance for benefits—In estimating the compensation, where part of a tract is taken, the value of special benefits resulting to the tract from the public improvement is to be deducted or set off against the damages. This deduction is to be made from the aggregate amount due, that is, from the compensation for the land taken and from the damages to the part of the tract not taken.[13] It is only special benefits that may be deducted, that is, those which result directly and peculiarly to the particular tract of which a part is taken: as, for instance, where property is made more available and valuable by opening a street through it, or where land is drained or otherwise directly im-

(433); Kremer v. Chi. etc. Ry., 51-15, 52+977.

[95] St. Paul etc. Ry. v. Murphy, 19-500 (433).

[96] Sherwood v. St. P. etc. Ry., 21-122; Id., 21-127.

[97] King v. Mpls. U. Ry., 32-224, 20+135.

[98] Russell v. St. P. etc. Ry., 33-210, 22+379.

[99] Sherman v. St. P. etc. Ry., 30-227, 15+239; Cedar Rapids etc. Ry. v. Ryan, 37-38, 33+6.

[1] Conan v. Ely, 91-127, 97+737.

[2] Duluth etc. Ry. v. West, 51-163, 53+197.

[3] Cameron v. Chi. etc. Ry., 51-153, 53+199.

[4] King v. Mpls. U. Ry., 32-224, 20+135.

[5] Rippe v. Chi. etc. Ry., 23-18.

[6] Brisbine v. St. P. etc. Ry., 23-114.

[7] Mpls. etc. Co. v. Friendshuh, 108-492, 122+451.

[8] Carli v. Stillwater etc. Ry., 16-260 (234); Union etc. Co. v. Brunswick, 31-297, 17+626; Mpls. etc. Co. v. Harkins, 108-478, 122+450; Mpls. etc. Co. v. Forstrom, 108-536, 122+451.

[9] Union etc. Co. v. Brunswick, 31-297, 17+626.

[10] See § 3060.

[11] Greve v. First Div. etc. Ry., 26-66, 1+816. See 14 Harv. L. Rev. 72; 20 Id. 70.

[12] Carli v. Stillwater etc. Ry., 16-260 (234); St. Paul etc. Ry. v. Murphy, 19-500 (433); Mpls. etc. Co. v. Harkins, 108-478, 122+450; Mpls. etc. Co. v. Forstrom, 108-536, 122+451.

[13] Winona etc. Ry. v. Waldron, 11-515 (392); Mantorville R. & T. Co. v. Slingerland, 101-488, 112+1033; Olson v. Albert Lea, 107-127, 119+794.

proved. General benefits, that is, those which the tract of which a part is taken shares in common with all land in the vicinity, are not to be deducted.[14] Special benefits may be set off, in proceedings to condemn a right of way for a railway company, against the value of the part taken and damages shown to have accrued to the remainder. The term "special benefits" as used in relation to a condemnation of a railway right of way, has the same meaning and is governed by the same principles as when employed in highway, drainage, or ordinary municipal improvement proceedings, only in so far as private property is taken for public use by such proceedings. In other cases, the identity of meaning and principles is to be determined with due reference to distinctions with respect to the exaction of payment as a condition precedent to subsequent use of railway facilities only, to the natural difference in accessibility to the improvement, and to the judicial nature of proceedings to condemn, as distinguished from the administrative character of ordinary local improvement assessments. Such benefits must be pro tanto a fair equivalent for land parted with and the damages inflicted. To that end they must be special, not common; direct, not consequential; substantial, not speculative; proximate, not remote; actual, and not constructive. The usual beneficial results of the mutually advantageous arrangement between a state and a railway company having the right to exercise the power of eminent domain are not special benefits. Mere increase in facilities of transportation does not amount to a special benefit.[15] Remote or speculative benefits, in anticipation of a rise in property for townsite purposes, or, generally, by reason of the proposed improvement of a water-power and the erection of mills in the vicinity, cannot be considered.[16] The benefits which the community enjoys from increased public facilities, and the consequent rise in the value of realty, are not to be considered.[17] There must be a substantial basis in the evidence for deducting special benefits.[18] Where there is no evidence of benefits the charge may omit reference thereto.[19] Whether the remainder of a tract is benefited by the improvement and to what extent are questions of fact for the jury, unless the evidence is conclusive.[20]

3057. Elements of damage—Where part of a tract is taken for railway purposes, the following have been held elements of damage: that the owner will have to build fences along the right of way, the company being under no obligation to build them;[21] that buildings already erected will be subjected to an increase risk of fire;[22] that danger of injury to, or destruction of, a household, will be greater;[23] the noise and inconvenience of passing trains;[24] the obstruc-

[14] Whitely v. Miss. etc. Co., 38-523, 38+753; Winona etc. Ry. v. Waldron, 11-515 (392); Arbrush v. Oakdale, 28-61, 9+30; Minn. C. Ry. v. McNamara, 13-508(468); Carli v. Stillwater etc. Ry., 16-260(234); Minn. V. Ry. v. Doran, 17-188(162); Weir v. St. P. etc. Ry., 18-155(139); State v. Shardlow, 43-524, 46+74; McKusick v. Stillwater, 44-372, 46+769; Haynes v. Duluth, 47-458, 50+693; State v. Dist. Ct., 66-161, 68+860; Homer v. Duluth, 70-378, 73+176; Swenson v. Hallock, 95-161, 103+895; Mantorville R. & T. Co. v. Slingerland, 101-488, 112+1033.

[15] Mantorville R. & T. Co. v. Slingerland, 101-488, 112+1033.

[16] Whitely v. Miss. etc. Co., 38-523, 38+753; Haynes v. Duluth, 47-458, 50+693.

[17] Arbrush v. Oakdale, 28-61, 9+30; State v. Shardlow, 43-524, 46+74.

[18] Miller v. Beaver, 37-203, 33+559.

[19] Simmons v. St. P. etc. Ry., 18-184 (168).

[20] Homer v. Duluth, 70-378, 73+176.

[21] Winona etc. Ry. v. Denman, 10-267 (208); Winona etc. Ry. v. Waldron, 11-515(392).

[22] Colvill v. St. P. etc. Ry., 19-283(240); Lehmicke v. St. P. etc. Ry., 19-464(406); Curtis v. St. P. etc. Ry., 20-28(19); Stillman v. N. P. etc. Ry., 34-420, 26+399; Harrington v. St. P. etc. Ry., 17-215 (188); Johnson v. Chi. etc. Ry., 37-519, 35+438.

[23] Curtis v. St. P. etc. Ry., 20-28(19).

[24] Blue Earth County v. St. P. etc. Ry., 28-503, 11+73; Cedar Rapids etc. Ry. v. Raymond, 37-204, 33+704; Adams v. Chi. etc. Ry., 39-286, 39+629.

tion of the flow of water from one part of a tract to another;[25] an increase in the rate of insurance on buildings already erected;[26] the fact that land is so near a railway station and stockyards that it will be subjected to extraordinary use;[27] the fact that the owner was prevented from enlarging a brickyard and put to the inconvenience of frequently crossing the tracks in hauling clay to the yard;[28] the obstruction caused by a fence along a right of way and the delay, labor, and inconvenience of opening and shutting gates or letting down and putting up bars;[29] an injury to a water-power.[30]

3058. Commensurate with interest taken—Compensation must be commensurate with the estate or interest taken.[31] If only an easement is taken the value of the easement, and not of the fee, is the measure of damages.[32] But a perpetual easement, such as a railway company acquires, has substantially the same value as the fee and the distinction is not material.[33]

3059. Relation to estate of owner—Where a party is shown to have merely an undivided interest in the land it is error to allow him compensation on the basis of a full ownership.[34]

3060. Valuation as of what date—Compensation is to be made with reference to the value of the property at the time of the award of the commissioners.[35] This rule is not changed by the fact that a railway company has, without the consent of the landowner, entered upon the premises and constructed its road without appropriate legal proceedings.[36] If the record is silent in respect to the matter it will be presumed that the valuation was made as of the proper time.[37]

3061. Effect of incumbrances—The measure of damages is unaffected by the fact that the land is subject to incumbrances.[38]

3062. Future conditions—Speculative values—Future conditions cannot be considered in estimating the value of the land unless they may be reasonably expected in the immediate future.[39]

3063. City property—Division into lots—City property may be assessed on the basis of its value if it were divided into lots.[40]

3064. Street across railway—In assessing damages for a street across a railway it is error to offset supposed benefits to the railway company from the opening of the street.[41]

3065. Reserved rights—Private crossings—Prior to Laws 1887 c. 174, it was held that where land is taken for a railway damages must be assessed on the

[25] Pflegar v. Hastings & D. Ry., 28–510, 11+72.

[26] Cedar Rapids etc. Ry. v. Raymond, 37–204, 33+704.

[27] Id.

[28] Sherwood v. St. P. etc. Ry., 21–127.

[29] Minn. V. Ry. v. Doran, 17–188(162).

[30] Lake Superior etc. Ry. v. Greve, 17–322 (299).

[31] Fairchild v. St. Paul, 46–540, 49+325; Mpls. etc. Ry. v. Nicolin, 76–302, 79+304.

[32] Robbins v. St. P. etc. Ry., 22–286.

[33] Robbins v. St. P. etc. Ry., 22–286; Winona etc. Ry. v. Denman, 10–267(208).

[34] Morin v. St. P. etc. Ry., 30–100, 14+460.

[35] Winona etc. Ry. v. Denman, 10–267 (208); Carli v. Stillwater etc. Ry., 16–260(234); Warren v. First Div. etc. Ry., 18–384(345); St. Paul etc. Ry. v. Murphy, 19–500(433); Sherwood v. St. P. etc. Ry., 21–122; Warren v. First Div. etc. Ry., 21–424; Conter v. St. P. etc. Ry., 22–342; Leber v. Mpls. etc. Ry., 29–256, 13+31; Commissioners v. Henry, 38–266, 36+874.

[36] Blue Earth County v. St. Paul etc. Ry., 28–503, 11+73; Winona etc. Ry. v. Denman, 10–267(208); Fish v. Chi. etc. Ry., 84–179, 87+606.

[37] Whitaere v. St. P. etc. Ry., 24–311; Minneapolis v. Wilkin, 30–140, 14+581.

[38] Knauft v. St. P. etc. Ry., 22–173; Bennett v. Mpls. etc. Ry., 42–245, 44+10.

[39] Russell v. St. P. etc. Ry., 33–210, 22+379; Cedar Rapids etc. Ry. v. Ryan, 37–38, 33+6; Stinson v. Chi. etc. Ry., 27–284, 6+784.

[40] Blue Earth County v. St. P. etc. Ry., 28–503, 11+73.

[41] St. Paul etc. Ry. v. Minneapolis, 35–141, 27+500.

assumption that the owner had no reserved right of private crossing unless such right was reserved in the condemnation proceedings.[42]

3066. Farm crossings—In railway cases the damages are to be assessed on the assumption that farm crossings will be maintained as required by statute.[43] It has been held proper to disregard temporary crossings.[44]

3067. Railway on street—Damages to an abutting owner for the construction and maintenance of a railway on a street are limited to those which result from the construction and operation directly opposite his land;[45] and when the railway is built on the opposite side of the center of the street, only such injuries to the property should be considered as proximately result from interference with the appurtenant easement for purposes of access, light, and air which the owner has in that part of the street.[46]

3068. Evidence of market value—General rule—Any existing fact which would naturally influence buyers and sellers and affect the market value of the land in general estimation is admissible.[47] Any use for which the land is available, or to which it is adapted, is an element to be taken into account in estimating its general value.[48]

3069. Evidence as to value—Evidence that there was no other route by which the proposed railway could be built, except across the land in question has been held inadmissable.[49] So has evidence as to the intentions and expectations of the owner in building a house long prior to the taking.[50]

3070. Prices offered—Evidence of what the landowner has been offered for the land is inadmissible,[51] and so is evidence of what other land in the vicinity has been offered at.[52]

3071. Sales of similar land—Evidence of what similar lands in the vicinity have recently sold for is inadmissible, at least if other evidence of value is available.[53]

3072. Opinion evidence—It is permissible to prove the value of the land, and the damages from the taking, by the opinions of qualified witnesses,[54] but the opinions of such witnesses are not conclusive upon the jury.[55]

3073. Competency of witnesses—Residents in the vicinity of the land and acquainted with it are competent to testify as to its value.[56] The competency of witnesses is for the court.[57]

[42] Cedar Rapids etc. Ry. v. Raymond, 37-204, 33+704; Schmidt v. Mpls. etc. Ry., 38-491, 38+487.

[43] St. Paul etc. Ry. v. Murphy, 19-500 (433).

[44] Sigafoos v. Mpls. etc. Ry., 39-8, 38+627.

[45] Adams v. Chi. etc. Ry., 39-286, 39+629; Demueles v. St. P. etc. Ry., 44-436, 46+912.

[46] Lamm v. Chi. etc. Ry., 45-71, 47+455.

[47] Russell v. St. P. etc. Ry., 33-210, 22+379; Sherman v. St. P. etc. Ry., 30-227, 15+239; King v. Mpls. U. Ry., 32-224, 20+135; Duluth etc. Ry. v. West, 51-163, 53+197; Conan v. Ely, 91-127, 97+737.

[48] Stinson v. Chi. etc. Ry., 27-284, 291, 6+784.

[49] Union etc. Co. v. Brunswick, 31-297, 17+626.

[50] St. Paul etc. Ry. v. Murphy, 19-500 (433).

[51] Minn. etc. Co. v. Gluek, 45-463, 48+194.

[52] Lehmicke v. St. P. etc. Ry., 19-464 (406).

[53] Stinson v. Chi. etc. Ry., 27-284, 6+784.

[54] Lehmicke v. St. P. etc. Ry., 19-464 (406); Simmons v. St. P. etc. Ry., 18-184(168); Sherman v. St. P. etc. Ry., 30-227, 15+239; Colvill v. St. P. etc. Ry., 19-283(240); Papooshek v. Winona etc. Ry., 44-195, 46+329; State v. Ensign, 55-278, 56+1006.

[55] Johnson v. Chi. etc. Ry., 37-519, 35+438.

[56] Lehmicke v. St. P. etc. Ry., 19-464 (406); Curtis v. St. P. etc. Ry., 20-28 (19); Papooshek v. Winona etc. Ry., 44-195, 46+329. See Colvill v. St. P. etc. Ry., 19-283(240).

[57] Papooshek v. Winona etc. Ry., 44-195, 46+329.

3074. Form of questions to witnesses—Where part of a tract of land is taken for railway purposes a witness may be asked, what is the value of the whole tract with the railway upon it and what is its value without the railway? or, what is the difference between the value of the whole tract with the railway upon it and its value without the railway? [58] While either form is allowable the former is preferable.[59] It is permissible, but not commendable, practice to ask a witness directly as to his opinion of the amount of the damages.[60] A witness may be asked in what manner the land is injured by the railway.[61] A witness cannot be asked, what is the value of the land for railway purposes? [62]

3075. Cross-examination of witnesses—The basis of the opinions of witnesses may be ascertained and tested on cross-examination.[63] It has been held allowable on cross-examination to ask a witness as to the rental value of the premises and the rents received from tenants; [64] as to the effect of the owner having no right to cross a railway right of way; [65] as to what a portion of the property was valuable for.[66]

3076. To whom payable—The award is a substitute in money for the land and is payable to the owner of the land, but others may have an interest in the land entitling them to share proportionately with him.[67] An equitable owner may be entitled to the award rather than the legal owner.[68] A mortgagee, after foreclosure and the expiration of the redemption period, may be an "owner" and as such entitled to the award.[69] If the title passes pending the condemnation proceedings the right to damages passes with the land.[70] If the award is paid to one not entitled to it, he is liable as for money had and received to the party entitled to it.[71] Charters sometimes contain provisions for the proof of title by claimants to an award.[72] When a homestead is taken the wife has no claim to the award as against her husband.[73] In actions to recover an award, it has been held that a complaint was sufficient; [74] that a third party might intervene as a claimant; [75] and that an action was barred by the statute of limitations.[76] The statute of limitations has been held to run on a claim for an award

[58] Simmons v. St. P. etc. Ry., 18–184 (168); Grannis v. St. P. etc. Ry., 18–194 (178); Colvill v. St. P. etc. Ry., 19–283 (240); Lehmicke v. St. P. etc. Ry., 19–464(406); St. Paul etc. Ry. v. Murphy, 19–500(433); Curtis v. St. P. etc. Ry., 20–28(19); Sherwood v. St. P. etc. Ry., 21–127; Sherman v. St. P. etc. Ry., 30–227, 15+239; Cedar Rapids etc. Ry. v. Ryan, 36–546, 33+35; Id., 37–38, 33+6; Sigafoos v. Mpls. etc. Ry., 39–8, 38+627; Emmons v. Mpls. etc. Ry., 41–133, 42+789; Haynes v. Duluth, 47–458, 50+693.

[59] Emmons v. Mpls. etc. Ry., 41–133, 42+789; Minn. etc. Co. v. Gluek, 45–463, 48+194.

[60] Minn. etc. Co. v. Gluek, 45–463, 48+194; Sherman v. St. P. etc. Ry., 30–227, 15+239. See Simmons v. St. P. etc. Ry., 18–184(168); St. Paul etc. Ry. v. Murphy, 19–500(433, 441).

[61] Winona etc. Ry. v. Waldron, 11 515 (392).

[62] Stinson v. Chi. etc. Ry., 27–284, 6+784.

[63] Haynes v. Duluth, 47–458, 50+693; State v. Dist. Ct., 87–268, 91+1111.

[64] Minn. etc. Co. v. Gluek, 45–463, 48+194.

[65] Sigafoos v. Mpls. etc. Ry., 39–8, 38+627.

[66] Colvill v. St. P. etc. Ry., 19–283(240).

[67] Daley v. St. Paul, 7–390(311); Carli v. Stillwater etc. Ry., 16–260(234); Moritz v. St. Paul, 52–409, 54+370; Boutelle v. Minneapolis, 59–493, 61+554; Farrand v. Clarke, 63–181, 65+361; Coles v. Stillwater, 64–105, 66+138; Smith v. St. Paul, 65–295, 68+32; Lumbermen's Ins. Co. v. St. Paul, 82–497, 85+525; Obst v. Covell, 93–30, 100+650.

[68] Moritz v. St. Paul, 52–409, 54+370.

[69] Moritz v. St. Paul, 52–409, 54+370; Boutelle v. Minneapolis, 59–493, 61+554; Lumbermen's Ins. Co. v. St. Paul, 82–497, 85+525.

[70] Carli v. Stillwater etc. Ry., 16–260 (234); Obst v. Covell, 93–30, 100+650.

[71] Smith v. St. Paul, 65–295, 68+32.

[72] Coles v. Stillwater, 64–105, 66+138; Stillwater etc. Ry. v. Stillwater, 66–176, 68+836.

[73] Canty v. Latterner, 31–239, 17+385.

[74] Daley v. St. Paul, 7–390(311).

[75] Smith v. St. Paul, 65–295, 68+32.

[76] Stillwater etc. Ry. v. Stillwater, 66–176, 68+836.

from the passage of an ordinance appropriating money for the payment of the award.[77] A final order, in proceedings under the Minneapolis park act, determining the parties entitled to an award, has been held improperly set aside after a period of several years.[78]

3077. By whom payable—A municipality has been held liable to pay for damages resulting from the change of grade of a street incident to the construction of a viaduct over a railway.[79]

3078. Waiver—The landowner may waive his right to compensation.[80]

PROCEDURE IN GENERAL

3079. Nature—The proceedings are not civil actions or causes within the meaning of the constitution, but special proceedings, only quasi judicial in their nature, whether conducted by judicial or non-judicial officers or tribunals.[81] They are in rem.[82]

3080. Legislative discretion—The mode in which the right of eminent domain shall be exercised is a matter of legislative discretion, within constitutional limitations.[83]

3081. Construction of statutes—So far as the proceedings are in invitum the statutes regulating them must be strictly followed.[84] When compensation is provided for, it must be ascertained and obtained in accordance with the course prescribed by the statute.[85]

3082. Impartial tribunal—While the legislature has a large discretion as to the mode of determining the compensation it must provide an impartial tribunal for that purpose, before which both parties may appear and discuss their claims on equal terms.[86] The tribunal need not be a jury.[87] It is sufficient if the landowner finds an impartial tribunal and an opportunity to be heard on appeal.[88] The tribunal need not be a judicial tribunal. It may be a jury, a court, a commission, or any other body, provided it is impartial.[89] The legislature cannot itself fix the compensation.[90]

3083. Conditions precedent—The filing of a plat and field notes has been held a condition precedent to the right to condemn land for a state road under

[77] Lumbermen's Ins. Co. v. St. Paul, 82-497, 85+525.

[78] Brame v. Towne, 66-133, 68+846.

[79] Dickerman v. Duluth, 88-288, 92+1119.

[80] St. Paul etc. Ry. v. Murphy, 19-500 (433) (a license to enter and construct a railway held not a waiver); Leber v. Mpls. etc. Ry., 29-256, 13+31 (mere silence held not a waiver); McCarty v. St. P. etc. Ry., 31-278, 17+616 (effect of deed from owner to trespassing railway company); Radke v. Mpls. etc. Ry., 41-350, 43+6 (id.); Brisbine v. St. P. etc. Ry., 23-114 (dedication of strip of land by riparian owner for street held not a waiver); Banse v. Clark, 69-53, 71+819 (failure to apply for assessment of damages in highway proceedings held a waiver).

[81] State v. Rapp, 39-65, 67, 38+926. See Minneapolis v. Wilkin, 30-140, 143, 14+581; Warren v. First Div. etc. Ry., 18-384(345, 354).

[82] Minn. V. Ry. v. Doran, 15-230(179); St. Paul etc. Ry. v. Minneapolis, 35-141, 27+500; Lumbermen's Ins. Co. v. St. Paul, 82-497, 85+525.

[83] Wilkin v. First Div. etc. Ry., 16-271 (244); Langford v. Ramsey County, 16-375(333); Weir v. St. P. etc. Ry., 18-155 (139); Warren v. First Div. etc. Ry., 18-384(345); State v. Rapp, 39-65, 38+926; St. Paul v. Nickl, 42-262, 44+59; State v. Dist. Ct., 83-464, 86+455.

[84] Minneapolis v. Wilkin, 30-140, 14+581; Teick v. Carver County, 11-292(201).

[85] Teick v. Carver County, 11-292(201).

[86] Langford v. Ramsey County, 16-375 (333); St. Paul v. Nickl, 42-262, 44+59; Weir v. St. P. etc. Ry., 18-155(139); Bruggerman v. True, 25-123; State v. Messenger, 27-119, 6+457; State v. Chi. etc. Ry., 36-402, 31+365; Ames v. Lake Superior etc. Ry., 21-241, 292; Paddock v. St. Croix B. Corp., 8-277(243); Banse v. Clark, 69-53, 71+819.

[87] See § 5233.

[88] Bruggerman v. True, 25-123; State v. Messenger, 27-119, 6+457.

[89] State v. Rapp, 39-65, 38+926; St. Paul v. Nickl, 42-262, 44+59.

[90] Langford v. Ramsey County, 16-375 (333); State v. Chi. etc. Ry., 36-402, 31+365; U. S. v. Minn. etc. Ry., 1-127(103).

a special act.[91] Before condemning land for extensions or branches a railway company is required by statute to comply with certain conditions precedent.[92]

3084. Parties—A railway company has been held authorized to complete proceedings begun by its predecessor in interest.[93] A railway company, seeking to have a default opened and to be allowed to oppose the proceedings has been held to show a sufficient interest in the property.[94] Proceedings against part of several cotenants do not affect those not joined.[95]

3085. Notice—It is not essential to the validity of statutory provisions for the condemnation of property for public use, or for the assessment of damages and benefits from public improvements, that the landowner have notice of the action of the proper authorities in determining what property shall be taken, or what property may be benefited by such improvements. But, in respect to the proceedings to ascertain the amount of compensation or damages to be paid to the landowner for property, taken for public use, he is entitled to have the same determined by an impartial tribunal, and to notice and opportunity to be heard upon the matter before such tribunal.[96] Constructive notice is sufficient.[97] Failure to give notice in conformity to the statute renders the proceedings void and subject to collateral attack, in the absence of a waiver. In other words, such notice is jurisdictional.[98] A general appearance waives notice.[99] Under G. S. 1878 c. 34 § 15 it was a condition precedent to the right to make service by publication of the notice therein required, upon non-resident landowners, or those whose residence was unknown, that an affidavit should be filed, showing the fact of the non-residence, or that after diligent inquiry the residence of such owner was unknown, or could not be ascertained.[1] The mode of service on corporations provided by G. S. 1878 c. 34 § 15 was exclusive.[2] A description in a notice of the lands sought to be acquired has been held sufficient.[3]

3086. Venue—A statute is not unconstitutional merely because it does not provide that the proceedings shall be had in the county or judicial district where the land is situated.[4] On appeal to the district court from the award of commissioners the place of trial may be changed.[5]

3087. Amendment—Where proper notice has been served on the landowner any indefiniteness in the description of the lands sought may be amended on appeal.[6] The court may allow an amendment of the petition as to the averment of title.[7] The court may allow the petitioner to amend his petition by striking out land, at least if the owner does not object. Amendments to supply omis-

[91] Teick v. Carver County, 11-292(201).

[92] R. L. 1905 § 2918. See Mpls. etc. Ry. v. Olson, 81-265, 83+1086, 84+101, 742.

[93] Bradley v. N. P. Ry., 38-234, 36+345.

[94] In re Mpls. Ry. Ter. Co., 38-157, 36+105.

[95] State v. Dist. Ct., 52-283, 53+1157.

[96] St. Paul v. Nickl, 42-262, 44+59; Langford v. Ramsey County, 16-375 (333); Lyle v. Chi. etc. Ry., 55-223, 56+820.

[97] St. Paul etc. Ry. v. Minneapolis, 35-141, 27+500; Miller v. Corinna, 42-391, 44+127; Kuschke v. St. Paul, 45-225, 47+786; Knoblauch v. Minneapolis, 56-321, 57+928; Hurst v. Martinsburg, 80-40, 82+1099; Forster v. Winona County, 84-308, 87+921.

[98] Rheiner v. Union etc. Co., 31-289, 294, 17+623; Fletcher v. Chi. etc. Ry., 67-339, 342, 69+1085; Lohman v. St. P. etc. Ry., 18-174(157); Siman v. Rhoades, 24-25, 29; Mpls. etc. Ry. v. Kanne, 32-174, 19+975; Kanne v. Mpls. etc. Ry., 33-419, 23+854; Overmann v. St. Paul, 39-120, 39+66; Lyle v. Chi. etc. Ry., 55-223, 56+820.

[99] See § 476.

[1] Brown v. St. P. etc. Ry., 38-506, 38+698.

[2] In re St. Paul etc. Ry., 36-85, 30+432.

[3] Wilkin v. First Div. etc. Ry., 16-271 (244); Kuschke v. St. Paul, 45-225, 47+786; Fairchild v. St. Paul, 46-540, 49+325; Lumbermen's Ins. Co. v. St. Paul, 85-234, 88+749.

[4] Weir v. St. P. etc. Ry., 18-155(139).

[5] Simmons v. St. P. etc. Ry., 18-184 (168); Lehmicke v. St. P. etc. Ry., 19-464 (406); Curtis v. St. P. etc. Ry., 20-28(19).

[6] Siman v. Rhoades, 24-25.

[7] Wilcox v. St. P. etc. Ry., 35-439, 29+148.

sions in the petition which go to the jurisdiction of the court ought not to be allowed.[8]

3088. Delays—The landowner must submit to the inconvenience and delay necessarily incident to condemnation proceedings.[9]

3089. Waiver—The doctrine of waiver is sometimes applied to irregularities in condemnation proceedings.[10] The landowner may waive any constitutional or statutory provision made for his benefit.[11]

3090. Who may oppose—Owners of tracts not included in a petition cannot object to the proceedings. Nor can a party, a part of whose lands are sought to be taken, raise an issue as to other tracts of his not sought to be taken.[12] A stranger to the proceedings, not interested in lands taken for a railway, cannot raise the objection that the company has no power under its charter to acquire the specific lands sought for railway purposes.[13] A union depot company has been held not estopped from objecting to a city taking a portion of its land for a street by the fact that it had previously petitioned for the laying out of a street on the land.[14] An owner who is properly served with notice cannot object to the sufficiency of notice to other owners.[15]

3091. Discontinuance or abandonment—At any time prior to judgment the condemnor may discontinue or abandon the proceedings, but if he is already in possession he must surrender possession as a condition of discontinuance.[16] It is the general rule that the condemnor must have a reasonable time after the assessment of damages in which to abandon the proceedings,[17] but he is not allowed more than a reasonable time.[18] Where in ejectment the defendant asks for an assessment under the statute, he may dismiss such application as of right at any time before the final submission of the case.[19] If the condemnor executes a bond on appeal under the general statute he cannot abandon the proceedings without the consent of the landlord.[20] A petition may be amended, with leave of court, by striking out land as to which the petitioner desires to discontinue the proceedings.[21] Failure of an appellant to prosecute an appeal cannot be urged as an abandonment of the proceedings by the respondent.[22] The provision of the charter of Minneapolis, as to abandonment upon failure to pay an award, has been construed.[23]

[8] Fletcher v. Chi. etc. Ry., 67–339, 69+1085.

[9] Commissioners v. Henry, 38–266, 36+874; Duluth T. Ry. v. N. P. Ry., 51–218, 53+366; State v. Otis, 53–318, 55+143.

[10] Whitely v. Miss. etc. Ry., 38–523, 38+753 (irregularity in notice as to place for presenting petition—waiver by appearing before commissioners and appealing from award); Minneapolis v. Wilkin, 30–140, 14+581 (assessment of damages by two instead of three commissioners); Rheiner v. Union etc. Co., 31–289, 17+623 (want of notice—waiver by appealing); Kanne v. Mpls. etc. Ry., 33–419, 23+854 (want of notice to landowner—held not waived by license to petitioner to enter lands or by motion to vacate award); Mpls. etc. Ry. v. Kanne, 32–174, 19+975 (want of notice of time and place of meeting of commissioners—held not waived by casual meeting with commissioners on land); State v. Rapp, 39–65, 38+926 (irregularity in summons—waiver by appearing and contesting appeal on merits).

[11] Minneapolis v. Wilkin, 30–140, 14+581.

[12] In re St. Paul etc. Ry., 34–227, 25+345.

[13] Kettle River etc. Ry. v. Eastern Ry., 41–461, 43+469.

[14] St. Paul U. D. Co. v. St. Paul, 30–359, 15+684.

[15] Weir v. St. P. etc. Ry., 18–155(139).

[16] Witt v. St. P. etc. Ry., 35–404, 29+161; Wilcox v. St. P. etc. Ry., 35–439, 29+148.

[17] Commissioners v. Henry, 38–266, 36+874; Duluth v. Lindberg, 70–132, 72+967. See 20 Harv. L. Rev. 574.

[18] McConville v. St. Paul, 75–383, 77+993.

[19] Kremer v. Chi. etc. Ry., 51–15, 52+977.

[20] Curtis v. St. P. etc. Ry., 21–497; Witt v. St. P. etc. Ry., 35–404, 29+161.

[21] Fletcher v. Chi. etc. Ry., 67–339, 69+1085.

[22] Bradley v. N. P. Ry., 38–234, 36+345.

[23] Bartleson v. Minneapolis, 33–468, 23+839.

PROCEDURE BEFORE COMMISSIONERS UNDER GENERAL STATUTES

3092. Jurisdiction—How acquired—Jurisdiction of the subject-matter is acquired by the presentation of the petition as provided by statute. Jurisdiction over the persons interested is acquired by the service of the statutory notice of the time and place of the presentation of the petition.[24]

3093. Petition—The petition is jurisdictional.[25] In railway cases a general allegation of the purposes for which the land is sought is sufficient.[26] The land sought must be described, but great precision is not required.[27] It is sufficient if it is all that the statute requires.[28] A petition may cover riparian rights not mentioned.[29] Naming the owners in the petition is an admission of their ownership for the purposes of the proceedings.[30] An allegation of ownership is an allegation of ownership in fee.[31] A petition under Pub. St. (1849–1858), c. 129, for a milldam, has been held sufficient.[32] A petition under G. S. 1894 § 2605 by a telephone company, has been held sufficient, though it contained no allegations as to the citizenship of its shareholders.[33]

3094. Hearing and order on petition—The court must determine whether the use for which the land is sought is a public use and whether the land is reasonably necessary therefor.[34] The statute imposing this duty is not an unconstitutional delegation of legislative power.[35] In discharging this duty the court will take judicial notice of all facts generally known to the public.[36] The necessity of taking the land is determined by the order appointing the commissioners.[37] Under a special act similar to the general statute, it has been held the duty of the court on the hearing to determine the persons interested in the land and to specify their interest in the order appointing the commissioners.[38] The burden of proof is on the petitioner.[39] The order may define the extent and duration of the interest to be acquired by the petitioner,[40] but whatever the language of the order the petitioner cannot acquire a greater interest than the constitution authorizes.[41] The order may reserve to the owner rights and privileges to be exercised in subordination to the public use.[42] The order must

[24] Rheiner v. Union etc. Co., 31–289, 17+623.

[25] Faribault v. Hulett, 10–30(15); Rheiner v. Union etc. Co., 31–289, 294, 17+623; Whitely v. Miss. etc. Co., 38–523, 525, 38+753; Fletcher v. Chi. etc. Ry., 67–339, 342, 69+1085.

[26] Wilkin v. First Div. etc. Ry., 16–271 (244); Fletcher v. Chi. etc. Ry., 67–339, 69+1085.

[27] Lumbermen's Ins. Co. v. St. Paul, 85–234, 88+749; Fairchild v. St. Paul, 46–540, 49+325; Kuschke v. St. Paul, 45–225, 47+786; Hanford v. St. P. etc. Ry., 43–104, 122, 42+596, 44+1144; Weaver v. Miss. etc. Co., 30–477, 16+269; Siman v. Rhoades, 24–25.

[28] Wilkin v. First Div. etc. Ry., 16–271 (244); Lumbermen's Ins. Co. v. St. Paul, 85–234, 88+749.

[29] Hanford v. St. P. etc. Ry., 43–104, 42+596, 44+1144.

[30] St. Paul etc. Ry. v. Matthews, 16–341 (303); Knauft v. St. P. etc. Ry., 22–173; Wilcox v. St. P. etc. Ry., 35–439, 29+148.

[31] St. Paul etc. Ry. v. Matthews, 16–341 (303).

[32] Faribault v. Hulett, 10–30(15).

[33] N. W. etc. Co. v. Chi. etc. Ry., 76–334, 79+315.

[34] In re St. Paul etc. Ry., 34–227, 25+345; Id., 37–164, 33+701; Minn. C. & P. Co. v. Koochiching Co., 97–429, 437, 107+405.

[35] McGee v. Hennepin County, 84–472, 88+6.

[36] In re St. Paul etc. Ry., 34–227, 25+345.

[37] Hopkins v. Chi. etc. Ry., 76–70, 78+969.

[38] St. Paul etc. Ry. v. Matthews, 16–341 (303).

[39] Chicago etc. Ry. v. Porter, 43–527, 46+75; Mpls. etc. Ry. v. Hartland, 85–76, 88+423.

[40] Mpls. etc. Ry. v. Nicolin, 76–302, 79+304.

[41] Scott v. St. P. etc. Ry., 21–322; Gurney v. Mpls. U. E. Co., 63–70, 65+136; Fletcher v. Chi. etc. Ry., 67–339, 69+1085.

[42] Cedar Rapids etc. Ry. v. Raymond, 37–204, 33+704; Hopkins v. Chi. etc. Ry., 76–70, 78+969.

fix the time and place of the first meeting of the commissioners with particularity.[43] The landowner may oppose the proceedings, as respects his own land, on the ground that the proposed taking is unnecessary.[44]

3095. Vacation of order—An order appointing commissioners may be vacated on motion,[45] or opened to allow an owner in default to oppose condemnation. An appeal from the award of the commissioners is not inconsistent with a motion to vacate the order appointing them.[46]

3096. Qualifications of commissioners—A resident or taxpayer of the municipality seeking to condemn the land is not disqualified.[47] It has been assumed that a husband is disqualified to act in relation to land of his wife.[48] An appraiser who had formerly taken part in appraising the value of the land as a member of a real estate board has been held disqualified.[49] Commissioners appointed by the council under the Minneapolis charter, have been held presumptively impartial.[50]

3097. Proceedings of commissioners—In general—The first meeting of the commissioners must be at the time and place specified in the order.[51] Under a former statute the commissioners were authorized to pass on the title of the persons named in the petition as owners,[52] but they probably have no such authority under the present statute.[53] In proper cases they may reserve to the owner a right of way or other privilege in or over the land taken, or attach reasonable conditions to such taking in addition to the damages given, or they may make an alternative award, conditioned upon the granting or withholding of the right specified.[54]

3098. Rules of evidence—To what extent the commissioners are bound by the rules of evidence applicable to ordinary actions is uncertain.[55]

3099. Assessment and award of damages—The damages assessable are not limited to the lands described in the petition where such land is a part of an entire tract,[56] but damages to other distinct tracts of the same owner, not described in the petition, are not assessable.[57] Damages are to be assessed with reference to the value and condition of the land at the time of the award.[58] They may be assessed in gross for the taking of several contiguous lots owned by the same party.[59] Past damages are not assessable.[60] An assessment of damages for land not authorized to be taken by the order appointing the commissioners is void.[61] Error in the assessment does not render the award void, a remedy being afforded by appeal.[62] Damages are to be assessed according to the extent

[43] Mpls. etc. Ry. v. Kanne, 32-174, 19+975.
[44] In re Mpls. Ry. Ter. Co., 38-157, 36+105.
[45] Mpls. etc. Ry. v. Olson, 81-265, 83+1086, 84+101, 742.
[46] In re Mpls. Ry. Ter. Co., 38-157, 36+105. See Warren v. First Div. etc. Ry., 18-384(345).
[47] Minneapolis v. Wilkin, 30-140, 14+581; McKusick v. Stillwater, 44-372, 46+769.
[48] State v. Dist. Ct., 50-14, 52+222.
[49] State v. Dist. Ct., 87-268, 91+1111.
[50] Knoblauch v. Minneapolis, 56-321, 57+928.
[51] Rheiner v. Union etc. Co., 31-289. 17+623; Mpls. etc. Ry. v. Kanne, 32-174, 19+975.
[52] Brisbine v. St. P. etc. Ry., 23-114.
[53] See St. Paul etc. Ry. v. Matthews, 16-341(303).
[54] R. L. 1905 § 2527; Mpls. etc. Ry. v. St. Martin, 108-494, 122+452.
[55] See Minneapolis v. Wilkin, 30-140, 14+581.
[56] Sheldon v. Mpls. etc. Ry., 29-318, 13+134; Wilmes v. Mpls. etc. Ry., 29-242, 13+39; Minn. V. Ry. v. Doran, 15-230(179).
[57] Minn. V. Ry. v. Doran, 15-230(179).
[58] See § 3060.
[59] Sherwood v. St. P. etc. Ry., 21-122; Id., 21-127.
[60] Proetz v. St. Paul W. Co., 17-163 (136); Leber v. Mpls. etc. Ry., 29-256, 13+31; Hempsted v. Cargill, 46-118, 48+558.
[61] Ramsey County v. Stees, 28-326, 9+879; Pfaender v. Chi. etc. Ry., 86-218, 90+393, 1133.
[62] St. Paul etc. Ry. v. Minneapolis, 35-141, 27+500; Kuschke v. St. Paul, 45-225, 47+786.

and duration of the interest to be acquired by the petitioner in the land, as defined by the order of the court.[63]

3100. Deposit in court—Provision is made by statute for a deposit of the amount of the award in certain cases.[64] The deposit must be unconditional.[65]

3101. Conclusiveness of award—Where jurisdiction has once attached by due service of the requisite petition and notice upon all parties having or claiming any estate or interest in the property thereby affected, and an award is regularly made by the commissioners as to each claimant, the rights of the respective parties become definitely fixed, and such award until modified or changed on appeal, is conclusive and binding, not only upon the parties to the record, but their privies and grantees. Any person subsequently acquiring any interest in the property takes it with full notice, and subject to the award.[66] In collateral proceedings it is to be conclusively presumed that the commissioners passed upon and allowed all legitimate items or elements of damage to the landowner, and no other.[67] An award may be conclusive as to damages incurred prior to the award.[68]

3102. Vacation of award—Reassessment—Possibly an award may be set aside and a reassessment ordered on the ground that the commissioners were not guided by the rules of evidence and misapprehended the principles upon which they were bound to make the assessment, the facts being made to appear by affidavit.[69] The landowner is under no obligation to move to set aside a void award; he may attack it collaterally. A motion to set aside an award has been held not a waiver of objections to it.[70] The court is authorized to vacate an award on motion, for cause.[71] In proceedings under a city charter to make a local improvement, such as opening or widening a street, an objection to the confirmation of the report of the commissioners appointed to appraise damages and benefits, on the ground of the disqualification of one of the commissioners, is analogous to an application to have a verdict set aside because of the disqualification of a juror; and as a general rule a party is not entitled to have the report set aside from the mere fact that he did not know of the disqualification until after the hearing, at least where the commission was appointed on his own application, and he had an opportunity of inquiring as to the qualifications of those proposed as commissioners. He ought to show that he made some investigation as to their qualifications, or give some excuse for not doing so.[72] Provisions of the Minneapolis charter respecting the payment of costs, etc., upon the vacation of an award, have been held constitutional.[73]

3103. Interest on award—Interest runs on the award from the date of its filing.[74]

3104. Tender—An instruction as to the sufficiency of a tender of the amount of the award has been sustained.[75] A tender pending appeal has been held ineffectual.[76]

[63] Mpls. etc. Ry. v. Nicolin, 76-302, 79+304.
[64] R. L. 1905 § 2529; N. P. Ry. v. Owens, 86-188, 194, 90+371.
[65] Kanne v. Mpls. etc. Ry., 30-423, 15+871.
[66] Trogden v. Winona etc. Ry., 22-198.
[67] McCullough v. St. P. etc. Ry., 52-12, 53+802.
[68] Leber v. Mpls. etc. Ry., 29-256, 13+31.
[69] Minneapolis v. Wilkin, 30-140, 14+581. See St. Paul v. Nickl, 42-262, 44+59.
[70] Kanne v. Mpls. etc. Ry., 33-419, 23+854.
[71] In re Mpls. Ry. Ter. Co., 38-157, 36+105.
[72] State v. Dist. Ct., 50-14, 52+222.
[73] State v. Dist. Ct., 87-268, 91+1111.
[74] R. L. 1905 § 2535; Minneapolis v. Wilkin, 30-145, 15+668.
[75] Scott v. St. P. etc. Ry., 21-322.
[76] Colvill v. Langdon, 22-565.

3105. Judgment—Prior to Revised Laws 1905, the statute provided for a judgment on the award of commissioners.[77] The provision seems to have been inadvertently omitted from the revision.

PROCEDURE IN DISTRICT COURT

3106. Jurisdiction—The jurisdiction of the district court is special and only such as the statute grants.[78] It is appellate.[79]

3107. Appeal to district court—A grantee in a conveyance by an owner after an award and before the expiration of the time to appeal may appeal.[80] Under G. S. 1866 c. 34 § 22, a mortgagee was held not a necessary party to an appeal.[81] A failure to file a notice of appeal within thirty days is fatal. The statute provides how the appeal shall be brought and the parties cannot substitute a different procedure and dispense with the requirements of the statute.[82] A notice of appeal has been held sufficient though alternative in form.[83] A notice of appeal served after notice of the filing of the report, perfected the appeal, though a prior notice of appeal had been served before notice of filing had been given.[84] The duty to prosecute an appeal rests on the appellant. A delay in such prosecution does not show an abandonment of the proceedings by the respondent.[85] A description of the land in a notice of appeal has been held not to limit the damages recoverable on appeal.[86] By appealing the appellant gives the court jurisdiction over his person.[87] An appeal is not inconsistent with a motion to vacate an order appointing commissioners.[88] The charter of a boom company has been held to authorize an appeal to the district court.[89] The charter of a railway company has been held not to provide any time for an appeal.[90]

3108. Dismissal—Various unimportant objections have been held not a ground for dismissal.[91] An appeal has been held properly dismissed for failure to file notice of appeal within thirty days.[92]

3109. Bond—The statute provides that the proposed improvement may go on notwithstanding an appeal, if the petitioner files a bond.[93]

[77] G. S. 1894 § 2615; Fletcher v. Chi. etc. Ry., 67–339, 347, 69+1085; Duluth Tr. Ry. v. Duluth Ter. Ry., 81–62, 83+497.

[78] Ramsey County v. Stees, 28–326, 9+ 879.

[79] See § 3110.

[80] Carli v. Stillwater etc. Ry., 16–260 (234); Schermeely v. Stillwater etc. Ry., 16–506(457). See Bradley v. N. P. Ry., 38–234, 36+345.

[81] Knauft v. St. P. etc. Ry., 22–173; Wilkin v. St. P. etc. Ry., 22–177.

[82] Klein v. St. P. etc. Ry., 30–451, 16+ 265. See Hempsted v. Cargill, 46–141, 48+686.

[83] St. Paul etc. Ry. v. Murphy, 19–500 (433).

[84] Ellering v. Mpls. etc. Ry., 107–46, 119+ 507.

[85] Bradley v. N. P. Ry., 38–234, 36+345.

[86] Sheldon v. Mpls. etc. Ry., 29–318, 13+ 134.

[87] Rheiner v. Union etc. Co., 31–289, 17+ 623; Whitely v. Miss. etc. Co., 38–523, 38+753.

[88] In re Mpls. Ry. T. Co., 38–157, 36+ 105.

[89] Paddock v. St. Croix B. Corp., 8–277 (243).

[90] Peters v. Hastings D. Ry., 19–260 (220).

[91] Warren v. First Div. etc. Ry., 18–384 (345) (order appointing commissioners not on file in district court); Knauft v. St. P. etc. Ry., 22–173 (mortgagees not joined—that jury has not examined premises); Wilkin v. St. P. etc. Ry., 22–177 (joinder of husband of landowner).

[92] Klein v. St. P. etc. Ry., 30–451, 16+ 265.

[93] R. L. 1905 § 2532; Weir v. St. P. etc. Ry., 18–155(139) (bond a sufficient security for the compensation within meaning of constitution); Curtis v. St. P. etc. Ry., 21–497 (provision for bond construed with provision for judgment); Robbins v. St. P. etc. Ry., 24–191 (id.); Rippe v. Chi. etc. Ry., 22–44 (insufficiency of bond not a ground for dismissal in supreme court); Mpls. etc. Ry. v. Woodworth, 32–452, 21+476 (effect of bond on liability to pay judgment); Witt v. St. P. etc. Ry., 35–404, 29+161 (effect of bond on right to abandon proceedings); Wilcox v. St. P.

3110. Issues—The issues to be tried in the district court are the same as the issues before the commissioners. The jurisdiction of the district court is appellate and the whole scope of the appeal is to secure a retrial in the district court of the same matters submitted to and passed upon by the commissioners. The proceedings prior to the award of the commissioners, including the petition and evidence thereon, are not before the court for review. The sole issue before the court is the amount of damages to be awarded.[94] But the court may determine whether the commissioners exceeded their authority in assessing damages for land not authorized to be taken.[95] A change of ownership pending the appeal does not affect the issues to be tried.[96] The question of title is not in issue.[97] Where the appeal is from a part of the award the review on appeal is limited to that part.[98]

3111. Trial—The oath to be administered the jury is the same as that in an ordinary civil action.[99] The court may limit the number of witnesses to value.[1] A view of the premises by the jury is governed by the same rules as in an ordinary action.[2] The landowner occupies the position of plaintiff and has the right to open and close.[3] The place of trial may be changed.[4] While the jurisdiction of the district court is appellate the trial of the issues involved is de novo and new evidence may be introduced in regard to matters which might have been contested below, without reference to the question whether they were or were not so contested.[5]

3112. Evidence—Admissibility—The award of the commissioners is not generally admissible on the issue of damages, but it is admissible for the purpose of explaining the location of the line of road and the description and situation of the premises.[6] If for any special reason it is admissible on the issue of damages it is the duty of counsel to call the attention of the court to the fact.[7] It has been held admissible to show the amount of damages awarded to a mortgagee not appealing.[8] A question to a witness as to the use for which lots were adapted has been held improper because it referred to the condition of the lots at the time of trial and not at the time of the filing of the report.[9]

3113. Proof of ownership—An allegation of ownership in the petition dispenses with the necessity of proof in the district court.[10] Where damages are claimed for injury to a portion of an entire tract not taken, actual possession of that portion is prima facie evidence of title in fee, as against the company.[11]

etc. Ry., 35-439, 29+148 (id.); Hennessy v. St. Paul, 44-306, 46+353 (necessity of bond under St. Paul charter to authorize improvement pending appeal).

[94] Turner v. Holleran, 11-253(168); Schermeely v. Stillwater etc. Ry., 16-506 (457); Warren v. First Div. etc. Ry., 18-384(345); St. Paul etc. Ry. v. Murphy, 19-500(433); Rippe v. Chi. etc. Ry., 20-187(166); Warren v. First Div. etc. Ry., 21-424; Trogden v. Winona etc. Ry., 22-198; Rippe v. Chi. etc. Ry., 23-18; Whitacre v. St. P. etc. Ry., 24-311; Ramsey County v. Stees, 28-326, 9+879; Sherman v. St. P. etc. Ry., 30-227, 15+239.

[95] Ramsey County v. Stees, 28-326, 9+879.

[96] Trogden v. Winona etc. Ry., 22-198.

[97] Rippe v. Chi. etc. Ry., 23-18.

[98] Mpls. etc. Co. v. St. Martin, 108-494, 122+452.

[99] Knauft v. St. P. etc. Ry., 22-173; Wilkin v. St. P. etc. Ry., 22-177.

[1] Sheldon v. Mpls. etc. Ry., 29-318, 13+134.

[2] Knauft v. St. P. etc. Ry., 22-173, 176; Gurney v. Mpls. etc. Ry., 41-223, 43+2.

[3] Minn. V. Ry. v. Doran, 17-188(162).

[4] Simmons v. St. P. etc. Ry., 18-184 (168); Lehmicke v. St. P. etc. Ry., 19-464(406); Curtis v. St. P. etc. Ry., 20-28(19).

[5] Winona etc. Ry. v. Denman, 10-267 (208).

[6] Sherman v. St. P. etc. Ry., 30-227, 15+239; N. P. Ry. v. Duncan, 87-91, 91+271.

[7] N. P. Ry. v. Duncan, 87-91, 91+271.

[8] Trogden v. Winona etc. Ry., 22-198.

[9] Conter v. St. P. etc. Ry., 22-342.

[10] St. Paul etc. Ry. v. Matthews, 16-341 (303); Knauft v. St. P. etc. Ry., 22-173; Wilkin v. St. P. etc. Ry., 22-177; Rippe v. Chi. etc. Ry., 23-18; Wilcox v. St. P. etc. Ry., 35-439, 29+148.

[11] St. Paul etc. Ry. v. Matthews, 16-341 (303); Adolph v. Mpls. etc. Ry., 42-170, 43+848. See Rippe v. Chi. etc. Ry., 23-18.

3114. Assessment of damages—Damages are to be assessed as of the time of the filing of the award.[12] They may be assessed at a greater or less amount than the award appealed from.[13] They may be assessed in gross for the taking of several contiguous lots owned by the same party.[14] Where part of an entire tract is taken the damages are not limited to the lands described in the petition or notice of appeal.[15] It is too late after verdict to object that there was not a separate assessment of the damages of each undivided owner.[16] Damages suffered prior to the award are not assessable.[17]

3115. Verdict—If, from the petition, the case settled, and the verdict, a judgment may be entered specifying clearly the relief granted, the verdict is sufficient.[18] Where several distinct tracts are involved, the objection that the verdict is for a gross sum for all cannot be raised for the first time in the supreme court.[19] The verdict is presumed to have reference to the time of the award, so far as the time of the assessment of damages is concerned.[20]

3116. Interest—Interest runs on the damages allowed from the time of the filing of the award by the commissioners.[21] But if the possession and use of the land, between the time of filing the award and the assessment by the jury, has been of actual value to the landowner, the amount of such value should be ascertained by the jury or court, and deducted from the interest allowed.[22]

3117. Judgment—The judgment is one adjudging and declaring the right of the petitioner to take, use, and appropriate the land in controversy upon paying the damages awarded, and also one in favor of the landowner for the amount of the compensation awarded for such taking.[23] The landowner is entitled to a personal judgment for the amount of his damages.[24] The judgment may follow a verdict in adjudging a gross sum for several lots.[25] If the judgment is defective in form, the remedy is a motion in the trial court and not certiorari.[26] The judgment determines the respective rights of the parties.[27] It determines the right of the petitioner to appropriate the land upon the payment of the amount adjudged to be due the landowner.[28] It may be amended.[29]

3118. Costs—The court has discretionary power to award costs to the prevailing party.[30]

3119. Payment of judgment or award—The judgment or award must be paid within sixty days under penalty of a dismissal of the proceedings.[31] When

[12] Sherwood v. St. P. etc. Ry., 21-122; Warren v. First Div. etc. Ry., 21-424; Whitacre v. St. P. etc. Ry., 24-311; Conter v. St. P. etc. Ry., 22-342. See § 3060.

[13] St. Paul etc. Ry. v. Murphy, 19-500 (433).

[14] Sherwood v. St. P. etc. Ry., 21-122; Id., 21-127.

[15] Sheldon v. Mpls. etc. Ry., 29-318, 13+134.

[16] Knauft v. St. P. etc. Ry., 22-173.

[17] Proetz v. St. Paul W. Co., 17-163 (136); Leber v. Mpls. etc. Ry., 29-256, 13+31; Hempsted v. Cargill, 46-118, 48+558.

[18] St. Paul etc. Ry. v. Matthews, 16-341 (303); Sherwood v. St. P. etc. Ry., 21-127.

[19] Lake Superior etc. Ry. v. Greve, 17-322(299).

[20] Whitacre v. St. P. etc. Ry., 24-311.

[21] R. L. 1905 § 2535; Warren v. First Div. etc. Ry., 21-424; Knauft v. St. P. etc. Ry., 22-173; Whitacre v. St. P. etc. Ry., 24-311; Minneapolis v. Wilkin, 30-145, 15+668; Weide v. St. Paul, 62-67, 64+65; Commissioners v. Henry, 38-266, 36+874; U. S. v. Sargent, 162 Fed. 81 (interest awardable against United States). See 23 Harv. L. Rev. 64.

[22] Warren v. First Div. etc. Ry., 21-424.

[23] Fletcher v. Chi. etc. Ry., 67-339, 69+1085.

[24] Curtis v. St. P. etc. Ry., 21-497; Robbins v. St. P. etc. Ry., 24-191.

[25] Sherwood v. St. P. etc. Ry., 21-127.

[26] St. Paul etc. Ry. v. Murphy, 19-500 (433).

[27] St. Paul etc. Ry. v. Matthews, 16-341 (303, 315); Witt v. St. P. etc. Ry., 35-404, 29+161.

[28] Witt v. St. P. etc. Ry., 35-404, 29+161.

[29] Siman v. Rhoades, 24-25.

[30] R. L. 1905 § 2533. See, under a former statute, Sherwood v. St. P. etc. Ry., 21-122.

[31] R. L. 1905 § 2535; Mpls. etc. Ry. v. Woodworth, 32-452, 21+476.

land is taken for a street and all acts required are done, the right to the damages awarded becomes fixed.[32] Cases are cited below involving the construction of charter provisions.[33]

3120. New trial—A new trial may be granted as in ordinary civil actions;[34] and the general rules, as to setting aside a verdict because contrary to the evidence,[35] or for excessive damages,[36] apply. The mere fact that the damages assessed exceed the estimates of a majority of the witnesses does not justify a new trial.[37]

3121. Recovery of expenses, etc.—Provision is made by statute for the recovery by the landowner of expenses, including attorney's fees, under certain conditions.[38]

PROCEDURE UNDER MUNICIPAL CHARTERS

3122. In general—Various cases are cited below involving questions of procedure under the charters of St. Paul,[39] Minneapolis,[40] Duluth[41] and Still-

[32] Daley v. St. Paul, 7-390(311).

[33] Bartleson v. Minneapolis, 33-468, 23+839 (provisions of charter of Minneapolis, as to abandonment of proceedings for failure to pay an award); State v. Board, 33-524, 24+187 (provisions of Minneapolis park act, as to payment, tender or deposit of damages); Moritz v. St. Paul, 52-409, 54+370 (provisions of St. Paul charter as to payment of damages for change of grade of street).

[34] McNamara v. Minn. C. Ry., 12-388 (269).

[35] Rheiner v. Stillwater etc. Co., 29-147, 12+449; Whitely v. Miss. etc. Co., 38-523, 38+753; King v. Mpls. U. Ry., 32-224, 20+135.

[36] St. Paul etc. Ry. v. Matthews, 16-341 (303); Lindahl v. Minn. etc. Ry., 89-283, 94+1134.

[37] Colvill v. St. P. etc. Ry., 19-283(240).

[38] R. L. 1905 § 2535. See Bergman v. St. P. etc. Ry., 21-533; Mpls. etc. Ry. v. Woodworth, 32-452, 21+476.

[39] Daley v. St. Paul, 7-390(311); (when right to award becomes fixed); Gurney v. St. Paul, 36-163, 30+661 (appeal from award of water commissioners—Sp. Laws 1881 c. 188); Overmann v. St. Paul, 39-120, 39+66 (notices of assessment of damages and confirmation thereof jurisdictional); Hennessy v. St. Paul, 44-306, 46+353 (necessity of bond to allow improvement to proceed pending an appeal); Kuschke v. St. Paul, 45-225, 47+786 (notice by publication sufficient—sufficiency of description of land in notice); Fairchild v. St. Paul, 46-540, 49+325 (publication of notice—description of land—benefits equaling damages—notice before taking possession); Moritz v. St. Paul, 52-409, 54+370 (damages for change of grade—to whom and when payable); James v. St. Paul, 58-459, 60+21 (notice of time and place of meeting of board of public works); Smith v. St. Paul, 65-295, 68+32 (action to recover award—intervention); Weide v. St. Paul, 62-67, 64+65 (interest on award); Lumbermen's Ins. Co. v. St. Paul, 82-497, 85+525 (description of easement in notice—statute of limitations against right to award—estoppel); Lumbermen's Ins. Co. v. St. Paul, 85-234, 88+749 (description of land—reference to record to determine sufficiency of proceedings).

[40] Minneapolis v. Wilkin, 30-145, 15+668 (interest on damages—condemnation for park); Minneapolis v. Wilkin, 30-140, 14+581 (condemnation for park—stipulation for reassessment of damages by two instead of three commissioners); State v. Board, 33-524, 24+187 (condemnation for park—confirmation of award—payment, tender, or deposit of damages); Bartleson v. Minneapolis, 33-468, 23+839 (failure to pay award—abandonment of proceedings); St. Paul etc. R. v. Minneapolis, 35-141, 27+500 (constructive notice—proceedings in opening street across railway); Keyes v. Minneapolis, 42-467, 44+529 (mistake as to tract); State v. Dist. Ct., 50-14, 52+222 (objection to disqualification of commissioner waived by laches); Knoblauch v. Minneapolis, 56-321, 57+928 (commissioners presumptively impartial—published notice sufficient); Boutelle v. Minneapolis, 59-493, 61+554 (when title vests in city—right of mortgagee to award); Brame v. Towne, 66-133, 68+846 (setting aside order determining to whom award payable); Sacks v. Minneapolis, 75-30, 77+563 (condemnation of land used as cemetery for street—consent of owner); State v. Dist. Ct., 87-268, 91+1111 (meaning of "improvements" in an award—disqualification of appraiser who has formerly appraised land—costs etc. on reappraisements).

[41] Duluth v. Lindberg, 70-132, 72+967 (condemnation for park—right to withdraw proceedings after award); Homer v. Duluth, 70-378, 73+176 (appeal from award—questions for jury).

water.[42] In so far as these cases involve general principles they will be found elsewhere under appropriate heads.

REMEDIES OF LANDOWNER

3123. Appeal not exclusive—When condemnation proceedings are without jurisdiction the landowner is not obliged to seek his remedy by appeal therein.[43]

3124. Mandamus—A railway company cannot be compelled by mandamus to resort to condemnation proceedings.[44]

3125. Ejectment against railway—Statute—Where a railway company enters and occupies land for railway purposes without making compensation therefor, the owner may maintain ejectment, whether the company entered with or without his consent.[45] In such an action the company may have the land condemned and the compensation therefor determined. The action is regulated by statute.[46] The damages or compensation are to be assessed as of the date of the trial.[47] The right to take [48] and the measure of compensation [49] are the same as in regular condemnation proceedings. In determining the value of the land without the railway upon it the general enhancement of values due to the construction of the railway through the section of country may be considered, but not special benefits to the land in question. It is erroneous to charge the jury to consider what the value of the tract would be if the railway were not on it, but in the immediate neighborhood.[50] In addition to the damages for the taking of the land, the plaintiff may recover the value of the use and occupation thereof prior to the time of the trial.[51] Where the company entered under a license of the owner, which was revoked by his death, it was held proper to allow damages for mesne profits from the time of the death.[52] The provision of the statute authorizing the recovery of attorney's fees is constitutional.[53] Prior to Laws 1895 c. 52, the defeated party was entitled to a new trial as of right.[54] The plaintiff may dismiss as of right before trial.[55] The plaintiff cannot recover where the company has a right to the land by contract irrespective of condemnation proceedings.[56] The statute applies where the company entered prior to its enactment.[57] The landowner's right of action is not defeated by delay, within the statutory time. The company may dismiss or abandon its applica-

[42] McKusick v. Stillwater, 44–372, 46+769 (assessment of damages by commissioners who assess benefits from local improvement—procedure); Coles v. Stillwater, 64–105, 66+138 (right to award—proof of title); Stillwater etc. Ry. v. Stillwater, 66–176, 68+836 (action for award—statute of limitations).

[43] Overmann v. St. Paul, 39–120, 39+66.

[44] Harrington v. St. P. etc. Ry., 17–215 (188).

[45] Kanne v. Mpls. etc. Ry., 33–419, 23+854; Shoemaker v. Cedar Rapids etc. Ry., 45–366, 48+191; Watson v. Chi. etc. Ry., 46–321, 48+1129; Harrington v. St. P. etc. Ry., 17–215(188, 202).

[46] R. L. 1905 §§ 2537-2540.

[47] Blue Earth County v. St. P. etc. Ry., 28–503, 11+73; Morin v. St. P. etc. Ry., 30–100, 14+460; Fish v. Chi. etc. Ry., 84–179, 87+606.

[48] Mpls. W. Ry. v. Mpls. etc. Ry., 61–502, 63+1035.

[49] Adolph v. Mpls. etc. Ry., 42–170, 43+848; Blue Earth County v. St. P. etc. Ry., 28–503, 11+73; Morin v. St. P. etc. Ry., 30–100, 14+460; Redmond v. St. P. etc. Ry., 39–248, 40+64; Bennett v. Mpls. etc. Ry., 42–245, 44+10; Kremer v. Chi. etc. Ry., 51–15, 52+977; Kanne v. Mpls. etc. Ry., 30–423, 15+871.

[50] Morin v. St. P. etc. Ry., 30–100, 14+460.

[51] Fish v. Chi. etc. Ry., 84–179, 87+606.

[52] Watson v. Chi. etc. Ry., 46–321, 48+1129.

[53] Cameron v. Chi. etc. Ry., 63–384, 65+652; Pfaender v. Chi. etc. Ry., 86–218, 90+393, 1133.

[54] Kremer v. Chi. etc. Ry., 54–157, 55+928.

[55] Koerper v. St. P. etc. Ry., 40–132, 41+656.

[56] See Shoemaker v. Cedar Rapids etc. Ry., 45–366, 48+191; Pfaender v. Chi. etc. Ry., 86–218, 90+393, 1133; St. Paul etc. Ry. v. Murphy, 19–500(433).

[57] Watson v. Chi. etc. Ry., 46–321, 48+1129.

tion for an assessment of compensation any time before the final submission of the case.[58] It is incumbent on the defendant rather than the plaintiff to cause incumbrancers to be made parties.[59] A verdict has been held sufficient in form as against an objection first raised on appeal.[60] A complaint has been held sufficient.[61] Evidence of an equitable title in the defendant cannot be proved unless properly pleaded. Certain condemnation proceedings have been held properly excluded.[62] The statute does not contemplate an assessment of compensation except where the plaintiff has established his right to recover the land.[63] An action will lie under the statute after condemnation proceedings have been dismissed or abandoned.[64]

3126. Injunction—When land is taken for a public use without the right to do so having been acquired by condemnation, or otherwise, the owner may have an injunction against the trespasser if his remedy at law would not be adequate. The writ may be granted conditionally, to give the trespasser an opportunity to resort to condemnation proceedings.[65]

3127. Trespass—A landowner whose land is taken for a public use without the right to do so having been acquired by condemnation, or otherwise, may recover damages for the trespass. The acts of the trespasser are a continuing trespass every repetition of which gives a fresh cause of action.[66] Possibly the trespasser may convert the action into one for condemnation under the statute.[67] A complaint in such an action has been sustained though it did not negative the commencement of condemnation proceedings,[68] and did not allege ownership to the center of a street.[69] Mere silence in the presence of the trespass is no defence.[70] That the defendant constructed and maintained its boom with proper care and skill and in the manner prescribed by its charter has been held no defence.[71] A supplemental answer has been held to state no facts material to the case occurring since the original answer.[72] Cases are cited below involving questions as to the damages recoverable.[73]

[58] Kremer v. Chi. etc. Ry., 51–15, 52+977.

[59] Bennett v. Mpls. etc. Ry., 42–245, 44+10.

[60] Adolph v. Mpls. etc. Ry., 42–170, 43+848.

[61] Hennessy v. St. P. etc. Ry., 30–55, 14+269.

[62] Pfaender v. Chi. etc. Ry., 86–218, 90+393, 1133.

[63] Koerper v. St. P. etc. Ry., 40–132, 41+656.

[64] Kanne v. Mpls. etc. Ry., 33–419, 23+854.

[65] Harrington v. St. P. etc. Ry., 17–215 (188); Lohman v. St. P. etc. Ry., 18–174 (157); Schurmeier v. St. P. etc. Ry., 10–82(59); Gustafson v. Hamm, 56–334, 57+1054; Johnson v. Clontarf, 98–281, 108+521. See Weir v. St. P. etc. Ry., 18–155 (139); University v. St. P. etc. Ry., 36–447, 31+936.

[66] Gray v. First Div. etc. Ry., 13–315 (289); Molitor v. First Div. etc. Ry., 14–285(212); Hursh v. First Div. etc. Ry., 17–439(417); Harrington v. St. P. etc. Ry., 17–215(188); Mathews v. St. P. etc. Ry., 18–434(392); Kaiser v. St. P. etc. Ry., 22–149; Spencer v. St. P. etc. Ry., 22–29; Weaver v. Miss. etc. Co., 28–534, 11+114; McKenzie v. Miss. etc. Co., 29–288, 13+123; Leber v. Mpls. etc. Ry., 29–256, 13+31; Overmann v. St. Paul, 39–120, 39+66; Sacks v. Minneapolis, 75–30, 77+563; Hueston v. Miss. etc. Co., 76–251, 79+92. See McCarty v. St. P. etc. Ry., 31–278, 17+616.

[67] Blue Earth County v. St. P. etc. Ry., 28–503, 11+73.

[68] Gray v. First Div. etc. Ry., 13–315 (289).

[69] Hartz v. St. P. etc. Ry., 21–358.

[70] Leber v. Mpls. etc. Ry., 29–256, 13+31; Kanne v. Mpls. etc. Ry., 33–419, 23+854.

[71] Weaver v. Miss. etc. Ry., 28–534, 11+114.

[72] Hursh v. First Div. etc. Ry., 17–439 (417).

[73] Hartz v. St. P. etc. Ry., 21–358 (damages for the depreciation of property from the lawful construction of a railway held not recoverable); Spencer v. St. P. etc. Ry., 22–29 (evidence of the effect of the operation of a railway on the use of a house and the discomfort and annoyance to the plaintiff held admissible); Schroeder v. De Graff, 28–299, 9+857 (depreciation of rental value held admissible—value of material added by trespasser);

3128. Action for damages—An action for damages will lie where property is taken or damaged for a public use.[74]

APPEAL TO SUPREME COURT

3129. When lies—An appeal lies from the final judgment entered in the district court upon appeal from the award of commissioners.[75] An order denying a new trial is appealable.[76] An order granting a new trial has been held not appealable.[77] An order appointing commissioners under the general statute has been held not appealable.[78] An order denying a motion to set aside an award by commissioners has been held not appealable.[79] An order appointing a committee in proceedings to condemn land for a cemetery under G. S. 1894 § 3096 is not appealable.[80] An order dismissing an appeal to the district court from the award of commissioners is appealable.[81] An order denying a motion to dismiss such an appeal is not appealable.[82] Cases are cited below arising under special acts.[83]

3130. Dismissal—The insufficiency of a bond to secure the judgment below is no ground for dismissing an appeal.[84]

3131. Scope of review—Error must be made to appear as on appeal in ordinary actions.[85] The objection that a verdict is for a gross sum for separate tracts cannot be raised for the first time in the supreme court.[86] Objections to the admissibility of evidence and the instructions to the jury cannot be raised for the first time on appeal.[87]

EMPLOYER AND EMPLOYEE—See Conspiracy, 1655; Master and Servant; Trade Unions.

EMPLOYERS LIABILITY INSURANCE—See Insurance, 4866; Jury, 5252; Master and Servant, 6025.

EMS—See note 88.

ENDOWMENT INSURANCE—See Insurance, 4757.

ENGINEERS—See Shipping, 8764; Steam.

Weaver v. Miss etc. Co., 28-534, 11+114 (evidence of what defendant had agreed to pay plaintiff for use of property for a term prior to the trespass held admissible); Leber v. Mpls. etc. Ry., 29-256, 13+31 (a question to a witness as to the damage to a tract by reason of a railway cut held proper); Hueston v. Miss. etc. Co., 76-251, 79+92 (a vendee in possession held entitled to recover the whole of the damages from a trespass).

[74] Adams v. Chi. etc. Ry., 39-286, 39+629; Demueles v. St. P. etc. Ry., 44-436, 46+912; Lamm v. Chi. etc. Ry., 45-71, 47+455; Dickerman v. Duluth, 88-288, 92+1119; Vanderburgh v. Minneapolis, 98-329, 108+480.

[75] Witt v. St. P. etc. Ry., 35-404, 29+161 (overruling Conter v. St. P. etc. Ry., 24-313).

[76] Minn. V. Ry. v. Doran, 15-230(179).

[77] McNamara v. Minn. C. Ry., 12-388 (269). It would probably now be held appealable. See Witt v. St. P. etc. Ry., 35-404, 29+161.

[78] Duluth Tr. Ry. v. Duluth Ter. Ry., 81-62, 83+497. It may now be appealable in view of a change in the statute.

[79] Fletcher v. Chi. etc. Ry., 67-339, 69+1085. It may now be appealable in view of a change in the statute.

[80] Forest Cem. Assn. v. Constans, 70-436, 73+153.

[81] Warren v. First Div. etc. Ry., 18-384 (345).

[82] Minn. C. Ry. v. Peterson, 31-42, 16+456.

[83] Ramsey County v. Stees, 27-14, 6+401 (Sp. Laws 1878 c. 150—avenue around Lake Phalen); Jones v. Minneapolis, 20-491(444) (Sp. Laws 1872 c. 10—Minneapolis charter); Gurney v. St. Paul, 36-163, 30+661 (St. Paul charter—Sp. Laws 1881 c. 188—appeal from award of water commissioners).

[84] Rippe v. Chi. etc. Ry., 22-44.

[85] Curtis v. St. P. etc. Ry., 20-28(19); Knauft v. St. P. etc. Ry., 22-173; Hempsted v. Cargill, 46-141, 48+686.

[86] Lake Superior etc. Ry. v. Greve, 17 322(299).

[87] Knauft v. St. P. etc. Ry., 22-173.

[88] Hobe v. Swift, 58-84, 59+831.

ENGROSSING—See Restraint of Trade, 8435.
ENTIRE CONTRACTS—See Contracts, 1727, 1880; Insurance, 4651; Master and Servant, 5811.
ENTIRETY—See Husband and Wife, 4253.
ENTRIES—See Evidence, 3346.
EQUAL PROTECTION OF LAWS—See Constitutional Laws, 1700.
EQUITABLE ACTIONS—See Trial, 9834–9874.

EQUITABLE CONVERSION

3132. Definition—Equitable conversion is a constructive change of personalty into realty or of realty into personalty. It is based on the maxim that equity regards that as done which ought to have been done.[89]

3133. Power or order of sale in will—Where a power of sale in a will is discretionary, there is no conversion until the power is actually exercised.[90]

EQUITABLE DEFENCES—See Pleading, 7587.
EQUITIES—See Assignments, 572; Judgments, 5196; Pleading, 7587.

EQUITY

Cross-References
See Action, 95; Limitation of Actions, 5596, 5599.

3134. Definition—Equity is that part of our law which originated in the English Court of Chancery. The term "equity" is often used in our law in the sense of justice or fairness in the adjustment of conflicting interests—the application of the dictates of good conscience to the settlement of controversies. It is also used to denote an equitable right or defence.[91] It is sometimes used in the sense of "the free constructive development of law, consciously directed to ends of justice and convenience." [92]

3135. Nature—Equity is not a distinct and self-sufficient system of law with a character essentially different from the rest of our law. Its function is not to overrule or correct the rest of the law, but to supplement it. It is a collection of rules additional to the common law, having no distinctive characteristics.[93] Equity is sometimes spoken of as one of the sources of law, but it seems neither desirable nor possible to differentiate "equitable" considerations from other considerations looking to the general weal out of which the courts

[89] Brown v. Crookston Agr. Assn., 34–545, 26+907; Cuilerier v. Brunelle, 37–71, 73, 33+123; Ness v. Davidson, 49–469, 52+46. See 18 Harv. L. Rev. 1, 83, 245; 19 Id. 1, 79, 233, 321; Langdell, Equity Jurisdiction (2 ed.) 260.

[90] Ness v. Davidson, 49–469, 52+46 (power of sale in will held not to prevent attachment of mechanic's lien after death of testator and before exercise of power).

[91] Century Dict.; Gray, Nature and Sources of Law § 654. See Baker v. Terrell, 8–195(165, 168) (equity is synonymous with justice); Place v. Johnson, 20–219(198, 207) (moral jurisdiction of a court of equity) and § 3135.

[92] Pollock, Expansion of Common Law, 135.

[93] See Maitland, Equity, cc. 1, 2; Salmond, Jurisprudence, 34-38; Spence, Equitable Jurisdiction of the Court of Chancery; Holmes, Early English Equity, 1 Law Quarterly Rev. 162, 2 Select Essays Anglo-American Legal History, 709; Austin, Lectures, 33–36; Clark, Practical Jurisprudence, c. 15; Maine, Ancient Law, c. 3; Markby, Elements of Law, §§ 120–124; Pollock, Expansion of Common Law, 67–79; Phelps, Falstaff and Equity; The Decadence of Equity, Roscoe Pound, 5 Col. L. Rev. 20.

frame rules.[94] The separate development of law and equity was accidental, or at least unnecessary, and the distinction between the two will no doubt gradually disappear.[95]

3136. Equity acts in personam—Equity acts in personam.[96] This, more than anything else, distinguishes equity from law, and accounts for its ethical superiority. The law regards chiefly the right of the plaintiff, and gives judgment, that he recover the land, goods, or damages, because they are his. Equity lays stress upon the duty of the defendant, and decrees that he do or refrain from doing a certain thing because he ought to act or forbear.[97]

3137. Adequate remedy at law—Equity will not grant relief where there is an adequate remedy at law.[98] To defeat equitable relief it is not enough that there is a remedy at law; it must be plain and adequate—as practical and efficient to the ends of justice and its prompt administration as the remedy in equity.[99] If the legal remedy is not reasonably available and effectual resort may be had to equitable relief.[1] The fact that the legal remedy must be pursued out of the jurisdiction is sometimes a ground for holding it inadequate.[2] The objection that there is an adequate remedy at law cannot be raised for the first time after going to trial on the merits.[3] A court of equity may, ex mero motu as well as upon objection, decline to take jurisdiction of an action of equitable cognizance, where the plaintiff has an adequate legal remedy; but where it does take jurisdiction, and proceeds to trial, and the case is voluntarily submitted by both parties, the case should be fully and finally disposed of on the merits, and full relief granted if the facts warrant it. The basis of this rule is that it is unjust to subject the plaintiff to the vexation and expense of a second trial on technical grounds, provided the court is competent to grant the appropriate relief.[4] The objection to a complaint in equity that there is an adequate remedy at law is properly taken by demurrer.[5]

3138. Equity grants full relief—When a court of equity once acquires jurisdiction of a cause it will grant full relief, either legal or equitable, or both.[6] It is the practice of equity to forestall a multiplicity of actions by bringing all the litigation into its grasp in one action for a general accounting and a complete adjustment of all rights.[7] A court of equity will not retain jurisdiction of an action as to some of the defendants, against whom the plaintiff has no cause of action, but is seeking auxiliary relief only, in aid of a demand claimed against another defendant, which constitutes the groundwork of the complaint, when, from want of jurisdiction over such other defendant, it is unable to make any adjudication as to such demand, or to grant any effectual relief in respect thereto.[8]

[94] Gray, Nature and Sources of Law, § 191.

[95] Dillon, Laws and Jurisprudence, 386; Maitland, Equity, 20.

[96] Towne v. Campbell, 35–231, 233, 28+254; Hawkins v. Ireland, 64–339, 344, 67+73. See Langdell, Equity Jurisdiction (2 ed.) 24.

[97] See 21 Harv. L. Rev. 261.

[98] Gates v. Smith, 2–30(21, 23); Miller v. Rouse, 8–124(97); Barker v. Walbridge, 14–469(351); Birdsall v. Fischer, 17–100(76); Johnston v. Paul, 23–46; Wieland v. Shillock, 23–227; Id., 24–345; Rice v. St. P. etc. Ry., 24–464, 479; Turnbull v. Crick, 63–91, 65+135; Barkey v. Johnson, 90–33, 95+583.

[99] Probstfield v. Czizek, 37–420, 34+896; Brown v. Maplewood C. Assn., 85–498, 515, 89+872; Baier v. Baier, 91–165, 97+671; Rich v. Braxton, 158 U. S. 406.

[1] Overmire v. Haworth, 48–372, 51+121; Fryberger v. Berven, 88–311, 92+1125; Slinerland v. Slingerland, 109–407, 124+19.

[2] Overmire v. Haworth, 48–372, 51+121. See Birdsall v. Fischer, 17–100(76).

[3] St. Paul etc. Ry. v. Robinson, 41–394, 43+75; Newton v. Newton, 46–33, 48+450; Lloyd v. Simons, 97–315, 105+902.

[4] Crump v. Ingersoll, 47–179, 49+739; Albrecht v. St. Paul, 47–531, 50+608.

[5] Lloyd v. Simons, 97–315, 105+902.

[6] See § 5041.

[7] McKusick v. Seymour, 48–158, 170, 50+1114.

[8] Western Ry. v. De Graff, 27–1, 6+341.

3139. Showing to secure equitable relief—Equitable relief is not granted as a matter of course, but only when an adequate appeal has been made to the court, and the facts shown bring the case within a recognized head of equity jurisdiction.[9]

3140. Conflict between legal and equitable rules—It is provided by statute in England and in some of the code states of this country, that where there is a conflict or variance between the rules of equity and the rules of the common law, with reference to the same matter, the rules of equity shall prevail. We have no such statute in this state, but where there is such a conflict or variance our courts apply the equitable rule.[10]

3141. Force of precedents—A court of equity is not a court of conscience deciding each case according to natural justice, without regard to established rules and principles. It is as much bound by precedents as a court of law.[11] But equity will sometimes grant relief though there is no precedent.[12]

3142. Equitable maxims—He who seeks equity must do equity.[13] This maxim is not to be applied so as to work out a result against equity and good conscience.[14] He who comes into equity must come with clean hands.[15] Equity aids the vigilant, not the slothful.[16] Equity suffers no wrong without a remedy.[17] Equity regards that as done which ought to have been done.[18] Equity regards the substance and intent, not the form.[19] Equality is equity.[20] Equity follows the law.[21] This maxim means merely that equity applies to equitable titles and interests those rules of law by which legal titles are regulated, provided this can be done in a manner not inconsistent with the equitable titles and interests themselves.[22]

3143. Courts of chancery—Prior to 1853 the district courts of the Territory of Minnesota exercised equitable powers as district courts of chancery, and in accordance with usual chancery practice. The same judges, however, presided over the chancery and law courts. In other words the district court sat either as a chancery court or a law court, and administered relief accordingly.[23]

3144. Pleading—Before the adoption of the code in this state, pleadings in an equitable action were in accordance with chancery practice.[24]

EQUIVOCATION—See Evidence, 3398; Wills, 10261.
ERASURES—See Alteration of Instruments, 263.
ERECT—See note 25.

[9] Laythe v. Minn. L. & I. Co., 101-152, 112+65.
[10] Flanigan v. Sable, 44-417, 46+854.
[11] Hone v. Woodruff, 1-418(303, 307).
[12] Brown v. Maplewood C. Assn., 85-498, 89+872; Stillwater W. Co. v. Farmer, 89-58, 65, 93+907.
[13] Bacon v. Cottrell, 13-194(183, 188); Knappen v. Freeman, 47-491, 494, 50+533; Carlton v. Hulett, 49-308, 320, 51+1053.
[14] Staughton v. Simpson, 72-536, 75+744.
[15] Evans v. Folsom, 5-422(342); Weed v. Little Falls & D. Ry., 31-154, 161, 16+851. See Hamilton v. Wood, 55-482, 57+208.
[16] See § 5351.
[17] Brown v. Maplewood C. Assn., 85-498, 514, 89+872.
[18] Kiefer v. Rogers, 19-32(14); Lebanon S. Bank v. Hollenbeck, 29-322, 325, 13+145; Ames v. Richardson, 29-330, 333, 13+137; Becker v. Seymour, 71-394, 398, 73+1096.
[19] St. Paul & C. Ry. v. McDonald, 34-195, 208, 25+453; Chicago etc. Ry. v. Durant, 44-361, 366, 46+676; Keith v. Albrecht, 89-247, 252, 94+677; Baart v. Martin, 99-197, 211, 108+945.
[20] Van Brunt v. Gordon, 53-227, 230, 54+1118.
[21] Birdsall v. Fisher, 17-100(76, 81); Wolf v. McKinley, 65-156, 158, 68+2.
[22] Wellner v. Eckstein, 105-444, 462, 117+830.
[23] Gates v. Smith, 2-30(21); Stone v. Bassett, 4-298(215, 220); Crombie v. Little, 47-581, 584, 50+823.
[24] Chouteau v. Rice, 1-106(83); Goodrich v. Parker, 1-195(169); Perrin v. Oliver, 1, 202(176); Potter v. Marvin, 4-525(410).
[25] Red Lake Falls M. Co. v. Thief River Falls, 109-52, 122+872.

ESCROWS

Cross-References

See Partnership, 7353; Vendor and Purchaser, 10007, 10011.

3145. Definition—A deed or other instrument is delivered in escrow when it is delivered to a stranger to be held by him until the performance of a specified condition, or the happening of a certain contingency, and then to be delivered to the grantee or obligee.[26]

3146. The depositary—At common law a sealed instrument cannot be delivered in escrow to the grantee or party to whom it runs. It is questionable whether the rule obtains in this state since the abolition of private seals.[27] It is well settled that unsealed instruments may be so deposited.[28] A deed cannot be delivered in escrow to an agent of the grantor.[29]

3147. Conditions may be express or implied—The conditions on which an instrument is delivered in escrow may be express or implied.[30]

3148. Conditions may be oral—The conditions on which an instrument is delivered in escrow may be oral.[31]

3149. When title passes—Death of party—Delivery—The title does not pass until the performance of the conditions or the happening of the contingency. The title of the grantee dates only from the final delivery of the deed to him, unless the intention of the parties was otherwise or justice requires the application of a different rule.[32] A contract to sell land, deposited in escrow, takes effect according to its terms on the performance of the agreed conditions by the grantee, though not in fact physically delivered to him.[33] If either of the parties dies before the condition is performed and afterwards the condition is performed, the deed is good and takes effect from the first delivery.[34]

3150. Intent of parties controls—Whether, when a deed is handed to a stranger to be delivered to the grantee at a future time, it is to be considered the deed of the grantor presently, or an escrow to take effect on the future delivery to the grantee, is a question to be determined by the actual intent of the grantor, as gathered from the evidence.[35]

3151. Binds both parties—Enforcement—A deposit in escrow cannot be withdrawn at pleasure. The deposit of a deed in escrow subjects both parties to the conditions on which it is deposited. A party refusing to comply with the conditions may be compelled to fulfil them, or a delivery adjudged on fulfilment by the other party.[36]

3152. Waiver of conditions—Conditions for the sole benefit of one of the parties may be waived by him.[37]

[26] See Daniels v. Smith, 4–172(117, 129); Tharaldson v. Everts, 87–168, 170, 91+467; Naylor v. Stene, 96–57, 104+685; Note, 130 Am. St. Rep. 910.

[27] Westman v. Krumweide, 30–313, 15+255; Tharaldson v. Everts, 87–168, 170, 91+467. See 16 Harv. L. Rev. 307.

[28] Westman v. Krumweide, 30–313, 15+255.

[29] Van Valkenburg v. Allen, 126+1092. See, contra, Lindley v. Groff, 37–338, 34+26.

[30] Naylor v. Stene, 96–57, 104+685.

[31] Tharaldson v. Everts, 87–168, 91+467. See Weller v. Minn. etc. Co., 87–227, 229, 91+891.

[32] Daniels v. Smith, 4–172(117, 129); Andrews v. Farnham, 29–246, 13+161; Lindley v. Groff, 37–338, 342, 34+26; Kammrath v. Kidd, 89–380, 383, 95+213.

[33] Naylor v. Stene, 96–57, 104+685.

[34] Lindley v. Groff, 37–338, 342, 34+26; Tharaldson v. Everts, 87–168, 91+467. See Haeg v. Haeg, 53–33, 55+1114.

[35] Andrews v. Farnham, 29–246, 13+161; Lindley v. Groff, 37–338, 342, 34+26.

[36] Tharaldson v. Everts, 87–168, 91+467; Knopf v. Hansen, 37–215, 218, 33+781. See Hill v. Webb, 43–545, 45+1133.

[37] Tharaldson v. Everts, 87–168, 91+467.

3153. Wrongful delivery—Conversion—Where the obligee wrongfully procures a delivery of the instrument, without performing the conditions, he is liable as for a conversion.[38]

ESTATES

Cross-References

See Covenants; Deeds; Landlord and Tenant; Merger; Wills.

IN GENERAL

3154. Definition—Estate is a degree, quantity, nature, and extent of interest which a person has in real property—the quantity of interest which a person has, from absolute ownership down to naked possession.[39]

3155. Feudal tenures abolished—Lands allodial—Feudal tenures of all kinds are abolished by our constitution, which declares all lands within the state to be allodial.[40] A reservation in an allodial grant, of a definite sum of money, payable annually, for any length of time, whether in the way of rent for use of the thing granted, or as a consideration for the grant itself, does not give it a feudal character. Fealty was the essential and distinguishing feature of a feudal tenure. A grant of a parcel of land, with one mill-power of water, for manufacturing purposes, subject to a fixed, perpetual, annual rent, is not prohibited by the constitution.[41]

3156. Estates of freehold—Estates of freehold are estates of inheritance and for life.[42]

3157. Estates in fee simple—An estate of fee simple or fee is an estate of inheritance.[43] It is the largest possible estate which one can have, being an absolute estate, without end, condition, or limitation of any kind. The word "simple" adds no meaning to the word "fee" standing by itself. But it excludes all qualification or restriction as to the persons who may inherit it as heirs, thus distinguishing it from a fee tail, as well as from an estate which, though inheritable, is subject to conditions or collateral determination.[44] The word "heirs," or other words of inheritance, are unnecessary to create or convey an estate in fee simple.[45]

3158. Estates less than freehold—Chattel interests—Chattel interests are estates or interests in land less than a freehold. Estates for years, at will, and by sufferance, are chattel interests.[46]

3159. Estates in possession and in expectancy—Estates, as respects the time of their enjoyment, are divided into estates in possession and estates in expectancy. An estate in possession is where the owner has an immediate right to the possession of the land; an estate in expectancy is where the right to the possession is postponed to a future period.[47]

[38] Winona v. Minn. etc. Co., 29–68, 11+228 (conversion of coupon bonds—measure of damages).

[39] Bouvier, Law Dict. (Rawle's ed.); Minn. D. Co. v. Dean, 85–473, 476, 89+848.

[40] Const. art. 1 § 15; Baker v. Kelley, 11–480(358, 384); Dutcher v. Culver, 24–584, 617; Sabledowsky v. Arbuckle, 50–475, 481, 52+920.

[41] Mpls. M. Co. v. Tiffany, 22 463.

[42] R. L. 1905 § 3195; Hamilton v. Detroit, 85–83, 89, 88+419.

[43] R. L. 1905 § 3192.

[44] Bouvier, Law Dict. (Rawle's ed.). See Steele v. Fish, 1–153(129). A good and indefeasible title in fee imports such ownership of the land as enables the owner to exercise absolute and exclusive control of it as against all others. Finnes v. Selover, 108–331, 122+174.

[45] R. L. 1905 § 3340. See In re Oertle, 34–173, 178, 24+924.

[46] R. L. 1905 § 3195; Hunter v. Frost, 47–1, 49+327; Penney v. Lynn, 58–371, 375, 59+1043.

[47] R. L. 1905 § 3197; Minn. D. Co. v.

3160. Future estates—A future estate is defined by statute as "an estate limited to commence in possession at a future day, either without the intervention of a precedent estate, or on the determination, by lapse of time or otherwise, of a precedent estate created at the same time." [48] This statute abolishes the common-law rule that a freehold estate to commence in the future cannot be created by deed without the intervention of a precedent estate to support it.[49]

3161. Estates at will—Tenancies from year to year are estates at will.[50]

3162. Rule in Shelley's Case abolished—The rule in Shelley's Case does not prevail in this state. It is provided by statute that "when a remainder is limited to the heirs, or heirs of the body, of a person, to whom a life estate in the same premises is given, the persons who, on the termination of the life estate, are the heirs or heirs of the body of such tenant for life shall be entitled to take as purchasers, by virtue of the remainder so limited to them." [51]

3163. Reversion—A reversion is the residue of an estate left in the grantor, or his heirs, or in the heirs of a testator, commencing in possession on the determination of a particular estate granted or devised.[52] A reversion is a vested interest or estate, and arises only by operation of law. In the latter respect it differs from a remainder, which arises only by deed or will.[53]

LIFE ESTATES

3164. Definition—A life estate is a freehold estate, not of inheritance, but which is held by the tenant for his own life or the life or lives of one or more other persons, or for an indefinite period, which may endure for the life or lives of persons in being, and not beyond the period of a life.[54]

3165. Creation—An estate for life may be created by express limitation or by a grant in general terms. If made to a person for a term of his own life, or for that of another person, he is called a "life tenant." But the estate may also be created by a general grant, without defining any specific interest, as where the grant is made to a person or to a person and his assigns, without any limitation in point of time, it will be considered as an estate for life, and for the life of the grantee only. Where made subject to be defeated by a particular event, and there is no limitation in point of time, it will be ab initio a grant for an estate for life, as much as if no such event had been contemplated. Thus, if a grant is made to one so long as he shall inhabit a certain place, or to a woman during her widowhood, as there is no certainty that the estate will be terminated by the change of habitation or by marriage of the grantee, the estate is as much an estate for life, until the prescribed event takes place, as if it had been so granted in express terms.[55] If an estate is given to a person generally or indefinitely, with a power of disposition, it carries a fee, unless the testator gives to the first taker an estate for life only, and annexes to it a power of disposition of the reversion. In that case, the express limitation for life will control the operation of the power, and prevent it from enlarging the estate into a fee.

Dean, 85–473, 476, 89+848; State v. Probate Ct., 102–268, 290, 113+888.

[48] R. L. 1905 § 3199; Minn. D. Co. v. Dean, 85–473, 476, 89+848.

[49] Sabledowsky v. Arbuckle, 50–475, 52+920.

[50] Hunter v. Frost, 47–1, 49+327. See § 5378.

[51] R. L. 1905 § 3217; Whiting v. Whiting, 42–548, 44+1030; Rosbach v. Weidenbach, 95–343, 104+137.

[52] R. L. 1905 § 3201; King v. Remington, 36–15, 33, 29+352; Atwater v. Manchester S. Bank, 45–341, 344, 48+187; State v. Probate Ct., 102–268, 291, 113+888.

[53] Bouvier, Law Dict. (Rawle's ed.); State v. Probate Ct., 102–268, 291, 113+888.

[54] Bouvier, Law Dict. (Rawle's ed.). See In re Oertle, 34–173, 24+924; Grueber v. Lindenmeier, 42–99, 43+964; Thompson v. Baxter, 107–122, 119+797.

[55] Thompson v. Baxter, 107–122, 119+797.

Words of implication do not merge or destroy an express life estate, unless it becomes absolutely necessary to uphold some manifest general intent. This was the common-law rule, under which a devise to one generally, without words of inheritance, or otherwise indicating an intention to grant a greater interest, passed an estate for life only. An estate thus given generally, with a power of disposition, by implication carried the fee. But then, and now since the statute, an intention to convey a less estate, expressed or clearly implied, will control.[56]

3166. In personalty—A life estate may be created in personalty as well as realty.[57]

3167. Purchase of lien or adverse title by life tenant—A tenant for life in possession, in the purchase of an incumbrance upon, or of an adverse title to, the estate, will be regarded as having made the purchase for the joint benefit of himself and the reversioner or remainderman. The law will not permit him to hold it for his own exclusive benefit, if the other parties interested in the estate will contribute their share of the amount paid for the purchase.[58]

3168. Renewal of leasehold by life tenant—If a life tenant of a leasehold estate, under a renewable lease, renews the lease, the law will make him a trustee for the reversioner or remainderman. But if, in such cases, the life tenant pays out money which he was not required to pay, or more than his proportionate share, he becomes, to that extent, creditor of the estate, and subrogated to the rights of the parties whose claims he has bought or paid off. He, and those claiming under him, occupy a position analogous to a mortgagee in possession after condition broken, and cannot be evicted until all sums due them from the estate have been repaid.[59]

3169. Right to income—Dividends—As between a life tenant, who is entitled to the income from certain stock in a corporation, and a remainderman, who will receive the corpus of the estate after the death of the life tenant, stock dividends declared out of a surplus produced by the accumulation of earnings after the death of the testator belong to the life tenant as a part of the earnings of the original stock.[60]

3170. Duties of life tenant—It is the duty of a life tenant to pay the taxes on the land, and to keep the premises in repair.[61]

REMAINDERS

3171. Definition—A remainder is a future estate dependent upon a precedent estate.[62]

3172. Vested remainders—Remainders are vested when there is a person in being who would have an immediate right to the possession upon the ceasing of the intermediate or precedent estate.[63]

3173. Contingent remainders—Remainders are contingent while the person to whom, or the event upon which, they are limited to take effect remains uncertain.[64]

[56] In re Oertle, 34-173, 178, 24+924.
[57] State v. Probate Ct., 102-268, 113+888.
[58] Whitney v. Salter, 36-103, 30+755. See 20 Harv. L. Rev. 639.
[59] Whitney v. Salter, 36-103, 30+755.
[60] Goodwin v. McGaughey, 108-248, 122+6.
[61] Wilson v. Proctor, 28-13, 8+830; Smalley v. Isaacson, 40-450, 42+352; St. Paul T. Co. v. Mintzer, 65-124, 67+657.
[62] R. L. 1905 § 3200; Whiting v. Whiting, 42-548, 44+1030; State v. Probate Ct., 102-268, 291, 113+888.
[63] R. L. 1905 § 3202; State v. Willrich, 72-165, 75+123; Minn. D. Co. v. Dean, 85-473, 89+848. See Cowles v. Henry, 61-459, 63+1028. The law always favors vested in preference to contingent estates or interests. Kottmann v. Gazett, 66-88, 68+732
[64] R. L. 1905 § 3202; Armstrong v. Armstrong, 54-248, 55+971; Minn. D. Co. v. Dean, 85-473, 89+848.

3174. Necessity of precedent estate—Executory devises—Whatever may be the rule as to "remainders," properly so-called, created by deed,[65] in a will a fee may be limited on a fee in the nature of an executory devise.[66]

3175. Statutory changes—Object—The object of our statutes was to abolish the technical distinctions between contingent remainders, springing and secondary uses, and executory devises, and to bring all these various executory interests nearer together, and to resolve them into a few plain principles, and to render all expectant estates equally secure from being defeated by the subtile refinements of the common law, contrary to the intention of the grantor or devisor.[67]

ESTATES OF DECEDENTS—See Descent and Distribution; Executors and Administrators; Probate Court.

ESTOPPEL

Cross-References

See Corporations, 1983; Judgments, 5159–5210; Landlord and Tenant, 5363; Mortgages, 6267; Partnership, 7348; Usury, 9986.

ESTOPPEL BY DEED

3176. In general—As a general rule one cannot question his own deed. He cannot assert against his grantee that he was not the owner at the time of the conveyance. He cannot question the title of his grantee acquired from him.[68] He may be estopped by his covenants from subsequently acquiring a title adverse to his grantee.[69]

3177. Clothing another with apparent title—An owner of realty, who conveys it to a third person for the purpose of enabling such third person to mortgage the same to procure funds with which to pay off a prior mortgage indebtedness against the property, even though such conveyance is limited by a contract of defeasance and thereby rendered an equitable mortgage, instead of a conveyance of the absolute fee, is estopped from questioning the power and authority of such third person to so mortgage such property as to the mortgagee who loans money to such third person in good faith, without notice of such defeasance, and in reliance on the appearance of title in him.[70]

3178. Recitals—The general rule is, that all parties to a deed are bound by the recitals therein, and they operate as an estoppel, working on the interests in the land, if it be a deed of conveyance, and binding both parties and privies in blood, in estate, and in law.[71] A party may be as effectually estopped by particular recitals in his deed as by covenants of title, where the facts recited are material to and of the essence of the contract; that is, when, unless the facts existed, it is to be presumed that the contract would not have been

[65] See Sabledowsky v. Arbuckle, 50–475, 52+920.

[66] Whiting v. Whiting, 42–548, 44+1030.

[67] Whiting v. Whiting, 42–548, 44+1030; Minn. D. Co. v. Dean, 85–473, 89+848.

[68] Gray v. Stockton, 8–529(472); Morris v. Watson, 15–212(165); Atkins v. Little, 17–342(320, 326); Carson v. Cochran, 52–67, 53+1130. See Shillock v. Gilbert, 23–386; Thian v. Gill, 45–459, 48+193; Beede v. Pabody, 70–174, 72+970.

[69] See Allison v. Armstrong, 28–276, 9+806; Sandwich Mfg. Co. v. Zellmer, 48–408, 51+379; Rooney v. Koenig, 80–483, 83+399; Tappan v. Huntington, 97–31, 106+98 and cases under §§ 2369, 2697, 6267.

[70] Esty v. Cummings, 80–516, 83+420.

[71] Daughaday v. Paine, 6–443(304, 310).

made; the matter recited being presumably taken as the basis of the action of the parties.[72] Recitals of a general,[73] or immaterial nature,[74] do not estop a party. To operate as an estoppel a recital must be certain. It must clearly affirm or deny some present or past fact, or admit a liability definitely stated.[75] A grantor has been held estopped from denying a recital in his deed as to a street.[76]

3179. Who bound—Strangers—Estoppels by deed bind only parties and privies. They must be mutual.[77] They do not operate in favor of or against strangers.[78] An attorney executing a deed for his principal is not estopped by its covenants.[79] One signing his name in the place for witnesses has been held not estopped.[80] A director of a corporation has been held estopped from profiting by a mistake in a mortgage of the corporation.[81]

3180. Grantee—As a general rule a grantee in a deed poll is not estopped by it, but may attack the title of his grantor.[82] A grantee who accepts a deed subject to a mortgage which he does not assume, is not estopped from denying the validity of the mortgage;[83] otherwise, if he assumes the mortgage.[84] A grantee of a mortgagor is not estopped by any covenants made by the latter to the mortgagee, and may connect himself with a paramount title and set up the same to defeat the mortgagee.[85] A grantee who gives back a mortgage for a part of the purchase price, with a covenant of seizin, is not estopped by his covenant from maintaining an action for a breach of the covenant of seizin in the grantor's deed to him.[86]

3181. Grantor in possession—A grantor remaining in possession is not estopped by his deed from asserting against third parties any claim to the premises which he might assert against his grantee.[87]

3182. Subsequently acquired title—A grantor may by covenant be estopped from asserting against his grantee a subsequently acquired title. In other words a subsequently acquired title will inure to the benefit of his grantee and assigns.[88] The subject is more fully considered elsewhere.[89]

3183. Void deed—A void deed cannot give rise to an estoppel by deed.[90]

3184. Estoppel against estoppel—An estoppel against an estoppel sets the matter at large. One cannot set up an estoppel by deed against the estoppel arising from his own grant.[91]

[72] Holcombe v. Richards, 38–38, 45, 35+714. See St. Paul etc. Ry. v. First Div. etc. Ry., 26–31, 49+303 (reference to plats and surveys).

[73] First Nat. Bank v. Rogers, 13–407 (376).

[74] Rice v. Tavernier, 8–248(214); Wilder v. St. Paul, 12–192(116); Ambs v. Chi. etc. Ry., 44–266, 46+321.

[75] Calkins v. Copley, 29–471, 13+904.

[76] Dawson v. St. Paul etc. Co., 15–136 (102); Johnson v. Andengaard, 100–130, 110+369. See Wilder v. St. Paul, 12–192 (116).

[77] Horton v. Kelly, 40–193, 41+1031.

[78] Cole v. Maxfield, 13–235(220, 226); Briggs v. Ripley, 37–78, 33+120; Horton v. Kelly, 40–193, 41+1031. See Groff v. State Bank, 50–234, 52+651; Esty v. Cummings, 80–516, 83+420.

[79] Kern v. Chalfant, 7–487(393).

[80] Shillock v. Gilbert, 23–386.

[81] Gill v. Russell, 23–362.

[82] Gesner v. Burdell, 18–497(444, 452).

[83] Thompson v. Morgan, 6–292(199); Calkins v. Copley, 29–471, 13+904; Merritt v. Byers, 46–74, 48+417; O'Brien v. Findeisen, 48–213, 50+1035; Welbon v. Webster, 89–177, 94+550; Widell v. Nat. Citizens Bank, 104–510, 116+919.

[84] See § 6299.

[85] Preiner v. Meyer, 67–197, 69+887.

[86] Resser v. Carney, 52–397, 54+89.

[87] Groff v. State Bank, 50–234, 52+651.

[88] Burke v. Beveridge, 15–205(160); Thielen v. Richardson, 35–509, 29+677; Sandwich Mfg. Co. v. Zellmer, 48–408, 51+379; Resser v. Carney, 52–397, 404, 54+89; Rooney v. Koenig, 80–483, 83+399 (see 21 Harv. L. Rev. 159); Swedish etc. Bank v. Conn. etc. Co. 83–377, 383, 86+420; Tappan v. Huntington, 97–31, 106+98; Bradley E. Co. v. Bradley, 97–161, 106+110. See Hope v. Stone, 10–141(114); Hurlbert v. Weaver, 24–30; Rogers v. Clark, 104–198, 222, 116+739.

[89] See §§ 2369, 2697, 6267.

[90] Alt v. Banholzer, 39–511, 40+830.

[91] Tappan v. Huntington, 97–31, 106+98.

EQUITABLE ESTOPPEL

3185. Definition—Equitable estoppel has been defined as the effect of the voluntary conduct of a party whereby he is absolutely precluded, both at law and in equity, from asserting rights which might perhaps have otherwise existed, either of property, of contract, or of remedy, as against another person, who has in good faith relied upon such conduct, and has been led thereby to change his position for the worse, and who on his part acquires some corresponding right either of property, of contract, or of remedy.[92] The doctrine of equitable estoppel is of such a nature that it is not advisable to restrict its application by the adoption of a rigid and exact definition. It should be left flexible and adaptable to the facts of particular cases as they arise.[93]

3186. Nature—The doctrine of estoppel in pais is founded in justice and good conscience,[94] and is a favorite of the law.[95] It is a flexible, equitable doctrine, its application depending on the facts of the particular case.[96] It can only be invoked to prevent fraud and injustice,[97] and it is never carried further than is necessary to prevent one person from being injured by his reliance on the acts or declarations of another.[98] Its object is to prevent the unjust assertion of rights existing independent of estoppel, and its effect is to create rights in the person in whose favor it operates.[99] It is distinguishable from waiver,[1] acquiescence,[2] ratification,[3] election of remedies,[4] and assumption of risk.[5] Equitable estoppel is to be distinguished from the common-law estoppel in pais.[6] An estoppel is a legal consequence—a right—arising from conduct.[7]

3187. When arises—General rule—An estoppel in pais arises where one, by his acts or representations, or by his silence when he ought to speak, intentionally, or through culpable negligence, induces another to believe certain facts to exist, and such other rightfullly acts on the belief so induced in such manner that if the former is permitted to deny the existence of such facts it will prejudice the latter.[8] To give rise to an estoppel a declaration must be sufficient to warrant the conclusion which is drawn from it and made under such circumstances as to justify such conclusion.[9] It must relate to a material fact in the transaction.[10]

3188. Mutuality—Estoppels of every kind are mutual.[11]

[92] Dimond v. Manheim, 61–178, 63+495. See Nell v. Dayton, 43–242, 45+229.

[93] Dimond v. Manheim, 61–178, 182, 63+495.

[94] Nell v. Dayton, 43–242, 245, 45+229; Dimond v. Manheim, 61–178, 181, 63+495. See Combs v. Cooper, 5–254(200, 210) ("moral principle").

[95] Dimond v. Manheim, 61–178, 181, 63+495.

[96] Kray v. Muggli, 77–231, 238, 79+964.

[97] Wilder v. St. Paul, 12–192(116, 124); Rochester Ins. Co. v. Martin, 13–59(54, 57); Gesner v. Burdell, 18–497(444, 453).

[98] Wilder v. St. Paul, 12–192(116, 124); Gesner v. Burdell, 18–497(444, 453).

[99] Dimond v. Manheim, 61–178, 63+495. See Rase v. Mpls. etc. Ry., 107–260, 120+360 ("estoppel prevents the successful assertion of an accrued right").

[1] Masonic T. Assn. v. Channell, 43–353, 45+716; State v. School Dist., 85–230, 88+751.

[2] Steffens v. Nelson, 94–365, 102+871. See Teipel v. Vanderweier, 36–443, 31+934; Shevlin v. Shevlin, 96–398, 105+257.

[3] Steffens v. Nelson, 94–365, 102+871.

[4] Pederson v. Christofferson, 97–491, 106+958.

[5] Rase v. Mpls. etc. Ry., 107–260, 120+360.

[6] Dimond v. Manheim, 61–178, 181, 63+495.

[7] Steffens v. Nelson, 94–365, 369, 102+871.

[8] Pence v. Arbuckle, 22–417, 420; Nell v. Dayton, 43–242, 45+229; Dimond v. Manheim, 61–178, 63+495; Western L. Assn. v. Banks, 80–317, 83+192. See, to same general effect, Combs v. Cooper, 5–254(200); Whitacre v. Culver, 8–133(103); Wilder v. St. Paul, 12–192(116, 124); Robson v. Swart, 14–371(287); Mathews v. St. P. etc. Ry., 18–434(392, 401).

[9] Tyler v. Hanscom, 28–1, 8+825.

[10] Western L. Assn. v. Banks, 80–317, 83+192.

[11] State v. School Dist., 85–230, 232, 88+751.

3189. Facts equally known by both parties—There can be no estoppel as to facts equally known to both parties,[12] or as to facts which the party invoking the estoppel ought in the exercise of reasonable prudence to know.[13]

3190. Fraudulent intent unnecessary—A misrepresentation may give rise to an estoppel though it is not made with an actual fraudulent intent. It is enough if the person making it knows, or ought to know, the truth; that he intends, or might reasonably anticipate, that the person to whom it is made, or to whom it is to be communicated, will rely and act upon it as true; and that the latter has relied and acted upon it, so that to permit the former to deny its truth will operate as a fraud.[14] But no estoppel can be created out of a representation made without fraudulent intent, and which, from its nature and the circumstances under which it is made, involves no culpable negligence on the part of the one making it.[15] The proposition that a person is estopped from asserting a right implies fault on his part. There can be no estoppel without some fault of the person estopped. If the estoppel is claimed by reason of his omission to do some act, it must appear that it was his duty in equity and good conscience to do such act.[16] Estoppel by conduct might appropriately be called estoppel by misconduct.[17] A party is often estopped by his acts done with a fraudulent, malicious or wrongful intent, when he would not be estopped by the same acts when done innocently and without any such intent. He may also be estopped as against one who he knew was likely to be injured, though the specific intent was to injure some one else.[18]

3191. Reliance on act or representation—It is essential that the party claiming an estoppel should have acted in reliance upon the conduct claimed to give rise to an estoppel.[19] The substance of estoppel is the inducement to another to act to his prejudice.[20] A statement or act retracted before it is acted upon will not give rise to an estoppel.[21]

3192. Necessity of prejudice—It is essential that the party claiming an estoppel would be materially prejudiced if the estoppel were not allowed.[22] Where the purpose of an action or defence is, and its necessary effect, if sustained, will be, to deprive a party of property which he was induced to purchase by the representations of the other party, it is not necessary, in order to apply the doctrine of estoppel, for the jury to find as a fact that to permit the party

[12] Plummer v. Mold, 22-15; Shillock v. Gilbert, 23-386, 394; James v. Wilder, 25-305; Chadbourn v. Williams, 45-294, 298, 47+812; Mpls. T. Co. v. Eastman, 47-301, 305, 50+82, 930; Mpls. M. Co. v. Mpls. etc. Ry., 51-304, 311, 53+639; Ward v. Dean, 69-466, 72+710; Western L. Assn. v. Banks, 80-317, 83+192; Cornish v. Antrim, 82-215, 84+724; Thompson v. Borg, 90-209, 214, 95+896; Sanborn v. Van Duyne, 90-215, 227, 96+41. See Combs v. Cooper, 5-254(200).

[13] Chadbourn v. Williams, 45-294, 298, 47+812; Clarke v. Milligan, 58-413, 59+955. See Combs v. Cooper, 5-254(200).

[14] Beebe v. Wilkinson, 30-548, 16+450; Stevens v. Ludlum, 46-160, 48+771; Wetmore v. Royal, 55-162, 56+594; Dimond v. Manheim, 61-178, 182, 63+495; Thompson v. Borg, 90-209, 213, 95+896.

[15] Sutton v. Wood, 27-362, 7+365.

[16] Bausman v. Faue, 45-412, 48+13. See Carleton College v. McNaughton, 26-194, 2+688.

[17] Townsend v. Johnson, 34-414, 26+395.

[18] Moffett v. Parker, 71-139, 147, 73+850.

[19] Chaska Co. v. Carver County, 6-204 (130); Wilder v. St. Paul, 12-192(116); Gesner v. Burdell, 18-497(444, 453); Hawkins v. Methodist E. Church, 23-256; McAbe v. Thompson, 27-134, 6+479; O'Mulcahy v. Holley, 28-31, 8+906; St. Anthony Falls, etc. Co. v. Merriman, 35-42, 50, 27+199; Hopkins v. Swensen, 41-292, 42+1062; Stuart v. Lowry, 42-473, 44+532; Nell v. Dayton, 43-242, 45+229; Masonic T. Assn. v. Channell, 43-353, 355, 45+716; Stong v. Lane, 66-94, 68+765; Ward v. Dean, 69-466, 72+710; Bates v. Johnson, 79-354, 82+649.

[20] Steffens v. Nelson, 94-365, 102+871.

[21] Wilder v. St. Paul, 12-192(116, 125).

[22] Chaska Co. v. Carver County, 6-204 (130); Wilder v. St. Paul, 12-192(116); Hennepin County v. Robinson, 16-381 (340); Gesner v. Burdell, 18-497(444, 453); Western L. Assn. v. Banks, 80-317, 321, 83+192.

to disprove the truth of his representations will operate as a fraud on or injury to the other party.[23]

3193. Knowledge of facts by party to be estopped—There can be no estoppel unless the party to be estopped had full knowledge of the facts at the time of the representation or concealment,[24] or was guilty of culpable negligence in not knowing them.[25]

3194. Probability of representation being acted upon—No estoppel arises from a representation if there is no reasonable probability that it will be acted upon.[26]

3195. Fraud of other party—One is not estopped by conduct induced by the fraud of the party claiming an estoppel.[27] A party cannot lay the foundation for an estoppel by his own wrong.[28]

3196. Silence where duty to speak—One may be estopped if he remains silent when he ought to speak.[29] Silence and acquiescence, when good faith requires a person to speak or act, are equivalent to express affirmation in this connection.[30] There is no estoppel unless the party claiming it was influenced by the silence.[31] To base an estoppel on mere silence there must be special circumstances making it a duty to speak.[32]

3197. Representations as to public law—As a general rule an estoppel cannot be based on a representation as to a public law.[33]

3198. Preventing performance of act—One who prevents the performance of an act cannot avail himself of the non-performance which he himself has caused.[34]

3199. Leaving blanks to be filled by another—Where one leaves blanks in an instrument to be filled out by another, he may be estopped in case such person fills them out improperly.[35]

3200. Failure to assert title to property—One may be estopped from claiming property if he remains silent while another deals with it as his own, or as the property of a third party.[36]

3201. Pointing out boundary lines—A person may be estopped from denying that a division line between his own and adjoining land is the true boundary line, as against a purchaser of the adjoining land, if he induces him, by his representations as to the line, to purchase with reference to such line, and up to it.[37]

[23] Bell v. Goodnature, 50–417, 52+908.

[24] Whitacre v. Culver, 8–133(103); Erickson v. Roehm, 33–53, 21+861; Welsh v. Cooley, 44–446, 46+908; Sharvey v. Rust, 50–97, 52+277; Reynolds v. St. Paul T. Co., 51–236, 53+457; Clarke v. Milligan, 58–413, 59+955.

[25] Coleman v. Pearce, 26–123, 1+846; Bausman v. Faue, 45–412, 48+13; Dimond v. Manheim, 61–178, 63+495; Theobald v. Hopkins, 93–253, 101+170.

[26] Sutton v. Wood, 27–362, 7+365; Fitzpatrick v. Hanson, 55–195, 198, 56+814. See Tyler v. Hanscom, 28–1, 8+825; Clarke v. Milligan, 58–413, 59+955.

[27] Rochester Ins. Co. v. Martin, 13–59 (54); McMartin v. Continental Ins. Co., 41–198, 42+934.

[28] King v. Duluth etc. Ry., 61–482, 487, 63+1105. See Wallace v. Hallowell, 66–473, 479, 69+466.

[29] Dimond v. Manheim, 61–178, 63+495 (failure to question illegal foreclosure); Renville County v. Gray, 61–242, 63+635 (alteration of bond); Brown v. Union Depot etc. Co., 65–508, 68+107 (failure to assert lien); Holcomb v. Independent School Dist., 67–321, 69+1067 (deed of married man without wife joining—wife failing to assert claim while grantee made improvements).

[30] Bausman v. Faue, 45–412, 418, 48+13.

[31] O'Mulcahy v. Holley, 28–31, 8+906.

[32] Mathews v. St. P. etc. Ry., 18–434 (392, 401).

[33] See Hennepin County v. Robinson, 16–381(340); James v. Wilder, 25–305.

[34] Scheerschmidt v. Smith, 74–224, 229, 77+34.

[35] Pence v. Arbuckle, 22–417.

[36] Califf v. Hillhouse, 3–311(217); Combs v. Cooper, 5–254 (200); Wilson v. Sherffbillich, 30–422, 15+876; Tousley v. Board of Ed., 39–419, 40+509; Hopkins v. Swensen, 41–292, 42+1062.

[37] Combs v. Cooper, 5–254(200); Bell v. Goodnature, 50–417, 52+908; Thompson v. Borg, 90–209, 95+896. See Ward v. Dean, 69–466, 72+710.

3202. Representations as to future—As a general rule a representation relating to the future will not give rise to an estoppel.[38]

3203. Inducing one to do his legal duty—The doctrine of estoppel has no application in cases where the representations which are claimed to give rise to it tend only to induce the party to do some act he is already legally bound to do.[39]

3204. Clothing another with the indicia of ownership—The owner of personalty may so clothe another with the indicia of ownership that he will be estopped from asserting his title as against a bona fide purchaser. But in order that the real owner of personalty may be estopped from asserting his title against a person who has dealt with the one in possession on the faith of his apparent ownership, something more than mere possession and control is necessary to be shown. To work an estoppel in such case the possession of the third person must be of such a character, or he be so clothed with the indicia of title, to deceive those dealing with him in the belief of his ownership.[40]

3205. Distinct transactions—Statements or admissions made in one transaction do not estop one from denying them in another distinct transaction.[41]

3206. Unlawful acts—The doctrine of estoppel cannot be applied so as to enable a person to do an unlawful act.[42]

3207. Disclaimer of interest in property—One who disclaims any interest in property may be estopped from subsequently claiming an interest.[43]

3208. In legal actions—The doctrine of equitable estoppel may be invoked in a legal as well as an equitable action.[44]

3209. Application to realty—The doctrine of estoppel is applicable to realty. The statute of frauds has not abolished the doctrine.[45] But it is to be applied to realty with great caution.[46] As a general rule, when a party's right to realty appears of record, mere silence on his part will not work an estoppel. Persons dealing in realty are bound to know what the record discloses as to the title. Special circumstances may take a case out of this rule.[47] One who without right and by trespass enters and occupies the land of another cannot claim, by reason of anything he may do upon it, and the owner's delay (short of the time limited by statute) to oust him, that the owner is estopped to seek any appropriate legal or equitable remedy in respect to it.[48]

[38] See St. Anthony Falls etc. Co. v. Merriman, 35–42, 27+199; 22 Harv. L. Rev. 451.

[39] Western L. Assn. v. Banks, 80–317, 83+192.

[40] Greene v. Dockendorf, 13–70(66); Warder v. Rublee, 42–23, 43+569; Baker v. Taylor, 54–71, 55+823; Armstrong v. Freimuth, 78–94, 80+862; Kiewel v. Tanner, 105–50, 117+231. See Mpls. T. M. Co. v. Davis, 40–110, 41+1026 (corporate stock); Olson v. Swensen, 53–516, 55+596 (allowing use of horses and wagons in a business); Esty v. Cummings, 80–516, 83+420 (analogous rule as to realty); Wright v. Tanner, 92–94, 99+422 (owner of personalty in possession of a third party not estopped from asserting ownership as against an attaching creditor when declarations of title by party in possession are unknown to owner).

[41] Whitacre v. Culver, 6–297(203); Bergman v. St. Paul M. B. Assn., 29–275, 13+120; Townsend v. Johnson, 34–414, 26+395.

[42] Wolford v. Crystal L. C. Assn., 54–440, 447, 56+56; Thomas v. Knapp, 101–432, 439, 112+989. See State v. Young, 23–551, 560.

[43] McAbe v. Thompson, 27–134, 6+479; Barchent v. Selleck, 89–513, 95+455. See Easton v. Goodwin, 22–426; Tyler v. Hanscom, 28–1, 8+825; Beebe v. Wilkinson, 30–548, 16+450; Stuart v. Lowry, 42–473, 44+532.

[44] Dimond v. Manheim, 61–178, 181, 63+495.

[45] Bell v. Goodnature, 50–417, 52+908.

[46] Combs v. Cooper, 5–254(200).

[47] Ogden v. Ball, 40–94, 41+453; Dimond v. Manheim, 61–178, 63+495.

[48] Wayzata v. G. N. Ry., 46–505, 49+205. See Mathews v. St. P. etc. Ry., 18–434 (392).

3210. Who may invoke doctrine—To entitle a party to claim that another is estopped by his representations, the representations must have been made to him, or they must have been of such a character, and made under such circumstances, that the party making them must be taken to have contemplated that they would be communicated to and acted on by him.[49] The doctrine of privity is recognized in this connection.[50] One cannot set up in his own favor an estoppel created by his own contract for the purpose, or with the effect, of making another party's invalid agreement binding on him, unless such party has in some way assented to this result.[51]

3211. Against state—To an extent not well defined the doctrine of estoppel is applicable against the state.[52] It cannot, however, be based on the mere neglect of public officers.[53] The wrongful acts of the officers of a municipal corporation cannot create an estoppel against the corporation, the taxpayers, or the people.[54]

3212. Heirs—An heir may be estopped by the conduct of his ancestor.[55]

3213. Estoppel against estoppel—An estoppel against an estoppel sets the matter at large.[56]

3214. Pleading—It is unnecessary to plead an estoppel in pais, at least where the facts giving rise to it appear upon the face of the complaint or are in evidence.[57] Cases are cited below involving the sufficiency of particular pleadings.[58]

3215. Evidence—Sufficiency—The facts giving rise to an estoppel must be clearly proved.[59]

3216. Law and fact—Unless the evidence is conclusive the question of estoppel is for the jury.[60]

[49] Pence v. Arbuckle, 22–417; Alexander v. Thompson, 42–498, 44+534; Hodge v. Ludlum, 45–290, 47+805; Stevens v. Ludlum, 46–160, 48+771; Irish-Am. Bank v. Ludlum, 49–344 51+1046.

[50] Irish-Am. Bank v. Ludlum, 49–344, 51+1046.

[51] Western L. Assn. v. Ready, 24–350.

[52] State v. School Dist., 85–230, 88+751; State v. Harris, 102–340, 113+887. See Hennepin County v. Robinson, 16–381 (340); Olmsted County v. Barber, 31–256, 263, 17+473; 19 Harv. L. Rev. 126.

[53] Hennepin County v. Dickey, 86–331, 90+775; State v. Shevlin, 102–470, 113+634; State v. Foster, 104–408, 116+826.

[54] Ramsey County v. Nelson, 51–79, 85, 52+991.

[55] Bausman v. Eads, 46–148, 48+769.

[56] Tappan v. Huntington, 97–31, 35, 106+98; Pederson v. Christofferson, 97–491, 497, 106+958.

[57] Caldwell v. Auger, 4–217(156); Coleman v. Pearce, 26–123, 1+846; Schmitt v. Hager, 88–413, 416, 93+110. See Smith v. St. Paul, 72–472, 474, 75+708.

[58] Moore v. St. Paul Ice Co., 59–23, 60+816 (answer held insufficient in failing to allege that a representation was false); Norman v. Eckern, 60–531, 63+170 (complaint for misrepresentation as to ownership of land sustained).

[59] Califf v. Hillhouse, 3–311(217); Northern L. P. Co. v. Platt, 22–413; Hawkins v. Methodist E. Church, 23–256; Calkins v Copley, 29–471, 13+904; Cannon River M. Assn. v. Rogers, 51–388, 397, 53+759.

[60] Lowry v. Mayo, 41–388, 43+78.

[61] Caldwell v. Auger, 4–217(156) (representation by part owner to sheriff that a certain person had an interest in the property); Easton v. Goodwin, 22–426 (receipting for money attached); Gill v. Russell, 23–362 (director in a corporation not allowed to take advantage of a mistake in a mortgage of the corporation which he took part in making); Coleman v. Pearce, 26–123, 1+846 (as to consignment of wheat); Wilson v. Sherffbillich, 30–422, 15+876 (silence at chattel mortgage foreclosure sale—waiver of lien for storing and hauling grain); Teipel v. Vanderweier, 36–443, 31+934 (long acquiescence by minors in a family settlement); Mpls. T. M. Co. v. Davis, 40–110, 41+1026 (subscription to corporate stock); Lowry v. Mayo, 41–388, 43+78 (procuring an instrument to be executed in the name of another without authority); St. Paul Nat. Bank v. Cannon, 46–95, 48+526 (estoppel of pledgee of note by judgment for maker in action by pledgor); Yale v. Watson, 54–173, 55+957 (statement that one "had taken care of a note"); Wetmore v. Royal, 55–162, 56+594 (erroneous date in a lien statement); Babcock v. Collins, 60–73, 61+1020 (statement of consideration in a deed); Marvin v. Foster, 61–154, 63+484 (divorce); Fitzgerald v. State Bank, 64–469, 67+361 (deposit

3217. Miscellaneous cases—Cases are cited below holding a party estopped,[61] or not estopped,[62] under the particular circumstances.

INCONSISTENT POSITIONS

3218. In legal proceedings—It may be laid down as a general proposition that where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him.[63] One cannot at the same time contest proceedings and enjoy the fruits thereof.[64] A party to an action, seeking to sustain a title in realty derived only from the adverse party, will not be heard to deny that such adverse party ever had any title.[65] A party cannot contest the title of the adverse party when his own title is derived from the same source.[66]

ESTRAYS—See Animals, 277.
ET AL—See note 67.

in bank—setting off claims); **Moffett v.** Parker, 71–139, 73+850 (as to consideration for a mortgage); **Munsch v. Stelter,** 109–403, 124+14 (when, pursuant to a verbal contract, the owners co-operate in the construction of a ditch for the purpose of draining their lands, one of them will be estopped from damming up the ditch to the detriment of the other).

[62] **Chaska Co. v. Carver County,** 6–204 (130) (validity of county bonds); **Whitacre v. Culver,** 6–297(203); Id., 8+133(103) (payment of note); **Robson v. Swart,** 14–371(287) (wheat receipt of warehouseman—quality of wheat); **Mathews v. St. St. P. etc. Ry.,** 18–434(392) (failure to object to railway company using land); **Hawkins v. Methodist E. Church,** 23–256 (as to existence of a valid judgment); **Shillock v. Gilbert,** 23–386 (signer under attestation clause not estopped to deny instrument to be his deed); **Sutton v. Wood,** 27–362, 7+365 (as to ownership of a harness); **Tyler v. Hanscom,** 28–1, 8+825 (as to ownership of realty); **O'Mulcahy v. Holley,** 28–31, 8+906 (as to ownership of note and mortgage); **Bergman v. St. Paul M. B. Assn.,** 29–275, 13+120 (as to surrender of corporate stock); **Erickson v. Roehm,** 33–53, 21+861 (stolen note); **Stuart v. Lowry,** 42–473, 44+532 (owner of land induced defendant to purchase it from a third person by representations that the latter was the owner—before purchase was effected owner conveyed the land to plaintiff—plaintiff held not estopped from claiming title); **Alexander v. Thompson,** 42–498, 44+534 (written acknowledgment of sum due—maker not estopped by it as to any one who may purchase the supposed debt); **Masonic T. Assn. v. Channell,** 43–353, 45+716 (subscription to corporate stock); **Mpls. T. Co. v. Eastman,** 47–301, 50+82 (filling in and raising land where accretions had been formed—permission of grantee—grantee not estopped); **Sharvey v. Rust,** 50–97, 52+277 (misstatement of sheriff as to amount of his fees); **Mpls. M. Co. v. Mpls. etc. Ry.,** 51–304, 53+639 (entry and occupation of land under a license); **Cannon River M. Assn. v. Rogers,** 51–388, 53+759 (as to acceptance of a release accepting benefits of contract); **Fitzpatrick v. Hanson,** 55–195, 56+814 (statement of purchase of grain to mortgagee of grain); **Bjork v. Bean,** 56–244, 57+657 (levying on one's own goods); **Clarke v. Milligan,** 58–413, 59+955 (mistake as to incorporation—conflicting names—deed); **Moore v. St. Paul Ice Co.,** 59–23, 60+816 (representation as to financial condition of a corporation); **Stong v. Lane,** 66–94, 68+765 (representations as to situation of a lot for sale); **Bates v. Johnson,** 79–354, 82+649 (failure to place deed on record); **Western L. Assn. v. Banks,** 80–317, 83+192 (representations as to point to which lines of a lot would extend when a certain railway was removed); **McLaughlin v. Betcher,** 87–1, 91+14 (going into possession of land under a deed from one who was not the true owner); **Sanborn v. Van Duyne,** 90–215, 96+41 (conveyance to city for levee purposes—subsequent failure of grantor to pay taxes or assert claim to land held not to estop him from objecting to improper use of land); **Theobald v. Hopkins,** 93–253, 101+170 (broker held not estopped as to amount of his commission); **Jurries v. Virgens,** 104–71, 116+109 (ditch proceedings).

[63] **Tozer v. Ocean A. & G. Corp.,** 94–478, 485, 103+509. See **Whitaker v. McClung,** 14–170(131); **Bovey v. Dow,** 68–273, 71+2; **Cumbey v. Ueland,** 72–453, 75+727.

[64] **Deering v. Donovan,** 82–162, 84+745.

[65] **Coleman v. McCormick,** 37–179, 33+556.

[66] **Finnegan v. Janeway,** 85–384, 89+4.

[67] **Berg v. Van Nest,** 97–187, 106–255.

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Cross-References

See Affidavits; Conflict of Laws, 1548; Criminal Law; Depositions; Discovery; Trial.

IN GENERAL

3219. Definition—The word "evidence," considered in relation to law, includes all the legal means, exclusive of mere argument, which tend to prove or disprove any matter of fact, the truth of which is submitted to judicial investigation.[68] When one offers "evidence," he offers, otherwise than by reference to

[68] Taylor, Ev. § 1. Evidence is any matter of fact which is furnished to a legal tribunal, otherwise than by reasoning, as the basis of inference in ascertaining some other matter of fact. Prof. Thayer, 3 Harv. L. Rev. 143.

what is already known, to prove a matter of fact which is to be used as a basis of inference to another matter of fact.[69]

3220. Legislative control—A person has no vested right to have his controversies determined by existing rules of evidence. Rules of evidence pertain to the remedy and are at all times subject to modification by the legislature.[70] The legislature has the right to prescribe, within reasonable limits, the evidence by which a fact shall be proved.[71]

3221. Same in civil and criminal cases—Except that a higher degree of conviction in the minds of the jury is required, criminal cases are tried on the same principles of evidence as civil cases.[72] A fact must be established by the same evidence, whether it is to be followed by a criminal or a civil consequence.[73]

3222. Rules of evidence should be practical—Rules of evidence should be practical and subject to modification as conditions change.[74]

3223. Rules of evidence means and not ends—Rules of evidence are means and not ends in themselves. They should not be construed and enforced with technical nicety and strictness. In their practical application much should be left to the discretion of the trial court.[75] This does not apply, however, to substantive rules of law expressed in the form of rules of evidence. It is coming to be generally recognized that altogether too much importance has been attached by the courts to rules of evidence.[76]

3224. Must be submitted in court—Knowledge of juror—The theory of jury trials is that all the evidence must be submitted to the jury in open court, where the judge can separate the legal from the illegal evidence, and where the parties can explain or rebut.[77] A jury cannot decide a case on their private knowledge of the facts. If a juror has private knowledge of the facts he should be sworn and testify as a witness.[78]

3225. Proof and evidence distinguished—Proof and evidence are often used synonymously. It has been said that "proof means anything which serves to convince the mind of the truth or falsehood of a fact or proposition, and a thing is said to be proved when that weight of evidence is produced which ordinarily satisfies an unprejudiced mind of its existence."[79] Strictly, proof is not evidence, but the effect of evidence.[80]

3226. Prima facie evidence—Prima facie evidence is evidence which, standing alone and unexplained, would warrant the conclusion to support which it is introduced. Prima facie evidence of a fact is in law sufficient to establish the fact, unless rebutted.[81] It shifts the burden of proof.[82]

3227. Competent evidence—In the law of evidence "competent" and "admissible" are often used synonymously.[83]

[69] Thayer, Ev. 263.

[70] Burke v. Lacock, 41–250, 42+1016; Straw v. Kilbourne, 80–125, 83+36. See § 1616.

[71] State v. Rogers, 97–322, 106+345.

[72] State v. Lautenschlager, 22–514, 525; Com. v. Abbott, 130 Mass. 472.

[73] 29 Howell's State Trials, 763.

[74] Mpls. Mill Co. v. Mpls. etc. Ry., 51–304, 315, 53+639; Swedish etc. Bank v. Chi. etc. Ry., 96–436, 105+69.

[75] Minn. etc. Co. v. Chi. etc. Ry., 108–470, 122+493.

[76] See Wigmore, Ev. § 21; Salmond, Jurisprudence, p. 457; Thayer, Ev. c. 12.

[77] Aldrich v. Wetmore, 52–164, 172, 53+1072.

[78] Chute v. State, 19–271(230).

[79] Karsen v. Mil. etc. Ry., 29–12, 11+122; Orth v. St. P. etc. Ry., 47–384, 50+363. See State v. Laliyer, 4–368(277) (proof and evidence distinguished); Missouri etc. Co. v. McLachlan, 59–468, 475, 61+560 (proof is merely that quantity of evidence which produces a reasonable assurance of the existence of a fact) and § 3468.

[80] Perry v. Dubuque etc. Ry., 36 Iowa, 106. See § 3468; Culver v. Scott, 53–360, 366, 55+552.

[81] State v. Lawlor, 28–216, 9+698.

[82] Burke v. Lacock, 41–250, 42+1016.

[83] State v. Johnson, 12–476(378).

RELEVANCY AND ADMISSIBILITY IN GENERAL

3228. General rules of admissibility—All facts which are logically relevant are admissible unless some specific rule forbids. No fact which is not, or is not supposed to be, logically relevant is admissible.[84] When there is a conflict in the evidence any fact is admissible which tends to show that the evidence of one party is more reasonable, and therefor more credible, than that of the other.[85] It is not desirable to collect here the innumerable cases illustrating these two fundamental rules. They will be found under specific heads.

3229. Definition and nature of relevancy—The word "relevant" means that any two facts to which it is applied are so related to each other that, according to the common course of events, one, either taken by itself or in connection with other facts, proves or renders probable the past, present, or future existence or non-existence of the other.[86] It is to be observed that this is a definition of logical relevancy.[87] The law furnishes no general test of relevancy. For this it tacitly refers to logic.[88] But every decision upon a question of relevancy becomes a precedent, of more or less controlling influence, and these precedents furnish legal tests of relevancy quite independent of logic. Hence the question of relevancy is a question of law so far as it is controlled by precedent.[89] In

[84] Thayer, Ev. 266; Wigmore, Ev. § 9; 16 Cyc. 1111; Cochrane v. West Duluth etc. Co., 64–369, 67+206; Plumb v. Curtis, 66 Conn. 154; Platner v. Platner, 78 N. Y. 95; Prior v. Oglesby, 39 So. (Florida) 593.

[85] Glassberg v. Olson, 89–195, 94+554; Knott v. Montgomery, 75–437, 77+977; Cochrane v. West Duluth etc. Co., 64–369, 67+206; Winslow v. Dakota L. Co., 32–237, 20+145. See § 3252.

[86] Stephen, Ev. art. 1; Sloan v. Becker, 31–414, 18+143; Moody v. Peirano, 88 Pac. (Cal.) 380; Plumb v. Curtis, 66 Conn. 154; Cole v. Boardman, 63 N. H. 580. Relevancy does not depend upon the conclusiveness of the testimony offered, but upon its legitimate tendency to establish a controverted fact. Relevancy is that quality of evidence which renders it properly applicable in determining the truth or falsity of the matter in issue between the parties to a suit. Interstate Com. Com. v. Baird, 194 U. S. 25.

[87] Cole v. Boardman, 63 N. H. 580. See 1 Elliott, Ev. § 146.

[88] Thayer, Ev. 265; Moody v. Peirano, 88 Pac. (Cal.) 380; Plumb v. Curtis, 66 Conn. 154, 33 Atl. 998. The law has no mandamus to the logical faculty. It orders nobody to draw inferences. State v. Halverson, 103–265, 114+957.

[89] The law of evidence does not prescribe rules of reasoning. Being a rational system it necessarily conforms to those uniform modes of thinking which are called laws of thought or rules of logic. It assumes that court and jury know how to reason and that they will reason about the cases submitted to them as they would reason about any matter out of court. The only difference is in the number of facts from which inferences may be drawn. The law of evidence does not concern itself with modes of reasoning or the legitimacy of inferences—those are matters it leaves to logic. It concerns itself with the determination of the facts from which inferences ought not be drawn in judicial investigations for reasons of public policy and various considerations of practical convenience and utility, mostly growing out of the character of the jury system. In reasoning out of court there is no limitation on the number or character of the facts from which inferences may be drawn. In judicial investigations, on the other hand, there are many facts from which inferences may not be drawn and the enumeration of such facts is the chief function of the law of evidence. In the determination of such facts the controlling consideration is the character of the jury. Our law of evidence owes its existence and form to the jury system. In those countries where no jury exists there is no such body of law. Its chief function is to determine what evidence is inadmissible, not what is admissible. It assumes that everything is admissible which is logically probative and concerns itself with excluding certain portions of such logically relevant matter. The necessity of shortening trials, the necessity of confining the minds of the jury to the matters in issue, the exclusion of matters likely to prejudice the minds of the jury, and the exclusion of untrustworthy evidence and evidence of facts which ought not to be made public, have been the chief considerations in the formation of the law of evidence. When a given fact is sought to be introduced in evidence two questions arise, Does it, either alone or in connection with other facts,

determining the relevancy of evidence much depends upon the nature of the issue in relation to which it is offered and a wide discretion is left to the trial court in determining whether it is admissible or not.[90] In determining whether evidence is relevant, all the issues must be kept in view, as it may be admissible as to one though not as to another.[91] It is not desirable to collect here the innumerable cases deciding questions of relevancy. They will be found under specific heads.

3230. Issuable facts—All facts put in issue by the pleadings are admissible. The hearsay rule has no application to such facts.[92]

3231. Direct evidence as to motive, intent, etc.—Whenever the motive, belief, knowledge, intention or understanding of a person is relevant he may testify directly thereto,[93] but one person cannot testify directly as to another person's intention, motive, belief, etc.[94]

3232. Facts supporting or rebutting inferences—Facts which support or rebut an inference suggested by a fact in issue or relevant to the issue are admissible.[95]

tend to prove the existence or non-existence of any of the facts in issue? Is there any reason why it should not be submitted to the jury? The first question is answered by logic; the second by the law of evidence. The question of relevancy, then, is, in strictness, no part of the law of evidence. It is fundamentally a question of logic and only a question of law in the sense that a judicial determination of a question of relevancy is followed by the courts as a precedent. When a new question of relevancy arises it must necessarily be settled by logic and not by the law of evidence. When its relevancy has been determined by logic the law of evidence comes in to determine its admissibility. See Thayer, Ev. 263-276; Wigmore, Ev. § 27.

[90] Moody v. Peirano, 88 Pac. (Cal.) 380.

[91] Platner v. Platner, 78 N. Y. 95.

[92] See Prof. Thayer, 15 Am. L. Rev. 78.

[93] Berkey v. Judd, 22-287; Filley v. Register, 4-391(296); Garrett v. Mannheimer, 24-193; Scigneuret v. Fahey, 27-60, 6+403; Marks v. Baker, 28-162, 9+678; Macy v. St. P. & D. Ry., 35-200, 28+249; State v. Brinkhaus, 34-285, 25+642; Ganser v. Fireman's F. Ins. Co., 38-74, 35+584; Bartlett v. Hawley, 38-308, 37+580; Fontaine v. Bush, 40-141, 41+465; Pfefferkorn v. Seefield, 66-223, 68+1072; Albion v. Maple Lake, 71-503, 74+282; Harding v. Canfield, 73 244, 75+1112; Com. etc. Co. v. Dakko, 89-386, 94+1088; State v. Ames, 90-183, 96+330; Grout v. Stewart, 96+230, 104+966; School Dist. v. Lapping, 100-139, 110+849; Hoyt v. Duluth etc. Co., 103-396, 115+263; Lindstrom v. Fitzpatrick, 105-331, 117+441. See Hubachek v. Hazzard, 83-437, 86+426; Note, 23 L. R. A. (N. S.) 367.

[94] Bank of Com. v. Selden, 1-340(251); State v. Garvey, 11-154(95); Lowry v. Harris, 12 255(166); Faribault v. Sater, 13-223(210); Berkey v. Judd, 22-287; Nichols v. Gerlich, 84-483, 87+1120; State v. Pierce, 85-101, 88+417.

[95] Stephen, Ev. art. 9; Courternier v. Secombe, 8-299(264) (fact that defendant claimed and took away a runaway horse admissible to prove that he was in charge of the horse at the time of the runaway); Graves v. Moses, 13-335(307) (hiring of horse and carriage—fact that one defendant went on the invitation and as a guest of the other defendant admissible); Davis v. Mendenhall, 19-149(113) (payment after a certain date of a sum for services before that date is evidence of an indebtedness of that sum at that date); Frohreich v. Gammon, 28-476, 11+88 (breach of warranty of harvester—fact that similar harvesters performed good work admissible); State v. Spaulding, 34-361, 25+793 (homicide—evidence explanatory of possession of weapon admissible); Paulson v. Osborne, 35-90, 27+203 (breach of warranty of harvester—fact that similar harvesters performed good work admissible); Macy v. St. P. & D. Ry., 35-200, 28+249 (action for injury to servant—evidence to explain his remaining in the master's service after the accident admissible); Branch v. Dawson, 36-193, 30+545 (conduct of party inconsistent with present claim); Segelbaum v. Segelbaum, 39-258, 39+492 (action for divorce for cruelty—other acts of cruelty); State v. Barrett, 40-65, 41+459 (homicide—evidence explaining possession of pistol); Brown v. Kohout, 61-113, 63+248 (admission against interest in a lease—fact that declarant could not read or understand English admissible in rebuttal); Lynch v. Kampff, 69-448, 72+455 (issue whether defendant accepted a well—fact that he sank another well admissible); Hall v. Austin, 73-134, 75+1121 (evidence to account for absence of witness admissible to rebut unfavorable inference from his absence); Moratzky v. Wirth, 74-146, 76+1032 (malpractice—to

3233. Explanatory and introductory facts—Facts necessary to be known to explain or introduce a fact in issue or relevant to the issue are admissible.[96]

3234. Circumstantial evidence—It is not essential that the issuable facts should be proved by direct evidence. In all cases, civil or criminal, the issuable facts may be proved by circumstantial evidence.[97]

3235. Evidence of evidentiary facts must be direct—Evidence of evidentiary facts must be direct. The validity of inferences depends primarily upon the certainty of the facts from which the inferences are drawn. For this reason it is a well-established and important rule of evidence that you cannot prove the facts in issue by drawing inferences respecting such facts from facts which are themselves nothing but inferences from still other facts. In short the law of evidence does not permit the drawing of inferences from inferences. For this reason legal presumptions cannot be taken as facts from which to infer the existence or non-existence of the facts in issue not otherwise proved.[98]

3236. Motive—When there is a question whether an act was done by a person any fact which supplies a motive for such an act is admissible.[99] This rule finds its chief application in the criminal law.[1]

3237. Whole of a conversation or document—Where a portion of a conversation or document is introduced the adverse party may insist upon the introduction of every other part of such conversation or document which tends to qualify, explain, or rebut the statements first introduced.[2] A mere denial of a conversation does not let in the conversation.[3]

3238. Negative evidence—Evidence may be admissible though it is of a negative nature.[4] Evidence that the bell of a locomotive was not rung on a particular occasion may be proved by witnesses who testify that they did not hear it ring, it appearing that under the circumstances they would naturally have heard it if it had rung.[5]

3239. Evidence improperly obtained—Evidence may be admissible though it was improperly or illegally obtained.[6]

rebut evidence of defendant that before he was called plaintiff was suffering severe pains in her leg and that she made no complaints as to her leg admissible). Mundal v. Mpls. etc. Ry., 92-26, 33, 99+273 (to rebut inference from fact that plaintiff waived examination before justice); Lindstrom v. Fitzpatrick, 105-331, 117+441 (to rebut inference from commencement of a former action); Jeremy v. Matsch, 106-543, 118+1008 (ejection from hotel—evidence of having been in hotel before without trouble).

[96] Stephen, Ev. art. 9; Ganser v. Fireman's F. Ins. Co., 38-74, 35+584. See Rollins v. Wibye, 40-149, 41+545.

[97] Lillstrom v. N. P. Ry., 53-464, 55+624; Pfefferkorn v. Seefield, 66-223, 68+1072; State v. Ames, 90-183, 191, 96+330; Prescott v. Johnson, 91-273, 97+891.

[98] U. S. v. Ross, 92 U. S. 281; Cole v. Boardman, 63 N. H. 580; State v. Kelly, 77 Conn. 266; Philbrook v. Smith, 40-100, 41+545. See Rogers v. Clark, 104-198, 215, 116+739.

[99] Stephen, Ev. art. 7; Branch v. Dawson, 36-193, 30+545.

[1] See § 2467.

[2] Guernsey v. Am. Ins. Co., 17-104(83, 89) (document); Davidson v. St. P. etc. Ry., 34-51, 54, 24+324 (document); Fitzgerald v. Evans, 49-541, 52+143 (conversation); In re Hess, 57-282, 59+193 (conversation). See Hathaway v. Brown, 18-414 (373) (conversation—cross-examination); Rouse v. Whited, 25 N. Y. 170 (conversation); People v. Beach, 87 N. Y. 508 (conversation).

[3] Philips v. Mo, 91-311, 97+969.

[4] Babcock v. Cobb, 11-347(247) (silence of record admissible to prove non-existence of executor's bond); State v. Lee, 22-407 (negative evidence of character); Gaston v. Merriam, 33-271, 22+614 (fact that no title in a party appears of record admissible to prove that he has no title in fact); Bingham v. Bernard, 36-114, 30+404 (negative evidence of character); Backdahl v. Grand Lodge, 46-61, 48+454 (as to sending notices to members of a lodge); Halvorson v. N. P. Ry., 104-525, 116+1134 (testimony of a witness that he did not see blocks in a certain position).

[5] Moran v. Eastern Ry., 48-46, 50+930; Cotton v. Willmar etc. Ry., 99-366, 109+835. See Evison v. Chi. etc. Ry., 45-370, 48+6.

[6] State v. Strait, 94-384, 102+913; State v. Hoyle, 98-254, 107+1130; State v. Lindquist, 124+215.

3240. Unfair or misleading evidence—If evidence has direct probative force it cannot be excluded merely because it is unfair or misleading. It must be left to be corrected by other evidence and by the intelligent judgment of the court or jury.[7]

3241. Immaterial facts—Evidence of immaterial facts may be excluded in the discretion of the court. It is not enough that facts are logically probative. To be admissible they must be material. In reasoning out of court there is never any limitation on the remoteness of the facts from which inferences may be drawn. On the other hand, in judicial investigations, the range of inferential reasoning is limited. In order that trials may not be unduly prolonged, the minds of the jury confused by a multiplicity of facts and inferences of doubtful validity drawn, the law of evidence requires an obvious and direct connection between the facts from which inferences are drawn, and the facts in issue. Remote inferences are prohibited. A fact is immaterial when it is so remote or unimportant that the jury could not reasonably or safely draw any inferences from it respecting the facts in issue. There is of course no general test of materiality and in cases where the evidence is wholly circumstantial objections to evidence on the ground of materiality are disfavored.[8] Where the evidence is necessarily circumstantial an objection that evidence offered is not material is not favored.[9] This is notably true in actions for fraud.[10] Evidence must be clearly relevant, and not merely slightly so; it must not barely afford a basis for conjecture, but for real belief; it must not be merely remotely relevant, but proximately so.[11] The law affords no general test for determining whether evidence is too slight, conjectural or remote. It is a question which must be left to the practical judgment of the trial court.[12]

3242. Character—It is the general rule that evidence of the character of parties to a civil action is inadmissible unless such character is directly in issue.[13]

3243. Customary practice or course of business—When there is a question whether a particular act was done the existence of any course of office or business according to which it would naturally have been done is admissible.[14]

3244. Facts admissible only on proof of other facts—Evidence which is material and competent only on proof of other facts may be excluded unless such other facts are proved or offered to be proved.[15]

3245. Conversations by telephone—A conversation by telephone has been held admissible, where the person speaking was sufficiently identified.[16]

3246. Experiments not in presence of jury—The admission of evidence of experiments rests almost wholly in the discretion of the trial court.[17]

[7] Morrison v. Porter, 35-425, 29+54.

[8] Thayer, Ev. 516; U. S. v. Ross, 92 U. S. 281; Xenia Bank v. Stewart, 114 U. S. 231; Cole v. Boardman, 63 N. H. 580; State v. Kelly, 77 Conn. 266; Derby v. Gallup, 5-119(85); Thayer v. Barney, 12-502(406); Marvin v. Dutcher, 26-391, 4+685; Fenno v. Chapin, 27-519, 8+762; State v. Sorenson, 32-118, 19+738; Coulter v. Goulding, 98-68, 107+823; Jungclaus v. G. N. Ry., 99-515, 108+1118; State v. Alton, 105-410, 117+617 and cases under § 7183.

[9] See Branch v. Dawson, 36-193, 30+545; State v. Barrett, 40-65, 41+459.

[10] See § 3838.

[11] Thayer, Ev. 516.

[12] Thayer, Ev. 517.

[13] Hein v. Holdridge, 78-468, 81+522; Cochran v. Toher, 14-385(293). See Schuck v. Hagar, 24-339.

[14] Stephen, Ev. art. 13; Shaber v. St. P. etc. Ry., 28-103, 9+575 (habitual speed of trains); First Nat. Bank v. Strait, 65-162, 67+987 (course of business of bank as to notes); Backdahl v. Grand Lodge, 46-61, 48+454 (sending notices to members of a lodge); Keigher v. St. Paul, 73-21, 75+732 (course of dealing between parties—payments); Evison v. Chi. etc. Ry., 45-370, 48+6 (as to ringing bell of locomotive).

[15] Follansbee v. Johnson, 28-311, 9+882.

[16] Deering v. Shumpik, 67-348, 69+1088; Barrett v. Magner, 105-118, 117+245.

[17] Thiel v. Kennedy, 82-142, 84+657;

3247. Value—The value of a thing is ordinarily to be proved by evidence of its market value.[18] A thing may have a market value at a place though it is not kept constantly in stock there for sale.[19] If it has no market value, its value may be proved by what it cost or what it sold for in a bona fide transaction,[20] or what the owner has been offered for it by a responsible party,[21] or by what similar property has been sold for,[22] or by facts affecting the supply and demand,[23] or by admissions of the owner.[24] In an action for breach of warranty, the purchase price is prima facie the value of the article as warranted, in the absence of other evidence.[25] Upon an issue as to the value of grain on a farm it is proper to prove what was the usual market for the grain.[26] Market value may be proved by what dealers in the article sold it for at a given time in the ordinary course of business.[27] Proof that a person refused to purchase property offered for sale to him at a certain price does not prove that the property was not of a greater value.[28] The value of a person's services is not provable by what others in the same employment receive.[29] What land was assessed for on account of local improvements, has been held inadmissible to prove the value of the land.[30] On an issue as to the market value of land, the opinion of a geological expert, not published so as to affect public opinion, that there is valuable stone beneath the surface, is inadmissible.[31] Evidence as to value must be limited to a reasonable time before or after the time in issue.[32] Cases are cited below involving the admissibility of evidence as to the value of a mercantile business,[33] of corporate stock,[34] of notes,[35] of vouchers,[36] and of an equitable interest in land.[37]

3248. Value to prove agreed price—Where there is a conflict of evidence as to the agreed price of a thing and there is no written contract, evidence of its actual value is admissible.[38]

3249. Identity of persons—Identity of names is prima facie evidence of identity of persons.[39] Circumstantial evidence is admitted freely.[40]

3250. Cumulative evidence—A trial court has discretionary power to exclude cumulative evidence.[41] It may limit the number of expert witnesses.[42]

Beckett v. N. W. etc. Assn., 67–298, 69+923; State v. Smith, 78–362, 81+17; State v. Ronk, 91–419, 98+334. See § 3261.

[18] Elfelt v. Smith, 1–125(101); Burger v. N. P. Ry., 22–343, 346; Berg v. Spink, 24–138; Harrow v. St. P. & D. Ry., 43–71, 44+881; Redding v. Godwin, 44–355, 358, 46+563; Humphreys v. Minn. C. Co., 94–469, 103+338. See §§ 3050, 8624.

[19] Coxe v. Anoka etc. Co., 91–50, 97+459.

[20] Harrow v. St. P. & D. Ry., 43–71, 44+881; Humphreys v. Minn. C. Co., 94–469, 103+338; Knudtson v. Schjelderup, 98–531, 107+1134.

[21] Finley v. Quirk, 9–194(179).

[22] Burger v. N. P. Ry., 22–343. See Banning v. Hall, 70–89, 72+817.

[23] Burger v. N. P. Ry., 22–343.

[24] Donlon v. Evans, 40–501, 42+472.

[25] Mpls. H. Works v. Bonnallie, 29–373, 13+149.

[26] Porter v. Chandler, 27–301, 7+142.

[27] N. W. F. Co. v. Mahler, 36–166, 30+756.

[28] Reynolds v. Franklin, 47–145, 49+648.

[29] Seurer v. Horst, 31–479, 18+283.

[30] Nelson v. West Duluth, 55–497, 57+149.

[31] Roussain v. Norton, 53–560, 55+747.

[32] Stearns v. Johnson, 17–142(116); Goebel v. Hough, 26–252, 2+847; Bennett v. Kniss, 27–49, 6+401; Stinson v. Chi. etc. Ry., 27–284, 6+784; McLennan v. Mpls. etc. Co., 57–317, 59+628.

[33] Goebel v. Hough, 26–252, 2+847.

[34] Doran v. Eaton, 40–35, 41+244; Moulton v. Warren, 81–259, 83+1082; Humphreys v. Minn. C. Co., 94–469, 103+338.

[35] Stearns v. Johnson, 17–142(116); MacLaren v. Cochran, 44–255, 46+408.

[36] Drake v. Auerbach, 37–505, 35+367.

[37] Rhodes v. Pray, 36–392, 32+86.

[38] Kumler v. Ferguson, 7–442(351); Schwerin v. De Graff, 21–354; Miller v. Lamb, 22–43; Smith v. Barringer, 37–94, 33+116; Saunders v. Gallagher, 53–422, 55+600; Zelch v. Hirt, 59–360, 61+20.

[39] See § 6917.

[40] See Pinney v. Russell, 52–443, 54+484; Kosmerl v. Mueller, 91–196, 97+660.

[41] Johnson v. Crookston L. Co., 92–393, 100+225; 18 Harv. L. Rev. 381. See Hamilton v. Hulett, 51–208, 53+364 (power to limit cross-examination).

[42] Sheldon v. Mpls. etc. Ry., 29–318, 13+134.

3251. Modern tendency to admit evidence freely—The modern tendency is to give as wide a scope as possible to the investigation of facts—to admit evidence freely, leaving it to the jury to determine its weight.[43] "People were formerly frightened out of their wits about admitting evidence, lest juries should go wrong. In modern times we admit the evidence and discuss its weight."[44] Appellate courts are unwilling to reverse cases because of error in the admission of irrelevant evidence unless there is reason to think that practical injustice has been caused thereby.[45] If evidence offered conduces in any reasonable degree to establish the probability or improbability of the fact in controversy it should go to the jury.[46] If evidence has direct probative force it should not be excluded except for substantial reasons.[47]

SIMILAR AND COLLATERAL FACTS

3252. Collateral facts—Discretion of trial court—Evidence of collateral facts is objectionable because it tends to raise collateral issues, to protract the trial, to confuse the jury, and to take the adverse party by surprise. Whether such evidence is admissible depends upon the facts of the particular case and not upon any general, inflexible rule. It is admissible if it has a direct, logical tendency to prove or disprove the facts in issue, and it would not unduly protract the trial and confuse the jury. This is not a question of law, but a question of sound, practical judgment, to be determined by the trial court with reference to the facts of the particular case. It is a question of where lies the balance of practical advantage, and should be left to the discretion of the trial court except where the case is controlled by a settled rule of law.[48] Whenever there

[43] Holmes v. Goldsmith, 147 U. S. 150, 164; Williamson v. U. S., 207 U. S. 425; Golden Reward M. Co. v. Buxton M. Co., 97 Fed. 413; Moody v. Peirano, 88 Pac. (Cal.) 380. In modern times an effort is made to afford the triers of fact all reasonable means of ascertaining the truth, instead of withholding from them all information possible by the rigid application of certain rules of exclusion. The question is not, how little, but how much, logically competent proof is admissible. Murray v. Boston etc. Ry., 72 N. H. 32. The modern tendency is to enlarge rather than to restrict the field of evidence. Lehmann v. Chapel, 70-496, 73+402.

[44] Cockburn, C. J., Reg. v. Birmingham, 1 B. & S. 763.

[45] Holmes v. Goldsmith, 147 U. S. 150; Williamson v. U. S., 207 U. S. 425.

[46] Insurance Co. v. Weide, 11 Wall. (U. S.) 438; Plumb v. Curtis, 66 Conn. 154; Moody v. Peirano, 88 Pac. (Cal.) 380.

[47] Morrison v. Porter, 35-425, 29+54.

[48] Thayer, Ev. 516; 12 Harv. L. Rev. 78; 17 Cyc. 274; Cochrane v. West Duluth etc. Co., 64-369, 67+206; Glassberg v. Olson, 89-195, 94+554; Philips v. Mo. 91-311, 97+969; McKenzie v. Banks, 94-496, 103+497; Schornak v. St. Paul etc. Ins. Co., 96-299, 104+1087; Dalby v. Lauritzen, 98-75, 107+826; Slingerland v. Slingerland, 46-100, 48+605; Rollins v. Wibye, 40-149, 41+545; State v. Spaulding, 34-361, 25+793; Ames v. First Div. etc. Ry., 12-412 (295, 303); State v. Hjerpe, 109-270, 123+474; 11 English Ruling Cases 238; Bemis v. Temple, 162 Mass. 342; Reeve v. Dennett, 145 Mass. 23; Leary v. Fitchburg Ry., 173 Mass. 373; Golden Reward M. Co. v. Buxton M. Co., 97 Fed. 413; Moody v. Peirano, 88 Pac. (Cal.) 380; Amoskeag Mfg. Co. v. Heard, 59 N. H. 332; Mayhew v. Sullivan M. Co., 76 Me. 100; Moore v. U. S., 150 U. S. 57. Whenever a line of inquiry will give rise to collateral issues of such number or difficulty that they will be likely to confuse and distract the jury, and unnecessarily protract the trial, it should not be permitted. But the mere fact that a collateral issue may be raised is not of itself enough to justify the exclusion of evidence which bears upon the issues on trial. Most circumstantial evidence introduces collateral issues, and ordinarily it is a practical question, depending upon its relation to the other facts and circumstances in the case, whether it should be received. It may be remote from the real issue, or closely connected with it, and in many cases its competency depends upon the decision of questions of fact affecting the practical administration of justice in the particular case such that a court of review will refuse to reverse the

is a conflict in the testimony of witnesses relevant to the issue, evidence of collateral facts, which has a direct tendency to show that the statements of the witnesses on one side of the issue are more reasonable, and therefore more credible, than those on the opposite side, is admissible. Considerable discretion, however, must be allowed the trial court in applying this general rule, and such evidence is to be admitted with caution.[49] Collateral facts are inadmissible if no inference could reasonably be drawn from them as to the truth of the facts in issue.[50] They should be excluded when their bearing on the issues would be so slight or remote that it would be unjust or unreasonable to prolong and complicate the trial by the collateral investigation.[51]

3253. Similar facts—One fact is not ordinarily admissible to prove another merely because the two are similar. The fact that a person did a certain act at one time is not ordinarily admissible to prove that he did a similar act at another time.[52] So far as civil cases are concerned this rule is but a particular application of the general rule excluding collateral matters stated above. What is said there is applicable here.[53] Various applications and limitations of the rule will be found considered elsewhere.[54] When there is a question whether a person said or did something, the fact that he said or did something of the same sort on a different occasion may be proved if it shows the existence on the occasion in question of any intention, knowledge, good or bad faith, malice, or other state of mind, or of any state of body or bodily feeling, the existence of which is in issue or relevant to the issue; but such acts or words may not be proved merely in order to show that the person so acting or speaking was likely on the occasion in question to act in a similar manner.[55] When the fact to be

ruling of the presiding judge, but will treat his ruling as a matter of discretion. Bemis v. Temple, 162 Mass. 342.

[49] Glassberg v. Olson, 89–195, 94+554; Philips v. Mo, 91–311, 97+969; McKenzie v. Banks, 94–496, 103+497; Dalby v. Lauritzen, 98–75, 107+826; State v. Callahan, 100–63, 110+342; Peters v. Schultz, 107–29, 119+385; Minn. etc. Co. v. Chi. etc. Ry., 108–470, 122+493; State v. Hjerpe, 109–270, 123+474.

[50] Ashton v. Thompson, 32–25, 18+918.

[51] Amoskeag Mfg. Co. v. Heard, 59 N. H. 332.

[52] Thayer, Ev. 516; Thayer, Cases on Ev. (2 ed.) 271, note; McLonghlin v. Nat. M. V. Bank, 139 N. Y. 523; Durkee v. India M. Ins. Co., 159 Mass. 515; Payson v. Everett, 12-216(137) (action to recover amount paid for a bad bank bill—evidence that defendant had previously passed a bad bill and been "taken up" for it inadmissible); Dorman v. Ames, 12–451 (347) (action for overflowing land—similar effects of overflow in other lands inadmissible); Thayer v. Barney, 12–502 (406) (issue as to profits of a business—profits of one period inadmissible to prove profitableness of business at another); Stearns v. Johnson, 17–142(116) (value of a thing at one time inadmissible to prove its value at another time); Plummer v. Mold, 22–15 (issue as to agreed price of logs—price same parties had agreed upon for other logs inadmissible); Roles v. Mintzer, 27–31, 6+378 (issue as to agreed wages—amount for which plaintiff had agreed to work for another inadmissible); Seurer v. Horst, 31–479, 18+283 (issue as to value of A's services—what B received for his services inadmissible); Boright v. Springfield etc. Co., 34–352, 25+796 (issue as to alteration of punctuation of insurance policy—similar policy inadmissible); Ham v. Wheaton, 61–212, 63+495 (issue as to nature of contract of employment—terms upon which other men were employed inadmissible); Vant Hul v. G. N. Ry., 90–329, 96+789 (personal injury from defective hammer—condition of other hammers in shop inadmissible); Hilary v. Mpls. St. Ry., 104–432, 116+933 (collision between street car and wagon—speed of car for a distance of eight or ten blocks prior to the collision admissible); Musolf v. Duluth etc. Co., 108–369, 122+499 (injury from defective electric wires—condition of wires day after accident admissible).

[53] See § 3252.

[54] See §§ 7051, 7052.

[55] Stephen, Ev. art. 11; Payson v. Everett, 12–216(137) (passing other counterfeit bills); Berkey v. Judd, 22–287 (another act of fraud); Larrabee v. Minn. T. Co., 36–141, 30+462 (other libelous publications, See § 5563); Moline v. Franklin, 37–137, 33+323 (another act of fraud); Fake v. Addicks, 45–37, 47+450 (other attacks by vicious dog); Rowe v. Ehrmann-

proved is of a continuing nature evidence of its existence within a reasonable time prior or subsequent to the time in controversy is not obnoxious to the general rule.[56]

3254. Res inter alios acta—The phrase "res inter alios acta" is sometimes used to justify the exclusion of evidence.[57] As there is no general rule excluding evidence of transaction between others the use of this phrase is misleading.[58]

REAL EVIDENCE

3255. Definition—Real evidence is evidence addressed directly to the senses of the court or jury without the intervention of the testimony of witnesses.[59] It is sometimes called demonstrative evidence.[60]

3256. Performance of physical act by party—In an action for personal injuries the court has the power, in a proper case, and under proper circumstances, to require the plaintiff to perform a physical act in the presence of the jury that will show the nature and extent of his injuries. But the propriety of doing so in a given case rests largely in the discretion of the trial court.[61]

3257. Exhibition of body—It is common practice to allow a plaintiff in a personal injury action to exhibit his person to the jury to show the nature of injuries.[62]

3258. Physical objects generally—It is always allowable to submit to the inspection of the jury and introduce in evidence physical objects connected with the crime, accident, or other subject-matter of investigation.[63]

3259. Maps, diagrams, etc.—Plans and diagrams of premises which are the scene of transactions under investigation, made for the purpose of the trial, may be referred to by the witnesses to explain and render more easily intelligible their testimony, and are proper for the consideration of the jury, so far as they are shown to be correct, not as independent testimony, but in connection with other evidence, to enable the jury to understand and apply such evidence.[64] Maps, plans, or designs may be authenticated by any witness who can testify

traut, 92–17, 99+211 (other attacks by vicious dog).

[56] Finley v. Quirk, 9–194(179) (issue as to whether horse was balky at a particular time—fact that he was balky three or four days afterwards admissible); In re Pinney, 27–280, 6+791 (issue as to testamentary capacity); Bennett v. Kniss, 27–49, 6+401 (issue as to value of horse); Russell v. Chambers, 31–54, 16+458 (seduction—subsequent conduct in seeking to continue illicit relation); Miller v. N. P. Ry., 36–296, 30+892 (issue as to condition of cattleguard on day of the injury—defective condition day previous admissible); Osborne v. Carpenter, 37–331, 34+163 (working of harvester during several seasons); Segelbaum v. Segelbaum, 39–258, 39+492 (action for divorce for cruelty—prior acts of cruelty); Johnson v. St. Paul, 52–364, 54+735 (injury from decayed sidewalk—subsequent condition of walk); McLennan v. Mpls. etc. Co., 57–317, 59+628 (issue as to value of wheat—value ten days prior admissible).

[57] Gates v. Thatcher, 11–204(133); Ferris v. Boxell, 31–262, 25+592; Breen v. Moran, 51–525, 53+755; Wahl v. Walton, 30–506, 16+397; Casey v. Sevatson, 30–516, 16+407; Chapman v. Bigelow, 206 U. S. 41.

[58] See 14 Am. L. Rev. 350.

[59] 11 A. & E. Ency. Law (2 ed.) 536; Thayer, Cases on Ev. (2 ed.) 720; Wigmore, Ev. §§ 24, 1150.

[60] Stewart v. St. P. C. Ry., 78–110, 80+855.

[61] Hatfield v. St. P. etc. Ry., 33–130, 22+176. See Adams v. Thief River Falls, 84–30, 86+767.

[62] Hatfield v. St. P. & D. Ry., 33–130, 22+176; Clay v. Chi. etc. Ry., 104–1, 115+949.

[63] Hatfield v. St. P. & D. Ry., 33–130, 22+176 (general subject considered); State v. Lentz, 45–177, 47+720 (shirt worn by defendant at time of alleged murder); State v. Smith, 56–78, 57+325 (signs or notices to trespassers); State v. Minot, 79–118, 81+753 (burglar's tools); State v. Olson, 95–104, 103+727 (bottle of tanto).

[64] State v. Lawlor, 28–216, 9+698 (plans or diagrams of place of murder); Rippe v. Chi. etc. Ry., 23–18 (use of plat by witness to point out property); Hall v. Conn. etc. Co., 76–401, 79+497 (action to determine adverse claims—map of the locality).

that they are correct representations. It is unnecessary to call the person who made them.[65] They are admitted on the same principle as a photograph.[66]

3260. Photographs—Photographs are frequently admitted in evidence as either secondary or demonstrative evidence, according to the method of their use. They are admissible as demonstrative evidence whenever it is important that the locus in quo, or any object, person, or thing, be described to the jury. In such cases they serve to explain, or illustrate and apply the testimony, and are aids to the court or jury in comprehending the questions in dispute, as affected by the evidence. Before they can be admitted they must be shown by extrinsic evidence to be faithful representations of the place or subject as it existed at the time involved in the controversy.[67] They are admitted on the same principle as a map or diagram.[68] They may be authenticated by any person who is able to testify that they are correct representations. It is unnecessary to call the photographer.[69]

3261. Experiments—The allowance of experiments in the presence of the jury is a matter lying almost wholly in the discretion of the trial court.[70]

3262. Compulsory physical examination of plaintiff—In a civil action for personal injuries, in which the plaintiff tenders an issue as to his physical condition the trial court has a discretionary power, under proper safeguards to protect the rights of both parties, to order the plaintiff to submit to a physical examination of his person in order to ascertain the nature and extent of his injuries; and if he refuses to submit, his action may be dismissed.[71]

BEST AND SECONDARY EVIDENCE

3263. The general rule—The contents of a writing can only be proved by the writing itself, unless there is a legal excuse for not producing it.[72]

[65] Hall v. Conn. etc. Co., 76–401, 79+497.

[66] Cooper v. St. P. C. Ry., 54–379, 56+42.

[67] Stewart v. St. P. C. Ry., 78–110, 80+855 (action for personal injury—photograph of place of accident taken eight months after accident held properly excluded); State v. Smith, 78–362, 81+17 (murder—photograph of locus in quo admitted); State v. Holden, 42–350, 44+123 (to identify a person); Cooper v. St. P. C. Ry., 54–379, 56+42 (action for personal injury—plaintiff unable to attend trial—photograph of certain parts of his body admitted—photograph not returned on appeal—error not shown); Hall v. Conn. etc. Co., 76–401, 79+497 (action to determine adverse claims—photographs of the locality held properly authenticated); Attix v. Minn. S. Co., 85–142, 88+436 (action for death by wrongful act—photograph of locus in quo taken seven months after the accident admitted—objection insufficient to raise point that conditions were not the same as at the time of the accident); Blom v. Yellowstone P. Assn., 86–237, 90+397 (action for personal injury—photograph of machinery admitted); Seeley v. Grimes, 93–331, 101+1134 (action by real estate broker for commission—photograph of premises admitted); Sumner v. Northfield, 96–107, 104+686 (action for personal injury).

[68] Cooper v. St. P. C. Ry., 54–379, 56+42.

[69] Hall v. Conn. etc. Co., 76–401, 79+497.

[70] Smith v. St. P. C. Ry., 32–1, 18+827; Adams v. Thief River Falls, 84–30, 86+767; State v. Gardner, 96–318, 104+971. See § 3246.

[71] Wanek v. Winona, 78–98, 80+851; Wittenberg v. Onsgard, 78–342, 81+14 (query whether a plaintiff may be required to submit to X-rays); Aske v. Duluth etc. Ry., 83–197, 85+1011 (query whether order is admissible in evidence to give credit to examiner).

[72] Lowry v. Harris, 12–255(166) (testimony of witness based on a letter not produced); Cowley v. Davidson, 13–92 (86, 92) (wheat receipts); Steele v. Etheridge, 15–501(413) (contract entered into through letters); Board of Ed. v. Moore, 17–412 (391) (records of a board of education); Paine v. Sherwood, 19–315(270) (a memorandum, not an original document, the absence of the original not being accounted for); School Dist. v. Thelander, 32–476, 21+554 (revocation of license to teach); Ortt v. Mpls. etc. Ry., 36–396, 31+519 (contract for carriage of live stock); Nichols v. Howe, 43–181, 45+14 (telegram); Dade v. Aetna Ins. Co., 54–336, 56+48 (compliance with the conditions of an insurance policy); Cullman v. Bottcher, 58–381, 59+971 (will); Hurley v. West

3264. Nature and scope of rule—The broad statement is sometimes found in the cases that a party must produce the best evidence of which the case is susceptible.[73] This is true only in regard to the contents of writings. The so-called best evidence rule, at the present time, is merely a name for the rule which requires the contents of a writing to be proved by the writing itself, if it is available. It is not a broad, general principle applicable throughout the law of evidence.[74] A party is not required to produce the best, in the sense of the most credible and trustworthy, evidence at his command. He may prove his case by weak and inconclusive circumstantial evidence, though he may have in his power clear, direct, and conclusive evidence. He may, for example, prove marriage by circumstantial evidence, though he may have in his possession the marriage certificate or might produce witnesses who were at the ceremony. He may have two witnesses to the same fact; one, thoroughly untrustworthy, the other of unimpeachable probity. No rule of evidence requires him to produce the latter. A party is compelled to produce the best evidence at his command only in one class of cases. If he wishes to prove the contents of a writing he must do so by producing the writing itself.

3265. Real or apparent exceptions—When a writing comes into an action incidentally or collaterally and is not made the foundation of the rights and liabilities of the parties its contents may be proved by oral evidence.[75] When the object sought is to prove the existence of a writing and not its contents the fact of its existence may be proved without producing the writing.[76] The best evidence rule has been held not to prevent the use of oral evidence to prove the existence of a partnership;[77] the existence of a corporation;[78] the ownership of a boat;[79] the fact that a party was interested in a townsite;[80] the fact of a survey of logs and its results;[81] the fact of a payment;[82] the amount of a payment;[83] the financial condition of a decedent;[84] the ownership of a horse;[85] the officers of a corporation;[86] the fact that a person was holding land as the tenant of another under a written lease;[87] the acts of a corporation.[88]

3266. Degrees of secondary evidence—In this state it seems that there are no degrees of secondary evidence. If the original writing cannot be produced oral evidence is admissible though a copy of the writing is available.[89]

3267. Relaxation of rule—Discretion of court—The rule requiring the best evidence is not inflexible, but may, under proper circumstances, be relaxed

St. Paul, 83–401, 86+427 (proceedings to establish highway); Jordan v. Nicolin, 84–370, 87+915 (liquor license); Dwyer v. Whiteman, 92–55, 99+362 (promissory note).

[73] Chapman v. Dodd, 10–350(277, 284); Firkins v. Chi. etc. Ry., 61–31, 33, 63+172.

[74] Thayer, Ev. 484; Thayer, Cases on Ev. (2 ed.) 778; Wigmore, Ev. § 1177, et seq.; 17 Cyc. 471.

[75] Cedar Rapids etc. Ry. v. Raymond, 37–204, 33+704; Wehring v. Modern Woodmen, 107–25, 119+245. See Barg v. Bousfield, 65–355, 68+45; State v. Bourne, 86–432, 90+1108; 17 Harv. L. Rev. 560.

[76] Barg v. Bousfield, 65–355, 68+45; Holyoke v. Hadley, 174 Mass. 424.

[77] McEvoy v. Bock, 37–402, 34+740; Gates v. Manny, 14–21(13); Rosenbaum v. Howard, 69–41, 71+823.

[78] Johnson v. Okerstrom, 70–303, 73+147. See First Nat. Bank v. Schmitz, 90–45, 95+577.

[79] McMahon v. Davidson, 12–357(232); Fay v. Davidson, 13–523(491).

[80] Cooper v. Breckenridge, 11–341(241).

[81] Antill v. Potter, 69–192, 71+935.

[82] Barron v. Liedloff, 95–474, 104+289.

[83] Le May v. Brett, 81–506, 84+339.

[84] Phelps v. Winona etc. Ry., 37–485, 35+273.

[85] Cogley v. Cushman, 16–397(354).

[86] State v. Bourne, 86–432, 90+1108.

[87] Minn. Deb. Co. v. Johnson, 96–91, 104+1149, 107+740.

[88] Flakne v. Minn. etc. Co., 105–479, 117+785. See State v. Guertin, 106–248, 119+43.

[89] Magie v. Herman, 50–424, 52+909; Mpls. Times Co. v. Nimocks, 53–381, 55+546; State v. Spaulding, 34–361, 25+793; Smith v. Valentine, 19–452(393). But see, Winona v. Huff, 11–119(75); Estes v. Farnham, 11–423(312); Windom v. Brown, 65–394, 398, 67+1028.

by the trial court. It is proper to admit secondary evidence where it is not feasible to produce primary evidence.[90]

3268. Secondary evidence received without objection—A fact may be proved by secondary evidence admitted without objection.[91]

3269. Primary evidence not obtainable—It is a general rule that secondary or less satisfactory evidence is admissible when better evidence is not obtainable.[92] This rule applies even where a party's inability to produce primary evidence is due to his own negligence.[93]

3270. Primary evidence out of jurisdiction—It seems that it is sufficient to justify secondary evidence of the contents of a writing that it is out of the state and not in the control or custody of the party.[94]

3271. Contract partly oral and partly written—The law allows a contract to rest partly in writing and partly in parol. In such a case so much of the contract as is in writing must be proved by the writing.[95]

3272. On cross-examination—It is improper, on cross-examination, to ask a witness as to the contents of a written instrument not in evidence. If the party cross-examining desires to show the contents, and cross-examine upon them, he should, if the instrument is admitted, introduce it, and make it part of his cross-examination.[96]

3273. Primary evidence lost or destroyed—Where a writing is satisfactorily shown to have been lost or destroyed secondary evidence of its contents is admissible, in the absence of any showing that the loss or destruction occurred through the fraud of the party offering the secondary evidence.[97] This rule applies to public records as well as to private documents.[98] A party prima facie in possession of a document cannot prove its contents without showing its loss or destruction without his fault.[99]

3274. Requisite search for lost writing—A party seeking to introduce secondary evidence of the contents of a missing document must prove that a diligent and bona fide but unsuccessful search has been made for the document in the place where it is most likely to be found and that all accessible sources of information and means of discovery have been exhausted in a reasonable degree. Positive and direct evidence of the loss or destruction is not required. It is sufficient if the evidence would justify a reasonable inference of loss or

[90] Mattson v. Minn. etc. Ry., 98-296, 108+517.

[91] State v. Mims, 26-183, 2+494, 683; Webb v. O'Donnell, 28-369, 10+140; Cullman v. Bottcher, 58-381, 59+971; Goodall v. Norton, 88-1, 92+445; Lindquist v. Dickson, 98-369, 107+958.

[92] Coleman v. Retail L. Ins. Assn., 77-31, 79+588 (oral evidence of the amount and quality of lumber in cars that were burned); Cooper v. St. P. C. Ry., 54-379, 56+42 (person too sick to be present at trial—photograph of part of body admissible); Mattson v. Minn. etc. Ry., 98-296, 108+517 (oral evidence of marks on wrappers of sticks of dynamite).

[93] State v. Taunt, 16-109(99).

[94] Kleeberg v. Schrader, 69-136, 72+59. This case seems to overrule, in part at least, Wood v. Cullen, 13-394(365). In Thomson v. Palmer, 52-174, 53+1137 it was held that secondary evidence was admissible when the original writing was in possession of a stranger out of the state, who, after being sworn as a witness for the purpose of taking his deposition, refused, upon request, to produce it. It was not held, however, that such a foundation was "necessary." See Wehring v. Modern Woodmen, 107-25, 119+245.

[95] Horn v. Hansen, 56-43, 57+315.

[96] O'Riley v. Clampet, 53-539, 55+740; McDonald v. Campbell, 96-87, 104+760. See Clark v. Butts, 78-373, 81+11; Wigmore, Ev. § 1263.

[97] Winona v. Huff, 11-119(75); Estes v. Farnham, 11-423(312); Brown v. Eaton, 21-409; Molm v. Barton, 27-530, 8+765; Wilson v. Mpls. etc. Ry., 31-481, 18+291; Gaston v. Merriam, 33-271, 22+614; Magie v. Herman, 50-424, 52+909; Styer v. Sprague, 63-414, 65+659; Danvers etc. Co. v. Johnson, 93-323, 101+492.

[98] Estes v. Farnham, 11-423(312); Smith v. Valentine, 19-452(393); Hurley v. West St. Paul, 83-401, 86+427.

[99] Winona v. Huff, 11-119(75).

destruction. Whether sufficient search has been made depends upon the nature and importance of the document and all the circumstances of the case. Where the circumstances suggest fraud an exhaustive search may properly be required.[1] Whether sufficient search has been shown is a question for the determination of the trial court and its action will not be reversed on appeal except for a clear abuse of discretion.[2] In reviewing the question the supreme court will consider all the evidence and not limit itself to the evidence introduced prior to the admission of the secondary evidence.[3] Very much less diligence is required where the document belongs to the adverse party than where it belongs to the party seeking to introduce secondary evidence.[4]

3275. Proof of existence of missing document—A party seeking to introduce secondary evidence of the contents of a document claimed to be lost or destroyed must prove its former existence. The degree of proof required depends upon the facts of the particular case, but ordinarily slight proof is sufficient.[5] When the former existence of a deed claimed to be lost is denied proof of its former existence must be clear and strong and it must be shown that it was properly executed.[6]

3276. Title to realty—When the title to realty is directly in issue it is ordinarily not permissible to prove it by oral evidence, but the muniments of title must be produced.[7]

3277. Public records—Records of public officers are the best evidence of their contents and secondary evidence thereof is admissible only upon proper showing that the originals cannot be produced. This rule applies as well to ancient official records as to those of recent date.[8] Provision is made by statute for the proof of public records by certified copy.[9]

3278. Telegrams—When one commences a correspondence with another by telegraph he makes the telegraph company his agent for the transmission and delivery of his communication and the transcribed message actually delivered is primary evidence, and, if lost or destroyed, its contents may be proved by parol.[10] But telegrams are inadmissible until it is proved, by other evidence than the transcribed message, that they were sent by the persons whose names are signed to them.[11]

3279. Duplicate originals—Letterpress and carbon copies—Where a writing is executed in duplicate or multiplicate each copy is primary evidence.[12]

[1] Phoenix Ins. Co. v. Taylor, 5–492(393); Guerin v. Hunt, 6–375(260); Thayer v. Barney, 12–502(406); Board of Ed. v. Moore, 17–412(391); Groff v. Ramsey, 19–44(24); Gaston v. Merriam, 33–271, 22+614; State v. Spaulding, 34–361, 25+793; Nelson v. Central L. Co., 35–408, 29+121; Baker v. Thompson, 36–314, 31+51; Stocking v. St. Paul T. Co., 39–410, 40+365; Filebeck v. Bean, 45–307, 47+969; Slocum v. Bracy, 65–100, 67+843; Windom v. Brown, 65–394, 67+1028; Hargreaves v. Reese, 66–434, 69+223; Hurley v. West St. Paul, 83–401, 86+427; State v. Salverson, 87–40, 91+1; Wehring v. Modern Woodmen, 107–25, 119+245.

[2] Phoenix Ins. Co. v. Taylor, 5–492(393); Molm v. Barton, 27–530, 8+765; State v. Salverson, 87–40, 91+1; Wehring v. Modern Woodmen, 107–25, 119+245. See Wigmore, Ev. § 1194.

[3] Groff v. Ramsey, 19–44(24, 39).

[4] Desnoyer v. McDonald, 4–515(402).

[5] Groff v. Ramsey, 19–44(24); Stocking v. St. Paul T. Co., 39–410, 40+365; Slocum v. Bracy, 65–100, 67+843; Windom v. Brown, 65–394, 67+1028; Hurley v. West St. Paul, 83–401, 86+427. In Board of Ed. v. Moore, 17–412(391) it is said that oral evidence cannot be substituted for any writing, the existence of which is disputed, and which is material to the issue.

[6] Wakefield v. Day, 41–344, 43+71. See Towle v. Sherer, 70–312, 73+180.

[7] Moe v. Chesrown, 54–118, 55+832. See Cooper v. Breckenridge, 11–341(241).

[8] Hurley v. West St. Paul, 83–401, 86+427; School Dist. v. Thelander, 32–476, 21+554.

[9] See § 3349.

[10] Wilson v. Mpls. etc. Ry., 31–481, 18+291; Magie v. Herman, 50–424, 52+909. See Nichols v. Howe, 43–181, 45+14.

[11] Burt v. Winona etc. Ry., 31–472, 18+285; Adams v. Mille Lacs L. Co., 32–216, 19+735.

[12] Anderson v. Johnson, 74–171, 77+26; International H. Co. v. Elfstrom, 101–263, 112+252.

The different numbers or impressions of a writing produced by placing carbon paper between sheets of paper and writing upon the exposed surface are duplicate originals, and either may be introduced in evidence without accounting for the non-production of the other. But letterpress copies are not primary evidence.[13]

3280. Photographs—Photographs are sometimes used as secondary evidence.[14]

3281. Rules of railway company—Where it does not appear that the rules of a railway company are written or printed they may be proved by parol.[15]

3282. Copies as secondary evidence—Authentication—A copy of a document cannot be admitted as secondary evidence without being properly authenticated.[16] Ordinarily it must be shown to have been compared with the original.[17] A letterpress copy, the handwriting of which is verified as his by the person who wrote the paper copied, is sufficiently authenticated.[18]

3283. Admissions of contents of writings—It seems to be an open question in this state whether the contents of a writing can be proved by the admissions of a party in disregard of the best evidence rule.[19]

3284. Notice to produce—As a general rule a party cannot give secondary evidence of the contents of a document in the possession or control of the adverse party without first giving him due notice to produce it at the trial.[20] The sufficiency of a notice is a question for the determination of the trial court and its action will not be reversed on appeal except for a clear abuse of discretion.[21] An admission by the adverse party of the loss of a document will render a notice to produce unnecessary, but a denial that a document ever existed will not.[22] When the fact of the service of a notice is admitted by the adverse party it is unnecessary to produce the notice on the trial.[23] A notice to produce may be submitted to the court, but it cannot be introduced in evidence for the consideration of the jury.[24] Upon the trial of an action to recover for a loss by fire under an insurance policy, notice at the trial to the defendant's attorneys to produce proofs of loss, sent by plaintiff to the company in a distant state, it not appearing that they were within reach of its attorneys at that time, is insufficient to lay the foundation for secondary evidence.[25]

3285. Refusal to produce primary evidence on notice—Effect—Where a party to an action refuses, after due notice, to produce a writing in his possession, which is required to be used as evidence by the adverse party upon the trial and secondary evidence tending to establish the contents thereof is introduced by the latter, every reasonable intendment and presumption will be against the party who withholds the writing which might definitely establish

[13] International H. Co. v. Elfstrom, 101–263, 112+252. See 19 Harv. L. Rev. 123.

[14] Cooper v. St. P. C. Ry., 54–379, 56+42; Stewart v. St. P. C. Ry., 78–110, 80+855.

[15] Sobieski v. St. P. & D. Ry., 41–169, 42+863.

[16] Estes v. Farnham, 11–423(312) (copy of pleading in another action—requisite authentication); Groff v. Ramsey, 19–44(24) (copy of letter); Mpls. Times Co. v. Nimocks, 53–381, 55+546 (copy of notice to stockholders). See Lindahl v. Supreme Court I. O. F., 100–87, 98, 110+358 (copy of copy published in newspaper).

[17] In re Gazett, 35–532, 29+347. See Mpls. Times Co. v. Nimocks, 53–381, 55+546.

[18] Smith v. Moorhead Mfg. Co., 23–141.

[19] Minn. Deb. Co. v. Johnson, 96–91, 104+1149, 107+740. But see, Horton v. Chadbourn, 31–322, 17+865.

[20] Desnoyer v. McDonald, 4–515(402); Wood v. Cullen, 13–394(365); Board of Ed. v. Moore, 17–412(391, 402); Smith v. Moorhead Mfg. Co., 23–141; Dade v. Aetna Ins. Co., 54–336, 56+48.

[21] Winona v. Huff, 11–119(75); McNamara v. Pengilly, 64–543, 67+661.

[22] Clary v. O'Shea, 72–105, 75+115.

[23] Rosemond v. N. W. etc. Co., 62–374, 64+925.

[24] McNamara v. Pengilly, 64–543, 67+661.

[25] Dade v. Aetna Ins. Co., 54–336, 56+48.

the matter in controversy. The party withholding the writing will not afterwards be permitted to introduce it as evidence in his own behalf on his side of the case.[26] Where it appears with reasonable certainty that a written instrument was delivered to the assignee therein, who is a party to the action on trial, it is for him to account for or produce it upon due notice; and, if he does not, the adverse party may introduce parol evidence of its contents.[27] Secondary evidence is admissible if the primary evidence is in the possession of the adverse party and he refuses or neglects to produce it on due notice.[28]

HEARSAY

3286. General rule—As a general rule[29] evidence of statements, oral or written, made by a person not a witness, is inadmissible to prove the facts stated.[30] The chief objections to hearsay evidence are the want of the sanction of an oath and of an opportunity for cross-examination.[31]

[26] McGuiness v. School Dist., 39–499, 41+103; First Nat. Bank v. St. Anthony etc. Co., 103–82, 114+265.

[27] Lovejoy v. Howe, 55–353, 57+57; Hobe v. Swift, 58–84, 59+831.

[28] First Nat. Bank v. St. Anthony etc. Co., 103–82, 114+265.

[29] See, for history and basis of rule, Thayer, Ev. 498–501, 518–528; Wigmore, Ev. § 1360.

[30] Payson v. Everett, 12–216(137) (bank-note detectors—medical books); Faribault v. Sater, 13–223(210) (issue as to fraud in sale of mill—statements of third party as to amount mill would grind); State v. Shettleworth, 18–208(191) (rape—admissions of prosecutrix); Chute v. State, 19–271(230) (indictment for maintaining a nuisance—resolution of city council of which defendant was a member, declaring the building a nuisance); Marvin v. Dutcher, 26–391, 4+685 (statements in a casual conversation as to the interest of another in a hotel); Keller v. Sioux City etc. Ry., 27–178, 6+486 (a narrative account of a railway accident); Opsahl v. Judd, 30–126, 14+575 (action for death by wrongful act—statement of employee of defendant that "that rope had nearly drowned two or three other men before"); Conlan v. Grace, 36–276, 30+880 (statement in relation to the signing of a deed); Griffin v. Bristle, 39–456, 40+523 (statements of plaintiff to third party as to matter in controversy); Heartz v. Klinkhammer, 39–488, 40+826 (receipt); Redding v. Godwin, 44–355, 46+563 (resolutions adopted at a corporate meeting); State v. Lentz, 45–177, 47+720 (statements of a member of decedent's family expressing the opinion that he committed suicide); James v. N. P. Ry., 46–168, 48+783 (what an engineer told a witness as to the rules of a railway company); Gardner v. Minea, 47–295, 50+199 (conversion—statements of defendant to witness day after taking); Peck v. Snow, 47–398, 50+470 (action against collection agency for balance collected—letters to agency from its correspondents); Redding v. Wright, 49–322, 51+1056 (statements as to embarrassed condition of corporation); Granning v. Swenson, 49–381, 52+30 (schedule of property); King v. Pillsbury, 50–48, 52+131 (recital in a power of attorney); Houlton v. Manteuffel, 51–185, 53+541 (statement of child's age in certificate of baptism); Little v. Cook, 55–265, 56+750 (statement that A held the title to property for the benefit of B); Hahn v. Penney, 60–487, 62+1129 (statements of a third party as to delivery of a note to a bank); Wyatt v. Quinby, 65–537, 68+109 (statement in affidavit of costs and disbursements in foreclosure proceedings); State v. Shevlin, 66–217, 68+973 (plat of land with statement of amount, quantity and value of timber on the land); Paget v. Electrical E. & S. Co., 67–31, 69+475 (issue as to execution and acceptance of a lease—statements of third party as to such execution and acceptance); Williams v. G. N. Ry., 68–55, 70+860 (statement of patient to his physician that he has lost his sexual powers); State v. Spencer, 73–101, 75+893 (statements of a woman that the defendant was the father of her bastard child); Church v. Church C. Co., 75–85, 77+548 (action for wages—conversation of plaintiff with his wife as to the amount of wages he was to receive); Hanson v. Swenson, 78–18, 80+833 (statements of widow of decedent as to disposition of estate by administrator); Bathke v. Krassin, 82–226, 84+796 (action for alienation of wife's affection—statements of wife as to her reasons for leaving her husband); Hagerty v. Evans, 87–435, 92+399 (master and servant—action for injury to servant—letter of plaintiff's attorney to defendant stating attorney's version of accident); Lloyd v. Simons, 90–237, 95+903 (action to establish lost deed—conversations with third parties—entries in grantor's and grantee's reception books kept in the register of deeds' office); Price v.

3287. Scope of rule—It is to be observed that the rule against hearsay applies only to such statements as are sought to be introduced to prove the facts stated. The hearsay rule does not apply where the fact that a person not a witness has made a statement is relevant, and the statement is introduced merely to prove the fact of its being made, and not to prove the facts stated. And of course if the fact that a person not a witness made a statement is in issue the statement is admissible. All facts in issue are admissible regardless of rules of evidence.[32]

3288. Received without objection—Hearsay evidence has probative force when received without objection.[33]

3289. Statements of an interpreter—When two persons, not speaking a common language, voluntarily agree on a third to interpret between them, the latter is to be regarded as the agent of each to translate and communicate what he says to the other, and such communication by the interpreter is not hearsay, and the party to whom it is made may testify to it.[34]

3290. Striking out—Where testimony is given on direct examination, as though upon personal knowledge, and the cross-examination shows that it was upon hearsay, it should be stricken out on motion.[35]

3291. Exceptions—Most of the rules of evidence are classified as exceptions to the hearsay rule. It is to be observed, however, that some of the so-called exceptions antedate the hearsay rule and were developed independently. A true analysis would probably restate the law so as to make what we call the hearsay rule the exception, and make our main rule this, namely, that whatsoever is relevant is admissible.[36] The modern tendency is to enlarge the admissibility of hearsay.[37]

VARIOUS EXCEPTIONS TO HEARSAY RULE

3292. Statements of pain or suffering—Whenever a person's bodily feelings are relevant his statements, expressive of existing pain or suffering, are admissible, and may be proved by any person in whose presence they were uttered. But statements which are mere narratives of past pain, suffering, or symptoms are not admissible.[38] A distinction is made in this state between descriptive statements of existing pain or suffering and those exclamations or complaints

Standard etc. Co., 90–264, 95+1118 (register of patients kept at a hospital—statements as to nature of disease); Met. Music Co. v. Shirley, 98–292, 108+271 (affidavit forming a part of a mortgage and stating that affiant is the owner of the property covered by the mortgage); Harms v. Proehl, 104–303, 116+587 (record of a church trial).

[31] Mpls. Mill Co. v. Mpls. etc. Ry., 51–304, 315, 53+639.

[32] Elliott, Ev. § 322; 16 Cyc. 1146; Prof. Thayer, 15 Am. L. Rev. 79; Brown v. Grant, 39–404, 40+268 (statements admissible to charge person to whom they were made with notice or knowledge); Peet v. Sherwood, 47–347, 50+241, 929 (letter accepting application for a loan); Merchants Nat. Bank v. Stanton, 62–204, 64+390 (statements admissible to show knowledge and the relation of parties); Fredin v. Richards, 66–46, 68+402 (conversations and correspondence admissible to show relation between parties); Riggs v. Thorpe, 67–217, 69+891 (statements admissible to charge person to whom they were made with notice or knowledge); First Nat. Bank v. St. Anthony etc. Co., 103–82, 114+265 (instructions to an agent admissible to prove the agency).

[33] Met. Music Co. v. Shirley, 98–292, 108+271; Crozier v. Mpls. St. Ry., 106–77, 118+256; Schlemmer v. Buffalo etc. Ry., 205 U. S. 1.

[34] Miller v. Lathrop, 50–91, 52+274.

[35] Wilford v. Farnham, 44–159, 46+295.

[36] Thayer, Ev. 519, 522.

[37] Fourth Nat. Bank v. Albaugh, 188 U. S. 734. See Lehmann v. Chapel, 70–496, 499, 73+402; Swedish etc. Bank v. Chi. etc. Ry., 96–436, 105+69.

[38] Williams v. G. N. Ry., 68–55, 70+860; Firkins v. Chi. etc. Ry., 61–31, 63+172; Holly v. Bennett, 46–386, 49+189; White v. Standard etc. Co., 100–541, 110+1134; N. P. Ry. v. Urlin, 158 U. S. 271.

which are the spontaneous manifestations of distress, and it is held that the former are only admissible when made to a medical attendant for the purpose of medical treatment.[39] This distinction has been very justly characterized as "utterly pedantic and impracticable." [40] A physician may give an opinion of the condition of a person after an examination of him and may, in connection with such opinion, testify as to statements made to him by such person in regard to his present condition, suffering, or symptoms, though such statements are called out by the physician in the examination,[41] but he cannot testify as to statements of past conditions, suffering or symptoms.[42] Statements of pain and suffering are commonly treated as admissible under the res gestae rule,[43] but it seems better to treat them as an independent exception to the hearsay rule.

3293. Statements of intention or purpose—When it is a question whether a person did a certain thing, or with what purpose he did it, his statements, made about the time in question, in a natural manner, and without circumstances of suspicion, indicating his then existing intention or purpose, are admissible.[44] And in general, whenever a person's intention is relevant, his statements about the time in question, indicating his intention, are admissible.[45] A statement indicative of intention may be too remote in point of time to be admissible.[46]

3294. Statements of friendship, hatred, etc.—When a person's feelings toward another are relevant his statements indicative of such feelings are admissible.[47]

3295. Family history—Proof by acquaintance—A witness whose knowledge of the subject is derived from an intimate acquaintance with a family may testify as to such facts of family history as marriage, kinship, name, and death[48]

3296. Age—Date of birth—A person's age or date of birth may be testified to by himself, or by members of his family, though they know the fact only by hearsay based on family tradition.[49] Declarations and admissions of a person, since deceased, made ante litem motam, respecting the date of his birth, are

[39] Williams v. G. N. Ry., 68–55, 70+860.

[40] Wigmore, Ev. § 1719.

[41] Jones v. Chi. etc. Ry., 43–279, 45+444; Johnson v. N. P. Ry., 47–430, 50+473; Brusch v. St. P. C. Ry., 52–512, 55+57; Cooper v. St. P. C. Ry., 54–379, 56+42; Firkins v. Chi. etc. Ry., 61–31, 63+172; Miller v. St. P. C. Ry., 62–216, 64+554; Weber v. St. P. C. Ry., 67–155, 69+716; Williams v. G. N. Ry., 68–55, 70+860; Edlund v. St. P. C. Ry., 78–434, 81+214.

[42] Williams v. G. N. Ry., 68–55, 70+860; Johnson v. N. P. Ry., 47–430, 50+473.

[43] Firkins v. Chi. etc. Ry., 61–31, 63+172.

[44] State v. Hayward, 62–474, 497, 65+63 (murder—statement of decedent that she had an engagement with the accused for the evening of the murder); Hale v. Life I. & I. Co., 65–548, 68+182 (statement of intention to commit suicide); Mathews v. G. N. Ry., 81–363, 84+101 (statements indicating purpose of boarding train); State v. Henn, 39–476, 40+572 (threats to commit crime); Woodcock v. Johnson, 36–217, 30+894 (statements indicating intention to execute a will); Pearsall v. Tabour, 98–248, 108+808 (statement of prospective bankrupt of intention to take care of a creditor). See Wigmore, Ev. § 1725, et seq.; 7 Harv. L. Rev. 117; State v. Kelly, 77 Conn. 266; Nordan v. State, 143 Ala. 13; Clemens v. Royal Neighbors (N. D.), 103+402; People v. Barker, 144 Cal. 705.

[45] King v. McCarthy, 54–190, 55+960 (statements as to domicil); Hill v. Winston, 73–80, 75+1030 (id.); Downer v. St. P. etc. Ry., 23–271 (statements as to dedication of land); Boye v. Albert Lea, 93–121, 100+642 (id.).

[46] State v. Kelly, 77 Conn. 266.

[47] Chapman v. Dodd, 10–350(277) (malicious prosecution—statements indicating malice); Bartlett v. Hawley, 38–308, 37+580; Skeffington v. Eylward, 97–244, 105+638 (id.); Lockwood v. Lockwood, 67–476, 70+784 (action for alienation of husband's affections—statement of husband that he had decided to leave his wife).

[48] Hoyt v. Lightbody, 98–189, 108+843; Backdahl v. Grand Lodge, 46–61, 48+454.

[49] Houlton v. Manteuffel, 51–185, 53+541; Taylor v. Grand Lodge, 101–72, 111+919.

admissible in evidence against his beneficiary in an action to recover upon a mutual benefit certificate issued to him in his lifetime, in which action the defence interposed is that a false date of birth was given in the application for membership, the basis for the insurance.[50] A statement as to a child's age in the certificate or registry of his baptism is, alone, no proof of the date of his birth.[51]

3297. Statements of decedents as to pedigree—A statement, oral or written, made by a person since deceased and who was a relative of the family in regard to which it was made, relating to matters of pedigree, including descent and relationship, births, marriages, and deaths, and the times when such events occurred, is admissible between third parties, when relevant.[52] This rule is classified as an exception to the hearsay rule, but it is worthy of note that it is older than the hearsay rule.[53] The statement must have been made ante litem motam.[54]

3298. Statements of decedents against interest—A statement, oral or written, made by a person since deceased is admissible between third parties, when relevant, if it appears that he had personal knowledge of the fact stated, that he had no apparent motive to misrepresent the fact, and it was against his pecuniary or proprietary interest.[55] Such statements are admissible though made post litem motam.[56] The rule owes its adoption to the desire of courts to prevent a failure of justice where perhaps the facts could not otherwise be shown. It rests upon the improbability of falsehood in the statement, it being considered that the regard which men have for their own interest will be sufficient security for the truthfulness of such statements.[57] While this rule is classified as an exception to the hearsay rule it is worthy of note that it is older than the hearsay rule, at least as regards written statements.[58]

3299. Reputation—Reputation in the community has been held admissible to prove solvency and insolvency;[59] the character of a house of prostitution;[60] boundaries;[61] and the fact that a man was unmarried.[62] It has been held inadmissible to prove the quality of slate taken from a quarry;[63] the residence of a pauper;[64] and the fact of agency.[65] It has been said that reputation is not mere hearsay,[66] but the prevailing practice is to treat it as hearsay and admit it only in excepted cases.[67]

[50] Taylor v. Grand Lodge, 101–72, 111+919.

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

[52] Dawson v. Mayall, 45–408, 48+12; Houlton v. Manteuffel, 51–185, 53+541; Taylor v. Grand Lodge, 101–72, 111+919. See Wigmore, Ev. § 1480; 1 Elliott, Ev. 360.

[53] Thayer, Ev. 520.

[54] Halvorsen v. Moon, 87–18, 91+28; Taylor v. Grand Lodge, 101–72, 111+919.

[55] Halvorsen v. Moon, 87–18, 91+28 (statement that the declarant was the cause of a fire); Hosford v. Rowe, 41-245, 42+1018 (statement by husband that an antenuptial contract had been annulled); Zimmerman v. Bloom, 43–163, 45+10 (statement as to receipt of interest and the receipt of a note in payment); Baker v. Taylor, 54–71, 55+823 (statement of the purchaser of a mare that the seller reserved an unborn colt); Dixon v. Union Ironworks, 90–492, 97+375 (statements of an employee as to the cause of his death tending to exculpate his employer from a charge of negligence); 1 Elliott, Ev. § 434; 2 Wigmore, Ev. § 1455.

[56] Halvorsen v. Moon, 87–18, 91+28.

[57] Baker v. Taylor, 54–71, 55+823.

[58] Thayer, Ev. 521.

[59] Nininger v. Knox, 8–140(110); Burr v. Willson, 22–206; West v. St. Paul Nat. Bank, 54–466, 56+54; Hahn v. Penney, 60–487, 62+1129; Birum v. Johnson, 87–362, 92+1 (financial standing). To prove notice or want of notice of insolvency, or cause, or want of cause, to believe party insolvent, Hahn v. Penney, 62–116, 63+843.

[60] State v. Smith, 29–193, 12+524; State v. Bresland, 59–281, 61+450; Egan v. Gordan, 65–505, 68+103.

[61] Thoen v. Roche, 57–135, 58+686.

[62] Holcomb v. Independent School Dist., 67–321, 69+1067.

[63] Chalmers v. Whittemore, 22–305.

[64] Albion v. Maple Lake, 71–503, 74+282.

[65] Graves v. Horton, 38–66, 35+568.

[66] State v. Bresland, 59–281, 61+450.

[67] See Wigmore, Ev. § 1580; 16 Cyc. 1209.

RES GESTAE

3300. General rule—Whenever any act, transaction, or occurrence may be proved, statements accompanying or forming a part thereof are admissible, if they tend to explain or characterize it.[68] This is an exception to the hearsay rule.[69] The modern tendency is to extend it.[70] It is commonly called the res gestae rule. The term res gestae, however, is often used to denote all the circumstances of an occurrence.[71] The singular form "res gesta" is in good usage in this connection,[72] but the plural form is the original.[73]

3301. Time of statement—The statement must be contemporaneous with the act or transaction of which it is a part. It is sufficient if it is substantially contemporaneous—if it was made so soon after the act or transaction that it may fairly be regarded as a part or incident thereof.[74] Whether a statement constitutes a part of an act or transaction depends upon the facts of the par-

[68] Stephen, Ev. arts. 3, 8; Prof. Thayer, 14 Am. L. Rev. 817; 15 Id. 1 (these articles are republished in Thayer, Legal Essays); 19 L. R. A. 733; 3 Columbia L. Rev. 351; 19 Law Quarterly Rev. 435; Waldele v. N. Y. etc. Ry., 95 N. Y. 274; Murray v. Boston etc. Ry., 72 N. H. 32; Vicksburg etc. Ry. v. O'Brien, 119 U. S. 99; Phoenix v. Gardner, 13-430(396) (transmission of deed of grantor to grantee—accompanying letter explaining purpose of deed admissible); Madigan v. De Graff, 17-52(34) (memoranda used by parties in settling an account); State v. Mims, 26-183, 2+494 (settlement between county auditor and county treasurer—papers used in settlement admissible); O'Connor v. Chi. etc. Ry., 27-166, 6+481 (railway accident—statements of engineer to conductor made shortly after accident in relation to its circumstances); State v. Horan, 32-394, 20+905 (highway robbery—statements of person robbed made shortly after the robbery to policemen describing the robbers); Jones v. Rigby, 41-530, 43+390 (statements made when surrendering property); State v. Hayward, 62-474, 65+63 (homicide—statement of decedent a few hours before homicide that she had an engagement with the accused for the evening); State v. Williams, 96-351, 105+265 (homicide—statement that the accused shot the declarant and another who died); O'Brien v. N. W. etc. Co., 82-136, 84+735 (statements made in connection with the management of a dam); Shelley v. Lash, 14-498(373) (statements of person making a payment as to the account on which it was made); Namyst v. Batz, 85-366, 88+991 (personal injury—statement of plaintiff that a plank on which he stepped tipped); Berkey v. Judd, 22-287 (fraud—statements forming part of general scheme of fraud); Lockwood v. Lockwood, 67-476, 70+784 (action for alienation of husband's affections—statement of husband that he had decided to leave his wife); Hyvonen v. Hector I. Co., 103-331, 115+167 (personal injury—fall of skip in mining shaft—statement of engineer, twenty or twenty-five minutes after accident and within five minutes after injured men were brought to surface, as to the cause of the accident); State v. Alton, 105-410, 117+617 (rape—statements made by the woman about half an hour after the assault as to identity of assailant held admissible—other statements made by her about an hour after the assault held inadmissible). When a fact is offered in evidence the whole transaction, if it consists of many particulars, may and ought to be proved. Every additional circumstance proved may vary the effect of the evidence—may neutralize it or give it point. What is then said by the parties, and what is said by others to them, relative to the subject of the transaction, is a part of the transaction itself. It is admissible on the same principle that every other part of it is, that the whole matter may be seen by the jury. Wiggin v. Plumer, 31 N. H. 251, 267.

[69] Firkins v. Chi. etc. Ry., 61-31, 33, 63+172; Waldele v. N. Y. C. etc. Ry., 95 N. Y. 274; 15 Am. Law Rev. 76; Wigmore, Ev. § 1745 et seq.

[70] Lehmann v. Chapel, 70-496, 73+402; Jack v. Life Assn., 113 Fed. 49; Murray v. Boston etc. Ry., 72 N. H. 32.

[71] See State v. Dumphey, 4-438(340); Opsahl v. Judd, 30-126, 14+575; Albitz v. Mpls. etc. Ry., 40-476, 42+394; State v. Minot, 79-118, 81+753; Hjelm v. Western G. C. Co., 98-222, 108+803.

[72] See O'Connell v. Cox, 179 Mass. 250.

[73] 21 Harv. L. Rev. 158.

[74] O'Connor v. Chi. etc. Ry., 27-166, 6+481; State v. Horan, 32-394, 20+905; State v. Williams, 96-351, 105+265; Hyvonen v. Hector I. Co., 103-331, 115+167; State v. Alton, 105-410, 117+617. See Conlan v. Grace, 36-276, 30+880; Vicksburg etc. Ry. v. O'Brien, 119 U. S. 99; Murray v. Boston etc. Ry., 72 N. H. 32; Prof. Thayer, 15 Am. Law Rev. 91; 19 L. R. A. 733.

ticular case and ought to be left almost wholly to the discretion of the trial court.[75] Statements which are mere narratives of past transactions are not admissible,[76] but of course the fact that a statement is in a narrative form does not exclude it.[77]

3302. May be part of evidentiary fact—The general rule is sometimes so stated as to suggest that a statement is not admissible unless it is a part of the act or transaction in issue.[78] It is admissible if it is a part of an evidentiary fact.[79]

3303. Must explain or characterize act—The statement must explain or characterize the act or transaction of which it is a part.[80]

3304. Must be part of some act or transaction—The statement must be a part of some act or transaction which is in issue or relevant to the issue. Its admissibility depends, not upon its own logical relevancy to the issue, but upon the admissibility of the act or transaction of which it is a part.[81]

3305. Must be material—A statement is inadmissible if it is immaterial, though it is a part of the res gestae.[82]

3306. Statements of persons in possession of property—Statements of a person in possession of property tending to characterize his possession are admissible when the character of his possession is relevant.[83] Formerly a less liberal rule prevailed in this state.[84] The declarations of a person alleged to

[75] O'Connor v. Chi. etc. Ry., 27–166, 173, 6+481; State v. Horan, 32–394, 20+905; State v. Bly, 99–74, 86, 108+833. See State v. Alton, 105–410, 117+617 (the statements held inadmissible in this case were such that their admissibility might well have been left to the discretion of the trial court—to grant a new trial because of their admission seems a clear departure from the sensible rule as to new trials laid down in State v. Nelson, 91–143, 97+652); Wigmore, Ev. § 1750.

[76] Keller v. Sioux City etc. Ry., 27–178, 6+486; Opsahl v. Judd, 30–126, 14+575; Gardner v. Minea, 47–295, 50+199; State v. Gallehugh, 89–212, 94+723. See Korby v. Chesser, 98–509, 108+520; Hyvonen v. Hector I. Co., 103–331, 115+167.

[77] See Wigmore, Ev. § 1756.

[78] See Conlan v. Grace, 36–276, 30+880.

[79] Elmer v. Fessenden, 151 Mass. 361; 15 Am. Law Rev. 96.

[80] Finch v. Green, 16–355(315); Opsahl v. Judd, 30–126, 14+575; Conlan v. Grace, 36–276, 30+880; Reem v. St. P. C. Ry., 77–503, 80+638; State v. Kelly, 77 Conn. 266.

[81] Marvin v. Dutcher, 26–391, 406, 4+685; Conlan v. Grace, 36–276, 30+880; Hulett v. Carey, 66–327, 69+31; Paget v. Electrical E. & S. Co., 67–31, 69+475; Reem v. St. P. C. Ry., 77–503, 80+638; State v. Bly, 99–74, 108+833; Wright v. Tatham, 4 Bing. N. C. 489; State v. Kelly, 77 Conn. 266. The case of State v. Hayward, 62–474, 65+63 violates this rule and is unsound. The statements therein were properly admitted on the ground stated in the concurring opinion of Chief Justice Start. See Wigmore, Ev. § 1726.

[82] O'Connor v. Chi. etc. Ry., 27–166, 6+481; Opsahl v. Judd, 30–126, 14+575; Conlan v. Grace, 36–276, 30+880; Jones v. Rigby, 41–530, 43+390; State v. Bly, 99–74, 108+833.

[83] Furman v. Tenny, 28–77, 9+172 (statement of husband living with his wife and accustomed to use and care for a horse—question of fraud upon creditors); Murch v. Swensen, 40–421, 42+290 (statements of vendor remaining in possession—question of fraud upon creditors); Merriam v. Swensen, 42–383, 45+960 (statements of vendor remaining in possession); Rosenberg v. Burnstein, 60–18, 61+684 (statement of person in possession of property that another person owned it); Brown v. Kohout, 61–113, 63+248 (statement of person in possession of land that he owned it—adverse possession); Elwood v. Saterlie, 68–173, 71+13 (statements of third party in possession as to the party for whom he was holding it); Lehmann v. Chapel, 70–496, 73+402 (statements of vendor remaining in possession—question of fraud upon creditors); Rollofson v. Nash, 75–237, 77+954 (proof of title by statements of prior owner in possession); McDonald v. Bayha, 93–139, 100+679 (statements of person holding property for another—question of conversion). See Adler v. Apt, 30–45, 14+63; Dailey v. Linnehan, 42–277, 44+59; Miller v. Lathrop, 50–91, 52+274; Paget v. Electrical E. & S. Co., 67–31, 65+475; Enneking v. Woebkenberg, 88–259, 92+932; Minn. Deb. Co. v. Johnson, 96–91, 104+1149, 107+740.

[84] King v. Frost, 28–417, 10+423; Livingston v. Ives, 35–55, 27+74; Olson v. Swensen, 53–516, 55+596. These cases are disapproved in Lehmann v. Chapel, 70–496, 73+402.

have been in possession of property at a given time as to his title thereto, or as to the character of his possession, are not admissible in an action to which he is not a party, unless the fact of his possession is first established by evidence independent of his declarations.[85]

EVIDENCE AT FORMER TRIAL

3307. Witness out of state—The fact that a witness is out of the state is a sufficient ground for admitting his testimony at a former trial. If his testimony at the former trial was taken down in full by an official court stenographer it is unnecessary to attempt to secure his deposition.[86] It is not essential to show that he is actually domiciled out of the state, yet the fact that he is a resident is pertinent and may be shown by his declarations.[87] The party offering such evidence must show that he could not, with the exercise of due diligence, procure the attendance of the witness at the second trial.[88] When a party has taken the deposition of a witness the absence of the witness from the state is not a ground for admitting his testimony at a former trial.[89]

3308. Death of witness—The fact that a witness is dead is a sufficient ground for admitting his testimony at a former trial.[90] The testimony of a witness for the state given on a preliminary examination of the defendant, who was present and had a reasonable opportunity to cross-examine the witness, is competent against the defendant on his subsequent trial for the same charge, the witness having died after the preliminary examination, and before the trial.[91]

3309. Insanity of witness—Failure of memory—The fact that a witness is insane is a sufficient ground for admitting his testimony at a former trial,[92] but failure of memory short of imbecility is not.[93]

3310. How proved—The testimony of a witness on a former trial may be shown by the stenographer who took it, who may use his original notes to refresh his memory, and read the testimony therefrom in cases where he cannot speak from memory as to the facts, or from a transcript of his notes, on proof being made accounting for the non-production of the original and showing the correctness of the transcript.[94] It may also be proved by a settled case,[95] or the report of a referee.[96]

OPINION EVIDENCE—NON-EXPERTS

3311. General rule—The fact that any person is of opinion that a fact in issue or relevant to the issue does or does not exist is generally inadmissible to prove the existence or non-existence of such fact.[97] It is not the function of a witness to draw inferences. It is the function of a witness to submit facts to the jury from which they may draw inferences pertinent to the issues. It is not generally permissible for a witness to give his impressions, opinions, or inferences to the jury. He must limit himself to matters of fact within his

[85] Whitney v. Wagener, 84–211, 87+602.
[86] Mpls. M. Co. v. Mpls. etc. Ry., 51–304, 53+639; King v. McCarthy, 54–190, 55+960; Hill v. Winston, 73–80, 75+1030.
[87] King v. McCarthy, 54–190, 55+960; Hill v. Winston, 73–80, 75+1030.
[88] Wilder v. St. Paul, 12–192(116).
[89] Stein v. Swensen, 46–360, 49+55.
[90] Slingerland v. Slingerland, 46–100, 48+605; Mpls. M. Co. v. Mpls. etc. Ry., 51–304, 315, 53+639; State v. George, 60–503, 63+100.
[91] State v. George, 60–503, 63+100.
[92] Mpls. M. Co. v. Mpls. etc. Ry., 51–304, 315, 53+639.
[93] Stein v. Swensen, 46–360, 49+55.
[94] Amor v. Stoeckele, 76–180, 78+1046; Stahl v. Duluth, 71–341, 74+143; State v. George, 60–503, 63+100.
[95] Slingerland v. Slingerland, 46–100, 48+605.
[96] Brown v. Eaton, 21–409.
[97] See Stephen, Ev. art. 48.

own knowledge.[98] While it is not generally permissible for a witness to give his impressions he may do so, if he swears to them as a matter of recollection.[99] He may testify "to the best of his recollection." [1] Cases are cited below holding various questions and answers either obnoxious [2] or not obnoxious [3] to the general rule.

[98] Thayer, Ev. 524; 17 Cyc. 25; Bank of Com. v. Selden, 1-340(251); Selden v. Bank of Com., 3-166(108); Sowers v. Dukes, 8-23(6); Hathaway v. Brown, 22-214; Lovejoy v. Howe, 55-353, 57+57; Conn. etc. Co. v. Lathrop, 111 U. S. 612, 618.

[99] Lovejoy v. Howe, 55-353, 57+57.

[1] McGrath v. G. N. Ry., 80-450, 83+413.

[2] Bank of Com. v. Selden, 1-340(251) (impression of witness as to knowledge of another); Selden v. Bank of Com., 3-166 (108) (impressions of witness—opinion as to liability of another); Roehl v. Baasen, 8-26(9) (question to witness, did you know the instrument was a mortgage when you signed it?); Nininger v. Knox, 8-140 (110) (opinion of witness as to his solvency at a certain time); Payson v. Everett, 12-216(137) (opinion as to genuineness of bank note); Lowry v. Harris, 12-255(166) (supposition of a witness as to a fact); Faribault v. Sater, 13-223(210) (as to effect of representations on the mind of another); Hathaway v. Brown, 22-214 (inference of witness—question to witness, could J. B. and H. have sat down by the stove, and had a conversation, without you having known it?—this is an absurdly technical case. See Fonda v. St. P. C. Ry., 77-336, 79+1043); Wilson v. Reedy, 33-503, 24+191 (question to witness, was the trouble with the machine, or the incompetency of these men to run it?) Peck v. Small, 35-465, 29+69 (question as to what was the "influence" of the defendant in the community); Gribble v. Pioneer Press Co., 37-277, 34+30 (as to meaning and application of an alleged libel); Hannem v. Pence, 40-127, 41+657 (question to witness whether A heard B call to A to get out of the way); State v. Lentz, 45-177, 47+720 (murder—opinion of witness that decedent committed suicide and accused was not guilty); Williams v. Clark, 47-53, 49+398 (opinion as to date of instrument based only on its appearance); Larson v. Lombard I. Co., 51-141, 53+179 (opinion as to an agency); Lovejoy v. Howe, 55-353, 57+57 (impression of a conversation); Hahn v. Penney, 60-487, 62+1129 (opinion as to solvency or insolvency); Peerless M. Co. v. Gates, 61-124, 63+260 (question to witness, state whether your father agreed to keep the machine, and did keep it, under this agreement); People's Bank v. Howes, 64-457, 67+355 (question to witness, you may state in what capacity or who he represented or claimed to represent); Manahan v. Halloran, 66-483, 69+619 (evidence that A appeared to be afraid of or under the influence of B); Traders' Ins. Co. v. Herber, 67-106, 69+701 (statement of witness as to existence of fact, not presumptively within his knowledge, but the existence of which is susceptible of direct proof); Carlson v. Marston, 68-400, 71+398 (whether it was possible to fasten a grab hook in a swamp chain otherwise than was done); Anderson v. G. N. Ry., 74-432, 77+240 (opinion of witness that it was neither practicable nor possible to work with safety in repairing the track in the manner he did except by a warning from the man who held the lever of the track jack); Moore v. Townsend, 76-64, 78+880 (opinion that a ladder standing against a building was dangerous and liable to blow down); Robbins v. Legg, 80-419, 83+379 (inference of witness from conversation with deceased person); Moldenhauer v. Mpls. St. Ry., 80-426, 83+381 (opinion as to strength of headlights); Conrad v. Swanke, 80-438, 83+383 (questions to witness, I will ask you if you would have sold these goods if you had understood that he was out of the business?—which was the responsible partner in the firm?); Hubachek v. Hazzard, 83-437, 86+426 (question to witness, had you had in mind * * * the purchasing of * * * the premises in question, in case they could be obtained by you at the figures you desired to pay for them?—held to call for a conclusion of the witness—this seems clearly wrong—if a witness' intention is relevant it is certainly proper for him to testify directly thereto. See § 3231); Swanson v. Andrus, 84-168, 87+363, 88+252 (testimony of witness that "we hadn't definitely settled"—held a conclusion); Steinbauer v. Stone, 85-274, 88+754 (opinion or conclusion of witness as to cost of certain work); Davis v. Hamilton, 88-64, 92+512 (libel—testimony of defendant as to truth of charges); Veum v. Sheeran, 88-257, 92+965 (inference of witness from conversation with deceased person); Lake v. Lund, 92-280, 99+884 (question to a witness as to whether he ever disaffirmed a contract); State v. Minck, 94-50, 102+207 (question to witness as to whether he thought any cement had ever been stolen from a certain place); McKenzie v. Banks, 94-496, 103+497 (question to witness, were you or were you not in such a position that you would have seen Mrs. A touch Mrs. B if she had done so?—held to call for a conclusion—this seems unduly technical. See Fonda v. St. P. C. Ry., 77-336,

3312. Comments on rule—Discretion of trial court—Harmless error— There is great confusion in the cases in regard to the theory and scope of the opinion evidence rule.[4] The modern tendency is to break away from the rule—to multiply exceptions.[5] A leading court has held that "there is, in truth, no general rule requiring the rejection of opinions as evidence." [6] The profoundest student of our law of evidence has said that "there is ground for saying that, in the main, any rule excluding opinion evidence is limited to cases where, in the judgment of the court, it will not be helpful to the jury. Whether accepted in terms or not, this view largely governs the administration of the rule. It is obvious that such a principle must allow a very great range of permissible difference in judgment; and that conclusions of that character ought not, usually, to be regarded as subject to review by higher courts. Unluckily the matter is often treated by the courts with much too heavy a hand; and the quantity of decisions on the subject is most unreasonably swollen." [7] Our own court has grievously sinned in this regard, especially in some of the earlier cases.[8] In the later cases it has shown a commendable tendency to hold error in this connection harmless.[9] Here, more than anywhere in the law of evidence courts should "cease to be pedantic and endeavor to be practical." [10]

79+1043); Anderson v. San Francisco, 104–320, 116+473 (question to witness as to utility of highway); Phillips v. Menomonie H. P. B. Co., 109–55, 122+874 (question to witness as to performance of a contract).

[3] Gates v. Manny, 14–21(13) (testimony of partner as to members of firm); Marcotte v. Beaupre, 15–152(117) (question to witness, state whether the agreement of $150 for a $9,000 house had anything to do with the plans for the new house); Cogley v. Cushman, 16–397(354) (witness may be asked whether he is the owner of personalty); Goodell v. Ward, 17–17(1) (question to witness, what damage, if any, have you sustained by reason of the taking and withholding of the wagon?); Derosia v. Winona etc. Ry., 18–133(119) (plaintiff testified that he called for his goods, and was asked, why did you not get them?); Schwerin v. De Graff, 19–414(359) (estimate as to number of yards excavated); Kronschnable v. Knoblauch, 21–56 (witness may testify as to relative value of two articles though ignorant of the actual value of either); State v. Lee, 22–407 (question to witness, what was defendant's character as to peace and quietness?); Kelly v. Southern Minn. Ry., 28–98, 9+588 (testimony as to how planks at railway crossings are usually laid); Blakeman v. Blakeman, 31–396, 18+103 (slander—testimony as to meaning and application of slanderous words); Kolsti v. Mpls. etc. Ry., 32–133, 19+655 (question to witness, would it be practicable to lock or fence turntables?—held to call for a fact); State v. Holden, 42–350, 44+123 (testimony to the effect that certain statements of an accused person were voluntary); Evison v. Chi. etc. Ry., 45–370, 48+6 (testimony that a witness did an act based on his customary practice); Backdahl v. Grand Lodge, 46–61, 48+454 (id.); Beardsley v. Mpls. St. Ry., 54–504, 56+176 (effect of weak fields in burning out armatures); Yanish v. Tarbox, 57–245, 59+300 (question as to whether a plat conformed to the recollection of the witness); Peerless M. Co. v. Gates, 61–124, 63+260 (question to witness, state whether or not any person or persons acting for you, as your agent or otherwise, had the right or authority to make the sale of a thresher, or any piece of machinery, to G. without first having submitted a printed order for the same?); Rosenbaum v. Howard, 69–41, 71+823 (testimony of partner as to members of firm); Burnett v. G. N. Ry., 76–461, 79+523 (as to flowage of water); Fonda v. St. P. C. Ry., 77–336, 79+1043 (question to witness, do you think you would have seen a team if there was one there?—See McKenzie v. Banks, 94–496, 103+497); McGrath v. G. N. Ry., 80–450, 83+413 (question to witness, do you know whether or not the whistle was about the time the train started off?—answer of witness, I should judge it was about the time); Carver v. Crookston L. Co., 84–79, 86+871 (estimate as to the number of logs in a boom).

[4] See 3 Wigmore, Ev. § 1917; Thayer, Ev. 524.

[5] See 3 Wigmore, Ev. 1929. In Sowers v. Dukes, 8 23(6), it is said that courts have uniformly and strictly adhered to the rule which excludes the opinions of witnesses, unless they fall within the exceptions to the general rule.

[6] Hardy v. Merrill, 56 N. H. 227, 241.

[7] Thayer, Ev. 525.

[8] See, for example, Hathaway v. Brown, 22–214.

[9] Larson v. Lombard I. Co., 51–141, 53+179; People's Bank v. Howes, 64–457, 67+355; Manahan v. Halloran, 66–483, 69+

3313. Laying foundation—Before opinion evidence can be admitted a foundation must be laid by showing that the witness is qualified to give an opinion. The matter rests in the discretion of the trial court.[11]

3314. Received without objection—Inadmissible opinion evidence has probative force if it is received without objection.[12]

3315. Facts which can only be described by an opinion—Facts may be submitted to a jury in the form of an opinion when they cannot otherwise be adequately or easily described.[13] The following facts fall within this rule: drunkenness, joy, grief, fear, hope, despondency, friendliness, hostility, fright, jest or earnest, offensive or insulting manner, appearance of being sane or insane;[14] sounds;[15] the health or physical condition of a person—appearance of being well, ill, or in pain.[16]

3316. Sanity—Mental capacity—A witness, though not an expert, may give an opinion as to the sanity or mental capacity of a person whom he has observed, after testifying as to the facts within his observation upon which his opinion is based.[17] He may testify as to whether such person acts like a sane or an insane person.[18] The attesting witnesses to a will are competent to testify as to the testamentary capacity of the testator.[19]

3317. Intention, motive, knowledge, etc., of another—A witness cannot testify as to the intention, motive, knowledge, belief, etc. of another.[20]

3318. Belief or opinion based on customary practice—A witness may testify that he believes that he did a certain act on a particular occasion, though he has no distinct recollection of doing it, if it was his customary practice to do it.[21]

3319. To prove a negative—Often the only way to prove a negative is to ask a witness a question which calls for his conclusion.[22]

3320. Opinion of handwriting—Competency of witness—To render a witness competent to testify as to the genuineness of the signature of another, as one having personal acquaintance with his handwriting, it is unnecessary that he should have seen the party write. Such personal acquaintance may be acquired by having seen papers, purporting to be the handwriting of the party, and which he has acknowledged or acquiesced in as being genuine.[23]

3321. Performance of contract—Where the performance of a contract is in issue, the trial court, in its discretion, may allow a party to be asked whether or not he has performed the same, if the answer amounts to no more than a mere

619; Finley v. Chi. etc. Ry., 71–471, 74+174; Fonda v. St. P. C. Ry., 77–336, 79+1043; Nichols v. Gerlich, 84–483, 87+1120; McKenzie v. Banks, 94–496, 103+497.

[10] See Swedish etc. Bank v. Chi. etc. Ry., 96–436, 105+69.

[11] Clarke v. Phil. etc. Co., 92–418, 100+231. See § 3335.

[12] Cameron v. Duluth etc. Co., 94–104, 102+208.

[13] State v. Lucy, 41–60, 42+697; McKillop v. Duluth St. Ry., 53–532, 55+739.

[14] McKillop v. Duluth St. Ry., 53–532, 55+739; Manahan v. Halloran, 66–483, 69+619; Myhre v. Tromanhauser, 64–541, 67+660; Clarke v. Philadelphia etc. Co., 92–418, 100+231.

[15] State v. Lucy, 41–60, 42+697.

[16] Cannady v. Lynch, 27–435, 8+164; Tierney v. Mpls. etc. Ry., 33–311, 23+229; Hall v. Austin, 73–134, 75+1121; Isherwood v. Jenkins, 87–388, 92+230; Morris v. St. P. C. Ry., 105–276, 117+500.

[17] In re Pinney, 27–280, 6+791, 7+144; Cannady v. Lynch, 27–435, 8+164; Woodcock v. Johnson, 36–217, 30+894; Scott v. Hay, 90–304, 97+106; Conn. M. L. Ins. Co. v. Lathrop, 111 U. S. 612.

[18] Cannady v. Lynch, 27–435, 8+164.

[19] Geraghty v. Kilroy, 103–286, 114+838.

[20] Bank of Com. v. Selden, 1–340(251); State v. Garvey, 11–154(95); Lowry v. Harris, 12–255(166); Faribault v. Sater, 13–223(210); Berkey v. Judd, 22–287; Nichols v. Gerlich, 84–483, 87+1120; State v. Pierce, 85–101, 88+417.

[21] Evison v. Chi. etc. Ry., 45–370, 48+6; Backdahl v. Grand Lodge, 46–61, 48+454.

[22] Peerless M. Co. v. Gates, 61–124, 63+260.

[23] Berg v. Peterson, 49–420, 52+37.

shorthand rendering of the facts. If the terms of the contract are indefinite, the witness should be required to state the facts constituting compliance, and not his conclusions or opinions.[24]

3322. Value—The value of anything having a market value may be proved by the opinion of any one acquainted with the market value of such things. It is unnecessary that the witness should be an expert. Market value is a fact and testimony as to the value of a thing is not regarded as an invasion of the opinion evidence rule.[25] The opinions of witnesses as to value are resorted to from necessity. The admissibility of such evidence does not necessarily rest upon the ground that the opinions are based upon facts or information possessed by the witnesses which would themselves be competent primary evidence to prove value, but because the experience or knowledge of the witness is such that he is able to estimate values more intelligently and accurately than those persons who have no special qualifications in that regard. Without such evidence it would often be impossible to inform a jury as to the value of real property, which depends upon such a variety of circumstances that no mere description of the property, or statement of facts regarding it, could enable the jury to intelligently estimate its value.[26] A witness cannot give an opinion of the value of a thing having a market value unless he shows himself acquainted with the market value of things of that class.[27] A person whose business is such that, by commercial reports or other like means, he is familiar with the market value of an article which is a common subject of sale, is competent to testify as to its value, though he has no personal knowledge of any particular sales.[28] The owner of property, either real or personal, is presumptively acquainted with its value, and may testify thereto.[29] A person may testify as to the value of his own services.[30] A farmer is presumptively acquainted with the value of crops such as he raises and sells, and may testify thereto without showing a familiarity with the market.[31] Though a thing has no market value its value may be proved by opinion evidence.[32] A witness may testify as to the difference in the value of property as described by witnesses and its value if sound.[33] A witness may testify as to the relative value of two articles though ignorant of the actual value of either.[34] A witness has been allowed to testify as to the value of plaintiff's services though he did not hear all of the plaintiff's testimony as to the character of the services rendered.[35] There is no inflexible rule of law defining how much a witness must know of the subject to qualify him to give an

[24] Phillips v. Menomonie H. P. B. Co., 109–55, 122+874.

[25] Elfelt v. Smith, 1–125(101) (value of services); Simmons v. St. P. etc. Ry., 18–184(168, 177) (value of land); Lommeland v. St. P. etc. Ry., 35–412, 29+119 (value of growing crops); Ironton L. Co. v. Butchart, 73–39, 75+749 (what the value of land would have been if a contract to maintain a steel plant had been fully performed). See 3 Wigmore, Ev. § 1940.

[26] Barnett v. St. Anthony etc. Co., 33–265, 22+535.

[27] Berg v. Spink, 24–138; Osborne v. Marks, 33–56, 22+1; Russell v. Hayden, 40–88, 41+456.

[28] Cleveland v. Rowe, 99–444, 109+817; Hoxsie v. Empire L. Co., 41–548, 43+476. See Brackett v. Edgerton, 14–174(134); Smith v. Library Board, 58–108, 59+979.

[29] Derby v. Gallup, 5–119(85); Hayden v. Albee, 20–159(143); Byrne v. Mpls. etc. Ry., 29–200, 12+698; Crich v. Williamsburg etc. Co., 45–441, 48+198; McLennan v. Mpls. etc. Co., 57–317, 59+628; Smith v. Library Board, 58–108, 59+979; Paterson v. Chi. etc. Ry., 95–57, 103+621; 17 Cyc. 114, 115.

[30] Loucks v. Chi. etc. Ry., 31–526, 18–651.

[31] McLennan v. Mpls. etc. Co., 57–317, 59+628; Linde v. Gaffke, 81–304, 84+41.

[32] Allis v. Day, 14–516(388) (legal services); Burger v. N. P. Ry., 22–343; Deane v. Hodge, 35–146, 27+917 (value of a patent right); Stevens v. Minneapolis, 42–136, 43+842. See First Nat. Bank v. St. Cloud, 73–219, 75+1054 (opinion evidence held inadmissible as to damages for failure of water company to render services).

[33] Marsh v. Webber, 16–418(375).

[34] Kronschnable v. Knoblauch, 21–56.

[35] Swanson v. Mellen, 66–486, 69+620.

opinion of the value of property. It is a matter resting almost wholly in the discretion of the trial court. The court may require the competency of a witness to be fully disclosed on the preliminary examination or it may leave the matter largely for the cross-examination.[36] The testimony of an expert in the business of negotiating securities has been held admissible to show that the dishonor of a note by the maker would depreciate the market value of other notes of the same maker, given for the same consideration, but not yet mature.[37] The rule as to the conclusiveness of opinion evidence to value is stated elsewhere.[38]

OPINION EVIDENCE—EXPERTS

3323. Expert defined—An expert is a person of superior experience or knowledge or skill in any science, art, trade or business.[39]

3324. Not favored—Our supreme court has frequently expressed distrust of experts.[40] It has been said that experts usually merit by their loyalty as advocates and by their lack of candor as witnesses their current appellation of "associate counsel," or "ancillary counselors." [41]

3325. When expert testimony admissible—General rule—The opinions of witnesses possessing peculiar skill are admissible whenever the subject of inquiry is such that inexperienced persons are unlikely to prove capable of forming a correct judgment upon it without such assistance.[42] In the application of this rule wide latitude of discretion is given the trial court.[43]

3326. Upon issuable facts—Expert or opinion evidence is not to be excluded merely because it bears directly upon the issues to be determined by the jury.[44] Often expert testimony necessarily goes directly to the main issue and is the only form of evidence by which it can be determined.[45]

3327. Cause of death—Disease—Physical condition, etc.—Medical experts are allowed to give their opinion, upon proper foundation, as to the cause of death;[46] the cause of bodily ailments or injuries;[47] the probability of recovery;[48] the nature, probable course, and duration of a disease or injury;[49] the sanity of a person;[50] and whether a person is feigning an injury.[51]

[36] Papooshek v. Winona etc. Ry., 44–195, 46+329; Crich v. Williamsburg etc. Co., 45–441, 48+198; Stevens v. Minneapolis, 42–136, 43+842; Burger v. N. P. Ry., 22–343, 347; Berg v. Spink, 24–138; Barnett v. St. Anthony etc. Co., 33–265, 22+535 and cases under § 3335.

[37] MacLaren v. Cochran, 44–255, 46+408.

[38] See § 3334.

[39] See Le Mere v. McHale, 30–410, 15+682; Davidson v. St. P. etc. Ry., 34–51, 24+324; Sneda v. Libera, 65–337, 68+36.

[40] See Peterson v. Chi. etc. Ry., 38–511, 515, 39+485; Briggs v. Mpls. St. Ry., 52–36, 40, 53+1019 (see, for a qualification of the language used in this case, Donnelly v. St. P. C. Ry., 70–278, 73+157); Beardsley v. Mpls. St. Ry., 54–504, 506, 56+176; Martin v. Courtney, 75–255, 261, 77+813; Mageau v. G. N. Ry., 106–375, 119+200; Johnson v. G. N. Ry., 107–285, 119+1061.

[41] Continental Ins. Co. v. Chi. etc. Ry., 97–467, 477, 107+548.

[42] Krippner v. Biebl, 28–139, 9+671; Davidson v. St. P. etc. Ry., 34–51, 24+324; Armstrong v. Chi. etc. Ry., 45–85, 47+459; Sneda v. Libera, 65–337, 68+36; Anderson v. Fielding, 92–42, 99+357.

[43] Beardsley v. Mpls. St. Ry., 54–504, 56+176. See 17 Cyc. 28.

[44] Donnelly v. St. P. C. Ry., 70–278, 73+157; Sieber v. G. N. Ry., 76–269, 79+95. See Winona v. Minn. etc. Co., 27–415, 6+795, 8+148; Wilson v. Reedy, 33–503, 24+191; Briggs v. Mpls. St. Ry., 52–36, 53+1019 (see comments on this case in Donnelly v. St. P. C. Ry., 70–278, 73+157).

[45] See Getchell v. Lindley, 24–265 (malpractice).

[46] Donnelly v. St. P. C. Ry., 70–278, 73+157; Gilbert v. Duluth G. E. Co., 93–99, 100+653.

[47] Brazil v. Peterson, 44–212, 46+331; Cooper v. St. P. C. Ry., 54–379, 56+42; Donnelly v. St. P. C. Ry., 70–278, 73+157; Joyce v. St. P. C. Ry., 70–339, 73+158; Decker v. Chi. etc. Ry., 102–99, 112+901; Ahern v. Mpls. St. Ry., 102–435, 113+1019; Crozier v. Mpls. St. Ry., 106–77, 118+256.

[48] Kelly v. Erie etc. Co., 34–321, 25+706; Peterson v. Chi. etc. Ry., 38–511, 39+485; Cooper v. St. P. C. Ry., 54–379, 56+42; Donnelly v. St. P. C. Ry., 70–278, 73+157.

[49] Jones v. Chi. etc. Ry., 43–279, 45+444;

3328. Insanity—An ordinary physician who has not given special study to insanity may nevertheless give an opinion of the sanity of a person. If the opinion is not given on a hypothetical question, or upon the evidence in the case, it must be preceded by a statement of the facts upon which it is based.[52]

3329. Summaries or balances of accounts—When books of account are in evidence, an expert may be permitted to testify as to balances or summaries of the accounts, based on his examination of them.[53]

3330. Comparison of handwriting—Upon the trial of an issue as to the genuineness of a certain handwriting, other instruments admitted to be genuine, but not otherwise relevant, may be received in evidence for the purpose of comparison.[54]

3331. Negligence—Due care, etc.—It is sometimes laid down broadly that whether this or that act of a person was negligent, or whether due care required this or that to be done are not questions for expert testimony.[55] This is true if the jury can pass on the question intelligently without the aid of expert testimony; otherwise not.[56]

3332. Expert testimony held admissible—Miscellaneous cases—Expert testimony has been held admissible upon the following questions: the age of sheep;[57] whether a place where a raft was moored was a safe place;[58] whether a certain mode of packing marble slabs for transportation was proper;[59] the meaning of "raceway;"[60] how long the eye requires, after looking at a bright light, to recover its natural power of sight;[61] how far a fire in stubble land is likely to "jump" a fire break;[62] whether the foreman of a crew of carpenters engaged in certain work should be a practical carpenter;[63] how long sparks emited from a locomotive engine will keep alive and at what distance fire may be communicated by them;[64] the effect of the dishonor of a note by the maker upon the market value of other notes of the same maker;[65] whether a stable was a proper and suitable one in which to house horses;[66] whether a person was feigning an injury to his arm;[67] whether the disease of "bog spavin" in horses may be transmitted;[68] within what distance an electric street car, going at a certain speed, can be stopped;[69] the proper manner of constructing large ice-tongs;[70] the sufficiency of material in the construction of a derrick platform;[71] the meaning of the word "breeder" as applied to a stallion;[72] the sufficiency of a cistern wall;[73] the effect of operating a bolting-saw without a carriage at-

Brazil v. Peterson, 44–212, 46+331; Johnson v. N. P. Ry., 47–430, 50+473; Skelton v. St. P. C. Ry., 88–192, 92+960.

[50] Scott v. Hay, 90–304, 97+106.

[51] Harrold v. Winona etc. Ry., 47–17, 49+389.

[52] Scott v. Hay, 90–304, 97+106.

[53] Wolford v. Farnham, 47–95, 49+528 (books not in evidence but in court and accessible to all the parties—no objection made that they were not in evidence); State v. Clements, 82–434, 85+229; State v. Salverson, 87–40, 91+1.

[54] Morrison v. Porter, 35–425, 29+54.

[55] Mantel v. Chi. etc. Ry., 33–62, 21+853; Goodsell v. Taylor, 41–207, 42+873; Bergquist v. Chandler, 49–511, 52+136. See 3 Wigmore, Ev. § 1949 for a criticism of an over-cautious attitude on this question.

[56] See cases under §§ 3332, 3333.

[57] Clague v. Hodgson, 16–329(291).

[58] Hayward v. Knapp, 23–430.

[59] Shriver v. Sioux City etc. Ry., 24–506.

[60] Wilder v. De Cou, 26–10, 1+48.

[61] Shaber v. St. P. etc. Ry., 28–103, 9+575.

[62] Krippner v. Biebl, 28–139, 9+671.

[63] Bunnell v. St. P. etc. Ry., 29–305, 13+129.

[64] Davidson v. St. P. etc. Ry., 34–51, 24+324.

[65] MacLaren v. Cochran, 44–255, 46+408.

[66] Armstrong v. Chi. etc. Ry., 45–85, 47+459.

[67] Harrold v. Winona etc. Ry., 47–17, 49+389.

[68] Fitzgerald v. Evans, 49–541, 52+143.

[69] Watson v. Mpls. St. Ry., 53–551, 55+742.

[70] Neubauer v. N. P. Ry., 60–130, 61+912.

[71] Blomquist v. Chi. etc. Ry., 60–426, 62+818.

[72] St. Paul etc. Co. v. Harrison, 64–300, 66+980.

[73] Sneda v. Libera, 65–337, 68+36.

tachment, as to the safety of the operator;[74] the effect of running a street car around a sharp curve;[75] the purpose of using blinkers on racehorses;[76] whether it was practicable to put a guard around machinery;[77] the proper and prudent method of "bucking" snow with locomotive engines;[78] the manner of operating an hydraulic pressure elevator, and the training, skill, and experience needed by the operator;[79] the character and use of tools used by robbers;[80] the construction and use of a belt shifter;[81] the sufficiency of scaffolding;[82] that a pile of stone was of a character naturally calculated to frighten horses of ordinary gentleness;[83] whether a freight and passenger elevator was properly constructed;[84] whether bananas transported from southern points to Minnesota would decay during the journey and to what extent;[85] whether a block and hook, constituting a part of a painter's apparatus for supporting himself when working on high structures, was reasonably safe;[86] the number of men necessary to do certain work with safety;[87] whether machinery was working properly;[88] the proper and customary way of putting covers on rollers of a laundry mangle and whether a mangle may reasonably be equipped with a guard for the protection of operators;[89] the cause of a building falling;[90] the proper means to relieve live stock suffering from heat while being transported by railway;[91] whether a bundle carrier was an approved appliance;[92] how long before the plaintiff's injury the defect in the insulation of the wires occurred;[93] what caused a street car to buck;[94] the distance within which a street car going at a certain speed can be stopped;[95] the durability of wood.[96]

3333. Expert testimony held inadmissible—Miscellaneous cases—Expert testimony has been held inadmissible upon the following questions: whether a fence was a proper fence to turn stock;[97] whether under a bridge was wholly river or partly river and partly island;[98] whether a change in a testator's life-long purpose to provide for a sister, occurring on his death-bed, and without apparent motive or reason, and unexplained, indicates any change in his intellect;[99] whether the appearance of machinery would suggest to a prudent man the necessity of an examination;[1] the construction of a contract;[2] solvency or insolvency;[3] the danger of threshing grain with the use of steam power with the wind blowing in the direction of the stacks;[4] what transactions are in the regular course of business;[5] whether a certain quantity of goods in a room could have burned without destroying the floor;[6] what produced a flood-

[74] Olmscheid v. Nelson, 66–61, 68+605.
[75] Blondel v. St. P. C. Ry., 66–284, 68+1079.
[76] Lane v. Minn. etc. Soc., 67–65, 69+463.
[77] Peterson v. Johnson, 70–538, 73+510.
[78] Sieber v. G. N. Ry., 76–269, 79+95.
[79] Nutzmann v. Germania L. Ins. Co., 78–504, 81+518.
[80] State v. Minot, 79–118, 81+753.
[81] Thiel v. Kennedy, 82–142, 84+657.
[82] Hagerty v. Evans, 87–435, 92+399.
[83] Nye v. Dibley, 88–465, 93+524.
[84] Craig v. Benedictine etc. Assn., 88–535, 93+669.
[85] Fruit Dispatch Co. v. Murphy, 90–286, 96+83.
[86] Anderson v. Fielding, 92–42, 99+357.
[87] Dell v. McGrath, 92–187, 99+629.
[88] Scarlotta v. Ash, 95–240, 103+1025.
[89] Carlin v. Kennedy, 97–141, 106+340.
[90] Bast v. Leonard, 15–304(235).
[91] Lindsley v. Chi. etc. Ry., 36–539, 33+7.
[92] Byard v. Palace C. H. Co., 85–363, 88+998.
[93] Bernier v. St. Paul G. Co., 92–214, 99+788.
[94] Beardsley v. Mpls. St. Ry., 54–504, 56+176.
[95] Watson v. Mpls. St. Ry., 53–551, 55+742.
[96] Holden v. Gary, 109–59, 122+1018.
[97] Sowers v. Dukes, 8–23(6).
[98] Winona v. Minn. etc. Co., 27–415, 6+795.
[99] In re Nelson, 39–204, 39+143.
[1] Goodsell v. Taylor, 41–207, 42+873.
[2] Cargill v. Thompson, 57–534, 59+638.
[3] Hahn v. Penney, 60–487, 62+1129.
[4] Morris v. Farmers etc. Ins. Co., 63–420, 65+655.
[5] Merchants etc. Bank v. Cross, 65–154, 67+1147.
[6] Hamberg v. St. P. etc. Co., 68–335, 71+388.

ing or overflow;[7] the condition of a flogging-hammer and its suitability for a certain purpose;[8] the safety of a railing;[9] whether a certain arrangement of machinery was dangerous;[10] whether the trouble was with a machine or the incompetency of the men operating it;[11] whether a ladder standing against a building was dangerous or liable to blow down;[12] the amount of damages for a tort;[13] whether it was possible to fasten a "grab-hook" in a "swamp-chain" otherwise than was done;[14] as to the effect of the pendency of an action or the recovery of a verdict upon a plaintiff in a personal injury action who is suffering from neurasthenia;[15] as to the safety and reliability of railway telltales.[16]

3334. Conclusiveness of expert testimony—The ordinary function of experts is to assist the jury, by their superior knowledge in reaching a correct conclusion from the facts in evidence. Their opinions are not ordinarily conclusive upon the jury, but are mere items of evidence to be considered by the jury along with the other evidence in the case. It is only where the evidence, and the facts to be deduced therefrom, are undisputed, and the case concerns a matter of science or specialized art, or other matter of which a juror must be presumed to have no knowledge, that a jury must accept the opinions of experts as conclusive.[17] The opinions of experts as to the value of services or anything not having a fixed and known market value are not conclusive, but it is the province of the jury to weigh such testimony by reference to all the other facts and circumstances in evidence and judge of the weight and force of such opinions by their own common sense and general knowledge of the subject of inquiry.[18] In determining the relative value of the testimony of experts the jury should consider their professional knowledge and experience, freedom from bias, and the reasons they are able to give for their conclusions.[19] Expert testimony must give way to physical facts.[20] The opinion of a physician that the death of a person was due to one disease, instead of another, both diseases being caused by the action of germs and manifested by similar external symptoms, based upon general observation, without a post mortem or microscopical examination, is too conjectural, theoretical, and uncertain, standing alone, to sustain a verdict.[21] The value to be attached to the testimony of physicians concerning alleged nervous disorders is to be determined, among other things, by the extent and character of the examination actually made by them, generally as to the person's physiological condition, and especially as to the condition of his nervous system.[22]

3335. Competency of experts—Question for court—Preliminary examination—Whether a witness offered as an expert possesses the requisite

[7] **Akin** v. St. Croix L. Co., 88–119, 92+537.
[8] Vant Hul v. G. N. Ry., 90–329, 96+789.
[9] McDonald v. Duluth, 93–206, 100+1102.
[10] Freeberg v. St. Paul P. Works, 48–99, 50+1026.
[11] Wilson v. Reedy, 33–503, 24+191.
[12] Moore v. Townsend, 76 64, 78+880.
[13] Chamberlain v. Porter, 9–260(244).
[14] Carlson v. Marston, 68–400, 71+398.
[15] Ahern v. Mpls. etc. Ry., 102–435, 113+1019.
[16] Whitehead v. Wis. C. Ry., 103 13, 114+254.
[17] Moratzky v. Wirth, 74–146, 76–1032 (instructions sustained); Continental Ins. Co. v. Chi. etc. Ry., 97–467, 476, 107+548; Musolf v. Duluth etc. Co., 108–369, 122+499. See Getchell v. Hill, 21–464, 471; Johnson v. Chi. etc. Ry., 37–519, 521, 35+438.
[18] Stevens v. Minneapolis, 42–136, 43+842; Johnson v. Chi. etc. Ry., 37–519, 35+438; Olson v. Gjertsen, 42–407, 44+306; Harrow v. St. P. & D. Ry., 43–71, 44+881; Papooshek v. Winona etc. Ry., 44–195, 46+329; Aldrich v. Grand Rapids C. Co., 61–531, 63+1115; Poirier v. Griffin, 104–239, 116+576.
[19] Bennison v. Walbank, 38–313, 37+447; Getchell v. Hill, 21–464, 471; Getchell v. Lindley, 24–265.
[20] Plonty v. Murphy, 82–268, 84+1005.
[21] Mageau v. G. N. Ry., 106–375, 119+200.
[22] Johnson v. G. N. Ry., 107–285, 119+1061.

qualfications is a question of fact to be decided by the trial court and its determination will not be reversed on appeal unless it clearly appears that it was not justified by the evidence or was based on an erroneous view of legal principles.[23] All the evidence as to his competency should be received and considered by the court before permitting him to testify.[24] Though the court may, in its discretion, allow the adverse party to cross-examine an expert witness as to his qualifications before permitting him to give his opinion, such preliminary cross-examination is not a matter of right.[25] Cases are cited below involving the qualification of witnesses to value [26] and miscellaneous subjects.[27]

[23] Stevens v. Minneapolis, 42–136, 43+842; Papooshek v. Winona etc. Ry., 44–195, 46+329; Blondel v. St. P. C. Ry., 66–284, 68+1079; Yorks v. Mooberg, 84–502, 87+1115; Meyers v. McAllister, 94–510, 103+564; Corse v. Minn. G. Co., 94–331, 102+728; Cleveland v. Rowe, 99–444, 109+817; Sprague v. Wis. C. Ry., 104–58, 116+104; Segerstrom v. Swenson, 105–115, 117+478.

[24] Martin v. Courtney, 75–255, 77+813. See Crich v. Williamsburg etc. Co., 45–441, 48+198.

[25] Finch v. Chi. etc. Ry., 46–250, 48+915.

[26] Elfelt v. Smith, 1–125(101) (value of services—witness must know usual rate of compensation); Brackett v. Edgerton, 14–174(134) (value of wheat in certain market—witness buying and selling in that market competent); Allis v. Day, 14–516 (388) (value of services of attorney—practicing attorneys competent); Burke v. Beveridge, 15–205(160) (value of realty—witness unacquainted with it till a year after time in controversy incompetent); Lehmicke v. St. P. etc. Ry., 19–464(406) (value of realty—resident in vicinity competent); Curtis v. St. P. etc. Ry., 20–28 (19) (id.); Hayden v. Albee, 20–159 (143) (owner of ford who has habitually used it in hauling wood and crops may testify as to its value as a ford); Burger v. N. P. Ry., 22–343 (value of hay—no market value—dealer in hay at another place competent); Berg v. Spink, 24–138 (value of horse—witness not showing acquaintance with market value of horse incompetent); Byrne v. Mpls. etc. Ry., 29–200, 12+698 (value of growing grass—owner a practical farmer competent); Johnston v. Clark, 31–165, 17+111 (value of unsound harvester—dealer in farm machinery competent); Seurer v. Horst, 31–479, 18+283 (value of services—witness not shown to have knowledge incompetent); Loucks v. Chi. etc. Ry., 31–526, 18+651 (value of farmer's labor—plaintiff a practical farmer competent); Osborne v. Marks, 33–56, 22+1 (value of harvester—witness not acquainted with market value incompetent though he may have worked machine or seen it worked); Barnett v. St. Anthony etc. Co., 33–265, 22+535 (value of land undermined—witness acquainted with market value competent); Nichols v. Chi. etc. Ry., 36–452, 32+176 (value of buildings destroyed by fire—carpenter competent); Russell v. Hayden, 40–88, 41+456 (value of lumber—witness unacquainted with market value incompetent); Hoxsie v. Empire L. Co., 41–548, 43+476 (value of sawlogs—witness acquainted with market value competent though ignorant of any sales); Stevens v. Minneapolis, 42–136, 43+842 (value of services in editing a city charter—attorney without special knowledge of subject incompetent); Lewis v. Willoughby, 43–307, 45+439 (value of horses, cattle and farm machines—witness held competent); Papooshek v. Winona etc. Ry., 44–195, 46+329 (value of realty—business men long resident in city competent); MacLaren v. Cochran, 44–255, 46+408 (value of note—dealer in mortgage loans and paper of all kinds competent); Crich v. Williamsburg etc. Co., 45–441, 48+198 (value of buildings destroyed by fire—owner competent); Finch v. Chi. etc. Ry., 46–250, 48+915 (effect on rental value of farm of leasing it unfenced—practical farmers competent); Redding v. Wright, 49–322, 51+1056 (value of business—witness in same line of business competent after two hours examination of business in question); McLennan v. Mpls. etc. Co., 57–317, 59+628 (value of farm products—farmer who raises and sells them competent); Smith v. Library Board, 58–108, 59+979 (value of rare coins—owner competent); Keller v. Smith, 59–203, 60+1102 (value of household furniture—witness who had kept house for eighteen years and bought furniture for his own use competent); Backus v. Ames, 79–145, 81+766 (value of lumber); Fossum v. Chi. etc. Ry., 80–9, 82+979 (value of land—witness held incompetent); Linde v. Gaffke, 81–304, 84+41 (value of wheat—farmer competent); Curry v. Sandusky F. Co., 88–485, 93+896 (value of fishing grounds—witness held incompetent); Yorks v. Mooberg, 84–502, 87+1115 (rental value of land—witnesses held competent); Beaudry v. Duquette, 92–158, 99+635 (value of ties and poles—witness held competent); Cochran v. Cochran, 93–284, 101+179 (action for divorce—competency of wife to testify as to value of husband's property); Meyers v. McAllister, 94–510, 103+564 (value of logging outfit—witness held com-

3336. On what based—In general—Questions calling for the opinion of an expert must be based upon facts testified to by him or by others, or upon an agreed state of facts, or upon facts assumed hypothetically as true.[28]

3337. Opinions based on hypothetical questions—The opinion of experts is customarily given in response to a hypothetical question which assumes the facts which the evidence tends to prove.[29] Such a question must be based on facts admitted, or established, or which, if controverted, might reasonably be found by the jury from the evidence. That is, it must be framed in accordance with some theory which the evidence reasonably tends to support. It should embody substantially all the facts relating to the subject upon which the opinion of the witness is asked.[30] It is improper if it assumes a material fact which is not supported by any evidence.[31] The facts are assumed only for the purpose of the question and the opinion of the witness is based wholly on the facts assumed. It follows that if the jury do not find the facts assumed the opinion of the expert is entitled to no weight,[32] and it is the duty of the court to instruct the jury to disregard it.[33] Where a hypothetical question omits material evidence, or contains a statement of a material fact as to which there is

petent); Corse v. Minn. G. Co., 94-331, 102+728 (value of securities); Paterson v. Chi. etc. Ry., 95-57, 103+621 (value of automobile); Cleveland v. Rowe, 99-444, 109+817 (value of lumber—no market value at place).

[27] Clague v. Hodgson, 16-329(291) (age of sheep—shepherd and owner of sheep competent); Krippner v. Biebl, 28-139, 9+671 (question as to how far fire in stubble will jump a fire-break—practical farmer with experience in prairie fires competent); Bunnell v. St. P. etc. Ry., 29-305, 13+129 (question whether a foreman of a crew of carpenters should be a practical carpenter—experienced carpenter competent); Kolsti v. Mpls. etc. Ry., 32-133, 19+655 (question as to practicability of locking a turntable—experienced railroad man competent); Davidson v. St. P. etc. Ry., 34-51, 24+324 (question as to how long sparks from a locomotive will keep alive and communicate fire—railroad men competent); Gilmore v. Brost, 39-190, 39+139 (question as to negligence in handling a stallion—witnesses held competent); Watson v. Mpls. St. Ry., 53-551, 55+742 (conductor of electric street car competent to testify as to distance within which car could be stopped); Beardsley v. Mpls. St. Ry., 54-504, 56+176 (witness held competent to testify as to bucking of street car); Peteler v. N. W. etc. Co., 60-127, 61+1024 (question as to what caused floors and walls to collapse—brick mason and contractor for brick and stone work incompetent); Blomquist v. Chi. etc. Ry., 60-426, 62+818 (question as to defective derrick—witnesses with some experience in putting up derricks competent); Sneda v. Libera, 65-337, 68+36 (sufficiency of cistern wall—witness held competent); Blondel v. St. P. C. Ry., 66-284, 68+1079 (question as to effect of running street car around curve at a certain speed—conductor of street car incompetent); Beckett v. N. W. etc. Assn., 67-298, 69+923 (question as to suicide—young physician competent); Peterson v. Johnson, 70-538, 73+510 (question as to practicability of guarding machinery—witness held competent); Martin v. Courtney, 75-255, 77+813 (malpractice—physician of another school held incompetent); Sloniker v. G. N. Ry., 76-306, 79+168 (question as to stopping handcar—witness held competent); Aultman v. Mosloski, 77-27, 79+593 (question as to defects in steam engine—farmer with license to run a steam threshing machine outfit held incompetent); Fonda v. St. P. Ry., 77-336, 79+1043 (question as to running street car—witness held competent); Hagerty v. Evans, 87-435, 92+399 (question as to the sufficiency of a scaffold—carpenters held competent).

[28] Webb v. Mpls. St. Ry., 107-282, 119+955.

[29] Jones v. Chi. etc. Ry., 43-279, 45+444; Crozier v. Mpls. St. Ry., 106-77, 118+256.

[30] Wittenberg v. Onsgard, 78-342, 81+14; Peterson v. Chi. etc. Ry., 38-511, 39+485; Briggs v. Mpls. St. Ry., 52-36, 53+1019; Cooper v. St. P. C. Ry., 54-379, 56+42; Smith v. Mpls. St. Ry., 91-239, 97+881; Greenwald v. Nelson, 92-531, 100+1124; Frigstad v. G. N. Ry., 101-40, 111+838; Masteller v. G. N. Ry., 103-244, 114+757.

[31] State v. Stokely, 16-282(249); State v. Hanley, 34-430, 26+397; State v. Scott, 41-365, 43+62; Frigstad v. G. N. Ry., 101-40, 111+838; Hjelm v. Western G. C. Co., 103-514, 114+1131.

[32] Peterson v. Chi. etc. Ry., 38-511, 39+485.

[33] Loucks v. Chi. etc. Ry., 31-526, 18+651.

no evidence, an objection upon the ground that the question does not contain a correct statement of the evidence is sufficiently specific, unless the trial judge asks that his attention be called to the evidence which is omitted or the matter which is improperly included. The duty of properly framing such a question rests primarily upon the counsel by whom the question is asked, and he should not be permitted to frame an improper question, and then cast the burden of supplying its deficiencies upon the opposing counsel.[34] A misleading,[35] or indefinite,[36] question should not be permitted. In a hypothetical question embodying a person's assumed symptoms and condition it is proper to ask a medical expert as to the probability of recovery.[37] On the direct examination it is improper to allow an expert to go into particular instances occurring in his experience if objection is made.[38] It is not the duty of the court to assist counsel in framing questions.[39]

3338. Opinions based on the evidence—A trial court may permit a question to an expert witness, calling for his opinion, to be put by referring him to the evidence in the case, if he has heard it, instead of stating the facts which it tends to prove. But such a question must require the witness to assume the evidence to be true.[40] Indeed, it has been said that this mode of examining an expert is ordinarily preferable to the use of hypothetical questions,[41] but this is not the prevailing opinion.[42] The question must specify the testimony.[43] If the expert has not heard certain of the testimony it may be read to him.[44]

3339. Opinions based on personal knowledge and the evidence—The opinion of an expert may be based in part on his own knowledge of the facts and in part on a hypothetical presentation of other facts in evidence.[45]

3340. Opinions based on knowledge acquired out of court—A medical expert may give his opinion of the condition of a person whom he has examined out of court, and such opinion may be based in part on statements made by the person to the witness, on an examination for treatment, concerning his feelings and bodily states. And such statements, in so far as they relate to then existing feelings and bodily states, may be testified to by the expert in connection with his opinion.[46] But on the direct examination the expert cannot be asked

[34] Frigstad v. G. N. Ry., 101–40, 111+838.

[35] Briggs v. Mpls. St. Ry., 52–36, 53–1019.

[36] State v. Scott, 41–365, 43+62.

[37] Peterson v. Chi. etc. Ry., 38–511, 39+485; Cooper v. St. P. C. Ry., 54–379, 56+42; Donnelly v. St. P. C. Ry., 70–278, 73+157.

[38] Holden v. Gary, 109–59, 122+1018.

[39] State v. Quirk, 101–334, 112+409.

[40] Jones v. Chi. etc. Ry., 43–279, 45+444; Getchell v. Hill, 21–464; State v. Lautenschlager, 22–514; In re Storer, 28–9, 8+827; Peterson v. Chi. etc. Ry., 38–511, 39+485; Cooper v. St. P. C. Ry., 54–379, 56+42; Beardsley v. Mpls. St. Ry., 54–504, 56+176; McGrath v. G. N. Ry., 80–450, 83+413; Gasink v. New Ulm, 92–52, 99+624; Decker v. Chi. etc. Ry., 102–99, 112+901; Ahern v. Mpls. St. Ry., 102–435, 113+1019; Masteller v. G. N. Ry., 103–244, 114+757; Crozier v. Mpls. St. Ry., 106–77, 118+256. See, as to the necessity of the expert hearing all the evidence, Peterson v. Chi. etc. Ry., 38–511, 39+485; Beardsley v. Mpls. St. Ry., 54–504, 56+176; Swanson v. Mellen, 66–486, 69+620; as to calling for an opinion by reference to opinion evidence, Beardsley v. Mpls. St. Ry., 54–504, 56+176.

[41] Beardsley v. Mpls. St. Ry., 54–504, 56+176.

[42] Crozier v. Mpls. St. Ry., 106–77, 118+256. See Lawson, Expert and Opinion Ev. (2 ed.) pp. 174, 258; Rogers, Expert Test. § 28; McKelvey, Ev. (2 ed.) 240; 17 Cyc. 255.

[43] In re Storer, 28–9, 8+827. See Masteller v. G. N. Ry., 103–244, 114+757.

[44] Beardsley v. Mpls. St. Ry., 54–504, 56+176.

[45] Masteller v. G. N. Ry., 103–244, 114+757.

[46] Jones v. Chi. etc. Ry., 43–279, 45+444; Johnson v. N. P. Ry., 47–430, 50+473; Brusch v. St. P. C. Ry., 52–512, 55+57; Cooper v. St. P. C. Ry., 54–379, 56+42; Firkins v. Chi. etc. Ry., 61–31, 63+172; Miller v. St. P. C. Ry., 62–216, 64+554; Weber v. St. P. C. Ry., 67–155, 69+716; Williams v. G. N. Ry., 68–55, 70+860; Fulmore v. St. P. C. Ry., 72–448, 75+589; Edlund v. St. P. C. Ry., 78–434, 81+214; Skelton v. St. P. C. Ry., 88–192, 92+960;

to give such statements if they related, at the time they were made, to past feelings and bodily states,[47] or if they related to the cause of the injury or disease.[48] A medical expert cannot give an opinion based on information obtained by him out of court from persons other than patients—from mere hearsay.[49] It may be stated generally that an expert who has become acquainted with the facts of the case out of court, directly and not through hearsay, may give his opinion based on such knowledge.[50]

3341. Re-direct examination—On re-direct examination it is discretionary with the trial court to allow a witness to be asked if he did not, on a former trial, testify differently.[51]

3342. Cross-examination—Under general rules of cross-examination an expert may be asked any question the answer to which might tend to qualify, explain, or render improbable the opinion expressed on the direct examination.[52] He may be asked hypothetical questions, pertinent to the inquiry, assuming facts having no foundation in the evidence.[53] But it seems that under the guise of testing the professional skill and knowledge of an expert his opinion upon the issues cannot be called out by means of hypothetical questions unsupported by the evidence.[54] The exclusion of a question on cross-examination which assumes the existence of facts which the jury find do not exist is not prejudicial.[55]

3343. Impeachment—The usual means of impeaching an expert is by cross-examination as to his qualifications,[56] and the reasons for his opinion.[57] He may be impeached by evidence of contradictory opinions expressed out of court.[58] A medical expert, having in his evidence in chief diagnosed the injury to the plaintiff as a dislocation of the cervical vertebrae, complicated with a fracture, and having then testified, without qualification or limitation, that the accepted treatment of a dislocation of cervical vertebrae, as laid down by the medical authorities, was a reduction of the dislocation, was asked on cross-examination whether a certain work (admitted by him to be a standard authority) did not lay it down that, where the dislocation was complicated with a fracture, no physician would be justified in attempting to reduce the dislocation. This was held proper cross-examination.[59] Facts inconsistent with the testimony of experts are admissible.[60]

3344. Limiting number of experts—A trial court has discretionary power to limit the number of expert witnesses.[61]

Masteller v. G. N. Ry., 103-244, 114+757; Crozier v. Mpls. St. Ry., 106-77, 118+256.

[47] Williams v. G. N. Ry., 68-55, 70+860. See Moratzky v. Wirth, 74-146, 76+1032. The distinction made in the Williams case between statements as to existing feelings or bodily states and statements as to past feelings or bodily states is reactionary and unsound. See Roosa v. Loan Co., 132 Mass. 439; Cronin v. Fitchburg etc. Co., 181 Mass. 202; 3 Wigmore, Ev. §§ 1720, 1722.

[48] Weber v. St. P. C. Ry., 67-155, 69+716.

[49] Miller v. St. P. C. Ry., 62-216, 64+554.

[50] Hayward v. Knapp, 23-430 (safety of place in river for mooring); Armstrong v. Chi. etc. Ry., 45-85, 47+459 (suitableness of stable for housing horses); Fonda v. St. P. C. Ry., 77-336, 79+1043 (stopping of street car); Lawson, Expert and Opinion Ev. (2 ed.) p. 257. See Raub v. Carpenter, 187 U. S. 159.

[51] Moratzky v. Wirth, 74-146, 76+1032.

[52] Kelly v. Erie etc. Co., 34-321, 25+706; Sigafoos v. Mpls. etc. Ry., 39-8, 38+627; Minn. etc. Ry., v. Gluek, 45-463, 48+194. See Moratzky v. Wirth, 74-146, 76+1032.

[53] Williams v. G. N. Ry., 68-55, 70+860.

[54] State v. Stokely, 16-282(249); State v. Hanley, 34-430, 26+397.

[55] Hayward v. Knapp, 23-430.

[56] See § 3342

[57] See § 3334.

[58] Smith v. Standard etc. Ins. Co., 80-291, 83+342.

[59] Wittenberg v. Onsgard, 78-342, 81+14.

[60] Minn. etc. Co. v. Chi. etc. Ry., 108-470, 122+493.

[61] Sheldon v. Mpls. etc. Ry., 29-318, 13+134.

DOCUMENTARY EVIDENCE

3345. Account books—*a. Admissibility under statute*—The admissibility of a party's account books is regulated by statute.[62] The statute is not limited to cases where the charges made and accounts kept are between both parties, or between all the parties, of the action. It applies to accounts between a party and third persons.[63] It does not apply, however, to the account books of a stranger to the action.[64] To render account books admissible under the statute they must be verified as therein prescribed.[65] It is unnecessary that they be verified by the oath of the clerk or other person who made the entries. They may be verified by the oath of the party whose account books they are, whether he made the entries or not. And if they are the books of a firm they may be verified by any partner, though he did not make the entries.[66] It is unnecessary that the books be kept in a formal manner or that entries be explicitly "charges," but they must be "original entries" substantially contemporaneous with the transaction. Entries made in a cash book every night, in the usual course of business, from slips made at the time of the transaction, are original entries. But entries made in a journal, from the stubs of a check book, several days after the giving of the checks, are not original entries.[67] The statute is so framed as to have a very general application. It is not limited to the account books of business or professional men.[68] As a general rule the facts entered must be within the personal knowledge of the person making the entries,[69] but this is unnecessary where entries are made by bookkeepers in the ordinary course of business from slips or memoranda made by others in the performance of their duties.[70] An entry as to an oral contract modifying a prior contract has been held not within the statute. An entry must relate to money paid, goods sold or delivered, materials furnished, services rendered, and the like.[71]

b. Admissibility at common law—In an action against an insurance company for the value of a stock of merchandise destroyed by fire, day books, ledgers, and other books of account, kept in the usual course of business, showing the amount and value of the goods, are admissible when properly verified. The fact that some entries were made by the bookkeeper from temporary slips furnished by salesmen will not affect their character as original entries. Whether such books are admissible when verified as required by the statute in the case of ordinary account books is an open question.[72] Where a witness testifes that entries made by him in an account book are the original entries of the transactions; that they were made by him at the time of the transactions; that they are just and true; and that he has no present recollection of the transactions, the entries are admissible.[73] The person making the entries must have per-

[62] R. L. 1905 § 4719; Laws 1909 c. 251.

[63] Winslow v. Dakota L. Co., 32-237, 20+145; Coleman v. Retail etc. Assn., 77-31, 79+588; Union etc. Co. v. Prigge, 90-370, 96+917. See Brackett v. Cunningham, 44-498, 47+157.

[64] Carlton v. Carey, 83-232, 86+85.

[65] Wimmer v. Key, 87-402, 92+228; Pickler v. Caldwell, 86-133, 90+307; Cumbey v. Lovett, 76-227, 79+99; Levine v. Lancashire Ins. Co., 66-138, 68+855; Johnson v. Morstad, 63-397, 65+727.

[66] Webb v. Michener, 32-48, 19+82; Branch v. Dawson, 36-193, 30+545.

[67] Woolsey v. Bohn, 41-235, 42+1022; Paine v. Sherwood, 21-225; Webb v. Michener, 32-48, 19+82; Levine v. Lancashire Ins. Co., 66-138, 68+855.

[68] Woolsey v. Bohn, 41-235, 42+1022.

[69] Union etc. Co. v. Prigge, 90-370, 96+917. See Carlton v. Carey, 83-232, 86+85; 18 Harv. L. Rev. 52.

[70] Levine v. Lancashire Ins. Co., 66-138, 68+855; Paine v. Sherwood, 21-225; Webb v. Michener, 32-48, 19+82.

[71] Deatherage v. Petruschke, 106-20, 118+153.

[72] Levine v. Lancashire Ins. Co., 66-138, 68+855.

[73] Newell v. Houlton, 22-19.

sonal knowledge of the facts entered,[74] unless he is a bookkeeper making the entries in the ordinary course of business from slips or other temporary memoranda made by others in the performance of their duties, and in such cases the person making the temporary entry must be called to verify his entry.[75]

c. In general—Effect—Upon an issue as to whether goods sold by A were upon the credit of B or C the fact that they are charged to B on the books of A is not conclusive.[76] An account book of A, containing an account between A and B is inadmissible in favor of A to prove a partnership between B and C.[77] The fact that books of account contain errors affects their credibility, but not their admissibility, at least in the absence of fraud.[78] The account books of loan agents have been held admissible against their principals.[79]

3346. Regular entries—Memoranda—Entries or memoranda made by third parties in the regular course of business, under circumstances calculated to insure accuracy and precluding any motive for misrepresentation, are admissible as prima facie evidence of the facts stated. It is unnecessary in all cases to verify the entries by the parties who made them. Their verification is not regulated by any inflexible, general rule. The sufficiency of a verification in a particular case is a matter lying in the discretion of the trial court and its action will not be reversed on appeal if there is any evidence fairly tending to sustain it.[80] The admissibility of regular entries made by a person since deceased is regulated by statute.[81] Memoranda prepared by a witness are often admissible in connection with his testimony. When, from the use of a memorandum, the memory of the witness is quickened and he is able to testify fully from actual recollection of the facts, the memorandum is inadmissible.[82] But if, upon reading the memorandum, the witness is unable to recollect the transaction or is only able to do so in part, but recognizes the memorandum as having been made by him and is willing to swear to its truthfulness, it may be introduced as substantive evidence, provided it is an original entry made at the time of the transaction and in accordance with the customary official, business or professional practice of the witness—that is, if it is such an entry as would be admissible if the witness were dead or beyond the jurisdiction of the court;[83] and provided, further, that it is first made to appear that the witness is unable to speak from memory or that the memorandum does not enable him to speak freely from memory.[84] According to the better view memoranda not made in

[74] Carlton v. Carey, 83-232, 86+85.

[75] Paine v. Sherwood, 21-225.

[76] Culver v. Scott, 53-360, 55+552.

[77] Brackett v. Cunningham, 44-498, 47+157.

[78] Levine v. Lancashire Ins. Co., 66-138, 68+855.

[79] General Convention v. Torkelson, 73-401, 76+215; Dexter v. Berge, 76-216, 78+1111.

[80] Swedish etc. Bank v. Chi. etc. Ry., 96-436, 105+69. This very sensible decision lays down a more liberal rule than prevails generally in this country and overrules or modifies some of our earlier cases. It is in harmony with the modern tendency to admit such evidence freely and to leave its admission largely to the discretion of the trial court. See Strand v. G. N. Ry., 101-85, 111+958 (record of engine inspector held not properly verified); Lamb v. Benson, 90-403, 97+143 (receipted lumber tickets admitted); Stickney v. Bronson, 5-215(172) (laying down the old rule that a memorandum can only be admitted in connection with the testimony of the person making it); Minn. etc. Co. v. Chi. etc. Ry., 108-470, 122+493 (conductor's report of train movements admissible).

[81] R. L. 1905 § 4720.

[82] Paine v. Sherwood, 19-315(270); Nat. Bank of Com. v. Meader, 40-325, 41+1043; Hoffman v. Chi. etc. Ry., 40-60, 41+301; Com. v. Jeffs, 132 Mass. 5; Vicksburg etc. Ry. v. O'Brien, 119 U. S. 99.

[83] Newell v. Houlton, 22-19; Singer v. Brockamp, 33-501, 24+189; Carlton v. Carey, 83-232, 86+85; Meyers v. McAllister, 94-510, 103+564; Naas v. Chi. etc. Ry., 96-84, 104+717. See Meyer v. Berlandi, 53-59, 54+937; Costello v. Crowell, 133 Mass. 355; Bates v. Preble, 151 U. S. 149.

[84] Stickney v. Bronson, 5-215(172); Beebe v. Wilkinson, 30-548, 16+450; Howe v. Cochran, 47-403, 50+368; Stahl v. Duluth, 71-341, 349, 74+143. This rule is not

accordance with the customary official, business, or professional practice of the witness are not admissible as substantive evidence except as provided by statute.[85] The question is perhaps still an open one in this state, but our court has gone far towards adopting that view.[86] All the cases agree that a memorandum made by a witness from statements made to him by another person, though communicated in the course of duty, is inadmissible as substantive evidence.[87] Whether a memorandum was made under circumstances rendering it admissible as substantive evidence is a preliminary question for the court and its action will not be reversed on appeal unless clearly wrong.[88] If entries properly admissible are in a book with other entries bearing on the issues, but not admissible, the pages containing the latter entries should be sealed before the book is delivered to the jury. It is not enough to instruct the jury to disregard the inadmissible entries.[89] To render a memorandum admissible as substantive evidence it must have been made at the time of the transaction, so as to be a part of it—substantially contemporaneous with the transaction.[90] Entries made a day or two after the transaction from "slips" made at the time are admissible.[91] Self-serving entries made by a party are not generally admissible.[92]

3347. Official records of public officers—The original record made by any public officer in the performance of his official duty is prima facie evidence of the facts required or permitted by law to be by him recorded.[93] But unauthorized recitals in public records are not evidence of the facts recited.[94] It is unnecessary that the record should be expressly required by law to be kept.

inflexible. If the items are so numerous that it is obvious that the witness could not testify to them from memory no formal proof of his inability is necessary. Meyers v. McAllister, 94-510, 103+564; Naas v. Chi. etc. Ry., 96-84, 104+717.

[85] Bates v. Preble, 151 U. S. 149; Donovan v. Boston etc. Ry., 158 Mass. 450; Riley v. Boehm, 167 Mass. 183; Smith, Leading Cases, vol. 1, pt. 1, p. 573 (8 Am. ed.).

[86] Granning v. Swenson, 49-381, 52+30; Carlton v. Carey, 83-232, 86+85; Hoffman v. Chi. etc. Ry., 40-60, 41+301.

[87] Carlton v. Carey, 83-232, 86+85; Stickney v. Bronson, 5-215(172); Price v. Standard etc. Co., 90-264, 95+1118; Chicago L. Co. v. Hewitt, 64 Fed. 314.

[88] Carlton v. Carey, 83-232, 86+85.

[89] Bates v. Preble, 151 U. S. 149.

[90] Chaffee v. U. S., 18 Wall. (U. S.) 516; Putman v. U. S., 162 U. S. 695.

[91] Webb v. Michener, 32-48, 19+82; Paine v. Sherwood, 21-225; Levine v. Lancashire Ins. Co., 66-138, 68+855.

[92] Deatherage v. Petruschke, 106-20, 118+153. See Gasser v. Wall, 126+284.

[93] R. L. 1905 § 4708; Winona v. Huff, 11-119(75) (entries in reception book, kept by the register of deeds, admissible to prove the record of a town plat, and to whom delivered after record); Sanborn v. School Dist., 12-17(1) (record of clerk of school district—statement that meeting was held "pursuant to notice previously given in writing agreeably to the provisions of statute"); Cassidy v. Smith, 13-129(122) (record of town supervisors as to laying out roads—recitals of jurisdictional facts); Board of Ed. v. Moore, 17-412(391) (record of board of education—register of bonds issued); Groff v. Ramsey, 19-44(24) (entry in reception book of register of deeds of the reception for record of an instrument not entitled to record, may be part of the proof, preliminary to evidence of its contents); Brown v. Eaton, 21-409 (report of referee); Messerschmidt v. Baker, 22-81 (recitals of sheriff in certificate of sale on execution); State v. Ring, 29-78, 11+233 (stub duplicates of tax receipts made by a county treasurer); School Dist. v. Thelander, 32-476, 21+554 (record of county superintendent of schools—revocation of license to teach); Gaston v. Merriam, 33-271, 277, 22+614 (record of deed in reception book); Whitacre v. Martin, 51-421, 53+806 (entries made in reception book of register of deeds as to time an instrument was received for record admissible); Porteous v. Com. L. Co., 80-234, 83+143 (log scale); Fish v. Chi. etc. Ry., 82-9, 84+458 (record of engineering department of municipality); Hurley v. West St. Paul, 83-401, 86+427 (record of laying out highway); State v. Bollenbach, 98-480, 108+3 (record of town clerk as to vote on license).

[94] Houlton v. Manteuffel, 51-185, 53+541; State v. Baldwin, 62-518, 65+80; Lloyd v. Simons, 90-237, 95+903. See Fleckten v. Spicer, 63-454, 65+926; Preiner v. Meyer, 67-197, 69+887.

It is sufficient if it is kept in the proper discharge of a public duty.[95] Nor is it necessary that the entries should be made by the public officer himself. They may be made by any person under his direction and authority.[96] As a general rule public records are not exclusive or conclusive evidence of the facts recorded, unless expressly made so by statute.[97]

3348. Official reports and certificates—Official reports and certificates made contemporaneously with the facts stated, and in the regular course of official duty, by an officer having personal knowledge of them, are admissible for the purpose of proving such facts.[98]

3349. Certified copies of public records—Form of certificate—Certified copies of public records are admissible and have the same effect as the originals.[99] The statute provides that the certificate shall state that the certifying officer has compared the copy with the original and that it is a correct transcript therefrom.[1] This requirement is applicable to a judgment roll of a foreign court.[2] It is inapplicable to an exemplification of a judgment of a justice court of another state,[3] or to a certification of a copy of a resolution designating a newspaper for publishing a delinquent tax list.[4] The clerk of the probate court of Ramsey county is authorized to authenticate and certify copies of the records of that court.[5] An affidavit, purporting to be made by a public officer, but not signed by him, has been held insufficient as a certificate.[6] To render a certificate of a public officer admissible it is unnecessary to prove his election or appointment.[7]

3350. Acknowledged instruments—Instruments acknowledged as provided by statute, and having the proper certificate of acknowledgment indorsed thereon, are admissible without other proof of their execution, even though the execution is denied under oath.[8] The statute does not render the instrument

[95] Evanston v. Gunn, 99 U. S. 660; White v. U. S., 164 U. S. 100; Chapman v. Dodd, 10-350(277) (criminal docket of justice of peace); Cole v. Curtis, 16-182(161) (id.).

[96] Evanston v. Gunn, 99 U. S. 660. See Davis v. Hudson, 29-27, 11+136.

[97] Leighton v. Sheldon, 16-243(214) (record of marriage); Rogers v. Stevenson, 16-68(56) (notary's record of protest); State v. Dist. Ct., 29-62, 11+133 (records of board of public works of St. Paul); State v. Ring, 29-78, 11+233 (duplicate stub receipts of taxes); State v. Brecht, 41-50, 42+602 (record of marriage); Antil v. Potter, 69-192, 71+935 (record of survey of logs).

[98] U. S. v. McCoy, 193 U. S. 593.

[99] R. L. 1905 § 4708; Williams v. McGrade, 13-46(39) (entry of judgment); Kelley v. Wallace, 14-236(173) (query whether copy of letter on file in the General Land Office is admissible); Rogers v. Stevenson, 16-68(56) (assignment to assignee in bankruptcy—no objection that copy was obtained after suit begun); Mankato v. Meagher, 17-265(243) (a transcript of the register of deeds of Blue Earth county from the records of Ramsey county, of a town plat, recorded there while such territory was attached to Ramsey county for judicial purposes); First Nat. Bank v. Kidd, 20-234(212) (letters testamentary); Clark v. Nelson, 34-289, 25+628 (scale bills of surveyor general of logs); Ellingboe v. Brakken, 36-156, 30+659 (chattel mortgage); Porteous v. Com. L. Co., 80-234, 83+143 (log scale); Van Dervort v. Vye, 85-35, 88+2 (chattel mortgage—conditional sale contract); Fitzpatrick v. Simonson, 86-140, 90+378 (decree of distribution); Wilcox v. Bergman, 96-219, 223, 104+955 (statute cited as to force of a certified copy).

[1] R. L. 1905 § 4708. Cited, Kelley v. Wallace, 14-236(173); In re Gazett, 35-532, 29+347.

[2] Merz v. Chi. etc. Ry., 86-33, 90+7.

[3] Smith v. Petrie, 70-433, 73+155.

[4] Kipp v. Dawson, 59-82, 60+845.

[5] Fitzpatrick v. Simonson, 86-140, 90+378.

[6] Citizens State Bank v. Bonnes, 76-45, 78+875.

[7] Thomas v. Hanson, 59-274, 61+135.

[8] R. L. 1905 § 4710; Ferris v. Boxell, 34-262, 25+592; Ellingboe v. Brakken, 36-156, 30+659; McMillan v. Edfast, 50-414, 52+907; Romer v. Conter, 53-171, 54+1052; Lennon v. White, 61-150, 63+620; Conrad v. Dobmeier, 64-284, 67+5; Bennett v. Knowles, 66-4, 68+111; Crowley v. Nelson, 66-400, 69+321; Tucker v. Helgren, 102-382, 113+912.

competent as evidence for any purpose for which it would not otherwise be competent.[9]

3351. Attested instruments—An instrument attested, but not required to be attested, has been held sufficiently authenticated by the testimony of one of the parties to it and of a notary who took the acknowledgment of the other party without calling one of the witnesses.[10] An attested assignment of a claim has been held insufficiently authenticated where proof of the signature of a witness was made but not of the signature of the party executing the instrument.[11]

3352. Certificate as to lost record—Provision is made by statute for a certificate to the effect that a public record has been lost.[12]

3353. Mortality tables—The Carlisle and other similar tables are admissible to show the expectation or probable duration of life.[13]

3354. Records of surveys—The records of surveys made by the engineering department of any municipality are made prima facie evidence by statute.[14]

3355. Record of recorded instruments—The record of recorded instruments is admissible, whenever relevant, to prove the instruments,[15] but it is not conclusive.[16] The record of a deed of real estate, appearing on its face to have been properly executed and acknowledged, is evidence that the deed was in fact executed as it purports to have been, notwithstanding the deed, by reason of extrinsic facts, is void, or voidable.[17] The record of an instrument is not admissible if the instrument was not entitled to be recorded.[18] The record of a deed, purporting to have been executed by an attorney, is not evidence for any purpose, unless the authority of the attorney is established.[19]

3356. Letters patent—Letters patent are properly proved by the original letters patent under the seal of the Patent Office.[20]

3357. Hospital register of patients—A register of patients, kept at a hospital, naming or pretending to name the disease with which a patient was said to be suffering, is inadmissible to prove the disease.[21]

3358. Books—Upon an issue as to the genuineness of a bank note bank-note detectors are inadmissible.[22]

3359. Foreign laws—The authentication of foreign laws is regulated by statute.[23]

3360. Foreign judicial records—A statute of this state provides that the records and judicial proceedings of a court of any other state or of the United States, or of any foreign country, are admissible when authenticated by the attestation of the clerk or other officer having charge of the records of such court, under his seal.[24] A copy of the proceedings of a court of another state

[9] Ferris v. Boxell, 34-262, 25+592. Execution in this connection includes delivery. Tucker v. Helgren, 102-382, 113+912.

[10] Conrad v. Dobmeier, 64-284, 67+5.

[11] Fitzgerald v. English, 73-266, 76+27.

[12] R. L. 1905 § 4714; Preiner v. Meyer, 67-197, 69+887.

[13] Scheffler v. Mpls. etc. Ry., 32-518, 21+711; Deisen v. Chi. etc. Ry., 43-454, 45+864.

[14] R. L. 1905 § 4703; Fish v. Chi. etc Ry., 82-9, 84+458; Id., 84-179, 87+606.

[15] R. L. 1905 § 4737; Conklin v. Hinds, 16-457(411); Gaston v. Merriam, 33-271, 22+614.

[16] Dodge v. Hollinshead, 6-25(1); Gaston v. Merriam, 33-271, 22+614.

[17] Clague v. Washburn, 42-371, 44+130.

[18] Meighen v. Strong, 6-177(111); Lund v. Rice, 9-230(215); Lowry v. Harris, 12-255(166); Lydiard v. Chute, 45-277, 47+967. See Wilder v. St. Paul, 12-192 (116); Lamberton v. Windom, 18-506 (455); Groff v. Ramsey, 19-44(24); Thorp v. Merrill, 21-336.

[19] Lowry v. Harris, 12-255(166).

[20] Owsley v. Greenwood, 18-429(386).

[21] Price v. Standard etc. Co., 90-264, 95+1118.

[22] Payson v. Everett, 12-216(137).

[23] R. L. 1905 §§ 4698, 4701, 4702; State v. Armstrong, 4-335(251) (proof of foreign statutes); Merz v. Chi. etc. Ry., 86-33, 90+7 (id.).

[24] R. L. 1905 § 4697. See Gribble v. Pioneer Press Co., 15 Fed. 689 (certificate of

is admissible here, if authenticated according to this statute, though not according to the act of Congress.[25] This statute does not apply to records of a non-judicial nature.[26] Another statute provides for the authentication of judgments rendered by justices of the peace in other states.[27] 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. The clerk or prothonotary of a court is presumed to possess authority to make and certify copies of the records of the court in his keeping, and such copies are duly authenticated by his certificate, over his official signature and the seal of the court. His official signature and the seal are duly authenticated by the great seal of the state or government in which the court is found, affixed to the certificate of the keeper thereof. The great seal proves itself.[28]

3361. Foreign non-judicial records—Copies of the record of deeds and other similar private writings made in a sister state are admissible in evidence in the courts of this state, under the provisions of R. S. U. S. § 906 (U. S. Comp. St. 1901, 677), when properly certified and authenticated. But they will be given such force and effect only as is given thereto by the law of the state from which they are taken, and it must appear that the record was one which was authorized and provided for by the statutes of that state.[29] A copy of the organization certificate of a national bank, certified and sealed by the comptroller of the treasury, is sufficient evidence of the corporate existence of the bank.[30] Copies of records in any of the governmental departments of the United States, authenticated as such, so as to entitle them to be received in the courts of the United States, are admissible in the courts of this state.[31] A certified copy of a deed, recorded in the office of register of deeds of a county in another state, is competent to prove the date on which the deed was there recorded.[32]

3362. Ancient documents—Ancient documents are evidence of their own authenticity in the absence of suspicious circumstances tending to discredit their genuineness.[33]

3363. Authentication—Necessity—It is the general rule that an instrument is not admissible in evidence without proof of its genuineness—of its execution by the person by whom it purports to be executed. In short, it must be authenticated.[34] Letters received by a person purporting to be in reply to letters sent by him are presumptively genuine and need not be otherwise au-

naturalization held admissible under this statute); First Nat. Bank v. Kidd, 20-234(212) (copy of will and probate held admissible under this statute and also under act of Congress of 1790); Bryan v. Farnsworth, 19-239(198) (exemplification of a judgment of a justice of the peace of another state made by another justice held inadmissible under this statute or under the act of Congress of 1790); Merz v. Chi. etc. Ry., 86-33, 90+7 (copy of judgment roll of court of another state held inadmissible because not certified as required by R. L. 1905 § 4708).

[25] In re Ellis, 55-401, 56+1056; Gribble v. Pioneer Press Co., 15 Fed. 689.

[26] Wilcox v. Bergman, 96-219, 104+955.

[27] R. L. 1905 § 4728; Smith v. Petrie, 70-433, 73+155 (compliance with this statute sufficient—unnecessary that certificate comply with R. L. 1905 § 4708). See Bryan v. Farnsworth, 19-239(198).

[28] Gunn v. Peakes, 36-177, 30+466; Bowman v. Hekla F. Ins. Co., 58-173, 59+943.

[29] Wilcox v. Bergman, 96 219, 104+955.

[30] First Nat. Bank v. Kidd, 20-234(212).

[31] R. L. 1905 § 4715. Preiner v. Meyer, 67-197, 69+887 (records of local land-office); Tidd v. Rines, 26-201, 2+497 (id.). See R. L. 1905 § 4734.

[32] Schweigel v. Shakman, 78-142, 80+871.

[33] Hurley v. West St. Paul, 83-401, 86+427. See Rogers v. Clark, 104-198, 116+739.

[34] Turrell v. Morgan, 7-368(290) (indorsement of payment on note); State v. Monnier, 8-212(182) (id.); Mower County v. Smith, 22-97 (memorandum of receipt of taxes made in margin of assessment books); Brayley v. Kelly, 25-160 (printed paper with printed signature); Mast v. Matthews, 30-441, 16+155 (contract); Burt v. Winona etc. Ry., 31-472, 18+285, 289 (telegram); Adams v. Mille Lacs L.

thenticated.[35] Whether sufficient foundation has been laid for the admission of documentary evidence is a question addressed to the discretion of the trial court.[36]

3364. Proof of unattested instruments—Common-law rule—The usual way of proving the execution of an unattested instrument is by proof of the genuineness of the signature.[37] It may be proved by the admissions of the party.[38] It is unnecessary to prove the genuineness of the body of the instrument.[39]

3365. Signatures presumed true—Statute—It is provided by statute that every written instrument purporting to have been signed or executed by any person shall be proof that it was so signed or executed until such person shall deny the signature or execution of the same by his oath or affidavit.[40] The statute applies only to an instrument on which an action is brought against the maker thereof, or to an instrument on which a counterclaim or defence against the maker thereof is founded.[41] It does not apply when the alleged signer is dead or not a party to the action.[42] It applies only to instruments which purport on their face to have been signed or executed by the party or his agent against whom it is sought to enforce them.[43] When an instrument purports to be executed by an agent, the authority of the agent is presumed.[44] The statute is applicable to instruments executed by corporations.[45] It prescribes a rule of evidence, not a rule of pleading. The only effect of a failure to make denial as prescribed by the statute is on the burden of proof.[46] A denial of execution in a pleading, to be effectual, under the statute, must be specific and the pleading must be personally verified. A general denial is insufficient. The verification must be positive and not on information and belief.[47] The statute does not change the effect of an acknowledgment. An acknowledged instrument is admissible without proof of its execution, though its execution is denied under

Co., 32–216, 19+735 (id.); Lydiard v. Chute, 45–277, 47+967 (deed); State v. Shevlin, 66–217, 68+973 (plat); Massillon etc. Co. v. Holdridge, 68–393, 71+399 (contract); Fitzgerald v. English, 73–266, 76+27 (assignment of claim); McGinty v. St. Paul etc. Ry., 74–259, 77+141 (contract); Bull v. Clark, 109–396, 124+20 (letters).

[35] Melby v. Osborne, 33–492, 24+253; Hoxsie v. Empire L. Co., 41–548, 43+476. See Banks v. Penn. Ry., 126+410.

[36] McManus v. Nichols, 109–355, 123+1080; Bull v. Clark, 109–396, 124+20.

[37] See Lamb v. Benson, 90–403, 97+143 (strict proof of signature not made but other evidence held sufficient); Schwartz v. Germania L. Ins. Co., 21–215 (objection that signature was not authenticated held not sufficiently specific).

[38] Pottgieser v. Dorn, 16–204(180).

[39] Wilson v. Hayes, 40–531, 537, 42+467.

[40] R. L. 1905 § 4730; Gardner v. United Surety, 125+264 (applicable to policy of insurance found among papers of insured after his death).

[41] Mast v. Matthews, 30–441, 16+155; Lydiard v. Chute, 45–277, 47+967; Fitzgerald v. English, 73–266, 76+27.

[42] Fitzgerald v. English, 73–266, 76+27.

[43] McGinty v. St. P. etc. Ry., 74–259, 77+141; Moore v. Holmes, 68–108, 70+872; Massillon etc. Co. v. Holdridge, 68–393, 71+399; Young v. Perkins, 29–173, 176, 12+515.

[44] Tarbox v. Gorman, 31–62, 16+466; First Nat. Bank v. Compo etc. Co., 61–274, 63+731; Moore v. Holmes, 68–108, 70+872. See McGinty v. St. P. etc. Ry., 74–259, 77+141.

[45] First Nat. Bank v. Compo etc. Co., 61–274, 63+731; London etc. Co. v. St. Paul etc. Co., 84–144, 86+872; La Plant v. Pratt, 102–93, 112+889.

[46] McCormick v. Doucette, 61–40, 63+95; Moore v. Holmes, 68–108, 70+872; Porter v. Winona etc. Co., 78–210, 80+965.

[47] Schwartz v. Germania L. Ins. Co., 21–215 (denial of delivery only verified by attorney insufficient); Johnston v. Clark, 30–308, 15+252 (verification by attorney insufficient); Cowing v. Peterson, 36–130, 30+461 (general denial insufficient); Bausman v. Credit G. Co., 47–377, 50+496 (id.); McCormick v. Doucette, 61–40, 63+95 (verification on information and belief insufficient—general denial insufficient); Moore v. Holmes, 68–108, 70+872 (id.); La Plant v. Pratt, 102–93, 112+889 (instrument of corporation—verified denial on information and belief by attorney insufficient).

oath.[48] Articles of association are within the statute.[49] Informal memoranda or entries are not.[50] The words "signed" and "executed" in the statute are evidently used synonymously.[51]

3366. Signatures of indorsers presumed true—Statute—It is provided by statute that in an action on a bill or note by an indorsee the possession of the bill or note shall be prima facie evidence that the same was indorsed by the person by whom it purports to be indorsed.[52] The effect of the statute is that the introduction of the bill or note makes out a prima facie case for the indorsee. He need not prove the indorsement.[53] The statute applies to bills and notes of corporations and the authority of officers making indorsements is presumed.[54] When the indorsement purports to be made by an agent his authority is presumed.[55] The statute applies to an indorsement guaranteeing the payment of the note or bill.[56] Checks are within the statute.[57]

3367. Indorsement of money received—An indorsement of money received on a promissory note, which appears to have been made when it was against the interest of the holder to make it, is prima facie evidence of the facts therein stated.[58]

PAROL EVIDENCE

3368. General rule—Contracts—As a general rule the terms of a written contract cannot be contradicted, altered, added to, or varied by parol evidence—by evidence of a prior or contemporaneous oral agreement.[59] In other words, "parol contemporaneous evidence is inadmissible to contradict or vary the terms of a valid written instrument."[60] The rule applies in equity as well as at law.[61] The law gives the character of conclusiveness to written instruments deliberately adopted by the parties as embodying their final agreements, and as to the terms, conditions, and limitations thereof the written contracts must speak for themselves.[62] Cases are cited below involving an application of this

[48] Romer v. Conter, 53-171, 54+1052; Lennon v. White, 61-150, 63+620; Tucker v. Helgren, 102-382, 113+912.

[49] Penn. Ins. Co. v. Murphy, 5-36(22).

[50] Mower County v. Smith, 22-97.

[51] Tucker v. Helgren, 102-382, 113+912.

[52] R. L. 1905 § 4730.

[53] Tarbox v. Gorman, 31-62, 16+466; Burr v. Crichton, 51-343, 53+645; Merchants etc. Bank v. Cross, 65-154, 67+1147; Thorson v. Sauby, 68-166, 70+1083; London etc. Co. v. St. Paul etc. Co., 84-144, 86+872; Huntley v. Hutchinson, 91-244, 97+971.

[54] First Nat. Bank v. Loyhed, 28-396, 10+421; Nat. Bank v. Mallan, 37-404, 34+901.

[55] Tarbox v. Gorman, 31-62, 16+466.

[56] London etc. Co. v. St. Paul etc. Co., 84-144, 86+872; Mullen v. Jones, 102-72, 112+1048.

[57] Estes v. Lovering, 59 504, 61+674.

[58] R. L. 1905 § 4731; Goenen v. Schroeder, 18-66(51, 60); Young v. Perkins, 29-173, 12+515; Atwood v. Lammers, 97-214, 106+310. See, prior to statute, Turrell v. Morgan, 7-368(290); State v. Monnier, 8 212(182).

[59] Harrison v. Morrison, 39-319, 40+66; Winona v. Thompson, 24-199, 207; Hills v. Rix, 43-543, 46+297.

[60] Thompson v. Libby, 34-374, 26+1; Wemple v. Knopf, 15-440(355).

[61] Austin v. Wacks, 30-335, 342, 15+409.

[62] Lewis v. Traders' Bank, 30-134, 14+587; Bell v. Mendenhall, 78-57, 80+843.

[63] Pierse v. Irvine, 1-369(272); McComb v. Thompson, 2-139(114); Levering v. Washington, 3-323(227); Walters v. Armstrong, 5-448(364); Borup v. Nininger, 5-523(417); Kern v. Von Phul, 7-426(341); Peckham v. Gilman, 7-446(355); Butler v. Paine, 8-324(284); Schurmeier v. Johnson, 10-319(250); First Nat. Bank v. Nat. Marine Bank, 20-63(49); Rock Co. Nat. Bank v. Hollister, 21-385; Esch v. Hardy, 22-65; Barnard v. Gaslin, 23-192; Third Nat. Bank v. Clark, 23-263; Merriam v. Pine City L. Co., 23-314; Coon v. Pruden, 25-105; Sears v. Wempner, 27-351, 7+362; Knoblauch v. Foglesong, 38-352, 37+586; Curtice v. Hokanson, 38-510, 38+694; Harrison v. Morrison, 39-319, 40+66; Farwell v. St. Paul T. Co., 45-495, 48+326; Rugland v. Thompson, 48-539, 51+604; Youngberg v. Nelson, 51-172, 53+629; Dennis v. Jackson, 57-286, 59+198; Singer Mfg. Co. v. Potts, 59-240, 61+23; People's Bank v. Rockwood, 59-420, 61+457; Roberts v. Wold, 61-291, 63+739; Northern T. Co. v. Hiltgen, 62-361, 64+909; Bowler v. Braun, 63-32, 65+124;

rule to bills and notes,[62] deeds,[64] mortgages,[65] leases,[66] contracts or bonds for deeds,[67] sales of personalty,[68] powers of attorney,[69] insurance policies,[70] articles of incorporation,[71] plats,[72] chattel mortgages,[73] bills of lading,[74] stock subscriptions,[75] and miscellaneous contracts.[76]

3369. Nature and basis of rule—The modern tendency is to regard the rule against admitting parol evidence to vary or contradict a written instrument as a rule of substantive law rather than a rule of evidence.[77] The theory of the rule is that the parties have determined that a particular document shall be made the sole embodiment of their legal act for certain legal purposes. The writing is the net result of all prior negotiations. It alone expresses and represents the terms of the legal act. The scattered facts have been brought together, the undesirable and ineffectual discarded, and the desirable and accepted welded into final form and embodied in the writing. What was said during the negotiation of the contract, or at the time of its execution, must be

Phelps v. Sargent, 73–260, 76+25; Porter v. Winona etc. Co., 78–210, 80+965; Northwest T. Co. v. Hulburt, 103–276, 115+159; Nat. Citizens Bank v. Bowen, 109–473, 124+241; Nat. Citizens' Bank v. Thro, 124+965. See Germania Bank v. Osborne, 81–272, 83+1084; Shove v. Martine, 85–29, 88+254, 412; McCaffery v. Burkhardt, 97–1, 105+971; Kaufman v. Barbour, 98–158, 107+1128.

[64] McKusick v. Washington County, 16–151(135); McMurphy v. Walker, 20–382 (334); Follansbee v. Johnson, 28–311, 9+882; Bruns v. Schreiber, 43–468, 45+861; Beardsley v. Crane, 52–537, 54+740; Castle v. Elder, 57–289, 59+197; Security Bank v. Holmes, 68–538, 71+699; Rooney v. Koenig, 80–483, 83+399.

[65] Berthold v. Fox, 13–501(462); Morrison v. Mendenhall, 18–232(212); Security Bank v. Holmes, 68–538, 71+699; Swedish etc. Bank v. Germania Bank, 76–409, 79+399.

[66] Stewart v. Murray, 13–426(393); McLean v. Nicol, 43–169, 45+15; St. Paul etc. Ry. v. St. Paul etc. Co., 44–325, 46+566; Haycock v. Johnston, 81–49, 83+494, 1118; Trainor v. Schutz, 98–213, 107+812; Erikson v. Propp, 106–238, 119+390.

[67] Russell v. Schurmeier, 9–28(16); Austin v. Wacks, 30–335, 15+409.

[68] Day v. Raguet, 14–273(203); Wemple v. Knopf, 15–440(355); Cole v. Curtis, 16–182(161); Jones v. Alley, 17–292(269); Cook v. Finch, 19–407(350); Kessler v. Smith, 42–494, 44+794; Hills v. Rix, 43–543, 46+297; Winslow v. Herzog, 46–452, 49+234; Am. Mfg. Co. v. Klarquist, 47–344, 50+243; Nat. G. & F. Co. v. Bixby, 48–323, 51+217; Gasper v. Heimbach, 53–414, 55+559; Justus v. Myers, 68–481, 71+867; Morse v. Johnson, 86–9, 89+1130; Northwest T. Co. v. Hulburt, 103–276, 115+159.

[69] Gilbert v. Thompson, 14–544(414).

[70] Frost's Detroit etc. Works v. Millers' etc. Co., 37–300, 34+35; Boak v. Manchester etc. Co., 84–419, 87+932; Calmenson v. Equitable etc. Co., 92–390, 100+88. See Kausal v. Minn. etc. Assn., 31–17, 16+430.

[71] Oswald v. Mpls. T. Co., 65–249, 68+15; Craig v. Benedictine etc. Assn., 88–535, 93+669.

[72] Wayzata v. G. N. Ry., 46–505, 49+205.

[73] Montgomery v. Chase, 30–132, 14+586.

[74] Mpls. etc. Ry. v. Home Ins. Co., 55–236, 56+815. See Security Bank v. Luttgen, 29–363, 13+151; Leuthold v. Fairchild, 35–99, 27+503, 28+218; Minn. etc. Co. v. Chi. etc. Ry., 108–470, 122+493.

[75] Mpls. T. M. Co. v. Davis, 40–110, 41+1026; Masonic T. Assn. v. Channell, 43–353, 45+716.

[76] Morrison v. Lovejoy, 6–319(224) (contract for operation of lumber mills); Nelson v. Robson, 17–284(260) (delivery of wheat as security for advances—evidence to show a sale inadmissible); Stees v. Leonard, 20–494(448) (building contract—oral contract to drain land inadmissible); Winona v. Thompson, 24–199 (contract for construction of railway); Cowel v. Anderson, 33–374, 23+542 (bond of indemnity); Norris v. Clark, 33–476, 24+128 (contract for exclusive agency to sell brick); King v. Merriman, 38–47, 35+570 (contract granting right to cut timber); Aultman v. Brown, 39–323, 40+159 (acceptance of orders); Masonic T. Assn. v. Channell, 43–353, 45+716 (stock subscription); Peet v. Sherwood, 47–347, 50+241, 929 (contract to pay agent commission for securing a loan); Mueller v. Barge, 54–314, 56+36 (assignment of corporate stock as security); Tarbox v. Cruzen, 68–44, 70+860 (contract of agency); Phelps v. Sargent, 73–260, 76+25 (guaranty of a note); Bell v. Mendenhall, 78–57, 80+843 (contract for the payment of "all of the outstanding indebtedness" of others); Baylor v. Butterfass, 82–21, 84+640 (acceptance of order by debtor—assignment of debt).

[77] Pitcairn v. Philip Hiss Co., 125 Fed. 110; Current v. Muir, 99–1, 108+870 (inferentially); Thayer, Ev. 390; 4 Wigmore, Ev. § 2400; 1 Elliott, Ev. § 569; 17 Cyc. 570; 17 Harv. L. Rev. 271.

excluded from consideration, because the parties have made the writing the only depository and memorial of the truth, and whatever is not found in the writing must be understood to have been waived or abandoned. The document is not, properly speaking, the evidence of the contract; it is the contract itself. As the document in the eye of the law is the contract between the parties, it must be accepted as final for the measurement and adjustment of all rights and obligations which rise out of it.[78] The rule is founded on the obvious inconvenience and injustice that would result if matters in writing, made with consideration and deliberation, and intended to embody the entire agreement of the parties, were liable to be controlled by what Lord Coke expressively calls "the uncertain testimony of slippery memory." Hence, where the parties have deliberately put their engagement into writing in such terms as to import a legal obligation, without any uncertainty as to the object or extent of such engagement, it is conclusively presumed that the whole engagement of the parties, and the manner and extent of their undertaking was reduced to writing. Parol evidence is inadmissible to add another term to the agreement, though the writing contains nothing on the particular one to which the parol evidence is directed. The rule forbids to add by parol where the writing is silent, as well as to vary where it speaks. The law controlling the operation of a written contract becomes a part of it, and cannot be varied by parol any more than what is written.[79]

3370. Necessity of valid written instrument—Before the parol evidence rule can be appealed to, or have force, there must be a valid written instrument. There must exist a writing, containing the terms of a contract between the parties, and designed to be the repository and evidence of their final intentions.[80]

3371. Parties—Parol evidence is admissible to show an undisclosed principal.[81] When an instrument is signed by a person and there is affixed to his name "agent," "trustee," "secretary," etc., parol evidence is admissible to show that he contracted in a representative capacity.[82] If the true owner conveys by any name, the conveyance, as between the grantor and grantee, will transfer title, and parol evidence is admissible to identify the actual grantor.[83] That parties to an instrument bear the relation of principal and surety may be shown

[78] Current v. Muir, 99–1, 108+870; Union Selling Co. v. Jones, 128 Fed. 672.

[79] Thompson v. Libby, 34–374, 26+1; Hone v. Woodruff, 1–418(303, 308); Schurmeier v. Johnson, 10–319(250); Berthold v. Fox, 13–501(462); Jones v. Alley, 17–292(269); Bradford v. Neill, 46–347, 49+193; Beyerstedt v. Winona M. Co., 49–1, 51+619; Wheaton v. Noye, 66–156, 68+854; Morse v. Johnson, 86–9, 89+1130; Seitz v. Brewers' R. Co., 141 U. S. 510; Union Selling Co. v. Jones, 128 Fed. 672. The rule that prior negotiations are merged in the contract is general in its nature. U. S. v. Bethlehem S. Co., 205 U. S. 105. Parol evidence is excluded, not because it is lacking in evidentiary value, but because the law for some substantive reason declares that what is sought to be proved by it, being outside the writing by which the parties have undertaken to be bound, shall not be shown. When, by statute, a writing is required either to create an obligation or to effect a result, as in the case of deeds and wills, or of contracts within the statute of frauds, it is readily understood that it is the writing alone that is to speak; but this is equally true of contracts which by the convention of the parties have assumed a similar form. The writing is the contractual act, of which that which is extrinsic, whether resting in parol or other writings, forms no part. Pitcairn v. Philip Hiss Co., 125 Fed. 110. See Graham v. Savage, 126+394 (exceptions to rule—nature and object of rule discussed).

[80] Beyerstedt v. Winona M. Co., 49–1, 51+619.

[81] Lindeke v. Levy, 76–364, 79+314 (overruling Rowell v. Oleson, 32–288, 20+227; Williams v. Journal P. Co., 43–537, 45+1133); Streeter v. Janu, 90–393, 96+1128; Hunter v. Cobe, 84–187, 87+612; Goss v. Stevens, 32–472, 21+549; Pleins v. Wachenheimer, 108–342, 122+166. See § 216.

[82] Souhegan Nat. Bank v. Boardman, 46–293, 48+1116; Kraniger v. People's B. Soc., 60–94, 61+904.

[83] Wakefield v. Brown, 38–361, 37+788.

by parol.[84] The parties to an instrument may always be identified by parol evidence.[85]

3372. Date of instrument—The real date upon which an instrument was delivered and became operative may generally be shown, regardless of the date recited in the instrument.[86]

3373. Consideration—As a general rule the statement in a deed or other written contract of the consideration is not conclusive. Parol evidence is admissible to show the real consideration. It may be shown to be greater or less, or different, or additional to the one expressed.[87] Where an aggregate sum is named as the consideration for the sale of several items of property the actual consideration for each of them may be shown.[88] A want or failure of consideration may be shown.[89] Where no consideration is expressed, the consideration may be shown by parol unless the contract is within the statute of frauds.[90] It may be shown by parol that the consideration was not to be paid until a certain event.[91] Under the guise of showing the real consideration a party cannot prove a prior or contemporaneous oral agreement that would change the legal effect and operation of the instrument.[92] Where the consideration is contractual, and stated in the instrument, parol evidence is inadmissible to vary or contradict it.[93] Some statements in our cases with reference to invalidating instruments and raising a resulting trust are to be read with reference to the fact that private seals have since been abolished in this state.[94] It is sometimes said that an additional consideration cannot be shown unless it is consistent with the one stated [95] but this is probably not true at the present time.

3374. Time of performance—When a contract is silent as to the time of performance the law implies that it is to be performed within a reasonable time, and if the contract is in writing parol evidence is inadmissible to vary

[84] Kaufman v. Barbour, 98–158, 107+1128; Metzner v. Baldwin, 11–150(92).

[85] Wakefield v. Brown, 38–361, 37+788.

[86] Pigott v. O'Halloran, 37–415, 35+4; Dennis v. Jackson, 57–286, 59+198; State v. Young, 23–551; Schwab v. Rigby, 38–395, 38+101; Swedish etc. Bank v. Germania Bank, 76–409, 79+399. See Almich v. Downey, 45–460, 48+197 (note postdated or antedated); Wilson v. Schnell, 20–40(33) (instrument not dated).

[87] Hone v. Woodruff, 1–418(303, 308); Kumler v. Ferguson, 7–442(351); Dayton v. Warren, 10–233(185); Jordan v. White, 20–91(77); Dole v. Wilson, 20–356(308); Minor v. Sheehan, 30–419, 15+687; Keith v. Briggs, 32–185, 20+91; McMillan v. Ames, 33–257, 22+612; Harrington v. Samples, 36–200, 30+671; Bolles v. Sachs, 37–315, 33+862; Devine v. Lewis, 38–24, 35+711; Nazro v. Ware, 38–443, 38+359; Donlon v. Evans, 40–501, 42+472; Pray v. Rhodes, 42–93, 43+838; Sayre v. Burdick, 47–367, 50+245; Board of Trustees v. Brown, 66–179, 68+837; Langan v. Iverson, 78–299, 80+1051; Jensen v. Crosby, 80–158, 83+43; Le May v. Brett, 81–506, 84+339; N. W. C. Co. v. Lanning, 83–19, 85+823; Witzel v. Zuel, 90–340, 96+1124; Anderman v. Meier, 91–413, 98+327; Johnson v. McClure, 92–257, 99+893.

[88] Mulcahy v. Dieudonne, 103–352, 115+636.

[89] Ruggles v. Swanwick, 6–526(365); Lamprey v. Lamprey, 29–151, 12+514; Pray v. Rhodes, 42–93, 43+838; Slater v. Foster, 62–150 64+160; Warner v. Schulz, 74–252, 77+25; N. W. C. Co. v. Lanning, 83–19, 85+823; Nat. Citizens Bank v. Bowen, 109–473, 124+241. See McKusick v. Washington County, 16–151(135) (decided before the abolition of private seals).

[90] Horn v. Hansen, 56–43, 57+315; Albert Lea College v. Brown, 88–524, 93+672.

[91] Johnson v. McClure, 92–257, 99+893.

[92] Bruns v. Schreiber, 43–468, 45+861; Sayre v. Burdick, 47–367, 50+245; Security Bank v. Holmes, 68–538, 71+699; Bell v. Mendenhall, 78–57, 80+843; Rooney v. Koenig, 80–483, 83+399; Jensen v. Crosby, 80–158, 83+43; Kammrath v. Kidd, 89–380, 95+213; Kramer v. Gardner, 104–370, 116+925; 17 Cyc. 659.

[93] Sayre v. Burdick, 47–367, 50+245; Anderman v. Meier, 91–413, 415, 98+327; Kramer v. Gardner, 104–370, 116+925; 17 Cyc. 661; 1 Elliott, Ev. § 582.

[94] See McKusick v. Washington County, 16–151(135); McMillan v. Ames, 33–257, 260, 22+612; Pray v. Rhodes, 42–93, 96, 43+838.

[95] Dole v. Wilson, 20–356(308); Keith v. Briggs, 32–185, 20+91.

this implication.[96] When time is not expressly or impliedly essential, parol evidence is inadmissible to prove that at the time of the execution of the contract it was understood or agreed that it should be so.[97] Where the time of performance in a written contract is material and expressed, parol evidence of a different time agreed on by the parties is inadmissible.[98]

3375. Modification—A written contract, not within the statute of frauds, may be modified by a subsequent oral agreement based on a sufficient consideration.[99] Prior to the abolition of private seals a sealed instrument could not be modified by parol, but it was held that a parol modification was valid, if executed, or so acted upon that it would be inequitable to enforce the original instrument.[1] It has been held that a statutory warehouse receipt cannot be subsequently modified by parol.[2]

3376. Facts invalidating contract—Fraud, illegality, etc.—The parol evidence rule does not exclude evidence to invalidate an instrument.[3] Thus parol evidence is admissible to prove fraud;[4] illegality;[5] unfairness;[6] duress;[7] want of due execution;[8] want or failure of consideration;[9] or mistake.[10]

3377. Conditional delivery—Parol evidence is admissible to show that an instrument was delivered to take effect and become operative only on the happening of a certain contingent future event.[11] The limitation of this rule to unsealed instruments, noted in some of our cases, has doubtless been removed in this state by the abolition of private seals.[12]

3378. Oral agreement referred to in writing—Where there is a direct reference in a writing to an oral agreement the latter may be proved though the effect is to add material terms and conditions to the writing.[13]

3379. Writing in part performance of oral contract—A writing given in part performance of an oral agreement does not exclude proof of the oral agreement.[14]

[96] Stone v. Harmon, 31-512, 19+88; Liljengren v. Mead, 42-420, 44+306.

[97] Austin v. Wacks, 30-335, 15+409.

[98] Morrison v. Lovejoy, 6-319(224).

[99] Hewitt v. Brown, 21-163; Liljengren v. Mead, 42-420, 44+306; Thompson v. Thompson, 78-379, 81+204, 543 (reversed on reargument); Van Santvoord v. Smith, 79-316, 82+642; Youngberg v. Lamberton, 91-100, 97+571; Steidl v. Mpls. etc. Ry., 94-233, 102+701; Craven v. Skobba, 108-165, 121+625.

[1] Siebert v. Leonard, 17-433(410); Stees v. Leonard, 20-494(448); McClay v. Gluck, 41-193, 42+875.

[2] Thompson v. Thompson, 78-379, 81+204, 543. This case is criticised in 13 Harv. L. Rev. 681.

[3] Cooper v. Finke, 38-2, 35+469.

[4] Kerrick v. Van Dusen, 32-317, 20+228; Cooper v. Finke, 38-2, 35+469; Lewis v. Willoughby, 43-307, 45+439; Vilett v. Moler, 82-12, 84+452; O'Malley v. G. N. Ry., 86-380, 90+974.

[5] Cooper v. Finke, 38-2, 35+469; Lewis v. Willoughby, 43-307, 45+439; Stein v. Swensen, 46-360, 49+55; Mohr v. Miessen, 47-228, 49+862.

[6] O'Malley v. G. N. Ry., 86-380, 90+974.

[7] Tapley v. Tapley, 10-448(360); Graham v. Burch, 44-33, 46+148.

[8] Dodge v. Hollinshead, 6-25(1) (impeachment of acknowledgment); Annan v. Folsom, 6-500(347) (id.); Baze v. Arper, 6-220(142) (id.); Edgerton v. Jones, 10-427(341) (id.); Ruggles v. Swanwick, 6-526(365) (non-delivery); Comer v. Baldwin, 16-172(151) (id.); Pigott v. O'Halloran, 37-415, 35+4 (id.).

[9] See § 3373.

[10] Smith v. Jordan, 13-264(246); Conger v. Nesbitt, 30-436, 15+875; Kausal v. Minn. etc. Assn., 31-17, 16+430; Gaston v. Merriam, 33-271, 22+614; Almich v. Downey, 45-460, 48+197; Northwest T. Co. v. Hulburt, 103-276, 115+159.

[11] Westman v. Krumweide, 30-313, 15+255; Skaaraas v. Finnegan, 31-48, 16+456; Merchants' Exch. Bank v. Luckow, 37-542, 35+434; Smith v. Mussetter, 58-159, 59+995; German-Am. Nat. Bank v. People's G. & E. Co., 63-12, 65+90; Shove v. Martine, 85-29, 88+254; Mendenhall v. Ulrich, 94-100, 101+1057; Burke v. Dulaney, 153 U. S. 228. See McCormick v. Wilson, 39-467, 40+571; Mpls. T. M. Co. v. Davis, 40-110, 41+1026; Ward v. Johnson, 57-301, 59+189; Slocum v. Bracy, 55-249, 56+826.

[12] See Blewitt v. Boorum, 142 N. Y. 357.

[13] Ruggles v. Swanwick, 6-526(365).

[14] Jordan v. White, 20-91(77); Healy v. Young, 21-389; Gammon v. Ganfield, 42-368, 44+125; Germania Bank v. Osborne,

3380. To explain subsequent conduct—A contemporaneous oral agreement may be admitted, not to vary the terms of a written contract, but to explain subsequent conduct claimed to be in accordance with such oral agreement.[15]

3381. Condition subsequent—Parol evidence is admissible to prove a condition subsequent which would have the effect of defeating or modifying the contract.[16]

3382. Agreement that contract should not be binding—Parol evidence is inadmissible to prove that a written instrument was executed with the understanding that it was not to be binding according to its terms.[17]

3383. Unilateral contracts—The parol evidence rule applies to unilateral contracts.[18]

3384. Oral contracts subsequently reduced to writing—Parol evidence of a valid and completed oral agreement is not excluded by the fact that the agreement is subsequently reduced to writing.[19] But when an oral agreement is reduced to writing before it is fully performed, the writing presumptively embodies the final contract of the parties and excludes parol evidence of its terms.[20]

3385. Instrument given as security—Parol evidence is admissible to show that an instrument absolute on its face was intended merely as security.[21] It may be shown that a chattel mortgage in terms securing the contemporary note of the mortgagor was in fact given as collateral security for a pre-existing debt which has been paid.[22]

3386. Terms and conditions implied by law—The terms or conditions which the law reads into the contracts of parties are no more subject to variation by parol than the terms used by the parties themselves.[23]

3387. Warranties—On a sale of personalty a warranty is not a distinct, collateral contract, but one of the terms of the sale, and if the sale is embodied in a writing complete in itself, but silent on the subject of warranty, parol evidence is inadmissible to prove a warranty.[24] Where the writing contains

81–272, 83+1084. See Wilson v. Hentges, 29–102, 12+151; Thompson v. Libby, 34–374, 26+1; Harrison v. Morrison, 39–319, 40+66; Bretto v. Levine, 50–168, 52+525; McNaughton v. Wahl, 99–92, 108+467; Rines v. Ferrell, 107–251, 119+1055.

[15] Levering v. Langley, 8–107(82); Rugland v. Thompson, 48–539, 51+604.

[16] Wemple v. Knopf, 15–440(355); Curtice v. Hokanson, 38–510, 38+694; Harrison v. Morrison, 39–319, 40+66; Kessler v. Smith, 42–494, 44+794; Masonic T. Assn. v. Channell, 43–353, 45+716. See Germania Bank v. Osborne, 81–272, 83+1084; Lilienthal v. Suffolk B. Co., 154 Mass. 185; 17 Cyc. 643.

[17] McCormick v. Wilson, 39–467, 40+571; Cowel v. Anderson, 33–374, 23+542; Graham v. Savage, 126+394. See Lebanon Sav. Bank v. Penney, 44–214, 46+331; Esch v. Hardy, 22–65.

[18] Horn v. Hansen, 56–43, 57+315.

[19] Conrad v. Marcotte, 23–55; Aultman v. Kennedy, 33–339, 23+528. See Kelly v. Clow etc. Co., 20–88(74); Frohreich v. Gammon, 28–476, 11+88; Salisbury v. Hekla F. Ins. Co., 32–458, 21+552; Ganser v. Fireman's F. Ins. Co., 34–372, 25+943.

[20] Blondel v. Le Vesconte, 41–35, 42+544; Cable v. Foley, 45–421, 47+1135; Pearce v. McGowan, 35–507, 29+176; Mueller v. Barge, 54–314, 56+36. See Aultman v. Falkum, 51–562, 53+875.

[21] Jones v. Rahilly, 16–320(283); Davis v. Crookston etc. Co., 57–402, 59+482; Pound v. Pound, 64–428, 67+200. See Russell v. Schurmeier, 9+28(16); Schurmeier v. Johnson, 10–319(250); Northern T. Co. v. Hiltgen, 62–361, 64+909.

[22] Harrington v. Samples, 36–200, 30+671.

[23] Stone v. Harmon, 31–512, 19+88; Thompson v. Libby, 34–374, 26+1; Liljengren v. Mead, 42–420, 44+306; Alexander v. Thompson 42–498, 44+534; Am. Mfg. Co. v. Klarquist, 47–344, 50+243; Oswald Mpls. T. Co., 65–249, 68+15; McAlpine v. Millen, 104–289, 301, 116+583; Am. B. Co. v. Am. etc. Co., 107–140, 119+783; Union Selling Co. v. Jones, 128 Fed. 672.

[24] Jones v. Alley, 17–292(269); Thompson v. Libby, 34–374, 26+1; Goulds v. Brophy, 42–109, 43+834; McCormick v. Thompson, 46–15, 48+415; Bradford v. Neill, 46–347, 49+193; Wisconsin etc. Co. v. Hood, 54–543, 56+165; Wheaton v. Noye, 66–156, 68+854; Shaw v. Maybell, 86–241, 90+392; Osborne v. Josselyn, 92–266, 99+

warranties other warranties cannot be proved by parol.[25] Evidence of an oral warranty of the quality of land conveyed by deed is inadmissible to vary or contradict the deed.[26]

3388. Judgments—The parol evidence rule applies to judgments and judicial proceedings.[27]

3389. Official records—Whether the official records of administrative officers and boards may be contradicted, varied, or supplemented by parol, depends upon the particular statute under which they are made.[28] As a general rule, such records cannot be contradicted, varied, or supplemented by parol evidence, unless the statute otherwise provides.[29]

3390. Informal and non-contractual writings—The parol evidence rule does not apply to informal and non-contractual instruments. On this ground parol evidence has been held admissible to vary or contradict a written admission;[30] an entry by a bank in a depositor's pass-book;[31] an order for goods;[32] an acknowledgment of a sum due;[33] a memorandum of a contract;[34] an agreement lacking some essential element of a valid contract.[35]

3391. Receipts—The parol evidence rule does not apply to receipts unless they are of a contractual nature.[36] If a part of a receipt is contractual and a

890; McNaughton v. Wahl, 99–92, 108+467; Seitz v. Brewer's etc. Co., 141 U. S. 510; Union Selling Co. v. Jones, 128 Fed. 672; 21 Harv. L. Rev. 565. See Kelly v. Clow, 20–88(74) (oral warranty not excluded by the fact that after the sale an agent of the seller gave the purchaser his written warranty); Aultman v. Falkum, 47–414, 50+471 (sale of harvester with written warranty—defence of prior oral warranty); Aultman v. Clifford, 55–159, 56+593 (writing incomplete—evidence of oral condition that article ordered should be of a certain quality); Potter v. Easton, 82–247, 84+1011 (writing incomplete).

[25] Humphrey v. Merriam, 46–413, 49+199.

[26] McMurphy v. Walker, 20–382(334).

[27] Steele v. Etheridge, 15–501(413); State v. Macdonald, 24–48; Long v. Webb, 24–380; Ferguson v. Kumler, 25–183; Schmitt v. Schmitt, 32–130, 19+649; Leftwich v. Day, 32–512, 21+731. See Mareck v. Mpls. T. Co., 74–538, 77+428 (parol evidence admissible to show that action was prosecuted for benefit of cestuis que trust).

[28] See State v. Gut, 13–341(315) (certificate of clerk as to drawing of jurors—not conclusive); St. Louis County v. Nettleton, 22–356 (record of county board as to taxes—parol evidence admissible to show a certain item included); State v. Dist. Ct., 29–62, 11+133 (records of board of public works of St. Paul only prima facie evidence—may be supplemented by parol); Keyes v. Mpls. etc. Ry., 36–290, 30+888 (order for vacation of highway—defects of order cannot be supplied by parol); Rud v. Pope County, 66–358, 68+1062 (order changing location of highway—extrinsic evidence inadmissible to aid description of highway).

[29] State v. Crookston L. Co., 85–405, 89+173 (record of county board in tax proceedings).

[30] Bingham v. Bernard, 36–114, 30+404.

[31] Branch v. Dawson, 36–193, 30+545.

[32] Boynton v. Clark, 42–335, 44+121; Head v. Miller, 45–446, 48+192; McCormick v. Thompson, 46–15, 48+415; Tufts Hunter, 63–464, 65+922; Becker v. Calmenson, 102–406, 113+1014. See Kessler v. Smith, 42–494, 44+794; Am. Mfg. Co. v. Klarquist, 47–344, 50+243.

[33] Alexander v. Thompson, 42–498, 44+534.

[34] Vaughan v. McCarthy, 63–221, 65+249.

[35] Beyerstedt v. Winona M. Co., 49–1, 51+619.

[36] Sencerbox v. McGrade, 6–484(334) (receipt in the nature of a contract of sale); Wykoff v. Irvine, 6–496(344) (receipt of money to be loaned); Robson v. Swart, 14–371(287) (warehouseman's wheat receipt); Knoblauch v. Kronschnabel, 18–300(272) (contractual receipt—sale of flour); Morris v. St. P. etc. Ry., 21–91 (non-contractual receipt of payment of money); Sears v. Wempner, 27–351, 7+362 (non-contractual receipt indorsed on note); Branch v. Dawson, 36–193, 30+545 (entry by a bank in depositor's pass-book non-contractual); Cummings v. Baars, 36–350, 31+449 (receipt "in full of all demands") McKinney v. Harvie, 38–18, 35+668 (receipt of money in part payment for land held non-contractual); Burke v. Ray, 40–34, 41+240 (receipt of money held non-contractual); Thompson v. Layman, 41–295, 42+1061 (satisfaction of mortgage held non-contractual); Elsbarg v. Myrman, 41–541, 43+572 (receipt of money held non-contractual); Tarbell v. Farmers' M. El. Co., 44–471, 47+152 (warehouseman's receipt for grain held contractual in part); Theopold

part non-contractual, the parol evidence rule applies to the former but not to the latter.[37]

3392. Incomplete written contracts—Where it is apparent that a written contract is not a complete and final statement of the whole of the transaction between the parties, parol evidence is admissible to prove the existence of any separate oral agreement as to any matter on which the written contract is silent, and which is not inconsistent therewith. The only criterion of its completeness or incompleteness is the writing itself. It cannot be proved to be incomplete by going outside of the writing, and proving that there was an oral stipulation entered into not contained in the written agreement. But, while the writing itself is the only criterion, it is unnecessary that its incompleteness should appear on its face from mere inspection. It is to be construed, as in any other case, in the light of its subject-matter, and the circumstances in which, and the purposes for which, it was executed.[38] The omitted portions of a contract which does not appear to be complete may be proved by parol, but so much of the contract as is in writing must be proved by the writing.[39]

3393. Distinct collateral contract—A complete written contract does not exclude proof of a prior or contemporaneous oral contract between the same parties, which is distinct and collateral, and does not qualify the written contract, and is not inconsistent therewith, though it may relate to the same subject-matter, and be a part of the same transaction.[40] It has been said that to justify the admission of an oral contract as "collateral" it must relate to a subject distinct from that to which the writing relates,[41] but a more liberal rule now prevails.[42] Proof is admissible of any independent fact, which is not inconsistent with, or does not qualify, any of the terms of the written contract, even though it may relate to the same subject-matter, and it is immaterial

v. Deike, 76–121, 78+977 (indorsement of payment on a note) Thompson v. Thompson, 78–379, 81+204, 543 (warehouseman's receipt for grain held contractual); Jordan v. G. N. Ry., 80–405, 83+391 (receipt in full of all claims and demands); Cappis v. Weidemann, 86–156, 90+368 (receipt in full for services of entire family held not a settlement but open to explanation); McCaffery v. Burkhardt, 97–1, 105+971 (indorsement of payment on note).

[37] Tarbell v. Farmers' M. El. Co., 44–471, 47+152.

[38] Wheaton v. Noye, 66–156, 68+854; Potter v. Easton, 82–247, 84+1011; Southwick v. Herring, 82–302, 84+1013; Rutherford v. Selover, 87–495, 92+413; McNaughton v. Wahl, 99–92, 108+467; Hand v. Ryan, 63–539, 65+1081; Vaughan v. McCarthy, 63–221, 65+249; Horn v. Hansen, 56–43, 57+315; Staples v. Edwards, 56–16, 57+220; Aultman v. Clifford, 55–159, 56+593; Phoenix Pub. Co. v. Riverside C. Co., 54–205, 55+912; Beyerstedt v. Winona M. Co., 49–1, 51+619; McCormick v. Thompson, 46–15, 48+415; Thompson v. Libby, 34–374, 26+1; Boynton v. Clark, 42–335, 337, 44+121; Gammon v. Ganfield, 42–368, 44+125; Domestic S. M. Co. v. Anderson, 23–57; Wallrich v. Hall, 19–383 (329); Wemple v. Knopf, 15–440(355); Ruggles v. Swanwick, 6–526(365); Keough v. McNitt, 6–513(357). See Wilson v. Hentges, 29–102, 12+151; Am. Mfg. Co. v. Klarquist, 47–344, 50+243; Bankers' etc. Co. v. Rogers, 73–12, 75+747; Becker v. Calmenson, 102–406, 113+1014; St. Anthony etc. Co. v. Princeton R. M. Co., 104–401, 116+935; Kessler v. Parelius, 107–224, 119+1069; Rines v. Ferrell, 107–251, 119+1055; Minn. T. Co. v. Penn. O. & S. Co., 108–221, 121+907; Reliable M. Co. v. Price, 108–502, 122+461; 13 Harv. L. Rev. 139; Browne, Parol Ev. 125.

[39] Horn v. Hansen, 56–43, 57+315.

[40] Backus v. Sternberg, 59–403, 61+335; Keough v. McNitt, 6–513(357); Levering v. Langley, 8–107(82); Metzner v. Baldwin, 11–150(92); Healy v. Young, 21–389; Wilson v. Hentges, 29–102, 12+151; Thompson v. Libby, 34–374, 379, 26+1; Bretto v. Levine, 50–168, 52+525; Am. B. & L. Assn. v. Dahl, 54–355, 56+47; Lynch v. Curfman, 65–170, 68+5; King v. Dahl, 82–240, 84+737; McNaughton v. Wahl, 99–92, 95, 108+467; Fink v. United etc. Co., 109–422, 124+7. See Rugland v. Thompson, 48–539, 51+604; Oswald v. Mpls. T. Co., 65–249, 253, 68+15; 1 Elliott, Ev. § 578; 21 A. & E. Ency. Law 1094; 21 Harv. L. Rev. 565.

[41] Thompson v. Libby, 34–374, 26+1.

[42] Backus v. Sternberg, 59–403, 61+335; King v. Dahl, 82–240, 84+737, 21 A. & E. Ency. Law 1096.

whether such fact occurred, contemporaneously with or was preliminary to, the written contract.[43]

3394. Implied or resulting trusts—Partnership property—Parol evidence is admissible to prove that land held by a partner is held in trust for the firm.[44] It is admissible to prove that the consideration for a deed proceeded from a third party, and that the grantee took the title in his own name for the benefit of such third party.[45]

3395. Facts held not to vary instrument—Miscellaneous cases—Parol evidence has been held admissible to prove that a contract has been discharged or fully performed;[46] facts giving rise to an estoppel;[47] admissions;[48] non-payment;[49] that a deed was not accepted as performance of a contract or only accepted as such conditionally;[50] an agreement as to an application of payments;[51] facts relating to the division of a crop;[52] that parties did not intend a writing to be the final contract between them;[53] that a claim was a claim against a firm;[54] the duration of a policy of insurance;[55] priority between different instruments.[56]

3396. Strangers—The parol evidence rule does not ordinarily apply between strangers to the instrument, or between a party and a stranger.[57] But it applies to a stranger who seeks to enforce rights based on the instrument.[58] It applies between privies of the parties.[59]

PAROL EVIDENCE TO AID IN CONSTRUCTION

3397. Direct declarations of intention—Parol evidence is inadmissible to prove prior or contemporaneous statements of the parties, expressing directly their intentions respecting the subject-matter of the instrument, or their understanding of its purpose, meaning, or effect.[60] There is an exception to this general rule in the case of equivocation.[61]

3398. Equivocation—Where the language of an instrument applies equally well to more than one object direct statements of intention may be proved by parol.[62] The reason for this excepion to the general rule is historical.[63]

3399. Colloquium—The prior conversations or negotiations of the parties concerning the subject-matter of an instrument are admissible to show the sense in which the parties used terms, to identify the subject-matter, and to

[43] Backus v. Sternberg, 59-403, 61+335.

[44] Arnold v. Wainwright, 6-358(241); Sherwood v. St. P. etc. Ry., 21-127; Brown v. Morrill, 45-483, 48+328.

[45] First Nat. Bank v. Kidd, 20-234(212).

[46] Harrington v. Samples, 36-200, 30+671. See Shaw v. Maybell, 86-241, 90+392.

[47] Kausal v. Minn. etc. Assn., 31-17, 16+430; Thian v. Gill, 45-459, 48+193; Mareck v. Mpls. T. Co., 74-538, 77+428; Thompson v. Borg, 90-209, 95+896.

[48] Fitzgerald v. Evans, 49-541, 52+143.

[49] Clossen v. Whitney, 39-50, 38+759.

[50] Slocum v. Bracy, 55-249, 56+826.

[51] Rugland v. Thompson, 48-539, 51+604.

[52] Smith v. Roberts, 43-342, 46+336.

[53] Rutherford v. Selover, 87-495, 92+413.

[54] Cannon v. Moody, 78-68, 80+842.

[55] Bankers' etc. Co. v. Rogers, 73-12, 75+747.

[56] Minor v. Sheehan, 30-419, 15+687.

[57] Van Eman v. Stanchfield, 10-255(197); Sanborn v. Sturtevant, 17-200(174); Nat. C. & L. Builder v. Cyclone etc. Co., 49-125, 51+657; N. W. Railroader v. Cyclone etc. Co., 49-133, 51+658; Buxton v. Beal, 49-230, 51+918; Cleribew v. West Side Bank, 50-538, 52+967; Horn v. Hansen, 56-43, 57+315; Pfeifer v. Nat. L. S. Ins. Co., 62-536, 64+1018.

[58] Sayre v. Burdick, 47-367, 50+245; Mpls. etc. Ry. v. Home Ins. Co., 55-236, 56+815; Lawton v. St. Paul P. L. Co., 56-353, 57+1061; Current v. Muir, 99-1, 108+870.

[59] Horn v. Hansen, 56-43, 57+315.

[60] Winona v. Thompson, 24-199, 208; Austin v. Wacks, 30-335, 342, 15+409; Stone v. Harmon, 31-512, 515, 19+88; King v. Merriman, 38-47, 54, 35+570; Union Selling Co. v. Jones, 128 Fed. 672.

[61] See § 3398.

[62] Stephen, Ev. art. 91; 1 Elliott, Ev. § 600; 4 Wigmore, Ev. § 2472; Pfeifer v. Nat. etc. Ins. Co., 62-536, 64+1018. See Slosson v. Hall, 17-95(71).

[63] Thayer, Ev. 441.

disclose the relation of the parties to each other and the subject-matter.[64] They are also admissible to show that material facts bearing on the time of performance were known to parties.[65]

3400. To show surrounding circumstances—It is often said that in construing an instrument the court is to place itself, as near as possible, in the situation of the parties at the time it was executed—that it is entitled to the same light that they had.[66] To this end parol evidence is admissible to show the situation and relation of the parties and all the circumstances surrounding the execution of the instrument.[67] The range of the inquiry must be limited, of course, to facts that have some relevancy.[68] Whatever be the nature of the document under review, the object is to discover the intention of the writer as evidenced by the words he has used; and, in order to do this the judge must put himself in the writer's place, and then see how the terms of the instrument affect the property or subject-matter. With this view, extrinsic evidence is admissible of all the circumstances surrounding the author of the instrument. It may, and indeed it often does, happen, that, in consequence of the surrounding circumstances being proved in evidence, the courts give to the instrument, thus relatively considered, an interpretation very different from what it would have received had it been considered in the abstract. But this is only just and proper, since the effect of the evidence is not to vary the language employed, but merely to explain the sense in which the writer understood it. Though a written agreement cannot be varied (by addition or subtraction) by proof of the circumstances out of which it grew and which surrounded its adoption, yet such circumstances are constantly resorted to for the purpose of ascertaining

[64] Kelly v. Bronson, 26–359, 4+607; Boak v. Manchester etc. Co., 84–419, 87+932; Lowrey v. Hawaii, 206 U. S. 206; U. S. v. Bethlehem S. Co., 205 U. S. 105; Simpson v. U. S., 199 U. S. 397; Stoops v. Smith, 100 Mass. 63; Smith v. Vose, 80 N. E. (Mass.) 527 and cases cited; White's Bank v. Myles, 73 N. Y. 335; Manchester P. Co. v. Moore, 104 N. Y. 680; N. Y. Sprinkler Co. v. Andrews, 38 N. Y. App. Div. 56; Brawley v. U. S., 96 U. S. 168; In re Curtis, 64 Conn. 501; Mason v. Ryus, 26 Kans. 464. See Union Selling Co. v. Jones, 128 Fed. 672 (a border case which might better have been decided the other way).

[65] Austin v. Wacks, 30–335, 15+409; Stone v. Harmon, 31–512, 19+88; Judd v. Skidmore, 33–140, 22+183; Palmer v. Breen, 34–39, 24+322; Liljengren v. Mead, 42–420, 44+306.

[66] Walker v. Barron, 6–508(353, 356); Morrison v. Mendenhall, 18–232(212, 222); Evans v. Stanton, 23–368; King v. Merriman, 38–47, 54, 35+570; Beaupre v. Dwyer, 43–485, 45+1094; Cannon v. Emmans, 44–294, 46+356; Ham v. Johnson, 51–105, 52+1080; Wheaton v. Noye, 66–156, 160, 68+854; Merriam v. U. S., 107 U. S. 437. It is not strictly true that the court is entitled to the same light that the parties enjoyed, for it cannot use the prior or contemporaneous statements of the parties showing their contractual or dispositive intent. See § 3397.

[67] Sanborn v. Neal, 4–126(83, 89); Donnelly v. Simonton, 13–301(278, 281); Miss. R. Co. v. Ankeny, 18–17(1, 7); Morrison v. Mendenhall, 18–232(212, 222); Wilson v. Schnell, 20–40(33); St. Anthony Falls etc. Co. v. Eastman, 20–277 (249, 256); Evans v. Stanton, 23–368; Winona v. Thompson, 24–199, 208; Kelly v. Bronson, 26–359, 4+607; Austin v. Wacks, 30–335, 342, 15+409; Bedford v. Small, 31–1, 16+452; Stone v. Harmon, 31–512, 19+88; Judd v. Skidmore, 33–140, 22+183; Thompson v. Libby, 34–374, 378, 26+1; King v. Merriman, 38–47, 54, 35+570; Witt v. St. P. etc. Ry., 38–122, 127, 35+862; Grueber v. Lindenmeier, 42–99, 101, 43+964; Beaupre v. Dwyer, 43–485, 45+1094; Cannon v. Emmans, 44–294, 46+356; St. P. etc. Ry. v. St. P. U. D. Co., 44–325, 46+566; Ham v. Johnson, 51–105, 52+1080; Longfellow v. McGregor, 56–312, 57+926; Board of Trustees v. Brown, 66–179, 184, 68+837; Wheaton v. Noye, 66–156, 160, 68+854; Landquist v. Swanson, 78–444, 81+1; Potter v. Easton, 82–247, 250, 84+1011; Shaw v. Maybell, 86–241, 244, 90+392; Brandt v. Edwards, 91–505, 509, 98+647; Callan v. Hause, 91–270, 97+973; Lawton v. Joesting, 96–163, 167, 104+830; Hamel v. Mpls. etc. Ry., 97–334, 338, 107+139; Reed v. Ins. Co., 95 U. S. 23; West v. Smith, 101 U. S. 263; French v. Carhart, 1 N. Y. 96; White's Bank v. Myles, 73 N. Y. 335; Stoops v. Smith, 100 Mass. 63.

[68] Winona v. Thompson, 24–199, 208.

the subject-matter and the standpoint of the parties in relation thereto. Without some knowledge derived from such evidence, it would be impossible to comprehend the meaning of an instrument or the effect to be given to the words of which it is composed. This preliminary knowledge is as indispensable as that of the language in which the instrument is written. A reference to the actual condition of things at the time, as they appeared to the parties themselves, is often necessary to prevent the court, in construing their language, from falling into mistakes and even absurdities.[69] The surrounding circumstances, within this rule, are not to be taken as including the prior representations, proposals, and negotiations of a promissory character leading up to, and superseded by, the written agreement.[70]

3401. To identify parties—Parol evidence is admissible to identify the parties to an instrument.[71]

3402. To identify subject-matter—Parol evidence is admissible to identify the subject-matter of an instrument [72]—in other words, to apply the terms of an instrument to the subject-matter.[73] In every case the words used must be translated into things and facts by parol evidence.[74] The rule which allows the use of parol evidence to apply the terms of an instrument to the subject-matter also allows its use for the purpose of explaining any uncertainty arising from such application.[75]

3403. To show object or purpose of instrument—Parol evidence is admissible to show the object or purpose of the instrument.[76]

3404. To explain technical terms—Parol evidence is admissible to explain technical terms, abbreviations, etc.[77]

3405. To show subsequent conduct of parties—Parol evidence is admissible to show the subsequent conduct of the parties indicating the practical construction which they put upon an instrument.[78]

3406. Latent and patent ambiguities—In determining the admissibility of parol evidence to aid in construction courts sometimes employ the distinc-

[69] Reed v. Ins. Co., 95 U. S. 23. In all cases the object is to see what is the intention expressed by the words used. But, from the imperfection of language, it is impossible to know what that intention is without inquiring farther, and seeing what the circumstances were with reference to which the words were used, and what was the object, appearing from those circumstances, which the person using them had in view. Lord Blackburn, River Wear Comrs. v. Adamson, 2 App. Cases, 743, 763.

[70] Union Selling Co. v. Jones, 128 Fed. 672; Inglis v. Buttery, 3 App. Cases, 552, 577; Winona v. Thompson, 24–199, 208. See § 3397.

[71] Wakefield v. Brown, 38–361, 37+788.

[72] Baldwin v. Winslow, 2–213(174); Case v. Young, 3–209(140); Eddy v. Caldwell, 7–225(166); Ames v. First Div. etc. Ry., 12–412(295); Slosson v. Hall, 17–95(71); Kelly v. Bronson, 26–359, 4+607; Tice v. Freeman, 30–389, 15+674; Ames v. Lowry, 30–283, 15+247; Stewart v. Colter, 31–385, 18+98; Romans v. Langevin, 34–312, 25+638; Beaupre v. Dwyer, 43–485, 45+1094; Russell v. Davis, 51–482, 53+766; Cannon v. Moody, 78–68, 80+842; Boak v. Manchester etc. Co., 84–419, 87+932; Sorenson v. Carey, 96–202, 104+958.

[73] Kelly v. Bronson, 26–359, 4+607; Romans v. Langevin, 34–312, 25+638; Thompson v. Libby, 34–374, 378, 26+1; Adamson v. Petersen, 35–529, 29+321; Nippolt v. Kammon, 39–372, 40+266; Eastman v. St. Anthony etc. Co., 43–60, 44+882; Borer v. Lange, 44–281, 46+358; Sergeant v. Dwyer, 44–309, 46+444; Merchant v. Howell, 53–295, 55+131; Shaw v. Maybell, 86–241, 90+392.

[74] Holmes, J., Doherty v. Hill, 144 Mass. 465, 468.

[75] Kelly v. Bronson, 26–359, 4+607; Stoops v. Smith, 100 Mass. 63.

[76] Longfellow v. McGregor, 56–312, 57+926; Wheaton v. Noye, 66–156, 68+854; Landquist v. Swanson, 78–444, 81+1; Callan v. Hause, 91–270, 97+973; Lawton v. Joesting, 96–163, 104+830.

[77] Cogan v. Cook, 22–137, 141; Winona v. Thompson, 24–199, 208; Wilder v. De Cou, 26–10, 1+48; Merchant v. Howell, 53–295, 55+131; St. Paul etc. Co. v. Harrison, 64–300, 66+980; Maurin v. Lyon, 69–257, 72+72; Reeves v. Cress, 80–466, 83+443.

[78] Engel v. Scott, 60–39, 61+825. See § 1820.

tion made by Lord Bacon between latent and patent ambiguities.[79] The misleading character of these terms has been pointed out again and again and their use ought to be discontinued.[80] A patent ambiguity is that which remains uncertain after all the evidence of surrounding circumstances and collateral facts, admissible under proper rules of evidence, is exhausted.[81]

3407. When instrument plain on face—It is sometimes said that extrinsic evidence is inadmissible in aid of construction when the instrument is plain and unambiguous on its face[82]—in other words, that it is inadmissible unless there is an ambiguity appearing on the face of the instrument.[83] Such expressions are a survival of primitive methods of construction.[84] They are simply not true, taken literally. To arrive at a just construction it is often necessary to resort to extrinsic evidence, though the instrument is plain on its face.[85] In the words of Lord Justice Bowen the rule against disturbing a plain meaning should be treated "not so much as a canon of construction as a counsel of caution, to warn you in dealing with such cases not to give way to guesses or mere speculation as to the probabilities or an intention, but to act only on such evidence as can lead a reasonable man to a distinct conclusion."[86] In other words, a court is not justified in refusing to consider extrinsic evidence simply because the instrument is apparently plain, but only when the extrinsic evidence offered could not reasonably affect the construction.

ADMISSIONS

3408. Nature—An admission is generally regarded as evidence.[87] It is often rather a substitute for evidence—what the Romans called a levamen probationis. This, either in virtue of the direct consent and waiver of the party, as in the case of explicit and solemn admissions, or on grounds of public policy and convenience, as in the case of those implied from assumed character, acquiescence, or conduct.[88] The primary use and effect of an admission is to discredit a party's claim by exhibiting his inconsistency in other utterances. It is therefore immaterial whether these other utterances would have been independently receivable as the testimony of a qualified witness. It is their inconsistentency with the party's present claim that gives them logical force, and not their testimonial credit. An admission is nothing but a piece of evidence, discrediting the party's present claim, and tending to prove the fact of its incorrectness. It is therefore to be distinguished from those statements of the party which become in themselves the foundation of independent rights for other persons by virtue of some doctrine of substantive law; in other words, from binding estoppels, warranties, and representations.[89]

[79] Baldwin v. Winslow, 2-213(174); McNair v. Toler, 5-435(356); Van Eman v. Stanchfield, 10-255(197); Slosson v. Hall, 17-95(71); St. Anthony Falls etc. Co. v. Eastman, 20-277(249, 256); McRoberts v. McArthur, 62-310, 64+903; Board of Trustees v. Brown, 66-179, 184, 68+837; Sorenson v. Carey, 96-202, 206, 104+958.

[80] Thayer, Ev. 422; 4 Wigmore, Ev. § 2472; 1 Elliott, Ev. § 599; Browne, Parol Ev. § 116; Jones, Construction, Contracts, § 46; 28 Am. L. Rev. 321.

[81] McRoberts v. McArthur, 62-310, 64+903; 17 Cyc. 682.

[82] Winona v. Thompson, 24-199; St. P. etc. Ry. v. Blackmar, 44-514, 47+172; Nat. G. & F. Co. v. Bixby, 48-323, 51+217; Haycock v. Johnston, 81-49, 83+494; Minn. T. Co. v. Penn. O. & S. Co., 108-221, 121+907. See Norris v. Clark, 33-476, 24+128.

[83] King v. Merriman, 38-47, 54, 35+570.

[84] See 4 Wigmore, Ev. § 2462; Prof. Thayer, 6 Harv. L. Rev. 434.

[85] See, for example, Kelly v. Bronson, 26-359, 4+607; St. Anthony Falls etc. Co. v. Eastman, 20-277(249); Board of Trustees v. Brown, 66-179, 68+837.

[86] Re Jodrell, L. R. 44 Ch. Div. 590.

[87] Burke v. Ray, 40-34, 41+240; McManus v. Nichols, 105-144, 117+223.

[88] 1 Greenleaf, Ev. § 169; Thayer, Cases on Ev. (2 ed.) 111. See 2 Wigmore, Ev. § 1048; 1 Elliott, Ev. § 220.

[89] Binewicz v. Haglin, 103-297, 115+271.

3409. By party—An admission made by a party to an action in relation to a relevant matter is admissible against him,[90] whenever made,[91] and without laying any foundation therefor.[92] All admissions by a party made outside the record, if relevant to the issue, are admissible in evidence as tending to prove the fact in issue to which the admissions relate, and, where they contradict the testimony of the party, to discredit him. Such evidence tends to prove the fact admitted and to discredit the party; but it is not necessarily conclusive as to either.[93] The admissions of a party against his interest are admissible against him though his interest is contingent or uncertain.[94] Where an agent is a party admissions made by him are admissible against him whenever made, though they might not have been admissible against his principal if the latter had brought the action.[95] A memorandum of a transaction made by A in a book of B, in his presence and at his request, is evidence in behalf of A against B.[96] An admission is not admissible in favor of the party making it.[97] And an admission of a party against his interest, at one time, cannot be rebutted by proof of a statement made by him in his own favor at another time.[98] Written admissions must be properly authenticated.[99]

3410. By agents—As a general rule statements of an agent are admissible against his principal, as admissions, only when made as a part of an authorized act or transaction.[1] It is often said that they must be a part of the res gestae,[2]

[90] Cooper v. Breckenridge, 11-341(241) (admission of interest in property of townsite association); Baldwin v. Blanchard, 15-489(403) (issue as to whether A had agreed with B to do a certain act—statement of A that he was going to do the act admissible); Weide v. Davidson, 15-327 (258) (unsigned bill of lading—admission of condition of goods); Sullivan v. Murphy, 23-6 (as to partnership); State v. Mims, 26-183, 2+494 (admission by accused before commission of offence); Stariha v. Greenwood, 28-521, 11+76 (admission of debt by promisor); Weaver v. Miss. etc. Co., 28-534, 11+114 (issue as to value of use of property—what party had agreed to pay for use admissible); Weaver v. Miss. etc. Co., 28-542, 11+113 (id.); Wilson v. Hentges, 29-102, 12+151 (formal admission on a trial by a party that he was not a bona fide purchaser—admissible on a second trial); Griswold v. Edson, 32-436, 21+475 (letters showing an intention to pay a note and making no reference to a counterclaim); Orth v. Bauer, 39-31, 38+758 (admission of party that he had sold property to another); Donlon v. Evans, 40-501, 42+472 (statements as to value of land made during negotiations for its transfer); Potter v. Mellen, 41-487, 43+375 (fraud in the sale of a business—statements as to the losing character of the business); Redding v. Godwin, 44-355, 46+563 (admissions as to insolvent condition of a corporation); Minn. etc. Soc. v. Swanson, 48-231, 51+117 (action for rent—statements as to whom a room was let); Irish Am. Bank v. Ludlum, 49-255, 51+1047 (statements regarding the conduct of a business); Fitzgerald v. Evans, 49-541, 52+143 (statements made while negotiating a sale); Olson v. Swensen, 53-516, 55+596 (statements as to the ownership of property); Towle v. Sherer, 70-312, 73+180 (action to establish a lost deed); Person v. Bowe, 79-238, 82+480 (action for wages—offer to pay claim if other party "would throw off five dollars"); Davis v. Hamilton, 88-64, 92+512 (action for libel—statements of party libeled tending to show the truth of the charges); White v. Collins, 90-165, 95+765 (action by real estate broker for commission); Pearsall v. Tabour, 98-248, 108+808 (issue as to new promise after bankruptcy—statement by prospective bankrupt of his intention to take care of the plaintiff); Jenning v. Rohde, 99-335, 109+597 (action for recovery of money loaned—statements characterizing nature of payments); McManus v. Nichols, 105-144, 117+223 (statements out of court inconsistent with testimony).

[91] Presley v. Lowry, 25-114. It may have been made at so remote a time as not to be material. Stearns v. Johnson, 17-142(116).

[92] White v. Collins, 90-165, 95+765; McManus v. Nichols, 105-144, 117+223.

[93] McManus v. Nichols, 105-144, 117+223.

[94] Towle v. Sherer, 70-312, 73+180.

[95] Wilson v. Reedy, 33-503, 24+191.

[96] Snyder v. Wolford, 33-175, 22+254.

[97] Marvin v. Dutcher, 26-391, 4+685; Griffin v. Bristle, 39-456, 40+523.

[98] Marvin v. Dutcher, 26-391, 4+685. See Houde v. Tolman, 42-522, 44+879.

[99] Mower County v. Smith, 22-97.

[1] First Nat. Bank v. St. Anthony etc. Co., 103-82, 114+265; Trainor v. Schutz, 98-213, 107+812; Whitney v. Wagener, 84-

but this adds nothing and breeds confusion.[3] It is important to distinguish statements which are admissible as admissions from statements which are admissible under the res gestae rule. The former are admissible only against the principal, while the latter are admissible both for and against him.[4] An agent's declarations can be received against his principal only when the agent had authority to make them; or where, though made without authority, they were brought home to the principal and he assented to or acquiesced in them, or remained silent when it was his duty to speak, so that the party offering them was misled.[5] The general rule applies to general as well as special agents.[6] The fact of the agency and the fact that the statements were made as a part of an authorized act or transaction should be proved prima facie before the statements are admitted,[7] but it is discretionary with the court to allow these facts to be proved after the admission of the statements.[8] The ruling of the court admitting the statements does not relieve the party offering them from the burden of proving the agency to the satisfaction of the jury. The court simply decides that there is sufficient evidence of agency to submit the question to the jury.[9] The statements of an agent are inadmissible, in an action in which he is not a party, to prove that he and not his principal is the owner of the property in controversy.[10] An authority to make an admission is not necessarily to be implied from an authority previously given in respect to the thing to which the admission relates.[11] It has been said that the modern tendency is to limit the admissibility of evidence of admissions of agents against their principals, and to keep it strictly within the limits of the rules as settled by the cases.[12] When an agent is himself a party to an action different rules apply.[13]

3411. By partners—During the continuance of a partnership each member thereof is an agent of the others as regards admissions concerning firm matters.[14] A partner's admissions cannot bring a matter within the scope of firm business which has no proper place there.[15] Statements of one member of an alleged partnership, made in the absence of the other members, are inadmissible against them to prove the partnership, but they are admissible against the declarant.[16] After the termination of a partnership the admissions of a partner are not binding on his copartners, even as to matters occurring during the continuance of the partnership, unless assented to or authorized by them.[17]

211, 87+602; Parker v. Winona etc. Ry., 83–212, 86+2; Jackson v. Mut. B. L. Ins. Co., 79–43, 81+545; Reem v. St. P. C. Ry., 77–503, 80+638; Cumbey v. Lovett, 76–227, 79+99; Rosted v. G. N. Ry., 76–123, 78+971; Dexter v. Berge, 76–216, 78+1111; General Convention v. Torkelson, 73–401, 76+215; Colby v. Life I. & I. Co., 57–510, 59+539; Halverson v. Chi. etc. Ry., 57–142, 58+871; Rodes v. St. Anthony etc. Co., 49–370, 52+27; Browning v. Hinkle, 48–544, 51+605; Van Doren v. Bailey, 48–305, 51+375; Doyle v. St. P. etc. Ry., 42–79, 43+787; Presley v. Lowry, 25–114; Winona v. Thompson, 24–199; Lawrence v. Winona etc. Ry., 15–390(313); Greene v. Dockendorf, 13–70(66); Lowry v. Harris, 12–255(166).

[2] Presley v. Lowry, 25–114 and cases supra.

[3] Prof. Thayer, 15 Am. Law Rev. 80; Wigmore, Ev. § 1078; Huffcut, Agency, § 139; Tiffany, Agency, 249. See, for an illustration of confusion resulting from this misuse of terms, O'Connor v. Chi. etc. Ry., 27–166, 169, 6+481.

[4] See Wigmore, Ev. § 1078.

[5] Greene v. Dockendorf, 13–70(66).

[6] Van Doren v. Bailey, 48–305, 51+375.

[7] Lowry v. Harris, 12–255(166); Minster v. Holbert, 32–533, 21+718. See Brown v. Mpls. etc. Ry., 108–1, 121+123 (error in rejecting proof of agency).

[8] Woodbury v. Larned, 5–339(271).

[9] Gates v. Manny, 14–21(13).

[10] Whitney v. Wagener, 84–211, 87+602.

[11] Rosted v. G. N. Ry., 76–123, 78+971.

[12] Vogel v. Osborne, 32–167, 20+129.

[13] Wilson v. Reedy, 33–503, 24+191.

[14] Coleman v. Pearce, 26–123, 1+846; Lindhjen v. Mueller, 42–307, 44+203.

[15] Slipp v. Hartley, 50–118, 52+386.

[16] Sullivan v. Murphy, 23–6; McNamara v. Eustis, 46–311, 48+1123; Boosalis v. Stevenson, 62–193, 64+380.

[17] Nat. Bank of Com. v. Meader, 40–325,

But a partial payment of a partnership debt, made by one partner after dissolution of the firm, will prevent the bar of the statute of limitations 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.[18]

3412. By attorneys—The admissions of attorneys in relation to the conduct of civil actions are binding on their clients.[19] A statement made by an attorney in his opening to the jury is not a binding admission, dispensing with proof of the fact by the adverse party.[20] An admission by an attorney of an issuable or relevant fact is admissible on the second trial of an action, unless it is apparent that it was made only for the occasion.[21]

3413. By public officers—The state has been held not bound by admissions made by county commissioners in tax proceedings.[22]

3414. Principal and surety—Statements of a principal, made as a part of an act or transaction for which the surety held himself liable, are admissible as admissions against the surety.[23]

3415. By wards—The question whether a ward can make an admission that will bind his estate has been raised but not determined.[24]

3416. Husband and wife—The mere relation of husband and wife does not authorize one to make admissions for the other.[25]

3417. By former owners—Statements of a former owner of either real [26] or personal property,[27] made while he held the title and in disparagement thereof, are admissible as admissions against his successors in interest. Such statements, made after the declarant has parted with the title are not admissible, as admissions, against his successors in interest.[28] But they are sometimes admissible on other grounds. If the declarant becomes a witness they are admissible for purposes of impeachment, if inconsistent with his testimony.[29] If the declarant is in possession and his statements characterize his possession they are admissible under the res gestae rule.[30] They are also admissible in case of a conspiracy.[31]

41+1043; First Nat. Bank v. Strait, 65-162, 67+987. See Whitney v. Reese, 11-138(87); Beatty v. Ambs, 11-331(234).

[18] Davison v. Sherburne, 57-355, 59+316. See Whitney v. Reese, 11-138(87).

[19] Rogers v. Greenwood, 14-333(256); Bingham v. Winona County, 8-441(390). See Gray v. Minn. T. Co., 81-333, 84+113.

[20] Ferson v. Wilcox, 19-449(388).

[21] Merchants Nat. Bank v. Stanton, 62-204, 64+390. See Wilson v. Hentges, 29-102, 12+151.

[22] State v. Olson, 55-118, 56+585.

[23] Prosser v. Hartley, 35-340, 29+156 (final account of assignee in insolvency); Lancashire Ins. Co. v. Callahan, 68-277, 71+261 (statements made in connection with the examination of books, accounts, etc.—bond of insurance agent); Capital F. Ins. Co. v. Watson, 76-387, 79+601 (bond of insurance agent—reports of agent to company); Hall v. United States F. & G. Co., 77-24, 79+590 (fidelity insurance—statements of principal in connection with the examination of his books).

[24] Johanson v. Hoff, 67-148, 69+705.

[25] Keller v. Sioux City etc. Ry., 27-178, 6+486; Miller v. Lathrop, 50-91, 52+274; Towle v. Sherer, 70-312, 73+180.

[26] See Hosford v. Rowe, 41-245, 42+1018; 23 Harv. L. Rev. 397.

[27] Taylor v. Hess, 57-96, 58+824; Nickerson v. Wells, 71-230, 73+959; Anderson v. Lee, 73-397, 76+24; 23 Harv. L. Rev. 397. Negotiable paper is an exception to this rule. See Wigmore, Ev. § 1084.

[28] Burt v. McKinstry, 4-204(146); Derby v. Gallup, 5-119(85); Zimmerman v. Lamb, 7-421(336); Scott v. King, 7-494(401); Howland v. Fuller, 8-50(30); Shaw v. Robertson, 12-445(334); Blackman v. Wheaton, 13-326(299); Hathaway v. Brown, 18-414(373); Groff v. Ramsey, 19-44(24); Adler v. Apt, 30-45, 14+63; Beard v. First Nat. Bank, 41-153, 43+7; Little v. Cook, 55-265, 56+750; Kurtz v. St. P. & D. Ry., 61-18, 63+1; Glaucke v. Gerlich, 91-282, 98+94. See Allen v. Knutson, 96-340, 104+963.

[29] Scott v. King, 7-494(401, 405); Zimmerman v. Lamb, 7-421(336); Hicks v. Stone, 13-434(398); Tunell v. Larson, 37-258, 34+29.

[30] Murch v. Swensen, 40-421, 42+290; Cortland v. Sharvy, 52-216, 53+1147. See § 3306.

[31] Carson v. Hawley, 82-204, 84+746.

3418. By corporate officers—The rules which govern admissions of agents [32] govern admissions of officers of private corporations.[33]

3419. By conduct—Conduct is sometimes treated in the cases as an admission,[34] when, strictly speaking, it is merely circumstantial evidence.[35]

3420. By silence—When a statement is made in the presence of a party regarding a relevant matter concerning him, under such circumstances that he would naturally reply, if he did not assent, and he is at liberty to do so, his failure to reply is admissible as an admission of the truth of the facts stated.[36] It is for the jury to determine, from all the circumstances, whether the party by his silence assented to the truth of the facts stated.[37]

3421. By stranger—The statement of one person is not admissible against another as an admission unless there is a special relation between the two which renders the statement admissible.[38] An admission made "either by a party to the action or else by a stranger" is not admissible.[39]

3422. Adoption of another's statements—A person may so adopt the statements of another as to render them admissible as his own admissions.[40]

3423. Of legal conclusions—An admission of a mere legal conclusion is not binding.[41]

3424. In pleadings—Where a pleading is amended the original is admissible as an admission, if it was signed or verified by the party, or was made with his knowledge or under his direction, but it is not conclusive.[42] An admission by a party in his pleading in an action is admissible against him in another action, but it is not conclusive. It is unnecessary that the parties or issues in the two actions should be the same.[43] Admissions in an unauthorized pleading filed in a justice court may be treated by the court as formal admis-

[32] See § 3410.

[33] Whitney v. Wagener, 84–211, 87+602; State v. Northern T. Co., 73–70, 75+754; Cannon River etc. Assn. v. Rogers, 51–388, 53+759; Browning v. Hinkle, 48–544, 51+605; Woodham v. First Nat. Bank, 48–67, 50+1015.

[34] Stariha v. Greenwood, 28–521, 11+76 (promise to pay to third party as admission of debt); Hulett v. Carey, 66–327, 69+31 (question at issue whether A and B were married—A wrote a letter to her sister describing B as her husband and your brother and handed it to B—B read it, inclosed it in an envelope addressed to the sister and put it in his pocket apparently for the purpose of posting it—letter held admissible as an admission of B).

[35] See Wigmore, Ev. § 1052.

[36] State v. Quirk, 101–334, 112+409 (manslaughter—question asked wife of defendant in his presence as to why he shot the decedent); Bathke v. Krassin, 82–226, 84+796 (action for alienation of wife's affection—statement made by wife in presence of defendant that she was leaving her husband because the defendant would not allow her to remain—whether defendant heard statement held a question for the jury); Powers v. Imperial F. Ins. Co., 48–380, 51+123 (several insurance agents negotiating in adjustment of loss—whether the failure of defendant's agent to dissent to statements made constituted an admission held a question for the jury); State v. Plym, 43–385, 45+848 (bigamy—statement as to existence of another wife); State v. Sauer, 42–258, 44+115 (conversation between wife of accused and police officer immediately before the arrest of the accused—whether it was in the presence of the accused held a question for the jury); Keller v. Sioux City etc. Ry., 27–178, 6+486 (evidence held not to show that statement was made in the presence of the party or under circumstances calling for a reply); Marvin v. Dutcher, 26–391, 4+685 (evidence held not to show a duty to reply); Greene v. Dockendorf, 13–70(66) (statements of agent brought home to principal—silence of principal). See Sparf v. U. S., 156 U. S. 51; Com. v. Trefethen, 157 Mass. 180; People v. Koerner, 154 N. Y. 355.

[37] State v. Quirk, 101–334, 112+409.

[38] Redding v. Wright, 49–322, 51+1056; Reisan v. Mott, 42–49, 43+691; Beard v. First Nat. Bank, 41–153, 43+7; Lundberg v. N. W. El. Co., 42–37, 43+685; Smith v. Crane, 33–144, 22+633; Minster v. Holbert, 32–533, 21+718; Faribault v. Sater, 13–223(210).

[39] Redding v. Godwin, 44–355, 46+563.

[40] Hulett v. Carey, 66–327, 69+31.

[41] Binewicz v. Haglin, 103–297, 115+271.

[42] Vogel v. Osborne, 32–167, 20+129; Reeves v. Cress, 80–466, 83+443; Stearns v. Kennedy, 94–439, 103+212.

[43] Siebert v. Leonard, 21–442; Rich v. Minneapolis, 40–82, 41+455; O'Riley v.

sions made by the party upon the trial of the cause.[44] If a fact is admitted by the pleadings one party cannot claim that the other is estopped from proving it.[45]

3425. Offer to compromise—An unaccepted offer by way of compromise is not admissible against the party making it as an admission.[46]

3426. To prove execution of written instrument—A party's admissions are competent to prove that an instrument was signed by him.[47]

3427. Must be considered as a whole—Where a party proves an admission of the adverse party the whole of such admission must be considerel,[48] and the entire conversation in which the admission was made may be shown.[49]

3428. Weight—It is not error to refuse to charge that admissions are the lowest class of proof and should be received and considered by the jury with great caution, and to charge instead that, "with respect to verbal admissions they ought to be received with great caution."[50] It is always for the court to consider what weight, if any, is to be given to an admission, or any other evidence. It is not conclusive merely because it is legally admissible. In determining what weight shall be given to admissions, courts consider two circumstances in particular—the extent of personal knowledge, and the character of the admission, whether concerning law or fact. An admission not based on personal knowledge may be admissible. But an admission evidently made without personal knowledge of the facts admitted, or a statement inconsistent and contradictory, indefinite or equivocal, and not elucidated by further proof, may have little or no weight as evidence. An admission of a mere legal conclusion is not binding. Slight credit will be given to the unsupported evidence of a witness who testifies to admissions obtained by him from a party for the purpose of charging him thereby. Testimony as to naked admissions, given by witnesses who, though not parties to the record, are in close sympathy and interest with the party calling them, is one of the most untrustworthy kinds of evidence.[51] Admissions of a person, since deceased, tending to establish a controverted fact in litigation, are scrutinized closely, and their weight and effect as substantive evidence are for the trial court. Though uncontradicted they are not necessarily conclusive.[52]

3429. Conclusiveness—Extrajudicial admissions are not conclusive, in the absence of elements of an estoppel, but may be explained, limited, qualified, or contradicted;[53] and this may be done by oral evidence where the admission is in writing.[54] Judicial admissions stand on a different footing.[55]

PRESUMPTIONS

3430. Nature and effect—A presumption of law is a rule of law that a given fact shall be assumed until the contrary is sufficiently proved. It is not

Clampet, 53–539, 55+740; Stoakes v. Larson, 108–234, 121+1112. See, as to the necessary foundation, Burns v. Maltby, 13–161, 45+3; Gray v. Minn. T. Co., 81–333, 84+113.

[44] Warder v. Willyard, 46–531, 49+300.

[45] Ryan v. Peacock, 40–470, 42+298.

[46] Melby v. Osborne, 35–387, 29+58; State v. Mpls. etc. Ry., 90–88, 95+581. See Person v. Bowe, 79–238, 82+480.

[47] Pottgieser v. Dorn, 16–204(180). See § 3364.

[48] Searles v. Thompson, 18–316(285).

[49] Fitzgerald v. Evans, 49–541, 52+143.

[50] Tozer v. Hershey, 15–257(197).

[51] Binewicz v. Haglin, 103–297, 115+271.

[52] Powers v. Johnson, 107–476, 120+1021.

[53] Beatty v. Ambs, 11–331(234); Allis v. Day, 14–516(388); Weaver v. Miss. etc. Co., 28–542, 11+113; Weaver v. Miss. etc. Co., 28–534, 11+114; State v. Mims, 26–183, 2+683; Salisbury v. Hekla F. Ins. Co., 32–458, 21+552; Rich v. Minneapolis, 40–82, 41+455; Brown v. Kohout, 61–113, 63+248; Binewicz v. Haglin, 103–297, 115+271; McManus v. Nichols, 105–144, 117+223.

[54] Bingham v. Bernard, 36–114, 30+404.

[55] Greengard v. Fretz, 64–10, 65+949. See Wilson v. Hentges, 29–102, 12+151.

itself evidence, but has the effect of evidence. It is a substitute for evidence—what the Romans called a levamen probationis. It operates to relieve the party in whose favor it works from going forward in argument or evidence. It serves, therefore, the purposes of a prima facie case, and in that sense it is, temporarily or provisionally, the substitute or equivalent for evidence. It serves this purpose until the adversary has gone forward with his evidence. How much evidence is required from the adversary to meet the presumption, or, as it is variously expressed, to overcome or destroy it, is determined by no general rule. It may be merely enough to make it reasonable to require the other side to answer; it may be enough to make out a prima facie case, and it may be a great weight of evidence, excluding all reasonable doubt.[56] When the presumption is overcome it disappears as a rule of law and the case is in the hands of the jury free from any rule.[57] A presumption is not the fact itself but the legal conclusion attached to it.[58] Most presumptions of law are based upon the experienced course of human conduct and affairs, and are but the result of the general experience of a connection between certain facts; the one being usually found to be the companion or effect of the other.[59]

3431. Presumptions of fact—So-called presumptions of fact are not "rules of law" at all, but are mere logical inferences which a court or jury may draw, but is not bound to draw. They do not make out a prima facie case or shift the burden of proof, as presumptions of law do.[60] It is not to be overlooked, however, that courts often call a presumption one of fact when it is in truth one of law.[61] And the word "presumption" is constantly being used to denote a permissible inference. If a presumption operates to make out a prima facie case and shifts the burden of proof it is a presumption of law, and not a presumption of fact. This is the true test, but courts use language in this connection so loosely that the subject is involved in great uncertainty.

[56] Thayer, Ev. 313, 314, 381, 563, 575; 4 Wigmore, Ev. §§ 2490, 2491; 1 Elliott, Ev. §§ 83–93; Hammon, Ev. p. 45; 9 Ency. Ev. 872; Bragg v. Chi. etc. Ry., 81–130, 83+511 (discriminating evidence and presumption); Philbrook v. Smith, 40–100, 41+545 (holding a presumption not evidence of an essential fact); Karsen v. Mil. etc. Ry., 29–12, 11+122 (effect of presumption in making prima facie case and shifting burden of proof); State v. Brecht, 41–50, 54, 42+602 (id.); Lotto v. Davenport, 50–99, 52+130 (id.); Vincent v. Mutual etc. Assn., 77 Conn. 281 (nature of presumptions discussed); Lisbon v. Lyman, 49 N. H. 553 (id.). There is high authority for the view that a presumption is itself evidence. Coffin v. U. S., 156 U. S. 432. For a criticism of this case see Thayer, Ev. 551; 4 Wigmore, Ev. § 2511. Doubt is thrown on the Coffin case by Agnew v. U. S., 165 U. S. 36, 51. It has been said that a presumption of law is "where the law itself, without the aid of a jury, infers one fact from the proved existence of another fact, in the absence of all opposing evidence." Karsen v. Mil. etc. Ry., 29–12, 11+122. This is misleading. A presumption is an assumption and not an inference. Thayer, Ev. 317; Hammon, Ev. 45. In Lotto v. Davenport, 50–99, 52+130 it is said that presumptions concern matters of proof. Prof. Thayer was the first to make clear the nature of presumptions. The general subject is well treated, in harmony with Prof. Thayer's views, in 1 Elliott, Ev. §§ 76–127; Hammon, Ev. pp. 45–373; 9 Ency. Ev. 872.

[57] 4 Wigmore, Ev. § 2491; 9 Ency. Ev. 885.

[58] Bragg v. Chi. etc. Ry., 81–130, 132, 83+511.

[59] Wilson v. Hayes, 40–531, 536, 42+467.

[60] Thayer, Ev. 339, 546; 1 Greenleaf, Ev. (16 ed.) 14y; 4 Wigmore, Ev. § 2491; 1 Elliott, Ev. §§ 78–83; Hammon, Ev. p. 48; 9 Ency. Ev. 882; Wilson v. Hayes, 40–531, 536, 42+467; Bragg v. Chi. etc. Ry., 81–130, 83+511; State v. Quackenbush, 98–515, 108+953; Leighton v. Morrill, 159 Mass. 271, 278.

[61] See, for example, Plath v. Minn. etc. Assn., 23–479; Benedict v. Grand Lodge, 48–471, 51+371. This error runs through the article in 16 Cyc. 1050. A presumption is the expression of a process of reasoning, and most, if not all, the rules of indirect evidence may be expressed as such. We cannot go far in the investigation of any controversy without finding ourselves compelled to infer one fact from another, but we would not therefore be justified in declaring such inferences legal axioms. Illinois etc. Ry. v. I. C. Com., 206 U. S. 441, 459.

3432. Conclusive presumptions—A conclusive presumption is a contradiction in terms. So-called conclusive presumptions are not presumptions at all, though they may have been in their origin, but are rules of substantive law stated in terms of presumption.[62] A conclusive presumption dispenses altogether with evidence as to the fact presumed.[63] Whenever it is said that a certain thing is essential to liability, but that it is conclusively presumed from something else, there is always ground for suspicion that the essential element is to be found in that something else, and not in what is said to be presumed from it.[64]

3433. Conflicting presumptions—Presumptions are used in the administration of the law as weapons of defence, not of assault; and, in cases where they are conflicting, effect will be given, in the absence of evidence on the subject-matter thereof, to that which negatives, rather than to that which implies bad faith.[65]

3434. Death—Person not heard of for seven years—A person shown not to have been heard of for seven years by those, if any, who, if he had been alive, would naturally have heard of him, is presumed to be dead, unless the circumstances of the case are such as to account for his not being heard of without assuming his death: but there is no presumption as to the time when he died, and the burden of proving his death at any particular time is upon the person who asserts it. There is no presumption as to the age at which a person died who is shown to have been alive at a given time, or as to the order in which two or more persons died who are shown to have died in the same accident, shipwreck, or battle.[66] Where one, steady in his habits, successful in his profession or business, contented and respected, having a fixed residence and pleasant domestic relations, suddenly disappears, and no tidings of him are received, such circumstances, if satisfactory to the jury, may warrant them in finding his death at or about the time of his disappearance.[67]

3435. Performance of official duty—Public officers are presumed to have done their duty and acted within the limits of their powers.[68] Where a public officer is required to perform a ministerial duty in one of two ways, according to circumstances, and he performs it in one of them, it is presumed that the

[62] 4 Wigmore, Ev. § 2492; Hammon, Ev. p. 51; 16 Cyc. 1080; 9 Ency. Ev. 884.

[63] Lotto v. Davenport, 50–99, 52+130.

[64] Holmes, Common Law, 134.

[65] Coffman v. Christenson, 102–460, 113+1064.

[66] Stephen, Ev. art. 99; State v. Plym, 43 385, 45+848; Waite v. Coaracy, 45–159, 47+537; Spahr v. Mutual etc. Co., 98–471, 108+4; Behlmer v. Grand Lodge, 109–305, 123+1071. See Note, 104 Am. St. Rep. 198.

[67] Spahr v. Mutual etc. Co., 98–471, 108+4.

[68] Bidwell v. Coleman, 11–78(45) (sheriff—filing duplicate); Payson v. Everett, 12 216(137) (justice of the peace—return on certiorari); Sweet v. Carver County, 16–106(96) (county treasurer—payment of orders); Young v. Young, 18–90(72) (notary public); Merrill v. Nelson, 18–366 (335) (sheriff—foreclosure sale); State v. Line, 23–521 (town clerk—posting notices of election); Howes v. Gillett, 23 231 (county auditor—tax duplicates); Knox v. Randall, 24–479 (sheriff—execution); Meeker County v. Butler, 25–363 (county treasurer—depositing money in name of county); Goener v. Woll, 26–154, 2+163 (service of summons); Herrick v. Ammerman, 32–544, 21+836 (clerk of court—issuing execution); Clossen v. Whitney, 39–50, 38+759 (sheriff—judicial sale); Lamm v. Chi. etc. Ry., 45–71, 47+455 (judge—deed as trustee); Blinn v. Chessman, 49–140, 51+666 (sheriff—service of summons—return); Nelson v. McKinnon, 61–219, 63+630 (sheriff—levy of distress warrant for taxes); Bradley v. Sandilands, 66–40, 68+321 (sheriff—execution); Gillette v. Aitkin County, 69–297, 72+123 (county board—bridge contract); Webb v. School Dist., 83–111, 85+932 (trustees of school district—purchase of site for schoolhouse); Hurley v. West St. Paul, 83–401, 86+427 (clerk of county board—preservation of records); Reed v. Anoka, 85–294, 88+981 (city council—contract for water and light); Hook v. Northwest T. Co., 91–482, 98+463 (sheriff—selection of homestead exemption); Martin v. Common School Dist., 93–409, 101+952 (officers of school district).

mode of performance was that which the circumstances authorized.[69] While acting within the scope of their official duties, upon any subject-matter over which they have control and are empowered to act, the presumption is that public officials obey the law when entering into contracts, and that they do not act in a different mode from that prescribed. So all contracts made by public officials, if within the scope of their power and authority, are presumed to be made in view of and in conformity to the law making them valid.[70] It is not presumed that public officers have complied with an unconstitutional statute.[71] The presumption of performance of official duty cannot be used to supply the essential facts in the derivation of title,[72] or to prove jurisdictional facts.[73] It has not been applied rigidly to tax sales.[74] It is not to be presumed that a licensed engineer of a vessel would, in disregard of his oath and duty, obey the illegal orders of the captain.[75] It will be presumed that officials know their duties.[76]

3436. Legality and regularity—The presumption is that all things are done legally and regularly—omnia rite acta presumuntur. Illegality will not be presumed.[77]

3437. Innocence and good faith—The presumption of innocence and good faith is one of the strongest, and always prevails over one giving rise to an inference of guilt or bad faith.[78] The mere fact that a person is indicted by a grand jury, or prosecuted on the complaint of an individual is no evidence that he is guilty of the offence charged. The presumption is that he is innocent until he is duly convicted.[79]

3438. Continuance of fact—When a fact of a continuous nature is shown to exist at a certain time there is a presumption of law that it continues to exist, at least for a reasonable time. This presumption has been applied to ownership;[80] possession;[81] status of person as a guest at an inn;[82] an illicit relation;[83] agency;[84] membership in an association;[85] statutes;[86] condition of goods in hands of carrier;[87] habitual insanity.[88] It is not a presumption

[69] Goener v. Woll, 26–154, 2+163.

[70] Gillette v. Aitkin County, 69–297, 72+123; Webb v. School Dist., 83–111, 85+932; Reed v. Anoka, 85–294, 88+981; Bayne v. Wright County, 90–1, 95+456; Brown v. Fitcher, 91–41, 97+416.

[71] Deering v. Peterson, 75–118, 77+568.

[72] Philbrook v. Smith, 40–100, 41+545.

[73] Howes v. Gillett, 23–231.

[74] Sterling v. Urquhart, 88–495, 93+898.

[75] McMahon v. Davidson, 12–357(232).

[76] Cochran v. Toher, 14–385(293, 299).

[77] Wiley v. Board of Ed., 11–371(268) (issuance of bonds by board of education); Thayer v. Barney, 12–502(406) (that a lost receipt was stamped); First Nat. Bank v. Kidd, 20–234(212) (unauthorized taking of real estate mortgage by national bank); State v. Smith, 22–218 (meeting of city council); Heintzelman v. Druids' Relief Assn., 38–138, 36+100 (as to vote of corporation meeting); Drake v. Sigafoos, 39–367, 40+257 (that an executor was regularly appointed by a clerk of court); State v. Russell, 69–502, 72+832 (vote of county board in selecting grand jury); In re Nunn, 73–292, 76+38 (that unauthorized erasures in public records were not made by officers); Langworthy v. Garding, 74–325, 77+207 (that a foreign corporation has complied with our laws); Jones v. G. N. Ry., 100–56, 110+260 (location of building on land of another—presumption of authority).

[78] Coffman v. Christenson, 102–460, 113+1064.

[79] Davis v. Hamilton, 88–64, 92+512.

[80] Rhone v. Gale, 12–54(25); Jaeger v. Hartman, 13–55(50); Mueller v. Jackson, 39–431, 40+565; Lind v. Lind, 53–48, 54+934; Pound v. Pound, 60–214, 62+264; Smith v. St. Paul, 72–472, 75+708. Contra, Armstrong v. Hinds, 8–254(221); Miller v. Hoberg, 22–249.

[81] Davis v. Woodward, 19–174(137); Combs v. Tuchelt, 24–423, 428; Ware v. Squyer, 81–388, 84+126.

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

[83] State v. Worthingham, 23–528, 536 (held a presumption of fact); In re Terry, 58–268, 59+1013.

[84] Dartt v. Sonnesyn, 86–55, 90+115.

[85] Cornfield v. Order B. A., 64–261, 66+970.

[86] State v. Armstrong, 4–335(251).

[87] Shriver v. Sioux City etc. Ry., 24–506.

[88] State v. Hayward, 62–474, 65+63.

of universal application.[89] It has been held inapplicable to infancy;[90] to a safe condition of machinery;[91] money in hands of sheriff;[92] money in a treasury;[93] life;[94] and temporary insanity.[95] It does not ordinarily operate retroactively.[96] It has been said that the presumption is a rule of evidence and not of pleading,[97] but this is not always true.[98]

3439. Character—Chastity—A person is presumed to be of good character and reputation.[99] A woman is presumed to be chaste.[1]

3440. Sanity—Intelligence—The presumption is that a person is sane,[2] and of ordinary intelligence.[3]

3441. Intention and knowledge—It is presumed that a person knows and intends his voluntary acts;[4] that he knows the contents[5] and legal effect of an instrument which he signs;[6] that he knows the contents of a deed which he accepts and retains;[7] that he intends his interest;[8] that he knows the law;[9] that he knows what it is his duty to know;[10] that he contemplates the probable consequences of his acts.[11]

3442. Love of life—Suicide—Ordinarily the love of life is a sufficient inducement for its preservation, and, in the absence of proof that death resulted from other than natural causes, suicide will not be presumed.[12] So the presumption is that a person killed or injured was in the exercise of ordinary care.[13]

3443. Solvency—The presumption is that a person is solvent.[14]

3444. Failure to call witness or to testify—When a party fails to call an available witness possessing peculiar knowledge of the facts of his case a presumption arises that if the witness had been called his testimony would be unfavorable to such party.[15] Of course this is a presumption of fact rather than of law—an inference which the jury may or may not draw as it sees fit.[16] The same is true of the failure of a party to testify in his own behalf.[17]

3445. Receipt of mail in due course—Mail matter properly directed and mailed, with the postage prepaid, is presumed to reach the addressee in the due course of the mails.[18] This is rebuttable by proof that the matter was in fact

89 Shriver v. Sioux City etc. Ry., 24-506, 512.
90 Germain v. Sheehan, 25-338.
91 Goodsell v. Taylor, 41-207, 42+873.
92 Northern C. Co. v. Munro, 83-37, 85+919.
93 Clayton v. Bennington, 24-14.
94 State v. Plym, 43-385, 45+848.
95 State v. Hayward, 62-474, 65+63.
96 State v. Armstrong, 4-335(251) (statute); Redding v. Godwin, 44-355, 46+563 (insolvency).
97 Clayton v. Bennington, 24-14.
98 See cases under 80 supra.
99 Cochran v. Toher, 14-385(293); Lotto v. Davenport, 50-99, 52+130.
1 See § 8720.
2 Bonfanti v. State, 2-123(99); In re Layman, 40-371, 42+286. See State v. Hayward, 62-474, 65+63.
3 Temple v. Norris, 53-286, 55+133.
4 State v. Welch, 21-22.
5 St. Paul v. Chi. etc. Ry., 63-330, 337, 63+267.
6 Jaggar v. Winslow, 30-263, 15+242.
7 Blinn v. Chessman, 49-140, 51+666.
8 Baker v. Terrell, 8-195(165); Davis v. Pierce, 10-376(302); Horton v. Maffitt, 14-289(216); McArthur v. Martin, 23-74.
9 Mankato v. Meagher, 17-265(243, 259).
10 State v. Quackenbush, 98-515, 108+953.
11 Anderson v. Settergren, 100-294, 299, 111+279.
12 Hale v. Life etc. Co., 61-516, 63+1108. See § 4811.
13 See § 7032.
14 Goss v. Broom, 31-484, 18+290; Crevier v. Stephen, 40-288, 41+1039; Grosse v. Cooley, 43-188, 45+15; Fort Dearborn Nat. Bank v. Security Bank, 87-81, 91+257.
15 Fonda v. St. P. C. Ry., 71-438, 74+166; Hall v. Austin, 73-134, 75+1121 (party may account for absence of witness to prevent presumption); Nat. G. A. Bank v. Lawrence, 77-282, 79+1016 (fact that one spouse objects to the examination of other spouse does not give rise to the presumption); Lemon v. De Wolf, 89-465, 95+316.
16 See Hall v. Austin, 73-134, 75+1121.
17 Wilson v. N. W. etc. Co., 103-35, 114+251.
18 Plath v. Minn. etc. Assn., 23-479; Pratt v. Tinkcom, 21-142; Melby v. Osborne, 33-492, 24+253; Benedict v. Grand Lodge, 48-471, 51+371; Dade v. Aetna

not received.[19] There is no presumption as to the particular time of receipt, in the absence of evidence as to the time of mailing, the frequency of the mails, etc.[20]

3446. Judicial proceedings—There is a general presumption in favor of the correctness of judicial proceedings,[21] including proceedings before a justice of the peace,[22] or a referee,[23] and in the probate court.[24]

3447. Miscellaneous presumptions—It will be presumed that a person did not consent to an injury to his person or property;[25] that two instruments executed on the same day were executed contemporaneously;[26] that the older of two persons will die first.[27]

JUDICIAL NOTICE

3448. Nature—Though judicial notice is generally classified under the head of evidence it is not strictly evidence. But, like admissions, stipulations, and presumptions, it dispenses with the necessity of evidence.[28] Its application is not limited to the region of evidence.[29] In very many cases, taking judicial notice of a fact is merely assuming it until there shall be reason to think otherwise. A court may judicially notice much which it cannot be required to notice. Practical convenience and good sense demand an increase rather than a lessening of the number of instances in which courts shorten trials, by making prima facie assumptions, not likely, on the one hand, to be successfully denied, and, on the other, if they be denied, admitting readily of verification or disproof.[30]

3449. By the jury—A jury, as well as a court, may take judicial notice of facts of common knowledge.[31] In considering evidence it uses its common sense and general knowledge of the subject-matter.[32] When damages are to be assessed with reference to the value of an article a jury cannot act upon its own knowledge of the value when the value is not a matter of common knowledge.[33]

3450. Court may inform itself—Carlisle tables—As to any fact of which it is bound to take notice a court may inform itself by reference to books or other sources of information which it may deem trustworthy,[34] including the Carlisle and similar tables showing the expectation or probable duration of life.[35]

3451. Matters of common knowledge—Courts will take judicial notice of whatever is generally known within the limits of their jurisdiction.[36] "Judges are entitled and bound to take judicial notice of that which is the common

Ins. Co., 54–336, 56+48; McDonald v. Smith, 99–42, 108+290.

[19] Plath v. Minn. etc. Assn., 23–479.

[20] Boon v. State Ins. Co., 37–426, 34+902.

[21] Brakken v. Mpls. etc. Ry., 32–425, 21+414 (assessment of damages); State v. Beebe, 17–241(218) (presentment to court of indictment). Other specific applications of this general presumption will be found under specific heads.

[22] Clague v. Hodgson, 16–329(291).

[23] Leyde v. Martin, 16–38(24).

[24] See § 7774.

[25] Faribault v. Hulett, 10–30(15, 21).

[26] Sheldon v. Brown, 72–496, 75+709.

[27] Hosford v. Rowe, 41–245, 42+1018.

[28] State v. Mann, 69 Conn. 123; 16 Cyc. 850.

[29] Thayer, Ev. 278.

[30] Thayer, Ev. 300, 309. See, upon the general subject, Note, 124 Am. St. Rep. 20.

[31] State v. Lewis, 86–174, 90+318 (that whisky or brandy is intoxicating); Armstrong v. Chi. etc. Ry., 45–85, 87, 47+459 (due care); Thayer, Ev. 296.

[32] See § 3334.

[33] Osborne v. Huntington, 37 275, 33+789 (value of harvester).

[34] Scheffler v. Mpls. etc. Ry., 32–518, 21+711; State v. Stearns, 72–200, 219, 75+210; Brown v. Piper, 91 U. S. 37; Jones v. U. S., 137 U. S. 202; Nix v. Hedden, 149 U. S. 304; Lochner v. N. Y., 198 U. S. 45, 70.

[35] Scheffler v. Mpls. etc. Ry., 32–518, 21+711.

[36] State v. Stearns, 72–200, 218, 75+210; Gurney v. Mpls. etc. Co., 63–70, 73, 65+136; In re St. P. etc. Ry., 34–227, 230, 25+345.

knowledge of the great majority of mankind and of the great majority of men of business." [37] The following facts have been judicially noticed within this rule: methods of transportation of goods by connecting carriers; [38] the fact that the sale of goods by sample is a useful and legitimate one; [39] the general development of commercial interests and the increase of trade and travel; [40] the manner of storing wheat in elevators; [41] the fact that the business of inspecting and keeping in repair the fences along a railway is within the usual and ordinary duties of a section foreman; [42] the customary manner of selling farm machinery "extras;" [43] the stock and grain gambling carried on at the exchanges in the commercial centers of the country; [44] that brandy is a spirituous and intoxicating liquor; [45] the practice of carriers to deliver certain kinds of goods from a freight house rather than from cars; [46] the period of gestation in the human species; [47] the fact that it is not unusual or extraordinary for the ground to be frozen on the Missabe Range in February; [48] the fact that the handling and transportation of grain is an important part of the railway business in this state and that grain elevators are a necessary adjunct of such business; [49] the fact that crushed stone is usually prepared for a specific purpose or on a particular order or contract; [50] that the decay of wood is a gradual process; [51] that in setting fires on a right of way sectionmen were acting within the scope of their employment; [52] the hours which employees in barber shops customarily work; [53] the purchase and sale of logs according to a scale; [54] that the storage of fireworks in a building increases the risk of loss from fire; [55] the custom of carriers to carry the sample trunks of drummers as baggage; [56] that a crop of wheat or oats cannot be raised in this state between August and March; [57] the practice of conductors on railways in taking up the tickets of passengers and giving them a substitute as evidence of the payment of fare; [58] that cream and milk may be mixed and sold to the inexperienced as pure cream; [59] that whisky and brandy are intoxicating liquors; [60] that many of the lakes of this state are gradually receding and drying up; [61] that the Mississippi river is a navigable stream; [62] that no bank in this state has issued bank notes since the establishment of the national banking system; [63] the custom of insurance companies to require, as a condition precedent to the issuance of an insurance policy, a properly signed and executed application therefor, with an authenticated medical examination of the applicant; [64] that a township has no

[37] Queen v. Aspinall, 2 L. R. Q. B. D. 62. Judges cannot denude themselves of knowledge which is common to all. Braun v. N. P. Ry., 79-404, 412, 82+675, 984.

[38] Irish v. Mil. etc. Ry., 19-376(323, 327).

[39] Darling v. St. Paul, 19-389(336).

[40] In re St. P. etc. Ry., 34-227, 230, 25+345.

[41] Davis v. Kobe, 36-214, 30+662.

[42] Keyes v. Mpls. etc. Ry., 36-290, 30+888.

[43] Warder v. Rublee, 42-23, 43+569.

[44] Mohr v. Miesen, 47-228, 232, 49+862.

[45] State v. Tisdale, 54-105, 55+903.

[46] Kirk v. Chi. etc. Ry., 59-161, 164, 60+1084.

[47] State v. Allrick, 61-415, 63+1085.

[48] King v. Duluth etc. Ry., 61-482, 489, 63+1105.

[49] Gurney v. Mpls. etc. Co., 63-70, 65+136.

[50] Duby v. Jackson, 69 342, 72+568.

[51] Hall v. Austin, 73-134, 75+1121.

[52] Baxter v. G. N. Ry., 73-189, 75+1114.

[53] State v. Petit, 74-376, 77+225; State v. Justus, 91-447, 98+325.

[54] Watts v. Howard, 70-122, 72+840.

[55] Betcher v. Capital F. Ins. Co., 78-240, 80+971.

[56] McKibbin v. G. N. Ry., 78-232, 80+1052.

[57] Abrahamson v. Lamberson, 79-135, 81+768.

[58] Braun v. N. P. Ry., 79 404, 412, 82+675, 984.

[59] State v. Crescent C. Co., 83-284, 86+107.

[60] State v. Lewis, 86-174, 90+318.

[61] Hanson v. Rice, 88-273, 92+982.

[62] Viebahn v. Crow Wing County, 96-276, 104+1089.

[63] Seymour v. Bank of Minn., 79-211, 222, 81+1059.

[64] Taylor v. Grand Lodge, 101-72, 111+919.

subdivisions known as blocks;[65] the extensive commerce and shipping interests at Duluth;[66] the general business depression prevailing in 1894;[67] that citizens have acted on commissions to draft home rule charters without compensation;[68] what constitutes a glass of beer, as to quantity;[69] that day is just breaking at about seven o'clock on December 20;[70] of the custom of farmers during winter to lay up for the succeeding year a supply of fuel.[71]

3452. Laws and ordinances of this state—Our courts take judicial notice of the public statutes of this state and of the federal government,[72] including the time when they go into effect,[73] the meaning of words used therein,[74] and the duties created thereby.[75] While they do not generally take judicial notice of private acts they will do so if such acts are recognized by a public act.[76] They do not take judicial notice of city ordinances,[77] unless they are expressly required to do so.[78] If municipal charters are public acts they are judicially noticed;[79] but if they are adopted under a general law they are not judicially noticed.[80]

3453. Laws of sister states—Our courts do not take judicial notice of the statutory [81] or common law [82] of a sister state.

3454. Legislative journals—Judicial notice is taken of the legislative journals.[83]

3455. Judicial proceedings—Judicial notice is taken of prior proceedings in the same cause;[84] of a dismissal of record of a former action between the same parties;[85] of notorious facts spread upon the records of the supreme court and forming a part of the judicial history of the state.[86]

3456. Political and governmental matters—Judicial notice is taken of the political and municipal subdivisions of the state;[87] of the territorial extent

[65] Herrick v. Morrill, 37–250, 33+849.

[66] Miller v. Mendenhall, 43–95, 44+1141.

[67] Steenerson v. G. N. Ry., 69–353, 411, 72+713.

[68] Young v. Mankato, 97–4, 105+969.

[69] State v. Stroschein, 99–248, 109+235.

[70] Miller v. Mpls. etc. Ry., 106–499, 119+218.

[71] Prudoehl v. Randall, 108–185, 121+913.

[72] Brimhall v. Van Campen, 8–13(1); Dole v. Wilson, 16–525(472); State v. Stearns, 72–200, 75+210 (constitutional amendment); Sanborn v. People's Ice Co., 82–43, 84+641; Kingsley v. Anderson, 103–510, 116+112.

[73] Duncan v. Cobb, 32–460, 21+714.

[74] Hobe v. Swift, 58–84, 59+831.

[75] Peterson v. Cokato, 84–205, 87+615.

[76] Webb v. Bidwell, 15–479(394); Albion v. Maple Lake, 71–503, 74+282. See Burlington Mfg. Co. v. Board etc. Comrs., 67–327, 69+1091.

[77] Winona v. Burke, 23–254; State v. Oleson, 26–507, 5+959.

[78] State v. Schoenig, 72–528, 75+711; State v. Gill, 89–502, 95+449. If the trial court takes notice of an ordinance the supreme court will do so. Steenerson v. G. N. Ry., 69–353, 377, 72+713; State v. Schoenig, 72–528, 75+711.

[79] State v. Tosney, 26–262, 3+345; Burfenning v. Chi. etc. Ry., 46–20, 48+444; Baumann v. Granite etc. Co., 66–227, 68+1074.

[80] State v. Nolan, 37–16, 33+36.

[81] Townsend v. Kendall, 4–412(315, 323); Becht v. Harris, 4–504(394); Brimhall v. Van Campen, 8–13(1); Hoyt v. McNeil, 13–390(362); Thomson v. Palmer, 52–174, 53+1137; Way v. Colyer, 54–14, 17, 55+744; Myers v. Chi. etc. Ry., 69–476, 72+694; Wilcox v. Bergman, 96–219, 104+955; Swing v. Red River L. Co., 101–428, 112+393; Stewart v. G. N. Ry., 103–156, 114+953. See Kern v. Field, 68–317, 319, 71+393 (for purpose of giving full faith and credit to judgment of a sister state).

[82] Crandall v. G. N. Ry., 83–190, 86+10. See Myers v. Chi. etc. Ry., 69–476, 480, 72+694.

[83] Miesen v. Canfield, 64–513, 67+632 (overruling Burt v. Winona etc. Ry., 31–472, 18+285, 289).

[84] In re Rees, 39–401, 40+370; Rippe v. Chi. etc. Ry., 23–18; Hospes v. N. W. etc. Co., 41–256, 261, 43+180; Olson v. Brady, 76–8, 78+864.

[85] Thornton v. Webb, 13–498(457).

[86] Mankato v. Meagher, 17–265(243, 252).

[87] State v. Lake City, 25–404, 412; Herrick v. Morrill, 37–250, 253, 33+849; Baumann v. Granite etc. Co., 66–227, 229, 68+1074; Hankey v. Bowman, 82–328, 335, 84+1002; State v. Dist. Ct., 90–118, 95+591.

3469. Burden of establishing allegations—Whoever desires any court to give judgment as to any legal right or liability dependent on the existence or non-existence of facts which he asserts or denies to exist, must prove that those facts do or do not exist.[22] He must prove a negative fact when it is an essential fact.[23] This burden never shifts.[24]

3470. Burden of going forward with the evidence—The burden of proof in any proceeding lies at first on that party against whom the judgment of the court would be given if no evidence at all were produced on either side, regard being had to any presumption which may appear upon the pleadings.[25] As the proceeding goes on, the burden of proof may be shifted from the party on whom it rested at first by his proving facts which raise a presumption in his favor.[26] When there are conflicting presumptions the case is the same as if there were conflicting evidence.[27] "The test, therefore, as to the burden of proof or onus of proof, whichever term is used, is simply this: To ask oneself which party will be successful if no evidence is given, or if no more evidence is given than has been given at a particular point of the case, for it is obvious that as the controversy involved in the litigation travels on, the parties from moment to moment may reach points at which the onus of proof shifts, and at which the tribunal will have to say that if the case stops there, it must be decided in a particular manner. The test being such as I have stated, it is not a burden that goes on forever resting on the shoulders of the person upon whom it is first cast. As soon as he brings evidence which, until it is answered, rebuts the evidence against which he is contending, then the balance descends on the other side and the burden rolls over until again there is evidence which once more turns the scale. That being so, the question as to onus of proof is only a rule for deciding on whom the obligation rests of going further if he wishes to win." [28]

3471. Burden of rendering evidence admissible—The burden of proving any fact necessary to be proved in order to enable any person to give evidence of any other fact is on the person who wishes to give such evidence.[29]

3472. Erroneous assumption of burden—Where a party erroneously assumes the burden of proof as to a particular fact, he cannot complain of the error on appeal.[30]

DEGREE OF PROOF REQUIRED

3473. In general—Proof is made out in ordinary civil cases by a fair preponderance of the evidence.[31] This rule applies to civil actions involving a

Heinemann v. Heard, 62 N. Y. 455; Farmers etc. Co. v. Siefke, 144 N. Y. 354; Stokes v. Stokes, 155 N. Y. 581; Thayer, Ev. c. 9.

[22] Stephen, Ev. art. 93; Day v. Raguet, 14-273(203); Stearns v. Johnson, 17-142 (116); Karsen v. Mil. etc. Ry., 29-12, 11+122; Chicago etc. Ry. v. Porter, 43-527, 46+75; Youn v. Lamont, 56-216, 57+478; Brown v. Farnham, 58-499, 60+344; Dietel v. Home etc. Assn., 59-211, 60+1100; Swing v. Akeley, 62-169, 64+97; St. Barnabas Hospital v. Mpls. etc. Co., 68-254, 70+1126; Sartell v. Royal Neighbors, 85-369, 88+985; Randahl v. Lindholm, 86-16, 89+1129; Peterson v. Mpls. St. Ry., 90-52, 66, 95+751; Willett v. Rich, 142 Mass. 356.

[23] Brown v. Farnham, 58-499, 60+344. See McMahon v. Davidson, 12-357(232, 248).

[24] See § 3468.

[25] Stephen, Ev. art. 95; Karsen v. Mil. etc. Ry., 29-12, 11+122; Paine v. Smith, 33-495, 24+305.

[26] Tyner v. Varien, 97-181, 184, 106+898.

[27] Mills v. Barber, 1 M. & W. 425.

[28] Bowen, L. J. Abrath v. N. E. Ry., 11 L. R. Q. B. D. 456; Tyner v. Varien, 97-181, 184, 106+898.

[29] Stephen, Ev. art. 97.

[30] Burgraf v. Byrnes, 104-343, 116+838.

[31] Fairchild v. Rogers, 32-269, 20+191; Lindsley v. Chi. etc. Ry., 36-539, 33+7; Martin v. Hill, 41-337, 43+337; Kramer v. N. W. El. Co., 97-44, 106+86.

charge of crime,[32] to usury cases,[33] and to controversies between a wife and her husband's creditors.[34] A thing is said to be proved when that weight of evidence is produced which ordinarily satisfies an unprejudiced mind of its existence [35]—which gives a reasonable assurance of the existence or non-existence of the fact in issue.[36] 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.[37] Something more than a fair preponderance of evidence is necessary in actions to set aside written instruments; [38] to reform written instruments; [39] to have a deed absolute on its face declared a mortgage; [40] to set aside a judgment for want of service of summons; [41] to overcome the statutory authentication by which proof of deeds is established.[42]

EXAMINATION OF OFFENDERS—See Criminal Law, 2438, 2439.
EXAMINATION OF PLAINTIFF—See Evidence, 3262.
EXCEPTIONS—See Cases and Bills of Exceptions, 1367; Deeds, 2671–2674; Trial, 9723–9749.
EXCESSIVE DAMAGES—See Damages, 2595; New Trial, 7132.

EXCHANGE OF PROPERTY

3474. Definition—An exchange of property is a reciprocal transfer of property for property without a fixed price or valuation.[43] If property is exchanged for property at a fixed price or valuation the transaction is a sale. An exchange of goods is a barter. An exchange of property is substantially a sale and is governed by the rules applicable to sales.

3475. Offer to exchange—A mere offer to exchange property is to be distinguished from an exchange.[44]

3476. Particular contracts construed—Cases are cited below involving the construction of particular contracts relating to the exchange of property.[45]

3477. Implied warranty of title—In an exchange of goods there is an implied warranty of title.[46]

3478. Excuse for non-performance—The fact that it was necessary in order to secure possession of goods exchanged to execute a bond to a third party who claimed a lien thereon, has been held not to excuse non-performance of a contract of exchange.[47] A party has been held not excused for non-performance because he had not been reimbursed for certain taxes that he had paid, or because there was an incumbrance on the land which he had agreed to accept in

[32] Burr v. Wilson, 22–206; Thoreson v. N. W. etc. Co., 29–107, 12+154; State v. Nichols, 29–357, 13+153; Lahr v. Kraemer, 91–26, 97+418.
[33] See § 9996.
[34] Laib v. Brandenburg, 34–367, 25+803.
[35] Karsen v. Mil. etc. Ry., 29–12, 11+122.
[36] Missouri etc. Co. v. McLachlan, 59–468, 475, 61+560.
[37] 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, 249, 119+1070. See § 7047.
[38] See § 1202.
[39] See § 8347.
[40] See § 6157.
[41] Vaule v. Miller, 69–440, 72+452.
[42] See § 78.
[43] Century Dict.
[44] Storch v. Duhnke, 76–521, 79+533; Newlin v. Hoyt, 91–409, 98+323.
[45] Brown v. O'Brien, 39–13, 38+637 (exchange of realty); Rollins v. Wibye, 40–149, 41+545 (exchange of horses); Reynolds v. Franklin, 41–279, 43+53 (exchange of household goods for realty); Storch v. Duhnke, 76–521, 79+533 (exchange of realty—held a mere offer to exchange); Newlin v. Hoyt, 91–409, 98+323 (id.); Todd v. Bettingen, 98–170, 107+1049 (stock in elevator company).
[46] Close v. Crossland, 47–500, 50+694.
[47] Reynolds v. Franklin, 41–279, 43+53.

EXECUTION

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Cross-References

See Chattel Mortgages, 1471; Criminal Law, 2504; Justices of the Peace, 5314.

IN GENERAL

3489. Means of enforcing judgments—An execution is the regular means for enforcing a judgment.[64] The issuing of an 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.[65]

3490. Kinds—Alias writ—Writ of restitution—The general form of execution is sufficient where jurisdiction is obtained against a non-resident by publishing summons and attaching his property.[66] An alias execution may issue under our practice as at common law.[67] A writ of assistance may issue in an action to foreclose a mortgage.[68]

3491. Form and contents of writ—The writ must be dated as of the day on which it is issued from the clerk's office and not as of the day upon which it is delivered to the sheriff.[69] A writ not under the seal of the court is probably void.[70] The fact that a writ does not run in the name of the state does not render it void.[71] A misrecital of the date of the judgment is immaterial, if the judgment is otherwise sufficiently identified.[72] If an attachment has issued, it is unnecessary for the execution to refer to the attachment proceedings, but it may be in the ordinary form.[73] Under an execution in which an officer is commanded to satisfy the same out of the property of A and B, judgment debtors, he may seize and sell the separate property of either or the joint property of both.[74]

3492. Time of issuance—An execution may issue at any time within ten years after the entry of judgment.[75] At common law the right to sue out an execution in a personal action was limited to a year and a day from the entry of judgment. After that time the party was put to his action upon the judgment.[76] An execution issued more than ten years from the entry of judgment is void and not merely voidable.[77] An action will not lie to enforce the lien of a judgment where the time prescribed for enforcing it by execution has expired.[78] A judgment cannot be enforced by sale after the expiration of the statutory period, though it is based on a levy made within the period. It is not enough to initiate proceedings in execution prior to the expiration of the statutory period, and complete them after that event.[79] But it has been held that an action on a judgment may be commenced at any time within the ten years and proceed to judgment afterwards.[80] In computing the period of ten years the statutory rule of computation applies and the day upon which the judgment

[64] R. L. 1905 § 4288; Maki v. Maki, 106-357, 119+51.

[65] Davidson v. Gaston, 16-230(202).

[66] Hencke v. Twomey, 58-550, 60+667.

[67] Walter v. Greenwood, 29-87, 12+145. See also, Tillman v. Jackson, 1-183(157); Lay v. Shaubhut, 6-273(182); Shaubhut v. Hilton, 7-506(412); First Nat. Bank v. Rogers, 15-381(305); Hutchins v. Carver County, 16-13(1); Erickson v. Johnson, 22-380; Butler v. White, 25-432; Sherburne v. Rippe, 35-540, 29+322; Suchaneck v. Smith, 53-96, 54+932.

[68] Belknap v. Van Riper, 76-268, 79+103.

[69] R. L. 1905 § 93; Mollison v. Eaton, 16-426(383).

[70] See Wheaton v. Thompson, 20-196 (175).

[71] Thompson v. Bickford, 19-17(1).

[72] Millis v. Lombard, 32-259, 20+187.

[73] Hencke v. Twomey, 58-550, 60+667.

[74] West Duluth L. Co. v. Bradley, 75-275, 77+964.

[75] R. L. 1905 § 4287. See, as to five-year limitation under a former statute, Entrop v. Williams, 11-381(276); Wakefield v. Brown, 38-361, 37+788.

[76] Wakefield v. Brown, 38-361, 37+788.

[77] Hanson v. Johnson, 20-194(172).

[78] Ashton v. Slater, 19-347(300); Dole v. Wilson, 39-330, 40+161. See Morrill v. Madden, 35-493, 29+193.

[79] Newell v. Dart, 28-248, 9+732; Spencer v. Haug, 45-231, 47+794. See Reed v. Siddall, 94-216, 102+453; Brown v. Dooley, 95-146, 103+894; Gaines v. Grunewald, 102-245, 113+450.

[80] Sandwich Mfg. Co. v. Earl, 56-390, 57+938; Gaines v. Grunewald, 102-245, 113+450.

is entered is to be excluded,[81] but of course this does not mean that execution may not issue on that day. Under a former statute it was held that the time during which a judgment creditor was, on motion of the judgment debtor enjoined from issuing execution, should be excluded from the statutory period.[82] Execution may issue before costs are inserted in the judgment.[83] Execution may issue before the filing of the judgment roll.[84]

3493. Issuance of writ after death of party—Provision is made by statute for the issuance of a writ after the death of a party.[85] It is applicable only to cases where a lien has been acquired on real property prior to the death of the party. It has no application to personal property. A judgment creditor who has acquired no lien prior to the death of the debtor must proceed to establish and collect his claim as a general creditor in the due course of administration.[86] A judgment creditor may take advantage of this provision though he presented his judgment for payment in the course of the administration of the estate of the decedent in the probate court.[87]

3494. Renewal of writs—There was formerly a statutory provision for the renewal of writs.[88] This was enacted merely to avoid the necessity of issuing an alias writ and it did not in any way affect any common-law rule governing executions. It was designed to afford a simple and cumulative remedy,[89] and did not prevent the issue of an alias writ.[90]

3495. Successive executions in action against stockholders—In an action to enforce the statutory liability of stockholders in a corporation successive executions may be issued.[91]

3496. Issuance of writ to another county—In issuing an execution to another county it is common practice for the clerk of the county where the judgment was rendered to deliver to the attorney a transcript of the original docket and an execution with the date of the docketing in the other county left blank, with the understanding that the attorney will have the judgment properly docketed in the latter county and the date of the docketing inserted in the execution before it is delivered to the sheriff of such county; and if this is done an execution so issued will be valid.[92] And if, in such cases, the execution is delivered to the sheriff before the judgment is docketed in his county, the subsequent docketing of the judgment will cure the defect as against the judgment creditor and all who are not bona fide purchasers. It is unnecessary to withdraw the writ and redeliver it to the sheriff or to issue a new writ.[93]

3497. What sheriff to execute writs—The general rule is that the sheriff in office in any county is the proper person to execute all process running to the sheriff of such county.[94] Provision is made by statute allowing an outgoing sheriff to complete an execution begun during his term.[95] But this is merely permissive.[96] Where a sheriff levies an attachment in an action, an execution on the judgment in the action, issued after such sheriff goes out of office, should be delivered to and executed by the sheriff in office when it issues.[97] When a sheriff dies, becomes insane, removes from the state or is in any manner unable

[81] Spencer v. Haug, 45-231, 47+794.
[82] Wakefield v. Brown, 38-361, 37+788.
[83] Richardson v. Rogers, 37-461, 35+270.
[84] See § 5053.
[85] R. L. 1905 § 4292.
[86] Byrnes v. Sexton, 62-135, 64+155.
[87] Fowler v. Mickley, 39-28, 38+634.
[88] G. S. 1894 § 5445.
[89] Barrett v. McKenzie, 24-20.
[90] Walter v. Greenwood, 29-87, 12+145.
[91] Harper v. Carroll, 66-487, 69+610, 1069.
[92] Dodge v. Chandler, 9-97(87); Mollison v. Eaton, 16-426(383); Gowan v. Fountain, 50-264, 52+862.
[93] Hoerr v. Meihofer, 77-228, 79+964.
[94] Beebe v. Fridley, 16-518(467); Butler v. White, 25-432.
[95] R. L. 1905 § 555. See Knox v. Randall, 24-479.
[96] Butler v. White, 25-432.
[97] Id.

to act, provision is made by statute for his successor in office to complete any execution begun by him.[98]

3498. Priority—It is the duty of the sheriff to execute writs of execution against the same debtor in the order in which they come into his hands. But the liens of creditors upon personalty, take precedence according to the order in which the executions are actually levied and not in the order in which they are delivered to the sheriff.[99] Where one writ is delivered to the sheriff and another to his deputy, the first one actually executed takes precedence.[1] In the case of realty the rule is different. Judgment liens on realty take precedence in accordance with the docketing of the judgments and no advantage is obtained by diligence in execution.[2]

3499. Effect of creditors' bill—The pendency of an action in the nature of a creditors' bill to enforce a judgment does not prevent the issuance of an execution upon the same judgment and a sale. The execution creditor has cumulative remedies and he may pursue them concurrently.[3]

3500. Execution against several—Under an execution in which an officer is commanded to satisfy the same out of the property of A and B, judgment debtors, he may seize and sell the separate property of either or the joint property of both.[4]

3501. Amendment of writ—A writ of execution may be amended as to matters of form even after a sale of realty under it.[5]

3502. Collateral attack—An execution cannot be collaterally attacked for irregularity. An execution which is not absolutely void is good until set aside by the court which issued it in a direct proceeding.[6]

3503. Sheriff acts as officer of the law—A sheriff, in making a levy and sale, acts not as the agent of the execution creditor but as the officer of the law.[7] Notice to the sheriff is not notice to the creditor.[8]

3504. Authority of attorney—Substitution—Lien—An attorney in the action for a judgment creditor may issue execution and receive the money collected on it within two years after the judgment.[9] But a judgment creditor may employ a new attorney to enforce his judgment without any formal substitution or notice.[10] If an assignee of a judgment acquiesces in the acts of an attorney of the judgment creditor he is bound by them. As against such assignee the sheriff may withhold the amount of the attorney's lien out of the proceeds of an execution sale.[11] An attorney has no implied authority to stipulate for a private sale.[12]

3505. Effect of misnomer—Where a party is sued under a wrong name the judgment is not absolutely void, but may be amended. A sheriff levying on such a judgment cannot justify under the execution until it and the judgment

[98] R. L. 1905 § 555.
[99] Albrecht v. Long, 25-163.
[1] Albrecht v. Long, 27-81, 6+420.
[2] Jackson v. Holbrook, 36-494, 32+852.
[3] Kumler v. Ferguson, 22-117. See Jackson v. Holbrook, 36-494, 32+852.
[4] West Duluth L. Co. v. Bradley, 75-275, 77+964. See Daly v. Bradbury, 46-396, 49+190.
[5] Mollison v. Eaton, 16-426(383) Thompson v. Bickford, 19-17(1); Casper v. Klippen, 61-353, 63+737.
[6] Thompson v. Bickford, 19-17(1).
[7] Armstrong v. Vroman, 11-220(142); Horton v. Maffitt, 14-289(216); Davis v. Seymour, 16-210(184); Nopson, v. Horton, 20-268(239); Tinkcom v. Lewis, 21-132; McCarthy v. Grace, 23-182; Schroeder v. Lahrman, 28-75, 9+173; Hall v. Swensen, 65-391, 67+1024.
[8] McCarthy v. Grace, 23-182.
[9] R. L. 1905 § 2283; Berthold v. Fox, 21-51; Sheldon v. Risedorph, 23-518; Schoregge v. Gordon, 29-367, 13+194; Gill v. Truelsen, 39-373, 40+254.
[10] Hinkley v. St. Anthony Falls etc. Co., 9-55(44); Berthold v. Fox, 21-51; Knox v. Randall, 24-479; Gill v. Truelsen, 39-373, 40+254.
[11] Gill v. Truelsen, 39-373, 40+254.
[12] Kronschnable v. Knoblauch, 21-56.

and all proceedings in the action are amended in a direct proceeding for that purpose.[13]

3506. Execution on satisfied judgment—Sale void—As to an execution creditor a sale on a judgment which has been satisfied is absolutely void. He is charged with notice and is not a bona fide purchaser. The plaintiff in execution is deemed to have notice of vices or irregularities affecting the validity of the proceedings; and defects affecting a sale to a purchaser with actual notice of them will also affect a sale to the plaintiff in the writ, whether he had actual notice or not.[14]

3507. Execution on judgment void on face—Sale void—An execution sale on a judgment void for want of jurisdiction appearing on its face is absolutely void and the purchaser acquires no title though he purchased in good faith.[15]

PROPERTY SUBJECT TO EXECUTION

3508. Growing crops—Statute—A levy on growing crops is authorized by statute.[16] Growing grain may be levied on at any period of its growth, whether the growth is going on below or above the surface of the soil.[17] The word "crops" had, long before this statute, acquired in law a meaning synonymous with or equivalent to the common-law term "emblements," and neither of them included fruits or perennial trees or shrubs, and it is to be presumed that the term "crops" is used in the statute in this same sense. The only change effected by the statute as to the kinds of products of the earth which may be levied on while still attached to the soil is, perhaps, to include perennial grasses. The main purpose of the statute was, while permitting immature growing crops to be levied on, to prohibit their sale until they were ripe and fit to be harvested. Blackberries, while growing on the bushes, are not subject to levy as personalty. It is only annual crops, that is, crops requiring fresh planting or sowing each year, that are subject to levy as personalty.[18] Where after judgment recovered, the judgment debtor conveyed away exempt realty, with growing crops thereon, which were subject to levy, with intent to defraud his creditors, it was held that the crops might be reached and subjected to process in the hands of the fraudulent grantee. The severable character of the property is not changed by the conveyance and may be levied upon though the land may remain exempt.[19] Whether crops growing on a homestead are exempt is an open question in this state.[20]

3509. Interest of pledgor or mortgagor of personalty—A levy on the interest of a pledgor or mortgagor of personalty is authorized by statute.[21] Upon a levy after default, but before possession has been taken by the mortgagee, the officer may take the chattels into his actual possession, and, as against the mortgagee, detain them for the purposes of the sale under the writ.[22] But in the absence of a showing that the mortgagee has been prejudiced, a levy will not be set aside for the failure of the sheriff to seize all the mortgaged property.[23] A railroad, with its rolling stock, and personal property belonging to

[13] Casper v. Klippen, 61–353, 63+737.
[14] Plummer v. Whitney, 33–427, 23+841; Norgren v. Edson, 51–567, 53+876. See Franklin v. Warden, 9–124(114); Gunz v. Heffner, 33–215, 22+386; Herrick v. Morrill, 37–250, 33+849.
[15] Barber v. Morris, 37–194, 33+559.
[16] R. L. 1905 § 4303. Statute cited arguendo, Kirkeby v. Erickson, 90–299, 96+705.
[17] Gillitt v. Truax, 27–528, 8+767.
[18] Sparrow v. Pond, 49–412, 52+36.
[19] Erickson v. Paterson, 47–525, 50+699.
[20] Sparrow v. Pond, 49–412, 52+36.
[21] R. L. 1905 § 4302. See R. L. 1905 § 3474.
[22] Barber v. Amundson, 52–358, 54+733. See Chophard v. Bayard, 4–533(418).
[23] Galde v. Forsyth, 72–248, 75+219.

the road and appertaining thereto, is, in favor of mortgagees, one property, and the different items cannot, as to such mortgagees, be levied on separately.[24] The levy must in all cases be confined to the "right and interest" of the mortgagor.[25] If a mortgagee or pledgee takes possession of the mortgaged or pledged chattels before any other lien attaches thereto, his title is valid as against subsequent attachment or execution creditors, there being no fraud in fact, though the mortgage was not filed or the chattels delivered when the contract of pledge was made.[26] In case of a contract, for work and payment therefore, between employer and employee secured by the former by chattel mortgage, the right of the employee to go on under the contract and hold and enforce the mortgage as security therefor, is not affected by a levy by a creditor of the mortgagor upon the mortgaged property.[27] If the maker of a pledged note pays it to the pledgee, after it has been levied on by the sheriff, with notice of the levy, he is not thereby discharged as to the balance above the debt for which it was pledged.[28]

3510. Held subject to levy—A judgment for money;[29] equitable interests in land;[30] interest of a vendor in a contract for a deed;[31] interest of a vendee in a contract for a deed;[32] interest of pledgor in note, if pledgee consents to surrender possession;[33] land transferred by debtor in fraud of creditors;[34] interest of one member of firm in action against such member alone;[35] the property of one partner to satisfy a partnership debt;[36] the interest of a beneficiary in an unauthorized trust who takes the legal title by virtue of the statute of uses;[37] an unpublished book;[38] interest of judgment debtor during the period of redemption from the sale of his land on execution;[39] the interest of a purchaser at an execution sale even before period of redemption expires;[40] a right to cut timber on land;[41] a vested interest of a legatee;[42] corporate stock.[43]

3511. Held not subject to levy—The interest of a mortgagee in either real or personal property so long, at least, as he holds it in good faith as security and has not applied it to the satisfaction of the debt by foreclosure or otherwise, and it is immaterial whether there has been a breach in the conditions of the mortgage or not;[44] interest of agent holding property for sale on commission;[45] interest of bailee;[46] interest of partner in profits only;[47] a claim for unliquidated

[24] Central T. Co. v. Moran, 56–188, 57+471.

[25] Appleton M. Co. v. Warder, 42–117, 43+791.

[26] Prouty v. Barlow, 74–130, 76+946.

[27] Minor v. Sheehan, 30–419, 15+687.

[28] Mower v. Stickney, 5 397(321).

[29] Henry v. Traynor, 42–234, 44+11; Wheaton v. Spooner, 52–417, 54+372.

[30] Reynolds v. Fleming, 43–513, 45+1099; Atwater v. Manchester S. Bank, 45–341, 48+187; Hook v. Northwest T. Co., 91–482, 98+463. See Fryberger v. Berven, 88–311, 92+1125.

[31] Steele v. Taylor, 1–274(210); Mpls. etc. Ry. v. Wilson, 25–382; Welles v. Baldwin, 28–408, 10+427; Coolbaugh v. Roemer, 30–424, 15+869; Berryhill v. Potter, 42–279, 44+251.

[32] Reynolds v. Fleming, 43–513, 45+1099; Hook v. Northwest T. Co., 91–482, 98+463.

[33] Mower v. Stickney, 5–397(321).

[34] Arper v. Baze, 9–108(98); Campbell v. Jones, 25–155; Jackson v. Holbrook, 36–494, 32+852; Kugath v. Meyers, 62–399, 64+1138; Fisher v. Utendorfer, 68–226, 71+29; Brasie v. Mpls. B. Co., 87–456, 92+340.

[35] Caldwell v. Auger, 4–217(156); Allis v. Day, 13–199(189); Day v. McQuillan, 13–205(192); Barrett v. McKenzie, 24–20; Wickham v. Davis, 24–167; Hankey v. Becht, 25–212; Lane v. Lenfest, 40–375, 42+84; Moquist v. Chapel, 62–258, 64+567.

[36] Daly v. Bradbury, 46–396, 49+190.

[37] Farmers' Nat. Bank v. Moran, 30–165, 14+805.

[38] Banker v. Caldwell, 3–94(46).

[39] Parke v. Hush, 29–434, 13+668.

[40] R. L. 1905 § 4309; Lindley v. Crombie, 31–232, 17+372.

[41] Pine County v. Tozer, 56–288, 57+796.

[42] Watkins v. Bigelow, 93–361, 101+497.

[43] Fowler v. Jenks, 90–74, 87, 95+887, 96+914, 97+127.

[44] Butman v. James, 34–547, 27+66; Prout v. Root, 116 Mass. 410; Jackson v. Willard, 4 Johns. (N. Y.) 41.

[45] Vose v. Stickney, 8–75(51); Benz v. Geissell, 24–169.

[46] Williams v. McGrade, 13–174(165); Heberling v. Jaggar, 47–70, 49+396.

[47] Hankey v. Becht, 25–212.

damages;[48] a mortgage never recorded, not accompanied by any evidence of personal liability, and which has been lost;[49] a mere equitable lien;[50] property garnished;[51] property in custodia legis;[52] the equitable interest of residuary legatee in trust fund;[53] money or other personal property on the debtor's person and all personal property not in view;[54] a contingent interest in the nature of a lien created by reservation in a deed.[55]

LEVY

3512. Time of levy—Diligence of officer—An officer who knows, or has reasonable ground for knowing, of the existence of property out of which the execution may be made acts at his peril in not making an immediate levy.[56] Where a levy has been made before the return day, it may be completed by sale after such day and the officer may retain the writ in his possession for that purpose.[57]

3513. Realty—No formal levy on realty is necessary.[58] The validity of a sale does not depend on an exact compliance with the statute as to the "minute" to be made on the writ.[59]

3514. Personalty capable of manual delivery—The statute provides that "personal property, capable of manual delivery, shall be levied upon by the officer taking it into his custody."[60] It is not enough to take merely; he must take into his custody, that is to say, into his keeping; or, in other words, he must keep as well as take. This requires at least such a custody as to enable an officer to retain and assert his power and control over the property, and so that it cannot probably be withdrawn or taken by another, without his knowing it.[61] It is to be observed, however, that a levy may be good as against the debtor or a trespasser, and not good as against other creditors and bona fide purchasers.[62] As against the debtor and trespassers a levy may be good though the property is left in the possession of the debtor.[63] After the officer has taken property into his custody he may leave it in charge of a receiptor.[64] A sheriff may levy on the interest of his execution debtor in personalty, and to make the levy effectual, may take the property into his custody. But if he levies on property in which such debtor has no leviable interest, his taking is wrongful, though he assumes to levy only on such debtor's interest.[65]

3515. Bulky articles—The statute provides for a levy on bulky articles, or other articles incapable of immediate removal, by filing a certified copy of

[48] Stromberg v. Lindberg, 25-513; Paine v. Gunniss, 60-257, 62+280.

[49] Gale v. Battin, 16-148(133). See Fryberger v. Berven, 88-311, 92+1125.

[50] Kugath v. Meyers, 62-399, 64+1138.

[51] Langdon v. Thompson, 25-509.

[52] Buck v. Colbath, 7-310(238); Davis v. Seymour, 16-210(184); Lord v. Meachem, 32-66, 19+346; Noyes v. Beaupre, 32-496, 21+728; North Star etc. Co. v. Lovejoy, 33-229, 22+388; Watkins v. Minn. T. M. Co., 41-150, 42+862; Strong v. Brown, 41-304, 43+67; Second Nat. Bank v. Schranck, 43-38, 44+524; Wheaton v. Spooner, 52-417, 54+372; Wright v. Robinson, 79-272, 82+632; Kelso v. Youngren, 86-177, 90+316.

[53] Merriam v. Wagener, 74-215, 77+44.

[54] Caldwell v. Sibley, 3-406(300).

[55] Fryberger v. Berven, 88-311, 92+1125.

[56] Guiterman v. Sharvey, 46-183, 48+780.

[57] Barrett v. McKenzie, 24-20; Knox v. Randall, 24-479; Spencer v. Haug, 45-231, 47+794; Bradley v. Sandilands, 66-40, 68+321.

[58] Tullis v. Brawley, 3-277(191); Rohrer v. Turrill, 4-407(309); Folsom v. Carli, 5-333(264); Bidwell v. Coleman, 11-78(45); Lockwood v. Bigelow, 11-113(70); Hutchins v. Carver County, 16-13(1); Knox v. Randall, 24-479.

[59] R. L. 1905 § 4297; Hutchins v. Carver County, 16-13(1).

[60] R. L. 1905 § 4298.

[61] Wilson v. Powers, 21-193; Barber v. Amundson, 52-358, 54+733.

[62] Horgan v. Lyons, 59-217, 60+1099.

[63] Horgan v. Lyons, 59-217, 60+1099. See Bennett v. McGrade, 15-132(99).

[64] Easton v. Goodwin, 22-426; Holcomb v. Nelson, 39-342, 40+354; Horgan v. Lyons, 59-217, 60+1099.

[65] Leonard v. Maginnis, 34-506, 26+733.

the execution and return.[66] The statute applies to a levy on growing crops.[67] A wrongful levy under the statute constitutes a conversion for which an action will lie against the officer.[68]

3516. Other personalty—Debts—Book accounts—Stock, etc.—The statute provides for a levy on other forms of personalty by the service of a certified copy of the execution and a notice.[69] This is the mode of levying on all debts except those which pass by delivery of the instruments upon which they rest, such as notes, bills of exchange, and negotiable bonds. Book accounts cannot be levied upon by the officer merely taking the books in which they are entered into his custody. For the purpose of a levy they stand just as debts of which there is no written evidence and must be levied on under this provision.[70] A judgment may be levied on without serving a copy of the execution with the clerk of the court where the judgment is docketed.[71]

3517. Partnership property—In levying on the interest of one partner in partnership property the officer may take actual possession of the property to the exclusion of the other partners and retain the same while the levy continues. But the purchaser at the sale does not acquire a right of possession; he acquires only the right to call the partnership to an accounting.[72]

3518. Property owned jointly—Where an officer has an execution against one part owner of a chattel, he must seize the whole chattel, though he can sell only the interest of the judgment debtor.[73]

3519. Receiptor—When personalty is levied upon by a taking into the custody of the officer he need not take it from the premises but may leave it with a receiptor.[74] The liability of the receiptor depends on the special contract, but it is ordinarily one of mere bailment, and he may excuse a non-delivery to the sheriff by proof that the property did not at the time of the levy belong to the execution debtor but to another person into whose possession it has gone.[75] Where a sheriff relinquishes possession of property, which has been seized and attached by him, to a bailee, and upon the strength of a receipt for the same, the bailee or receiptor will not be permitted to question a judgment, obtained in the action in which the property was so seized and attached, upon the ground that the judgment was secured by perjury and fraudulent acts and practices.[76]

3520. Use of force—For the purpose of making a levy an officer is not authorized to break open the outer door of the debtor's dwelling house. Nor can he enter against the will of the debtor even without the use of force.[77] He is not authorized to break into a store, if it consists of one room occupied by the debtor both as a store and a dwelling room.[78]

3521. Excessive levy—While much must be left to the discretion of the officer in determining the amount of property to be levied upon a clearly excessive levy, made wilfully, renders him liable.[79]

3522. Care and management of property by sheriff—Threshing grain—In reference to the care and management of personal property levied on much

[66] R. L. 1905 § 4299.

[67] See Hossfeldt v. Dill, 28-469, 10+781; Howard v. Rugland, 35-388, 29+63; Kloos v. Gatz, 97-167, 105+639.

[68] Hossfeldt v. Dill, 28-469, 10+781; Howard v. Rugland, 35-388, 29+63; Kloos v. Gatz, 97-167, 105+639.

[69] R. L. 1905 § 4300. See, for a form of copy and notice, Paine v. Gunniss, 60-257, 62+280.

[70] Tullis v. Brawley, 3-277(191); Swart v. Thomas, 26-141, 1+830; Ide v. Harwood, 30-191, 14+884; Lesher v. Getman, 30-321, 15+309.

[71] Henry v. Traynor, 42-234, 44+11; Wheaton v. Spooner, 52-417, 54+372.

[72] See cases under § 3510.

[73] Caldwell v. Auger, 4-217(156).

[74] Horgan v. Lyons, 59-217, 60+1099.

[75] Mason v. Aldrich, 36-283, 30+884.

[76] Holcomb v. Nelson, 39-342, 40+354.

[77] Welsh v. Wilson, 34-92, 24+327; Curtis v. Hubbard, 4 Hill (N. Y.) 437; Stearns v. Vincent, 50 Mich. 209.

[78] Welsh v. Wilson, 34-92, 24+327.

[79] Pierce v. Wagner, 64-265, 66+977, 67+537; Sharvy v. Cash, 66-200, 68+1070.

must be left to the judgment of the officer. There are many irregularities for which the officer would be liable in damages to an aggrieved party which would not render him a trespasser from the beginning by relation. He will not, by reason of his disposition or management of personalty before sale, become a trespasser from the beginning unless he has been guilty of a substantial violation of the legal rights of the party and of such a character as to show a gross or wanton disregard of duty on his part. Where a sheriff, before sale on execution, caused grain which he had previously levied on in the stack or shock, to be threshed and placed in an elevator, it was held not to be such an abuse of discretion as to make him a trespasser from the beginning.[80]

3523. Levy on personalty—How far satisfaction of judgment—A levy on sufficient personalty of the execution debtor is prima facie a satisfaction of the judgment. It may operate as a satisfaction and must be fairly tried. But if it fails, in whole or in part, without any fault of the plaintiff he may go to his further execution. He must fairly exhaust the first, and while that is going on he can neither sue on the judgment or have another fi. fa., or a ca. sa., or redeem lands sold on another judgment. When a judgment debtor shows a levy upon sufficient of his personalty to satisfy the debt, and that it is undisposed of after a reasonable time, the burden of proof rests on those who assert that there has been no satisfaction.[81] This presumption of satisfaction arises from the fact that the debtor has been deprived of his property in the regular course of execution, and that therefore he ought to be exonerated from further liability, and the judgment creditor be compelled to look to the sheriff. But if the debtor has not been deprived of his property by reason of the levy; if it has been left in his possession, and eloigned or abandoned, and returned to him, or released from the levy and delivered to a third person upon the debtor's request, the presumption ceases.[82] Of course a sale under the levy may operate as a satisfaction.[83]

3524. Levy on realty not a satisfaction—A levy on realty is not a satisfaction of the judgment.[84] But if a sale follows and the property is bid off for the amount of the judgment or more the judgment is thereby satisfied.[85] The levy, sale, and return of satisfaction may, however, be set aside for cause.[86]

3525. Presumption of regularity—In the absence of evidence to the contrary it will be presumed that in making a levy and sale the officer properly discharged his duty and complied with all the requirements of the law.[87]

3526. Nature of sheriff's interest—A debtor loses no rights in his property when it is levied upon except the right of possession and control. On payment of the debt he has the right to have it returned to him in the same condition in which it was at the time of the seizure, usual wear and tear of removal and preservation only excepted. The sheriff has no personal right of possession; his possession is that of the law, whose agent he is, and he has no right to use the property or profit by its possession. In the interval between the levy and sale the debtor is not divested of his ownership in the property, but the incident

[80] Ladd v. Newell, 34–107, 24+366. See Liljengren v. Ege, 46–488, 49+250.

[81] First Nat. Bank v. Rogers, 13–407 (376); Bennett v. McGrade, 15–132(99).

[82] First Nat. Bank v. Rogers, 15–381 (305); Willis v. Jelineck, 27–18, 6+373. See Osborne v. Wilson, 37–8, 32+786.

[83] See Mpls. T. M. Co. v. Jones, 89–184, 94+551.

[84] Davidson v. Gaston, 16–230(202).

[85] Warren v. Fish, 7–432(347); Holmes v. Campbell, 10–401(320).

[86] Lay v. Shaubhut, 6–273(182); Shaubhut v. Hilton, 7–506(412).

[87] Tullis v. Brawley, 3–277(191); Merrill v. Nelson, 18–366(335); Knox v. Randall, 24–479; State v. Penner, 27–269, 6+790; Clossen v. Whitney, 39–50, 38+759; Bradley v. Sandilands, 66–40, 68+321; Galde v. Forsyth, 72–248, 75+219.

of title, the right to possess, use and dispose of the property, is suspended only, which he may regain at any moment by paying the debt.[88]

3527. Actions by sheriff—Motions—A sheriff may bring an action in his own name for the collection of things in action upon which he has levied.[89] In an action on a note he must allege and prove not only the execution, but a valid judgment upon which it issued.[90] A sheriff selling realty on execution may maintain an action in his individual name against the purchaser for the amount bid at the sale.[91] Where a satisfaction of judgment has been improperly entered of record, the sheriff may have the same vacated on motion.[92] Upon a levy good as against an assignee in insolvency under Laws 1881, it was held that the sheriff might bring an action against the assignee to recover money or property in his hands.[93] If a person unlawfully interferes with property in the custody of the sheriff, or a receiptor under him, an action by the sheriff will lie.[94] Things in action can only be sold if the court so orders. A judgment is a thing in action within the meaning of this rule.[95] A sheriff may bring an action against a receiptor with whom he has left property levied upon and who refuses to deliver it.[96]

CLAIMS OF THIRD PARTIES

3528. Affidavit of claim by third party—Statute—Third parties claiming property levied upon or taken by a sheriff by virtue of an execution, writ of attachment, or other process, or in an action of replevin, are required by statute to serve on the officer an affidavit of their title or right to the possession of the property, stating its value and the ground of such title or right.[97] The statute is designed for the protection of the officer in the discharge of his duties.[98] It is applicable only to cases where the property seized is found in the possession of the defendant named in the writ, or his agent, so as to create an appearance or presumption of ownership in him.[99] A statement in the affidavit that the claimant is the owner of the property is a sufficient statement of the ground of his title or right to possession, at least if he is the general owner. The affidavit should allege the claimant's ownership as of the time of the levy, as well as of the time of the demand. An agent making an affidavit may state the facts as upon information furnished to him by his principal. A substantial compliance with the statute is sufficient.[1] The affidavit may be served on the deputy sheriff who made the levy and has the property in his possession.[2]

[88] Banker v. Caldwell, 3-94(46).

[89] Rohrer v. Turrill, 4-407(309); Mower v. Stickney, 5-397(321); Robertson v. Sibley, 10-323(253).

[90] Mower v. Stickney, 5-397(321).

[91] Armstrong v. Vroman, 11-220(142); Hokanson v. Gunderson, 54-499, 56+172; Blexrud v. Kuster, 62-455, 64+1140.

[92] Henry v. Traynor, 42-234, 44+11.

[93] Bean v. Schmidt, 43-505, 46+72.

[94] Horgan v. Lyons, 59-217, 60+1099.

[95] Thompson v. Sutton, 23-50; Henry v. Traynor, 42-234, 44+11.

[96] Holcomb v. Nelson, 39-342, 40+354.

[97] R. L. 1905 § 4213. See, under former statute, Edson v. Newell, 14-228(167). See, independent of statute, Vose v. Stickney, 8-75(51).

[98] Heberling v. Jaggar, 47-70, 49+396; Schneider v. Anderson, 77-124, 79+603; Kiewel v. Tanner, 105-50, 117+231. See Gilbert v. Gonyea, 103-459, 115+640.

[99] Dodge v. Chandler, 9-97(87); Barry v. McGrade, 14-163(126); Livingstone v. Brown, 18-308(278); Butler v. White, 25-432; Moulton v. Thompson, 26-120, 1+836; Jones v. Town, 26-172, 2+473; Bailey v. Chandler, 27-174, 6+480; Tyler v. Hanscom, 28-1, 8+825; Ohlson v. Manderfeld, 28-390, 10+418; Lampsen v. Brander, 28-526, 11+94; Lesher v. Getman, 30-321, 15+309; Perkins v. Zarracher, 32-71, 19+385; Leonard v. Maginnis, 34-506, 26+733; Johnson v. Bray, 35-248, 28+504; Hazeltine v. Swensen, 38-424, 38+110; Granning v. Swenson, 49-381, 52+30; Wood v. Matter, 88-123, 92+523; Kiewel v. Tanner, 105-50, 117+231. See Vose v. Stickney, 8-75(51).

[1] Carpenter v. Bodkin, 36-183, 30+453; Schneider v. Anderson, 77-124, 79+603.

[2] Williams v. McGrade, 13-174(165).

3529. Indemnifying bond—Provision is made by statute for the execution of a bond by the plaintiff in execution, indemnifying the sheriff against the claims of third parties.[3] An attorney of a non-resident has implied authority to execute such a bond in the name of his client.[4] In an action against the sheriff by a claimant the plaintiff in the execution and the sureties on the bond may be impleaded; and if judgment is obtained against the sheriff, their property is first liable for its satisfaction.[5]

SALE

3530. Notice of sale—The designation of the place of sale is an essential requisite of the notice. A notice specifying as the place of sale "the front door of the courthouse" in a certain village, when, in fact, there was no courthouse, or place known as the courthouse, or front door of the courthouse, in the village, has been held insufficient.[6] The property should be so described that those who are invited by the notice to attend and bid will be able to identify it and know exactly what is being sold.[7] A description of the property as "Lot 5, block 39, in the county of Morrison and state of Minnesota," has been held insufficient.[8] The failure of the sheriff to give the proper notice of sale does not affect the validity of the sale either as to third parties or parties to the action.[9] Under a former statute it was held that a judgment creditor purchasing at the sale was charged with notice of defects in the notice of sale.[10]

3531. Officer acts in ministerial capacity—Not a judicial sale—A sale on execution is not a judicial sale. The officer making the sale acts as the ministerial officer of the law and not as the organ of the court. He is not its instrument or agent, as in judicial sales, and the court is not the vendor. His authority to sell rests on the law and on the writ, and does not, as in judicial sales, emanate from the court. The functions of the court terminate at the rendition of the judgment, except when its power is invoked to set the sale aside, for cause, on motion. The court does not direct what shall be levied on or sold, or how the sale shall be made. The validity of the purchase does not depend upon its sanction and approval.[11]

3532. Preparing property for sale—Within reasonable limits a sheriff has discretionary authority to put personalty into shape for sale, as, for example, to cause grain to be threshed.[12]

3533. Mode and terms of sale—A sale of personalty in gross is ordinarily a mere irregularity not affecting the validity of the sale.[13] The statutory provision requiring realty consisting of several known parcels to be sold separately is directory merely. An improper sale in gross is not void but only voidable on a showing of actual fraud or material prejudice.[14] Government subdivisions

[3] R. L. 1905 § 4213; Howe v. Friedheim, 27-294, 7+143 (what constitutes breach); Campbell v. Rotering, 42-115, 43+795 (signer of bond held liable though his name did not appear in body of bond—when liability accrues); Sharvy v. Cash, 66-200, 68+1070 (scope of liability—excessive levy).

[4] Schoregge v. Gordon, 29-367, 13+194.

[5] R. L. 1905 § 4214; Lesher v. Getman, 30-321, 15+309; Richardson v. McLaughlin, 55-489, 57+210.

[6] Bottineau v. Aetna etc. Co., 31-125, 16+849.

[7] Herrick v. Morrill, 37-250, 33+849. See Hutchins v. Carver County, 16-13(1).

[8] Herrick v. Ammerman, 32-544, 21+836.

[9] R. L. 1905 § 4304; McNair v. Toler, 21-175; White v. Leeds I. Co., 72-352, 75+595, 761; Bigelow v. Chatterton, 51 Fed. 614.

[10] Pettingill v. Moss, 3-222(151).

[11] First Nat. Bank v. Rogers, 22-224, Willard v. Finnegan, 42-476, 44+985; Johnson v. Laybourn, 56-332, 57+935.

[12] Ladd v. Newell, 34-107, 24+366.

[13] See Gunz v. Heffner, 33-215, 22+386.

[14] R. L. 1905 § 4306; Tillman v. Jackson, 1-183(157); Worley v. Naylor, 6-192 (123); Paquin v. Braley, 10-379(304); Merrill v. Nelson, 18-366(335); Lamberton v. Merchants' Nat. Bank, 24-281;

do not alone determine whether a body of land consists of separate tracts.[15] The sale must be for cash [16] and to the highest bidder.[17] An attorney of the debtor has no implied authority to stipulate that property levied upon shall be sold at private sale and by a person other than the sheriff.[18] The execution creditor may bid off the property and so may his assignee.[19] If one of two joint judgment creditors bids off the property he will be held a trustee for the other.[20] A sale of realty will not be set aside because the price realized is far below the real value of the property.[21] The statute provides that no more of the property shall be sold than necessary to satisfy the execution.[22]

3534. Service of papers on judgment debtor—The statute provides for the service of a copy of the execution, inventory, and notice, on the judgment debtor.[23] A failure of the sheriff to comply with this provision does not affect the title of the purchaser at the sale.[24] Such a failure has been held to relieve a judgment debtor from making a demand on a sheriff before bringing suit to recover money collected on an exempt judgment.[25]

3535. Certificate of sale of realty—Contents—Description of property—A description which fairly identifies the execution is sufficient. A false particular in such description may be disregarded as in case of deeds and other instruments.[26] While it is the better practice to describe the debtor's interest accurately, it is not absolutely essential, in ordinary execution sales, that the sheriff should specify in his certificate the precise quantum of the debtor's estate. A certificate merely describing the land sold will convey the entire interest of the debtor.[27] But the officer must not, in his certificate, describe a different interest or estate than the one which he was specifically directed to levy upon.[28] The property sold must be described with sufficient certainty to enable a person of common understanding to identify it. A certificate takes effect only as the execution of a statutory power and hence should be construed with some strictness, so as to enable the purchaser to identify the land he is bidding on, and the owner to ascertain what to redeem. A description sufficient to convey land between man and man, or which, if contained in an agreement to convey, would authorize a decree of specific performance, might not be sufficient in proceedings to sell land on an execution. Extrinsic evidence is admissible to identify the property.[29] If there is any descrepancy between the return and the certificate the latter controls, at least, as to the purchaser.[30] When a sale is regularly made its validity is not affected by the omission of the sheriff to make a certificate.[31] If the sale is made by a deputy sheriff the certificate should be executed and acknowledged by him rather than by the sheriff.[32] The proper evidence of a sale on execution is the certificate and no other note or

Coolbaugh v. Roemer, 32-445, 21+472; Abbott v. Peck, 35-499, 29+194; Willard v. Finnegan, 42-476, 44+985; Duford v. Lewis, 43-26, 44+522; Ryder v. Hulett, 44-353, 46+559; Clark v. Kraker, 51-444, 53+706; Webb v. Downes, 93-457, 461, 101+966.

[15] Worley v. Naylor, 6-192(123).

[16] Kumler v. Brandenburg, 39-59, 38+704; Hokanson v. Gunderson, 54-499, 56+172; Carlson v. Headline, 100-327, 111+259.

[17] Tillman v. Jackson, 1-183(157).

[18] Kronschnable v. Knoblauch, 21-56.

[19] Holmes v. Campbell, 10-401(320).

[20] Id.

[21] Coolbaugh v. Roemer, 32-445, 21+472. See White v. Leeds I. Co., 72-352, 75+595, 761.

[22] R. L. 1905 § 4306. See Johnson v. Williams, 4-260(183).

[23] R. L. 1905 § 4305.

[24] Duford v. Lewis, 43-26, 44+522.

[25] Wylie v. Grundysen, 51-360, 53+805.

[26] Bartleson v. Thompson, 30-161, 14+795.

[27] Reynolds v. Fleming, 43-513, 45+1099.

[28] Smith v. Lytle, 27-184, 6+625.

[29] Lowry v. Tilleny, 31-500, 18+452; Herrick v. Ammerman, 32-544, 21+836; Smith v. Buse, 35-234, 28+220; Herrick v. Morrill, 37-250, 33+849.

[30] Spencer v. Haug, 45-231, 47+794.

[31] Barnes v. Kerlinger, 7-82(55). See Smith v. Buse, 35-234, 28+220; Hokanson v. Gunderson, 54-499, 56+172.

[32] Herrick v. Morrill, 37-250, 33+849.

memorandum is required by the statute of frauds to make it a valid contract. If the certificate contains other facts than those required by the statute it not evidence as to them.[34] A certificate executed by the sheriff as such is go though it does not state that he made the sale as sheriff.[35] The provision r quiring the certificate to state that the property is subject to redemption directory merely. A recital that "the above described premises are subject redemption within the time and according to the statute in such case made a provided" is sufficient.[36] The sheriff may be compelled to execute a certificat A sheriff cannot be required to issue his certificate of sale under an execut issued upon a judgment until the full amount of the bid has been paid in ca but, if the certificate is issued without such payment, the sale is valid and remedy of the execution debtor is an action against the sheriff for the unp purchase money.[38] Under an early statute it was held that the certificate n not be attested by witnesses or be under seal.[39] The right to apply for and h a second certificate of sale upon execution from the officer making such in certain cases, which was given by Laws 1862 c. 19, survived the repea that chapter, and was saved to the purchaser by G. S. 1866, c. 121 § 4.[40]

3536. Title and rights of purchaser of realty—Under a former statut the interest of the execution debtor passed to the purchaser at once upon sale subject to the right of redemption.[41] Under the present statute the ru otherwise.[42] Now, the title of the debtor does not pass until the time to re expires, yet the purchaser acquires by the incomplete sale a right whic whatever name it may be called, is assignable; and if such right is assig the title, when it passes by lapse of time and non-redemption, vests, by v of the statute, in the assignee of such right. This right will pass by a de the purchaser whereby he "grants, bargains, sells, releases and quitclain right, title, interest, claim, or demand" in or to the land; and when the to redeem expires without redemption, the title under the execution sal vest in the grantee in the deed.[43] This interest has been held "real e within the meaning of a will.[44] If the execution debtor is a married p the purchaser acquires the land free from the statutory interest of the spouse.[45] Title by execution was "unknown to the common law and see be of American origin. It has grown out of the system of judgment adopted by many, and probably by most of the American states, and out enforcement of the purposes of such liens, by process of execution. Th of the judgment and process of execution appear to have been substitut the old common-law writ of eligit."[46] The title acquired by the pur cannot be defeated or impaired by the subsequent acts or omissions

[33] Armstrong v. Vroman, 11-220(142).

[34] Overing v. Foote, 43 N. Y. 290. See Messerschmidt v. Baker, 22-81.

[35] Merrill v. Nelson, 18-366(335).

[36] Wells v. Atkinson, 24-161.

[37] Hokanson v. Gunderson, 54-499, 56+172. See Barnes v. Kerlinger, 7-82(55).

[38] Carlson v. Headline, 100-327, 111+259.

[39] Bidwell v. Coleman, 11-78(45).

[40] Oleson v. Peterson, 53-522, 55+815.

[41] Dickinson v. Kinney, 5-409(332); Messerschmidt v. Baker, 22-81; James v. Wilder, 25-305; Curriden v. St. P. etc. Ry., 50-454, 52+966; Morgan v. Joslyn, 91-60, 97+449.

[42] Parke v. Hush, 29-434, 13+668; Whitney v. Huntington, 34-458, 26+631.

[43] Lindley v. Crombie, 31-232, Cooper v. Finke, 38-2, 35+469; B v. Reid, 43-172, 45+11; Holmes Bank, 53-350, 55+555; Tuttle v. 88-284, 92+1117; Morgan v. Jos 60, 97+449. See Messerschmidt v 22-81; James v. Wilder, 25-305.

[44] Morgan v. Joslyn, 91-60, 97+4

[45] R. L. 1905 § 3648; Aretz v. K 432, 440, 95+216, 769; Griswold v 102-114, 112+1020. Prior to L c. 33 the rule was otherwise, I Corser, 51-406, 53+717.

[46] Steele v. Taylor, 1-274(21(also, Whitney v. Huntington, 34 26+631.

sheriff.[47] It is unaffected by defects or informalities in the return of the sheriff.[48] The purchaser succeeds to all the interest of the execution debtor though such interest is not described in the notice of sale or certificate of the sheriff.[49] If the interest of the vendee in a contract for the sale of land is sold on execution the purchaser succeeds to the interest subject to its being defeated by laches on the part of the vendee.[50] Where a sale and transfer of property is void as to a creditor it is also void as to the purchaser upon an execution sale based on a judgment recovered by such creditor.[51] The purchaser acquires the interest of the debtor not only in the land but also in buildings and trees on the land.[52] When the period of redemption has expired without redemption the execution debtor is a mere stranger to the property and cannot raise objection to subsequent proceedings.[53] The purchaser at an execution sale stands in the shoes of the judgment debtor and acquires his title as it stood at the time the execution creditor's lien was acquired.[54]

3537. Obstruction—Action to set aside—Where, after the rendition and docketing of a judgment against a debtor in whose name the title to certain land stood of record, he executed a conveyance of the property in which he fraudulently recited that he merely held the title in trust for the grantee who had always been the beneficial owner of the premises, it was held that an action would not lie to remove the obstruction to a sale or execution created by the recital.[55]

3538. Remedies of purchaser to obtain possession—The purchaser at an execution sale of realty may recover possession by an action of ejectment.[56] He has a more summary remedy under the unlawful detainer act.[57]

3539. Disposition of proceeds—The proceeds of the sale stand in the place of the property sold. If there is more than enough to satisfy the execution and the costs of the sale, it is the duty of the sheriff to apply the balance to the satisfaction of other liens on the land.[58] He is required by statute to satisfy liens for wages under certain conditions.[59]

REDEMPTION FROM SALE OF REALTY

3540. Same as redemption from foreclosure sales—The rules governing redemption from execution sales and from mortgage foreclosure sales are substantially the same. They will be found under the head of mortgages.[60]

3541. By the judgment debtor, his heirs, or assigns—A grantee or successor in interest of the judgment debtor redeems on the same terms as the judgment debtor himself.[61] Under a former statute it was held that the owner or his successor might redeem without paying other liens held by the purchaser. The present statute prescribes a different rule, where the purchaser is a creditor having a prior lien.[62] A redemption by the judgment debtor terminates the sale and restores the estate to its condition before the sale, except as to the judgment under which the sale was made.[63]

[47] Millis v. Lombard, 32-259, 20+187; Hokanson v. Gunderson, 54-499, 56+172.
[48] Millis v. Lombard, 32-259, 20+187.
[49] Reynolds v. Fleming, 43-513, 45+1099.
[50] Id.; Smith v. Lytle, 27-184, 6+625.
[51] Millis v. Lombard, 32-259, 20+187.
[52] Whitney v. Huntington, 34-458, 26+631.
[53] Messerschmidt v. Baker, 22-81.
[54] Steele v. Taylor, 1-274(210); Banning v. Edes, 6-402(270).
[55] Cornman v. Sidle, 65-84, 67+667.
[56] Herrick v. Ammerman, 32-544, 21+836; Fisher v. Utendorfer, 68-226, 71+29
[57] Ferguson v. Kumler, 25-183.
[58] Carlson v. Headline, 100-327, 111+259. See Brand v. Williams, 29-238, 240, 13+42.
[59] R. L. 1905 § 3542; Kruse v. Thompson, 26-424, 4+814; Liljengren v. Ege, 46-488, 49+250.
[60] See §§ 6382-6424.
[61] Warren v. Fish, 7-432(347); Rutherford v. Newman, 8-47(28).
[62] R. L. 1905 § 4311.
[63] R. L. 1905 §§ 4313, 4484; Warren v.

RETURN

3542. In general—The return of the officer is his official answer respectin the duty enjoined upon him by the writ and is intended to inform the cou of what has been done in the premises. Upon being made and filed, it become a part of the record in the action, and partakes of its nature, in that it impor absolute verity as to every statement of fact contained in it, concerning whic it is his duty therein to speak. So long as it remains a part of the record, cannot, as to any such statement, be controverted or questioned collaterally l any of the parties thereto or their privies, for the purpose of invalidating th proceedings of the officer or affecting any rights dependent thereon.[64] But th return may be controverted in a direct proceeding even by the parties.[65] An the parties may always controvert it in another action, its conclusive charact being limited to the action in which it is made.[66] As to strangers the retu is prima facie evidence of the facts therein stated but is not conclusive, ev collaterally.[67] The return of an execution "nulla bona" is evidence of the i solvency of the judgment debtor and of no property out of which to satisfy t judgment.[68] In an action against the officer by any of the parties or th privies the officer is estopped from denying the truth of his return as to matters material to be returned. If his return is erroneous in respect to a matter of fact therein stated, his remedy is to get it amended in accordan with the facts, upon application to the court and leave granted.[69] A retu will never be set aside or amended to the material injury of innocent th parties.[70] In reporting his acts under the writ the officer is only required give the ultimate facts. A return which certifies in general terms that officer "levied" on certain property is sufficient, it not being necessary to st the particulars of the levy.[71] In construing the return it is to be presumed the absence of a contrary showing upon its face, that the officer has done that was required of him, both in the execution of the process and in the m ing of the return thereto.[72] The return need not be made within sixty d of the issuance of the writ.[73] Irregularities in the return will not be permit to prejudice the purchaser at the sale or redemptioners.[74] Evidence that a a levy on personal property the sheriff surrendered the property to the ju ment debtor does not contradict the return.[75] A return may be amended motion, to conform to the facts.[76] The court may set aside the return or execution of satisfaction where, in fact, there has been no satisfaction.[77] evidence not inconsistent with the return is always admissible to prove v

Fish, 7-432(347); Rutherford v. Newman, 8-47(28).

[64] State v. Penner, 27-269, 6+790.

[65] Crosby v. Farmer, 39-305, 40+71.

[66] Stewart v. Duncan, 47-285, 50+227.

[67] Tullis v. Brawley, 3-277(191); Clossen v. Whitney, 39-50, 38+759; Stewart v. Duncan, 47-285, 50+227.

[68] Spooner v. Travelers Ins. Co., 76-311, 79+305; Fryberger v. Berven, 88-311, 92+1125.

[69] State v. Penner, 27-269, 6+790; Ryan Drug Co. v. Peacock, 40-470, 42+298.

[70] Castner v. Symonds, 1-427(310); Crosby v. Farmer, 39-305, 40+71. See Lay v. Shaubhut, 6-273(182); Butler v. White, 25-432.

[71] Tullis v. Brawley, 3-277(191); Rohrer v. Turrill, 4-407(309); Folsom v. Carli, 5-333(264); Hutchins v. Carver County, 16-13(1); Hossfeldt v. Dill, 28-469, 781.

[72] Tullis v. Brawley, 3-277(191); v. Penner, 27-269, 6+790.

[73] Barrett v. McKenzie, 24-20; Kn Randall, 24-479; Spencer v. Haug, 231, 47+794; Bradley v. Sandilands 40, 68+321.

[74] Hutchins v. Carver County, 16-1: Millis v. Lombard, 32-259, 20+187; cer v. Haug, 45-231, 47+794.

[75] First Nat. Bank v. Rogers, 1 (305).

[76] Hutchins v. Carver County, 16-1 State v. Penner, 27-269, 6+790.

[77] Lay v. Shaubhut, 6-273(182); S hut v. Hilton, 7-506(412); Osbor Wilson, 37-8, 32+786; Suchaneck v. S 53-96, 54+932.

was done under the writ.[78] Where the plaintiff had levied an attachment on personalty of the defendant and subsequently an execution was returned "no property found" with the knowledge and consent of the plaintiff, it was held that the return constituted a waiver of the attachment as to innocent third parties.[79] A return of "unsatisfied" is not equivalent to a return that the party had no property, personal or real, out of which the amount specified in the execution, or any part of the same, could be collected. The reasons for the nonsatisfaction of the writ ought to be stated.[80] A return may be made by an officer after the expiration of his term of office.[81]

SUPPLEMENTARY PROCEEDINGS

3543. General nature and object of proceeding—The proceedings authorized by the statute were intended to furnish a speedy, inexpensive, and adequate remedy for discovering and reaching all equitable interests of the debtor not liable to seizure and sale on execution, and also all property so liable which an officer holding such process has been unable to find, and to compel the application of the same towards the satisfaction of the judgment. They not only perform the office of a creditors' bill, but have a somewhat enlarged scope and purpose.[82] The remedy afforded by the statute is in the nature of an equitable execution.[83]

3544. Order for disclosure—Service—A judgment creditor is entitled, as a matter of right, to an order requiring his debtor to appear and make disclosure concerning his property, whenever it appears that an execution against the property of such debtor has been issued to the sheriff of the proper county and the same has been returned unsatisfied in whole or in part. These facts alone are sufficient to sustain the jurisdiction to issue the order for a disclosure, and to take such subsequent proceedings as the statute allows, and as may become necessary upon the disclosure. It is unnecessary to prove, in addition to these facts, that any personal demand was ever made upon the debtor to pay the judgment, or to turn out property upon the execution.[84] Nor is it necessary to show that the debtor has property subject to execution, or facts making it reasonably probable that property may be discovered.[85] It is unnecessary to wait until the expiration of the sixty days within which the officer may make return on the execution.[86] It is customary to make the facts justifying an order appear by affidavit. Such an affidavit need not state the nature of the relief sought.[87] The order must be personally served on the judgment debtor.[88]

3545. Judgment authorizing proceedings—A money judgment in the federal court of this state may be the basis of proceedings.[89]

3546. Effect of as a lien—Priority—The commencement of supplementary proceedings by the service of the order on the judgment debtor gives the moving creditor an equitable lien on the assets subsequently discovered, if he pro-

[78] Millis v. Lombard, 32-259, 20+187.
[79] Butler v. White, 25-432.
[80] Sherburne v. Rippe, 35-540, 29+322.
[81] Knox v. Randall, 24-479.
[82] Kay v. Vischers, 9-270(254); Flint v. Webb, 25-263; Towne v. Campbell, 35-231, 28+254; Bean v. Heron, 65-64, 67+805; Bradley v. Burk, 81-368, 84+123.
[83] Bean v. Heron, 65-64, 67+805.
[84] Kay v. Vischers, 9-270(254); Flint v. Webb, 25-263; Tomlinson v. Shatto, 34 Fed. 380. See Beebe v. Fridley, 16-518 (467) (effect of county in which judgment debtor resides being attached to another for judicial purposes).
[85] Kay v. Vischers, 9-270(254).
[86] Tomlinson v. Shatto, 34 Fed. 380.
[87] Knight v. Nash, 22-452.
[88] Billson v. Linderberg, 66-66, 68+771 (debtor absent from state—service on clerk in charge of his office held insufficient—service of order appointing receiver on debtor after his return held insufficient).
[89] Sage v. St. P. etc. Ry., 47 Fed. 3.

ceeds with proper diligence to discover and apply the same to the payment c his judgment; that is, it gives him priority over other creditors. If the judg ment debtor cannot be found within the state, so that service can be had o him, the lien may be acquired in some other way, as by the ex parte appoin ment of a receiver and the commencement of a suit by him against the thir person in possession or control of the judgment debtor's assets, or by chargir such third person in the supplementary proceedings and ordering him to appe and disclose.[90] The lien is dissolved by an assignment for the benefit of cre itors.[91]

3547. Officer's return conclusive—That the sheriff, in the execution and r turn of process has done his duty, is to be presumed and hence a return of nul bona is itself evidence that the officer has made all reasonable search and inqui after the debtor's property, necessary under the circumstances to justify l return. If, however, through the wrongful procurement of the plaintiff in t execution, the sheriff improperly returns it unsatisfied, where there is sufficie property upon which the officer ought to have levied to satisfy the debt, the d fendant should apply directly to the court, on motion, to set aside the retu and to vacate the order and proceedings had thereon, on these grounds. long as the return is suffered to remain of record in force and unimpeach the jurisdiction dependent thereon to institute and prosecute supplement proceedings, in the manner prescribed by statute, cannot be affected by any quiries into the conduct of the sheriff in executing the writ, or into the ex ence of any property which he might and ought to have taken by virtue of execution, but did not. No question of this character can be raised after commencement of the proceedings, and upon the disclosure of the defend on his examination under the order.[92]

3548. Order for application of property—The statute provides that judge may order property of the debtor not exempt to be applied to the sa faction of the judgment.[93] Such an order is discretionary where propert disclosed on an examination which may be reached by execution. Ordina the creditor should be left to his simple remedy of another execution. An or should be resorted to only when it is the only effective remedy available.[94] justify an order under the statute the evidence must be clear and convincin The court may order the judgment debtor to convey to a receiver an inte in realty situate in another state.[96] The judgment debtor may be ordere assign to a receiver a claim against a municipal corporation though the la denies the indebtedness.[97] In an early case—since overruled by statute [98]- order directing a judgment debtor to turn over his watch was sustained.[99] has been held that an officer of a municipal corporation cannot be compelle assign to a receiver his salary.[1] Where a judgment creditor let a portion building occupied by him as a homestead it was held that he could not b dered to assign the lease to a receiver.[2] The judgment debtor cannot be ord

[90] Wolf v. McKinley, 65-156, 68+2; Billson v. Linderberg, 66-66, 68+771; Kellogg v. Coller, 47 Wis. 649; Tomlinson v. Shatto, 34 Fed. 380.

[91] Wolf v. McKinley, 65-156, 68+2; Billson v. Lardner, 67-35, 69+477.

[92] Flint v. Webb, 25-263. See Sherburne v. Rippe, 35-540, 29+322; Spooner v. Bay St. Louis Synd., 44-401, 46+848.

[93] R. L. 1905 § 4323.

[94] Kay v. Vischers, 9-270(254); Re v. Henry, 82 Iowa, 134.

[95] Bradley v. Burk, 81-368, 84+123.

[96] Towne v. Campbell, 35-231, 28 Tomlinson v. Shatto, 34 Fed. 380.

[97] Knight v. Nash, 22-452.

[98] Laws 1899 c. 267.

[99] Rothschild v. Boelter, 18-361(3

[1] Roeller v. Ames, 33-132, 22+177. R. L. 1905 § 4237.

[2] Umland v. Holcombe, 26 286, 3+

to pay over a specific sum of money received by him after the service of the order for examination, but paid out by him before the disclosure.[3] It has been held that a city treasurer cannot be compelled to pay over the salary of a city fireman.[4]

3549. Receiver—The judge may appoint a receiver of the debtor's unexempt property, or forbid a transfer or other disposition thereof, or any interference therewith.[5] The mere fact that the examination discloses property which may be subjected to the satisfaction of the judgment does not make the appointment of a receiver a matter of right. Whether a receiver shall be appointed rests in the discretion of the court. It is a discretion to be exercised cautiously and with reference to the facts of the particular case. Placing a person's property in the hands of a receiver is, at best, a drastic proceeding, usually very expensive, and frequently resulting in absorbing the greater part of the estate in expenses; and it is against the general policy of the law to permit a creditor to resort to it where he has other adequate remedies.[6] While to require or warrant the appointment of a receiver it is unnecessary that it should appear with certainty that the debtor has property which should be applied on the judgment, it should appear that there is a reasonable ground to believe that he has. Mere suspicion or surmise falls far short of what is required to justify the exercise of a power which should be sparingly used.[7] A receiver should not be appointed where the creditor has a mortgage amply sufficient to satisfy the whole debt.[8] A receiver may be appointed though the only property disclosed is an interest in realty situate in another state, and the debtor may be required to convey such interest to the receiver.[9] It is discretionary with the court to appoint a receiver immediately upon granting an order for the examination of the debtor.[10] An order appointing a receiver of certain specific property of the judgment debtor, is an adjudication that such property is not exempt property, and protects the receiver for acts done under it and in confomity therewith. though afterwards reversed for error in such adjudication.[11] A receiver may sue in his own name without joining the judgment creditors.[12] In bringing an action he must allege his appointment with sufficient fulness to show that he has authority to bring the particular action.[13] He may maintain an action to avoid a fraudulent conveyance of realty by the judgment debtor although there has been no transfer of the title to him.[14] A judgment in favor of the defendant in an action brought by a receiver is binding and conclusive upon the creditor at whose instance and for whose benefit the receiver was appointed.[15]

3550. Examination of debtors of judgment debtor—The statute authorizes the examination of persons having property of the judgment debtor or indebted to him.[16]

[3] Christensen v. Tostevin, 51–230, 53+461. See Benbow v. Kellom, 52–433, 54+482.

[4] Sandwich Mfg. Co. v. Krake, 66–110, 68+606. See R. L. 1905 § 4237.

[5] R. L. 1905 § 4323.

[6] Knight v. Nash, 22–452; Flint v. Webb, 25–263; Holcombe v. Johnson, 27–353, 7+364; Towne v. Campbell, 35–231, 28+254; Dunham v. Byrnes, 36–106, 30+402; Benbow v. Kellom, 52–433, 54+482; Bean v. Heron, 65–64, 67+805; Billson v. Linderberg, 66–66, 68+771; Flint v. Zimmerman, 70–346, 73+175; Poppitz v. Rognes, 76–109, 78+964.

[7] Flint v. Zimmerman, 70–346, 73+175.

[8] Bean v. Heron, 65–64, 67+805.

[9] Towne v. Campbell, 35–231, 28+254.

[10] Flint v. Webb, 25–263.

[11] Holcombe v. Johnson, 27–353, 7+364.

[12] See § 8260.

[13] Walsh v. Byrnes, 39–527, 40+831; Tvedt v. Mackel, 67–24, 69+475; Rossman v. Mitchell, 73–198, 75+1053.

[14] Farmers' L. & T. Co. v. Mpls. etc. Works, 35–543, 29+349; Dunham v. Byrnes, 36–106, 30+402.

[15] Dohs v. Holbert, 103–283, 114+961.

[16] R. L. 1905 § 4325; Menage v. Lustfield, 30–487, 16+398 (third party not appearing in response to order—punishment for contempt—appeal); Billson v. Linderberg, 66–66, 68+771 (judgment debtor absent from state—acquiring lien on his property by proceedings against third party).

WRONGFUL LEVY

3551. Remedies of owner—In general—The owner of personalty wrong fully taken on execution has several remedies. He may sue the officer for a re covery of the property,[17] if he is not the defendant in the action;[18] or for con version[19] or trespass.[20] He may sue the purchaser at the execution sale fo conversion.[21] If the judgment on which the execution is based is void he ma sue the execution creditor.[22] If the writ is issued maliciously at the instanc of the attorney of the execution creditor the owner may sue the attorney. If the property when taken by the officer is not in the possession of the owne but in the possession of the execution debtor, the owner cannot sue the offic until he has made a demand as provided by statute.[24] A demand is also som times necessary when the property taken is exempt.[25] The owner of real wrongfully levied upon and sold has several alternative remedies. He ma sometimes enjoin the sale.[26] He may sometimes have the sale set aside as cloud on his title.[27] If he is in possession he can wait until the purchas brings an action against him and then attack the sale as void.[28] He may te the sale in a statutory action to determine adverse claims,[29] or for partition He may bring an action to have the sale set aside,[31] or he may achieve the sar object by motion.[32]

3552. Injunction—An injunction will sometimes be granted to restrain illegal levy and sale, but the legal remedies are generally adequate.[33] The effe of an injunction of an execution sale is to stop the proceedings upon the ex cution where they are. But such injunction does not operate to kill the exec tion, or to destroy or impair a levy made under it. It is therefore compete for the sheriff holding such writ to go on after the dissolution of the injunctio and even after the expiration of his term of office, and complete the proceedin commenced by him[34]

3553. Liability of execution creditor—If a judgment creditor causes ex cution to issue on a void judgment he is liable to the execution debtor.[35]

[17] Lynd v. Picket, 7-184(128); Caldwell v. Arnold, 8-265(231); Dodge v. Chandler, 9-97(87); Williams v. McGrade, 13-46(39); Butler v. White, 25-432; Leonard v. Maginnis, 34-506, 26+733; Howard v. Rugland, 35-388, 29+63; Hazeltine v. Swensen, 38-424, 38+110; Whitney v. Swensen, 43-337, 45+609; Cosgrove v. Kohler, 45-148, 47+539; Hanson v. Bean, 51-546, 53+871; Prouty v. Barlow, 74-130, 76+946; McNeal v. Rider, 79-153, 81+830.

[18] Kelso v. Youngren, 86-177, 90+316.

[19] See § 8747.

[20] Buck v. Colbath, 7-310(238); Granning v. Swenson, 49-381, 52+30; Haugen v. Younggren, 57-170, 58+988; Matteson v. Munro, 80-340, 83+153.

[21] Kronschnable v. Knoblauch, 21-56; Heberling v. Jaggar, 47-70, 49+396.

[22] Gunz v. Heffner, 33-215, 22+386; Ladd v. Newell, 34-107, 24+366; Farmer v. Crosby, 43-459, 45+866.

[23] Farmer v. Crosby, 43-459, 45+866.

[24] See § 3528.

[25] Tullis v. Orthwein, 5-377(305); Lynd v. Picket, 7-184(128).

[26] See § 3552.

[27] Hanson v. Johnson, 20-194(17: Plummer v. Whitney, 33-427, 23+841; E man v. James, 34-547, 27+66; Norgren Edson, 51-567, 53+876.

[28] Herrick v. Ammerman, 32-544, 836.

[29] Plummer v. Whitney, 33-427, 23+8 Herrick v. Morrill, 37-250, 33+849.

[30] Barber v. Morris, 37-194, 33+559.

[31] Jakobsen v. Wigen, 52-6, 53+1(

[32] Jakobsen v. Wigen, 52-6, 53+10 Cunningham v. Water Power S. Co., 282, 77+137.

[33] Hart v. Marshall, 4-294(211); Han v. Johnson, 20-194(172); Wickham v. vis, 24-167; Hamilton v. Wood, 55-57+208; Central T. Co. v. Moran, 56-57+471; Rother v. Monahan, 60-186, 62+263; Kugath v. Meyers, 62-399, 1138; Pelican River M. Co., v. Maurin, 418, 69+1149; Bagley v. Pennington, 226, 78+1113.

[34] Knox v. Randall, 24-479. See Pet gill v. Moss, 3-222(151) (overruled part by change in statute); Wakefiel Brown, 38-361, 37+788 (effect of inj tion on time of issuance of writ).

[35] Gunz v. Heffner, 33-215, 22+386; L

erroneous judgment is valid till reversed and protects the plaintiff in enforcing it. Where, on an erroneous judgment, before its reversal, execution is issued, and the defendant's property levied on and sold, the defendant, after a reversal, is entitled to restitution from the plaintiff of only so much as plaintiff received on the execution; he cannot recover the full value of the property if it was sold for less.[36] Where a judgment creditor, in order to satisfy a balance due on his judgment, legally sold a tract of land and bid it in himself for more than the amount due on the judgment, but for less than the value of the land, it was held that he was only liable to account for the amount of his bid in excess of the amount due on the judgment.[37] Where by mistake a judgment creditor sells land not belonging to the judgment debtor he is liable to the latter.[38]

EXECUTION, EXECUTED—See note 39.

EXECUTOR DE BONIS NON—See Executors and Administrators, 3583.

EXECUTOR DE SON TORT—See Executors and Administrators, 3582.

v. Newell, 34–107, 24+366; Farmer v. Crosby, 43–459, 45+866.

[36] Peck v. McLean, 36–228, 30+759.

[37] Henry v. Meighen, 46–548, 49+323.

[38] Id.

[39] Hayward v. Grant, 13–165(154); Romans v. Langevin, 34–312, 25+638; Cable v. Mpls. etc. Co., 47–417, 50+528; State v. Butler, 47–483, 50+532; Tucker v. Helgren, 102–382, 113+912.

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SALES OF REALTY

Cross-References

See Descent and Distribution; Mortgages, 6323; Parties, 7331; Powers; Probate Court; Trusts; Wills.

IN GENERAL

3554. Representatives — Personal representatives — Definitions — The terms "representatives," "personal representatives," and "legal representatives" mean, in their ordinary use, executors or administrators. They are sometimes used to denote next of kin, heirs, or any one succeeding to the rights and liabilities of the decedent, or any one who, by operation of law, stands in the place of and represents the interests of another.[40] In the statutes relating to the probate court the word "representative" includes executors, administrators, special administrators, administrators with the will annexed, administrators de bonis non, and guardians.[41]

3555. Nature of "estates"—The estate of a decedent has no legal personality that can have a status in court.[42] It is the property of every kind left by him at his death.[43]

3556. Probate law—The term "probate law" is used in this country to denote all matters of which probate courts usually have jurisdiction, including the administration of estates of decedents. The word "probate" originally meant merely "relating to proof" and afterwards "relating to the proof of wills."[44]

[40] Boutiller v. St. Milwaukee, 8–97(72, 79); Jones v. Tainter, 15–512(423); Atkinson v. Duffy, 16–45(30, 36); Nash v. Tousley, 28–5, 5+875; Walter v. Hensel, 42–204, 209, 44+57; Ewing v. Warner, 47–446, 50+603; Schultz v. Citizens' etc. Co., 59–308, 313, 61+331; Willoughby v. St. Paul etc. Co., 80–432, 436, 83+377; Argall v. Sullivan, 83–71, 85+931; Alford v. Consolidated etc. Co., 88–478, 93+517; Lowry v. Duluth, 94–95, 101+1059; Jones v. Minn. Tr. Ry., 108–129, 121+606.

[41] R. L. 1905 § 3636; Jones v. Minn. Tr. Ry., 108–129, 121+606.

[42] Columbus v. Monti, 6–568(403); Kenaston v. Lorig, 81–454, 84+323.

[43] Kenaston v. Lorig, 81–454, 84+323.

[44] Johnson v. Harrison, 47–575, 50+923.

3557. Liability of estate for acts of representative—An estate is not r sponsible for the fraud of a representative. The mere delivery of property one who is a representative, the estate not being entitled to it, does not ma the estate responsible for such property to the person entitled to it, it not a pearing that the property was treated or used as assets of the estate, or that t estate received any benefit from it.[45] An estate cannot be prejudiced by t acts of a representative in relation thereto prior to his appointment.[46]

ADMINISTRATION IN GENERAL

3558. Nature and object—To take charge of and manage the estate of decedent, to settle and pay claims against the estate, and to distribute the mainder of the estate according to law, are the primary purposes of administ tion.[47] The existence of assets is essential to administration.[48] The proce ing is in rem, the res being the estate of the decedent.[49]

3559. Necessity—Where no administration of the estate of a decedent w died intestate is applied for, either by the next of kin or creditors, within period fixed by statute, for the presentation of claims against the estate, a no claims are filed or presented within that time, or administration had, heirs entitled to the personal estate may dispense with the appointment of administrator and formal administration by an amicable distribution of the same according to their respective rights, and thus acquire a valid title such property.[50]

3560. Control of probate court—The whole estate of every decedent subject to administration, whatever disposition may be made of it by w Whenever the jurisdiction of the probate court attaches in the particular stance to the estate, the whole of it, and more especially the personalty, co within the authority and control of the court, for the purpose of administrati for distribution according to law and to the directions of the will, if there one. This control of the property the court exercises through the executor administrator, whose duty it is to bring it into his possession. Until it passed to him through administration, no legatee, whether the bequest be him in his own right, or as trustee, and no next of kin, has a right to the session. That right is in the executor or administrator, as such, and if he t possession he takes it in that capacity.[51]

LETTERS OF ADMINISTRATION

3561. Who entitled to letters—The statute defines who are entitled to ters of administration,[52] but much is left to the discretion of the probate cou A creditor of the decedent may be appointed.[53]

3562. Petition for letters—Notice—The failure to give proper notic interested parties of the hearing on a petition for the appointment of an ministrator, by the publication of the citation for the full time required by statute, is an irregularity which renders the subsequent proceedings void

[45] Fritz v. McGill, 31–536, 18+753.
[46] Wiswell v. Wiswell, 35–371, 29+166. See § 3566.
[47] State v. Probate Ct., 33–94, 95, 22+10; Mousseau v. Mousseau, 40–236, 238, 41+977; Fitzpatrick v. Simonson, 86 140, 146, 90+378; Granger v. Harriman, 89–303, 305, 94+869.
[48] Hutchins v. St. P. etc. Ry., 44–5, 7, 46+79; Hanson v. Nygaard, 105–30, 38, 117+235.
[49] Morin v. St. P. etc. Ry., 33–176, 180, 22+251; Hutchins v. St. P. etc. 44–5, 7, 46+79; Ladd v. Weiskopf, 6 36, 64+99.
[50] Granger v. Harriman, 89–303, 94
[51] In re Scheffer, 58–29, 34, 59+956.
[52] R. L. 1905 § 3696.
[53] Hanson v. Nygaard, 105–30, 35, 235.
[54] Putnam v. Pitney, 45–242, 245, 47 Granger v. Harriman, 89–303, 306, 94

and subject to be set aside on motion or appeal. But the giving of such notice, by the proper publication of the citation, is not necessary in order to confer jurisdiction over the estate upon the court, and therefore the validity of the subsequent proceedings cannot be questioned in a collateral proceeding.[55]

3563. Effect—Collateral attack—Letters of administration issued by a court with jurisdiction are not subject to collateral attack for error or irregularity, and are conclusive evidence of the due appointment of the person therein named as administrator.[56] In all cases to which an administrator, as such, is a party, for the purpose of showing his representative capacity, and his authority to act for and enforce and protect the rights of the estate he assumes to represent, the letters of administration are at least prima facie evidence of every fact upon which such capacity and authority depend, including the death of the person on whose estate the letters issued.[57]

LETTERS TESTAMENTARY

3564. When granted—Effect—The statute provides that "when a will has been duly proved and allowed, the court shall issue letters testamentary thereon to the executor named therein, if he is legally competent, and accepts the trust and gives bond as required by law; otherwise, such court shall grant letters of administration with the will annexed." [58] The statute is inapplicable to foreign wills.[59] An order granting letters testamentary has been held to include an adjudication as to the sufficiency of the executor's bond.[60]

POWERS, DUTIES, AND LIABILITIES OF REPRESENTATIVES

3565. Trust relation—A representative is a trustee and cannot derive any personal advantage from the management of the trust estate.[61]

3566. Powers before letters—At common law, an executor could do nearly all acts under the will before it was proved that he could do afterwards, and, when the will was proved, it related back and cured his acts. Such is not the law under our statutes, but a deed of land in this state, executed by a foreign executor after the will had been probated at the domicil and he had qualified there, but before the will had been probated in this state, has been sustained.[62] When necessary for the protection of the estate the title of an administrator will be held to relate back to the death of the intestate. An administrator is a mere officer of the law, and his title to the assets of the estate is official, and not personal, and cannot be affected, to the prejudice of the estate, by any acts of his prior to his appointment.[63]

3567. Right to realty—On the death of a person the title to his realty immediately vests in his heirs or devisees,[64] but the statute gives to his personal representative a right to the possession for purposes of administration.[65] The representative is entitled to the possession as against heirs, devisees, or their assigns, until the estate is settled. He may recover possession without showing

[55] Hanson v. Nygaard, 105-30, 117+235.
[56] Moreland v. Lawrence, 23-84; Pick v. Strong, 26-303, 3+697; O'son v. Fish, 75-228, 77+818; Hanson v. Nygaard, 105-30, 37, 117+235. See Mumford v. Hall, 25-347; Davis v. Hudson, 29-27, 38, 11+136; Culver v. Hardenbergh, 37-225, 33+792; Minn. L. & T. Co. v. Beebe, 40-7, 11, 41+232.
[57] Pick v. Strong, 26-303, 3+697. See Morin v. St. P. etc. Ry., 33-176, 180, 22+251.
[58] R. L. 1905 § 3692.
[59] Babcock v. Collins, 60-73, 61+1020; Hardin v. Jamison, 60-112, 61+1018.
[60] Mumford v. Hall, 25-347.
[61] Fleming v. McCutcheon, 85-152, 155, 88+433. See § 3570.
[62] Babcock v. Collins, 60-73, 61+1020.
[63] Wiswell v. Wiswell, 35-371, 29+166.
[64] See § 2722.
[65] R. L. 1905 § 3705.

affirmatively that it is necessary for purposes of administration. It is not suf cient to defeat his right, to show that there is no absolute necessity for his ta ing possession, or to show that the personalty will probably be sufficient f the payment of the debts of the decedent and the expenses of administratio To defeat his recovery it must be shown that in fact the personalty is sufficie for such purposes.[66] The right of the representative to possession is sole a exclusive of the rights of the heirs. It is not dependent on the insufficien of the personalty to pay the debts of the decedent. The representative may s for the possession without an order of court.[67] He has no title or interest in t realty, except a possessory right during administration and for the purpo thereof.[68] The heirs or devisees have the right to the possession as agai every one but the representative or his tenants,[69] and until he asserts his rig the heirs or devisees are unaffected by the statute.[70] They may maintain eje ment against third persons if the representative has not taken possessio To question the right of a representative to the possession of realty ejectm will lie.[72]

3568. Right to personalty—Upon the appointment of an executor or ministrator he becomes invested with the title to the personalty of the decede for the purposes of administration.[73] He has the right of possession,[74] may sell the property without any order or license of court.[75] His title, w absolute for certain purposes and greater than his title to the realty, is sti qualified title.[76] It is not personal, but official, and is not affected by his prior to appointment. It relates back to the death of the decedent.[77] title, possession, and control of the property should remain in the represe tive until it is sold, or distributed by order of the probate court.[78]

3569. Contracts—Promissory notes—It is the general rule that a re sentative cannot make a new contract that will bind the estate. Such a tract binds him personally, and it is immaterial how he describes himself that he assumes to make it in his representative capacity. The rule is ot wise if the contract merely binds him to do what it is his duty to do, or w he is authorized to do.[79] It is held that if he borrows money for the purp of the estate, and devotes it to the payment of debts due, or if he contr for services which are actually rendered, valuable and important to the es or if he executes a deed in his representative capacity, containing cove which fail, he is individually liable, and judgment must be against him sonally. The estate is not bound.[80] A representative cannot bind the e

[66] Kern v. Cooper, 91-121, 97+648; Id., 97-509, 106+962; Wellner v. Eckstein, 105-444, 470, 117+830.

[67] Miller v. Hoberg, 22-249; Jordan v. Secombe, 33-220, 224, 22+383.

[68] Noon v. Finnegan, 29-418, 420, 13+197.

[69] Miller v. Hoberg, 22 249.

[70] Paine v. First Div. etc. Ry., 14-65 (49); Noon v. Finnegan, 29-418, 420, 13+197.

[71] Noon v. Finnegan, 29-418, 13+197.

[72] Pabst v. Small, 83-445, 86+450.

[73] State v. Probate Ct., 25 22, 25; Greenwood v. Murray, 26-259, 261, 2+945; Wiswell v. Wiswell, 35-371, 29+166; Mitchell v. Mitchell, 54-301, 55+1134; In re Scheffer, 58-29, 59+956; Reiser v. Gigrich, 59-368, 377, 61+30; Vail v. Anderson, 61-552, 554, 64+47; Randall v. Macbeth, 81-376, 84+119; Granger v. Harriman, 89-303, 94+869; Wellner v. Eckstein, 105-444, 470, 117+830. Representatives have a only to such funds as belong to the e of the decedent, and which, when rec are assets for the purposes of admin tion and distribution under the statu the will. Walter v. Hensel, 42-204, 4

[74] Mitchell v. Mitchell, 54-301, 55+1 Reiser v. Gigrich, 59-368, 377, 61+30; v. Anderson, 61-552, 554, 64+47; Gr v. Harriman, 89-303, 94+869.

[75] Cone v. Hooper, 18-531(476, State v. Probate Ct., 25-22.

[76] Vail v. Anderson, 61-552, 554, 6 Granger v. Harriman, 89-303, 94+8

[77] Wiswell v. Wiswell, 35-371, 29+1

[78] Reiser v. Gigrich, 59-368, 377,

[79] Ness v. Wood, 42-427, 44+313; v. Farnham, 55-27, 56+352; Ger Bank v. Michaud, 62-459, 65+70. Hayes v. Crane, 48-39, 45, 50+925.

[80] Ness v. Wood, 42-427, 44+313.

or make it liable in any way on any promissory note he may make. The only effect of his making a note is to render himself personally liable thereon.[81]

3570. Purchase of trust property—Neither the administrator of the estate or his attorney may, for their personal use and profit by a sale thereof, purchase an outstanding life estate in realty of which the administrator is trustee. In such case the administrator is chargeable with and must account to the estate for the amount so realized.[82]

3571. Investment of funds—An investment of funds in bank certificates of deposit has been approved, but an investment in certain certificates of deposit issued by an executor as a trust company to itself as an executor, has been disapproved.[83]

3572. Lease of realty—A representative is authorized to lease the realty of the decedent for the term of the administration, but it may be necessary for him to obtain a license from the probate court to do so.[84]

3573. Sale of personalty—A representative may sell the personalty of the decedent without any order of court.[85]

3574. Conversion of realty into personalty—A representative has no general power to convert realty into personalty.[86]

3575. Funeral expenses—The rule that an executor, if he has sufficient assets, is liable to an undertaker who, at the request of those in charge of the body of a decedent, renders services in and about the interment, is the same in the case of an administrator. An administrator who, having assets in his hands, refuses or neglects to pay the funeral expenses of his intestate, being requested to do so, is individually liable at the suit of the undertaker.[87]

3576. Loss of funds—The test of the liability of a representative for the loss of funds of the estate is whether he exercised the degree of care which men of ordinary prudence usually exercise in their own affairs.[88]

3577. Fraud—The financial condition of an estate may be the subject of false representations by a representative.[89]

3578. Waiver of personal rights—By treating property as part of the estate a representative may waive his personal rights therein.[90]

3579. Trespass—A representative may be liable for trespass in forcibly taking possession of the personalty of the decedent.[91]

3580. Bonds—Liability—Actions—The statutes require representatives to give a bond to the probate judge conditioned for the faithful discharge of all the duties of their trust according to law.[92] Special bonds are provided for where the representative is the sole or residuary legatee,[93] and upon a sale or mortgage of realty.[94] An action will not lie on a bond without leave of the probate court.[95] But leave of court is no part of the cause of action and need not be alleged in a complaint.[96] An administrator de bonis non is an "interested"

[81] Germania Bank v. Michaud, 62–459, 65+70 (sufficiency of consideration).

[82] Turner v. Fryberger, 94–433, 103+217.

[83] St. Paul T. Co. v. Kittson, 62–408, 65+74.

[84] R. L. 1905 §§ 3705, 3752, 3753; Smith v. Park, 31–70, 16+490.

[85] Cone v. Hooper, 18–531(476, 484); State v. Probate Ct., 25–22. See Cullman v. Bottcher, 58–381, 384, 59+971.

[86] Townshend v. Goodfellow, 40–312, 318, 41+1056.

[87] Dampier v. St. Paul T. Co., 46–526, 49+286.

[88] Harding v. Canfield, 73–244, 75+1112. See Wood v. Myrick, 17–408(386); State v. Germania Bank, 106–164, 118+683.

[89] Winston v. Young, 47–80, 49+521; Id., 52–1, 53+1015.

[90] Lewis v. Welch, 47–193, 48+608, 49+665.

[91] Mitchell v. Mitchell, 54–301, 55+1134.

[92] R. L. 1905 §§ 3809, 3814. See, as to sufficiency of condition, Lanier v. Irvine, 21–447; Mumford v. Hall, 25–347.

[93] R. L. 1905 § 3810. See Olson v. Fish, 75–228, 77+818.

[94] R. L. 1905 § 3812. See § 3622.

[95] Eaton v. Gale, 96–161, 104+833. See Palmer v. Pollock, 26–433, 4+1113.

[96] Hantzch v. Massolt, 61–361, 369, 63+

person within the statute, and may sue on his predecessor's bond.[97] Legate cannot sue on a bond for a failure of the representative to pay legacies until t probate court orders payment.[98] A claimant whose claim has been allowed the probate court may sue on the bond for a failure of the representative pay it, though there has been no order of court to pay it.[99] The statute of li itations runs against an action on a bond from the time of the final decree distribution.[1] The district court has jurisdiction of actions on bonds.[2] action on a bond will lie for a failure or refusal to obey an order of the prob court;[3] for refusal to pay a claim ordered paid by the district court on app from the probate court;[4] or for a failure to account to the probate court wit the time limited and to pay over funds to a successor.[5] In an action on a b an administrator has been held entitled to an accounting.[6] An action agai one of several obligors on a bond has been sustained.[7] An order granting ters testamentary has been held to include an adjudication of the sufficienc a bond.[8] Where the signatures of sureties to a bond were obtained by frau was held that they were estopped from asserting the defence as against credi or other beneficiaries of the estate.[9] A surety on a bond has been held estop from asserting an undisclosed condition as to its delivery,[10] and a mistak to the nature of the bond.[11] The creditors to whom a right of action on bond was given by a former statute, were those who had been determine be such by an allowance of their claims against the estate, by commissioner by the judge of probate, in the manner prescribed by statute.[12]

3581. Devastavit—Where, at the commencement of an action against a resentative, he had sufficient funds to satisfy any judgment that might b covered against him therein, and during the pendency of the action he sec a final settlement and decree of distribution, it was held that the decree wa defence to an action on the judgment against the representative in the n of devastavit.[13]

3582. Executor de son tort—An executor de son tort (of his own wr is one who, not being an executor or administrator, wrongfully interme with the personalty of a decedent. At common law such an intermedd subject to all the liabilities of an executor, and estopped by his own acts denying that he is an executor in fact. The common-law rules upon this ject are abrogated by the statute which defines the liability of such an meddler.[14]

3583. Administrator de bonis non—The statute provides for the app ment of an administrator or executor de bonis non, when a sole or surv executor or administrator dies, resigns, or is removed before having full ministered an estate.[15] There can properly be no such appointment while

1069; Ganser v. Ganser, 83-199, 201, 86+ 18.

[97] Balch v. Hooper, 32-158, 20+124; McAlpine v. Kratka, 98-151, 107+961. See Palmer v. Pollock, 26-433, 4+1113.

[98] Huntsman v. Hooper, 32-163, 20+127.

[99] Johanson v. Hoff, 70-140, 72+965. Under a former statute an order of court for payment was a prerequisite. Wood v. Myrick, 16 494(447); Waterman v. Millard, 22-261; Forepaugh v. Hoffman, 23-295.

[1] Ganser v. Ganser, 83-199, 86+18 (overruling Wood v. Myrick, 16-494, 447; Lanier v. Irvine, 24-116).

[2] McAlpine v. Kratka, 98-151, 107+961.

[3] O'Gorman v. Lindeke, 26-93, 1+841.

[4] Berkey v. Judd, 31-271, 17+618.

[5] McAlpine v. Kratka, 98-151, 107-

[6] Ames v. Slater, 27-70, 6+418.

[7] O'Gorman v. Lindeke, 26-93, 1+8

[8] Mumford v. Hall, 25-347.

[9] Engstad v. Syverson, 72-188, 75-

[10] Berkey v. Judd, 34-393, 26+5.

[11] Olson v. Fish, 75-228, 77+818.

[12] First Nat. Bank v. How, 28-150,

[13] Whitney v. Pinney, 51-146, 53+

[14] R. L. 1905 § 4505; Noon v. Fi 29-418, 13+197. See Note, 98 A Rep. 190.

[15] R. L. 1905 § 3701; Wilkinson v. of Winne, 15-159(123). See Note, 1 St. Rep. 413.

is already a representative,[16] but if one is made it is not void or subject to collateral attack.[17] Such a representative has the same powers and liabilities as the original. He may sue on the bond of his predecessor,[18] or recover money collected thereon.[19]

3584. Special administrators—The statute provides for the appointment of a special administrator under certain conditions,[20] and prescribes his powers and duties.[21] He is a representative of the decedent, appointed by the probate court to care for and preserve the estate until an executor or general administrator is appointed.[22] His powers are strictly limited to those prescribed.[23] He is entitled to the possession of the personalty of the decedent.[24] He may maintain an action under the statute for death by wrongful act.[25]

3585. De facto administrators—Whether there may be a de facto administrator is an open question, though it has been strongly intimated that there may be.[26]

ASSETS

3586. What are assets—A debt owing by an executor to the decedent is generally regarded as an asset.[27] Money payable on contract to the heirs of the decedent is not an asset.[28] Land patented to the heirs of the decedent under the federal statute is not an asset.[29] Damages recovered in a statutory action for death by wrongful act are not an asset.[30] Land occupied by the intestate under a contract for purchase, but in the adverse possession of the administrator for over twenty years, has been held not an asset.[31] The interest of a decedent as a mortgagee is an asset.[32] It has been held that the fact that a note was in the possession of the decedent at the time of his death made it prima facie a part of his estate.[33]

3587. Property fraudulently conveyed—When the estate is insufficient to pay the claims of administration, the representative is authorized by statute to maintain an action to set aside fraudulent conveyances of the decedent.[34] The statute is not exclusive. A creditor may proceed independently.[35] It does not authorize an action by a special administrator.[36] Replevin will lie.[37]

3588. Action for recovery—A representative may sue for the recovery of assets of the estate until his discharge. The fact that his final account has

[16] Culver v. Hardenbergh, 37–225, 33+792; Hamilton v. McIndoo, 81–324, 326, 84+118.

[17] Culver v. Hardenbergh, 37–225, 33+792.

[18] Balch v. Hooper, 32–158, 20+124.

[19] Palmer v. Pollock, 26–433, 4+1113.

[20] R. L. 1905 § 3702; Dutcher v. Culver, 23–415; Foster v. Gordon, 96–142, 144, 104+765; Hanson v. Nygaard, 105–30, 34, 117+235.

[21] R. L. 1905 §§ 3703, 3704.

[22] Jones v. Minn. Tr. Ry., 108 129, 121+606.

[23] Richmond v. Campbell, 71–453, 73+1099 (no power to avoid fraudulent conveyances of decedent); Larson v. Johnson, 72–441, 75+699 (id.); McAlpine v. Kratka, 92–411, 100+233 (contract with third party to protect realty from trespassers, sale of realty, and redemption of land from taxes, held unauthorized); Sheeran v. Sheeran, 96–484, 105+677 (entitled to appeal from an order admitting a will to probate).

[24] Mitchell v. Mitchell, 54–301, 55+1134.

[25] Jones v. Minn. Tr. Ry., 108–129, 121+606.

[26] Culver v. Hardenbergh, 37–225, 33+792.

[27] Peterson v. Vanderburgh, 77–218, 79+828.

[28] Bomash v. Supreme Sitting, 42–241, 44+12.

[29] Dawson v. Mayall, 45–408, 48+12.

[30] See § 2608.

[31] Davis v. Townsend, 45–523, 48+405.

[32] R. L. 1905 § 3717. See § 6323.

[33] Christians v. Christians, 108–157, 121+633.

[34] R. L. 1905 § 3720; Little v. Simonds, 46–380, 382, 49+186; Donohue v. Campbell, 81–107, 83+469.

[35] McCord v. Knowlton, 79–299, 304, 82+589.

[36] Richmond v. Campbell, 71–453, 73+1099.

[37] Bennett v. Schuster, 24–383.

been allowed and an order of distribution made does not affect his authority.[38] He may sue on any cause of action which the decedent had, if it survives.[39] H may foreclose mortgages of the decedent.[40]

3589. Neglect to collect—If an executor delays to take steps for the co lection of a debt until after the same is outlawed, and the delay is not in cor sequence of any mistake of law, or of advice given by his attorney, he is liab to the estate for the loss occasioned by his negligence.[41]

3590. Disposal of assets by heir—Recovery by representative—A repr sentative has been held not entitled to recover certain assets disposed of by sole heir, it appearing that there were no claims against the estate.[42]

3591. Payment of debt to heir—The bona fide payment of a debt due to a intestate, made to his sole heir before administration is granted, will, if justi requires it and the estate is solvent, be held to discharge the debtor from liabi ity to a subsequently appointed administrator. An action by an administrat on such a claim may be stayed, pending administration, to determine wheth the estate is solvent.[43]

CLAIMS

3592. Necessity of presenting claims to probate court—It is provided statute that all claims ex contractu, except contingent claims not becoming a solute before final settlement, must be presented to the probate court for allo ance within the time limited by order of the court, or be forever barred.[44] T statute is inapplicable to claims upon which an action is pending against t decedent at the time of his death;[45] to claims ex delicto;[46] to claims arisi out of administration, including funeral expenses;[47] or where a guardian h been appointed for a mentally incompetent person.[48] It applies only to oblig tions incurred by the decedent. It does not apply to obligations incurred his representative.[49] Formerly it applied to taxes.[50] If a claim which is quired to be presented to the probate court is not so presented, it is fore barred.[51] No action can be maintained thereon against representatives[52] heirs.[53] A representative cannot waive compliance with the statute, pay a cla himself, and then, after it has been barred, present it as a debit item in account, and have it allowed by the court.[54] The jurisdiction of the prob court under the statute is exclusive.[55]

3593. Contingent claims—A contingent claim is one where the liability pends on some future event, which may or may not happen, and it is theref uncertain whether there will ever be a liability or not.[56] A contingent cla

[38] Lowry v. Tilleny, 31-500, 18+452.
[39] Connolly v. Connolly, 26-350, 4+233.
[40] R. L. 1905 § 3717. See § 6323.
[41] State v. Germania Bank, 106-164, 171, 118+683.
[42] Cooper v. Hayward, 71-374, 74+152.
[43] Vail v. Anderson, 61-552, 64+47.
[44] R. L. 1905 § 3730.
[45] See § 3603.
[46] Comstock v. Matthews, 55-111, 56+583. See First Nat. Bank v. Strait, 65-162, 167, 67+987; Gilman v. Maxwell, 79-377, 82+669; Clark v. Gates, 84-381, 383, 87+941.
[47] Dampier v. St. Paul T. Co., 46-526, 49+286.
[48] Pflaum v. Babb, 86-395, 90+1051.
[49] Winston v. Young, 52-1, 53+1015; Smith v. Pence, 62-321, 64+822.
[50] McAlpine v. Kratka, 92-411, 414, 100-233.
[51] R. L. 1905 § 3730; Backus v. Ar 79-145, 147, 81+766; Clark v. Gates, 381, 383, 87+941; Innis v. Flint, 106-3 119+48. See, under former statute, F v. Leuthold, 39-212, 39+399.
[52] R. L. 1905 § 3733. See cases ur § 3594. There was a similar statute force when claims were required to be sented to commissioners. Wilkinson Estate of Winne, 15-159(123); Comr cial Bank v. Slater, 21-172; Id., 21-1 Bunnell v. Post, 25-376, 380; Cumm v. Halsted, 26-151, 1+1052.
[53] Hill v. Nichols, 47-382, 50+367; bert v. Quesnel, 65-107, 67+803. § 2734.
[54] Gilman v. Maxwell, 79-377, 82+669
[55] Johanson v. Hoff, 63-296, 65+464.
[56] Hantzch v. Massolt, 61-361, 364, 1069; Fitzhugh v. Harrison, 75-481,

which does not become absolute and capable of liquidation during administration need not be presented to the probate court and is not allowable therein.[57] If such a claim becomes absolute after the time limited for the presentation of claims to the probate court, but before final settlement, application must be made for leave to file it or it will be barred.[58] A contingent claim, which becomes absolute before the expiration of the time limited for the presentation of claims must be presented or it will be barred.[59]

3594. Held provable in probate court—A claim against a stockholder for unpaid stock;[60] a claim for reimbursement in connection with a land contract;[61] a claim for breach of a contract to convey realty;[62] a claim for an assessment levied on a stockholder;[63] a claim for a breach of warranty on a sale of personalty;[64] a claim for a deficiency on the foreclosure of a mortgage;[65] a claim in judgment;[66] a claim for personal property taxes;[67] a claim for services in caring for the decedent;[68] a claim for services in foreclosing a mortgage;[69] a claim on a note of the decedent;[70] a claim for the recovery of money received from the sale of land by one who supposed himself the owner.[71]

3595. Held not provable in probate court—A claim ex delicto;[72] a claim for funeral expenses;[73] a claim against a person under guardianship;[74] a claim against sureties on a guardian's bond;[75] a claim for taxes and insurance payable by a lessee;[76] a claim for an assessment on stock;[77] a claim against a surety on an assignee's bond;[78] a claim against a stockholder on his constitutional liability;[79] a claim against a stockholder on bonus stock;[80] a claim against a surety on an administrator's bond;[81] a claim for money paid to relieve an estate of an incumbrance, at the request of an executor;[82] a claim relating to an equitable mortgage and lien.[83]

3596. Mode of presenting—The statute requires claims to be itemized, and to be verified by an affidavit of the claimant, or his agent or attorney, showing the balance due, that no payments have been made thereon that are not credited, and that there are no offsets thereto known to the affiant.[84]

78+95; Jorgenson v. Larson, 85–134, 136, 88+439. See In re Harrison, 58–445, 60+24.

[57] Hantzch v. Massolt, 61–361, 63+1069; Oswald v. Pillsbury, 61–520, 63+1072; State v. Probate Ct., 66–246, 68+1063; Berryhill v. Peabody, 72–232, 75+220. See, under former statute, McKeen v. Waldron, 25–466; Palmer v. Pollock, 26–433, 4+1113; Hospes v. N. W. etc. Co., 48–174, 200, 50+1117.

[58] Jorgenson v. Larson, 85–134, 88+439; Hunt v. Burns, 90–172, 95+1110; Schurmeier v. Conn. etc. Co., 137 Fed. 42.

[59] Fitzhugh v. Harrison, 75–481, 489, 78+95.

[60] Nolan v. Hazen, 44–478, 47+155; State v. Probate Ct., 66–246, 68+1063.

[61] Fitzhugh v. Harrison, 75–481, 78+95.

[62] Jorgenson v. Larson, 85–134, 88+439. See Berryhill v. Gasquoine, 88–281, 92+1121.

[63] Hunt v. Burns, 90–172, 95+1110; Neff v. Lamm, 99–115, 108+849.

[64] Clark v. Gates, 84–381, 87+941.

[65] Hill v. Townley, 45–167, 47+653.

[66] Fowler v. Mickley, 39–28, 38+634; Byrnes v. Sexton, 62–135, 64+155. See Martin Co. Nat. Bank v. Bird, 92–110, 99+780.

[67] In re Jefferson, 35–215, 28+256.

[68] Fitzgerald v. English, 73–266, 76+27.

[69] Merrick v. Putnam, 73–240, 75+1047.

[70] Albert Lea College v. Brown, 88–524, 93+672.

[71] Berryhill v. Gasquoine, 88–281, 92+1121.

[72] Comstock v. Matthews, 55–111, 56+583. See Gilman v. Maxwell, 79–377, 82+669.

[73] Dampier v. St. Paul T. Co., 46–526, 49+286.

[74] Pflaum v. Babb, 86–395, 90+1051.

[75] Hantzch v. Massolt, 61–361, 63+1069.

[76] Oswald v. Pillsbury, 61–520, 63+1072.

[77] Lake Phalen L. & I. Co. v. Lindeke, 66–209, 68+974; Dent v. Matteson, 70–519, 73+416.

[78] Berryhill v. Peabody, 72–232, 75+220; Id., 77–59, 79+651.

[79] In re Martin, 56–420, 57+1065; Willoughby v. St. Paul etc. Co., 80–432, 436, 83+377.

[80] Hospes v. N. W. etc. Co., 48–174, 200, 50+1117.

[81] McKeen v. Waldron, 25–466.

[82] Winston v. Young, 52–1, 53+1015.

[83] State v. Probate Ct., 103–325, 115+173.

[84] R. L. 1905 § 3730; Gibson v. Brennan, 46–92, 48+460.

3597. Order limiting time to present claims—The statute provides for a order of court limiting the time for creditors to present claims against th estate.[85] The order must be made at the time of granting letters of administra tion.[86] If there are no debts the time may be limited to three months.[87]

3598. Extension of time to present claims—It is provided by statute tha "for cause shown, and upon notice to the executor or administrator, the cour in its discretion, may receive, hear, and allow a claim when presented befor the final settlement of the administrator's or executor's account, and withi one year and six months after the time when notice of the order was given."[88] While the granting of relief under the statute is discretionary with the probat court, it ought to be granted very freely where no injury can result to innocer parties and the administration will not be materially delayed, if the applicar makes any reasonable excuse for his delay.[89] The application must be mad within one year and six months after the time when notice of the order wa given.[90] The applicant must show cause for relief and present his claim in th form prescribed by R. L. 1905 § 3730.[91] The court may set aside a final decre to allow a creditor to file a claim after the time limited.[92]

3599. Proof—Admissions of representative—A claim cannot be prove in the probate court by the admissions of the representative.[93]

3600. Who may contest—Any one interested in the estate may contest th allowance of claims.[94] But one not so interested cannot.[95] To vacate an allow ance of a claim against an estate, filed by an administrator on the applicatio of one who knew of the time for hearing, but failed to appear and oppose th claim, his only excuse for not appearing being that he felt confident that th administrator would administer the estate justly and honestly, and not perm unjust claims to be allowed, is abuse of discretion.[96]

3601. Hearing on claims—Practice—Proceedings in proof of claims nee not be formally entitled. Any description which will identify them is suf cient.[97] No provision is made for pleadings. The practice is informal.[98] Th proceeding is not an adversary suit between litigant parties, the creditor c one side, and the executor or administrator on the other, but is in the nature a proceeding against the estate, which estate is, in theory, in the probate cour for the purpose of being administered by distribution among creditors, hei devisees, legatees and next of kin. Though the proceedings on the part of t estate are conducted in the name of the executor or administrator, he is on a nominal party; the actual parties are those interested in the estate.[99]

3602. Prior allowance in foreign state—Collateral security—The me fact that a claim has been allowed in another state, or that the claimant h collateral security, is no reason why it should not be allowed in this state.[1]

3603. Claims in litigation at death of decedent—It is provided by statu that "all actions pending against a decedent at the time of his death may, if t cause of action survives, be prosecuted to final judgment, and the executor

[85] R. L. 1905 § 3727.
[86] Johanson v. Hoff, 70-140, 142, 72+965.
[87] Hunt v. Burns, 90-172, 175, 95+1110.
[88] R. L. 1905 § 3729.
[89] Mass. etc. Co. v. Estate of Elliot, 24-134; In re Mills, 34-296, 25+631; State v. Probate Ct., 42-54, 43+692; Gibson v. Brennan, 46-92, 48+460; St. Croix B. Corp. v. Brown, 47-281, 50+197; State v. Probate Ct., 67-51, 69+609, 908; State v. Probate Ct., 79-257, 82+580; Hunt v. Burns, 90-172, 176, 95+1110.
[90] Hantzch v. Massolt, 61-361, 366, 63+1069; Berryhill v. Peabody, 77-59, 61, 651.
[91] Gibson v. Brennan, 46-92, 48+460.
[92] State v. Bazille, 89-440, 95+211.
[93] Johanson v. Hoff, 63-296, 65+464.
[94] State v. Probate Ct., 25-22, 26.
[95] Semper v. Coates, 93-80, 100+663.
[96] In re Kidder, 53-529, 55+738.
[97] In re Jefferson, 35-215, 28+256.
[98] Stuart v. Stuart, 70-46, 49, 72+819.
[99] State v. Probate Ct., 25-22, 26.
[1] State v. Probate Ct., 67-51, 54, 69+908.

administrator may be admitted to defend the same. If judgment be rendered against the executor or administrator the court rendering it shall certify the same to the probate court, and it shall be paid in the same manner as other claims against the estate." [2] The statute is applicable to foreign representatives,[3] and to actions in the federal courts.[4] It is inapplicable to actions in another state.[5]

3604. Joint debts—Where the decedent was indebted on a joint contract, or upon a judgment founded on a joint contract, his estate is liable as though the contract had been joint and several, or the judgment had been against him alone.[6]

3605. Funeral expenses—Funeral expenses incurred by a widow are a legitimate charge on the estate. If she pays for them and is reimbursed by the representative, the latter is entitled to reimbursement out of the estate.[7]

3606. Compromise—It being supposed that the estate of an intestate was insolvent, a creditor, whose claim was reduced to judgment, accepted an amount less than his claim in full satisfaction thereof. It was held that there was sufficient consideration for such accord and satisfaction, even though it turned out that the estate was not insolvent.[8]

3607. Order allowing or disallowing claims—Interest—The statute provides for an order of the probate court allowing or disallowing claims.[9] An order allowing a claim has the effect of a judgment against the estate, and is conclusive on all persons interested therein.[10] It stops the running of the statute of limitations on the original claim.[11] It does not give the claimant a lien on the realty of the decedent.[12] There is only one order contemplated by the statute, and though a part of a claim is disallowed the order is nevertheless an order allowing a claim. An order must state the amount allowed or disallowed.[13] A claim bears interest from the date of the order allowing it.[14] The court may vacate an order allowing a claim for the purpose of permitting a contest thereon.[15]

3608. Payment—Duty of representative—It is ordinarily the duty of a representative to pay a claim as soon as it is allowed by the court, if he has the necessary funds. No order of court is necessary. All claims must be paid before final settlement.[16] Where a claim is allowed and adjudged to be paid by the district court on appeal from the probate court, it is the duty of the representative to pay it, if he has sufficient funds, as if originally allowed by the probate court.[17] At common law, except when suit was brought against him, the administrator or executor himself, and not the court, allowed or adjusted the debts of the decedent with the creditors. He paid these debts without any

[2] R. L. 1905 § 3736; Berkey v. Judd, 27-475, 477, 8+383; Fern v. Leuthold, 39-212, 216, 39+399.

[3] Brown v. Brown, 35-191, 28+238.

[4] In re Kittson, 45-197, 48+419.

[5] Commercial Bank v. Slater, 21-172.

[6] R. L. 1905 § 3738; Hawkins v. Mahoney, 71-155, 164, 73+720; Berryhill v. Peabody, 72-232, 75+220.

[7] McNally v. Weld, 30-209, 14+895.

[8] Rice v. London etc. Co., 70-77, 72+826.

[9] R. L. 1905 § 3734.

[10] Barber v. Bowen, 47-118, 49+684; Lewis v. Welch, 47-193, 48+608; Johanson v. Hoff, 70-140, 72+965; McCord v. Knowlton, 79-299, 82+589. See, for like effect of allowance by commissioners under former statute, State v. Probate Ct., 25-22; Gage v. Stimson, 26-64, 1+806; State v. Probate Ct., 40-296, 300, 41+1033.

[11] McCord v. Knowlton, 79-299, 82+589.

[12] Whitney v. Burd, 29-203, 12+530; Nelson v. Rogers, 65-246, 68+18.

[13] First U. Soc. v. Houliston, 96-342, 105+66.

[14] R. L. 1905 § 3734; Johanson v. Hoff, 70-140, 143, 72+965.

[15] See In re Gragg, 32-142, 19+651; In re Kidder, 53-529, 55+738.

[16] Johanson v. Hoff, 70-140, 72+965. Formerly an order of court was necessary. Wood v. Myrick, 16-494(447); Waterman v. Millard, 22-261; Huntsman v. Hooper, 32-163, 20+127. See Lanier v. Irvine, 24-116.

[17] Berkey v. Judd, 31-271, 17+618.

order of the court out of the assets of the estate, or paid them out of his ow funds, and reimbursed himself out of the assets. He had the right, amo creditors of equal degree, to pay one in preference to another. He might th prefer and pay a creditor by giving his own obligation for the debt.[18]

3609. Payment of secured claims—Order of court—Provision is made statute for the payment of secured claims and the interest thereon, upon order of the probate court.[19] The statute has no application to equitable disputed liens. The proper meaning of the statute is that where there is dispute, and nothing to litigate, the probate court may, as an incident to distribution of the estate, direct the executor or administrator to pay o mortgage, pledge, or security in favor of a claimant.[20]

3610. Order of payment when estate insolvent—The statute prescri the order of paying claims in case the estate is insolvent.[21] Funeral expen expenses of last sickness,[22] and taxes,[23] are preferred. After preferred cla are paid all other claims are to be paid pro rata.[24] Secured claims are not able until the creditor has first exhausted his security; or released or sur dered it.[25]

3611. Five-year limitation—The statute provides that no claim again decedent shall be a charge upon his estate unless presented to the probate c for allowance within five years after his death.[26] This limitation applies th there is no administration.[27] It is of course inapplicable to claims not a able by the probate court.[28] An order allowing a claim not presented w five years is erroneous, but not subject to collateral attack.[29] Formerly was no statutory limitation, and the equitable doctrine of laches was appl

3612. Action in federal courts—After an estate is closed an action wil lie in the federal courts on a claim which ought to have been presented t probate court under the statute.[31] A judgment obtained in a federal cou a claim that had previously been disallowed by commissioners appointed probate court of this state, has been held valid and binding on the repre tive, though it was deemed erroneous by our supreme court.[32]

3613. Allowance by commissioners—Obsolete statutes—Cases are below involving the construction of obsolete statutes providing for the ance of claims by commissioners.[33]

[18] Germania Bank v. Michaud, 62-459, 466, 65+70.

[19] R. L. 1905 § 3749.

[20] State v. Probate Ct., 103-325, 330, 115+173.

[21] R. L. 1905 § 3745.

[22] McNally v. Weld, 30-209, 213, 14+895; Dampier v. St. Paul T. Co., 46-526, 49+286.

[23] In re Jefferson, 35-215, 28+256.

[24] Oswald v. Pillsbury, 61-520, 63+1072; Byrnes v. Sexton, 62-135, 140, 64+155.

[25] Rice v. London etc. Co., 70-77, 78, 72+826.

[26] R. L. 1905 § 3733.

[27] Granger v. Harriman, 89-303, 306, 94+869.

[28] Berryhill v. Peabody, 72-232, 234, 75+220.

[29] O'Brien v. Larson, 71-371, 74+148.

[30] O'Mulcahey v. Gragg, 45-112, 47+543.

[31] Security T. Co. v. Black River Nat. Bank, 187 U. S. 211.

[32] Ames v. Slater, 27-70, 6+418.

[33] Wilkinson v. Estate of Winne. (123) (time of appointing commis —failure to appoint—absence of c sioner from state—cumulative rem Bryant v. Livermore, 20-313(271) of disallowance of claim by com ers on right of action); Capehart gan, 20-442(395) (appeal); Con Bank v. Slater, 21-172 (claim be not presented to commissioners); C cial Bank v. Slater, 21-174 (id.); v. Irvine, 24-116 (decree directi ment of claims allowed by commiss presumption as to notice by com ers); Mass. etc. Co. v. Estate o 24-134 (application for further present claims to commissioners— of commission to commissioners); Probate Ct., 25-22 (effect of a commissioners—nature of proc Bunnell v. Post, 25-376 (pay claims by representative without by commissioners); Gage v. Stin 64, 1+806 (effect of allowance

SALES OF REALTY

3614. Jurisdiction of probate court exclusive—The probate court has exclusive original jurisdiction to grant license to sell the realty and to determine the necessity or expediency thereof.[34] But a sale may be made under a power in a will without any license from the probate court.[35]

3615. Grounds for selling—The realty of a decedent may be sold when his personalty is insufficient to pay his debts, the legacies, if any, and the expenses of administration, or if the court deems a sale to be for the best interests of the estate and of all the persons interested therein.[36] Ordinarily there can be no sale of the realty if there is sufficient personalty to pay the debts of the decedent. The personalty is the primary fund for the payment of such debts; the realty a secondary fund.[37] The allowance to a widow pending administration may be paid out of the rents and profits of the realty.[38] When an estate in land cannot be equitably divided the entire estate, including the third of a surviving spouse, may be sold.[39]

3616. Within what time—Realty of a decedent can only be sold within a reasonable time after the allowance of claims, not exceeding ten years in any event.[40] A former statute prescribed a limitation of three years.[41] There can be no sale after a final decree discharging administration.[42]

3617. A proceeding in rem—The proceedings are in rem. There are no adversary parties.[43]

3618. Petition for license—The statute provides for a petition by a represenative to the probate court for a license to sell, mortgage, or lease realty.[44] If a representative is licensed to sell by a court with jurisdiction the absence of a petition is not fatal to the sale.[45] A petition must be made within a reasonable time after the allowance of claims.[46] A general petition covers the interest of a surviving spouse.[47] A petition must show the "condition" of the land; but it need not show that there are no incumbrances, or that it is not cultivated, improved, or built upon, or that it has no water power or other natural advantages.[48] The debts outstanding may be stated in gross.[49]

3619. Notice of hearing on petition—The statute provides for a published notice of hearing on a petition for a license.[50]

by commissioners); Palmer v. Pollock, 26–433, 4+1113 (contingent claims); Ames v. Slater, 27–70, 6+418 (claim disallowed by commissioners—subsequent action thereon in federal court); Berkey v. Judd, 27–475, 8+383 (death after verdict—unnecessary to present claims to commissioners).

[34] Paine v. First Div. etc. Ry., 14–65 (49).

[35] Lovejoy v. McDonald, 59–393, 401, 61+320.

[36] R. L. 1905 §§ 3743, 3751; Deppe v. Ford, 89–253, 94+679 (for best interest of estate).

[37] State v. Probate Ct., 25–22; Greenwood v. Murray, 26–259, 2+945.

[38] Blakeman v. Blakeman, 64–315, 67+69.

[39] Kelly v. Slack, 93–489, 101+797.

[40] State v. Probate Ct., 40–296, 41+1033. See O'Mulcahey v. Gragg, 45–112, 47+543; Davis v. Townsend, 45–523, 48+405; Hill v. Nichols, 47–382, 50+367; Berkey v. St. Paul Nat. Bank, 54–448, 56+53; Mowry v. McQueen, 80–385, 390, 83+348 (rule under Wisconsin statute).

[41] In re Ackerman, 33–54, 21+852; Gates v. Shugrue, 35–392, 29+57; Culver v. Hardenbergh, 37–225, 33+792; Boltz v. Schutz, 61–444, 64+48; Harrison v. Harrison, 67–520, 70+802.

[42] State v. Probate Ct., 40–296, 41+1033.

[43] Spencer v. Sheehan, 19–338(292).

[44] R. L. 1905 § 3753.

[45] R. L. 1905 § 3774; Montour v. Purdy, 11–384(278); Rumrill v. First Nat. Bank, 28–202, 9+731; Davis v. Hudson, 29–27, 11+136; Smith v. Barr, 83–354, 86+342.

[46] State v. Probate Ct., 40–296, 41+1033. See Berkey v. St. Paul Nat. Bank, 54–448, 454, 56+53; Mowry v. McQueen, 80–385, 390, 83+348.

[47] Scott v. Wells, 55–274, 56+828.

[48] Spencer v. Sheehan, 19–338(292).

[49] State v. Probate Ct., 19–117(85).

[50] R. L. 1905 § 3754. See Spencer v. Sheehan, 19–338(292) (notice need not be directed to interested parties by name or personally served); Dayton v. Mintzer, 22–393 (sufficiency of publication).

3620. License—A license to sell must describe the land with reasonable tainty.[51] A misdescription has been held fatal to a sale and not subjec amendment.[52] An informal order directing the sale of the interest of a cedent in a contract for the purchase of the land to be sold, has been sustaine The probate court has power to grant a second license after the expiratio the first.[54] No license is necessary to sell under a power in a will.[55]

3621. Notice of sale—The statute provides for a published notice of sa The notice must describe the land with reasonable certainty,[57] and state particular place in a city where the sale will be had.[58] An error in the r of an attorney of a non-resident guardian in a notice has been held immater Cases are cited below involving the sufficiency of publication under former ute.[60]

3622. Bond and oath of representative before sale or mortgage—statute requires a representative to give a bond and oath before selling or gaging realty of the decedent.[61] Cases are cited below relating to the ciency [62] and filing of bonds,[63] and to the liability thereon;[64] and to the ciency [65] and filing of oaths.[66]

3623. Adjournment of sale—The statute provides for an adjournme sales.[67] A statement in a report that a sale was "legally made" covers ad ments.[68]

3624. Representatives cannot purchase—The statute forbids sales t resentatives, directly or indirectly, and makes them void,[69] but they are nc as against a bona fide purchaser from one who purchased for the repre tive.[70] The law will not infer fraud from the mere fact that the purchas son of the representative.[71]

3625. Form of deed—Though a guardian's deed does not refer to th ceedings in the probate court, if it appears by the record of that court a deed that the sale and deed were made pursuant to the license, it is suf Such a deed in the name of the guardian, in his official capacity, as gra good.[72] Where a deed is made by "A. B., Executor," and signed by him same form, it sufficiently appears that it was made by him in his represe capacity.[73]

[51] R. L. 1905 § 3758; Middleton v. Wharton, 41–266, 43+4; Buntin v. Root, 66–454, 69+330.

[52] Hanson v. Ingwaldson, 77–533, 80+702.

[53] Smith v. Barr, 83–354, 86+342.

[54] Harrison v. Harrison, 67–520, 70+802.

[55] Townshend v. Goodfellow, 40–312, 317, 41+1056; Lovejoy v. McDonald, 59–393, 401, 61+320.

[56] R. L. 1905 § 3760.

[57] Rice v. Dickerman, 47–527, 50+698; Richardson v. Farwell, 49–210, 51+915; In re Winona Bridge Ry., 51–97, 52+1079.

[58] Hartley v. Croze, 38–325, 37+449.

[59] Richardson v. Farwell, 49–210, 51+915.

[60] Montour v. Purdy, 11–384(278); Dayton v. Mintzer, 22–393; Wilson v. Thompson, 26–299, 3+699; Greenwood v. Murray, 28–120, 123, 9+629; Hartley v. Croze, 38–325, 37+449; Richardson v. Farwell, 49–210, 51+915; Hugo v. Miller, 50–105, 52+381.

[61] R. L. 1905 §§ 3759, 3812. See Babcock v. Cobb, 11–317(247).

[62] In re Winona Bridge Ry., 51–97, 52+1079; Buntin v. Root, 66–454, 330.

[63] Jordan v. Secombe, 33–220, 2

[64] Tomlinson v. Simpson, 33–4 864.

[65] Montour v. Purdy, 11–384(278 v. Miller, 50–105, 52+381.

[66] West Duluth L. Co. v. Kurtz 47+1134.

[67] R. L. 1905 § 3765.

[68] Dayton v. Mintzer, 22–393, 3

[69] R. L. 1905 § 3764; White v. I 487, 5+359; Davis v. Hudson, 2 11+136; Brown v. Fischer, 77–1 (sale to husband of guardian). ber v. Bowen, 47–118, 49+684; Welch, 47–193, 48+608; Fleming cheon, 85–152, 88+433; Turner berger, 94–433, 103+217.

[70] White v. Iselin, 26–487, 5+ Brown v. Fischer, 77–1, 79+494.

[71] Cain v. McGeenty, 41–194, 4

[72] Menage v. Jones, 40–254, 41+

[73] Babcock v. Collins, 60–73, 61

3626. Partition after license—Where land held in common was partitioned after a license of the probate court to sell an undivided interest therein was issued, and before the sale in pursuance thereof, it was held that the license was not invalidated by the partition, but that jurisdiction attached to the land set off to the heirs, which the administrator might thereafter proceed to sell upon due notice.[74]

3627. Confirmation of sale by probate court—The statute provides for a confirmation of the sale by the probate court.[75] A confirmation does not extend to matters anterior to the sale. It is confined to the legality and fairness of the sale and the sufficiency of the price.[76] Regularly a confirmation should precede the execution of the deed, but a subsequent confirmation is effectual.[77] A confirmation of a sale not made pursuant to a prior license has been held not to make a marketable title.[78] It is unnecessary to include in an order of confirmation a description of the land sold.[79]

3628. Waiver of statutory requirements—An instrument executed by one interested in the estate, authorizing the administrator to sell "under the direction of the court," has been held not to dispense with the necessity for complying with the statutory requirements.[80]

3629. Disposition of surplus—Where land is sold in proceedings in the probate court for the payment of debts and expenses of administration, the surplus proceeds, if any, go to the heir who would have taken the land. The conversion of the land into money is complete only to the extent and for the purposes for which the sale was authorized. So far as these purposes do not extend, the land retains its former character in respect of the rights of the owner. Therefore any surplus must be applied to the payment of a judgment obtained against the heir, and duly docketed after the death of the ancestor and before the sale.[81]

3630. Five essentials of a valid sale—Immaterial irregularities disregarded—Statute—It is provided by statute [82] that in case of an action relating to any estate sold by a representative in which an heir or person claiming under the decedent, or a ward or person claiming under him, shall contest the validity of the same, it shall not be avoided on account of any irregularity in the proceedings if it appears: that the representative was licensed to make the sale by the probate court having jurisdiction;[83] that he gave a bond, which was approved by the probate court;[84] that he took the oath prescribed by the statute;[85] that he gave notice of the time and place of sale as in the statute prescribed, if such notice was required by the order of license;[86] that the premises were sold in the manner required by the order of license, and the sale confirmed by the court, and that they are held by one who purchased them in good faith.[87] The effect of this statute is to limit the general rule that the orders and de-

[74] Rice v. Dickerman, 47–527, 50+698.
[75] R. L. 1905 § 3773. See, as to recording order, Dawson v. Helmes, 30–107, 14+462.
[76] Dawson v. Helmes, 30–107, 14+462; Culver v. Hardenbergh, 37–225, 229, 33+792; Burrell v. Chi. etc. Ry., 43–363, 45+849. See Dayton v. Mintzer, 22–393; Hugo v. Miller, 50–105, 52+381.
[77] Dawson v. Helmes, 30–107, 14+462.
[78] Williams v. Schembri, 44–250, 46+403.
[79] Buntin v. Root, 66–454, 458, 69+330.
[80] Hartley v. Croze, 38–325, 37+449.
[81] Kolars v. Brown, 108–60, 121+229.
[82] R. L. 1905 § 3774.
[83] Montour v. Purdy, 11–384(278); Rumrill v. First Nat. Bank, 28–202, 9+731; Davis v. Hudson, 29–27, 39, 11+136; Curran v. Kuby, 37–330, 33+907; West Duluth L. Co. v. Kurtz, 45–380, 47+1134; Smith v. Barr, 83–354, 86+342; Deppe v. Ford, 89–253, 256, 94+679; Brown v. Pinkerton, 95–153, 103+897.
[84] Babcock v. Cobb, 11–347(247); In re Winona Bridge Ry., 51–97, 52+1079; Buntin v. Root, 66–454, 69+330.
[85] See § 3622.
[86] Id.
[87] White v. Iselin, 26–487, 493, 5+359.

crees of a probate court are not subject to collateral attack for error or irr larity or for want of jurisdiction not affirmatively appearing on the face of record. Where the records of a probate court fail to show any of the fiv sentials of a valid sale, the sale may be collaterally attacked within five yea If such records show affirmatively a compliance with the five statutory req ments, they cannot be impeached collaterally, by extrinsic evidence.[89] A made by a representative licensed to sell by a court with jurisdiction ca be impeached collaterally for errors or irregularities in the proceedings v culminated in the license.[90] A sale by one not an executor, administrat guardian, is a nullity.[91] A sale to a bona fide purchaser, under the licer a probate court having jurisdiction of the administration of such estat record being regular on its face, cannot be impeached collaterally, or set by showing, contrary to the petition for a license, that there were in fa debts against the estate.[92] The statute, and the records of probate cou lating to sales, are to be liberally construed. Sales are to be sustaine withstanding mere irregularities or technical omissions in the records as five essentials.[93]

3631. Limitation of actions attacking sales—The statute prescribes itation of five years to actions attacking sales.[94] It is constitutional,[95] a limited to actions of ejectment.[96] It is a statute of repose and retroa It is inapplicable to a party in possession defending his title derived ward against the affirmative attacks of one relying on a guardian's sal is applicable to void, as well as to irregular sales. To set the statute run is sufficient if there is a sale in fact by a representative licensed by the court.[99] It is inapplicable to a sale made without a license or by on guardian.[1] Formerly the statute included an exception in favor of n dents.[2]

3632. Sale of land subject to charges—Land of a decedent or ward to a mortgage or other charge may be sold by his representative, subject charge, but "the sale shall not be confirmed by the court until the p executes a bond to the representative, approved by the court, conditioned said estate and such representative harmless, or unless such charge shall satisfied and released by the owner or holder thereof. The representat sell the whole or any part of the interest of the decedent or ward in a of land charged with any incumbrance, and upon release of the tract so apply the proceeds of such sale or sales to the payment of the incumbra the same is fully paid, and he shall account only for the balance rema proceeds of the estate." [3]

[88] Davis v. Hudson, 29–27, 11+136; Brown v. Pinkerton, 95–153, 103+897; Cater v. Steeves, 95–225, 103+885.

[89] Kurtz v. St. P. & D. Ry., 61–18, 63+1.

[90] Rumrill v. First Nat. Bank, 28–202, 9+731; Curran v. Kuby, 37–330, 33+907; Kurtz v. St. P. & D. Ry., 61–18, 63+1; Deppe v. Ford, 89–253, 256, 94+679.

[91] Culver v. Hardenbergh, 37–225, 33+792.

[92] Curran v. Kuby, 37–330, 33+907.

[93] Buntin v. Root, 66–454, 69+330; Smith v. Barr, 83–354, 356, 86+342.

[94] R. L. 1905 § 3776. See Dawson v. Helmes, 30–107, 14+462 (limitation of two years under former statute).

[95] Streeter v. Wilkinson, 24–288; Rice v. Dickerman, 47–527, 50+698.

[96] Brown v. Fischer, 77–1, 7 Hanson v. Nygaard, 105–30, 38

[97] Brown v. Pinkerton, 95–153

[98] Dawson v. Helmes, 30–107,

[99] Spencer v. Sheehan, 19– Smith v. Swenson, 37–1, 32+78 Dickerman, 47–527, 50+698; Pinkerton, 95–153, 103+897; Nygaard, 105–30, 117+235.

[1] Dawson v. Helmes, 30–107, 1 Culver v. Hardenbergh, 37–225,

[2] Jordan v. Secombe, 33–22 Brown v. Pinkerton, 95–153, 897.

[3] R. L. 1905 § 3768; Culver bergh, 37–225, 33+792; McGow win, 46–477, 49+251. See Nes son, 45–424, 48+10.

3633. Court may direct a conveyance—When a person under contract to convey realty dies, or becomes insane or incompetent, before making the conveyance, the probate court is authorized by statute to direct the representative to make a conveyance in accordance with the contract.[4] This statute does not give the probate court jurisdiction of actions for specific performance.[5]

3634. Sale of whole estate when division inexpedient—Provision is made by statute for the sale of the whole estate when a sale of a part would be inexpedient.[6] Under this statute it has been held that where it appeared that the undivided one-third interest of the surviving husband and the other undivided two-thirds interest of the realty could not be equitably divided, the probate court had jurisdiction, incidental to the administration and distribution of the estate, to cause the entire estate to be sold to pay specific legacies, if for the best interests of the estate and all parties concerned.[7]

3635. Vacation—After a probate court has made an order for the sale of realty of an estate, and it has been accordingly sold, the sale confirmed by the court, and a deed executed to the purchaser as directed by the order of confirmation, and the administrator has been discharged, the matter is out of the jurisdiction of the probate court, and it cannot entertain an application to review and set aside the sale proceedings.[8]

3636. Private sale—Notice—A failure to give a notice as required by a license to sell at private sale, has been held fatal.[9]

3637. Conveyances for public uses—Representatives are authorized by statute to convey land for public uses.[10]

3638. Proof and finding as to sale—In proving a sale it is necessary to show authority therefor.[11] A finding that a guardian of certain minors, having been licensed to sell certain lands by a probate court, "did sell" the same to the plaintiff, is not a finding of any title in the plaintiff.[12]

3639. Foreign representatives—Foreign representatives are authorized by statute to sell realty in this state, under certain conditions, upon obtaining a license as in the case of domestic representatives.[13] The probate court of a county in this state in which there is realty of a ward residing out of this state, under guardianship by virtue of an appointment of a guardian in another state, is the "probate court having jurisdiction," upon an application by the guardian for license to sell such realty of the ward. There being realty of the ward in the county, and the record of the probate court showing a petition by the guardian from another state asking for license to sell the realty, and notice and opportunity to be heard, the jurisdiction in the matter appears. On such hearing it is for the probate court to determine whether the guardian was duly appointed in such other state, and whether he has complied with the law of this state by filing an authenticated copy of his appointment, and its decision, except on appeal, is final.[14]

3640. Obsolete statutes—Cases are cited below involving the construction of various obsolete statutes relating to sales.[15]

[4] R. L. 1905 § 3777; Mousseau v. Mousseau, 40-236, 41+977.

[5] Mousseau v. Mousseau, 40-236, 41+977; Svanburg v. Fosseen, 75-350, 78+4.

[6] R. L. 1905 § 3756.

[7] Kelly v. Slack, 93-489, 101+797.

[8] State v. Probate Ct., 19-117(85); State v. Probate Ct., 33-94, 22+10.

[9] Cater v. Steeves, 95-225, 103+885.

[10] R. L. 1905 § 3770; Burrell v. Chi. etc. Ry., 43-363, 45+849.

[11] Dawson v. Helmes, 30-107, 112, 14+462.

[12] Myrick v. Coursalle, 32-153, 19+736.

[13] R. L. 1905 § 3769; Townsend v. Kendall, 4-412(315, 324); Jordan v. Secombe, 33-220, 22+383.

[14] Menage v. Jones, 40-254, 41+972.

[15] Montour v. Purdy, 11-384(278) (lien given to purchaser at void sale); Culver v. Hardenbergh, 37-225, 33+792 (order extending time to sell—indorsement on cer-

ACCOUNTING AND DISCHARGE

3641. Jurisdiction—The jurisdiction of the probate court over the acco ing of representatives is exclusive, and is not lost by a discharge of a r sentative leaving an estate unadministered.[16]

3642. Intermediate accountings—The probate court may require a r sentative to account at any time prior to final settlement.[17] An interme accounting in the probate court by a representative is conclusive on all of contesting it who were under no disability, and on all of those under disa who were properly represented by guardians.[18]

3643. Final settlement—Petition—Notice—The statute provides petition by a representative for a final settlement,[19] and for a published of the order fixing the time and place of hearing.[20] A decree based on a tion by one of two representatives has been held irregular, but not void.[21] fact that some of the distributees are minors is not a ground for keepin estate open.[22] Guardians ad litem need not be appointed for minor devisees, or legatees interested in the estate.[23] A representative should n tition for a final settlement while there is an action pending against him

3644. Account—Form—Items allowable—In settling the account representative the court should be governed by broad principles of equity. representative should be allowed to show the real nature of his transa and their fairness, unimpeded by technical rules.[25] The account sho itemized and reasonably specific.[26] Expenses of administration, inc funeral expenses, are allowable.[27] A representative must be allowed all sary expenses in the care, management, and settlement of the estate, inc reasonable fees paid to attorneys.[28] There can be no legitimate charges ministration where there is no estate to administer.[29] Expenses of hunt heirs, or for looking after one's own interests in an estate, are not allow Cases are cited below involving the allowance of miscellaneous items.[31]

tified copy of license); McCarthy v. Van Der Mey, 42–189, 44+53 (sale of fee of homestead—sale during life estate of survivor).

[16] Betcher v. Betcher, 83–215, 86+1. See McAlpine v. Kratka, 98–151, 107+961.

[17] R. L. 1905 § 3784.

[18] Kittson v. St. Paul T. Co., 78–325, 81+7.

[19] R. L. 1905 § 3788.

[20] R. L. 1905 § 3789. See § 3656.

[21] State v. Probate Ct., 40–296, 41+1033.

[22] Schmidt v. Stark, 61–91, 93, 63+255.

[23] Balch v. Hooper, 32–158, 20+124.

[24] In re Kittson, 45–197, 48+419; Whitney v. Pinney, 51–146, 53+198.

[25] Wheaton v. Pope, 91–299, 305, 97+1046. See, as to the admission of evidence, Hanson v. Swenson, 78–18, 80+833.

[26] Wheaton v. Pope, 91–299, 97+1046.

[27] Dampier v. St. Paul T. Co., 46–526, 49+286. See McNally v. Weld, 30–209, 14+895 (funeral expenses advanced by widow—reimbursement of widow by representative).

[28] R. L. 1905 § 3707.

[29] In re Thompson, 57–109, 58+682.

[30] In re Glynn, 57–21, 58+684.

[31] Bunnell v. Post, 25–376 (debts improperly paid by representative allowance by commissioners); L Flaherty, 29–295, 13+131 (costs representative); State v. Probate 132, 78+1039 (attorney's fees); v. Watson, 81–251, 83+989 (prop belonging to decedent, but received resentative as if it were, and use ministration); Wheaton v. Pope, 97+1046 (life tenant under a last testament, who is also the executr therein, may anticipate and dis pecuniary obligation, to mature death, to a remainderman, and t accepting and retaining the payn not be permitted to insist that t trix shall again account for the when making a final settlement tate); McAlpine v. Kratka, 92– 233 (money paid to redeem l taxes); Ryan v. Williams, 92– 380 (note payable to order of transferred by representative father); Turner v. Fryberger 103+217 (administrator held with profits of his attorney in and selling a life estate in the which the administrator was tru

3645. Who may contest—Any person interested in the estate may contest the allowance of any item in the account of a representative.[32]

3646. Compensation of representatives—The compensation of representatives is regulated by statute.[33] A representative who is not guilty of wilful default, misconduct, or gross negligence in the management of his trust, is entitled to compensation.[34]

3647. Liability for interest—If a representative mingles the trust fund with his own money, or uses it in his private business, he will be charged with simple interest at the rate established by law as the legal rate, in the absence of special agreements. The rule is subject to the qualification that if he receives or makes more than legal interest he must pay more. If a representative fails to keep proper accounts, from which may be readily ascertained with reasonable certainty the amount of the profits, he will be charged interest at the legal rate.[35]

3648. By representative of deceased representative—If a representative dies before a final accounting, it is the duty of his representative to settle his account. Upon such an accounting, an order directing the representative of the deceased representative to pay into court the amount found due, is proper.[36]

3649. Allowance of account—The statute provides that "if the account is found correct, it shall be settled and allowed; if incorrect, it shall be corrected under the direction of the court, and then settled and allowed." [37] An order of allowance has been held conclusive as to intermediate accountings.[38] An account cannot be allowed until it is made to appear that all taxes against the estate have been paid.[39]

3650. Discharge of representative—The statute provides for a formal discharge of a representative.[40] Prior to Laws 1903 c. 195 there was no statutory provision for an order discharging a representative, and it was held that the final decree of distribution ipso facto discharged him.[41] A discharge of one of two representatives on his sole petition has been held irregular but not void.[42] To close administration, or to relieve executors from their responsibility as such, or to change their possession as such, or any part of the estate, into possession as legatees under the will, requires the action of the probate court, evidenced by order or decree showing with certainty its intention to produce such result.[43] An order discharging a representative is not subject to collateral attack, even though it states an insufficient ground therefor.[44]

3651. Accounting after discharge—After the estate has been settled and assigned, and while the final decree of distribution remains unreversed and unmodified, the probate court has no jurisdiction to entertain a petition to issue a citation to the administrator requiring him to further account for the property belonging to the estate which is in his possession, or came into his possession.[45]

[32] Bunnell v. Post, 25–376, 381.
[33] R. L. 1905 § 3707. See St. Paul T. Co. v. Kittson, 88–38, 92+500.
[34] St. Paul T. Co. v. Kittson, 62–408, 65+74.
[35] St. Paul T. Co. v. Kittson, 62–408, 65+74; Id., 67–59, 69+625. See St. Paul T. Co. v. Strong, 85–1, 88+256.
[36] O'Gorman v. Lindeke, 26–93, 1+841. See Peel v. McCarthy, 38–451, 38+205; State v. Probate Ct., 76–132, 78+1039.
[37] R. L. 1905 § 3790; Laws 1907 c. 434. See, for a form of allowance held sufficient, Balch v. Hooper, 32–158, 20+124.
[38] Kittson v. St. Paul T. Co., 78–325, 81+7.
[39] Laws 1907 c. 434.
[40] R. L. 1905 § 3794; Laws 1905 c. 332.
[41] State v. Probate Ct., 84–289, 87+783.
[42] State v. Probate Ct., 40–296, 41+1033.
[43] In re Scheffer, 58–29, 59+956.
[44] Simpson v. Cook, 24–180.
[45] State v. Probate Ct., 84–289, 87+783. See Lowry v. Tilleny, 31–500, 18+452.

FINAL DECREE OF DISTRIBUTION

3652. Jurisdiction—The jurisdiction of the probate court to make distri tion of the estate of a decedent is exclusive.[46]

3653. Necessity—A decree of distribution is ordinarily necessary to tra fer the title to personalty,[47] but not to realty.[48] It is necessary to close administration and relieve representatives,[49] and to charge representatives non-payment of legacies.[50] A representative may pay over funds to the p entitled thereto as heir, without an order of court. Such an order simply tects him and his sureties from subsequent claims.[51]

3654. Partial distribution—The probate court is authorized to make a tial distribution prior to final settlement.[52] A special bond is required.[53]

3655. Who may apply for—Any person interested in the estate may a for a decree of distribution.[54]

3656. Notice—Order for hearing—The statute requires a three weeks' lished notice of the order fixing the time and place for hearing the applic for a final accounting, settlement, and decree of distribution.[55] Formerl statutory notice was held jurisdictional,[56] but the rule is now otherwise.[5 is unnecessary that the land be described in the order fixing the time and of hearing.[58]

3657. Pendency of actions—The pendency of an action in a federal involving the estate is a ground for denying a petition for a final settl and decree of distribution.[59] A representative who ignores the pendency action against him in his representative capacity and upon his own n brings about a final settlement and distribution, may render himself pers liable.[60]

3658. Powers of court—In making distribution the court has power termine the succession of the property of the decedent, subject to admi tion and the rights of creditors. It determines who are the heirs, devis legatees, and what part of the estate is, after administration, to be assig each.[61] Where the decedent dies testate, the court necessarily constru determines the legal effect of the will, for purposes of administration. jurisdiction for such purposes is exclusive.[63] Its construction of a will a case is only for the purposes of administration. It is a conclusive ad tion that the persons to whom the distribution is made, are the persons to the property under the will and of that fact only. For any other purp

[46] Starkey v. Sweeney, 71-241, 244, 73+859. See Wiswell v. Wiswell, 35-371, 29+166; Reiser v. Gigrich, 59-368, 377, 61+30; Kosmerl v. Snively, 85-228, 88+753.

[47] See § 3660 and Granger v. Harriman, 89-303, 94+869.

[48] State v. Probate Ct., 25-22, 25; Jenkins v. Jenkins, 92-310, 100+7; Wellner v. Eckstein, 105-444, 470, 117+830 and cases under § 2722.

[49] In re Scheffer, 58-29, 59+956.

[50] Huntsman v. Hooper, 32-163, 20+127.

[51] Kraus v. Kraus, 81-484, 84+332. See Wheaton v. Pope, 91-299, 305, 97+1046.

[52] R. L. 1905 § 3785; Laws 1905 c. 21. See Reiser v. Gigrich, 59-368, 377, 61+30.

[53] R. L. 1905 § 3786; Laws 1905 c. 21; Olson v. Fish, 75-228, 77+818.

[54] Greenwood v. Murray, 28-120, 124, 9+629.

[55] R. L. 1905 § 3789.

[56] Wood v. Myrick, 16-494(447) wood v. Murray, 28-120, 122, 9+(Namara v. Casserly, 61-335, 339 See Jacobs v. Fouse, 23-51, 54; Irvine, 24-116.

[57] Hanson v. Nygaard, 105-30, 1

[58] Chadbourne v. Alden, 98-118,

[59] In re Kittson, 45-197, 48+419

[60] Whitney v. Pinney, 51-146, 5

[61] Farnham v. Thompson, 34-26+9; Kleeberg v. Schrader, 69-72+59; Hershey v. Meeker Co. 255, 268, 73+967.

[62] Bengtsson v. Johnson, 75-321 3; Duxbury v. Shanahan, 84-353 944.

[63] State v. Ueland, 30-277, 15 pleby v. Watkins, 95 455, 104+3

upon any other questions, it is coram non judice.[64] The court has no power to determine the rights of one claiming, through the acts of an heir or devisee, the realty to which such heir or devisee succeeds.[65] But such a claimant may appear in the probate court, demand an accounting, and oppose proceedings to divest the heir or devisee of his share.[66] The court has power to determine a claim to the estate under a contract with the decedent to make a will in favor of the claimant.[67]

3659. Partition—Provision is made by statute for a partition in the probate court where the estate to be assigned to two or more persons is in common and undivided, and the respective shares are not separated and distinguished.[68] The statute does not authorize a sale where an equitable division cannot be had.[69] After the close of administration the probate court has no jurisdiction of partition proceedings.[70]

3660. Effect—Res judicata—The effect of a decree of distribution is to transfer the title to personalty, and the right of possession of the realty, from the representative to the legatees, devisees, or heirs. The property ceases to be the estate of the decedent, and becomes the individual property of the distributees, with full right of control and possession, and right to recover it from the representative by action if he refuses to deliver it.[71] The effect of a decree upon realty is to discharge it from the administration. Until then, it is an asset and liable to be applied, in default of personalty, to payment of debts and charges of administration, whether it remains in the hands of the heir or devisee, or has been by him conveyed to another. A purchaser takes with this liability upon it.[72] The decree divests the probate court of jurisdiction of the property distributed, and, prior to Laws 1903 c. 195, it was held that it divested the probate court of jurisdiction of the estate.[73] If the court has jurisdiction, its decree of distribution is conclusive on all persons interested in the estate, whether under disability or not, or whether in being or not. Administration proceedings are in rem, acting directly on the res, which is the estate of the decedent. The decree is in rem and binds all persons interested in the estate, not only as to its legal consequences, but also as to the facts upon which it is based.[74] It is not binding on all the world as to the facts upon which it is based. It is not evidence of heirship as against strangers.[75] A decree assigning to a devisee property devised establishes the validity of the devise conclusively as against all interested in the estate, unless an appeal is taken. It establishes the right to the property assigned of the person to whom it is assigned,

[64] Hershey v. Mecker Co. Bank, 71–255, 268, 73+967.

[65] Farnham v. Thompson, 34–330, 336, 26+9; Dobberstein v. Murphy, 44–526, 47+171; Kleeberg v. Schrader, 69–136, 138, 72+59; Starkey v. Sweeney, 71–241, 244, 73+859.

[66] In re Langevin, 45–429, 47+1133; Starkey v. Sweeney, 71–241, 73+859.

[67] Kleeberg v. Schrader, 69–136, 72+59.

[68] R. L. 1905 §§ 3801–3808.

[69] Kelly v. Slack, 93–489, 495, 101+797.

[70] Hurley v. Hamilton, 37–160, 33+912; State v. Probate Ct., 84–289, 293, 87+783.

[71] State v. Probate Ct., 25–22; Schmidt v. Stark, 61–91, 63+255; State v. Probate Ct., 84–289, 294, 87+783.

[72] State v. Probate Ct., 25–22; State v. Probate Ct., 40–296, 41+1033; State v. Probate Ct., 84–289, 294, 87+783.

[73] Hurley v. Hamilton, 37–160, 33+912; State v. Probate Ct., 40–296, 41+1033; Schmidt v. Stark, 61–91, 63+255; State v. Probate Ct., 84–289, 87+783.

[74] Greenwood v. Murray, 26–259, 2+945; Id., 28–120, 9+629; Ladd v. Weiskopf, 62–29, 64+99 (the statement in this case to the effect that a decree of distribution has as wide an effect as a decree in admiralty, that is, that it binds all the world as to the facts on which it is based, is erroneous); Eddy v. Kelly, 72–32, 74+1020; Bengtsson v. Johnson, 75–321, 78+3; Fitzpatrick v. Simonson, 86–140, 147, 90+378; Chadbourne v. Hartz, 93–233, 101+68; Wellner v. Eckstein, 105–444, 117+830; Innis v. Flint, 106–343, 119+48.

[75] Backdahl v. Grand Lodge, 46–61, 48+454.

the same as would the judgment of any other court of competent jurisdictio and if assigned to a devisee in trust, it establishes the validity of the trust It is not subject to collateral attack for mere error.[77] A decree has been h not a defence to an action against a representative in the nature of devastavi

3661. Right to distributive share—The right of a distributee to his sh of the estate accrues when the final decree of distribution is made by the prob court. He may then demand it of the representative, and if it is refused, ma tain an action against the representative and his bondsmen.[79]

3662. Enforcement—The probate court has no power to enforce its de of distribution. One who is deprived of his share under a decree must re to the district court, even as against representatives.[80]

3663. Construction—Cases are cited below involving the constructio particular decrees.[81]

3664 Appeal—Who may attack—One who is not specially aggrieved final decree of distribution cannot appeal from it, or attack it in any wa appeal.[82]

RESIGNATION AND REMOVAL OF REPRESENTATIVES

3665. Resignation—A representative may resign at any time, but his r nation does not take effect until the court has examined and allowed his account, and made an order accepting his resignation.[83]

3666. Removal—Provision is made by statute for the removal of repres tives for cause.[84]

ACTIONS BY AND AGAINST REPRESENTATIVES

3667. Actions by representatives—An action by an executor or ad trator upon a cause of action belonging to him in his representative ca must be brought by him in that capacity.[85] He may maintain an action cover the realty of the decedent or to quiet the title thereto;[86] to recover

[76] Greenwood v. Murray, 26-259, 2+945; Innis v. Flint, 106-343, 119+48.

[77] Wood v. Myrick, 16-494(447). See Judgments, 5145.

[78] Whitney v. Pinney, 51-146, 53+198.

[79] In re Scheffer, 58-29, 59+956; Ganser v. Ganser, 83-199, 201, 86+18. See Miller v. Ganser, 87-345, 92+3 (complaint for distributive share sustained).

[80] Schmidt v. Stark, 61-91, 63+255; State v. Probate Ct., 84-289, 294, 87+783.

[81] Tidd v. Rines, 26-201, 2+497 ("to have and to hold the same unto her, her heirs and assigns, forever," held an assignment of an estate in fee); McNamara v. Casserly, 61-335, 63+880 (decree assigning property to one "as sole heir" held not to assign the property on the condition that the party was the sole heir—innocent purchaser from such party not estopped, as against true heir, from asserting title in himself); Ladd v. Weiskopf, 62-29, 64+99 (decree held to assign a life estate to a widow and a vested remainder to seven others, share and share alike); Faloon v. Flannery, 74-38, 76+954 (will directed widow to divide realty between children, "to the best advantage sees fit and proper"—decree realty to widow, "subject to the tions and provisions of the will") v. Farmers' etc. Bank, 89-482, 95+ assignment "and of all the real of which the said testator died whether the same is described in ventory herein or not," held no clude a homestead).

[82] Casey v. Casey, 126+401.

[83] R. L. 1905 § 3708. See, prior ute, Simpson v. Cook, 24-180; R First Nat. Bank, 28-202, 9+731; Hooper, 32-158, 20+124.

[84] R. L. 1905 §§ 3645, 3709; Si Cook, 24-180, 188 (collateral a order of removal not permissibl vin v. Dutcher, 26-391, 404, 4+ judicata); Balch v. Hooper, 32- 20+124 (form of order of remo ciency); Ellis v. Warshauer, 92- 214 (receiver pending appeal f of removal).

[85] Hamilton v. McIndoo, 81-32 See Bond v. Corbett, 2-248(209)

[86] R. L. 1905 § 3705. See § 35

of the estate;[87] to set aside a fraudulent conveyance by the decedent;[88] for a trespass to the realty, if he has taken possession thereof;[89] on a note payable to the decedent;[90] on a covenant of seizin;[91] or for death by wrongful act.[92] He cannot maintain an action to recover money payable upon contract to the heirs of the decedent;[93] or for an execution on a judgment recovered in the district court by the decedent.[94]

3668. By one executor against another—A court of equity will entertain an action brought by an executor on the part of the estate against a co-executor to determine the amount of a disputed claim, or to force an account, or to foreclose a mortgage, or in any other case, where justice requires it, there being no remedy at law.[95]

3669. Actions against representatives—An action will lie against a representative on a claim against the decedent which survives, and which could not be proved in the probate court; otherwise if it could be so proved.[96] An action will not lie against a representative personally and also in his representative capacity. If such an action is brought the plaintiff may be required to elect on which cause of action he will proceed.[97]

3670. Setoff—The statute provides that in an action by a representative the defendant may set off any claim he has against the estate, instead of presenting it to the probate court.[98] It is immaterial that the time for filing claims has expired, and the offset may be made though the estate has been distributed.[99]

3671. Limitation of actions—The statute determines the effect of death on the running of statutes of limitation and prescribes certain periods within which actions by or against personal representatives may be brought.[1] It is inapplicable to an action for death by wrongful act.[2] It has been held not to justify a delay in instituting foreclosure proceedings.[3]

3672. Pleading—It is no longer necessary to make profert of letters testamentary or of administration. But one who sues as an executor or administrator must allege, in a direct and issuable form, that he is such. This is properly done by alleging that he is executor or administrator by virtue of letters issued by a probate court of a specified county at a specified time.[4] In an action by an administrator de bonis non the name of the original administrator should be given and it should be alleged that he is dead, or has resigned, or has been discharged, as the case may be.[5] In an action purporting to be brought by plaintiff as a foreign administrator, allegations in the complaint to the effect that plaintiff has been duly appointed such foreign administrator, and has duly filed in the proper probate court of this state a duly authenticated copy of his

to statute he could not maintain an action to remove a cloud, if he had not obtained possession or a license to sell. Paine v. First Div. etc. Ry., 14-65(49).

[87] See § 3588.

[88] See § 3587.

[89] Noon v. Finnegan, 29-418, 13+197; Id., 32-81, 19+391.

[90] Cooper v. Hayward, 71-374, 74+152.

[91] Lowry v. Tilleny, 31-500, 18+452.

[92] See § 2607.

[93] Bomash v. Supreme Sitting, 42-241, 44+12.

[94] Lough v. Pitman, 25-120.

[95] Peterson v. Vanderburgh, 77-218, 79+828.

[96] See § 3595.

[97] Fritz v. McGill, 31-536, 18+753. See Whitney v. Pinney, 51-146, 53+198; Pabst v. Small, 83-445, 86+450.

[98] R. L. 1905 § 3737; Martin Co. Nat. Bank v. Bird, 92-110, 113, 99+780.

[99] Gerdtzen v. Cockrell, 52-501, 55+58; Talty v. Torling, 79-386, 82+632.

[1] R. L. 1905 § 4085; Wilkinson v. Estate of Winne, 15-159(123); St. Paul T. Co. v. Sargent, 44-449, 47+51; Wood v. Bragg, 75-527, 78+93.

[2] Rugland v. Anderson, 30-386, 15+676.

[3] Hill v. Townley, 45-167, 47+653. See Rogers v. Benton, 39-39, 38+765.

[4] Chamberlain v. Tiner, 31-371, 18+97; Perkins v. Merrill, 37-40, 33+3; Hamilton v. McIndoo, 81-324, 84+118. See Hughes v. Meehan, 84-226, 87+768 (admission of due appointment in answer).

[5] Hamilton v. McIndoo, 81-324, 84+118.

appointment, are put in issue by an answer denying the complaint, and "ea and every part and portion thereof." [6]

3673. Costs—The liability of a representative for costs is regulated by st ute.[7] A judgment for costs has been construed as a judgment against an ministrator personally, to be enforced by execution against his property.[8]

FOREIGN EXECUTORS AND ADMINISTRATORS

3674. Right to letters in this state—When a foreign will has been prob in this state as provided by statute the executor therein named is entitle letters testamentary unless there are special reasons to the contrary.[9]

3675. Appointment at domicil—Presumption—Where the appointi of a foreign representative at his domicil by a court with jurisdiction is sh it will be presumed that it was regularly made.[10]

3676. Control of domestic court—Service of summons—Where, upo petition of non-residents, they have been appointed executors or administr by a probate court of this state, such court has the power to order that submit to the service of a summons in a civil action brought in this sta the purpose of determining the liability of the estate they represent on a or demand not provable in the probate court in the due course of admir tion. Whether the remedy in case of a refusal to obey the order is by pr ings as for contempt, or by removal from office is an open question.[11]

3677. Powers—In general—The authority of a foreign representat act as such in this state is purely statutory. Letters testamentary or of a istration have no force at common law out of the jurisdiction in which tl granted.[12] But without statutory authority a foreign representative r anything in this state which does not involve an assertion of his represe capacity. He may receive a voluntary payment of a debt due the dec or foreclose a mortgage pursuant to a power given in the mortgage,[14] possession of personalty peaceably.[15] By statute he may assign, release, or foreclose any mortgage, judgment, or lien on real or personal prop longing to the estate, upon filing proof of his appointment.[16]

3678. Actions by—Without statutory authority a representative ca as such in a foreign jurisdiction.[17] By statute a foreign representat sue in this state after filing an authenticated copy of his appointment probate court of the county in which the action is brought.[18] A failu before suit is not cured by a subsequent filing.[19] A failure to file m fects the capacity to sue in our courts and is waived unless the obj raised by answer or demurrer.[20] A foreign representative cannot mai action for trespass to realty in this state, if the will has not been prov

[6] Fogle v. Schaeffer, 23-304.
[7] R. L. 1905 § 4349.
[8] Lough v. Flaherty, 29-295, 13+131.
[9] R. L. 1905 § 3686; Bloor v. Myerscaugh, 45-29, 47+311; Hardin v. Jamison, 60-112, 61+1018; Babcock v. Collins, 60-73, 61+1020.
[10] Drake v. Sigafoos, 39-367, 40+257 (appointment by clerk of court in vacation under Iowa statute).
[11] State v. Probate Ct., 66-246, 68+1063.
[12] Pott v. Pennington, 16-509(460); Fogle v. Schaeffer, 23-304.
[13] Putnam v. Pitney, 45-242, 47+790; Dexter v. Berge, 76-216, 78+1111.
[14] Holcombe v. Richards, 38-3 Cone v. Nimocks, 78-249, 80+105
[15] Putnam v. Pitney, 45-242, 4
[16] R. L. 1905 § 3711; Holcom ards, 38-38, 35+714 (foreclosur gages); Cone v. Nimocks, 7 1056 (id.). See § 6323.
[17] Pott v. Pennington, 16-509 gle v. Schaeffer, 23-304; Putr ney, 45-242, 47+790; Cone v 78-249, 80+1056.
[18] R. L. 1905 § 4506.
[19] Fogle v. Schaeffer, 23-304.
[20] Pope v. Waugh, 94-502, 1(

ters issued in this state, though an authenticated copy of his foreign appointment is filed under the statute.[21] While a foreign representative cannot sue in this state on a thing in action, without statutory authority, his assignee may do so.[22]

ANCILLARY ADMINISTRATION

3679. In general—Ancillary administration will not be granted unless clearly necessary. A divided administration is always to be avoided if possible, as it involves greater expense to the estate, and is apt to give one set of creditors an advantage over others and to cause a clash of interests. If there are no domestic creditors ancillary administration will not be granted on the application of a foreign creditor, if no reason appears why he cannot collect his debt at the decedent's domicil.[23]

EXECUTORY DEVISES—See Estates, 3174; Wills, 10284.
EXEMPLARY DAMAGES—See Damages, 2539–2558.

EXEMPTIONS

3680. In general—Under the constitution exemption laws must be reasonable in amount.[24] They are not intended to aid debtors in defeating the just demands of their creditors, but are passed in that humane and enlightened spirit of legislation which considers the preservation of the family, and the means of supporting and educating the children, and maintaining the decencies and proprieties of life, as paramount to the temporary inconvenience of the creditor.[25] They are to be liberally construed.[26] They cannot be given a retroactive operation so as to impair the vested rights of creditors.[27] The exemption of certain kinds or classes of property from levy and sale on execution is not an incident inseparably attached to the property itself, but a personal privilege conferred upon debtors happening to own the same, which they may insist upon or waive at pleasure.[28] The exemption is a personal privilege which the debtor alone can assert; his vendee cannot claim the exemption.[29] A voluntary transfer of exempt property vests a good title in the donee as against the creditors of the donor.[30]

3681. Public property of municipalities—The public property of municipalities is exempt. A judgment against a municipality is enforceable by mandamus.[31]

[21] Pott v. Pennington, 16-509(460).

[22] Putnam v. Pitney, 45-242, 47+790; Cone v. Nimocks, 78-249, 254, 80+1056.

[23] Putnam v. Pitney, 45-242, 47+790; State v. Probate Ct., 67-51, 53, 69+609, 908. See 23 Harv. L. Rev. 467.

[24] Const. art. 1 § 12; In re How, 59-415, 61+456.

[25] Grimes v. Bryne, 2-89(72). See also, Berg v. Baldwin, 31-541, 18+821; Boelter v. Klossner, 74-272, 77+4.

[26] Rothschild v. Boelter, 18-361(331); Berg v. Baldwin, 31-541, 18+821; Shadewald v. Phillips, 72-520, 75+717; Boelter v. Klossner, 74-272, 77+4; Olin v. Fox, 79-459, 82+858; Grimestad v. Lofgren, 105-286, 117+515. In some of our earlier cases it was held that exemption laws should be strictly construed. Grimes v. Bryne, 2-89(72); Olson v. Nelson, 3-53 (22); Temple v. Scott, 3-419(306); Ward v. Huhn, 16-159(142). This view is now thoroughly discredited.

[27] Gunn v. Barry, 15 Wall. 610; Tillotson v. Millard, 7-513(419); Dunn v. Stevens, 62-380, 64+924. The case of Grimes v. Bryne, 2-89(72) is overruled.

[28] Orr v. Box, 22-485.

[29] Howland v. Fuller, 8-50(30). See Langevin v. Bloom, 69-22, 71+697.

[30] Furman v. Tenny, 28-77, 9+172.

[31] Jordan v. Board of Ed., 39-298, 39+801.

3682. Wages—Under a former statute the exemption was limited to t engaged in manual labor.[32] The present statute was designed to extend exemption to all who work for wages—to servants, employees, clerks, etc well as to laboring men.[33] The thirty days are to be computed from the and not from the issuance of the writ from the clerk's office.[34]

3683. Wages of municipal officers and employees—The wages and aries of municipal officers and employees are no longer fully exempt.[35] merly the rule was otherwise.[36]

3684. Family provisions—This exemption is not in favor of the head c family, but in favor of the debtor, and is intended to protect the family must be liberally construed, so as to effectuate its humane purpose. V husband and wife are living together, and both have provisions which m appropriated for the support of the family, the wife is not entitled to tl emption, nor in a case where the husband alone is supporting the famil in such case there would be no necessity to appropriate any provisions by her to the support of the family. But in a case where husband and wif living together with their children on her farm and were supporting the ily by their joint labors in cultivating the farm and caring for the hous and neither had any other farm or grain except such as was raised ther was held that the wife was entitled to an exemption under this subdivisi

3685. Wearing apparel and household goods—That an article r worn does not make it wearing apparel within the meaning of the statute words of the statute are to be construed according to the common and ap usage of the language, namely, as referring to garments or clothing ge designed for wear of the debtor and his family. A watch is not wear parel.[38] Whether all the property exempt under the fifth subdivision statute is limited so that its value shall not exceed five hundred dol whether it is only that included in the phrase "all other property not enumerated," is still an open question.[39] A cooking stove and its fixt exempt.[40]

3686. Farm stock and implements—Food for stock—A buggy or is exempt as coming within the term "wagon."[41] A bicycle is not exe "wagon."[42] Whether a horse kept for racing purposes is exempt, is question.[43] Two year old steers are exempt.[44] In order to have the b the exemption of food for stock it is unnecessary that the debtor sho all of the stock.[45] The question how much food is "necessary" is for t A horse delivered to the keeper of a livery or boarding stable is sub lien for his keep.[47]

3687. Seed grain—An owner of a farm may claim the exemptio grain when renting the farm on shares and furnishing the seed.[48] grain is exempt is ordinarily a question for the jury.[49]

[32] Wildner v. Ferguson, 42-112, 43+794.
[33] Boyle v. Vanderhoof, 45 31, 47+396. See Sheehan v. Newpick, 77-426, 80+356; Rustad v. Bishop, 80-497, 83+449.
[34] Bean v. Germania Life Ins. Co., 54-366, 56+127.
[35] R. L. 1905 § 4237; Mitchell v. Miller, 95-62, 103+716.
[36] Roeller v. Ames, 33-132, 22+177.
[37] Boelter v. Klossner, 74-272, 77+4.
[38] Rothschild v. Boelter, 18-361(331).
[39] Fletcher v. Staples, 62-471, 64+1150.
[40] Harlev v. Davis, 16-487(441).
[41] Allen v. Coates, 29-46, 11+132 (overruling Dingman v. Raymond, 597); Kimball v. Jones, 41-318.
[42] Shadewald v. Phillips, 72-5 See R. L. 1905 § 4317(10).
[43] Anderson v. Ege, 44-216, 4
[44] Berg v. Baldwin, 31-541, 1
[45] Olin v. Fox, 79-459, 82+85
[46] Howard v. Rugland, 35-3 Haugen v. Younggren, 57-170,
[47] Flint v. Luhrs, 66-57, 68+5
[48] Matteson v. Munro, 80-340,
[49] Howard v. Rugland, 35-2 Haugen v. Younggren, 57-170,

3688. Tools and stock in trade—One carrying on the trade of tailor may be entitled to the exemption of two sewing machines, if kept and personally used for the purposes of his trade and if reasonably necessary therefor.[50] The ordinary stock in trade of a merchant is not exempt under this subdivision.[51] The phrase "stock in trade" as here used means the stock of materials belonging to the owner of the tools and implements, and which he has provided and holds for the purpose of enabling him to make their use a beneficial or profitable one as a means of support. It includes all the materials got and held for that purpose, in whatever condition or state of preparation for use they may be, so that they are suitable and adapted to the end in view, and to the particular business in which he is engaged, wherein the use of such tools is necessary.[52] Unfinished burial caskets have been held exempt.[53] The stock in trade of a partnership is not exempt.[54] The "tools" of a mechanic or other person, in order to be exempt, must be held for the purpose of carrying on his trade.[55] The exemption of "tools and instruments" may be lost by abandonment of the trade or profession in which they are used.[56]

3689. Insurance—The statute exempting policies of insurance effected by the insured in favor of another, or made payable to his wife, or for her benefit, applies only to policies which on their face are so payable.[57] A former statute exempting insurance money was held unconstitutional because it contained no reasonable limitation on the amount.[58] It was sustained, however, so far as it exempted insurance money from the creditors of the beneficiary, when such money was designed as a gift to the beneficiary.[59]

3690. Action for purchase money of exempt property—No property exempt by the general statute is exempt from attachment or execution in an action for the recovery of the purchase money of the same.[60]

3691. Claim of damages and judgment for taking exempt property—A claim for damages recoverable by any person by reason of a levy upon or sale under execution of his exempt personalty, or by reason of the wrongful taking or detention of such property by any person, and any judgment recovered for such damages, are exempt.[61]

3692. Funds of beneficial associations—The statute exempts "all moneys, relief, or other benefits payable or to be rendered by any police department association, fire department association, beneficiary association, or fraternal benefit association to any person entitled to assistance therefrom, or to any certificate holder thereof or beneficiary under any such certificate." [62]

3693. Partnership property—The exemption laws are inapplicable to partnership property.[63]

3694. Residence—An absconding debtor who leaves the state without any intention of returning and becomes a resident of another state cannot have

[50] Cronfeldt v. Arrol, 50–327, 52+857.
[51] Grimes v. Bryne, 2–89(72); Hillyer v. Remore, 42–254, 44+116.
[52] McAbe v. Thompson, 27–134, 6+479; Prosser v. Hartley, 35–340, 29+156.
[53] McAbe v. Thompson, 27–134, 6+479.
[54] Baker v. Sheehan, 29–235, 12+704; Prosser v. Hartley, 35–340, 29+156.
[55] Prosser v. Hartley, 35–340, 29+156.
[56] Cable v. Hoolihan, 98–143, 107+967.
[57] R. L. 1905 §§ 1691, 1692; Remley v. Travelers' Ins. Co., 108–31, 121+230.
[58] In re How, 59–415, 61+456.
[59] In re How, 61–217, 63+627.
[60] R. L. 1905 § 4317(18); Harlev v. Davis, 16–487(441); Rogers v. Brackett, 34–279, 25+601; Langevin v. Bloom, 69–22, 71+679.
[61] R. L. 1905 § 4317(18); Henry v. Traynor, 42–234, 44+11; Wylie v. Grundysen, 51–360, 53+805. See, prior to statute, Temple v. Scott, 3–419(306).
[62] R. L. 1905 § 4317(15). See Brown v. Balfour, 46–68, 48+604; Lake v. Minn. M. R. Assn., 61–107, 63+263; First Nat. Bank v. How, 65–187, 67+994.
[63] Baker v. Sheehan, 29–235, 12+704; Prosser v. Hartley, 35–340, 29+156; Security Bank v. Beede, 37–527, 35+435.

the benefit of our exemption laws in respect to personalty left behind subsequently seized and sold on execution.[64] A person in the act of mo out of the state, to acquire a domicil elsewhere, has been held entitled to benefit of our exemption laws.[65]

3695. Claiming exemption—Levy on excess—The mode of levying property in excess of exemption is regulated by statute.[66] Where all property which a debtor has, of a kind which is exempted with a limit quantity or amount, and not with a limit as to value, does not exceed quantity or amount which the statute exempts, there is no occasion fo debtor to choose or select the same as exempt. In such case the st operates to choose and select for him.[67] Where the statute exempts a spe amount of a designated class or species of property, the sheriff may levy the whole property of that class or species and he cannot be sued in re before an appraisement, a selection by the owner and a demand fo articles so selected. No time is specified within which the inventory appraisal are to be made, but the officer has undoubtedly a reasonable within which to discharge the duty; and until this is done, the defendar no right to make his selection.[68] A mere failure to claim a right of exem at the time of a levy will not preclude a party from asserting the right wards and before the sale, if no one is prejudiced thereby.[69] The owne horse levied upon may avail himself of the right to select that hor exemption, without bringing his other horses from another county, s the officer may levy on them.[70]

3696. Pleading—Cases are cited below involving questions of pleadir

3697. Burden of proof—The burden generally rests on the debtor to that property levied upon is exempt.[72]

3698. Law and fact—The construction of exemption laws is for the c Where the levy is on food for stock, provisions for a family or seed gr question of what and how much is "necessary" is for the jury.[74] An erally the question of exemption is for the jury under proper instructio

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EXHAUSTING SECURITY—See Action, 92.
EXHIBITING BODY—See Evidence, 3257.
EXHIBITS—See Indictment, 4400; Pleading, 7526.
EXPENSES OF ACTION—See Costs; Damages, 2523.
EXPERIMENTS—See Evidence, 3246, 3261; Trial, 9722.
EXPERTS— See Evidence, 3323; Witnesses, 10303, 10361.

[64] Orr v. Box, 22-485; Grimestad v. Lofgren, 105-286, 117+515.
[65] Grimestad v. Lofgren, 105-286, 117+515.
[66] R. L. 1905 § 4318.
[67] Howard v. Rugland, 35-388, 29+63.
[68] Tullis v. Orthwein, 5-377(305).
[69] McAbe v. Thompson, 27-134, 6+479.
[70] Anderson v. Ege, 44-216, 46+362.
[71] Keegan v. Peterson, 24-1 (whether harvester is a "farming utensil" to be raised by answer and not demurrer); Murphy v. Sherman, 25-196 (nee pleading a waiver); Cable v. 98-143, 107+967 (unnecessary facts showing loss of exemption donment of trade).
[72] Fletcher v. Staples, 62-471. See § 3695.
[73] Wildner v. Ferguson, 42-112
[74] Howard v. Rugland, 35-388 Haugen v. Younggren, 57-170, 5
[75] Cronfeldt v. Arrol, 50-327, 5

EXPLOSIVES

3699. Explosions—Liability for negligence—A person in the possession or control of a dangerous explosive, or using it for any purpose, is bound to exercise reasonable care to prevent injuries to others from explosions. Reasonable care, as regards dangerous explosives, calls for a very high degree of care—a care commensurate with the danger involved. Every reasonable precaution must be taken against accident.[76] The degree of care required for the protection of young children is greater than in the case of adults.[77] To what extent the doctrine of res ipsa loquitur applies is unsettled in this state.[78]

3700. Blasting—Liability for trespass—One may be liable for injuries resulting from blasting, on the ground of trespass, irrespective of negligence.[79]

EX POST FACTO LAWS—See Constitutional Law, 1648.

EXPRESSIO EORUM QUAE TACITE INSUNT NIHIL OPERATUR—See Statutes, 8981.

EXPRESSIO UNIUS EST EXCLUSIO ALTERIUS—See Contracts, 1838; Counties, 2281; Statutes, 5548.

EXPRESSUM FACIT CESSARE TACITUM—See Statutes, 8982.

EXTENSION OF TIME—See Service of Notices and Papers, 8732.

EXTORTION

3701. What constitutes—Payment of money to another, induced by fear of exposure by such person of a compromising situation with a woman, constitutes extortion within the meaning of R. L. 1905 § 5096, and it is unnecessary to prove intent as an independent fact. The essential facts constituting extortion being established, intent is presumed. A brought about a series of events which resulted in placing B in a compromising situation, and which induced him to pay money to A as the result of fear, to avoid exposure. It is immaterial that A may have originally intended merely to secure evidence against B to be used in a divorce suit. Having created the situation, he could not accept hush money, paid under the stress of fear, and claim immunity simply because no express threat was made.[80]

3702. Indictment—An indictment under Pub. St. (1849–1858), c. 89 § 37, has been held insufficient for failure to allege that the threats were made "with intent to compel," and that the party sought to be compelled to convey property had an interest therein.[81] An indictment against a probate judge for extorting fees has been held insufficient for failure to allege in what official capacity he exacted the fees; what fees if any, were due; what amount was collected; and the place where the offence was committed.[82]

EXTRA COMPENSATION—See Contracts, 1766.

[76] Mattson v. Minn. etc. Ry., 95-477, 104+443; Wiita v. Interstate I. Co., 103-303, 309, 115+169; Anderson v. Smith, 104-40, 115+743; Froeberg v. Smith, 106-72, 118+57. See Clarkin v. Biwabik B. Co., 65-483, 67+1020; Anderson v. Settergren, 100-294, 111+279.

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

[78] See Gould v. Winona G. Co., 100-258, 266, 111+254.

[79] See Gould v. Winona G. Co., 100-258, 265, 111+254; 54 Am. L. Rev. 677; 13 Harv. L. Rev. 600.

[80] State v. Coleman, 99-487, 110+5. See Note, 116 Am. St. Rep. 441.

[81] State v. Ullman, 5-13(1).

[82] State v. Brown, 12-490(393).

3703. Duty and discretion of governor—When a case is presented whi is clearly one contemplated by the federal constitution the governor h no discretion but it is his imperative duty to issue the warrant. This du however, is one of imperfect obligation, for, if the governor refuses to perfo it, there is no power, state or federal, to compel him to do so. In determini whether a case is one contemplated by the constitution the governor n exercise a discretion, and if he is satisfied that the demand is made for so ulterior and improper purpose—as, for example, the collection of a priv debt—he may refuse to issue a warrant.[83] The governor acts in an execut rather than a judicial capacity.[84]

3704. Jurisdictional prerequisites—To justify the issuance of a warr three things are necessary: first, there must be a demand from the gover of the state where the crime was committed for the surrender of the fugi who has fled from its jurisdiction; second, the requisition must be acc panied by a copy of an indictment or affidavit charging the fugitive v the commission of the offence specified; third, such copy must be authentic by the certificate of the governor making the requisition.[85]

3705. Who is a fugitive from justice—To be a fugitive from justic the sense of the act of Congress regulating the subject of extradition, unnecessary that the party charged should have left the state in which crime is alleged to have been committed, for the purpose of avoidi prosecution anticipated or begun, but simply that, having within a committed a crime against its laws, when he is sought to be subjecte its criminal process to answer for his offence, he has left its jurisdiction, is found within the territory of another state. The important fact is his purpose in leaving, but that he has left, and hence is beyond the of the process of the state in which the crime was committed. The that he is not within the state to answer the charge when required, re him, in legal intendment, a fugitive from justice, regardless of his pu in leaving.[86] One who leaves a jurisdiction after having committed an a furtherance of a crime subsequently consummated is a fugitive from just

3706. The crime charged—The indictment or affidavit on which re tion is made must state facts which constitute a criminal offence i state from which the requisition comes.[87] It is immaterial whether facts constitute a criminal offence in this state.[88] While extradition be allowed for a misdemeanor [89] it will not be allowed for petty offences

3707. Proof that person demanded is a fugitive—The governor m furnished with proof that the person demanded is a fugitive from j but the law does not prescribe the nature of the evidence to be furn When the governor issues a warrant it is presumed that it was grant competent proof that the prisoner was a fugitive from justice, charge a crime, at a time when he was within the state from which he ha The question whether a person is a fugitive involves the question w he was in the demanding state at the time the crime was commit prerequisite to the granting of requisition.[91]

[83] State v. Toole, 69 104, 72+53.
[84] State v. Goss, 66–291, 68+1089.
[85] State v. Richardson, 34–115, 24+354; State v. O'Connor, 38–243, 36+462. See Note, 112 Am. St. Rep. 103.
[86] State v. Richter, 37–436, 35+9; Appleyard v. Mass., 203 U. S. 37.
[91] State v. Gerber, 126+482.
[87] State v. O'Connor, 38–243, 36+4
[88] State v. Goss, 66–291, 68+1089.
[89] Ex parte v. Reggle, 114 U. S. 6
[90] See Ops. Atty. Genl. 1904, 1906, Nos. 59, 132 and p. 15.
[91] State v. Justus, 84–237, 87+77

3708. Sufficiency of requisition papers—It is the duty of the governor to disregard merely formal defects in the papers.[92] The requirement that the papers include a copy of the indictment or affidavit properly authenticated is imperative.[93] The indictment or affidavit is sufficient if it substantially charges the commission of a crime against the state from whose justice the accused is alleged to have fled. With its sufficiency as a pleading in other respects the courts of this state have no concern. It is immaterial that it is not as definite and certain as the rules of criminal pleading of this state require in charging the same offence.[94] If the requisition certifies that all papers returned are true and correct copies, and one of them contains a criminal accusation, indorsed as "an indictment," signed by a foreman as "a true bill," such authentication is sufficient under the act of Congress.[95] It will be implied from the executive authentication that the officer certifying to the jurat of the affidavit was such magistrate as he is therein represented to be.[96] A requisition signed by an "acting governor" has been held sufficient.[97] An affidavit or verified complaint has been held sufficient against the objections that it did not state a venue and was entitled in a cause not pending. An authentication has been held sufficient against the objection that it did not cover all the papers.[98]

3709. Sufficiency of warrant—It need not set forth the facts upon which it is issued with the certainty required in criminal pleadings. It is sufficient if it appears therein that the prisoner is demanded as a fugitive under the federal constitution and the act of Congress.[99] Neither the federal or state statute prescribes the form of warrant to be used. It should show on its face that the officer to whom it is directed is thereby authorized to arrest the fugitive therein named and deliver him to the agent of the demanding state. This may be shown by a recital in the warrant of the ultimate facts, omitting details, which authorize such arrest and delivery.[1] It is probably sufficient if the warrant recites generally that the governor is satisfied that the demand is conformable to law and ought to be complied with, but if the warrant attempts to set out all the jurisdictional facts they must be fully set out.[2] It is unnecessary that copies of the indictment, affidavit, or other records be annexed to the warrant.[3] A warrant has been held sufficient which recited that the person demanded was charged upon "complaint" with the crime of forgery, instead of by "affidavit."[4]

3710. Revocation of warrant—The governor may revoke his warrant at any time before the fugitive is taken out of the state, if he is satisfied that it was improperly issued.[5]

3711. Exemption from civil process—One who by interstate rendition proceedings is brought to this state from another state or territory, as a fugitive from justice, is not exempt from civil prosecution while detained here under such proceedings.[6]

3712. Trial for other offence—A person extradited for one offence may be tried for another, and without being given an opportunity to leave the

12 Harv. L. Rev. 532; 13 Id. 141; 17 Id. 427; Munsey v. Clough, 196 U. S. 364.

[92] State v. Goss, 66–291, 68+1089. See State v. Curtiss, 126+719.

[93] State v. Richardson, 34–115, 24+354; State v. Justus, 84–237, 87+770.

[94] State v. O'Connor, 38–243, 36+462; State v. Goss, 66–291, 68+1089.

[95] State v. Justus, 84–237, 87+770.

[96] State v. Richardson, 34–115, 24+354; State v. Bates, 101–303, 112+260.

[97] State v. Justus, 84–237, 87+770.

[98] State v. Bates, 101–303, 112+260.

[99] State v. Justus, 84–237, 87+770.

[1] State v. Bates, 101–303, 112+260.

[2] State v. Richardson, 34–115, 24+354.

[3] State v. Richardson, 34–115, 24+354; State v. Bates, 101–303, 112+260.

[4] State v. Bates, 101–303, 112+260. See State v. Richardson, 34–115, 24+354; State v. Curtiss, 126+719.

[5] State v. Toole, 69–104, 72+53.

[6] Reid v. Ham, 54–305, 56+35.

state.[7] A different rule generally applies to extradition from a foreig country under treaty.[8]

3713. Review by courts—Habeas corpus—Courts will presume that tl governor has done his duty and issued a warrant upon proper proof.[9] If court has before it the papers on which the warrant was issued it will d termine their sufficiency. In passing on the sufficiency of an indictment affidavit a court will only determine whether it states substantially a cri under the laws of the demanding state and will not determine its sufficier as a criminal pleading in other respects.[10] If it appears that the warr has been revoked, the prisoner must be discharged and the court cannot quire into the grounds for the revocation.[11] Under Laws 1895 c. 327, a co will not inquire whether the prisoner has been previously unlawfully rested or was in unlawful custody at the time the warrant was served u him.[12] In the absence of any claim by the relator, either in his petition the writ, or in his traverse of the return thereto, that he is not the per named in the warrant, the presumption arising from the identity of name of the relator with the name in the warrant and requisition paper sufficient prima facie evidence of his identity.[13] Where an executive w rant for the surrender of a fugitive from justice is called in question u habeas corpus, the existence of the jurisdictional facts required by the of Congress, in pursuance of which such warrant is issued, must appear i the return to the writ, either by the recitals in the warrant, or by records upon which the same is issued.[14]

EXTRA WORK—See Contracts, 1859; Work and Labor, 10370.
FACT—See note 15.

FACTORS

Cross-References

See Brokers; Warehousemen.

3714. Definition—A factor is an agent intrusted with the possess goods for sale; a commission merchant.[16]

3715. Powers—A factor may in his own name sell the property con to him, or insure it for its full value.[17] He has no implied autho pledge the goods for his own benefit.[18]

3716. Duty to exercise care and diligence—A factor is bound ercise ordinary or reasonable care, skill, and diligence in his emplo that is, the degree of care, skill, and diligence commonly exercised by in the same line of business.[19] He undertakes for that degree wl ordinarily discreet, prudent, and diligent man would exercise in h

[7] Lascelles v. Georgia, 148 U. S. 537; Reid v. Ham, 54 305, 56+35.
[8] U. S. v. Rauscher, 119 U. S. 407; Johnson v. Browne, 205 U. S. 309.
[9] State v. Justus, 84-237, 87+770; State v. Curtiss, 126+719.
[10] State v. O'Connor, 38-243, 36+462; State v. Goss, 66-291, 68+1089.
[11] State v. Toole, 69-104, 72+53.
[12] State v. Justus, 84-237, 87+770.
[13] State v. Bates, 101-303, 112+260.
[14] State v. Richardson, 34-115, 24+354.
[15] Cotton v. Willmar, 99-366, 368, 109+ 835 (silence is as much a fact a
[16] Century Dict.
[17] Johnson v. Martin, 87-370, Baxter v. Sherman, 73-434, 76+2
[18] Baxter v. Sherman, 73-434, Tuttle v. Howe, 14-145 (113, 11 chants' Ins. Co. v. Prince, 50-5
[19] Lake City F. M. Co. v. Mc 301, 20+233; Roberts v. Cobb, 7 540; Selser v. Mpls. C. S. Co., 7 680; State v. Edwards, 94-225 See, as to duty to insure, Evans, 30-89, 14+271.

business under the circumstances. If he exercises less than that degree of skill and knowledge, and loss ensues, he is liable therefor.[20]

3717. Sale by factor to himself—A sale by a factor to himself of the goods consigned to him is voidable at the election of the consignor. A consignor is not estopped from repudiating a purchase of grain by his consignee, unless he acquiesces therein and ratifies the same after being fully informed of the transaction, including a subsequent sale at a profit.[21]

3718. Sale to pay advances—Where a factor has made large advances to his principal upon the property consigned for sale, and the property becomes doubtful security for his reimbursement, and the principal refuses or neglects to comply with his reasonable demands to repay or secure him for such advances, the factor may, after reasonable notice to his principal, in good faith, and with reasonable discretion, sell the property, though directed by the principal to hold it longer.[22]

3719. Liability for difference in grades of grain—A factor is not responsible to his principal by reason of the established grades of grain being different in the market where he is to sell from the grades at other places.[23]

3720. Storage of wheat in mass—A factor, to whom wheat is consigned for storage in an elevator and for sale, may, in the absence of particular instructions, store it in a mass with other wheat of the same grade and quality.[24]

3721. Reimbursement of factor—A factor is entitled to reimbursement from his principal for proper expenditures in connection with his employment.[25]

3722. Liability to purchasers—Where a factor sells goods in his own name he is liable to the purchaser if the title fails.[26]

3723. Refusal to disclose purchaser—A factor may be liable to his principal for refusal to disclose the name of the purchaser of goods.[27]

3724. Return of goods not sold—Contracts are sometimes made for a return of the property to the consignor if not sold within a specified time.[28]

3725. Criminal liability—Failure to report—The statute makes it a criminal offence for a factor to whom grain is consigned for sale on commission not to report to the consignor within twenty-four hours of a sale.[29]

3726. Conversion—Any unauthorized exercise of dominion by the factor over the property consigned renders him liable as for conversion.[30] In an action for conversion, brought against a factor by the true owner of personalty which has come to the possession of the former by the criminal act of another, has been sold by him, and the proceeds received and paid over to the criminal, less expenses and commission, it is no defence that the factor acted throughout the entire transaction in good faith, without negligence, and in the supposition that the criminal was the real owner of the property.[31]

3727. Lien—Special property—No express agreement is necessary to give a factor or commission merchant a lien upon the goods in his hands for

[20] Roberts v. Cobb, 76–420, 79+540.
[21] State v. Edwards, 94–225, 102+697.
[22] Davis v. Kobe, 36–214, 30+662.
[23] Id.
[24] Id.
[25] See Earl v. Thurston, 60–351, 62+439.
[26] Johnson v. Martin, 87–370, 92+221.
[27] Mobile F. & T. Co. v. Potter, 78–487, 81+392.
[28] Main v. Oien, 47–89, 49+523.
[29] R. L. 1905 §§ 2117, 2120; Laws 1905 c. 126; State v. Edwards, 94–225, 102+697 (what constitutes offence—purchase by factor—intent immaterial).
[30] Coleman v. Pearce, 26–123, 1+846 (refusal to sell or account for wheat consigned); Dolliff v. Robbins, 83–498, 86+772 (sale of wheat and misapplication of proceeds).
[31] Johnson v. Martin, 87–370, 92+221.

advances and expenditures made by him in the business of his agency, connected with the goods consigned to him. The lien arises from an agr ment which the law implies. Hence, though the contract between him a his principal is in writing, and contains no express agreement to that effe he is, nevertheless, entitled to a lien, provided the written contract conta no special agreement inconsistent with the existence of such lien.[32] virtue of his lien a factor has a special property in the goods consigned ; may maintain replevin for them.[33]

FAILURE—See note 34.

FAIR TRIAL—See Criminal Law, 2473.

FALSA DEMONSTRATIO NON NOCET—See Boundaries, 1C Chattel Mortgages, 1432.

FALSE CLAIMS—See False Pretences, 3735.

FALSE IMPRISONMENT

Cross-References

See Limitation of Actions, 5655.

3728. What constitutes—The most common form of false imprison is an illegal arrest and imprisonment in jail.[35] Even though an arre lawful, a detention of the prisoner for an unreasonable time without t him before a committing magistrate will constitute a false imprisonm One who merely makes complaint before a committing magistrate o commission of a public offence is not liable for false imprisonment, t the person charged is illegally arrested and imprisoned in conseque Merely taking charge of the person of a ward by his guardian is not a imprisonment.[38] If a private person making an arrest unreasonably in turning the prisoner over to an officer or in bringing him bef magistrate, he is guilty of false imprisonment.[39]

3729. Motive and malice—The fact that the defendant supposed t was acting legally in making an arrest is immaterial, except in mitigat damages. If malice is essential it is only such as the law infers fro wilful doing of an injurious act without lawful excuse.[40]

3730. Probable cause—Probable cause for believing the person d guilty is not involved in an action for false imprisonment,[41] except termining the legality of an arrest and imprisonment without a warran

3731. Pleading—A complaint alleging that at a specified time an the defendant imprisoned the plaintiff without probable cause, has be sufficient.[43]

[32] Haebler v. Luttgen, 61–315, 63+720. See Deering v. Hamilton, 80–162, 83+44; Peterson v. Hall, 61–268, 63+733.

[33] Johnson v. Martin, 87–370, 92+221. See Grinnell v. Illinois C. Ry., 109–513, 124+377.

[34] State v. Butler, 81–103, 106, 83+483.

[35] Judson v. Reardon, 16–431(387); Nixon v. Reeves, 65–159, 67+989; Rauma v. Lamont, 82–477, 85+236; Robie v. Canadian N. Ry., 101–534, 111+1134. See Collins v. Brackett, 34 339, 25+708 (sufficiency of warrant of commitment as justification for arrest); Hawkins v. Manston, 57–323, 59+309 (evidence insuffi justify verdict).

[36] Cochran v. Toher, 14–385(293 son v. Reardon, 16–431(387).

[37] Gifford v. Wiggins, 50–401, See Hawkins v. Manston, 57–323,

[38] Townsend v. Kendall, 4–412(3

[39] Judson v. Reardon, 16–431(38

[40] Id.

[41] Robie v. Canadian N. Ry., 111+1134. See Nixon v. Reeves 67+989.

[42] See Cochran v. Toher, 14–385

[43] Nixon v. Reeves, 65–159, 67+

3732. Evidence—Admissibility—The plaintiff cannot introduce evidence of his good character unless it is assailed. [44] The record of a conviction for the offence for which the arrest was made has been held inadmissible.[45]

3733. Damages—Exemplary damages are recoverable as in other actions ex delicto.[46] The fact that the defendant thought that he was acting legally is admissible in mitigation of damages.[47] Cases are cited below involving the excessiveness of damages awarded.[48]

FALSE PRETENCES

Cross-References

See Larceny, 5486.

3734. What constitutes—Where the false token is a written instrument, it need not be such as, if genuine, would be of legal validity.[49] An indictment will lie for obtaining a deed on the false representation that the land is unincumbered. An indictment will not lie on a mere false warranty, or on representations to be implied from mere promises or contract obligations. But, though there is a warranty or contract on the part of the accused, if there is also false representations of fact, an indictment will lie, provided the representation, and not the warranty or contract, induced the act of the other party.[50] Under the Penal Code there is no such offence as obtaining money or property by false pretences, eo nomine. It is treated as a form of larceny.[51] The statute is not aimed at false pretences that can do no harm, and, where the signature to an instrument is obtained by false pretences, the case comes within the statute only if the instrument, or the affixing of the signature, may possibly prejudice the party who is thus induced to affix it.[52] The false representation need not be oral where the crime is committed by false writings. The conduct and acts of the party may be sufficient without any verbal assertion. Offering the paper for sale or as security for a loan of money, may, of itself amount to a false representation. It is unnecessary that the false pretence or representation should be one which is calculated to deceive men of ordinary intelligence or business prudence; it is sufficient that it is calculated to deceive the weak and ignorant.[53] A criminal false pretence may be accomplished wholly by means of writings in connection with such conduct by the person making use of the same as to reasonably induce confidence in their genuineness, though in fact false and fictitious; and it is not essential that a strict legal liability is

Townsend v. Kendall, 4–412(315); Quinn v. Shortall, 29–106, 12+153.

[44] Cochran v. Toher, 14–385(293).

[45] Wahl v. Walton, 30–506, 16+397.

[46] Woodward v. Glidden, 33–108, 22+127; Rauma v. Lamont, 82–477, 85+236.

[47] Judson v. Reardon, 16–431(387).

[48] Judson v. Reardon, 16–431(387) (ignominious arrest—detention in jail for two hours—verdict for $800 sustained); Woodward v. Glidden, 33–108, 22+127 (imprisonment in city lockup for about three hours—verdict for $2.917 held excessive); Rauma v. Lamont, 82–477, 85+236 (abusive language in making arrest—unnecessary force—pointing revolver at prisoner—confinement in filthy lockup for two and one-half hours—verdicts for $450 and $350 against different defendants sustained); Robie v. Canadian N. Ry., 101–534, 111+1134 (locked up in cell for a night—verdict for $500 sustained).

[49] State v. Henn, 39–464, 40+564; State v. Southall, 77–296, 79+1007.

[50] State v. Butler, 47–483, 50+532.

[51] R. L. 1905 § 5078; State v. Henn, 39–464, 40+564.

[52] State v. Butler, 47–483, 50+532.

[53] State v. Southall, 77–296, 79+1007.

indicated thereby, if the reasonable tendency is to impose on the person d frauded.[54] An intent to defraud is the gist of the offence. Hence a perso is not guilty of an offence in obtaining money by a worthless check if h had good reason to believe and did believe that the check would be paid the ordinary course of business.[55]

3735. Presenting false claim to public officer—The presentation of frau ulent claims to public officers is made a criminal offence by statute.[56]

3736. Indictment—The common form of indictment for larceny is i sufficient under the Penal Code.[57] An indictment for obtaining a part signature to a deed by false representations that the land was unincumbe has been held sufficient.[58] Where a promise is connected with false pretenc and co-operates with them to influence the party deceived thereby, the prom may be alleged and shown as a part of the charge, if the pretence of p or existing facts is sufficient.[59] It is unnecessary to use the exact wo "with intent to defraud." Equivalent language will suffice. An allegat that the accused unlawfully, knowingly, etc., and with intent to deprive true owner of his property by means, color, and aid of certain false writ and representations, then and there known to the accused to be false, amo to an allegation of an intent to defraud.[60] An indictment charging accused with having obtained money from a railway company by fa representing that he had been injured while in the company's employ, been held sufficient against the objection that the names of the na persons to whom the representations were made were not given and the truth of the statements alleged to have been made to the company not directly denied.[61] An indictment for obtaining bank deposits has held insufficient because the fraudulent representations were alleged mentatively and not directly and positively.[62] The property obtained be definitely described.[63]

3737. Variance—A variance as to the person defrauded is not fatal.[64]

3738. Evidence—Admissibility—Cases are cited below involving admissibility of evidence.[65]

3739. Evidence—Sufficiency—Cases are cited below holding ev sufficient[66] or insufficient[67] to warrant a conviction.

SWINDLING

3740. What constitutes—The object of the statute was to codif expand the common law on the subject of cheats. To constitute a co law cheat, the money or property must have been obtained by me some false token, symbol, or device, as distinguished from mere word ever false and fraudulent. And under the statute to constitute the c

[54] State v. Bourne, 86-432, 90+1108.
[55] State v. Johnson, 77-267, 79+968.
[56] R. L. 1905 § 5182; State v. Peebles, 93-311, 101+306 (facts held to constitute offence—conviction sustained).
[57] State v. Henn, 39-464, 40+564.
[58] State v. Butler, 47-483, 50+532.
[59] State v. Thaden, 43-325, 45+614.
[60] State v. Southall, 77-296, 79+1007.
[61] State v. Hulder, 78-524, 81+532.
[62] State v. Clements, 82-448, 85+234.
[63] See State v. O'Connor, 38-243, 36+462.
[64] State v. Bourne, 86-432, 90+11
[65] State v. Southall, 77-296, (crime committed by means of tin —evidence that accused had c other similar time checks held a to prove knowledge and criminal State v. Hulder, 78-524, 81+532 (consistent with truthfulness of re tions of accused held admissible)
[66] State v. Henn, 39-464, 40+5 v. Hulder, 78-524, 81+532; Bourne, 86-432, 90+1108.
[67] State v. Johnson, 77-267, 79+

swindling the property must have been obtained by some false token or device other than mere words.[68] But the use of a mechanical contrivance is unnecessary. The statute covers swindling by means of sleight of hand and tricks, as, for example, the "short-change trick." The fact that the evidence would justify a conviction for larceny does not render the case any the less swindling.[69] A false personation—that is, a man's calling himself by a false name—was not, at common law, and probably is not under the statute, a false token or device. But wearing and exhibiting a police star as a means of passing one's self as a police officer is such a token or device.[70] A device is "that which is devised or formed by design; a contrivance; a project; a scheme,—often a scheme to deceive; a strategem; an artifice." A trick is "a sly, dexterous, ingenious procedure fitted to puzzle or amuse." The statute was intended to reach cheats and swindlers of all kinds and is to be construed broadly.[71] The swindling may be done by the use of other than ordinary playing cards.[72]

3741. Indictment—An indictment in the language of the statute, alleging the different statutory means conjunctively and stating that a more particular description of the means was to the grand jury unknown, has been held sufficient.[73]

3742. Evidence—Admissibility—Cases are cited below involving the admissibility of evidence.[74]

3743. Evidence—Sufficiency—Evidence held sufficient to warrant a conviction.[75]

FALSUS IN UNO FALSUS IN OMNIBUS—See Witnesses, 10345.
FAMILY—See note 76.
FARM—See note 77.
FARM CONTRACTS—See Landlord and Tenant, 5484.
FARM CROSSINGS—See Railroads, 8150.
FAULT—See note 78.

FEDERAL COURTS

Cross-References

See Abatement and Revival, 8; Admiralty; Corporations, 2187, 2190; Injunction, 4488; Judgments, 5141, 5145; Replevin, 8405.

3744. Jurisdiction—A circuit court sitting in this state has jurisdiction of an action by a corporation of another state against a citizen of this state.[79] The jurisdiction of a federal court may be concurrent with that of a state court. Actions involving the same question may be pending in the federal

[68] State v. Wilson, 72–522, 75+715.
[69] State v. Smith, 82–342, 85+12.
[70] State v. Wilson, 72–522, 75+715.
[71] State v. Smith, 82–342, 85+12.
[72] State v. Gray, 29–142, 12+455.
[73] State v. Gray, 29–142, 12+455; State v. Evans, 88–262, 92+976.
[74] State v. Wilson, 72–522, 75+715 (other similar swindles admissible to prove a criminal intent—circumstantial evidence); State v. Evans, 88–262, 92+976 (statements of a fellow conspirator—circumstantial evidence).
[75] State v. Gray, 29–142, 12+455; State v. Smith, 82–342, 85+12; State v. Evans, 88–262, 92+976; State v. Crawford, 95–467, 104+295.
[76] State v. Hays, 105–399, 117+615.
[77] Worley v. Naylor, 6–192(123, 128).
[78] Fay v. Davidson, 13–523(491, 503).
[79] Ames v. Slater, 27–70, 74, 6+418. See Miller v. Natwick, 125+1022 (action by receiver of federal circuit court to recover possession of property which the court, through its receivers, held and was administering—circuit court held to have jurisdiction without reference to amount in controversy).

and state courts at the same time.[80] While the federal courts are in sor respects of limited jurisdiction, they possess the same general authority courts of record at common law, and their judgments and proceedings a protected by the same presumptions and freedom from collateral attack.[81]

3745. Domestic courts—Federal courts are regarded as domestic cou of the state in which they sit.[82]

3746. Conflict with state courts—Property in custodia legis—T federal and state courts defer to one another in respect to property in custody of either. The court first acquiring the custody of property allowed to retain exclusive control.[83] Replevin will not lie in a state co against an officer of a federal court for property in his possession as s officer.[84] But an action for trespass or conversion will lie in a state cc against an officer of a federal court for a wrongful seizure of property.[85]

3747. Decisions conclusive on state courts—The construction of fed statutes by the federal courts is conclusive on the state courts.[86] The ju ments of federal courts cannot be reviewed in state courts.[87] While a s court is bound by the decisions of the United States Supreme Court a the powers of national banks, the application of such decisions to a s bank, in a case brought in the state courts, is to be determined by s decisions.[88]

3748. Following decisions of state courts—Upon questions of ger commercial law the federal courts exercise an independent judgment an not feel bound to follow the decisions of the supreme court of the stat which they sit.[89]

3749. Appeal to circuit court of appeals—Bond—The parties t appeal bond, on appeal from a circuit court to a circuit court of app are liable jointly and severally under our statute. A complaint on su bond has been sustained.[90]

3750. Writ of error from federal supreme court—Stay—A stay of ceedings in our supreme court for a reasonable time will ordinarily be gr as a matter of course to afford counsel an opportunity to sue out a w error from the federal supreme court.[91]

3751. Foreclosure of mortgages—Deficiency judgment—In an for the foreclosure of a mortgage federal courts are authorized to aw personal deficiency judgment.[92]

3752. Clerk of circuit court—A clerk of the circuit court has bee liable for negligence in giving information from the records of his offi

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FEES—See Implied or Quasi Contracts, 4306; Sheriffs and Const and other specific heads.

[80] Patterson v. Barber, 94-39, 43, 101+1064.

[81] Hollister v. U. S. etc. Co., 84-251, 87+776.

[82] Turrell v. Warren, 25-9; Simon v. Mann, 33-412, 23+856; In re Kittson, 45-197, 48+419.

[83] Mollison v. Eaton, 16-426(383); Central T. Co. v. Moran, 56-188, 57+471; Irwin v. McKechnie, 58-145, 147, 59+987.

[84] Lewis v. Buck, 7-104(71); Caldwell v. Arnold, 8-265(231, 234); Druhe v. Fischbein, 101-81, 111+950.

[85] Buck v. Colbath, 7-310(238); Marsh v. Armstrong, 20-81(66); Bennett v. Denny, 33-530, 24+193.

[86] French v. Smith, 81-341, 346, 8

[87] Plainview v. Winona etc. Ry., 32+745.

[88] Hunt v. Hauser, 90-282, 96+85.

[89] Nat. Bank of Com. v. Chi. etc. 224, 235, 46+342; Rosemond v. 54-323, 329, 56+38. See 23 Harv. 139.

[90] Hollister v. U. S. etc. Co., 84-2 776.

[91] See Todd v. Bettingen, 98-1 107+1049. Bradley v. Gamelle (260) is contrary to the present

[92] Grant v. Winona etc. Ry., 85-60.

[93] Selover v. Sheardown, 73-393,

FEE SIMPLE—See Estates, 3157.
FELLOW SERVANTS—See Master and Servant.
FELONIOUS—See Criminal Law, 2406.

FENCES

Cross-References

See Railroads, 8130; Torts, 9636.

3753. No duty to fence at common law—At common law a landowner is not bound to fence his land against the cattle or other animals of another. Each owner is required to keep his stock on his own land. Such is the law of this state, except as modified by statute.[94]

3754. Sufficiency—The statute defines what shall constitute a legal and sufficient fence.[95]

3755. Partition fences—Statute—The subject of partition fences is regulated by statute.[96] When uninclosed lands are afterwards inclosed, the owner or occupant thereof is required to pay one-half of the value of each partition fence extending upon the line between his land and the inclosure of any other owner or occupant.[97] As respects the location of a partition fence it is enough that it is on the line which the parties agree upon as the true dividing line between their lands, and is the place where the fence should be built.[98] In proceedings under R. L. 1905 §§ 2753, 2754, a party erecting the portion of a partition fence assigned to another is entitled to recover double the ascertained value of the fence erected, but not double the fees of the supervisors. The exhibition to the delinquent of the supervisors' certificate of ascertained value, accompanied by a request of payment of such value, is a sufficient demand. In the absence of fraud or mistake, the adjudication of the supervisors upon the sufficiency of a fence erected as a lawful fence, and of its value, is final under R. L. 1905 § 2754.[99] Proceedings by township supervisors for an assignment of the respective shares of a partition fence required to be maintained by the occupants of adjoining lands must be taken against and in the name of the party sought to be charged with the duty. Proceedings against an "occupant," upon notices directed to and served on him, will not authorize a recovery against an "owner" not named or joined, for the amount of an appraisal under the statute. The duties of the supervisors, when acting as fence-viewers, are judicial in their nature, and notice "to the parties" is necessary to give them jurisdiction of the proceedings to make an assignment or appraisal in the case of partition fences.[1] The rights and duties of parties may be fixed by agreement, independent of statute.[2]

[94] Locke v. First Div. etc. Ry., 15–350 (283); Gowan v. St. P. etc. Ry., 25–328, 330; Watier v. Chi. etc. Ry., 31–91, 16+537.

[95] R. L. 1905 § 2749; Fitzgerald v. St. P. etc. Ry., 29–336, 340, 13+168; Oxborough v. Boesser, 30–1, 13+906; Evans v. St. P. etc. Ry., 30–489, 492, 16+271; Halverson v. Mpls. etc. Ry., 32–88, 19+392; Nickolson v. N. P. Ry., 80–508, 511, 83+454; Ellington v. G. N. Ry., 96–176, 104+827.

[96] R. L. 1905 §§ 2748–2768.

[97] R. L. 1905 § 2762; Boenig v. Hornberg, 24–307 (land inclosed and used for pasturage—subsequent abandonment held not to affect liability under statute).

[98] Oxborough v. Boesser, 30–1, 13+906.

[99] Id.

[1] McClay v. Clark, 42–363, 44+255. See Davis v. St. Louis County, 65–310, 313, 67+997.

[2] Youngman v. Ahrens, 104–531, 116+1135.

FERRIES

3756. Charter—Franchise—License—At the present time ferries operated under a license from the county board or municipal council.[3] the early days of the state they were operated under special charters franchises.[4] The right to run a ferry for public accommodation and charge tolls is a franchise subject to legislative control.[5] The unlaw establishment of a rival ferry may be restrained by injunction.[6] An act at law will also lie.[7]

3757. Liability for negligence—The rules governing the liability common-carrier apply to a ferryman. The doctrine of contributory ligence applies. Where a stage company, a common carrier of passen over a certain route, employs, as a part of its route, a ferry owned by anc person, across a river, the ferry owner is liable to respond to the stage com for damages, which it is compelled to and does pay for injuries to passe on its stage, occurring through the negligence of those in charge of the while the stage is in their possession for the purpose of carriage over the r A ferryman has been held not liable for negligence in not maintaining g or rails at the end of his boat, in a case where runaway horses ran upo ferry and over the end.[9]

FEUDAL TENURES—See Estates, 3155.

FIDELITY BONDS—See Indemnity, 4343; Suretyship, 9105.

FIDUCIARY—See note 10.

FIDUCIARY RELATION—See Trusts, 9887.

FIELD NOTES—See Boundaries, 1077.

FILE, FILING, FILED, ON FILE—At common law a "file" thread, string, or wire upon which writs and other exhibits in courts an were fastened or filed for safe keeping and ready reference. At the time a paper is filed when it is delivered to the proper officer and rece him to be kept on file.[11] It is not indispensable that it be delivered to cer at his office,[12] or that it be indorsed by him to the effect that it i While recording is not essential to filing, a recorded instrument is filed.[14]

[3] R. L. 1905 §§ 1246-1254.

[4] Perrin v. O iver, 1-202(176) (original charter provided that no other ferry should be established within two miles, but reserved to the legislature the right to repeal the charter—subsequent act limiting exclusive right to a quarter of a mile along the shore sustained); McRoberts v. Washburne, 10-23(8) (effect of charter to run a ferry as a contract—impairment by subsequent legis'ation—enlargement of limits by special act—limits of franchise to run a ferry across Mississippi at La Crescent); Myrick v. Brawley, 33-377, 23+549 (repeal of franchise—impairment of contract).

[5] McRoberts v. Washburne, 10-23(8).

[6] Id.

[7] McRoberts v. Southern Minn. Ry., 18-108(91, 102).

[8] Blakeley v. LeDuc, 19-187(152); Id., 22-476. See McLean v. Burban (189); Id., 12-530(438).

[9] Evans v. Goodrich, 46-388, 4

[10] Gee v. Gee, 84-384, 387, 87+1

[11] Gorham v. Summers, 25-81; Headley, 33-384, 23+550; Apple v. Wardner, 42-117, 43+791; Bonness, 84-120, 86+896; Bogar 85-261; 88+748; Burkleo v. Bay 224, 120+526, 121+874. See J Griffin, 14-464(346); Slosson v 95(71); Runyon v. Alton, 78-; Rosaaen v. Black Hammer, 10 267.

[12] Burkleo v. Baytown, 10 526, 121+874. See Runyon v. 31, 80+836.

[13] Bogart v. Kiene, 85-2 Burkleo v. Baytown, 108-2 121+874.

[14] Willis v. Jelineck, 27-18,

FINAL—See note 15.
FINAL DECREE OF DISTRIBUTION—See Executors and Administrators, 3652.
FINDING LOST PROPERTY—See Larceny, 5488.
FINDINGS OF FACT BY COURT—See Trial, 9846–9874.
FINDINGS OF FACT BY REFEREE—See Reference, 8318, 8319.
FINDINGS (SPECIAL, BY JURY)—See Trial, 9801–9810.

FINES

3758. Definition—A fine is a pecuniary punishment imposed by a court upon a person convicted of a crime.[16] The words "penalty" and "fine" are sometimes used synonymously.[17]

3759. Amount—Excessive—The statute places certain limits on fines,[18] and the constitution forbids excessive fines.[19] An excessive penalty does not necessarily invalidate the entire law imposing it.[20]

3760. Costs of prosecution—The power to punish by fine does not include the power to add to such a fine as may be deemed a proper penalty for the offence committed the costs of the prosecution.[21]

3761. Commitment until payment—In all cases where the defendant is sentenced and adjudged to pay a fine the court may, in its discretion, as part of the judgment, order that he be committed to the common jail of the county until the fine is paid, not exceeding a reasonable time, to be graduated according to the amount of the fine.[22] Without express statutory authority the court cannot impose a fine and commit the convict to prison until the fine is paid so as to exceed the limit of imprisonment prescribed by statute for the offence.[23] A convict cannot be committed to state prison merely to enforce the payment of a fine and not by way of punishment for a crime; for such purpose imprisonment in the county jail is alone warranted.[24]

3762. Recovery by indictment—Provision is made by statute for the recovery of fines by indictment.[25]

3763. Disposition—Fines are payable into the treasury of the county where they are incurred, in the absence of express provision to the contrary.[26]

FIRE ARMS—See Infants, 4466.
FIRE DEPARTMENT—See Highways, 4173; Municipal Corporations, 6599.
FIRE INSURANCE—See Insurance, 4759.
FIRE LIMITS—See Municipal Corporations, 6599.

[15] Rondeau v. Beaumette, 4-224(163).
[16] See State v. Horgan, 55-183, 186, 56+688.
[17] State v. Horgan, 55-183, 185, 56+688.
[18] R. L. 1905 §§ 4762, 4763, 4776. See § 2502.
[19] See § 1661.
[20] Red Lake Falls M. Co. v. Thief River Falls, 109-52, 122+872.
[21] State v. Cantieny, 34-1, 7, 24+458.
[22] R. L. 1905 §§ 4542, 4776; Mims v. State, 26-494, 5+369; State v. Peterson, 38-143, 36+443; State v. Framness, 43-490, 45+1098; Jordan v. Nicolin, 84-367, 87+916.
[23] Mims v. State, 26-494, 5+369.
[24] State v. Framness, 43-490, 45+1098.
[25] R. L. 1905 § 4542; State v. Horgan, 55-183, 56+688.
[26] R. L. 1905 § 4541; St. James v. Hingtgen, 47-521, 50+700.

FIRES

Cross-References

See Master and Servant, 5840; Railroads, 8204.

3764. Liability for negligence—One who uses fire is bound to exercise o ordinary or reasonable care to prevent it from injuring others. He must exerci a degree of care commensurate with the danger involved. Regard must l had to the dryness of the season, the direction and velocity of the wind, t presence of combustible material, and all the circumstances of the particul case.[27] He is not an insurer of safety. The doctrine of Rylands v. Fletcher d not apply.[28] The gist of an action for damages caused by fire is negligence The doctrine of the turntable cases is inapplicable.[30] One who negligently s fire on his own land, and keeps it negligently, is liable for any injury done the spreading or communication of the fire directly from his land to the pr erty of another, whether through the air or along the ground, and whether might or might not have reasonably anticipated the particular manner and rection in which it is actually communicated.[31] One who, without negligence on his own part, makes an effort to save his own property in danger of dest tion by fire negligently set by another and, in so doing, is personally injure the fire, may recover for such injuries from the person who set the fire. negligent setting of the fire is the proximate cause of the injury.[32]

FIRST MORTGAGE BONDS—See note 33.

FIXTURES

Cross-References

See Mortgages, 6186, 6379.

3765. Definition—A fixture is a chattel annexed to realty. The term plied indiscriminately to chattels so annexed to realty as to become a thereof and irremovable, and to chattels temporarily annexed and remov

[27] Day v. Akeley, 54-522, 56+243 (fire set by sawmill); Riley v. Chi. etc. Ry., 71-425, 74+171 (fire set by locomotive). See Dewey v. Leonard, 14-153(120) (burning grass and stubble on farm); Krippner v. Biebl, 28-139, 9+671 (burning stubble on farm—plowing around field to prevent spread—fire jumping break—fire smo'dering in slough for two days—change in direction and force of wind—proximate cause); Keating v. Brown, 30-9, 13+909 (negligence in burning straw stack—spread of fire to adjoining farm—complaint sustained); Richard v. Schleusener, 41-49, 42+599 (burning dry grass on farm—wind drove fire to adjoining farm—evidence held sufficient to require submission of question of negligence to jury); Ellegard v. Ackland, 43-352, 45+715 (fire negligently kindled on farm—spread to adjoining farm—destruction of trees—father held liable for act of son); Jesperson v. Phillips, 46-147, 48+770 (burning on farm—starting back fire); Whi Ames, 68-23, 70+793 (burning stu farm—issue as to whether person fire was a servant or independe tractor); Swenson v. Erlandson, 90+534 (fire claimed to be set by of threshing machine outfit—evid cause of fire insufficient to charge ant).

[28] Berger v. Mpls. G. Co., 60-2 62+336.

[29] Day v. Akeley, 54-522, 528, Shute v. Princeton, 58-337, 59+1(ger v. Mpls. G. Co., 60-296, 301, (

[30] Erickson v. G. N. Ry., 82-60

[31] Krippner v. Biebl, 28-139, 9

[32] Berg v. G. N. Ry., 70-272, 73

[33] Minn. etc. Ry. v. Sibley, 2-1

[34] Wolford v. Baxter, 33-12, 17 Pond v. O'Connor, 70-266, 73+15

3766. General principles—Tests—In determining whether a chattel has become a fixture in the sense of an irremovable part of the realty, the fact and character of annexation, the nature of the chattel, its adaptability to the use of the realty, the intent of the party in making the annexation, the end sought thereby, and the relation of the party making it to the freehold, are to be considered. Intent alone will not convert a chattel into a fixture. Physical annexation is necessary. The chattel must either be physically annexed itself, or be accessory to or a part of a chattel which is physically annexed.[35] The intention of the parties is the controlling consideration.[36] The chattel need not be fastened to the realty. It may be annexed by force of its weight.[37] The fact that the chattel can be removed without material injury to the realty is an important consideration.[38]

3767. A question of fact—Whether a chattel annexed to realty is a removable fixture, or a permanent and immovable part of the realty is largely a question of fact.[39] The question is sometimes determined by the court as a matter of law, and sometimes submitted to the jury.[40]

3768. Special agreement—Where a chattel is annexed to realty, in such a way that it may be detached without material injury to itself or the realty, it will remain personalty, if such was the agreement of the parties.[41]

3769. General effect of annexation—It is the general rule that whatever is annexed to realty becomes a part thereof, irremovable except by the owner of the realty. The exceptions to this general rule are based on special agreement, the interests of trade, or equitable considerations.[42]

3770. Buildings erected on land of another—It is the general rule that whatever is annexed to the soil becomes part of the inheritance.[43] Prima facie, all buildings belong to the owner of the land on which they stand. It is only by virtue of some agreement with the owner of land that buildings thereon can be held by another as personalty. If erected wrongfully, or without such agreement, they become the property of the owner of the soil. The agreement may be express or implied. Where buildings are erected by one having no interest in the land on which they stand, by the permission or license of the owner of the land, an agreement will be implied, in the absence of facts showing a contrary intention, that they should remain the property of him who erects them.[44] They may be removed by the licensee either before or within a reasonable time after a revocation of the license.[45] If they are erected under a contract for a deed, and the vendee defaults, they

[35] Wolford v. Baxter, 33–12, 21+744; Farmers' L. & T. Co. v. Mpls. etc. Works, 35–543, 548, 29+349; Shepard v. Blossom, 66–421, 424, 69+221; Pond v. O'Connor, 70–266, 268, 73+159, 248.

[36] Warner v. Kenning, 25–173, 175; Farmers' L. & T. Co. v. Mpls. etc. Works, 35–543, 548, 29+349.

[37] Wolford v. Baxter, 33–12, 18, 21+744; Shepard v. Blossom, 66–421, 69+221.

[38] Stout v. Stoppel, 30–56, 58, 14+268; Shapira v. Barney, 30–59, 14+270; Wolford v. Baxter, 33–12, 21+744.

[39] Pond v. O'Connor, 70–266, 268, 73+159, 248.

[40] Capehart v. Foster, 61–132, 63+257.

[41] Hamlin v. Parsons, 12–108(59); Warner v. Kenning, 25–173; Stout v. Stoppel, 30–56, 14+268; Little v. Willford, 31–173, 179, 17+282; Pioneer S. & L. Co. v. Fuller, 57–60, 58+831.

[42] Little v. Willford, 31–173, 178, 17+282; Warner v. Kenning, 25–173; Merchants' Nat. Bank v. Stanton, 55–211, 218, 56+821; Washburn v. Mpls. etc. Ry., 56–200, 57+309; Brandser v. Mjageto, 79–457, 82+860.

[43] Little v. Willford, 31–173, 178, 17+282.

[44] Merchants' Nat. Bank v. Stanton, 55–211, 56+821; Id., 59–532, 61+680; Id., 62–204, 64+390; Little v. Willford, 31–173, 17+282; Mitchell v. Bridgman, 71–360, 74+142; N. W. etc. Co. v. George, 77–319, 325. 79+1028, 1064. See Brandser v. Mjageto, 79–457, 459, 82+860; Woods v. Wulf, 84–299, 303, 87+840.

[45] Little v. Willford, 31–173, 17+282; Ingalls v. St. P. etc. Ry., 39–479, 40+524; Turner v. Kennedy, 57–104, 58+823.

become the property of the owner of the land.[46] The burden of proving ar agreement has been held to be on the defendant.[47]

3771. Time in which to remove—As between landlord and tenant th right to remove fixtures expires with the lease, unless a subsequent removal i provided for in the lease, or the lease is of such uncertain duration that n reasonable opportunity for a previous removal is offered.[48] A tenant who lease in terms gives the right to remove, at the expiration of his term, buil ings which he may have erected, may exercise that right within a reasonab time after his term expires.[49] Where buildings are erected on the land another by his licensee they may be removed either before or within reasonable time after a revocation of the license.[50]

3772. Held a part of realty—A heavy planer in a machine shop;[51] gines, boilers, etc., in a factory;[52] a saloon "bar";[53] a granary;[54] a ho erected by a licensee and not removed within a reasonable time after revocation of the license;[55] steam radiators, electric annunciator, and of desk;[56] machinery in a manufacturing plant;[57] and a heating plant.[58]

3773. Held not a part of realty—A steam engine;[59] a house;[60] coun and shelving;[61] a platform in a store;[62] a church building;[63] hogshe fermenting tubs, and a copper cooler used in a brewery;[64] a building platform scales set in a street with the consent of the village counci a building erected by a licensee;[67] a mantel and tiling;[68] gas fixture a saloon "bar," etc.;[70] an oat-meal mill;[71] machinery in a manufactu plant;[72] a refrigerating plant.[73]

3774. Wrongful removal—Actions—A landlord may maintain trove fixtures unlawfully severed from demised premises by his tenant.[74]

3775. Evidence—Admissibility—Cases are cited below involving admissibility of evidence.[75]

FLAGMEN—See Railroads, 8178.

FLAX—See Warehousemen, 10143.

[46] Little v. Willford, 31-173, 178, 17+282.

[47] Merchants' Nat. Bank v. Stanton, 59-532, 536, 61+680.

[48] Erickson v. Jones, 37-459, 35+267. See Medicke v. Sauer, 61-15, 63+170 (general rule held inapplicable); Shapira v. Barney, 30-59, 14+270.

[49] Smith v. Park, 31-70, 16+490. See Kenny v. Seu Si Lun, 101-253, 112+220.

[50] Little v. Willford, 31-173, 17+282; Ingalls v. St. P. etc. Ry., 39-479, 40+524; Turner v. Kennedy, 57-104, 58+823.

[51] Pond v. Robinson, 38-272, 37+99.

[52] Beaupre v. Dwyer, 43-485, 45+1094.

[53] Woodham v. First Nat. Bank, 48-67, 50+1015. See Capehart v. Foster, 61-132, 63+257.

[54] Wylie v. Grundysen, 51-360, 53+805.

[55] Turner v. Kennedy, 57-104, 58+823.

[56] Capehart v. Foster, 61-132, 63+257.

[57] Shepard v. Blossom, 66-421, 69+221.

[58] Pond v. O'Connor, 70-266, 73+159, 248.

[59] Warner v. Kenning, 25-173.

[60] Hamlin v. Parsons, 12-108(59).

[61] Stout v. Stoppel, 30-56, 14+268.

[62] Shapira v. Barney, 30-59, 14+270.

[63] Little v. Willford, 31-173, 17+282.

[64] Wolford v. Baxter, 33-12, 21+7

[65] Ingalls v. St. P. etc. Ry., 39-4 524; Merchants' Nat. Bank v. S 55-211, 56+821.

[66] O'Donnell v. Burroughs, 55-91,

[67] Merchants' Nat. Bank v. Stan 211, 56+821; Id., 59-532, 61+680; 204, 64+390.

[68] Pioneer S. & L. Co. v. Fuller 58+831.

[69] Capehart v. Foster, 61-132, 6

[70] Medicke v. Sauer, 61-15, 63+1

[71] Merchants' Nat. Bank v. Stat 204, 64+390.

[72] Shepard v. Blossom, 66-421,

[73] N. W. etc. Co. v. George, 77 1028, 1064.

[74] Whitney v. Huntington, 34-26+631.

[75] Little v. Willford, 31-173, 282 (evidence of consent to the r buildings); Woodham v. First N 48-67, 50+1015 (admissions o Merchants' Nat. Bank v. Stanto 61+680; Id., 62-204, 64+390 showing the intention with whic erty was annexed and the relat parties).

FLIGHT—See Criminal Law, 2464.
FOLIO—See note 76.

FOOD

3776. Milk—License for sale—Inspection of dairies—Sellers of milk and cream in municipalities are required to be licensed by the state dairy and food commissioner.[77] Municipalities are authorized to provide by ordinance for the inspection of dairies, dairy herds, milk, and butter, and to regulate the sale of milk and butter within their limits.[78] The sale of skimmed milk is forbidden except under certain conditions.[79]

3777. Cream—The statute prohibiting the sale of cream containing less than twenty per cent. of fat is constitutional.[80] The fact that a manufacturer of condensed milk adopted as a tradename, before the enactment of the statute, the term "Evaporated Cream" to designate his product, does not give him the right to sell such product as cream, evaporated or otherwise.[81]

3778. Butter—Oleomargarine—The statutes enacted for the regulation of the manufacture and sale of oleomargarine and other substitutes for butter have been held constitutional against various objections.[82] The offence prohibited by Laws 1891 c. 11 § 1 is a misdemeanor and the penalty therein specified is to be recovered in accordance with the provisions of G. S. 1878 c. 78 § 10, by a criminal prosecution in a court of competent jurisdiction.[83] To sustain a conviction under R. L. 1905 § 1753, it is not sufficient to prove that by the use of wholesome, necessary, and recognized ingredients there resulted between yellow butter and the article manufactured and sold as oleomargarine a resemblance in qualities inherent in the articles and common to both.[84]

3779. Lard—Cottolene—The statutes regulating the manufacture and sale of lard, cottolene, and other lard substitutes, have been held constitutional.[85]

3780. Baking powder—The statutes regulating the manufacture and sale of baking powder have been held constitutional.[86]

3781. Use of preservatives—The statute relating to the use of preservatives in dairy products, does not prohibit the use of preservatives in meats. It is not in the power of the legislature to forbid the use of all chemical agents in the preservation of articles of food, but it may forbid the use of preservatives injurious to consumers.[87]

3782. Impure food—Liability of seller—A manufacturer who sells to a retailer food injurious to health is liable under the statute to a purchaser of the food from the retailer, for any injury resulting from its consumption.

[76] Hobe v. Swift, 58–84, 59+831. See R. L. 1905 § 5514(4).
[77] R. L. 1905 § 1741; State v. Nelson, 66–166, 68+1066; State v. Elofson, 86–103, 90+309.
[78] R. L. 1905 § 1749; State v. Nelson, 66–166, 68+1066; St. Paul v. Peck, 78–497, 81+389; State v. Elofson, 86–103, 90+309. See Laws 1909 c. 354.
[79] R. L. 1905 § 1740; Sloggy v. Crescent C. Co., 72–316, 75+225.
[80] State v. Crescent C. Co., 83–284, 86+107; State v. Tetu, 98–351, 107+953.
[81] State v. Tetu, 98–351, 107+953.
[82] Butler v. Chambers, 36–69, 30+308; State v. Horgan, 55–183, 56+688; State v. Hammond, 105–359, 117+606.
[83] State v. Horgan, 55–183, 56+688.
[84] State v. Hammond, 105–359, 117+606.
[85] State v. Aslesen, 50–5, 52+220; State v. Hanson, 84–42, 86+768.
[86] Stolz v. Thompson, 44–271, 46+410; State v. Sherod, 80–446, 83+417.
[87] State v. Rumberg, 86–399, 90+1055.

The fact that the manufacturer did not know that the food was impure o injurious is no defence.[88]

FORBEARANCE—See Contracts, 1760.

FORCIBLE ENTRY AND DETAINER

Cross-References

See Execution, 3538; Landlord and Tenant, 5448; Mortgages, 6474.

3783. When lies—An action will lie for an unlawful and forcible tention though the entry was peaceable.[89]

3784. Nature and object of action—The primary object of the statut to prevent those claiming a right of entry or possession of land held versely from redressing their own wrongs by entering into possession a violent and forcible manner.[90] The purpose of the action is to gi speedy remedy to those whose possession of realty has been invaded, and to take the place of the action of ejectment. Forcible entry and deta is essentially an action given to protect actual occupation of realty ag unlawful intrusion or forcible detention; and, to maintain such an ac a plaintiff must prove that he or his grantor was in the actual and pea possession of the premises in dispute. Mere constructive possession i sufficient, though an actual foothold is not always absolutely required.[91]

3785. Pleading—Cases are cited below involving questions of pleadin

FOREIGN CORPORATIONS—See Corporations, 2183-2193; Pr 7814.

FOREIGN EXECUTORS AND ADMINISTRATORS—See ecutors and Administrators, 3674.

FOREIGN GUARDIANS—See Guardian and Ward, 4117.

FOREIGN INSURANCE COMPANIES—See Insurance, 4723 cess, 7814.

FOREIGN JUDGMENTS—See Evidence, 3360; Judgments, 520

FOREIGN JUDICIAL RECORDS—See Evidence, 3360.

FOREIGN LAWS

Cross-References

See Conflict of Laws; Evidence, 3359.

3786. Presumptions—In the absence of pleading and proof to t trary, it will be presumed that the common law prevails in a sister sta

[88] Meshbesher v. Channellene etc. Co., 107-104, 119+428.

[89] Davis v. Woodward, 19-174(137).

[90] Lobdell v. Keene, 85-90, 88+426. See Mercil v. Broulette, 66-416, 69+218; Note, 121 Am. St. Rep. 369.

[91] O'Neill v. Jones, 72-446, 75+701.

[92] Davis v. Woodward, 19-174(137) (complaint sustained); Anderson v. Schultz, 37-76, 33+440 (complaint held possibly sufficient). See Berryhill v. He 444, 95+314 (oral plea of not gui ter in confession and avoidance) son v. Munson, 105-348, 117+ plea of not guilty).

[93] Townsend v. Kendall, 4-412(Aiken v. Franklin, 42-91, 43+8 v. Chi. etc. Ry., 69-476, 72+694; Merritt, 75-12, 77+552.

that it is the same as in this state.[94] There is no presumption that the statutory law of a sister state is the same as our own.[95] In the absence of proof of the statutes of a sister state, the common-law rule will be applied in determining the validity of contracts made in such state.[96]

3787. Construction—The construction given to a foreign statute by the courts of the state of its enactment will be followed in this state in determining rights thereunder.[97]

3788. How proved—The existence and the tenor or effect of all foreign laws may be proved as facts by parol evidence; but, if it appears that the law in question is contained in a written statute or code, the court may, in its discretion, reject any evidence of such law which is not accompanied by a copy thereof.[98] The production of the statutes of another state raises a presumption that the law has continued to be the same as at the date of their passage, until an amendment or repeal is shown. The presumption does not operate retroactively.[99] The unwritten or common law of any other state may be proved as a fact by parol evidence, and the books of reports of cases adjudged in the courts of such states may also be admitted as evidence of such law.[1] Copies of judicial decisions, certified by the state librarian, are admissible.[2]

3789. Necessity of pleading—Not judicially noticed—Foreign laws are regarded as facts to be alleged and proved like other matters of fact. They are not judicially noticed, whether common law or statutes.[3] The laws of another state, as to pleading and proof, stand upon the same footing as any other facts, and are not required to be pleaded when they are mere matters of evidence. Hence, under a general plea of payment by note, a party may introduce in evidence the laws of the state where the note was given and payable to show that in that state this paid and extinguished the original debt.[4]

3790. How pleaded—In pleading a foreign statute it must be set out in full, or at least so much of it as may be material to the cause of action or defence.[5] In pleading the common law of another state it is sufficient to state as a fact what the law is, without setting out decisions of the courts.[6]

3791. Law and fact—Where the evidence of the law of a sister state consists entirely of the judicial opinions of that state, their construction and effect is a question for the court.[7]

FOREIGN RAILWAY COMPANIES—See Process, 7814.

FOREIGN RECEIVERS—See Receivers, 8264.

FOREIGN REPRESENTATIVES—See Executors and Administrators, 3639.

[94] Crandall v. G. N. Ry., 83-190, 86+10; Engstrand v. Kleffman, 86-403, 90+1054; Swedish etc. Bank v. First Nat. Bank, 89-98, 117, 94+218.

[95] Myers v. Chi. etc. Ry., 69-476, 72+694; Pardoe v. Merritt, 75-12, 77+552; Wilcox v. Bergman, 96-219, 104+955; Stewart v. G. N. Ry., 103-156, 114+953. See Dieckhoff v. Fox, 56-438, 442, 57+930; Mowry v. McQueen, 80-385, 83+348.

[96] Mohr v. Miesen, 47-228, 49+862.

[97] Paquin v. Wis. C. Ry., 99-170, 108+882.

[98] R. L. 1905 § 4698; State v. Armstrong, 4-335(251).

[99] State v. Armstrong, 4-335(251).

[1] R. L. 1905 § 4702. See Paquin v. Wis. C. Ry., 99-170, 108+882 (the common law of a sister state is to be ascertained by an examination of the decisions of its courts).

[2] R. L. 1905 § 4704.

[3] See § 3453.

[4] Thomson v. Palmer, 52-174, 53+1137.

[5] Becht v. Harris, 4-504(394); Hoyt v McNeil, 13-390(362).

[6] Crandall v. G. N. Ry., 83-190, 86+10.

[7] Thomson v. Palmer, 52-174, 53+1137.

FORFEITURES

3792. Definition—A forfeiture is the divesting of property, or the termi ation or failure of a right, by or in consequence of a wrong, default, breach of a condition.[8]

3793. Relief against—As a general rule, it may be said that when valid legislative act has determined conditions on which rights shall vest be forfeited, and no fraud has been practiced, no court can interpose co ditions or qualifications in violation of the statute. The courts have power to relieve against statutory forfeitures.[9] It is said that provisions f forfeitures are regarded with disfavor and construed with strictness, and th courts of equity will lean against their enforcement. This, as a general rul is true when applied to cases of contract, and the forfeiture relates to matter admitting of compensation or restoration; but there can be no leanin of the court against a forfeiture which is intended to secure the constructio of a work, in which the public is interested, where compensation cannot b made for the default of the party, nor where the forfeiture is imposed b positive law.[10]

FORGERY

3794. What constitutes—Forgery, at common law, is defined as "the fraudulent making of a false writing, which, if genuine, would be apparently of some legal efficacy."[11] The essential elements of the offence are a writing apparently valid, an intent to defraud, and a forging of the writing.[12] To constitute forgery the writing falsely made must purport to be the writing of another person than the one making it. A false assumption of authority in executing an instrument as the agent of a named principal does not constitute forgery.[13] The signing of another's name without authority is not necessarily forgery.[14] An alteration to be criminal must be such as to alter the legal effect of the instrument. A mere verbal alteration, not affecting the obligation of the instrument, is not enough.[15] The instrument forged must be in fact or appear to be one which, if true, would possess some legal validity.[16] The gist of the offence of forgery is the intent to defraud.[17] To constitute the offence of forging an instrument by which "any person may be bound, affected, or in any way injured," it is unnecessary that the person be bound at the time of the forgery. The fraudulent alteration of a mortgage has been held forgery though the mortgage had been satisfied and recorded so that the act likewise constituted the offence of mutilating a public record.[18] A bill of lading is an "instrument or writing" within the statute.[01]

[8] Century Dict.
[9] State v. Kerr, 51–417, 420, 53+719.
[10] Tower v. Tower etc. Ry., 68–500, 71+691.
[11] State v. Mott, 16–472(424); State v. Rose, 70–403, 73+177; State v. Greenwood, 76–211, 78+1042.
[12] State v. Greenwood, 76–211, 78+1042; State v. Bjornaas, 88–301, 92+980.
[13] State v. Willson, 28–52, 9+28.
[14] State v. Bjornaas, 88–301, 92+980.
[15] State v. Riebe, 27–315, 7+262.
[16] State v. Wheeler, 19–98(70). See State v. Henn, 39–464, 40+564.
[17] State v. Greenwood, 76–211, 78+1042; State v. Bjornaas, 88–301, 92+980.
[18] State v. Adamson, 43–196, 45+152.
[01] State v. Bierbauer, 126+406.

3795. Acts held to constitute forgery—The forging of a note without a revenue stamp;[19] inserting in a chattel mortgage a description of property not embraced in the mortgage as executed;[20] forging a real estate mortgage;[21] changing the second initial of the name of a party to a contract;[22] making false entries in accounts or books which the party is employed to keep.[23]

3796. Acts held not to constitute forgery—An indorsement of payment on a note by the maker, no name being signed;[24] signing an instrument as agent of a named principal without authority;[25] an immaterial verbal alteration in a written instrument.[26]

3797. Indictment—An indictment substantially in the language of the statute is sufficient. It is unnecessary to allege the acts constituting the forgery, if it is alleged that the accused "forged" the instrument set out. It is unnecessary to state the name of the person intended to be defrauded. An indictment which charges that on a certain day and at a certain place the accused, with intent to defraud, did then and there feloniously forge a certain promissory note, of the tenor following, and then sets out the note in full, is sufficient. It is unnecessary that the facts and circumstances showing the fraudulent intent should be alleged; it is enough that they are given in evidence on the trial.[27] It is the general rule that the instrument forged must be set out in haec verba; that is, according to its tenor;[28] but an indictment charging that the forgery consisted in indorsing the name of A on a check dated March 8, 1887, for the sum of fifty dollars, signed and drawn by B, and payable to the order of C, the name of the drawee not being given, has been held sufficient.[29] Where it does not appear on the face of the instrument forged that some one might be defrauded by it, extrinsic facts must be alleged showing that some person might be defrauded by it.[30] Where the instrument forged purports to be signed by an agent, it is unnecessary to aver the authority of the agent.[31] A general allegation of intent to defraud is sufficient, without naming the party defrauded.[32] It is unnecessary to allege the value of property added by forgery to the description in a chattel mortgage.[33]

3798. Variance—A variance as to the initial of the middle name of the accused has been held immaterial.[34]

3799. Evidence—Sufficiency—Evidence held sufficient to warrant a conviction.[35]

UTTERING FORGED INSTRUMENTS

3800. What constitutes—The instrument uttered or published must be one the false making of which would be forgery. Making and uttering a

[19] State v. Mott, 16–472(424).
[20] State v. Adamson, 43–196, 45+152.
[21] State v. Moore, 86–418, 90+786.
[22] State v. Higgins, 60–1, 61+816.
[23] State v. Goodrich, 67–176, 69+815.
[24] State v. Monnier, 8–212(182) (at common law).
[25] State v. Willson, 28–52, 9+28.
[26] State v. Riebe, 27–315, 7+262.
[27] State v. Greenwood, 76–211, 78+1042.
[28] State v. Goodrich, 67–176, 69+815. See State v. Fay, 80–251, 83+158; State v. Greenwood, 76–211, 78+1042; State v. Wheeler, 19–98(70); State v. Riebe, 27–315, 7+262.
[29] State v. Curtis, 39–357, 40+263.
[30] State v. Wheeler, 19–98(70); State v. Riebe, 27–315, 7+262; State v. Goodrich, 67–176, 69+815; State v. Rose, 70–403, 73+177; State v. Greenwood, 76–211, 78+1042; State v. Fay, 80–251, 83+158.
[31] State v. Fay, 80–251, 83+158.
[32] State v. Adamson, 43–196, 45+152; State v. Goodrich, 67–176, 69+815; State v. Greenwood, 76–211, 78+1042.
[33] State v. Adamson, 43–196, 45+152.
[34] State v. Tall, 43–273, 45+449.
[35] Id.

deed as an agent of a named principal under a false assumption of authori is not criminal.[36] The gist of the offence of uttering a forged instrument that the accused, knowing it to be false, uttered it as true, with intent to d fraud.[37] Uttering false entries in accounts or books which the utterer employed to keep, knowing them to be false and intending to defraud is cri inal.[38] The intent to defraud and uttering the instrument "as true" a essential elements of the offence.[39] The intent to defraud must appear fr facts reasonably calculated to show such guilty purpose.[40] Uttering seve forged instruments at the same time and to the same party, as one act, c stitutes but one offence.[41]

3801. Forging and uttering—The forging of an instrument and the ut ing of it were, prior to the Penal Code, separate offences, and are still wh each act is committed by a different person, or by the same person bu different times and as separate acts.[42] The forging of an instrument the uttering of it by the same person, at the same time, as one transact constitute but one offence.[43]

3802. Presumption of intent to defraud—While the intent to defrau uttering a forged indorsement to a bank check may be presumed from fact of affixing the signature of the payee to the check by the accused presumption is rebuttable.[44]

3803. Indictment—An indictment need not allege who made the fals strument or how it was done, or the intent in making it.[45] It must a that the instrument was uttered "as true."[46] If the instrument uttered not import on its face a legal liability it may be invested with apparent validity by allegations of extrinsic facts.[47] All the acts enumerated in 1894 § 6702 (R. L. 1905 § 5060) may be charged in a single count.[48] indictment for uttering as true forged paper, purporting on its face to been issued by an agent in the name of his principal, which sets out t strument in haec verba, need not aver the authority of the agent.[49] A dictment for uttering counterfeit bills under Pub. St. (1849–1858), c. 9 has been held insufficient for not alleging that the bills purported to been issued by a bank authorized by law to issue them.[50] In an indic for uttering a forged mortgage it is unnecessary to allege that the a had in his possession a note which the mortgage secured and that he it off with the mortgage.[51]

3804. Evidence—Admissibility—Cases are cited below involving t missibility of evidence.[52]

[36] State v. Willson, 28-52, 9+28; State v. Rose, 70-403, 73+177.
[37] State v. Goodrich, 67-176, 69+815.
[38] Id.
[39] State v. Cody, 65-121, 67+798.
[40] State v. Bjornaas, 88-301, 92+980.
[41] State v. Moore, 86-422, 90+787.
[42] State v. Wood, 13-121(112); State v. Goodrich, 67-176, 69+815; State v. Klugherz, 91-406, 98+99.
[43] State v. Klugherz, 91-406, 98+99. See State v. Moore, 86-422, 90+787.
[44] State v. Bjornaas, 88-301, 92+980.
[45] State v. Goodrich, 67-176, 69+815; State v. Bierbauer, 126+406 (unnecessary to set out extrinsic matter concerning the execution of the forgery—an allegation that defendant "did utter, dispose put off as true" held sufficient).
[46] Benson v. State, 5-19(6); Cody, 65-121, 67+798.
[47] State v. Rose, 70-403, 73+177.
[48] State v. Greenwood, 76-207, 1117.
[49] State v. Fay, 80-251, 83+158.
[50] Benson v. State, 5-19(6).
[51] State v. Moore, 86-418, 90+78
[52] State v. Thaden, 43-253, 45+ of fellow conspirators); State v. 403, 73+177 (other instruments character); State v. Bjornaas, 88 980 (evidence inconsistent with to defraud).

FORMER ADJUDICATION—See Judgments, 5159–5210.
FORMER CONVICTION OR ACQUITTAL—See Criminal Law, 2425.
FORMER JEOPARDY—See Criminal Law, 2425.
FORMS OF ACTIONS—See Action, 94.

FORNICATION

3805. What constitutes—A single act of sexual intercourse between a man and an unmarried woman does not constitute fornication under R. L. 1905 § 4952. The word "cohabit," as used in the statute, means to live and dwell together.[53]

3806. Indictment—Cases are cited below involving the sufficiency of particular indictments.[54]

FORESTRY—See Woods and Forests.
FORTHWITH—As soon as reasonably possible under the circumstances—not necessarily at once.[55]
FOR VALUE RECEIVED—See Contracts, 1769, 1907.
FOURTEENTH AMENDMENT—See Constitutional Law, 1701.

FRANCHISES

Cross References

See Corporations, 2019; Elections, 2919–2922; Eminent Domain, 3038; Railroads, 8085.

3807. Definition—A franchise is a special privilege conferred by the government upon an individual or corporation, which does not belong to citizens generally of common right;[56] a privilege or immunity of a public nature, which cannot be legally exercised without legislative grant;[57] a privilege conferred by grant from government and vested in individuals.[58] In England a franchise is defined as a royal privilege or branch of the King's prerogative, subsisting in the hands of a subject.[59] The term is often used loosely to denote any right, privilege, or immunity.[60]

3808. What constitutes—An exemption from taxation,[61] a right to operate a public ferry and to charge tolls,[62] a right to exist as a corporate entity,[63]

[53] State v. Williams, 94–319, 102+722; State v. Zempel, 103–428, 115+275.

[54] State v. Miller, 23–352 (sufficiency of indictment conceded); State v. Gates, 27–52, 6+404 (indictment held insufficient for seduction but sufficient for fornication).

[55] Sorenson v. Swensen, 55–58, 56+350; Rines v. German Ins. Co., 78–46, 80+839; Fletcher v. German etc. Co., 79–337, 82+647; Minn. D. Co. v. Scott, 106–32, 119+391. See Insurance, 4787; Justices of the Peace, 5309.

[56] Green v. Knife Falls B. Corp., 35–155, 27+924; International T. Co. v. Am. L. & T. Co., 62–501, 65+78. See Bouvier, Law Dict. (Rawle's ed.).

[57] Blake v. Winona etc. Ry., 19–418(362, 369); State v. Minn. T. M. Co., 40–213, 225, 41+1020; International T. Co. v. Am. L. & T. Co., 62–501, 65+78.

[58] McRoberts v. Washburne, 10–23(8, 12). To same effect, Dike v. State, 38–366, 38+95.

[59] State v. Minn. T. M. Co., 40–213, 225, 41+1020.

[60] State v. G. N. Ry., 106–303, 325, 119+202.

[61] Stevens County v. St. P. etc. Ry., 36–467, 471, 31+942. See First Div. etc. Ry. v. Parcher, 14–297(224, 252); State v. G. N. Ry., 106–303, 325, 119+202.

[62] McRoberts v. Washburne, 10–23(8).

[63] Green v. Knife Falls B. Corp., 35–155 27+924; State v. Minn. T. M. Co., 40–213 226, 41+1020.

and a right to build roads and railways and collect tolls and fares thereon [64] are franchises.

3809. Contract—Impairment—A franchise is a contract within the constitutional provision against laws impairing the obligation of contracts. Unless it reserves the right to do so, the government cannot, at its pleasure, impair or withdraw the privilege conferred.[65]

3810. Property—A franchise is property—an incorporeal hereditament.[66]

3811. Distinction between franchises and powers—There is a distinction between the franchises and powers of a corporation. The authority of a corporation to carry on a particular line of business is a power and not a franchise.[67]

3812. Transfer—A franchise of a public nature is not transferable except by express legislative authority.[68]

3813. Construction—Franchises involving the rights of the public, and in derogation of common right, are to be strictly construed.[69]

3814. Forfeiture—Courts will declare a forfeiture of a franchise only in a very clear case.[70]

3815. Interference—Action—Injunction—For a wrongful interference with a franchise an action for damages will lie, and if the remedy at law is inadequate an injunction will be granted.[71]

FRATERNAL SOCIETIES—See Insurance, 4818.

FRAUD

Cross-References

See Cancelation of Instruments; Contracts, 1810, 1814; Duress; Fraudulent Conveyances; Limitation of Actions, 5652; Reformation of Instruments; Sales, 8589; Statute or Frauds; Vendor and Purchaser, 10059; Undue Influence; and other specific heads.

WHAT CONSTITUTES

3816. Definition—Fraud has been defined as any kind of artifice used by one person to deceive another.[72] While deceit is the typical form of fraud,[73] it is not the exclusive form. There is no limit to the forms which fraud may take. Duress and undue influence are species of fraud.[74] The term "fraud" is sometimes used in a very broad sense, so as to include all acts or omissions which involve a breach of legal duty and are injurious to the rights of others.[75] Fraud differs from negligence in that it is an intentional wrong.[76]

[64] Blake v. Winona etc. Ry., 19-418(362).

[65] McRoberts v. Washburne, 10-23(8). See St. Paul v. Chi. etc. Ry., 63-330, 63+267, 65+649, 68+458.

[66] McRoberts v. Washburne, 10-23(8).

[67] State v. Minn. T. M. Co., 40-213, 41+1020; Brady v. Moulton, 61-185, 63+489; International T. Co. v. Am. L. & T. Co., 62-501, 65+78.

[68] State v. Dist. Ct., 31-354, 358, 17+954; State v. Savings Bank, 102-199, 113+268.

[69] St. Louis River etc. Co. v. Nelson, 51-10, 52+976; N. W. etc. Co. v. O'Brien, 75-335, 339, 77+989; State v. St. P. etc. Ry., 98-380, 108+261. See Minn. & P. Ry. v. Sibley, 2-13(1, 15).

[70] State v. Minn. T. M. Co., 40-213, 225, 41+1020.

[71] McRoberts v. Washburne, 10-23(8).

[72] Brown v. Manning, 3-35(13, 16); Roebuck v. Wick, 98-130, 107+1054.

[73] Humphrey v. Merriam, 32-197, 20+138. See In re Shotwell, 43-389, 393, 45+842.

[74] Neibuhr v. Gage, 99-149, 108+884; Graham v. Burch, 44-33, 36, 46+148.

[75] Cock v. Van Etten, 12-522(431); In re Shotwell, 43-389, 392, 45+842.

[76] Leighton v. Grant, 20-345(298, 307).

3817. In law and in equity—As to what constitutes fraud, the rules at law and in equity are the same.[77] But fraud is a recognized head of equity jurisdiction, and owing to its peculiar remedies equity is often able to give relief from fraud where the common law is helpless.[78] In order to prevent fraud a court of equity will sometimes give to the acts of parties an effect different from that which they intended.[79] But in giving relief equity must act in accordance with those rules which have been established by statute and judicial authority.[80]

3818. Essentials of deceit—A person is liable for deceit if he makes a false representation of a past or existing material fact susceptible of knowledge, knowing it to be false, or as of his own knowledge without knowing whether it is true or false, with intention to induce the person to whom it is made to act in reliance upon it, and such person, acting with reasonable prudence, is thereby deceived and induced to act in reliance upon it, to his pecuniary damage.[81] It is unnecessary that the person making the representation should receive any benefit from the deceit, or be in collusion with the party benefited.[82] Words are unnecessary.[83] It is immaterial that the party was under no obligation to make a representation.[84] The essentials of deceit are the same whether it is used as a defence or a cause of action.[85]

3819. Intention to deceive—Knowledge of falsity—An intention to deceive is an essential element of deceit. A false representation is not actionable unless it was made with a fraudulent intent.[86] But to constitute fraudulent intent it is not essential that the party knew his statements to be false. Fraudulent intent may be proved by showing that the party knew his statements to be false; or that, having no knowledge of their truth or falsity, he did not believe them to be true; or that, having no knowledge of their truth or falsity, he yet represented them to be true of his own knowledge.[87] An unqualified affirmation amounts to an affirmation as of one's own knowledge.[88]

[77] See Humphrey v. Merriam, 32–197, 200, 20+138; Pollock, Torts (8 ed.), 280.

[78] See Belote v. Morrison, 8–87(62); Nolan v. Dyer, 75–231, 237, 77+786; Baart v. Martin, 99–197, 211, 108+945.

[79] Hall v. Southwick, 27–234, 6+799.

[80] Hone v. Woodruff, 1–418(303).

[81] Hone v. Woodruff, 1–418(303); Brown v. Manning, 3–35(13); Brooks v. Hamilton, 15–26(10, 14); Wilder v. De Cou, 18–470(421); Kelly v. Rogers, 21–146, 152; Burr v. Willson, 22–206; Merriam v. Pine City L. Co., 23–314, 324; Humphrey v. Merriam, 32–197, 20+138; Griffin v. Farrier, 32–474, 21+553; Thompson v. Libby, 36–287, 31+52; Busterud v. Farrington, 36–320, 31+360; Clark v. Lovering, 37–120, 33+776; Bullitt v. Farrar, 42–8, 43+566; Haven v. Neal, 43–315, 45+612; Johnson v. Truesdale, 46–345, 48+1136; Alden v. Wright, 47–225, 49+767; Knappen v. Freeman, 47–491, 495, 50+533; Hedin v. Mpls. M. & S. Institute, 62–146, 64+158; Riggs v. Thorpe, 67–217, 69+891; Kellogg v. Holm, 82–416, 85+159; Roebuck v. Wick, 98–130, 107+1054; First Nat. Bank v. Person, 101–30, 111+730; Anderson v. Heileman, 104–327, 116+655; Providence J. Co. v. Crowe, 108–84, 121+415. See Zimmerman v. Burchard, 126+282.

[82] Busterud v. Farrington, 36–320, 31+360.

[83] Place v. Johnson, 20–219(198, 209).

[84] Kelly v. Rogers, 21–146, 152.

[85] Wilder v. De Cou, 18–470(421).

[86] Faribault v. Sater, 13–223(210, 216); Wilder v. De Cou, 18–470(421); Humphrey v. Merriam, 32–197, 20+138; Bullitt v. Farrar, 42–8, 43+566; Holt v. Sims, 94–157, 102+386; Kelly v. Pioneer P. Co., 94–448, 103+330. See In re Shotwell, 43–389, 392, 45+842.

[87] Humphrey v. Merriam, 32–197, 20+138; Bullitt v. Farrar, 42–8, 43+566; Haven v. Neal, 43–315, 45+612; Knappen v. Freeman, 47–491, 50+533; Hedin v. Mpls. M. & S. Institute, 62–146, 64+158; Riggs v. Thorpe, 67–217, 69+891. See, as to the necessity of the law transcending moral standards in this connection and reaching objective standards, Holmes, Common Law, 132, 324.

[88] Wilder v. De Cou, 18–470(421, 429); Bullitt v. Farrar, 42–8, 43+566; Haven v. Neal, 43–315, 45+612; Knappen v. Freeman, 47–491, 50+533; Carlton v. Hulett, 49–308, 319, 51+1053.

It is immaterial whether a statement as of one's own knowledge is made innocently or knowingly. It is as fraudulent to affirm the existence of a fact about which one is in entire ignorance as it is to affirm what is false, knowing it to be so.[89] A false representation due to ignorance amounting to negligence is actionable.[90] It is sometimes said that one is liable if he represents that as true which is false, and the truth or falsity of which he is presumed to know, and is therefore estopped to deny that he knew it was false.[91]

3820. Materiality of representation—To constitute a fraud a representation must relate to a material fact.[92] The test of materiality is whether the representation would naturally affect the conduct of the party addressed.[93]

3821. Acting upon representation—A false representation is not actionable unless it deceived the complainant—unless he acted in reliance upon it.[94] It need not be the sole motive or inducement; it is enough if it has a material influence—is one of the substantial inducements.[95] If a party makes an independent investigation of the facts and relies thereon, he cannot recover for the false representation.[96]

3822. Negligence of party defrauded—A false representation is not actionable if it is made under such circumstances and in relation to such a subject-matter that a person of ordinary or reasonable prudence would not rely upon it.[97] A party seeking to avoid a contract for fraud must himself be reasonably free from negligence.[98] If, in a business transaction, one of the parties makes a positive and false representation as to a material matter susceptible of knowledge, and with intent to deceive, it is no defence that the other party might have learned the truth if he had sought information from other available sources[99]—that he was lacking in ordinary business prudence

[89] Bullitt v. Farrar, 42-8, 43+566.

[90] Kiefer v. Rogers, 19-32(14). See Leighton v. Grant, 20-345(298); State v. Weyerhauser, 68-353, 367, 71+265.

[91] Brooks v. Hamilton, 15-26(10, 14).

[92] Wilder v. De Cou, 18-470(421) (representation as to inventory of stock and undervaluation held material); Kelly v. Rogers, 21-146 (representation as to expiration of time of redemption from a foreclosure sale); Burr v. Willson, 22-206 (representation as to collectibility of judgment held material); Newell v. Randall, 32-171, 19+972 (merchant's statements as to his financial condition held material); Griffin v. Farrier, 32-474, 21+553 (must relate to material facts of a nature to affect the conduct of others); Busterud v. Farrington, 36-320, 31+360 (representations as to matters affecting the value of property made to a prospective purchaser are material); Huffman v. Long, 40-473, 42+355 (representation by a vendor that he was merely an agent held immaterial); Winston v. Young, 52-1, 53+1015 (representation by executor as to solvency of an estate held immaterial); Lofgren v. Peterson, 54-343, 56+44 (representations as to the location and price of realty held material); Hedin v. Mpls. M. & S. Institute, 62-146, 64+158 (representation by a physician as to the curability of an injury held material); Niebels v. Howland, 97-209, 214, 106+337 (exchange of property—representation as to contents of a contract); Roebuck v. Wick, 98-130, 107+1054 (representation as to other sales); Ritko v. Grove, 102-312, 113+629 (representation as to value, quality, and condition of land held material).

[93] Griffin v. Farrier, 32-474, 21+533. See Holmes, Common Law, 326.

[94] Chouteau v. Rice, 1-106(83, 90); Hone v. Woodruff, 1-418(303, 307); Cochrane v. Halsey, 25-52, 64; Humphrey v. Merriam, 32-197, 20+138; McKeen v. Haseltine, 46-426, 430, 49+195. See, as to the time within which the party must act. Lewis v. Pratt, 11-57(31).

[95] Moline v. Franklin, 37-137, 33+323; Marshall v. Gilman, 52-88, 53+811. Whether the party would have acted in the absence of the representation, is sometimes made the test. Burr v. Willson, 22-206. This test is discredited.

[96] Humphrey v. Merriam, 32-197, 20+138. See Cobb v. Wright, 43-83, 44+662.

[97] Morrill v. Madden, 35-493, 29+193; Cobb v. Wright, 43-83, 44+662. See Zimmerman v. Burchard, 126+282.

[98] Mpls. etc. Ry. v. Chisholm, 55-374, 377, 57+63.

[99] Faribault v. Sater, 13-223(210); Kiefer v. Rogers, 19-32(14); Burr v. Willson, 22-206; Porter v. Fletcher, 25-493; Olson v. Orton, 28-36, 8+878; Reynolds v. Frank-

in relying on the representation.[1] And especially is this true, if the representation is of a nature to discourage investigation or lull suspicion, or any trick or artifice is resorted to to prevent inquiry,[2] or if the parties have not equal means of knowledge.[3]

3823. Concealment and silence—Fraud may consist in the suppression of the truth, or the suggestion of a falsehood.[4] One may be guilty of fraud by keeping silent when he ought to speak.[5] If a party conceals a fact material to the transaction, and peculiarly within his own knowledge, knowing that the other party acts on the presumption that no such fact exists, it is as much of a fraud as if the existence of such fact were expressly denied, or the reverse of it expressly stated.[6] To tell half a truth only is to conceal the other half, and may amount to a false representation under the circumstances.[7] One may make a false representation by indirect as well as by direct statements.[8] To sell sheep without disclosing the fact that they were affected with a contagious disease, has been held a fraud.[9] It is the general rule that a purchaser, when buying on credit, is not bound to disclose the facts of his financial condition. If he makes no actual misrepresentations, if he is not asked any questions, and does not give any untrue, evasive, or partial answers, his mere silence as to his general bad pecuniary condition, or his indebtedness, will not constitute a fraudulent concealment.[10]

3824. Expressions of opinion—As a general rule expressions of mere opinion or conjecture are not actionable.[11] The reason generally assigned for this rule is that a person relying on such expressions is wanting in ordinary prudence.[12] There are many cases in which even a false assertion of an opinion will amount to a fraud, the reason being that, under the circumstances, the other party has a right to rely upon what is stated or represented. Thus,

lin, 39–24, 38+636; Maxfield v. Schwartz, 45–150, 47+448; Redding v. Wright, 49–322, 51+1056; Carlton v. Hulett, 49–308, 51+1053; Erickson v. Fisher, 51–300, 53+638; Lofgren v. Peterson, 54–343, 56+44; Wyman v. Gillett, 54–536, 56+167; Stearns v. Kennedy, 94–439, 103+212; Lang v. Merbach, 96–431, 105+415; Bonness v. Felsing, 97–227, 106+909; Johnston v. Johnston, 107–109, 119+652. See Griffin v. Farrier, 32–474, 21+553.

[1] Johnson v. Wallower, 18–288(262, 269); Erickson v. Fisher, 51–300, 53+638; Shrimpton v. Philbrick, 53–366, 55+551.

[2] Faribault v. Sater, 13–223(210, 219); Cummings v. Thompson, 18–246(228, 233); Burr v. Willson, 22–206; Griffin v. Farrier, 32–474, 21+553; Wyman v. Gillett, 54–536, 56+167; Adolph v. Mpls. & P. Ry., 58–178, 59+959; Mountain v. Day, 91–249, 252, 97+883.

[3] Faribault v. Sater, 13–223(210, 219); Cummings v. Thompson, 18–246(228, 233).

[4] Chouteau v. Rice, 1–106(83); Brown v. Manning, 3–35(13, 16).

[5] Cochrane v. Halsey, 25–52, 64; Rollins v. Mitchell, 52–41, 49, 53+1020.

[6] Thomas v. Murphy, 87–358, 91+1097; Niebels v. Howland, 97–209, 214, 106+337.

[7] Newell v. Randall, 32–171, 19+972.

[8] Rollins v. Mitchell, 52–41, 53+1020.

[9] Marsh v. Webber, 13–109(99); Johnson v. Wallower, 15–472(387); Id., 18–288(262).

[10] Newell v. Randall, 32–171, 19+972. See Cochrane v. Halsey, 25–52, 64.

[11] Wilder v. De Cou, 18–470(421) (statements of value may be either of fact or opinion); Merriam v. Pine City L. Co., 23–314 (statements of opinion founded on information derived from others); Cochrane v. Halsey, 25–52, 64 (as to value of business); Sollund v. Johnson, 27–455, 8+271 (representation as to solvency of another actionable); Wilkinson v. Clauson, 29–91, 12+147 (as to condition and character of premises); Perkins v. Trinka, 30–241, 15+115 (as to legal effect of tax deed); Reynolds v. Franklin, 39–24, 38+636 (representations as to title held not mere expressions of opinion); Cobb v. Wright, 43–83, 44+662 (as to title—effect of legal transactions); Winston v. Young, 47–80, 49+521 (representations as to solvency of an estate held not mere opinions); Redding v. Wright, 49–322, 51+1056 (representations as to profitableness of a business held not mere opinions); Doty v. Chi. etc. Ry., 49–499, 52+135 (opinion of physician as to probability of a cure).

[12] Cochrane v. Halsey, 25–52, 64; Griffin v. Farrier, 32–474, 21+553; Cobb v. Wright, 43–83, 44+662. See 17 Harv. L. Rev. 193.

the liability may arise where one has or assumes to have knowledge upon a subject of which the other is ignorant, and knowingly makes false statements, on which the other relies. Where parties possess special learning or knowledge on the subject with respect to which their opinions are given, such opinions are capable of approximating to the truth. And for a false statement of them, when deception is designed and injury has followed from reliance on the opinions, an action will lie.[13] Representations of a seller as to the present or prospective value of his property are not ordinarily actionable.[14]

3825. Misrepresentations of law—As a general rule a misrepresentation of a matter of law is not actionable.[15] Fraud cannot be predicated upon misrepresentations as to the legal effect of instruments, there being no misunderstanding as to their contents or fiduciary relation between the parties.[16]

3826. Innocent misrepresentations—A mere innocent misrepresentation by mistake can never be made the ground of a personal action for fraud.[17] But a court of equity may rescind an executed contract for an innocent misrepresentation.[18]

3827. Promises and statements of intention—To amount to a fraud a representation must relate to a past or existing fact, and not to a future fact. Fraud cannot be predicated on a mere promise or statement of intention unperformed,[19] unless it was made with no intention to perform and with intent to deceive.[20]

3828. Necessity of damage—Damage is of the essence of an action for deceit—an essential element of the cause of action, and not merely a consequence flowing from it. Fraud without damage, or damage without fraud, will not sustain an action.[21] Deceit, not followed by what the law recognizes as a wrong, is not actionable.[22]

3829. Communication through third person—Where false and fraudulent representations are made to one person, with the expectation and purpose that they should be communicated to another, and they are so communicated to and acted on by him to his prejudice, the result of the fraud must be deemed to have been contemplated by the party making such representations, and he is liable therefor.[23]

3830. Disparity between parties—Even as between adults, when a transaction is assailed on the ground of fraud, undue influence, etc., their disparity in intelligence and experience, or in any other respect which gives one an

[13] Hedin v. Mpls. M. & S. Institute, 62–146, 64+158 (positive assurance by physicians that patient could be cured); Vilett v. Moler, 82–12, 84+452 (representations as to time required to learn the barber's trade). See Haarstad v. Gates, 107–565, 119+390.

[14] See §§ 8590, 10060.

[15] See Cummings v. Thompson, 18–246 (228, 231); Kelly v. Rogers, 21–146; Perkins v. Trinka, 30–241, 15+115; Colby v. Life I. & I. Co., 57–510, 516, 59+539.

[16] Catlin v. Fletcher, 9–85(75); Jaggar v. Winslow, 30–263, 15+242.

[17] Faribault v. Sater, 13–223(210, 216); Brooks v. Hamilton, 15–26(10, 16). An action for deceit must be based on fraud and not on merely negligent misrepresentation. O'Brien v. Am. B. Co., 125+1012.

[18] Brooks v. Hamilton, 15–26(10).

[19] Hone v. Woodruff, 1–418(303); Evans v. Folsom, 5–422(342); Catlin v. Fletcher, 9–85(75); Albitz v. Mpls. etc. Ry., 40–476, 42+394; Columbia E. Co. v. Dixon, 46–463, 465, 49+244; Bay View L. Co. v. Meyers, 62–265, 64+816; Hodsden v. Hodsden, 69–486, 72+562.

[20] Albitz v. Mpls. etc. Ry., 40–476, 42+394.

[21] Belote v. Morrison, 8–87(62, 69); Doran v. Eaton, 40–35, 41+244; Alden v. Wright, 47–225, 49+767; Winston v. Young, 52–1, 5, 53+1015; Parker v. Jewett, 52–514, 55+56; Anderson v. Heileman, 104–327, 116+655. See McNair v. Toler, 21–175.

[22] Albrecht v. Long, 27–81, 83, 6+420.

[23] Chubbuck v. Cleveland, 37–466, 35+362.

ascendency over the other, or tends to prevent the latter from exercising an intelligent and unbiased judgment, is always a most vital consideration with the courts. Where a contract is improvident and unfair, courts of equity have frequently inferred fraud from the mere disparity of the parties.[24] But the mere fact that parties are not upon an equal footing in point of intelligence and business experience, does not render an expression of opinion actionable.[25]

3831. Doing what the law permits or directs—Fraud cannot be predicated on an act which the law directs or authorizes.[26] But one may be guilty of fraud though he conforms to all the requirements of a statute, and it may be a fraud to take advantage of a statute.[27] Equity will not allow one to hold the benefits of a fraud, though obtained under the forms of law.[28]

3832. Signatures obtained by fraud—Where one of two contracting parties is fraudulently induced to execute a written instrument upon the false representation that it expresses the agreement which they had made, the party defrauded may defend against the enforcement of the fraudulent instrument by the other party, even though he may be chargeable with want of prudence in relying upon the false representations.[29] This defence may also be made when a third party, for whose benefit the contract was made, seeks to enforce it.[30] An assignee takes subject to the defence, if the instrument is non-negotiable and there is no ground for an estoppel.[31] The evidence to establish the fraud must be clear and strong.[32] The fact that the person signing is unable to read English, or unacquainted with business transactions, is a material consideration in determining the question of fraud.[33] The subject is governed by a special statute where the instrument is negotiable.[34]

3833. Abuse of confidence—When a peculiarly confidential relation exists between the parties, the law exacts the utmost good faith in all transactions. Courts of equity will often interfere in such cases, where, but for the peculiar relations, they would either abstain from granting relief, or would grant it in a very moderate manner. If confidence is reposed, it must be faithfully acted upon, and preserved from any intermixture of imposition. If influence is acquired, it must be kept free from the taint of selfish interests and cunning bargains. The general principle which governs cases of this kind is that, if confidence is reposed, and that confidence is abused, courts of equity will grant relief.[35] Where confidence is reposed by one brother in another, and that confidence is abused by the brother having it in his power, for his own advantage, to sacrifice those interests which he is bound to protect, he will not be permitted to retain any undue advantage he may have gained. There is no presumption of fiduciary relations between brothers, especially where both of them are of

[24] Johnson v. N. W. etc. Co., 56-365, 376, 59+992. See Adolph v. Mpls. & P. Ry., 58-178, 59+959.

[25] Perkins v. Trinka, 30-241, 242, 15+115.

[26] Western L. Assn. v. McComber, 41-20, 42+543; Jacoby v. Parkland D. Co., 41-227, 43+52.

[27] Scott v. Reed, 33-341, 23+463.

[28] Baart v. Martin, 99-197, 211, 108+945.

[29] Aultman v. Olson, 34-450, 26+451; Maxfield v. Schwartz, 45-150, 47+448; Erickson v. Fisher, 51-300, 53+638; Shrimpton v. Philbrick, 53-366, 55+551; McCarty v. N. Y. etc. Co., 74-530, 77+426; Eggleston v. Advance T. Co., 96-241, 104+891; Providence J. Co. v. Crowe, 108-84, 121+415. See Follansbee v. Johnson, 28-311, 9+882.

[30] Maxfield v. Schwartz, 45-150, 47+448.

[31] Paulsen v. Koon, 85-240, 88+760. See Eggleston v. Advance T. Co., 96-241, 247, 104+891.

[32] McCall v. Bushnell, 41-37, 42+545; Oxford v. Nichols, 57-206, 58+865; Engstad v. Syverson, 72-188, 75+125; Loveland v. Gravel, 95-135, 103+721.

[33] Adolph v. Mpls. & P. Ry., 58-178, 59+959.

[34] See § 1019.

[35] Pinger v. Pinger, 40-417, 42+289; Shevlin v. Shevlin, 96-398, 105+257; Naeseth v. Hommedal, 109-153, 123+287. See King v. Remington, 36-15, 29+352.

mature years and have had experience in the matters of business as to which fraud is alleged. The fact that such confidential relation existed must be affirmatively established by proof. The burden of proof rests upon the party asserting it.[36]

EFFECT

3834. In general—Fraud renders voidable everything into which it enters. A court will look through any form of instrument or proceeding, no matter how solemn, in order to prevent a party from profiting by his fraud. It is immaterial that he has conformed to all the formal requirements of the law.[37] A court will not take a single step to save harmless a party who is guilty of fraud and no right can arise out of a fraudulent act.[38]

ACTIONS

3835. Demand—A demand is not ordinarily necessary before bringing an action for fraud.[39]

3836. Pleading—In pleading fraud the material facts constituting the fraud must be specifically alleged. A general charge of fraud is unavailing.[40] But a general statement of the matters of fact constituting the fraud is sufficient. It is unnecessary to allege minutely all the circumstances that may tend to prove the general charge.[41] In pleading deceit an intent to deceive should be directly alleged.[42] It should be alleged that the defendant knew the representation to be false.[43] An allegation of damage is essential.[44] Fraud is new matter to be specially pleaded. It is inadmissible under a denial.[45] So is a waiver or ratification.[46] Cases are cited below involving questions of variance,[47] and the sufficiency of particular pleadings.[48]

3837. Presumptions and burden of proof—As a general rule fraud is not presumed, but must be affirmatively proved.[49] Where the parties stand in a fiduciary or confidential relation fraud is generally presumed.[50] In an action for deceit the falsity of the representations must be proved.[51]

3838. Evidence—Admissibility—As it is usually necessary to prove fraud by circumstantial evidence great liberality is allowed in the admission of evidence,[52] especially in the cross-examination of the party charged with fraud.[53]

[36] Shevlin v. Shevlin, 96-398, 105+257.
[37] Baart v. Martin, 99-197, 211, 108+945.
[38] Thompson v. Bickford, 19-17(1, 7).
[39] Sollund v. Johnson, 27-455, 8+271.
[40] Kelley v. Wallace, 14-236(173); Brooks v. Hamilton, 15-26(10, 15); Cummings v. Thompson, 18-246(228); Kraemer v. Deustermann, 37-469, 35+276; Rand v. Hennepin County, 50-391, 52+901; Morrill v. Little Falls Mfg. Co., 53-371, 55+547; Smith v. Prior, 58-247, 59+1016; Alden v. Christianson, 83-21, 85+824; Johnson v. Velve, 86-46, 90+126.
[41] Cummings v. Thompson, 18-246(228); Johnson v. Velve, 86-46, 90+126.
[42] McKibbin v. Ellingson, 58-205, 59+1003; Hodsden v. Hodsden, 69-486, 72+562; Holt v. Sims, 94-157, 102+386; Ahern v. Hindman, 101-34, 111+734.
[43] Smith v. Kingman, 70-453, 73+253.
[44] McNair v. Toler, 21-175; Alden v. Wright, 47-225, 49+767; Parker v. Jewett, 52-514, 55+56; Anderson v. Heileman, 104-327, 116+655.
[45] Daly v. Proetz, 20-411(363); Livingston v. Ives, 35-55, 27+74; MacFee v. Horan, 40-30, 41+239; Duford v. Lewis, 43-26, 44+522; Morrill v. Little Falls Mfg. Co., 53-371, 55+547; Christianson v. Chi. etc. Ry., 61-249, 63+639; Reeves v. Cress, 80-466, 83+443; Trainor v. Schutz, 98-213, 107+812.
[46] Newell v. Randall, 32-171, 19+972.
[47] Leighton v. Grant, 20-345(298, 306); Cochrane v. Halsey, 25-52, 61.
[48] Brown v. Manning, 3-35(13); Howland v. Fuller, 8-50(30); Egan v. Gordon, 65-505, 68+103; Mlnazek v. Libera, 83-288, 86+100; Loveland v. Gravel, 95-135, 103+721; Ritko v. Grove, 102-312, 113+629; Haarstad v. Gates, 107-565, 119+390; Newstrom v. Turnblad, 108-58, 121+236; Providence J. Co. v. Crowe, 108-84, 121+415.
[49] Berkey v. Judd, 22-287, 294.
[50] Ashton v. Thompson, 32-25, 18+918.
[51] Peterson v. Nelson, 41-506, 43+967.
[52] Berkey v. Judd, 22-287, 294 (circum-

Other acts of fraud forming a part of a general scheme of fraud are admissible.[54] Parol evidence is admissible to show fraud in a written instrument.[55] The defrauded party may testify directly as to the effect of the representations on his mind and that he acted in reliance upon them.[56]

3839. Evidence—Sufficiency—Proof of fraud may be made out by a fair preponderance of evidence in civil actions.[57] But fraud cannot be established by equivocal evidence—by evidence of facts that are equally consistent with an honest intention.[58] Where the object is to avoid a written instrument for fraud the evidence must be clear and strong.[59]

3840. Law and fact—The question of fraud is for the jury, unless the evidence is conclusive.[60]

3841. Measure of damages—In an action for deceit the measure of damages is the natural and proximate loss sustained.[61] The defrauded party is entitled to recover the difference in the value of what he was induced to part with and the value of what he got in the transaction.[62] This general rule must be applied with reference to the facts of the particular case. Thus, where the plaintiff is induced by deceit to purchase property for cash, another way of stating the rule is the difference between the value of the property purchased and the purchase price.[63] Expenses of suit are not recoverable.[64] It seems that a party may be entitled to recover nominal damages for deceit.[65] The amount of damages is a question of fact for the jury, within reasonable limits.[66]

FRAUDS (STATUTE OF)—See Statute of Frauds.

stantial evidence); Graham v. Burch, 44–33, 46+148 (id.); Mountain v. Day, 91–249, 252, 97+883 (all the circumstances surrounding the parties may be shown). See § 3910.

[53] See § 3915.

[54] See §§ 2459, 3253.

[55] See § 3376.

[56] Berkey v. Judd, 22–287; Smith v. Kingman, 70–453, 73+253.

[57] Burr v. Willson, 22–206. See Sollund v. Johnson, 27–455, 8+271; Brown v. Chadbourn, 62–253, 64+566; Ahern v. Hindman, 101–34, 111+734.

[58] Sprague v. Kempe, 74–465, 77+412.

[59] Cummings v. Baars, 36–350, 31+449; McCall v. Bushnell, 41–37, 42+545; Maxfield v. Schwartz, 45–150, 47+448; Michaud v. Eisenmenger, 46–405, 408, 49+202; Mpls. etc. Ry. v. Chisholm, 55–374, 377, 57+63; Oxford v. Nichols, 57–206, 58+865; Dart v. Minn. L. & T. Co., 74–426, 77+288; First Nat. Bank v. Flynn, 75–279, 77+961; Jumiska v. Andrews, 87–515, 92+470. See Follansbee v. Johnson, 28–311, 9+882.

[60] Stearns v. Johnson, 17–142(116); Merriam v. Pine City L. Co., 23–314; Haven v. Neal, 43–315, 45+612; O'Gara v. Hansing, 88–401, 93+307; Brown v. Bayer, 91–140, 97+736.

[61] Marsh v. Webber, 16–418(375) (plaintiff entitled to recover all the damages of which the act complained of was the efficient cause—sale of diseased sheep); Johnson v. Wallower, 18–288(262) (sale of diseased horses); Vilett v. Moler, 82–12, 84+452 (contract to teach barber's trade).

[62] Reynolds v. Franklin, 44–30, 46+139 (exchange of land); Redding v. Godwin, 44–355, 46+563 (sale of stock in corporation); Alden v. Wright, 47–225, 49+767 (exchange of land for corporate stock); Stickney v. Jordan, 47–262, 49+980 (purchase of land); Fixen v. Blake, 47–540, 50+612 (exchange of stock of merchandise for land); Wallace v. Hallowell, 56–501, 58+292 (exchange of notes); Mountain v. Day, 91–249, 97+883 (sale of land); Ritko v. Grove, 102–312, 113+629 (exchange of land); Knight v. Leighton, 124+1090 (sale of land—price agreed upon not controlling).

[63] Mountain v. Day, 91–249, 97+883; Ritko v. Grove, 102–312, 317, 113+629.

[64] Kelly v. Rogers, 21–146.

[65] See Potter v. Mellen 36–122, 30+438; Bradford v. Neill, 46–347, 49+193.

[66] Villett v. Moler, 82–12, 84+452.

FRAUDULENT CONVEYANCES

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Cross-References

See Assignments for the Benefit of Creditors, 604; Bankruptcy, 747, 758; Garnishment, 3997; Trusts.

WHAT CONSTITUTES

3842. The statute—Our general statute against fraudulent conveyances [67] is based on 13 Eliz. c. 5,[68] and like that statute is declaratory of common law.[69] It is broad and comprehensive, aiming not merely to prevent the debtor from defeating his creditors in the collection of their debts, but even from in any manner hindering or delaying them.[70]

3843. Object and effect of statute—The object and effect of statutes avoiding fraudulent conveyances of property, as to creditors, is not to transfer any right of property, or to dispense with legal remedies for the satisfaction of debts, but to remove obstacles fraudulently interposed to the enforcement of such remedies, and to enable the creditor to avail himself of these remedies notwithstanding the fraud.[71]

3844. Voidable not void—The word "void" as used in the statute means "voidable." A transfer in fraud of creditors is voidable at their election, but in all other respects it is valid. It is a mere private fraud available only to those injured by it.[72]

3845. Creditor's right to debtor's property—The law regards all the unexempt property of a debtor as of right belonging to his creditors and sanctions no scheme or device to deprive them of it.[73] A debtor's property is by law subject immediately to process issued at the instance of his creditor, and he may not lawfully delay the creditor by any device which leaves it virtually subject to his control and disposition. And it makes no difference that he intends ultimately to apply the avails of it to the payment of his debts, because that leaves the time of payment, as well as the particular creditor to whom the avails shall be paid, to depend on his will and pleasure.[74]

3846. Essential elements—To make a debtor's transfer of property fraudulent as respects his creditors, there must be an intent to defraud, express or implied, and an act which, if allowed to stand, will actually defraud them by hindering, delaying, or preventing the collection of their claims.[75]

3847. Name of instrument not controlling—The name by which an instrument is called by the parties, or terms in which it is expressed, are unimportant. The intent with which it is executed and its effect on creditors are the important questions.[76]

3848. Fraudulent intent—Fraudulent intent is essential. The conveyance must be made with intent on the part of the debtor to hinder, delay, or defraud his creditors. The validity of a conveyance is to be determined, not by its

[67] R. L. 1905 § 3498.

[68] Bruggerman v. Hoerr, 7-337(264); Piper v. Johnston, 12-60(27); Livingston v. Ives, 35-55, 27+74; Fullington v. N. W. etc. Assn., 48-490, 51+475; Byrnes v. Volz, 53-110, 54+942; Wilson v. Walrath, 103-412, 115+203.

[69] Piper v. Johnston, 12-60(27); Blackman v. Wheaton, 13-326(299); Hathaway v. Brown, 18-414(373); Byrnes v. Volz, 53-110, 54+942.

[70] Burt v. McKinstry, 4-204(146).

[71] Tolbert v. Horton, 31-518, 18+647.

[72] Brasie v. Mpls. B. Co., 87-456, 92+540; Lucy v. Freeman, 93-274, 101+167; Devlin v. Quigg, 44-534, 47+258; Livingston v. Ives, 35-55, 27+74; Butler v. White, 25-432; Hathaway v. Brown, 22-214.

[73] Gere v. Murray, 6-305(213, 223); Truitt v. Caldwell, 3-364(257, 270); May v. Walker, 35-194, 28+252.

[74] Smith v. Conkwright, 28-23, 8+876.

[75] Baldwin v. Rogers, 28-544, 11+77; Blake v. Boisjoli, 51-296, 53+637; Keith v. Albrecht, 89-247, 94+677; Aretz v. Kloos, 89-432, 95+216, 769.

[76] Chophard v. Bayard, 4-533(418); Bennett v. Ellison, 23-242, 252; Minor v. Sheehan, 30-419, 421, 15+687.

effect, but by the intention with which it is made.[77] It is not enough that the effect of a conveyance will be to hinder, delay, or defraud creditors.[78] The intent must exist at the time of the transfer.[79] A transfer must stand or fall by the intent existing at the time it is made, and if then void, it will not be rendered valid by any subsequent act of the maker or change in the value of the property.[80] When the necessary consequence of a transfer is to hinder, delay, or defraud creditors, the fraudulent intent will be conclusively presumed. The law imputes to the debtor the intention necessarily implied from the nature of an instrument executed by him.[81] A fraudulent intent is unnecessary to render a voluntary transfer voidable.[82]

3849. Consideration—A transfer may be fraudulent and voidable though based on a valuable consideration.[83]

3850. Property must be appropriable—A transfer is not fraudulent as to creditors, unless the property transferred is appropriable by law to the payment of their claims. The thing transferred must be of value, out of which the creditor could have realized the whole or a part of his claim.[84] A transfer of exempt property is not fraudulent,[85] nor is a transfer of property incumbered to its full value.[86] There may be a fraudulent transfer of a "contingent interest," [87] of a "beneficial interest," [88] or of things in action.[89]

3851. Grantee—Knowledge of fraud—As a general rule, to render a transfer fraudulent as to creditors voidable, the grantee must participate in the fraud or have knowledge of it,[90] but this is unnecessary in the case of a fraudulent assignment for the benefit of creditors,[91] or in the case of any other voluntary conveyance,[92] or where the necessary consequence of the transfer is to defraud creditors.[93]

3852. Preferences—The payment of an honest debt is not deemed fraudulent under the general statute against fraudulent conveyances, though it operates as a preference, and hinders and delays the other creditors.[94] A preferential mortgage is not void under that statute.[95]

[77] Burt v. McKinstry, 4-204(146, 150); Gere v. Murray, 6-305(213); Hathaway v. Brown, 18-414(373, 382); Vose v. Stickney, 19-367(312); Horton v. Williams, 21-187, 192; Bennett v. Ellison, 23-242, 252; O'Connor v. Meehan, 47-247, 49+982; Wetherill v. Canney, 62-341, 64+818.

[78] O'Connor v. Meehan, 47-247, 49+982.

[79] Burt v. McKinstry, 4-204(146); Filebeck v. Bean, 45-307, 47+969.

[80] Burt v. McKinstry, 4-204(146); Stein v. Munch, 24-390; Rounds v. Green, 29-139, 12+454.

[81] Greenleaf v. Edes, 2-264(226); Chophard v. Bayard, 4-533(418); Gallagher v. Rosenfield, 47-507, 50+696.

[82] See § 3873.

[83] Truitt v. Caldwell, 3-364(257); Braley v. Byrnes, 20-435(389); Fish v. McDonnell, 42-519, 44+535.

[84] Blake v. Boisjoli, 51-296, 53+637; Aretz v. Kloos, 89-432, 95+216, 769.

[85] Morrison v. Abbott, 27-116, 6+455; Ferguson v. Kumler, 27-156, 6+618; Furman v. Tenny, 28-77, 9+172; Baldwin v. Rogers, 28-544, 11+77; Blake v. Boisjoli, 51-296, 53+637; Keith v. Albrecht, 89-247, 94+677.

[86] Baldwin v. Rogers, 28-544, 11+77; Horton v. Kelly, 40-193, 41+1031; Blake v. Boisjoli, 51-296, 53+637; Aultman v. Pikop, 56-531, 58+551; Spooner v. Travelers Ins. Co., 76-311, 79+305; Fryberger v. Berven, 88-311, 92+1125; Aretz v. Kloos, 89-432, 95+769.

[87] Fryberger v. Berven, 88-311, 92+1125.

[88] Brown v. Matthaus, 14-205(149).

[89] Sumner v. Sawtelle, 8-309(272).

[90] Hathaway v. Brown, 18-414(373); Forepaugh v. Pryor, 30-35, 14+61.

[91] Gere v. Murray, 6-305(213); Guerin v. Hunt, 6-375(260); Bennett v. Ellison, 23-242; Lesher v. Getman, 28-93, 9+585.

[92] Knatvold v. Wilkinson, 83-265, 86+99.

[93] Gallagher v. Rosenfield, 47-507, 50+696.

[94] Ferguson v. Kumler, 11-104(62); Vose v. Stickney, 19-367(312); Butler v. White, 25-432; Smith v. Deidrick, 30-60, 14+262; Leonard v. Green, 34-137, 24+915; Atwater v. Manchester S. Bank, 45-341, 48+187; Frost v. Steele, 46-1, 48+413; Mackellar v. Pillsbury, 48-396, 51+222; Walsh v. St. Paul S. F. Co., 60-397, 62+383; Davis v. Cobb, 81-167, 83+505; Aretz v. Kloos, 89-432, 95+216, 769. See Wolford v. Farnham, 47-95, 49+528.

[95] Berry v. O'Connor, 33-29, 21+840; Bannon v. Bowler, 34-416, 26+237; Dyson

3853. Fraudulent transfers of personalty—A transfer of personalty, made with intent to hinder, delay, or defraud creditors, is void the same as a like transfer of realty. The omission in the statute of such transfers does not abrogate the common-law rule.[96]

3854. Trusts for debtor—Statute—It is provided by statute that a transfer made in trust for the person making it is void as against the creditors, existing or subsequent, of such person.[97] The statute is affirmative of the common law,[98] and is applicable to transfers of realty as well as personalty.[99] It has been held inapplicable to a transfer of exempt property,[1] and to a bill of sale of firm property to secure firm debts, with a right of redemption.[2] It is inapplicable to transfers made primarily for the use of the grantee, with an incidental and partial reservation to the grantor.[3] A complaint held not to state a course of action under the statute.[4]

3855. Sale of chattels—Change of possession—Statute—It is provided by statute that a sale or assignment of a chattel, without a change of possession, shall be presumptively fraudulent as to creditors.[5] The statute is affirmative of the prevailing rule at common law.[6] No inflexible rule can be laid down as to what constitutes a sufficient change of possession to satisfy the statute. It depends upon the nature and situation of the property, the relation and position of the parties, and all the circumstances of the particular case. The delivery and change of possession must be actual, when reasonably possible. When an actual delivery is not reasonably possible, a constructive or symbolical delivery is sufficient.[7] When, at the time of a sale or transfer, the property is in the hands of one who has a lien upon it, notice to him of such sale or transfer is sufficient to constitute a delivery, as against subsequent attaching creditors.[8] Those who become creditors subsequent to the sale, but while the property is in the possession of the vendor, are "creditors" within the statute.[9] A subsequent purchaser, to avail himself of the statute, has the burden of proving that he is a bona fide purchaser. This he may do, prima facie, by proof that he paid a valuable consideration.[10] Under the statute, a vendee has the burden of establishing his own good faith, but not that of the vendor. The statute does not change the common-law rule as to bona fide purchasers. It was enacted to settle the question, as to which

v. St. Paul Nat. Bank, 74–439, 77+236; Aretz v. Kloos, 89-432, 95+216, 769.

[96] Blackman v. Wheaton, 13-326(299); Hicks v. Stone, 13–434(398); Hathaway v. Brown, 18-414(373); Benton v. Snyder, 22–247; Byrnes v. Volz, 53–110, 54+942; Wilson v. Walrath, 103–412, 115+203.

[97] R. L. 1905 § 3495.

[98] Wetherill v. Canney, 62–341, 64+818; Anderson v. Lindberg, 64–476, 67+538; Smith v. Conkwright, 28-23, 8+876; May v. Walker, 35–194, 28+252; Walsh v. Byrnes, 39–527, 40+831; Truitt v. Caldwell, 3–364(257); Thompson v. Bickford, 19–17(1); Williams v. Kemper, 99–301, 109+242.

[99] Wetherill v. Canney, 62–341, 64+818; Anderson v. Lindberg, 64–476, 67+538; Williams v. Kemper, 99–301, 109+242.

[1] Blake v. Boisjoli, 51–296, 53+637.

[2] Dyson v. St. Paul Nat. Bank, 74–439, 77+236.

[3] Camp v. Thompson, 25–175; Truitt v. Caldwell, 3–364(257); Vose v. Stickney, 19–367(312); Wetherill v. Canney, 62–341, 64+818; Anderson v. Lindberg, 64–476, 67+538; Hunt v. Ahnemann, 94–67, 102+376.

[4] Anderson v. Lindberg, 64–476, 67+538.

[5] R. L. 1905 § 3496.

[6] Crowford v. Neal, 144 U. S. 585; Flanigan v. Pomeroy, 85–264, 88+761; Wilson v. Walrath, 103–412, 115+203.

[7] Tuncll v. Larson, 39–269, 39+628; Murch v. Swensen, 40–421, 42+290; Chickering v. White, 42–457, 44+988; Lathrop v. Clayton, 45–124, 47+544; Mullen v. Noonan, 44–541, 47+164; Hopkins v. Swensen, 41–292, 42+1062; Vose v. Stickney, 19–367(312); Bruggemann v. Wagener, 72–329, 75+230; Cortland v. Sharvy, 52–216, 53+1147; Gilbert v. Gonyea, 103–459, 115+640.

[8] Freiberg v. Steenbock, 54–509, 56+175.

[9] Murch v. Swensen, 40–421, 42+290; Hopkins v. Swensen, 41–292, 42+1062.

[10] Mullen v. Noonan, 44–541, 47+164.

the courts were divided, whether the retention of possession by a vendor was prima facie or conclusive evidence of fraud.[11] The retention of possession has always been regarded as a badge of fraud.[12] The statute raises a mere presumption of fraud. The vendee may overcome the presumption by proof that he was a bona fide purchaser.[13] Where the facts of a transaction are such as to make applicable this provision of the statute, the general principle of law that, where one of two innocent persons must suffer, the loss should fall on him whose acts or omissions have made the loss possible, does not apply.[14]

3856. Sale of stock of merchandise—Statute—A common form of fraudulent transfer is a sale of a stock of merchandise.[15] The statute declares such sales presumptively fraudulent as to creditors, unless certain acts are performed by the parties.[16] The statute is constitutional. It merely prescribes a rule of evidence. A sale without conforming to the statute is not absolutely void, but only presumptively fraudulent.[17] The statute has been held inapplicable to a sale of fixtures.[18]

3857. Assignment of debt—Statute—By statute assignments of debts, except in certain cases, are presumptively fraudulent as to creditors, unless they are filed with the clerk of the municipality in which the assignor resides.[19]

3858. Transfers between near relatives—Transfers between father and son, brothers and sisters, and other near relatives, are scrutinized closely by the courts, but they are not presumptively fraudulent.[20] When voluntary, they are, like all voluntary transfers, presumptively fraudulent.[21]

3859. Transfers between husband and wife—Transfers between a husband and wife, whether directly or indirectly, are presumptively fraudulent as to existing creditors. The burden is on her to show good faith and a valuable consideration paid by her, or by some one in her behalf. She cannot rest

[11] Leqve v. Smith, 63–24, 65+121; Wilson v. Walrath, 103–412, 115+203.

[12] Lehmann v. Chapel, 70–496, 73+402.

[13] Molm v. Barton, 27–530, 8+765; Mackellar v. Pillsbury, 48–396, 51+222; Cortland v. Sharvy, 52–216, 53+1147; Leqve v. Smith, 63–24, 65+121; Wilson v. Walrath, 103–412, 115+203; Gilbert v. Gonyea, 103–459, 115+640.

[14] Wilson v. Walrath, 103–412, 115+203.

[15] Derby v. Gallup, 5–119(85); Vose v. Stickney, 19–367(312); Hathaway v. Brown, 22–214; Campbell v. Landberg, 27–454, 8+168; Cotterell v. Dill, 29–114, 12+355; Wilcox v. Landberg, 30–93, 14+365; Adler v. Apt, 31–348, 17+950; Bowers v. Mayo, 32–241, 20+186; Murch v. Swensen, 40–421, 42+290; Riddell v. Munro, 49–532, 52+141; Mix v. Ege, 67–116, 69+703; McCarvel v. Wood, 68–104, 70+871; Brown v. Scheffer, 72–27, 74+902; Bruggemann v. Wagener, 72–329, 75+230; Benton v. Mpls. etc. Co., 73–498, 76+265; Benson v. Nash, 75–341, 77+991; Manwaring v. O'Brien, 75–542, 78+1; Scheffer v. Lowe, 77–279, 79+970; Carson v. Hawley, 82–204, 84+746; Dispatch P. Co. v. George, 83–309, 86+339; Sharood v. Jordan, 90–249, 95+1108; Seabury v. Michaelis, 106–544, 119+65.

[16] R. L. 1905 § 3503.

[17] Thorpe v. Pennock, 99–22, 108+940; Gilbert v. Gonyea, 103–459, 115+640.

[18] Kolander v. Dunn, 95–422, 104+371, 483.

[19] R. L. 1905 § 3502; Baylor v. Butterfass, 82–21, 84+640; Burton v. Gage, 85–355, 88+997; Dickson v. St. Paul, 97–258, 106+1053. See Dyer v. Rowe, 82–223, 84+797.

[20] Nichols v. Gerlich, 84–483, 87+1120; Shea v. Hynes, 89–423, 95+214; Heim v. Heim, 90–497, 97+379; Gustafson v. Gustafson, 92–139, 99+631. See Leqve v. Stoppel, 64–74, 66+208; Id., 64–152, 66+124; Welch v. Bradley, 45–540, 48+440; Wetherill v. Canney, 62–341, 64+818; Oliver v. Hilgers, 88–35, 92+511; Pfefferkorn v. Seefield, 66–223, 68+1072; Bowers v. Mayo, 32–241, 20+186; Allen v. Fortier, 37–218, 34+21; Homberger v. Brandenberg, 35–401, 29+123; Tunell v. Larson, 39–269, 39+628; Riddell v. Munro, 49–532, 52+141; Ferguson v. Kumler, 11–104(62); Werner v. Lindgren, 56–309, 57+793; Kells v. McClure, 69–60, 71+827; Germain v. Sheehan, 25–338; Dorwin v. Patton, 101–344, 112+266.

[21] McCord v. Knowlton, 79–299, 82+589. See § 3873.

her case solely upon the production of a deed in which there is an expressed consideration.[22] The presumption is not conclusive, though the husband is insolvent.[23] There is no such presumption as to subsequent creditors.[24]

3860. Existence of other property—A fraudulent transfer is voidable, though the debtor has other property out of which his debts may be made. In other words, it is unnecessary that the debtor should be insolvent. But the retention of other property is of course evidence of a want of fraudulent intent.[25] If a grantor retains property sufficient for the payment of all of his debts, he has a right in good faith to provide for his future support by a conveyance of a part of his property.[26]

3861. Transfer fraudulent in part—If a transfer is fraudulent in part it is voidable in toto.[27]

3862. Transfers to secure time—A transfer made by a debtor to secure an extension of time in which to pay his debts is fraudulent.[28]

3863. Improvements on land of another—It is not a fraud on his creditor for a debtor, in good faith, to spend money in improvements on the land of another, in payment of an indebtedness.[29]

3864. Payment of compound interest—The payment of compound interest is not a fraud on creditors.[30]

3865. Payment of outlawed debt—The payment of a debt barred by the statute of limitations is not a fraud on creditors.[31]

3866. Transformation of property—A debtor cannot put his property beyond the reach of his creditors by changing its form or by substituting other property.[32]

3867. Gratuitous labor by debtor—Creditors cannot compel a debtor to earn money for their benefit, and they cannot complain if he chooses to work for another gratuitously.[33]

3868. Real estate mortgages—A fraudulent transfer may be in the form of a real estate mortgage.[34]

3869. Leases—A fraudulent transfer may be in the form of a lease.[35]

[22] Mpls. etc. Co. v. Halonen, 56–469, 57+1136; Shea v. Hynes, 89–423, 95+214; Bodkin v. Kerr, 97–301, 107+137; Quinn v. Mpls. T. M. Co., 102–256, 113+689. See Teller v. Bishop, 8–226(195); Brown v. Matthaus, 14–205(149); Sanders v. Chandler, 26–273, 3+351; Farnham v. Kennedy, 28–365, 10+20; Hossfeldt v. Dill, 28–469, 10+781; Ladd v. Newell, 34–107, 24+366; Eilers v. Conradt, 39–242, 39+320; Union Nat. Bank v. Pray, 44–168, 46+304; Chadbourn v. Williams, 45–294, 47+812; Frost v. Steele, 46–1, 48+413; Olson v. Amundson, 51–114, 52+1096; Hazlett v. Babcock, 64–254, 66+971; Cain v. Mead, 66–195, 68+840; Bond v. Stryker, 73–265, 76+26; De Lancey v. Finnegan, 86–255, 90+387; Fryberger v. Berven, 88–311, 92+1125; Halbert v. Pranke, 91–204, 97+976; Bodkin v. Kerr, 97–301, 107+137.

[23] Teller v. Bishop, 8–226(195); Quinn v. Mpls. T. M. Co., 102–256, 113+689.

[24] See Sanders v. Chandler, 26–273, 3+351.

[25] Wetherill v. Canney, 62–341, 347, 64+818; Wadsworth v. Schisselbauer, 32–84, 19+390; Rounds v. Green, 29–139, 12+454; Walkow v. Kingsley, 45–283, 47+807; Spooner v. Travelers Ins. Co., 76–311, 79+305; Cochran v. Cochran, 96–523, 105+183. But see, Camp v. Thompson, 25–175; Johnston v. Piper, 4–192(133).

[26] Wetherill v. Canney, 62–341, 64+818.

[27] Greenleaf v. Edes, 2–264(226); Horton v. Williams, 21–187; Gallagher v. Rosenfield, 47–507, 50+696. See Erickson v. Paterson, 47–525, 50+699; Henderson v. Kendrick, 72–253, 75+127.

[28] Bennett v. Ellison, 23–242; Kells v. McClure, 69–60, 71+827.

[29] Frost v. Steele, 46–1, 48+413.

[30] Id.

[31] Id.

[32] See Brown v. Matthaus, 14–205(149).

[33] Eilers v. Conradt, 39–242, 39+320.

[34] See Thompson v. Bickford, 19–17(1); Gjerness v. Mathews, 27–320, 7+355; Madigan v. Mead, 31–94, 16+539; Livingston v. Ives, 35–55, 27+74; Nazro v. Ware, 38–443, 38+359; Horton v. Kelly, 40–193, 41+1031; Devlin v. Quigg, 44–534, 47+258; Kellogg v. Kelley, 69–124, 71+924; New Prague M. Co. v. Schreiner, 70–125, 72+963; Moffett v. Parker, 71–139, 73+850; First Nat. Bank v. Brass, 71–211, 73+729; Anderson v. Lee, 73–397, 76+24; Hanson

VOLUNTARY TRANSFERS

3870. Definition—A voluntary conveyance is one made without any valuable consideration.[36]

3871. Of personalty—A voluntary transfer of personalty stands on the same footing as a voluntary transfer of realty.[37]

3872. Not fraudulent per se—By virtue of statute a voluntary transfer is not fraudulent per se as to creditors.[38]

3873. Presumptively fraudulent—A voluntary transfer by a debtor is presumptively fraudulent as to existing creditors;[39] otherwise as to subsequent creditors.[40] It is only presumptively fraudulent. It is valid upon proof that the debtor had ample property, other than that conveyed, to satisfy all his debts and that it was made in good faith.[41]

3874. With fraudulent intent—A voluntary transfer by a debtor, made with fraudulent intent, is voidable as to creditors.[42]

3875. Transfers for future maintenance—Transfers made by a debtor on no other consideration than a promise for future maintenance are voluntary and presumptively fraudulent as to creditors.[43]

ASSIGNMENTS FOR THE BENEFIT OF CREDITORS

3876. General rule—An assignment for the benefit of creditors, made with intent to hinder, delay, or defraud creditors, is voidable at their election.[44] This rule is not changed by the statute regulating such assignments.[45] Such assignments, if not fraudulent, are tolerated though they necessarily involve some delay to creditors. They are an exception to the general rule making transfers which delay creditors voidable. But no other delay than such as is reasonably necessary to convert the property into money and distribute it among the creditors is permitted.[46] A fraudulent intent will vitiate an assignment whether such intent appears upon the face of the instrument, or from extrinsic evidence.[47]

3877. Fraudulent provisions—An assignment is fraudulent and voidable if it reserves any benefit to the assignor before all the debts are paid;[48] if it authorizes the assignee to sell on credit;[49] if it requires releases;[50] if it

v. White, 75–523, 78+111; Taylor v. Mitchell, 80–492, 83+418; De Lancey v. Finnegan, 86–255, 90+387.

[35] See Ohlson v. Manderfeld, 28–390, 10+418; Allen v. Fortier, 37–218, 34+21; McDonald v. Peacock, 37–512, 35+370.

[36] Knatvold v. Wilkinson, 83–265, 86+99.

[37] Sumner v. Sawtelle, 8–309(272, 282).

[38] R. L. 1905 § 3500.

[39] Filley v. Register, 4–391(296); Henry v. Hinman, 25–199; Tupper v. Thompson, 26–385, 4+621; Walsh v. Byrnes, 39–527, 40+831; Welch v. Bradley, 45–540, 48+440; McCord v. Knowlton, 79–299, 82+589; Knatvold v. Wilkinson, 83–265, 86+99; Woolley v. Cochran, 101–541, 112+1143.

[40] Walsh v. Byrnes, 39–527, 40+831.

[41] Filley v. Register, 4–391(296, 299).

[42] Walsh v. Byrnes, 39–527, 40+831; Knatvold v. Wilkinson, 83–265, 86+99.

[43] Henry v. Hinman, 25–199; Tupper v. Thompson, 26–385, 4+621; McCord v. Knowlton, 79–299, 82+589. See Wetherill v. Canney, 62–341, 64–818; Leqve v. Stoppel, 64–152, 66+124.

[44] R. L. 1905 § 3498; Blackman v. Wheaton, 13–326(299) and cases under §§ 3877–3882.

[45] Lesher v. Getman, 28–93, 9+585.

[46] Bennett v. Ellison, 23–242, 252; Greenleaf v. Edes, 2–264(226, 237); Guerin v. Hunt, 8–477(427, 436).

[47] Lesher v. Getman, 28–93, 9+585.

[48] Bennett v. Ellison, 23–242, 252; Banning v. Sibley, 3–389(282); Kidder v. Sibley, 3–406(300); Truitt v. Caldwell, 3–364(257); May v. Walker, 35–194, 28+252. See Dyson v. St. Paul Nat. Bank, 74–439, 77+236.

[49] Greenleaf v. Edes, 2–264(226); Truitt v. Caldwell, 3–364(257); Scott v. Edes, 3–377(271); Mower v. Hanford, 6–535(372); Benton v. Snyder, 22–247; Bennett v. Ellison, 23–242, 252.

[50] Bennett v. Ellison, 23–242, 252; May v. Walker, 35–194, 28+252; McConnell v. Rakness, 41–3, 42+539.

dictates to the creditors the terms upon which they may share in the estate;[51] or if it authorizes the assignee to sell in the ordinary course of business.[52] It is not fraudulent merely because it authorizes the assignee to sell as soon as "convenient."[53]

3878. By solvent debtor—If the value of the property assigned is greatly in excess of the debts, the intent to hinder and delay creditors conclusively appears. Where the excess of assets is so unreasonably large as to force the conclusion that the assignment is made in the interest of the assignor, and to protect him from the sacrifice attending a forced sale, rather than for the benefit of the creditors, the assignment is fraudulent. The schedule is not conclusive in this connection, as to the value of the property assigned.[54]

3879. Selection of unfit assignee—The selection of an unfit or incompetent assignee is a badge of fraud.[55]

3880. To force a compromise—An assignment made with the intent to force a compromise with creditors is voidable at their election.[56] But a mere hope or expectation on the part of an assignor that a compromise will be consummated will not vitiate an assignment.[57]

3881. Assignment must be absolute—The only intent consistent with good faith is that the assigned property should be devoted absolutely, unreservedly, and in the shortest time consistent with the best interest of the creditors, to the payment of all the debts of the assignor.[58]

3882. To continue business—An assignment made with intent to prevent a forced sale and to continue a business is fraudulent.[59]

3883. Employment of assignor—The employment of the assignor by the assignee, to act as clerk and to assist in the sale of the assigned property, is not conclusive evidence of fraud.[60]

CHATTEL MORTGAGES

3884. General rule—A chattel mortgage, executed with the intent to hinder, delay, or defraud creditors, is voidable at their election.[61] A chattel mortgage not filed as required by statute is presumptively fraudulent as to creditors.[62]

3885. Retention of possession by mortgagor—A chattel mortgage with an agreement that the mortgagor may retain possession and sell or dispose of the property as his own, without satisfaction of the mortgage debt, is fraudulent as a matter of law and voidable as against the mortgagor's creditors and subsequent purchasers and mortgagees.[63] Where the mortgage contains an

[51] Banning v. Sibley, 3–389(282).
[52] Truitt v. Caldwell, 3–364(257).
[53] McClung v. Bergfeld, 4–148(99).
[54] Burt v. McKinstry, 4–204(146); Guerin v. Hunt, 8–477(427). See Gere v. Murray, 6–305(213).
[55] Guerin v. Hunt, 6–375(260); Simon v. Mann, 33–412, 23+856; McKibbin v. Ellingson, 58–205, 59+1003.
[56] Bennett v. Ellison, 23–242; May v. Walker, 35–194, 28+252; Davies v. Dow, 80–223, 83+50.
[57] Lesher v. Getman, 28–93, 9+585.
[58] Gere v. Murray, 6–305(213).
[59] Id.; Davies v. Dow, 80–223, 83+50.
[60] Noyes v. Beaupre, 36–49, 30+126.
[61] Evidence held to show fraud; Solberg v. Peterson, 27–431, 8+144; Millis v. Lombard, 32–259, 20+187; North Star B. & S. Co. v. Ladd, 32–381, 20+334; Fish v. McDonnell, 42–519, 44+535; Hanson v. Bean, 51–546, 53+871; Allen v. Knutson, 96–340, 104+963. Evidence held not to show fraud: Forepaugh v. Pryor, 30–35, 14+61; Aretz v. Kloos, 89–432, 95+216, 769; Adams v. Overboe, 105–295, 117+496; Canfield v. Bodkin, 105–522, 117+498.
[62] See § 1446.
[63] Chophard v. Bayard, 4–533(418); Horton v. Williams, 21–187; Stein v. Munch, 24–390; First Nat. Bank v. Anderson, 24–435; Mann v. Flower, 25–500; Bannon v. Bowler, 34–416, 26+237; Filebeck v. Bean, 45–307, 47+969; Gallagher v. Rosenfield, 47–507, 50+696; Hayes v. Gallagher, 58–502, 60+343; Pierce v. Wagner, 64–265, 66+977, 67+537; Pabst v. Butchart, 67–191, 69+809; Clarke v. Nat. Citizens' Bank, 74–58, 76+965, 1125; Donohue v. Campbell, 81–107, 83+469; Citizens' S.

express agreement authorizing the mortgagor to sell in the usual course of business, the mortgage is fraudulent as a matter of law, unless it also contains an agreement that the mortgagor shall apply the proceeds of the sales to the payment of the mortgage debt. This rule, however, is not to be extended to cases not fairly falling within it.[64] A mortgage on a retail stock of goods provided that the mortgagor should sell the goods in the regular course of business, and apply the proceeds in keeping up the stock and defraying the expenses of running the business, and that all of the balance of the proceeds should be paid to the mortgagee, to be applied on the mortgage debt. It was held that the mortgage was fraudulent as a matter of law.[65] If the mortgage requires the proceeds of sales to be paid directly to the mortgagee, in payment of the mortgage debt, it is not fraudulent as a matter of law.[66] A subsequent taking by the mortgagee, under and by virtue of the mortgage, of a part of the property not sold by the mortgagor will not remove the original taint.[67] But, if the mortgagor, before any creditor attacks the mortgage, voluntarily and in good faith delivers the property to the holder of the mortgage, for the purpose of being applied in payment of the mortgage debt, a creditor cannot subsequently attack the mortgage as a fraud upon him.[68] Taking possession of the property by the mortgagee under proceedings to foreclose a mortgage voidable for fraud will not impair the rights of creditors to reach the same or to compel him to account for it. Where a mortgage confers the power to sell, a provision requiring the mortgagor in possession to replenish the stock will not render it valid.[69] The term "creditors," as used in relation to mortgages fraudulent as to creditors, includes all persons who were such while the chattels remained in the possession of the mortgagor under the agreement, and their rights are not affected by the fact that they did not obtain judgment or a specific lien until after the delivery of the property to the mortgagee.[70]

3886. To secure future advances—A mortgage to secure future advances is not fraudulent as a matter of law.[71]

3887. To secure future earnings—A chattel mortgage is void, at least against creditors without actual notice, which purports to assign, to secure a specified debt, all the future earnings of a threshing machine, therein described, also of any other threshing machine operated by the mortgagor, and of the crew, including men and teams, operating them, which may accrue for threshing during the then ensuing two years within three designated townships.[72]

3888. In excess of amount due—The mere fact that a mortgage is given to secure a larger sum than is actually due from the mortgagor to the mortgagee, or that it fails to describe the real character of the debt or liability secured, does not render it fraudulent as a matter of law; but it is evidence of fraud, and throws the burden on the mortgagee of showing the good faith of the mortgage.[73]

3889. Withholding from record—If a mortgage is withheld from record, pursuant to an agreement between the mortgagor and mortgagee, in order

Bank v. Brown, 124+990. See 13 Harv. L. Rev. 151.

[64] Donohue v. Campbell, 81–107, 83+469.

[65] Pabst v. Butchart, 67–191, 69+809. See Blakely v. Hammerel, 62–307, 64+821.

[66] Bannon v. Bowler, 34–416, 26+237; Donohue v. Campbell, 81–107, 83+469. See Pabst v. Butchart, 67–191, 69+809.

[67] Stein v. Munch, 24–390.

[68] First Nat. Bank v. Anderson, 24–435.

[69] Gallagher v. Rosenfield, 47–507, 50+696.

[70] Citizens' S. Bank v. Brown, 124+990.

[71] Berry v. O'Connor, 33–29, 21+840.

[72] Dyer v. Schneider, 106–271, 118+1011.

[73] Berry v. O'Connor, 33–29, 21+840; Minor v. Sheehan, 30–419, 15+687; Hanson v. Bean, 51–546, 53+871; Heim v. Chapel, 62–338, 64+825.

that the credit of the former may not be impaired, it would be deemed a fraud as to any one who should become a creditor of the mortgagor, relying upon the false appearance of responsibility thus created, and as to such a creditor the mortgagee would be estopped.[74]

RIGHTS AND LIABILITIES OF PURCHASERS

3890. Title of grantee—The legal title to property alleged to have been transferred with intent to hinder, delay, and defraud creditors is in the fraudulent grantee, the fraudulent character of the transfer not appearing upon its face; and the title continues in such grantee, notwithstanding a sale of the property by a creditor on execution against the grantor, until the fraud is exposed, and the transfer set aside in some judicial proceeding. The title of a fraudulent grantee is protected by the statute of limitations, and, unless defrauded creditors effect a cancelation thereof in some appropriate action brought within six years from the discovery of the fraud, his title becomes absolute and unassailable.[75] The grantee may do with the property all that the grantor might have done if he had retained it.[76] He gets no title as against creditors by a deed from the purchaser at the foreclosure of a mortgage existing on the land at the time of the fraudulent conveyance and afterwards foreclosed, which deed was given as upon redemption, or by assignment of the certificate of foreclosure sale.[77]

3891. Reimbursement—If a transfer is tainted with actual fraud it will not be allowed to stand for any purpose either of reimbursement or indemnity. If a transfer is only constructively fraudulent the rule is flexible, depending on the facts of the particular case. It may be allowed to stand to secure the grantee for the amount paid by him to satisfy a mortgage on the land.[78]

3892. Right to crops—A fraudulent grantee of a farm has, as against the creditors of his grantor, title to the crops that he raises on the farm while the conveyance is unimpeached, unless it be shown that he manages the farm, and raises the crops, for the benefit of the grantor.[79] Crops on land at the time it is fraudulently conveyed may be reached by creditors.[80]

3893. Liability of grantee to creditors—If a grantee who has knowledge of the fraud of his grantor receives rents and profits from the property, or sells it to a bona fide purchaser, he is liable for the proceeds to the grantor's creditors, without any deduction for the debt due from the grantor to him, or for any taxes or liens paid by him; and if he has invested the proceeds in specific stocks or securities, the creditors may have such stocks or securities sold to satisfy their demands.[81]

BONA FIDE PURCHASERS

3894. Protected—The statute protects the title of a bona fide purchaser.[82] It is affirmative of common law and it is therefore immaterial whether it applies

[74] Baker v. Pottle, 48–479, 51+383.

[75] Brasie v. Mpls. B. Co., 87–456, 92+340. See, for a criticism of this case, 16 Harv. L. Rev. 375.

[76] Brown v. Scheffer, 72–27, 74+902.

[77] Thompson v. Bickford, 19–17(1).

[78] Leqve v. Stoppel, 64–74, 66+208.

[79] Sanders v. Chandler, 26–273, 3+351; Hossfeldt v. Dill, 28–469, 10+781; Hartman v. Weiland, 36–223, 30+815; Olson v. Amundson, 51–114, 52+1096; Cain v. Mead, 66–195, 68+840.

[80] Erickson v. Paterson, 47–525, 50+699.

[81] Thompson v. Bickford, 19–17(1); Byrnes v. Volz, 53–110, 54+942. See Noblet v. St. John, 29–180, 12+527; Leqve v. Stoppel, 64–74, 66+208; Thompson v. Johnson, 55–515, 57+223; Chamberlain v. O'Brien, 46–80, 48+447; McCarvel v. Wood, 68–104, 70+871.

[82] R. L. 1905 § 3501; Hathaway v. Brown, 18–414(373); Durfee v. Pavitt, 14–424 (319).

to transfers of personalty or not.[83] A purchaser with notice from a bona fide purchaser is protected.[84]

3895. Consideration—To constitute one a bona fide purchaser he must have paid a valuable consideration.[85] If only a part of the purchase money is paid before notice the transfer may be set aside, but the purchaser will be protected pro tanto.[86] The relinquishment of a precedent debt is a valuable consideration in this connection.[87]

3896. Notice—If the instrument of transfer bears a fraudulent intent on its face the grantee is charged with notice of the fraud.[88] If the grantee has knowledge of facts which would put a man of ordinary prudence upon an inquiry which would lead to the discovery of the fraudulent intent, he is charged with notice of such intent.[89] Mere knowledge of the purchaser that the vendor is in failing circumstances or insolvent, or that there are suits pending against him, is not in itself sufficient to put the purchaser upon inquiry.[90] Where the necessary consequence of a transfer is to hinder, delay, or defraud creditors the grantee cannot be a bona fide purchaser.[91] A purchaser is charged with notice of a prior attachment by a creditor.[92] Evidence held to show that a grantee had notice.[93]

3897. Right to surplus—A surplus after paying the claims of creditors belongs to the grantee, though he is a fraudulent grantee.[94]

WHO MAY AVOID

3898. In general.—The following persons have been held entitled to avoid a fraudulent transfer: an assignee for the benefit of creditors;[95] a receiver in insolvency;[96] a receiver in supplementary proceedings;[97] a receiver of an insolvent corporation;[98] a purchaser at an execution sale;[99] a wife, suing or about to sue for a divorce and alimony;[1] a trustee in bankruptcy;[2] a purchaser from an assignee or receiver in insolvency;[3] a mortgagee;[4] and members of a firm.[5] The following persons have been held not entitled to avoid a fraudulent transfer: a junior mortgagee;[6] a purchaser, from an assignee in insolvency, of property subject to a mortgage;[7] a mortgagee with

[83] Leqve v. Smith, 63-24, 28, 65+121.
[84] Mix v. Ege, 67-116, 69+703.
[85] Hicks v. Stone, 13-434(398); Arnold v. Hoschildt, 69-101, 71+829.
[86] Crockett v. Phinney, 33-157, 22+292. See Riddell v. Munro, 49-532, 52+141.
[87] See Woodworth v. Carroll, 104-65, 112+1054, 115+946 (overruling Baze v. Arper, 6-220, 142).
[88] Henry v. Hinman, 25-199, 201; Gallagher v. Rosenfield, 47-507, 50+696.
[89] Manwaring v. O'Brien, 75-542, 78+1; Arnold v. Hoschildt, 69-101, 71+829; Wachuta v. Holmberg, 71-55, 73+637; Cochran v. Cochran, 96-523, 105+183. See Thompson v. Johnson, 55-515, 57+223; Durfee v. Pavitt, 14-424(319); Bergenthal v. Security S. Bank, 102-138, 112+892; Gilbert v. Gonyea, 103-459, 115+640.
[90] Gilbert v. Gonyea, 103-459, 115+640.
[91] Gallagher v. Rosenfield, 47-507, 50+696.
[92] Arper v. Baze, 9-108(98); Smith v. Conkwright, 28-23, 8+876.
[93] Kells v. McClure, 69-60, 71+827.
[94] Piper v. Johnston, 12-60(27, 33).
[95] See § 604.
[96] See § 4589.
[97] Dunham v. Byrnes, 36-106, 30+402. See Tvedt v. Mackel, 67-24, 69+475; Walsh v. Byrnes, 39-527, 40+831.
[98] Farmers' L. & T. Co. v. Mpls. E. & M. Works, 35-543, 29+349; Taylor v Mitchell, 80-492, 83+418.
[99] Campbell v. Jones, 25-155; Millis v. Lombard, 32-259, 20+187; Fisher v. Utendorfer, 68-226, 71+29.
[1] See § 2809.
[2] Schmitt v. Dahl, 88-506, 93+665. See Lane v. Innes, 43-137, 45+4.
[3] Shay v. Security Bank, 67-287, 69+920; Fisher v. Utendorfer, 68-226, 71+29.
[4] Arnold v. Hoschildt, 69-101, 71+829.
[5] Fuller v. Nelson, 35-213, 28+511.
[6] Tolbert v. Horton, 31-518, 18+647.
[7] Olson v. Hanson, 74-337, 77+231.

notice;[8] one not a subsequent purchaser or mortgagee or creditor;[9] a debtor of an assignor;[10] and a subsequent purchaser from the debtor.[11]

3899. Good between the parties—A transfer in fraud of creditors is valid between the parties,[12] and their privies.[13] The grantor cannot maintain an action to set it aside,[14] but a fraudulent mortgagor may redeem,[15] or resist a foreclosure.[16] A fraudulent pledgor may redeem.[17]

3900. Subsequent creditors—A subsequent creditor cannot avoid a transfer merely because it was made with intent to defraud creditors existing at the time of its execution.[18] He may avoid a transfer made with intent to defraud him,[19] or one the necessary consequence of which is to defraud creditors.[20] An intent to defraud existing creditors may, in connection with other circumstances, be evidence of an intent to defraud subsequent creditors.[21]

3901. Creditors must have a "lawful" claim—A creditor cannot attack a transfer for fraud unless he has a "lawful" claim—one enforceable at law.[22] If he has recovered judgment it is conclusive of the validity of his claim.[23]

3902. Confirmation—Creditors may confirm a fraudulent transfer and they will be held to have done so if they pursue the property or money which the debtor received in exchange for the transfer. They have an election to confirm or avoid the transfer; they cannot do both, and they must affirm or avoid in toto.[24]

3903. Estoppel—A person who receives a benefit from a transfer may be estopped from subsequently attacking it for fraud.[25]

3904. Others than creditors—The general statute covers transfers fraudulent as to creditors "or other persons."[26] This includes a wife prosecuting, or about to prosecute, an action for divorce and alimony.[27]

[8] Fitzpatrick v. Hanson, 55–195, 56+814.

[9] Howe v. Cochran, 47–403, 50+368; Ellingboe v. Brakken, 36–156, 30+659; Clark v. Richards, 68–282, 71+389; Zimmerman v. Lamb, 7–421(336).

[10] Rohrer v. Turrill, 4–407(309).

[11] Yallop v. Mpls. etc. Ry., 33–482, 24+185.

[12] Lemay v. Bibeau, 2–291(251); Rohrer v. Turrill, 4–407(309); Piper v. Johnston, 12–60(27); Jones v. Rahilly, 16–320(283); Mann v. Flower, 25–500; Adler v. Apt, 30–45, 14+63; Livingston v. Ives, 35–55, 27+74; Stevens v. McMillin, 37–509, 35+372; Johnson v. Oswald, 38–550, 38+630; Cain v. Mead, 66–195, 68+840; New Prague M. Co. v. Schreiner, 70–125, 72+963; Brown v. Scheffer, 72–27, 74+902; Brasie v. Mpls. B. Co., 87–456, 92+340; Olson v. Hanson, 74–337, 77+231.

[13] Lemay v. Bibeau, 2–291(251); Piper v. Johnston, 12–60(27); Jones v. Rahilly, 16–320(283); Collins v. Colleran, 86–199, 90+364.

[14] Sawyer v. Harrison, 43–297, 45+434; Stevens v. McMillin, 37–509, 35+372; Dougan v. Dougan, 90–471, 97+122.

[15] Livingston v. Ives, 35–55, 27+74.

[16] Bickford v. Johnson, 36–123, 30+439; Devlin v. Quigg, 44–534, 47+258; Anderson v. Lee, 73–397, 76+24. See Moffett v. Parker, 71–139, 73+850.

[17] Jones v. Rahilly, 16–320(283).

[18] Fullington v. N. W. etc. Assn., 48–490, 51+475; Schmitt v. Dahl, 88–506, 515, 93+665; Seager v. Armstrong, 95–414, 104+479; Williams v. Kemper, 99–301, 109+242; Sanders v. Chandler, 26–273, 3+351; Stone v. Myers, 9–303(287); Seabury v. Michaelis, 106–544, 119+65.

[19] Walsh v. Byrnes, 39–527, 40+831; Fullington v. N. W. etc. Assn., 48–490, 51+475; Byrnes v. Volz, 53–110, 54+942; Williams v. Kemper, 99–301, 109+242. See Anderson v. Lindberg, 64–476, 67+538.

[20] Gallagher v. Rosenfield, 47–507, 50+696.

[21] Union Nat. Bank v. Pray, 44–168, 46+304; Fullington v. N. W. etc. Assn., 48–490, 51+475.

[22] R. L. 1905 § 3498; Bruggerman v. Hoerr, 7–337(264); Ferguson v. Kumler, 11–104(62).

[23] See § 3908.

[24] Lemay v. Bibeau, 2–291(251); Hathaway v. Brown, 22–214; Kells v. McClure, 69–60, 71+827; New Prague M. Co. v. Schreiner, 70–125, 72+963. See Banning v. Sibley, 3–389(282).

[25] Lemay v. Bibeau, 2–291(251); Scott v. Edes, 3–377(271); Banning v. Sibley, 3–389(282); Richards v. White, 7–345(271); Arnold v. Hoschildt, 69–101, 71+829.

[26] R. L. 1905 § 3498.

[27] Byrnes v. Volz, 53–110, 54+942; Dougan v. Dougan, 90–471, 97+122; Cochran v. Cochran, 96–523, 105+183.

REMEDIES OF CREDITORS

3905. Election—A creditor who has recovered a judgment has an election of three remedies against a fraudulent transfer. He may sell the property fraudulently transferred upon an execution issued on his judgment, leaving the purchaser to contest the validity of the transfer; or he may maintain an action in equity either before or after a sale on execution to set aside the transfer—in other words, to remove the obstruction to the enforcement of his lien; or he may upon the return of execution unsatisfied maintain a creditors' suit to have the transfer adjudged fraudulent and void as to his judgment, and the lands sold by a receiver or other officer of the court, and the proceeds applied to the satisfaction of the judgment, as in the case of equitable interests that cannot be reached by execution.[28]

3906. Sale on execution—Attachment—A judgment creditor against whom a transfer is fraudulent and voidable may treat the transfer as a nullity and sell it under execution.[29] This rule as to land conveyed with intent to defraud creditors is somewhat exceptional in its nature, and has its foundation in somewhat exceptional and peculiar reasons. It proceeds upon the theory that such conveyances are void as to creditors ab initio, and one great purpose which the rule is designed to effect is that such conveyances shall not delay the creditor in the collection of his debt.[30] By levying an attachment he acquires a lien on the property as if no transfer had been made and subsequent purchasers are charged with notice.[31] Where several judgments are recovered against a debtor who has made a fraudulent conveyance of realty, which is voidable as to them, they are valid liens and may be enforced in the order of their recovery.[32]

BURDEN OF PROOF

3907. In general—It is the general rule that fraud will not be presumed and that the burden of proving a transfer fraudulent is upon him who asserts it,[33] including the fact that the grantee participated in or had notice of the fraudulent intent.[34] The grantee is not bound in the first instance, to prove that he paid a valuable consideration or to disprove the fraud charged.[35] In a case where the sale to plaintiff is attacked for fraud as to creditors, and the party justifying the taking took the property from plaintiff's possession, the burden of proving the fraud is on the defendant.[36] Special rules apply to voluntary transfers;[37] to transfers between husband and wife;[38] to unfiled chattel mortgages;[39] to unfiled conditional sales;[40] to sales of personalty

[28] Jackson v. Holbrook, 36-494, 32+852; Brasie v. Mpls. B. Co., 87-456, 92+340; Lane v. Innes, 43-137, 45+4.

[29] Campbell v. Jones, 25-155; Tupper v. Thompson, 26-385, 4+621; Kumler v. Ferguson, 22-117; Jackson v. Holbrook, 36-494, 32+852; Brasie v. Mpls. B. Co., 87-456, 92+340; Fisher v. Utendorfer, 68-226, 71+29.

[30] Fisher v. Utendorfer, 68-226, 231, 71+29.

[31] Arper v. Baze, 9-108(98); Smith v. Conkwright, 28-23, 8+876.

[32] Jackson v. Holbrook, 36-494, 32+852. The transfer is voidable by the purchaser at the execution sale. Millis v. Lombard, 32-259, 20+187.

[33] McMillan v. Edfast, 50-414, 52+907; Hathaway v. Brown, 18-414(373); Brasie v. Mpls. B. Co., 87-456, 462, 92+340; Shea v. Hynes, 89-423, 95+214; Heim v. Heim, 90-497, 97+379; Halbert v. Pranke, 91-204, 97+976; Guerin v. Hunt, 8-477(427); Durfee v. Pavitt, 14-424(319).

[34] Durfee v. Pavitt, 14-424(319); Hathaway v. Brown, 18-414(373); Hartman v. Weiland, 36-223, 30+815.

[35] McMillan v. Edfast, 50-414, 52+907.

[36] Derby v. Gallup, 5-119(85); Hathaway v. Brown, 18-414(373); Lathrop v. Clayton, 45-124, 47+544.

[37] See § 3873.

[38] See § 3859.

[39] See § 1446.

[40] See § 8655.

where the possession is retained by the vendor;[41] to transfers to one upon a consideration paid by another;[42] to mortgages for future advances;[43] and to mortgages for more than the amount due.[44]

3908. Proof of debt—The creditor must prove that the claim on which his judgment is based existed at the time of the alleged fraudulent transfer and the judgment itself does not prove this.[45] But the judgment proves the validity of the claim and cannot be attacked except for fraud or want of jurisdiction.[46] In an action against a sheriff for seizing property under an attachment, if he defends on the ground that the property was transferred in fraud of creditors, he must prove that the attachment debt existed at the time of the transfer, and the attachment papers are not proof of this.[47]

3909. Degree of proof required—Proof that a transfer is fraudulent must be clear and satisfactory.[48] The common law, it is said, is tender of presuming fraud from circumstances, and expects that it be manifest or plainly inferable.[49] But a fair preponderance of the evidence is sufficient.[50]

EVIDENCE

3910. In general—As a general rule any fact that will throw light upon the real character of the transaction may be shown. The prior or subsequent acts of the parties may be shown to explain their motives in connection with the transfer.[51] But the facts going to invalidate the transfer as to creditors must be proved by evidence which is competent as to the transferee.[52]

3911. Direct evidence as to intent—The debtor may testify directly as to his intent in making the transfer.[53]

3912. Admitted liberally—Evidence is to be admitted with exceptional liberality when the issue is fraud.[54]

3913. Circumstantial evidence—The fraudulent intent may be proved by circumstantial evidence. Indeed, it is rarely susceptible of any other proof.[55]

3914. Badges of fraud—Facts strongly indicative of fraud are often called "badges of fraud."[56]

[41] See § 3855.
[42] See § 9898.
[43] See § 3886.
[44] See § 3888.
[45] Schmitt v. Dahl, 88–506, 93+665; Fullington v. N. W. etc. Assn., 48–490, 51+475; Bloom v. Moy, 43–397, 45+715; Hartman v. Weiland, 36–223, 30+815; First Nat. Bank v. Brass, 71–211, 73+729; Bruggerman v. Hoerr, 7–337(264); Hoerr v. Meihofer, 77–228, 79+964; Irish v. Daniels, 100–189, 110+968; Pabst v. Jensen, 68–293, 71+384.
[46] Schmitt v. Dahl, 88–506, 93+665; Irish v. Daniels, 100–189, 110+968.
[47] Braley v. Byrnes, 20–435(389). See Buck v. Colbath, 7–310(238).
[48] Aretz v. Kloos, 89–432, 95+216, 769. See Hazeltine v. Swensen, 38–424, 38+110. But see, Leqve v. Stoppel, 64–74, 84, 66+208.
[49] Leqve v. Smith, 63–24, 65+121.
[50] See Laib v. Brandenburg, 34–367, 25+803.
[51] Adler v. Apt, 31–348, 17+950; Mower v. Hanford, 6–535(372, 380); Mix v. Ege, 67–116, 69+703; Whitney v. Swensen, 43–337, 45+609; Dyer v. Rowe, 82–223, 84+797.
[52] Adler v. Apt, 30–45, 14+63.
[53] Allen v. Knutson, 96–340, 104+963. See Fish v. McDonnell, 42–519, 44+535.
[54] Pfefferkorn v. Seefield, 66–223, 227, 68+1072; Ladd v. Newell, 34–107, 109, 24+366; Nicolay v. Mallery, 62–119, 121, 64+108; Christian v. Klein, 77–116, 119, 79+602; Adler v. Apt, 31–348, 17+950; North Star etc. Co. v. Ladd, 32–381, 20+334.
[55] North Star B. & S. Co. v. Ladd, 32–381, 384, 20+334; Manwaring v. O'Brien, 75–542, 545, 78+1; Nicolay v. Mallery, 62–119, 121, 64+108; Pfefferkorn v. Seefield, 66–223, 227, 68+1072; Mower v. Hanford, 6–535(372); Dyer v. Rowe, 82–223, 84+797.
[56] See Adler v. Apt, 31–348, 17+950 (insolvency of debtor); Hanson v. Bean, 51–546, 53+871 (mortgage in excess of amount due); Bond v. Stryker, 73–265, 76+26 (inadequacy of consideration—keeping deed from record—confidential relation of parties—grantor enjoying fruits of possession after transfer); Benson v. Nash, 75–

3915. Cross-examination—Great latitude is to be allowed in the cross-examination of the immediate parties to the transaction. It is not to be limited to matters touched upon in the direct examination.[57] This rule applies to one claiming to be a bona fide purchaser. Not only the circumstances of his purchase, but his financial condition and his object in making it, and the situation, character, and value of the property, may all be inquired into.[58]

3916. Acts and declarations of conspirators—Where there is a conspiracy between the grantor and grantee of a transfer to defraud the other creditors of the grantor, the acts and declarations of the conspirators are admissible against each other, when made in furtherance of the fraudulent design, so as to be a part of the res gestae.[59]

3917. Declarations of debtor after transfer—The declarations or admissions of the debtor made after the alleged fraudulent transfer, and independent of it, are inadmissible to impeach the title of his grantee.[60] This rule does not apply to testimony of the debtor in court.[61]

3918. Acts and declarations of grantor in possession—Where the debtor remains in possession of property which once belonged to him, and which his creditor seeks to reach as fraudulently transferred, his acts and declarations, while thus in actual possession, tending to characterize his possession, are admissible against the grantee.[62] The rule applies though the grantee has ostensibly acquired title from a third party.[63]

3919. Insolvency of debtor—The fact that the debtor was solvent or insolvent at the time of the transfer is competent evidence on the issue of fraud, but it is not conclusive. A solvent debtor may defraud his creditors.[64]

3920. Miscellaneous cases—Various cases are cited below holding evidence admissible [65] or inadmissible.[66]

341, 77+991 (purchase of stock of merchandise without taking an inventory and without making investigation as to values, incumbrance, etc.); Scheffer v. Lowe, 77-279, 79+970 (id.); Carson v. Hawley, 82-204, 84+746 (inadequacy of price); Shea v. Hynes, 89-423, 95+214 (near relationship of parties); Filley v. Register, 4-391(296, 308) (secrecy); Guerin v. Hunt, 6-375(260) (selection of unfit assignee—scheduling debts that have been paid).

[57] Cohen v. Goldberg, 65-473, 67+1149; Nicolay v. Mallery, 62-119, 64+108; Bowers v. Mayo, 32-241, 20+186; Allen v. Fortier, 37-218, 34+21; Pfefferkorn v. Seefield, 66-223, 68+1072; Ladd v. Newell, 34-107, 24+366; Homberger v. Brandenberg, 35-401, 29+123; Tunell v. Larson, 39-269, 39+628; Manwaring v. O'Brien, 75-542, 78+1; Nat. G. A. Bank v. Lawrence, 77-282, 289, 79+1016, 80+363.

[58] Riddell v. Munro, 49-532, 52+141.

[59] Adler v. Apt, 30-45, 14+63; Nicolay v. Mallery, 62-119, 64+108; Carson v. Hawley, 82-204, 84+746.

[60] Burt v. McKinstry, 4-204(146); Derby v. Gallup, 5-119(85); Zimmerman v. Lamb, 7-421(336); Howland v. Fuller, 8-50(30); Shaw v. Robertson, 12-445(334); Blackman v. Wheaton, 13-326(299); Hathaway v. Brown, 18-414(373); Adler v. Apt, 30-45, 14+63; Carson v. Hawley, 82-204, 84+746; Glaucke v. Gerlich, 91-282, 98+94.

[61] Allen v. Knutson, 96-340, 104+963.

[62] Murch v. Swensen, 40-421, 42+290; Cortland W. Co. v. Sharvy, 52-216, 53+1147; Dailey v. Linnehan, 42-277, 44+59; Lehmann v. Chapel, 70-496, 73+402; Christian v. Klein, 77-116, 79+602.

[63] Lehmann v. Chapel, 70-496, 73+402.

[64] Walkow v. Kingsley, 45-283, 47+807; Lathrop v. Clayton, 45-124, 127, 47+544; Adler v. Apt, 31-348, 17+950; Teller v. Bishop, 8-226(195); Mower v. Hanford, 6-535(372); Wolford v. Farnham, 44-159, 46+295; Id., 47-95, 49+528; Quinn v. Mpls. T. M. Co., 102-256, 113+689.

[65] Filley v. Register, 4-391(296) (testimony of wife as to her knowledge of her husband's affairs); Guerin v. Hunt, 6-375(260) (manner in which assignee conducts business—fact that a debt scheduled had been paid—other fraudulent assignment); Baze v. Arper, 6-220(142) (value of the land transferred); Mower v. Hanford, 6-535(372) (fact that debtor prior to an assignment was applying his available means to payment of debts—insolvency—concealment of property—appropriation of property to debtor's own use); Farnham v. Kennedy, 28-365, 10+20 (facts tending to prove adherence to prior plan for a purchase for a wife with her means);

ACTION TO SET ASIDE

3921. Nature of action—It is an equitable action [67]—a species of creditors' suit.[68] Its object is to remove the obstruction to the enforcement of the creditor's judgment.[69] It is in rem.[70]

3922. Limitation of actions—The action must be begun within six years of the discovery of the fraud.[71] In case of a conveyance of land, fraudulent as respects a judgment creditor, the creditor's right of action to reach the property and subject it to the payment of his judgment does not accrue until the judgment has been docketed in the county in which the land lies.[72] Where the creditor levies and sells upon execution the statute begins to run from the date of the sale, unless it appears that the creditor did not discover the fraud till some later time.[73]

3923. Necessity of judgment—As a general rule a simple contract creditor cannot maintain the action. The creditor must first obtain a judgment and docket it in the county where the land lies, but it is unnecessary for him to have an execution returned unsatisfied.[74] In the case of personalty it is necessary to have an execution returned unsatisfied.[75] A simple contract creditor may maintain the action where the debtor has absconded or is a non-resident.[76]

3924. Parties defendant—In an action to set aside a conveyance of a husband's property, in which his wife joined, the wife is not a proper or necessary

Adler v. Apt, 31–348, 17+950 (payment of vendor's debts by vendee—compromise by vendee of claims against vendor); Tunell v. Larson, 37–258, 34+29 (declarations of debtor inconsistent with his testimony); Tunell v. Larson, 39–269, 39+628 (execution and filing of a bill of sale—deed of homestead—exemption of part of property); Laib v. Brandenburg, 34–367, 25+803 (consignment of other goods to husband); Olson v. Swensen, 53–516, 55+596 (admissions of plaintiff as to ownership of property); Cain v. Mead, 66–195, 68+840 (fact that grain in controversy was grown on portion of farm claimed as a homestead); McCarvel v. Wood, 68–104, 70+871 (reputation as to insolvency of debtor); Kells v. McClure, 69–60, 71+827 (books of account and records to show insolvency); Benson v. Nash, 75–341, 77+991 (failure of purchaser to investigate title—record of chattel mortgage); Manwaring v. O'Brien, 75–542, 78+1 (collateral business transactions of debtor of a suspicious character); Scheffer v. Lowe, 77–279, 79+970 (sale of stock of merchandise—manner in which clerk in charge conducted business after sale); Fryberger v. Berven, 88–311, 92+1125 (return of execution unsatisfied); Cochran v. Cochran, 96–523, 105+183 (that a defendant claimed no interest in an alleged fraudulent mortgage).

[66] Guerin v. Hunt, 6–375(260) (other fraudulent assignment by partner of firm making assignment—solvency of assignee); Mower v. Hanford, 6–535(372) (judgment roll in action between other parties); Hathaway v. Brown, 18–414(373) (petition and adjudication in bankruptcy); Tunell v. Larson, 37–258, 34+29 (declarations of debtor as to disconnected transfers); Whitney v. Swensen, 43–337, 45+609 (value of property at time of trial as compared with its value at time of transfer); Olson v. Swensen, 53–516, 55+596 (declarations of third parties as to title); Hibbs v. Marpe, 84–10, 86+612 (judgment and schedules in bankruptcy); Halbert v. Pranke, 91–204, 97+976 (id.); Mix v. Ege, 67–116, 69+703 (records of another action); Derby v. Gallup, 5–119 (85) (evidence as to profits and capital in grocery business and terms of sales).

[67] Banning v. Armstrong, 7–40(24).

[68] Wadsworth v. Schisselbauer, 32–84, 19+390.

[69] See cases under § 3905.

[70] Lane v. Innes, 43–137, 45+4.

[71] McMillan v. Cheeney, 30–519, 16+404; Duxbury v. Boice, 70–113, 72+838; Brasie v. Mpls. B. Co., 87–456, 92+340; Schmitt v. Hager, 88–413, 93+110; Mpls. T. M. Co. v. Jones, 89–184, 94+551.

[72] Rounds v. Green, 29–139, 12+454.

[73] Brasie v. Mpls. B. Co., 87–456, 92+340.

[74] Wadsworth v. Schisselbauer, 32–84, 19+390; Massey v. Gorton, 12–145(83); Banning v. Armstrong, 7–40(24); Rounds v. Green, 29–139, 12+454; Scanlan v. Murphy, 51–536, 53+799; Spooner v. Travelers Ins. Co., 76–311, 316, 79+305; Peaslee v. Ridgway, 82–288, 84+1024.

[75] Wadsworth v. Schisselbauer, 32–84, 19+390; Banning v. Armstrong, 7–40(24).

[76] See Overmire v. Haworth, 48–372, 51+121; Rule v. Omega S. & G. Co., 64–326, 67+60.

party, but the wife of the fraudulent grantee is a proper party.[77] A person through whom a transfer is made is not a necessary party.[78] A party who has conveyed the premises by a warranty deed has sufficient interest to entitle him to defend.[79]

3925. Complaint—Facts must be alleged which show that the plaintiff occupies a status, either as creditor or as the representative of creditors, which entitles him to assail the transfer.[80] The recovery and docketing of judgment must be alleged, but it is not ordinarily necessary to allege the return of an execution unsatisfied.[81] In pleading the judgment it is sufficient to allege that it was duly made, or words to that effect.[82] It is unnecessary to allege that the debtor had no other property at the time of the conveyance, out of which the judgment might have been made.[83] It is unnecessary to allege that there is no other property out of which the judgment might be made,[84] or that the defendant is insolvent.[85] If the plaintiff is a subsequent creditor he must allege facts showing that the transfer was fraudulent as to him and not merely as to existing creditors.[86] If the plaintiff was a creditor at the time of the transfer, that fact should be affirmatively alleged.[87] The fraudulent intent should be alleged directly and not left to inference.[88] The debt for which the judgment was rendered may be alleged in general terms, the only purpose of such an allegation being to show that the judgment was recovered on a debt accruing prior to the transfer.[89] If it appears from the complaint that six years have elapsed since the commission of the fraud, the plaintiff must allege that he did not discover the fraud until within six years of the commencement of the action.[90] If the complaint shows that the plaintiff's judgment has been satisfied by a sale on execution it is demurrable.[91]

3926. Answer—An answer held insufficient is not denying facts from which fraud might be inferred.[92]

3927. Defences—It is a complete defence that the plaintiff's judgment has been satisfied by a sale on execution.[93] That the judgment creditor has collateral security is not a defence.[94] Where a fraudulent conveyance was defeated by a paramount title and the holder of such title conveyed to the fraudulent grantee, it was held that an action by a creditor would not lie.[95]

3928. Law and fact—The question of fraudulent intent is declared by statute a question of fact.[96] This does not mean that the question must always be submitted to a jury, even where the trial is by jury.[97] Where the evidence is reasonably susceptible of but one inference the court may direct a verdict as in

[77] Tatum v. Roberts, 59–52, 60+848.
[78] Hunt v. Dean, 91–96, 97+574.
[79] Johnston v. Piper, 4–192(133).
[80] Sawyer v. Harrison, 43–297, 45+434; Tvedt v. Mackel, 67–24, 69+475.
[81] See cases under § 3923.
[82] Scanlan v. Murphy, 51–536, 53+799.
[83] Rounds v. Green, 29–139, 12+454.
[84] Wadsworth v. Schisselbauer, 32–84, 19+390; Spooner v. Travelers Ins. Co., 76–311, 79+305.
[85] Spooner v. Travelers Ins. Co., 76–311, 79+305.
[86] Williams v. Kemper, 99–301, 109+242; Anderson v. Lindberg, 64–476, 67+538, and cases under § 3900.
[87] See Piper v. Johnston, 12–60(27); Walsh v. Byrnes, 39–527, 40+831; Welch v. Bradley, 45–540, 48+440.
[88] See McKibbin v. Ellingson, 58–205, 212, 59+1003.
[89] Scanlan v. Murphy, 51–536, 53+799. See Welch v. Bradley, 45–540, 48+440.
[90] Duxbury v. Boice, 70–113, 72+838; Mpls. T. M. Co. v. Jones, 89–184, 94+551; Schmitt v. Hager, 88–413, 93+110.
[91] Mpls. T. M. Co. v. Jones, 89–184, 94+551.
[92] Johnston v. Piper, 4–192(133).
[93] Mpls. T. M. Co. v. Jones, 89–184, 94+551.
[94] See Spooner v. Travelers Ins. Co., 76–311, 79+305.
[95] Noblet v. St. John, 29–180, 12+527.
[96] R. L. 1905 § 3500; Filley v. Register, 4–391(296); Vose v. Stickney, 19–367(312); Molm v. Barton, 27–530, 8+765; Mackellar v. Pillsbury, 48–396, 51+222; Union Nat. Bank v. Pray, 44–168, 46+304; Lathrop v. Clayton, 45–124, 47+544; Leqve v. Smith, 63–24, 65+121.
[97] See Hibbs v. Marpe, 84–10, 86–612.

other cases.[98] If the fraudulent intent unequivocally appears on the face of the conveyance or from the facts admitted by the pleadings, the existence of such intent is not to be submitted to a jury.[99] The law declares certain transfers by a debtor fraudulent irrespective of his intent. In the case of such transfers there is no question of fraudulent intent to be submitted to a jury.[1] The expressions fraudulent "in law" and "as a matter of law" are ambiguous. They mean either that the law regards transfers like the one in question as fraudulent, irrespective of the intent of the debtor, or that the evidence of fraudulent intent in the particular case is conclusive.[2] In a trial by the court, it is discretionary to submit the question of fraud to a jury.[3] The statute is inapplicable to transfers of personalty.[4] Ordinarily the question of fraud is one of fact for the court or jury.[5]

3929. Findings—Cases are cited below involving the sufficiency of particular findings.[6] Where the court erroneously dismisses an action without findings the supreme court cannot order judgment for the plaintiff.[7]

3930. Judgment—Relief allowable—The judgment may provide that the conveyance shall stand as security or indemnity to the grantee.[8] A conveyance is to be set aside or declared void only so far as it obstructs the enforcement of the plaintiff's judgment.[9] Various cases, relating to judgments, are cited below.[10]

3931. Custody of property pending action—An order of court after verdict and before judgment, requiring the defendant to deliver to the sheriff logs cut by him upon the lands involved, has been held erroneous.[11]

FREEHOLDER—One who has an estate of inheritance, or an estate for life, in realty.[12]

FREEHOLD ESTATE—See Estates, 3156.

FRIGHT—See Carriers, 1266, 1288; Damages, 2526; Torts, 9640.

[98] Fish v. McDonnell, 42–519, 44+535; Cortland v. Sharvy, 52–216, 53+1147; Wetherill v. Canney, 62–341, 64+818.

[99] Burt v. McKinstry, 4–204(146); Filley v. Register, 4–391(296); Gere v. Murray, 6–305(213); Horton v. Williams, 21–187.

[1] See §§ 3848, 3854.

[2] See Berry v. O'Connor, 33–29, 31, 21+840; Gallagher v. Rosenfield, 74–507, 50+696; Wetherill v. Canney, 62–341, 346, 64+818; Mower v. Hanford, 6–535(372, 379); Knatvold v. Wilkinson, 83–265, 86+99; Gere v. Murray, 6–305(213).

[3] Hibbs v. Marpe, 84–10, 86+612.

[4] Hathaway v. Brown, 18–414(373).

[5] Filley v. Register, 4–391(296); Foster v. Berkey, 8–351(310); Leqve v. Smith, 63–24, 65+121; Blakely v. Hammerel, 62–307, 64+821; Wilcox v. Landberg, 30–93, 14+365; Bruggemann v. Wagener, 72–329, 75+230; Heim v. Heim, 90–497, 97+379; Dyer v. Rowe, 82–223, 84+797; Hanson v. Oadson, 92–301, 99+1133; Dorwin v. Patton, 101–344, 112+266.

[6] Durfee v. Pavitt, 14–424(319); Matthews v. Torinus, 22–132; Smith v. Conkwright, 28–23, 8+876; Lesher v. Getman, 28–93, 9+585; Forepaugh v. Pryor, 30–35, 14+61; Lane v. Innes, 43–137, 45+4; Wetherill v. Canney, 62–341, 64+818; Arnold v. Hoschildt, 69–101, 71+829; Flanigan v. Pomeroy, 85–264, 88+761.

[7] Heim v. Heim, 90–497, 97+379.

[8] See § 3891.

[9] Coons v. Lemieu, 58–99, 59+977.

[10] Thompson v. Bickford, 19–17(1) (conveyance in part to be held in trust for the grantor and in part to secure a debt to the grantee—judgment setting it aside as a whole sustained); Horton v. Kelly, 40–193, 41+1031 (protection of homestead and dower interests); Coons v. Lemieu, 58–99, 59+977 (judgment made a specific lien on the property); Leqve v. Stoppel, 64–152, 66+124 (plaintiff held not entitled to judgment declaring transfer fraudulent as to certain parts of the purchase price); Kells v. McClure, 69–60, 71+827 (surrender of logs and lumber—defendant denied privilege of paying value instead of surrendering—accounting denied); Fryberger v. Berven, 88–311, 92+1125 (judgment declared lien on a reserved interest in the land); Brown v. Matthaus, 14–205(149) (charging notes with payment of judgment—holders of notes required to bring them into court).

[11] Mower v. Hanford, 6–535(372).

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

FRIVOLOUS APPEALS—See Appeal and Error, 291, 462.
FRIVOLOUS PLEADINGS—See Pleading, 7668.
FROGS—See Master and Servant, 5875; Railroads, 8129.
FROM—See Time, 9627.
FUGITIVE FROM JUSTICE—See Extradition, 3705.
FULL FAITH AND CREDIT—See Constitutional Law, 1698; Judgments, 5207.
FUNERAL EXPENSES—See Executors and Administrators, 3575, 3592, 3605, 3610.
FURNITURE—See note 13.
FUTURE ESTATES—See Estates, 3160.
FUTURES—See Brokers, 1126.
GAMBLING—See Gaming; Wagers.

GAME AND FISH

3932. Legislative control—Constitutionality of statutes—It is within the police power of the state to enact such laws as will preserve from extermination or undue depletion wild game adapted to consumption as food, or to other useful purpose; and to that end the state may adopt any reasonable regulations, not only as to the time and manner of taking or killing such game, but also imposing such limitations or restrictions upon its use, or the right of property in it, after it is taken or killed, as will tend to prevent such extermination or depletion.[14] Several statutes relating to game and fish have been held constitutional against various objections.[15]

3933. Title in state—The title to all wild game is in the state in its sovereign capacity. No person can acquire any property in it, except by catching or killing it at the time and in the manner authorized by law. If it is acquired contrary to law the state may reclaim it.[16]

3934. Right of landowner to hunt and protect—A landowner has the exclusive right of hunting on his land and fishing in the waters thereon.[17] He has the exclusive right to control and protect the wild game on his land, except as against the state.[18]

3935. Ruffed grouse—Unlawful sale and possession—The provisions of Laws 1903 c. 336 § 45, forbidding any one to sell or to have in his possession any ruffed grouse, except under certain conditions, apply to all ruffed grouse, whether captured within or without this state.[19]

3936. Possession after closed season—Laws 1891 c. 9 § 11, as amended by Laws 1893 c. 124 § 9, forbids the having in possession, more than five days after the commencement of the closed season, certain kinds of game, though lawfully taken or killed during the open season.[20]

[13] State v. Segel, 60-507, 509, 62+1134.
[14] State v. Rodman, 58-393, 59+1098. See 14 Harv. L. Rev. 228.
[15] State v. Rodman, 58-393, 59+1098; State v. N. P. Ex. Co., 58-403, 59+1100; State v. Mrozinski, 59-465, 61+560; State v. Chapel, 64-130, 66+205; State v. Poole, 93-148, 100+647; State v. Shattuck, 96-45, 104+719; State v. Tower L. Co., 100-38, 110+254. See State v. Chapel, 63-535, 65+940 (title of Laws 1893 c. 124 held insufficient).
[16] State v. Rodman, 58-393, 59+1098; Thomas v. N. P. Ex. Co., 73-185, 75+1120; Linden v. McCormick, 90-337, 96+785; State v. Shattuck, 96-45, 49, 104+719.
[17] Lamprey v. Danz, 86-317, 321, 90+578; Realty Co. v. Johnson, 92-363, 100+94.
[18] Realty Co. v. Johnson, 92-363, 100+94.
[19] State v. Shattuck, 96-45, 104+719.
[20] State v. Rodman, 58-393, 59+1098.

3937 Deer and moose skins—Purchase—A person who, in good faith, has purchased deer and moose skins for the purpose of tanning the same, acquires a valid title thereto; and in an action to recover the hides, or their value, from the game warden, who takes possession thereof, the owner is not required to prove that the animals from which such skins were taken were lawfully killed.[21] Such skins, purchased in good faith from persons who have taken them from animals legally killed during the open season, may lawfully be shipped out of the state for the purpose of being tanned and returned to the shipper for use in manufacturing gloves and mittens.[22]

3938. Mode of catching fish—Laws 1893 c. 124 § 15, prohibiting the taking of fish, with certain exceptions, in any other manner than by angling for them with hook and line, is valid.[23]

3939. Obstructing fish commission—Laws 1905 c. 344 § 56, forbidding the obstruction of the game and fish commission while engaged in gathering fish spawn as authorized by the statute, is valid.[24]

3940. Burden of proof as to lawful killing or taking—Whether the burden of proof is upon the person having possession during the open season and claiming title to wild game alleged to have been caught and taken in violation of law, or upon the state, to show whether the law was violated, is an open question.[25] Where game unlawfully killed has been commingled with game lawfully killed, the burden is upon the possessor to prove, as against the state, what part was lawfully killed, and thereby became his property.[26]

GAMING

3941. Gambling—What constitutes under R. L. 1905 § 4964—The risking of money between two or more persons on a contest of chance of any kind, where one must be the loser, and the other the gainer, is gambling.[27] The boards and lists commonly used in pool rooms in connection with horse races are not "gambling devices" within the meaning of the statute.[28]

3942. Punishment for gambling—Gambling, under G. S. 1894 § 6588 (R. L. 1905 § 4964), is punishable as a misdemeanor under G. S. 1894 § 6297 (R. L. 1905 § 4763).[29]

3943. Definition of gambling device—A gambling device may be defined as "an invention or contrivance to determine the question as to who wins or who loses his money on a contest of chance;" [30] or as "any kind of apparatus, contrivance, or instrument which may be used in games of chance, and upon the manipulation or operation of which the result of the game is determined." [31]

3944. Keeping gambling device—Indictment—An indictment for keeping a gambling device has been held sufficient against the objections that it did not directly charge the accused with keeping a gambling device; that it was double; and that it did not sufficiently describe the device, the description being "a certain gambling device designed to be used in gambling, commonly known

[21] Linden v. McCormick, 90–337, 96+785; Allbright v. N. P. Ry., 96–135, 104+827.
[22] Allbright v. N. P. Ry., 96–135, 104+827.
[23] State v. Mrozinski, 59–465, 61+560.
[24] State v. Tower L. Co., 100–38, 110+254.
[25] Graham v. N. P. Ex. Co., 89–193, 94+548.
[26] Thomas v. N. P. Ex. Co., 73–185, 75+1120.
[27] State v. Shaw, 39–153, 39+305; State v. Grimes, 74–257, 77+4.
[28] State v. Shaw, 39–153, 39+305.
[29] Id.
[30] State v. Grimes, 49–443, 52+42.
[31] State v. Shaw, 39–153, 39+305. See State v. Grimes, 74–257, 77+4; State v. Briggs, 84–357, 87+935.

and designated as a 'nickel-in-the-slot machine,' a more particular description of said device being to the grand jury unknown." [32] An indictment for keeping a gambling device has been held insufficient for failure to charge the commission of the offence directly.[33]

3945. Keeping a gaming house—Indictment at common law—An indictment for keeping a gaming house at common law has been held sufficient, though it alleged that the act was done feloniously and against the form of the statute and did not allege the names of the players or that they were to the jury unknown. The common-law offence has been held not abrogated by the charter or ordinances of St. Paul.[34] The keepers of a pool room in connection with horse races would be liable at common law for keeping a gaming house.[35]

3946. Keeping a gaming house—Complaint under city charter—A complaint substantially in the language of the ordinance has been held sufficient though it did not allege that the house either belonged to, or was occupied or controlled by, the defendant.[36]

3947. Evidence—Admissibility—That a certain place is maintained as a gambling house, may be shown by the general reputation of the place, by the reputation of the inmates, and frequenters, as professional gamblers, and by articles and devices found therein which are commonly known as gambling pharaphernalia. It is no defence in such a case that the officers of the law, who seized the apparatus and made the arrests, gained admittance to the premises without authority of law.[37]

3948. Evidence—Sufficiency—Evidence held sufficient to warrant a conviction for keeping a gambling device; [38] for keeping a gambling house.[39]

[32] State v. Briggs, 84–357, 87+935.
[33] State v. Nelson, 79–388, 82+650.
[34] State v. Crummey, 17–72(50).
[35] State v. Shaw, 39–153, 39+305.
[36] State v. Grimes, 74–257, 77+4.
[37] State v. Hoyle, 98–254, 107+1130.
[38] State v. Briggs, 84–357, 87+935.
[39] State v. Grimes, 74–257, 77+4.

GARNISHMENT

Cross-References

See Banks and Banking, 822; Chattel Mortgages, 1470; Conflict of Laws, 1551; Justices of the Peace, 5308.

IN GENERAL

3949. Nature—A garnishment proceeding is not an independent action but is ancillary to the main action against the defendant.[40] It is a mode of attaching property to secure and make effectual any judgment that may be rendered in the main action to which it is ancillary.[41] It is used to attach forms of property that cannot be attached by an ordinary writ of attachment.[42]

[40] Olson v. Brady, 76-8, 78+864; Willson v. Pennoyer, 93-348, 101+502; Duxbury v. Shanahan, 84-353, 355, 87+944; Iselin v. Simon, 62-128, 64+143.

[41] Benton v. Snyder, 22-247; Cooley v. Minn. T. Ry., 53-327, 332, 55+141.

[42] Banning v. Sibley, 3-389(282).

Under an attachment certain specific property is seized and taken into the actual or constructive possession of the officer holding the writ, but a garnishment is a dragnet which impounds everything in the hands of the garnishee belonging to the defendant.[43] It is a proceeding in rem, or rather may be, as against a non-resident.[44] It is summary[45] and informal.[46] It is instituted to enforce the rights of the creditor and not the rights of the debtor.[47] When the court already has jurisdiction of the person of the defendant, the proceedings against the garnishee are much in the nature of proceedings to bring in additional parties defendant, and in such a case, when the garnishee is brought in, the action is in personam, as to all the parties, and takes on a double aspect—that of an action against the defendant to recover judgment for the debt, and that of a sort of a creditors' bill against him and the garnishee, to reach assets in the hands of the garnishee, to be applied in satisfaction of the judgment.[48] The garnishment statutes are designed to protect creditors without injustice to debtors or garnishees. The purpose is to require the debtor of A to pay A's debt to B and thereby to relieve him from further liability to A. It is not contemplated that the garnishee shall interest himself for the protection of his creditor, who is the defendant in the original action; nor should the statute be so construed as to enable the garnishee to assist his creditor.[49]

3950. In what actions—Garnishment may be had in an action for tort.[50]

3951. Construction of statutes—The statutes regulating garnishment are construed in favor of the garnishee.[51] They should not be so construed as to enable the garnishee to assist his creditor.[52]

3952. What will defeat—The fact that the garnishee has an unliquidated lien on the property of the defendant in his hands will not defeat a garnishment. A garnishee cannot defeat garnishment by bringing suit in another court on a note belonging to the defendant and filing the note in that court.[53] A contract of the defendant to pay what he owed the garnishee to another has been held not to defeat garnishment.[54]

EFFECT

3953. In general—The service of a summons in garnishment proceedings does not change the rights of the parties, further than to transfer the right of the principal defendant to proceed against the garnishee for the collection of the debt. The attaching creditor occupies no better position with respect to the garnishee than would the defendant in a suit by him against the garnishee.[55]

3954. Lien—By the service of a garnishee summons the attaching creditor acquires no more than an inchoate lien.[56] While he does not acquire a specific lien he acquires a specific right, superior to that of the general creditor, which is substantially like that acquired by an ordinary attachment.[57] It

[43] Greengard v. Fretz, 64–10, 15, 65+949.
[44] Lewis v. Bush, 30–244, 15+113; Harvey v. G. N. Ry., 50–405, 407, 52+905; Aultman v. Markley, 61–404, 63+1078; Swedish etc. Bank v. Bleecker, 72–383, 75+740.
[45] Aultman v. Markley, 61–404, 408, 63+1078.
[46] Cole v. Sater, 5–468(378, 382).
[47] Stanek v. Libera, 73–171, 75+1124.
[48] Aultman v. Markley, 61–404, 408, 63+1078.
[49] Mpls. etc. Ry. v. Pierce, 103–504, 115+649.
[50] Cummings v. Edwards, 95–118, 103+709, 106+304.
[51] See Ide v. Harwood, 30–191, 14+884; Stevenot v. Eastern Ry., 61–104, 63+256.
[52] Mpls. etc. Ry. v. Pierce, 103–504, 115+649.
[53] Trunkey v. Crosby, 33–464, 23+846.
[54] Davis v. Mendenhall, 19–149(113).
[55] Bacon v. Felthouse, 103–387, 115+205.
[56] Pitzl v. Winter, 96–499, 105+673.
[57] North Star B. & S. Co. v. Ladd, 32–

charges the garnishee with the responsibility of retaining the money or property, as in the custody of the law, in order that it may be applied to the satisfaction of any judgment that the plaintiff may recover.[58]

3955. Rights of garnishee unaffected—It is a fundamental principle in the law of garnishment that the debt or property is arrested, if at all, subject to all the rights of the garnishee.[59]

3956. Rights of third parties unaffected—The lien of an attachment is subject to the pre-existing rights of third parties.[60]

3957. Property affected—The lien does not attach to property acquired or indebtedness incurred by the garnishee subsequent to the service of the garnishee summons,[61] or to debts assigned by the defendant prior to such service, though the garnishee had no notice of the assignment.[62] If a garnishee fails to disclose an assignment of which he has knowledge and allows a judgment to be entered against him he may be liable to the assignee notwithstanding the judgment.[63]

3958. Delivery of property by garnishee—A garnishee is not bound to deliver property in his hands except upon a judgment or order of the court.[64] He is not bound to deliver at any other time or place than as stipulated in the contract between him and the defendant.[65]

3959. Conditions of payment unaffected—The garnishee cannot be required to perform his contract otherwise than stipulated. He can be required to pay only in the manner provided by the contract which creates his liability.[66]

3960. Effect on other actions—Stay—Plea—Abatement—Where the defendant in an action is garnished by a creditor of the plaintiff, the proper practice is for the court in which the action is pending to grant a stay of proceedings in the action before judgment; or, if judgment is permitted to be entered, to stay execution as to the whole or a part of the judgment, as circumstances may require, until the proceedings of garnishment are disposed of. It is immaterial whether the two actions are pending in the same state or in different states.[67]

JURISDICTION

3961. In general—If personal jurisdiction is obtained of the defendant in the main action, the steps taken to bring the garnishee into the action are not jurisdictional as to the defendant, and he cannot question their sufficiency. On the other hand if the defendant is a non-resident and served with summons only by publication the steps taken to bring the garnishee into the action

381, 20+334. See Banning v. Sibley, 3–389 (282, 297); Irwin v. McKechnie, 58–145, 59+987; Prince v. Heenan, 5–347(279, 282).

[58] Cooley v. Minn. T. Ry., 53–327, 55+141.

[59] Stevenot v. Eastern Ry., 61–104, 63+256; Vanderhoof v. Holloway, 41–498, 43+331.

[60] Cooley v. Minn. T. Ry., 53–327, 55+141; Mansfield v. Stevens, 31–40, 16+455.

[61] Nash v. Gale, 2–310(265); McLean v. Sworts, 69–128, 71+925; Greenman v. Melbye, 78–361, 81+21.

[62] MacDonald v. Kneeland, 5–352(283); Williams v. Pomeroy, 27–85, 6+445; Lewis v. Bush, 30–244, 15+113; Union I. W. Co. v. Kilgore, 65–497, 67+1017. See Lewis v. Traders' Bank, 30–134, 14+587; Murphy v. Bordwell, 83–54, 85+915; Baylor v. Butterfass, 82–21, 84+640; Dyer v. Rowe, 82–223, 84+797; Steinbach v. Brant, 79–383, 82+651; Burton v. Gage, 85–355, 88+997.

[63] Black v. Brisbin, 3–360(253).

[64] Stromberg v. Lindberg, 25–513.

[65] Stevenot v. Eastern Ry., 61–104, 63+256; Baldwin v. G. N. Ry., 81–247, 83+986. See Merz v. Chi. etc. Ry., 86–33, 36, 90+7; Bacon v. Felthous, 103–387, 115+205.

[66] Bacon v. Felthous, 103–387, 115+205.

[67] Blair v. Hilgedick, 45–23, 47+310; Harvey v. G. N. Ry., 50–405, 52+905; Am. H. L. Co. v. Joannin, 99–305, 109+403. See Duxbury v. Shanahan, 84–353, 87+944.

are jurisdictional as to the defendant and he may object to their sufficiency.[68] If the court has jurisdiction of the person of the defendant the voluntary appearance and disclosure of the garnishee waives defects in the garnishee affidavit or summons.[69] In all cases the res must be within the state so that it can be seized and sold to satisfy any judgment obtained against the principal debtor.[70] It is the right and duty of a garnishee to raise all questions as to the jurisdiction of the court to proceed against him.[71] It is necessary for the court to have jurisdiction of the main action in order to have jurisdiction of the ancillary garnishment proceedings.[72] The proper court to determine whether a garnishee may be charged as such on his disclosure is the court in which the garnishment proceedings are pending.[73] The objection that the defendant has no property in the state, and that for that reason service could not be made by publication, is waived by a garnishee who defaults.[74]

3962. Not dependent on situs of debt—The obligation of a debtor to pay his debt clings to and accompanies him wherever he goes. It is this obligation which is garnished. Jurisdiction over the person of the debtor gives jurisdiction over the debt or obligation. Jurisdiction does not depend on the so-called situs of the debt.[75]

3963. Debt owing to non-resident—An ordinary debt may be garnished wherever the debtor can be found and his creditor might sue him for its recovery. An ordinary debt owing to a non-resident may be garnished in this state, if the debtor can be found here, and it is immaterial that the debt is not made payable here, or that the debtor is here casually or temporarily.[76] The old idea that the question depends on the situs of the debt has been discarded. Jurisdiction over the person of the garnishee gives the court jurisdiction over his obligation.[77] A judgment is not an ordinary debt within the general rule.[78] If a debtor is garnished in an action in which his creditor is not personally served he is bound to give his creditor notice of the pendency of the proceedings, if he wishes to avail himself of the garnishee judgment as a bar against his creditor.[79]

WHAT GARNISHABLE

3964. Where tort may be waived—Where a tort may be waived and recovery had on an implied agreement garnishment will lie.[80]

3965. Judgments—A judgment recovered in this state has been held not subject to garnishment in another state.[81]

[68] Hinkley v. St. Anthony Falls etc. Co., 9–55(44); Aultman v. Markley, 61–404, 63+1078; Olson v. Brady, 76–8, 78+864; Webster v. Penrod, 103–69, 114+257.

[69] Howland v. Jeuel, 55–102, 56+581. See Jordan v. Jordan, 109–299, 123+825.

[70] Stevenot v. Eastern Ry., 61–104, 63+256; Lewis v. Bush, 30–244, 15+113. See § 3963.

[71] McKinney v. Mills, 80–478, 83+452.

[72] Willson v. Pennoyer, 93–348, 101+502.

[73] American H. L. Co. v. Joannin, 99–305, 109+403.

[74] Mpls. etc. Ry. v. Pierce, 103–504, 115+649.

[75] Harris v. Balk, 198 U. S. 215.

[76] Harvey v. G. N. Ry., 50–405, 52+905; Krafve v. Roy, 98–141, 107+966; McShane v. Knox, 103–268, 114+955; Chicago etc. Ry. v. Sturm, 174 U. S. 710; King v. Cross, 175 U. S. 396; Harris v. Balk, 198 U. S. 215; Rothschilds v. Knight, 176 Mass. 48; Morgan v. Mut. B. L. Ins. Co., 189 N. Y. 447, 3 L. R. A. (N. S.) 608; 20 Id. 264. See, however, Swedish etc. Bank v. Bleecker, 72–383, 75+740; McKinney v. Mills, 80–478, 83+452; N. W. etc. Co. v. Gippe, 92–36, 99+364.

[77] Harris v. Balk, 198 U. S. 215. See 19 Harv. L. Rev. 132.

[78] Boyle v. Musser, 88–456, 93+520.

[79] Harris v. Balk, 198 U. S. 215.

[80] Pabst v. Liston, 80–473, 83+448.

[81] Boyle v. Musser, 88–456, 93+520.

3966. Garnishable—A debt owing to a non-resident;[82] a legacy in the hands of an executor;[83] an ordinary debt owing by a public corporation;[84] the salary or wages of a municipal officer or employee;[85] a debt owing by a receiver of a railroad under a federal court, to an employee;[86] logs of the defendant in a boom of the garnishee for safe-keeping;[87] a United States voucher;[88] bonds of the state deposited with a trustee;[89] money in the hands of the garnishee which in equity and good conscience belongs to the defendant;[90] stock in a foreign corporation;[91] a debt due from a warehouseman for lease of goods stored;[92] a note;[93] money in the hands of a stakeholder on a bet;[94] goods held by a common carrier in a warehouse;[95] book accounts;[96] a mortgagor's right of redemption from a chattel mortgage;[97] money derived from the sale of a homestead.[98]

3967. Not garnishable—A contingent liability;[99] a liability on a draft, bill, or note;[1] a liability on a judgment, if execution may issue;[2] property in the hands of a common carrier in transit to a place outside of the state;[3] property out of the state;[4] real property;[5] property in custodia legis;[6] the salary or fees of a state officer.[7]

PRACTICE IN GENERAL

3968. Affidavit—It is sufficient if it conforms to the statute.[8] While it is somewhat in the nature of a complaint against the garnishee, its sufficiency

[82] See § 3963.

[83] R. L. 1905 § 4233. See Kraus v. Kraus, 81–484, 84+332; Duxbury v. Shanahan, 84–353, 87+944.

[84] Mitchell v. Miller, 95–62, 103+716 (overruling McDougal v. Hennepin County, 4–184, 130). See Knight v. Nash, 22–452.

[85] R. L. 1905 § 4237; Mitchell v. Miller, 95–62, 103+716. Prior to Laws 1901 c. 96, the rule was otherwise. Pioneer P. Co. v. Sanborn, 3–413(304); McDougal v. Hennepin County, 4–184(130); Roeller v. Ames, 33–132, 22+177; Sandwich Mfg. Co. v. Krake, 66–110, 68+606; Orme v. Kingsley, 73–143, 75+1123.

[86] Irwin v. McKechnie, 58–145, 59+987.

[87] Farmers etc. Bank v. Welles, 23–475.

[88] Leighton v. Heagerty, 21–42.

[89] Banning v. Sibley, 3–389(282).

[90] DeGraff v. Thompson, 24–452; Pabst v. Liston, 80–473, 83+448.

[91] Puget Sound Nat. Bank v. Mather, 60–362, 62+396.

[92] Olson v. Brady, 76–8, 78+864.

[93] Trunkey v. Crosby, 33–464, 23+846.

[94] Pabst v. Liston, 80–473, 83+448.

[95] Cooley v. Minn. T. Ry., 53–327, 55+141.

[96] Ide v. Harwood, 30–191, 14+884.

[97] Becker v. Dunham, 27–32, 6+406.

[98] Fred v. Bramen, 97–484, 107+159.

[99] R. L. 1905 § 4234; Gies v. Bechtner, 12–279(183); Wheeler v. Day, 23–545; Durling v. Peck, 41–317, 43+65; Irwin v. McKechnie, 58–145, 59+987; Olson v. Brady, 76–8, 78+864; Bacon v. Felthous, 103–387, 115+205.

[1] R. L. 1905 § 4234; Hubbard v. Williams, 1–54(37); Cole v. Sater, 5–468(378); Groh v. Bassett, 7–325(254); American H. L. Co. v. Joannin, 99–305, 109+403.

[2] R. L. 1905 § 4234; Boyle v. Musser, 88–456, 463, 93+520.

[3] Stevenot v. Eastern Ry., 61–104, 63+256; Baldwin v. G. N. Ry., 81–247, 83+986; Connery v. Quincy etc. Ry., 92–20, 99+365. See 14 Harv. L. Rev. 384.

[4] Stevenot v. Eastern Ry., 61–104, 63+256. See Puget Sound Nat. Bank v. Mather, 60–362, 62+396.

[5] Banning v. Sibley, 3–389(282, 297).

[6] In re Mann, 32–60, 19+347 (property in hands of assignee under the insolvent law of 1881 held not garnishable); Simon v. Mann, 32–65, 19+347 (id.); Lord v. Meachem, 32–66, 19+346 (id.); Armour v. Brown, 76–465, 79+522 (id.); Devlin v. McMillan, 77–137, 79+1126 (id.); Second Nat. Bank v. Schranck, 43–38, 44+524 (validity of assignment under insolvent law not subject to attack in garnishment proceedings); Lanpher v. Burns, 77–407, 80+361 (validity of common-law assignment for the benefit of creditors may be assailed in garnishment proceedings); Marine Nat. Bank v. Whiteman, 49–133, 51+665 (money in hands of clerk unofficially held not in custodia legis); Irwin v. McKechnie, 58–145, 59+987 (money owing by railroad receiver to employees held garnishable); Trunkey v. Crosby, 33–464, 23+846 (note filed in court held garnishable); May v. Walker, 35–194, 28+252 (property held by assignee under fraudulent assignment for benefit of creditors held not in custodia legis).

[7] Sexton v. Brown, 72–371, 75+600; Orme v. Kingsley, 73–143, 75+1123.

[8] Howland v. Jeuel, 55–102, 56+581.

is not to be determined by the ordinary rules of pleading. In an action against two defendants an affidavit that the garnishee "is indebted to the said defendants in an amount exceeding the sum of fifty dollars" is sufficient to charge the garnishee for a debt due from him to one of the defendants alone.[9] It must not be in the alternative,[10] but a defect in this regard may be waived.[11] It need not allege that the garnishee is a corporation.[12] It may be dated prior to the commencement of the action.[13] It must be filed before the garnishee summons is issued.[14] The filing of a sufficient affidavit may be waived as to the garnishee by his voluntary appearance and disclosure without objection.[15] The defendant, as well as the garnishee, may object to the sufficiency of an affidavit, when the defendant is served with summons only by publication.[16]

3969. Garnishee summons—It is issued by the plaintiff or his attorney without any order of court.[17] It need not run in the name of the state.[18] A single summons may include several garnishees. A summons has been held to designate sufficiently the court or officer before whom it was returnable.[19] It cannot be issued prior to the filing of the affidavit.[20] A voluntary general appearance by the garnishee waives as to him all defects in the summons or its service on him.[21] A garnishee summons is issued when delivered by the plaintiff, or his attorney, to the proper officer for service upon the garnishee, and, when the writ is sent to the officer by mail, delivery is not completed until received by him.[22] A service of summons on an assignee under a void assignment for the benefit of creditors has been held ineffectual as to certain book accounts, the proper service being upon the debtors.[23]

3970. Service of garnishee summons and notice on defendant—Failure to serve upon the defendant a proper copy of the garnishee summons and notice of the time of disclosure is not a jurisdictional defect, such as to render void a judgment entered against the garnishee upon the disclosure. But the garnishee proceedings may be dismissed, and the garnishee discharged, on motion of defendant, specially appearing for that purpose.[24]

3971. Corporate officers—The court is given discretionary power to cite other corporate officers than the one who appears to make disclosure.[25]

3972. After appeal from justice court—After a case has been removed by appeal from a justice court to the district court, garnishment proceedings may be commenced in the district court, notwithstanding the fact that a proper appeal bond was given and is in full force and effect.[26]

3973. Fees—A garnishee need not appear unless his fees for one day's attendance and mileage are paid or tendered in advance.[27] Formerly the rule was otherwise.[28]

[9] Aultman v. Markley, 61-404, 63+1078.
[10] Prince v. Heenan, 5-347(279).
[11] Aultman v. Markley, 61-404, 1078.
[12] Howland v. Jeuel, 55-102, 56+581.
[13] See Crombie v. Little, 47-581, 587, 50+823.
[14] Black v. Brisbin, 3-360(253).
[15] Hinkley v. St. Anthony Falls etc. Co., 9-55(44); Howland v. Jeuel, 55-102, 56+581; Aultman v. Markley, 61-404, 63+1078.
[16] Aultman v. Markley, 61-404, 63+1078.
[17] Hinkley v. St. Anthony Falls etc. Co., 9-55(44).
[18] Hanna v. Russell, 12-80(43).
[19] N. W. Fuel Co. v. Kofod, 74-448, 77+206.
[20] Black v. Brisbin, 3-360(253); Hinkley v. St. Anthony Falls etc. Co., 9-55(44).
[21] Hinkley v. St. Anthony Falls etc. Co., 9-55(44); Howland v. Jeuel, 55-102, 56+581.
[22] Webster v. Penrod, 103-69, 114+257.
[23] Ide v. Harwood, 30-191, 14+884.
[24] Webster v. Penrod, 103-69, 114+257.
[25] R. L. 1905 § 4236; Johnson v. Bergman, 80-73, 82+1108.
[26] Hopkins v. McCusker, 103-79, 114+468.
[27] R. L. 1905 § 4232.
[28] Goodrich v. Hopkins, 10-162(130).

3974. Powers of referee—A referee to take and report a disclosure cannot determine questions of jurisdiction.[29]

3975. Discharge on bond—Statute—Provision is made by statute for a discharge of garnishment on bond.[30] Provision is made by rule of court for a notice of the application for a discharge under the statute.[31] The obligors upon a bond given under the statute, in which it was admitted that the plaintiff had garnished the money, property, and effects of the defendant in the hands of the garnishee, are estopped in an action upon the bond, and cannot be permitted to assert that the admission was false.[32]

3976. Dissolution on motion—In case of an assignment under the insolvent law of 1881 the assignee is not garnishable in a suit against his assignor. If the validity of such assignment stands admitted, a purported garnishment of the assignee may be dissolved on motion and without disclosure.[33] A motion to dismiss on the ground that the right to maintain the proceedings had passed to a receiver, has been denied, the remedy being a motion for a substitution of the receiver under R. L. 1905 § 4064.[34]

3977. Abuse of process—Dismissal—Where an action is brought in a justice court, and after a judgment against the defendant the case is appealed to the district court, on questions of law and fact, garnishment proceedings commenced in the district court cannot properly be dismissed on the ground that they were commenced for the purpose of annoying and harassing the defendant, because after the appeal from the justice court was effected garnishment proceedings were commenced in the justice court by inadvertence and subsequently abandoned.[35]

3978. Concurrent levy—The fact that after the plaintiff had garnished money enough to pay part of his judgment he subsequently levied on other property, which would have sold for more than enough to pay the whole judgment, has been held not to operate as a release of the money garnished.[36]

3979. Appeal to supreme court—An order discharging a garnishee, whether upon examination or not, is appealable.[37] An order for judgment against a garnishee is not appealable.[38] An order refusing to discharge a garnishee is not appealable,[39] except when the motion challenges the jurisdiction of the court.[40] An order, refusing to set aside the proceedings for insufficiency of the affidavit and granting plaintiff leave to file a supplemental complaint, has been held not appealable.[41] An appeal has been dismissed because the proper parties were not made parties to the appeal.[42]

DISCLOSURE

3980. No pleadings—No provision is made in this state for any pleading on the part of the garnishee,[43] or for framing issues.[44]

[29] Prince v. Heenan, 5-347(279).
[30] R. L. 1905 § 4256.
[31] Rule 3, District Court.
[32] Greengard v. Fretz, 64-10, 65+949.
[33] Lord v. Meachem, 32-66, 19+346.
[34] Am. E. Co. v. Crowley, 105-233, 117+428.
[35] Hopkins v. McCusker, 103-79, 114+468.
[36] Pierce v. Wagner, 64-265, 66+977, 67+537.
[37] McConnell v. Rakness, 41-3, 42+539; Cummings v. Edwards, 95-118, 103+709, 106+304.
[38] Croft v. Miller, 26-317, 4+45.
[39] Duxbury v. Shanahan, 84-353, 87+944; Krafve v. Roy, 98-141, 107+966.
[40] Krafve v. Roy, 98-141, 107+966.
[41] Prince v. Heenan, 5-347(279).
[42] Greenman v. Melbye, 78-361, 81+21.
[43] Peterson v. Lake Tetonka P. Co., 72-263, 75+375.
[44] Mahoney v. McLean, 28-63, 9+76

3981. Personal appearance—There must be a personal appearance. A mere filing of an affidavit denying liability is ineffectual.[45]

3982. Scope of examination—The plaintiff has the right to examine the garnishee so as to bring out all the facts, in order that the court and not the garnishee may determine the latter's liability.[46] The garnishee should be permitted to testify as to matters in defence or setoff.[47] He is entitled to the privileges of an ordinary witness.[48] He may be questioned in regard either to an indebtedness or in regard to property in his hands, though the affidavit does not state both grounds for issuing the summons.[49] He may be required to answer questions tending to show that he was a party to a fraudulent assignment by the defendant.[50]

3983. Witnesses—Witnesses may be heard upon the examination for the purpose of corroborating or explaining the testimony of the garnishee, or of developing facts additional to those disclosed by him.[51] But evidence in contradiction is not admissible.[52] The disclosure is not the same as a trial of disputed facts in ordinary actions.[53]

3984. Setoff—The equitable doctrine of setoff may be applied by a court of equity in garnishment proceedings in all cases where the plaintiff presents no superior right. A lien acquired by garnishment is, in the absence of some special and superior right in the plaintiff, subject to all equities existing between the garnishee and the defendant. A bank, summoned as garnishee in an action against one of its depositors, may set off against the depositor's general account unmatured notes held by it at the time of the service of the garnishee summons, when it appears that the depositor is insolvent. It need not be shown that the depositor had at the time of the service of the summons been formally adjudged an insolvent in insolvency or bankruptcy proceedings. Insolvency in fact is all that is necessary to entitle the garnishee to the remedy.[54]

3985. Further disclosure—Applications for a further disclosure on the ground of mistake, inadvertence, or excusable neglect are addressed to the discretion of the court.[55]

3986. Conclusiveness of disclosure—The disclosure of the garnishee is conclusive upon the plaintiff. The latter cannot introduce evidence in contradiction.[56]

3987. Premature action—Dismissal—Garnishment proceedings will not be dismissed, on the ground that the main action was prematurely brought, after a decision in favor of the plaintiff.[57]

3988. Findings—Where no supplemental complaint is filed, and no claim made by third parties, the statute does not contemplate findings of fact.[58]

3989. Effect—The disclosure is the sole basis of any judgment which may be rendered against the garnishee, except when the plaintiff files a supplemental complaint. It shows what property has been attached and in that respect is analogous to the return of the sheriff in an ordinary writ of attachment.[59]

[45] Peterson v. Lake Tetonka P. Co., 72-263, 75+375.
[46] Id.
[47] Milliken v. Mannheimer, 49-521, 52+139. See Wunderlich v. Merchants Nat. Bank, 109-468, 124+223.
[48] Banning v. Sibley, 3-389(282).
[49] Prince v. Heenan, 5-347(279).
[50] Oberteuffer v. Harwood, 6 Fed. 828.
[51] Leighton v. Heagerty, 21-42; Pitzl v. Winter, 96-499, 105+673.
[52] See § 3986.
[53] Wildner v. Ferguson, 42-112, 43+794.
[54] Wunderlich v. Merchants Nat. Bank, 109-468, 124+223. See Milliken v. Mannheimer, 49-521, 52+139.
[55] Milliken v. Mannheimer, 49-521, 52+139.
[56] Banning v. Sibley, 3-389(282); Chase v. North, 4-381(288); Cole v. Sater, 5-468(378).
[57] Iselin v. Simon, 62-128, 64+143.
[58] Wildner v. Ferguson, 42-112, 43+794.
[59] Bradley v. Thorne, 67-281, 69+909.

SUPPLEMENTAL COMPLAINT

3990. Statutory procedure exclusive—The only way in which the plaintiff can controvert the disclosure of the garnishee is by filing a supplemental complaint as provided by statute.[60]

3991. Not a matter of right—A plaintiff cannot have leave to file a supplemental complaint merely because he believes that the garnishee does not answer truly, or that the title by which the garnishee holds property is void as to creditors of the defendant. He must make that appear probable to the court.[61]

3992. When not allowed—It will not be allowed if the facts disclosed by the garnishee in themselves warrant judgment against him,[62] or where a claim is made by a third party,[63] or where the plaintiff has previously moved for judgment against the garnishee on his disclosure alone.[64]

3993. Diligence—An application for leave to file a complaint must be made with reasonable diligence.[65]

3994. Pleading—A supplemental complaint is to be construed in connection with the original complaint, and it is unnecessary to repeat in the former the allegations of the latter.[66]

3995. Practice—The proceedings are to be deemed a continuation of the garnishment proceedings.[67] The trial is governed by the same rules of procedure and evidence as an ordinary civil action.[68] A jury trial is not a matter of right.[69] The notice of motion for leave to file a complaint, and the complaint, may be served on the attorney who has appeared for the defendant in the main action.[70] The court will take judicial notice of the entry of judgment against the defendant in the main action.[71] The court should make findings of fact as in an ordinary action.[72]

3996. Impeachment of garnishee—When the plaintiff makes the garnishee his witness, he may with permission of the court, ask him as to former statements inconsistent with his testimony.[73]

3997. Fraudulent conveyances—The statute authorizes the garnishee to be charged for property which he holds by a title which is void for fraud as to the defendant's creditors.[74] The plaintiff cannot attack a transaction solely upon the ground that it was a fraud upon his debtor.[75] The burden of proving the existence of an indebtedness at the time of the alleged fraudulent transfer has been held upon the plaintiff.[76] Where the garnishee has under his control personal property of the debtor, the plaintiff may, without filing a supplemental complaint prove that a transfer by the debtor of the property to a third person was not intended to operate as a sale but only as a cover against creditors.[77]

[60] Ingersoll v. First Nat. Bank, 10–396 (315); Leighton v. Heagerty, 21–42; Vanderhoof v. Holloway, 41–498, 43+331. See Davis v. Mendenhall, 19–149(113); Pitzl v. Winter, 96–499, 105+673.

[61] Mahoney v. McLean, 28–63, 9+76.

[62] Leighton v. Heagerty, 21–42; Farmers etc. Bank v. Welles, 23–475.

[63] Smith v. Barclay, 54–47, 55+827; King v. Carroll, 74–470, 77+409.

[64] Mahoney v. McLean, 28–63, 9+76.

[65] Stacy v. Stephen, 78–480, 81+391.

[66] First Nat. Bank v. Brass, 71–211, 73+729. See § 4001.

[67] Mahoney v. McLean, 28–63, 9+76; Trunkey v. Crosby, 33–464, 23+846; Olson v. Brady, 76–8, 78+864.

[68] First Nat. Bank v. Brass, 71–211, 73+729; Wildner v. Ferguson, 42–112, 43+794.

[69] Weibeler v. Ford, 61–398, 63+1075.

[70] Trunkey v. Crosby, 33–464, 23+846.

[71] Olson v. Brady, 76–8, 78+864.

[72] Wildner v. Ferguson, 42–112, 43+794.

[73] Trunkey v. Crosby, 33–464, 23+846.

[74] R. L. 1905 § 4240; Davis v. Mendenhall, 19–149(113); Benton v. Snyder, 22–247.

[75] Stanek v. Libera, 73–171, 75+1124.

[76] First Nat. Bank v. Brass, 71–211, 73+729.

[77] Davis v. Mendenhall, 19–149(113).

THIRD PARTIES AS CLAIMANTS

3998. Statutory procedure exclusive—Where the money or property in the hands of the garnishee is claimed by a person not a party to the action the mode of procedure prescribed by the statute [78] is exclusive.[79]

3999. Who may intervene—Any person having or claiming an interest in the garnished property antedating the garnishment may intervene.[80]

4000. Necessity of summoning claimant—Where the garnishee discloses an indebtedness, but also shows that it is claimed to have been assigned, and to be due to a third person named, it is error to order judgment against the garnishee before the claimant is cited in and made a party; and the rights of such claimant cannot be barred or affected by the judgment, unless he is duly summoned to appear, and is made a party to the proceeding.[81] Where from the evidence taken at the disclosure of a garnishee, it appeared that a third party asserted ownership of the property in the garnishee's hands and claimed to be the absolute owner thereof, it was held proper to compel the claimant to appear and maintain his right, and that the court erred in discharging the garnishee.[82] Where the evidence shows that the debt sought to be garnished is payable to a third person, and not to the defendant in the principal action, the disclosure itself is sufficient to protect the garnishee, and it devolves upon the plaintiff to bring in such party if he desires to test the validity of his claim.[83]

4001. Pleading—Burden of proof—The claimant must serve the first pleading, in the nature of a complaint in intervention, setting forth the grounds of his claim. The plaintiff may answer.[84] It is unnecessary, either in the complaint or answer, to allege what already appears from the record in the action.[85] The complaint may be aided by the answer.[86] The claimant may rest his claim on the disclosure alone.[87] The plaintiff has twenty days in which to answer.[88] The allegations of the plaintiff's answer may be admitted if the intervener fails to reply.[89]

4002. Practice—Claimants should be brought in or allowed to intervene by a formal order, but a defect in this regard may be waived by proceeding without objection.[90] Personal service on a claimant out of the state has been held unauthorized.[91] On the issues formed by the complaint in intervention and the answer thereto the parties are entitled to a trial as in an ordinary action.[92] A jury trial is probably not a matter of right.[93] A claimant must have the same opportunity to protect his interest as is accorded to any party to an action.[94] Upon a trial by the court findings of fact should doubtless be made as in an ordinary action.[95] A claimant may move to discharge the garnishee though a prior motion to that effect has been denied before he became a party.[96]

4003. Issues—It has been held permissible to attack a chattel mortgage as fraudulent as to creditors.[97]

78 R. L. 1905 § 4239.
79 Smith v. Barclay, 54–47, 55+827.
80 Crone v. Braun, 23–239; Gage v. Stimson, 26–64, 1+806.
81 Levy v. Miller, 38–526, 38+700.
82 King v. Carroll, 74–470, 77+409.
83 Mansfield v. Stevens, 31–40, 16+455.
84 Smith v. Barclay, 54–47, 55+827.
85 Id.; Smith v. Meyer, 84–455, 87+1122.
86 McMahon v. Merrick, 33–262, 22+543.
87 Donnelly v. O'Connor, 22–309.
88 Leslie v. Godfrey, 55–231, 56+818.
89 Pierce v. Wagner, 64–265, 66+977, 67+537.
90 Williams v. Pomeroy, 27–85, 6+445; Levy v. Miller, 38–526, 38+700.
91 Levy v. Miller, 38–526, 38+700.
92 Leslie v. Godfrey, 55–231, 56+818; Wildner v. Ferguson, 42–112, 43+794.
93 See Smith v. Barclay, 54–47, 55+827; Weibeler v. Ford, 61–398, 63+1075.
94 Donnelly v. O'Connor, 22–309.
95 Wildner v. Ferguson, 42–112, 43+794.
96 McMahon v. Merrick, 33–262, 22+543
97 North Star B. & S. Co. v. Ladd, 32–

4004. Burden of proof—The burden of proving his right to the property rests on the claimant.[98]

4005. Evidence—Admissibility—The disclosure of the garnishee is admissible in favor of the claimant.[99] Under a general allegation of ownership in the complaint of the claimant and a denial in the answer of the plaintiff the latter may introduce any evidence tending to impeach the title of the claimant.[1]

4006. Judgment—A judgment against the plaintiff for interest on funds pending the litigation held erroneous.[2]

4007. Costs—A claimant who succeeds is entitled to the same costs as a defendant in an action.[3]

JUDGMENT

4008. When proper—Judgment can be rendered against a garnishee on his disclosure only when he admits that he is owing the principal debtor, or that he has in his possession or under his control property belonging to him, or when the facts disclosed show beyond a reasonable doubt that such is the case.[4] If the garnishee makes full disclosure and the facts disclosed clearly establish his liability, judgment should be rendered against him regardless of his denial of liability.[5] If the debt sought to be reached appears from the disclosure to belong to a third party, the garnishee should be discharged unless the third party is brought in under the statute.[6] The disclosure is the sole basis of the judgment.[7] Where the garnishee appeared by its attorney on the return day of the summons, and offered to file an ex parte affidavit denying in general terms its liability, but did not offer to appear and answer in any other manner, it was held that judgment was properly entered against it for failure to make disclosure as required by the statute.[8] Upon an application for judgment upon the disclosure the disclosure must be taken as true.[9]

4009. Order for—Time—Judgment cannot be ordered until the disclosure is closed.[10] There can be no judgment against the garnishee except upon an order of the court.[11] The proper court to determine whether a garnishee may be charged as such on the facts of his disclosure is the court in which the garnishment proceedings are pending.[12]

4010. Entry—To render a garnishee liable there must be a formal judgment entered against him pursuant to an order of the court.[13] When the garnishee is discharged there is no formal judgment entered.[14]

381, 20+334; Coykendall v. Ladd, 32-529, 21+733. See First Nat. Bank v. Brass, 71-211, 73+729.

[98] Donnelly v. O'Connor, 22-309; North Star B. & S. Co. v. Ladd, 32-381, 20+334; Smith v. Barclay, 54-47, 55+827; Conroy v. Ferree, 68-325, 71+383.

[99] Bradley v. Thorne, 67-281, 69+909.

[1] Smith v. Barclay, 54-47, 55+827.

[2] Twohy v. Melbye, 83-394, 86+411.

[3] Mahoney v. McLean, 28-63, 9+76; Twohy v. Melbye, 83-394, 86+411.

[4] Banning v. Sibley, 3-389(282, 293); Pioneer P. Co. v. Sanborn, 3-413(304); Chase v. North, 4-381(288); Cole v. Sater, 5-468(378); Ingersoll v. First Nat. Bank, 10-396(315); Schafer v. Vizena, 30-387, 15+675; Vanderhoof v. Holloway, 41-498, 43+331; McLean v. Sworts, 69-128, 71+925.

[5] Milliken v. Mannheimer, 49-521, 52+139; Donnelly v. O'Connor, 22-309.

[6] Mansfield v. Stevens, 31-40, 16+455; Levy v. Miller, 38-526, 38+700.

[7] Bradley v. Thorne, 67-281, 69+909.

[8] Peterson v. Lake Tetonka P. Co., 72-263, 75+375.

[9] Vanderhoof v. Holloway, 41-498, 43+331.

[10] Williams v. Pomeroy, 27-85, 6+445.

[11] R. L. 1905 § 4244; Langdon v. Thompson, 25-509; Willson v. Pennoyer, 93-348, 101+502.

[12] American H. L. Co. v. Joannin, 99-305, 109+403.

[13] Langdon v. Thompson, 25-509; Pitzl v. Winter, 96-499, 105+673.

[14] McConnell v. Rakness, 41-3, 42+539; Cummings v. Edwards, 95-118, 103+709, 106+304.

4011. On default—When the garnishee defaults, and the amount of property in his possession is thus undetermined, and the summons in the original action is thereafter duly published, the court acquires jurisdiction to enter judgment against the defendant, and the garnishee is not in a position to object if the judgment is entered, upon the default of the defendant, for the full amount claimed in the complaint. Jurisdiction having been obtained, the amount of the judgment entered is not material, as it is in rem, and fully satisfied by the application of the property actually attached. Judgment having thus been entered in the original action, judgment may be entered for the full amount thereof against the garnishee upon his default. The court having jurisdiction to enter a judgment, the garnishee cannot question the correctness of the amount thereof.[15]

4012. Form—A judgment requiring the sheriff to pay the garnishee the amount of his lien on a note held unauthorized.[16]

4013. Effect—A judgment against a garnishee acquits him as to all parties to the process in regard to any payment or delivery of property he may make thereunder.[17] It does not bind claimants who are not made parties.[18] The effect of the judgment is merely to determine the existence and amount of the debt, and to substitute the plaintiff for the defendant as the person to whom it is payable.[19]

4014. Interest—The rule that a garnishee is not chargeable with interest as damages for the detention of money, while he is, by the operation of an attachment, restrained from making payment, applies only where he stands in all respects as a mere stakeholder, ready and willing to pay to whomsoever the court directs, and not where he assumes the attitude of a litigant.[20]

4015. Counsel fees—Counsel fees can only be allowed to the garnishee by the court in the garnishment proceedings. The allowance is discretionary.[21]

4016. Costs—When a garnishee is discharged he is not entitled to a judgment for costs.[22] Costs include disbursements within the garnishment statutes.[23]

4017. Opening default—The opening of a default judgment against a garnishee is discretionary with the court. If a judgment is opened the court should fix a time for the disclosure.[24] The remedy by motion is exclusive.[25]

GAS

4018. Liability for escaping gas—A gas company is liable for injury to trees and plants from gas which it negligently allows to escape from its mains. Its liability does not rest on the doctrine of insurance of safety, but on the principles of negligence applicable to authorized public works. It is bound to exercise due care—care commensurate with the danger. It must take every reasonable precaution suggested by experience and the known danger of the es-

[15] Mpls. etc. Ry. v. Pierce, 103-504, 115+649.
[16] Cole v. Sater, 5-468(378).
[17] R. L. 1905 § 4246; Troyer v. Schweizer, 15-241(187); Crone v. Braun, 23-239. See Black v. Brisbin, 3-360(253); McMahon v. Merrick, 33-262, 22+543.
[18] McMahon v. Merrick, 33-262, 22+543; Levy v. Miller, 38-526, 38+700.
[19] Irwin v. McKechnie, 58-145, 59+987.
[20] Ray v. Lewis, 67-365, 69+1100.
[21] Schwerin v. De Graff, 19-414(359).
[22] McConnell v. Rakness, 41-3, 42+539; Cummings v. Edwards, 95-118, 103+709, 106+304.
[23] Woolsey v. O'Brien, 23-71.
[24] Goodrich v. Hopkins, 10-162(130); Mpls. etc. Ry. v. Pierce, 103-504, 115+649; Jordan v. Jordan, 109-299, 123+825.
[25] Segog v. Engle, 43-191, 45+427.

cape of gas.[26] The escape of gas and consequent injury make out a prima facie case. In other words the doctrine of res ipsa loquitur applies.[27] Possibly one who allows gas to escape upon the premises of another may be liable for trespass regardless of negligence.[28] A gas company has been held not liable for neglect to notify an occupant of a room in a boarding house that the gas was to be turned off in connection with repairs it was making in the house, or for neglecting to see that all the jets in the house were turned off when the gas was turned on again.[29]

4019. Supply by public service corporations—Rules—Rates—The rates of a public service corporation for gas furnished the public must be reasonable and uniform. Such a corporation may adopt reasonable rules and regulations, including a rule that gas will not be furnished to a person until he has paid arrears for gas furnished to him in the past.[30]

GENERAL—See note 31.
GENERAL DAMAGES—See Damages, 2520, 2580.
GENERAL DENIAL—See Pleading, 7572–7574.
GENERAL ISSUE—See note 32.

GIFTS

Cross-References

See Charities, 1423; Husband and Wife, 4251; Parent and Child, 7310.

IN GENERAL

4020. Requisites—To be valid a gift inter vivos must be voluntary, gratuitous, absolute, and made by a person competent to contract. There must be freedom of will; the gift must be complete; the property must be delivered by the donor and accepted by the donee; and the gift must go into immediate and absolute effect.[33]

4021. Inter vivos and causa mortis distinguished—The chief distinction between a gift inter vivos and a gift causa mortis is that the former is absolute and irrevocable, while the latter is conditional, taking effect only upon the death of the donor, who, in the meantime, has the power of revocation. In either case the gift must be complete and the property delivered and accepted.[34]

4022. Competency of donor—Any person competent to transact ordinary business may give what he owns to any other person.[35]

4023. A contract—A gift, made perfect by delivery, is an executed contract, irrevocable by the donor.[36]

[26] Gould v. Winona G. Co., 100–258, 111+254; Sherman v. Winona G. Co., 103–518, 114+654. See Hansen v. St. Paul G. Co., 82–84, 84+727; Hansen v. St. Paul G. Co., 88–86, 92+510.

[27] Gould v. Winona G. Co., 100–258, 111+254; Wiltse v. Red Wing, 100–548, 111+1134.

[28] Gould v. Winona G. Co., 100–258, 111+254.

[29] Skogland v. St. Paul G. Co., 89–1, 93+668.

[30] State v. Board W. & L. Comrs., 105–472, 117+827.

[31] State v. Cooley, 56–540, 549, 58+150.

[32] Fetz v. Clark, 7–217(159) (effect of general issue in common-law pleading).

[33] Davis v. Kuck, 93–262, 101+165.

[34] Id.; Varley v. Sims, 100–331, 111+269.

[35] Stewart v. Hidden, 13–43(29). See Hooper v. Vanstrum, 92–406, 100+229.

[36] Stewart v. Hidden, 13–43(29).

4024. Intention—To constitute a valid gift the donor must have a present intention of transferring the property absolutely to the donee.[37] A delivery must be made with the present intention of making a gift and passing the title absolutely.[38] Such intention need not be expressed, but may be proved by circumstantial evidence and the prior declarations of the donor.[39]

4025. Promise to make—A mere promise to make a gift is not enforceable.[40]

4026. Delivery—The property must be delivered to the donee.[41] Any substantial act of the donor tending to carry a gift into effect and give the donee dominion over the property, so that he can appropriate it to his own use, is sufficient.[42] A delivery is sufficient if it is the only one of which the subject is capable, as, for example, a receipt for a debt.[43] A delivery may be made through the medium of a third party.[44]

4027. Acceptance—An incomplete voluntary gift creates no right that can be enforced. A gift requires the assent of both minds as much as a contract. The donee must accept the gift. Ownership cannot be thrust upon one against his will. Knowledge of the gift on the part of the donee, at the time it is made, may not be essential in order that it may take effect. If the act of transfer be complete on the part of the donor, subsequent acceptance by the donee, before revocation, will be sufficient. But a mere deposit of the property by the depositor, in the name of another, with a third person, will not of itself be sufficient to pass the title.[45] Acceptance is necessary whether the gift is causa mortis or inter vivos.[46] Where a gift causa mortis is beneficial to the donee and imposes no burdens upon him, acceptance by him is presumed as a matter of law.[47]

4028. Consideration—A gift perfected by delivery is an executed contract and needs no consideration.[48] But a mere promise to make a gift, being executory, is invalid without a consideration.[49]

4029. What may be given—A note may be the subject of a gift by the owner, either to the maker or to a stranger. If it is given to the maker it cancels the note.[50] A creditor may give to his debtor a part of his debt.[51]

4030. Of money in a bank—A check on a bank for the entire amount of the drawer's credit therein, delivered to a person as a gift of the money, though unaccepted by the bank, operates as an assignment of the fund; and if so delivered and intended by the donor, in anticipation of death from an impending peril from which he subsequently dies, it is valid as a gift causa mortis. It is unnecessary that the check disclose on its face that it covers the entire bank credit. That fact may be shown dehors the instrument. The delivery of a check as a gift causa mortis to a person other than the donee, but for his use and benefit, and with instructions to deliver the same to the donee, is a sufficient delivery to pass title, though it does not reach the hands of the donee until after the donor's death. The person to whom the delivery

[37] Hooper v. Vanstrum, 92-406, 100+229.
[38] Jenning v. Rohde, 99-335, 109+597.
[39] Johnson v. Holst, 86-496, 90+1115.
[40] See Slingerland v. Slingerland, 46-100, 48+605; Albert Lea College v. Brown, 88-524, 93+672; Murphy v. Bordwell, 83-54, 57, 85+915.
[41] Branch v. Dawson, 36-193, 30+545; Manahan v. Halloran, 66-483, 69+619; Richardson v. Colburn, 77-412, 80+356, 784; Murphy v. Bordwell, 83 54, 85+915; Winslow v. McHenry, 93-507, 101+799; Nelson v. Olson, 108-109, 121+609. See § 4042.
[42] Murphy v. Bordwell, 83-54, 85+915.
[43] Lamprey v. Lamprey, 29-151, 12+514.
[44] Nelson v. Olson, 108-109, 121+609.
[45] Branch v. Dawson, 36-193, 30+545.
[46] Davis v. Kuck, 93-262, 101+165.
[47] Varley v. Sims, 100-331, 111+269.
[48] Stewart v. Hidden, 13-43(29).
[49] See Albert Lea College v. Brown, 88-524, 93+672.
[50] Stewart v. Hidden, 13-43(29); Peters v. Schultz, 107-29, 119+385.
[51] Lamprey v. Lamprey, 29-151, 12+514. See Butler v. Bohn, 31-325, 17+862.

is made is presumed, in the absence of a contrary showing, to be the trustee of the donee.[52] A gift of money deposited in a bank in the name of the donor has been sustained, though the deposit remained in the name of the donor, a power of attorney having been given to the donee to draw the money in the name of the donor.[53] A mere deposit in a bank in the name of another, without his knowledge has been held not to pass the title to him.[54] Evidence held not to show a gift of a certificate of deposit.[55]

4031. Of realty—The mere recording of a deed of land, without delivering it to the grantee and without any present intention on the part of the grantor to pass the title absolutely, has been held not a gift of the land.[56] To take a parol gift of land out of the statute of frauds the donee must not only enter into possession of the premises, but must also make substantial improvements thereon or perform such other acts with reference thereto as would make it inequitable to enforce the gift.[57] A parol gift of land from a father to a son, has been held to set the statute of limitations running in favor of the son.[58]

4032. Life interest in personalty—The donee for life of personalty is entitled to the possession thereof without executing security for its safe-keeping except in cases of real danger. It is not usual or proper in practice to exact anything more in the first instance than the filing of an inventory in the proper court.[59]

4033. To take effect after death—A gift to take effect after death is invalid.[60]

4034. Conditional—A donor has a right to impose upon a gift a condition which will bind the donee to use the funds in the nature of a trust.[61]

4035. Undue influence—A gift procured by undue influence may be set aside.[62] Undue influence is presumed in the case of a gift from a ward to a guardian,[63] but not in the case of a gift from a parent to a child or from a child to a parent.[64]

4036. Revocation—A gift causa mortis is subject to revocation,[65] but a gift inter vivos is not.[66]

4037. Evidence—Admissibility—Cases are cited below involving the admissibility of evidence.[67]

4038. Proof—Degree required—A gift can only be established by clear and convincing evidence,[68] but the "clearest and most unequivocal evidence" is not required.[69]

[52] Varley v. Sims, 100-331, 111+269.
[53] Murphy v. Bordwell, 83-54, 85+917.
[54] Branch v. Dawson, 36-193, 30+545.
[55] Manahan v. Halloran, 66-483, 69+619; Winslow v. McHenry, 93-507, 101+799.
[56] Hooper v. Vanstrum, 92-406, 100+229. See Dodsworth v. Sullivan, 95-39, 103+719.
[57] Snow v. Snow, 98-348, 108+295; Schmitt v. Schmitt, 94-414, 103+214.
[58] Malone v. Malone, 88-418, 93+605.
[59] In re Oertle, 34-173, 24+924.
[60] Logenfiel v. Richter, 60-49, 61+826.
[61] Cone v. Wold, 85-302, 88+977.
[62] Prescott v. Johnson, 91-273, 97+891. See Fischer v. Sperl, 94-421, 103+502; Sass v. McCormack, 62-234, 64+385.
[63] Ashton v. Thompson, 32-25, 18+918.
[64] Prescott v. Johnson, 91-273, 97+891; Jenning v. Rohde, 99-335, 109+597; Rader v. Rader, 108-139, 121+393; Naeseth v. Hommedal, 109-153, 123+287. See Davis v. Kuck, 93-262, 101+165; Fischer v. Sperl, 94-421, 103+502.
[65] Logenfiel v. Richter, 60-49, 61+826; Davis v. Kuck, 93-262, 265, 101+165; Varley v. Sims, 100-331, 111+269.
[66] Stewart v. Hidden, 13-43(29).
[67] Furman v. Tenny, 28-77, 9+172 (statements of husband that property in his possession belonged to his wife); Lamprey v. Lamprey, 29-151, 12+514 (sealed acknowledgment of the part payment of a debt evidence of a pro tanto gift of the debt); Manahan v. Halloran, 66-483, 69+619 (fact that donor appeared to be afraid of or under the influence of a person held inadmissible); Peters v. Schultz, 107-29, 119+385 (will—conversations—collateral facts).
[68] Hooper v. Vanstrum, 92-406, 410, 100+

4039. Evidence—Sufficiency—Cases are cited below involving the sufficiency of evidence to prove gifts.[70]

GIFTS CAUSA MORTIS

4040. Definition—A gift causa mortis is a gift of personal estate, made in prospect of death at no very remote period, and which is dependent upon the condition of death occurring, substantially as expected by the donor, and that the same be not revoked before death. The requisites of a gift causa mortis are in most respects the same as those of a gift inter vivos. It must be complete and the property delivered and accepted.[71]

4041. Mental competency of donor—The degree of mental competency required to make a gift causa mortis is the same as that required to make a will.[72]

4042. Delivery—A gift causa mortis is not valid unless the property is delivered to the donee. What constitutes a sufficient delivery depends upon the nature of the property and the situation of the parties.[73]

4043. Property in possession of donee—The rule requiring an actual delivery is applied more strictly to gifts causa mortis than to gifts inter vivos. But it has been held that where the property is already in the possession of the donee a formal delivery is unnecessary, if the donee expressly accepts the gift and exercises dominion over the property prior to the death of the donor.[74]

GONDOLA CAR—See note 75.

GOOD FAITH—See Bona Fide Purchasers, Chattel Mortgages, 1450, and note 76.

GOOD WILL

4044. Definition—The good will of a business is the favor which it has won from the public and the consequent probability that old customers will continue their patronage.[77]

4045. A species of property—Good will is regarded as a species of personal property, incident to the business to which it is attached.[78]

4046. Sale—Good will may be sold as an incident of the business to which it is attached and the purchaser may assign it, though the transfer to him

229; Schmitt v. Schmitt, 94-414, 103+214. See Johnson v. Holst, 86-496, 498, 90+1115.

[69] Jenning v. Rohde, 99-335, 109+597.

[70] In re Yetter, 55-452, 57+147; Gale v. Baxter, 64-264, 66+972; Manahan v. Halloran, 66-483, 69+619; Johnson v. Holst, 86-496, 90+1115; Peters v. Schultz, 107-29, 119+385.

[71] Davis v. Kuck, 93-262, 101+165; Logenfiel v. Richter, 60-49, 61+826; Allen v. Allen, 75-116, 77+567; Winslow v. McHenry, 93-507, 101+799; Varley v. Sims, 100-331, 111+269. See Note, 99 Am. St. Rep. 890.

[72] Sass v. McCormack, 62-234, 64+385.

[73] Logenfiel v. Richter, 60-49, 61+826; Allen v. Allen, 75-116, 77+567; Johnson v. Holst, 86-496, 90+1115; Davis v. Kuck, 93-262, 101+165; Winslow v. McHenry, 93-507, 101+799; Varley v. Sims, 100-331, 111+269.

[74] Davis v. Kuck, 93-262, 101+165. See 18 Harv. L. Rev. 394.

[75] Griffin v. Minn. T. Ry., 94-191, 193, 102+391.

[76] Bank of Farmington v. Ellis, 30-270, 15+243; Tolbert v. Horton, 31-518, 18+647; Whitney v. Huntington, 37-197, 201, 33+561; Allen v. Pioneer P. Co., 40-117, 41+936; Hoyt v. Duluth etc. Ry., 103-396, 400, 115+263.

[77] Haugen v. Sundseth, 106-129, 118+666.

[78] Haugen v. Sundseth, 106-129, 118+666. It is deemed a subject of substantial value because of the reasonable expectation of its continuance. Potter v. Mellen, 41-487, 43+375. See 16 Harv. L. Rev. 135; 19 Id. 538.

does not contain the words "successors" or "assigns".[79] A sale by a partnership binds the members individually and as partners.[80]

GOVERNOR—See Militia; State, 8843; Statutes, 8901.
GRADING OF STREETS—See Municipal Corporations, 6627.
GRAFT, GRAFTING—See note 81.
GRAIN—See note 82.
GRAIN ELEVATORS—See Warehousemen.

GRAND JURY

Cross-References

See Indictment.

4047. Preparation of jury list by county board—The county board does not draw the jury. It simply selects a larger list of names from which the jury is subsequently drawn.[83] The clerk of court has no authority to draw a jury from any list except such as is made out and certified to him as required by statute.[84] The statutes regulating the preparation of the list by the board are merely directory. The fact that a person acted as a member of the board without authority is not a ground for setting aside the indictment.[85] A list of grand jurors has been held sufficient though it was under the same heading as the petit jury list and there was but one certificate for the two lists. An informal certificate has been held sufficient.[86] The objection that the list was not properly signed and certified by the chairman of the board cannot be raised after the arraignment without leave of court,[87] and if the accused was held on a charge for a public offence at the time the jury was impaneled the objection must be made by challenge to the panel and cannot be made by a motion to quash.[88] If the accused was not so held the objection may be raised by motion to quash at the time of the arraignment.[89] It is too late to raise the objection after demurrer.[90] It cannot be raised by motion in arrest of judgment.[91]

4048. Preparation of jury list under special laws—Sp. Laws 1876 c. 214, providing that the grand jury lists for Ramsey county shall be selected "from the qualified electors of the several wards in the city of St. Paul and towns of said county," does not require that the names selected shall be apportioned among the different wards and towns.[92] A jury list prepared under G. S. 1894 §§ 5629-5633—a special jury law for Washington county—has been sustained.[93] Laws 1899 c. 151, regulating the manner of drawing jurors in counties having a population of two hundred thousand, is constitutional.[94]

4049. Deficiency of jurors—Special venire—The failure of a sufficient number of grand jurors selected and summoned on the regular panel to appear when called in court is a "deficiency of grand jurors" within the meaning of

[79] Southworth v. Davison, 106-119, 118+363; Haugen v. Sundseth, 106-129, 118+666.
[80] Southworth v. Davison, 106-119, 118+363.
[81] Craig v. Warren, 99-246, 109+231.
[82] State v. Cowdery, 79-94, 81+750.
[83] State v. Russell, 69-502, 72+832.
[84] State v. Greenman, 23-209; State v. Schumm, 47-373, 50+362.
[85] State v. Russell, 69-502, 72+832.
[86] State v. Peterson, 61-73, 63+171.
[87] State v. Schumm, 47-373, 50+362; State v. Dick, 47-375, 50+362.
[88] State v. Greenman, 23-209.
[89] State v. Russell, 69-502, 72+832; State v. Ames, 90-183, 96+330.
[90] State v. Thomas, 19-484(418).
[91] State v. Conway, 23-291.
[92] State v. Hawks, 56-129, 57+455.
[93] State v. Goodrich, 67-176, 69+815.
[94] State v. Ames, 91-365, 98+190.

R. L. 1905 § 5270.[95] Under R. L. 1905 § 103 a deficiency authorizing a special venire may occur either at the time of the organization of the grand jury by the failure of a sufficient number to appear, or at any subsequent period of their services, by death, sickness, challenges to individual jurors on the panel, or other unavoidable causes.[96] Where a disqualified juror is excused, the accused cannot complain that a new juror is not summoned in his place, if not less than sixteen remain.[97] The objection that additional jurors are improperly summoned by a special venire cannot be raised after arraignment.[98]

4050. Special venire—Adjourned term—The court may discharge a grand jury impaneled at a regular general term, adjourn the term to a future day and order a new venire of grand jurors to be drawn and summoned for such adjourned term. Such new venire may be drawn from the regular jury list selected by the county board and certified and filed with the clerk of the court.[99]

4051. Requisite number of jurors—Where the number of grand jurors is less than twenty-three, but not less than sixteen, the accused cannot complain, because the smaller the number the more secure he is against indictment. A grand jury is sufficiently large if there are sixteen jurors present and voting on an indictment. An indictment cannot be found without the concurrence of at least twelve jurors. The accused cannot insist on the attendance of the full panel summoned.[1]

4052. Addition of new members—Repeating charge—The power to add new members to the jury is not limited to the period prior to the charge, but continues throughout the period of its sessions. When new members are added after the original charge the charge should be repeated, but a failure to repeat it is not a ground for quashing the indictment.[2]

4053. When objections to grand jury must be made—Objections to the grand jury are too late after demurrer to the indictment,[3] or after a plea of not guilty.[4] 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] Challenges of individual jurors can only be made before the jury retires.[6] Challenges to the panel can only be made before the jury retires, if the accused was held on a charge for a public offence when the jury was impaneled.[7] The discretion of the court in denying the accused leave to withdraw his plea of not guilty, for the purpose of enabling him to move to quash the indictment on the ground that two of the members of the grand jury were aliens, has been held properly exercised.[8] Objection to the authentication of the jury list cannot be made on a motion in arrest of judgment.[9]

4054. Challenge to the panel—A challenge to the panel can be interposed only for some one or more of the statutory causes, whether the jury is summoned by a general or special venire.[10] It will lie on the ground that the list was not properly signed and certified by the chairman of the county board.[11]

[95] State v. McCartey, 17-76(54).
[96] State v. Froiseth, 16-313(277); State v. Grimes, 50-123, 52+275; State v. Russell, 69-502, 72+832.
[97] State v. Cooley, 72-476, 75+729.
[98] State v. Schumm, 47-373, 50+362; State v. Dick, 47-375, 50+362.
[99] State v. Peterson, 61-73, 63+171.
[1] State v. Cooley, 72-476, 75+729.
[2] State v. Froiseth, 16-313(277).
[3] State v. Thomas, 19-484(418).
[4] State v. Arbes, 70-462, 73+403.
[5] State v. Schumm, 47-373, 50+362; State v. Dick, 47-375, 50+362.
[6] See § 4055.
[7] See § 4054.
[8] State v. Arbes, 70-462, 73+403.
[9] State v. Conway, 23-291.
[10] State v. Gut, 13-341(315); State v. Russell, 69-502, 72+832; State v. Ames, 90-183, 96+330.
[11] State v. Greenman, 23-209. See State v. Schumm, 47-373, 50+362.

Where, at the time of the impaneling of a grand jury, a person is held to answer a charge for a public offence, the only way in which he can object to the panel is by challenge. He cannot object by motion to quash the indictment.[12] But where he is not so held he may object to the panel on the grounds stated in R. L. 1905 § 5272, and on those grounds only, by a motion to quash the indictment.[13] The right to challenge the panel is restricted to those who are held to answer a charge for a public offence.[14] The right to challenge the panel must be exercised before the jury retires and this is so though the accused is in prison at the time.[15]

4055. Challenge to individual jurors—A challenge to an individual juror must in all cases be made before the jury retires.[16] This rule applies to persons who are imprisoned at the time the jury is impaneled.[17] The right to challenge a juror is limited to those who are held to answer a charge for a public offence.[18] While an objection in the nature of a challenge to the panel may be made by motion to quash, by a person who was not held on a charge for a public offence at the time the jury was impaneled,[19] such a person cannot move to quash on any of the statutory grounds of challenge to individual jurors—at least, on the ground of bias or prejudice.[20] The decision of the trial court on a challenge for bias is final, or at least will not be disturbed except for manifest error.[21]

4056. Effect of disqualified person on jury—Where a grand jury is composed of not less than sixteen members and not more than twenty-three its action is not vitiated by reason of there being drawn as one member thereof a disqualified person, he being excused before the charge in the indictment is considered.[22] Leave to withdraw a plea of not guilty for the purpose of enabling the accused to move to quash the indictment on the ground that two of the members of the grand jury were aliens, has been held properly denied.[23] The objection that the certificate to the jury list did not show that the jurors were qualified cannot be raised after demurrer.[24]

4057. Effect of qualified person irregularly on jury—The general rule is that mere irregularity in the proceedings by which a grand juror gets upon the panel does not affect the legality of its proceedings, if such grand juror is not personally disqualified.[25]

4058. Court may excuse juror—The court may excuse a juror for over age without the consent of the accused.[26] It has discretionary power to excuse a juror who appears not to be impartial though he is not challenged.[27] Its action will be presumed correct on appeal.[28]

4059. Jurisdiction—A grand jury may inquire of any indictable offence alleged to have been committed in their county. If they find an indictment for such an offence in the county where, by reason of some statutory, preliminary requisite, they ought not to have found it, it is, at most, error or irregularity, but does not affect their jurisdiction.[29]

[12] State v. Greenman, 23–209.
[13] State v. Russell, 69–502, 72+832; State v. Ames, 90–183, 96+330.
[14] State v. Davis, 22–423.
[15] Maher v. State, 3–444(329); State v. Hinckley, 4–345(261); State v. Hoyt, 13–132(125).
[16] State v. Greenman, 23–209; State v. Ames, 90–183, 96+330.
[17] Maher v. State, 3–444(329).
[18] State v. Davis, 22–423; State v. Ames, 90–183, 96+330.
[19] State v. Russell, 69–502, 72+832.
[20] State v. Ames, 90–183, 96+330. See State v. Greenman, 23–209.
[21] State v. Gut, 13–341(315).
[22] State v. Cooley, 72–476, 75+729.
[23] State v. Arbes, 70–462, 73+403.
[24] State v. Thomas, 19–484(418).
[25] State v. Cooley, 72–476, 75+729.
[26] State v. Brown, 12–538(448).
[27] State v. Strait, 94–384, 102+913. See State v. Ring, 29–78, 11+233.
[28] See Hill v. Winston, 73–80, 75+1030.
[29] State v. Brecht, 41–50, 42+602.

4060. Evidence on which indictment found—The statute provides that only legal evidence shall be admitted, but the illegality of the evidence cannot be shown by the affidavit of a juror.[30] An indictment cannot be based in whole or in part on the involuntary testimony of the accused.[31] If the evidence before the grand jury on a charge against one person shows that another ought also to be indicted, it is the duty of the jury to indict him.[32] When an indictment is set aside the same grand jury may find a second indictment for the same offence on the same evidence on which the first indictment was found.[33]

4061. Accused as witness—If the accused is required to appear before a grand jury and give testimony against himself the indictment may be quashed on motion, though his name is not indorsed thereon as a witness.[34] An affidavit on a motion to quash for such a cause has been held sufficient to require the state to traverse it and the court to determine the motion on the merits.[35] The fact that a person may, in the investigation of some other charge by the grand jury, have been required to give evidence which would have been material on the particular charge for which he is indicted, is no cause for setting aside the indictment on the ground that he was required to testify against himself, unless it appears from the indorsement or entry of his name on the indictment as a witness that the grand jury found the bill, in whole or in part, on his evidence.[36]

4062. Attendance of petit jury unnecessary—A grand jury may find an indictment though there is no petit jury in attendance upon the court.[37]

4063. Juror cannot impeach indictment—The affidavit of a grand juror is inadmissible to prove the misconduct of the jury in finding an indictment.[38]

4064. Secrecy—Duty of jurors—Except as otherwise provided by statute, a grand juror is bound to keep secret whatever he himself or any other juror said, or how he or any other juror voted, on a matter before the jury.[39] He is not competent to testify as to such matters.[40]

4065. Adjournment and discharge—The court may adjourn the sessions of the grand jury from time to time during the term,[41] and until finally discharged by the court or the expiration of the term the jury retains all its powers and functions.[42]

GRANT—See note 43.
GRASS—See note 44.
GROSS NEGLIGENCE—See Carriers, 1315; Negligence, 6971.

[30] State v. Beebe, 17-241(218).
[31] State v. Froiseth, 16-296(260); State v. Gardner, 88-130, 92+529.
[32] State v. Beebe, 17-241(218). See State v. Hawks, 56-129, 57+455.
[33] State v. Peterson, 61-73, 63+171.
[34] State v. Froiseth, 16-296(260); State v. Gardner, 88-130, 92+529.
[35] State v. Gardner, 88-130, 92+529.
[36] State v. Hawks, 56-129, 57+455.
[37] State v. Davis, 22-423.
[38] State v. Beebe, 17-241(218).
[39] R. L. 1905 §§ 5286, 5287; In re Pinney, 27-280, 6+791.
[40] Loveland v. Cooley, 59-259, 61+138.
[41] R. L. 1905 § 5277; State v. Davis, 22-423; State v. Goodrich, 67-176, 69+815.
[42] State v. Davis, 22-423.
[43] State v. Minneapolis, 65-298, 68+31.
[44] Kirkeby v. Erickson, 90-299, 300, 96+705.

GROUND RENT

4066. Definition—Ground rent is rent reserved to himself and his heirs, by the grantor of land in fee simple, out of the land conveyed.[45]

4067. Validity—A reservation, in an allodial grant, of a definite sum of money, payable annually, for any length of time, whether in the way of rent for the use of the thing granted, or as a consideration for the grant itself, does not give it a feudal character. Fealty was the essential and distinguishing feature of a feudal tenure. A grant of a parcel of land, with one mill-power of water, for manufacturing purposes, subject to a fixed, perpetual, annual rent, is not prohibited by the constitution.[46]

GUARANTY

Cross-References

See Indemnity; Statute of Frauds; Subrogation; Suretyship.

IN GENERAL

4068. Definition—A guaranty is a collateral contract to answer for the payment of a debt or the performance of a duty in case of the default of another who is primarily liable to pay or perform the same.[47]

4069. Distinguished from suretyship—The undertaking of a surety is primary, while that of a guarantor is collateral and secondary.[48]

4070. What constitutes—The question whether a contract is one of guaranty or not [49] arises most frequently in connection with the statute of frauds.[50]

4071. Consideration—A contract of guaranty, like other contracts, requires a consideration.[51] When the contract is within the statute of frauds the consideration must be expressed in writing.[52]

4072. Conditional delivery—It may be shown by parol that the contract was signed and delivered on the condition that it should not become operative until signed by other guarantors.[53]

4073. Construction in general—Guaranties and contracts of suretyship are subject to the same rules of construction.[54] Where one guarantees the payment of a note its stipulations are to be construed against him as they would be against the maker.[55] A guaranty is to be construed with reference to the situation of the parties at the time it was made.[56] Parol evidence is admissible to show the circumstances.[57] The nature of the obligation of a guarantor is

[45] Bouvier, Law Dict. (Rawle's ed.).
[46] Mpls. M. Co. v. Tiffany, 22-463.
[47] See Oswald v. Fratenburgh, 36-270, 31+173; Bausman v. Credit G. Co., 47-377, 50+496; Note, 105 Am. St. Rep. 502.
[48] Hammel v. Beardsley, 31-314, 17+858.
[49] See Oswald v. Fratenburgh, 36-270, 31+173; Weikle v. Mpls. etc. Ry., 64-296, 66+963; Swindells v. Dupont, 88-9, 92+468; Burns v. Poole, 106-69, 118+156.
[50] See § 8865.
[51] Oswald v. Fratenburgh, 36-270, 31+173; Peterson v. Russell, 62-220, 64+555; Osborne v. Gullikson, 64-218, 66+965; Hale v. Dressen, 76-183, 78+1045.
[52] See § 8866.
[53] Merchants' Exch. Bank v. Luckow, 37-542, 35+434; Kells v. Williams, 69-270, 72+112.
[54] Cushing v. Cable, 48-3, 50+891; Twohy v. McMurran, 57-242, 59+301; Lamson v. Coffin, 102-493, 114+248. See § 9079.
[55] Lanpher v. Barnum, 57-172, 58+988.
[56] Fall v. Youmans, 67-83, 69+697.
[57] Wilson v. Schnell, 20-40(33).

affected by the character of the principal contract to which the guaranty relates.[58]

4074. Particular contracts construed—Cases are cited below involving the construction of particular contracts of guaranty.[59]

4075. Conditional—A guaranty may be conditional.[60]

4076. Guaranty of payment—One who, before maturity, unconditionally guarantees the payment of a note, becomes absolutely liable upon default of the maker.[61] The right of action against the guarantor accrues simultaneously with the holder's right of action on the note.[62] One who absolutely guarantees the payment of a note is essentially a surety.[63] A general guaranty of payment indorsed on a note passes with the assignment of the note.[64] A guarantor of payment of a note may also be an indorser within the law merchant.[65] He cannot deny its execution by the party by whom it purports to be executed.[66] The liability of a guarantor of payment of the interest to mature on a note ceases at the maturity of the note.[67]

4077. Guaranty of collection—A guaranty of the collection of a note or other debt is an undertaking to pay if payment cannot be obtained from the debtor by the exercise of due or reasonable diligence.[68]

4078. Extent of credit—The extent of credit authorized necessarily depends on the language of the particular contract.[69] Though a continuing contract is unlimited as to the amount of credit the amount must be reasonable under all the circumstances of the case.[70]

4079. Limited or continuing—Where, by the terms of a written guaranty, it appears that the parties look to a future course of dealing for an indefinite time, or a succession of credits to be given, it is to be deemed a continuing guaranty, but where no time is fixed upon, and nothing in the agreement indicates a continuance of the undertaking, the presumption is in favor of a

[58] Hungerford v. O'Brien, 37-306, 34+161.

[59] Hendricks v. Banning, 7-32(17) (guaranty of amount due on a note); Oswald v. Fratenburgh, 36-270, 31+173 (guaranty of lease); Cushing v. Cable, 48-3, 50+891 (guaranty of payment for the use of boilers and engines); Maxwell v. Capehart, 62-377, 64+927 (guaranty of mortgage note—assignment of mortgage to guarantor); Historical Pub. Co. v. La Vaque, 64-282, 66+1150 (letter of credit—guaranty of payment of bill of goods); Walsh v. Featherstone, 67-103, 69+811 (a bond guaranteeing the obligee against liability held a contract to indemnify and not actionable by a third party); Phelps v. Sargent, 69-118, 71+927 (guaranty of payment of note and interest); Stranahan v. Richardson, 75-402, 78+110, 671 (guaranty of profits in real estate investment); Beeson v. Day, 78-88, 80+864 (guaranty of dividends on bank stock); Tolerton v. Barck, 81-470, 84+330 (guaranty of payment of goods within limits); Esch v. White, 82-462, 85+238, 718 (guaranty in favor of sureties on an appeal bond); Smith v. Hunt, 90-255, 95+907 (guaranty of salary); Lamson v. Coffin, 102-493, 114+248 (guaranty of validity of homestead papers).

[60] Smith v. Hunt, 90-255, 95+907. See Maxwell v. Capehart, 62-377, 64+927.

[61] Hungerford v. O'Brien, 37-306, 34+161; Maxwell v. Capehart, 62-377, 64+927; Peterson v. Homan, 44-166, 46+303.

[62] Lanpher v. Barnum, 57-172, 58+988; Phelps v. Sargent, 69-118, 71+927.

[63] Hammel v. Beardsley, 31-314, 17+858.

[64] Harbord v. Cooper, 43-466, 45+860; Phelps v. Sargent, 69-118, 71+927; Wood v. Bragg, 75-527, 78+93.

[65] Elgin etc. Co. v. Zelch, 57-487, 59+544.

[66] First Nat. Bank v. Compo-Board Mfg. Co., 61-274, 63+731.

[67] Merritt v. Haas, 106-275, 118+1023, 119+247.

[68] Brackett v. Rich, 23-485; Nichols v. Allen, 22-283; Crane v. Wheeler, 48-207, 50+1033; Osborne v. Thompson, 36-528, 33+1; Fall v. Youmans, 67-83, 69+697; Conner v. Howe, 35-518, 29+314. See Wilcox v. School Dist., 103-43, 114+262; Northwest T. Co. v. Dahltorp, 104-130, 116+106.

[69] Tolerton v. Barck, 81-470, 84+330; Historical Pub. Co. v. La Vaque, 64-282, 66+1150.

[70] Lehigh C. & I. Co. v. Scallen, 61-63 63+245.

limited liability as to time and credits.[71] Though a continuing guaranty is unlimited as to the time it shall continue, it continues only for a reasonable time under the circumstances of the case.[72] Any express limitation of time is to be strictly enforced.[73]

4080. Contribution—Guarantors have the same right of contribution as sureties.[74]

4081. Payment by guarantor—A guarantor has a right to pay the debt any time after it is due and be subrogated to the rights and remedies of the principal debtor.[75] Evidence held to show a payment of the debt by the guarantor.[76]

DISCHARGE OF GUARANTOR

4082. Neglect to pursue principal—Where the guarantor unconditionally guarantees the "payment" of a debt, he is not discharged by the mere neglect of the creditor to pursue his remedies against the principal debtor.[77] The rule is otherwise in the case of a guaranty of the "collection" of a debt.[78]

4083. Extension of time—A valid agreement between the principal debtor and the creditor, by which the time of payment or performance is extended without the consent of the guarantor, releases him.[79] The agreement may be implied. The payment and reception of interest in advance on a past due note by the act and assent of the holder and maker thereof may constitute an implied agreement to extend the time of payment for the period for which the interest is paid in advance.[80] The defence that the time of the payment of a note has been extended is not inconsistent with the defence of payment.[81] The burden is generally on the guarantor to prove the extension and that it was without his consent.[82]

4084. Failure of plaintiff to perform—If the plaintiff has not performed the contract strictly on his own part he cannot hold the guarantor.[83]

4085. Alteration of contract—The assignment of a lease by the lessee, with the assent of the lessor, does not affect the liability of the lessee so as to release his guarantor.[84]

4086. Payment of principal debt—A transaction has been held not a payment of a note by a stranger so as to discharge the guarantor.[85] If the debt guaranteed is paid the guarantor is discharged.[86]

4087. Consideration—Evidence held not to show a consideration for a release.[87]

4088. Foreclosure of mortgage—The foreclosure of a mortgage has been held not to release a guarantor of payment of a note which the mortgage secured.[88]

[71] Twohy v. McMurran, 57–242, 59+301. See Tolerton v. Barck, 81–470, 84+330; Fidelity & C. Co. v. Lawler, 64–144, 66+143.

[72] Lehigh C. & I. Co. v. Scallen, 61–63, 63+245.

[73] Cushing v. Cable, 48–3, 50+891.

[74] Young v. Shunk, 30–503, 16+402. See § 9090.

[75] Conner v. Howe, 35–518, 29+314.

[76] Twohy v. McMurran, 57–242, 59+301.

[77] Hungerford v. O'Brien, 37–306, 34+161; Osborne v. Gullikson, 64–218, 66+965; Peterson v. Russell, 62–220, 64+555; Yale v. Watson, 54–173, 55+957; Merritt v. Haas, 106–275, 118+1023, 119+247. See Northwest T. Co. v. Dahltorp, 104–130, 116+106.

[78] See § 4077.

[79] Cushing v. Cable, 54–6, 55+736 (extending time for return of property by bailee); Moor v. Folsom, 14–340(260).

[80] St. Paul T. Co. v. St. Paul Ch. of Com., 64–439, 67+350.

[81] Osborne v. Waller, 73–52, 75+732.

[82] St. Paul T. Co. v. St. Paul Ch. of Com., 64–439, 67+350.

[83] Pioneer S. & L. Co. v. Freeburg, 59–230, 61+25.

[84] Oswald v. Fratenburgh, 36–270, 31+173.

[85] Fogarty v. Wilson, 30–289, 15+175.

[86] Historical Pub. Co. v. La Vaque, 64–282, 66+1150.

[87] Hale v. Dressen, 76–183, 78+1045.

[88] Maxwell v. Capehart, 62–377, 64+927.

STEPS TO CHARGE GUARANTOR

4089. Acceptance and notice—To charge a guarantor upon a letter of guaranty addressed to a particular person, or to persons generally, for a future credit to be given the party in whose favor, and at whose request, the letter was drawn, and to whom it was delivered by the guarantor, notice must be given, within a reasonable time, to the latter, that the person giving the credit has accepted or acted upon the guaranty, and has given credit on the faith of it. Such notice need not be in any particular form, and may be inferred from facts and circumstances.[89] When notice has once been given it is unnecessary to give notice of subsequent extensions of credit during the life of the guaranty. What constitutes a reasonable time for notice is ordinarily a question of fact.[90] When an instrument of guaranty is executed and delivered, not as an offer of guaranty, but as an acceptance of a proposition coming from the guarantee, or contemporaneous with an agreement by the guarantee to accept, no further notice to the guarantor of acceptance by the guarantee is necessary to bind the guarantor.[91] Knowledge from any source is binding on the guarantor.[92]

4090. Demand and notice of default—In the case of an absolute guaranty a demand on the principal and a notice of his default are unnecessary to charge the guarantor.[93] If a guaranty is conditional such demand and notice, within a reasonable time, are generally necessary to charge the guarantor.[94] But a failure to give notice does not release him unless he was prejudiced thereby.[95] A notice of default has been held to have been given within a reasonable time.[96]

4091. Exhausting securities—Guaranty of collection—Where one assigns a note, which is secured by mortgage, guaranteeing its collection, and at the same time, and as part of the same transaction, also assigns the mortgage, he is not liable upon the guaranty until resort has been had to the mortgage security. In such a case the condition of the guarantor's contract is that he will pay the debt, provided, on due diligence, it cannot be collected out of the debtor or the mortgage security.[97]

4092. Suit against principal—In the case of an absolute guaranty a suit against the principal debtor is unnecessary to charge the guarantor.[98] In the case of a conditional guaranty, as, for example, a guaranty of collection, it is necessary for the creditor promptly to bring suit against the principal debtor and prosecute it to judgment and a return of execution, in order to charge the guarantor,[99] unless the debtor is so utterly insolvent as to make it certain that a suit against him would be fruitless.[1] The burden of proving such insolvency is on the creditor.[2] A delay of fifteen months in bringing suit has been held a want of due diligence.[3] If, at the time of a guaranty, the principal resided in another state, the creditor must pursue him there in order to charge the guarantor.[4]

[89] Winnebago P. Mills v. Travis, 56–480, 58+36.
[90] Straight v. Wight, 60–515, 63+105.
[91] Lehigh C. & I. Co. v. Scallen, 61–63, 63+245.
[92] Burns v. Poole, 106–69, 118+156.
[93] Hungerford v. O'Brien, 37–306, 34+161. See 6 Col. L. Rev. 229.
[94] Plano Mfg. Co. v. Klatt, 87–27, 91+22.
[95] Brackett v. Rich, 23–485.
[96] Straight v. Wight, 60–515, 63+105.
[97] Dewey v. Clark, 48–130, 50+1032.
[98] See Hungerford v. O'Brien, 37–306, 34+161.
[99] Crane v. Wheeler, 48–207, 50+1033; Nichols v. Allen, 22–283; Fall v. Youmans, 67–83, 69+697. See Dewey v. Clark, 48–130, 50+1032.
[1] Brackett v. Rich, 23–485.
[2] Osborne v. Thompson, 36–528, 33+1.
[3] Crane v. Wheeler, 48–207, 50+1033.
[4] Fall v. Youmans, 67–83, 69+697.

4093. Removal of principal—Where the principal debtor removes from the state where he resided at the time of the guaranty the creditor is not bound to pursue him in order to charge the guarantor. The burden is on the guarantor to prove that the debtor left property in the state of his former residence out of which the debt might be collected.[5]

ACTIONS

4094. Pleading—Cases are cited below involving questions of pleading.[6]

4095. Evidence—Admissibility—In an action against a guarantor on a lease testimony of the guarantor that he had no interest in the lease or the business conducted on the premises has been held admissible.[7]

GUARDIAN AD LITEM—See Executors and Administrators, 3643; Infants, 4452; Insane Persons, 4529; Wills, 10249.

GUARDIAN AND WARD

Cross-References

See Incompetents; Infants; Insane Persons.

IN GENERAL

4096. Jurisdiction—Jurisdiction of the subject is in the probate court and it may be exercised after the ward becomes of age.[8]

4097. Control of court—A statutory guardian is subject to the direction or control of the probate court, in the management and disposition of his ward's property.[9]

4098. Officer of court—A guardian is an officer of the court appointing him,[10] and subject to its orders.[11]

4099. Appointment—In general—Jurisdiction to appoint a guardian exists as well when the infant has property in the state where the jurisdiction is sought to be exercised, as when he is domiciled therein. It rests in both cases on the right and duty of a government to take care of those who are unable to take care of themselves, as respects either person or property.[12] Notice is not a constitutional prerequisite. Appointing a guardian deprives no one of his property, and does not affect title to property. Letters of guardianship are merely a commission which places the property of the ward in the care of an officer of the court as custodian, and in its effect is not essentially different from the appointment of a receiver.[13]

[5] Falls v. Youmans, 67–83, 69+697.

[6] Walsh v. Kattenburgh, 8–127(99) (unnecessary to allege that contract is in writing); Nichols v. Allen, 22–283 (complaint on a guaranty of the collection of a note held insufficient); Straight v. Wight, 60–515, 63+105 (failure of complaint to allege notice of acceptance of guaranty held waived by answer); Egan v. Gordon, 65–505, 68+103 (answer alleging that signing of a guaranty on a lease was induced by fraud held sufficient); Osborne v. Waller, 73–52, 75+732 (plea of extension of time not inconsistent with plea of payment).

[7] Egan v. Gordon, 65–505, 68+103.

[8] Jacobs v. Fouse, 23–51.

[9] Cox v. Manvel, 56–358, 57+1062.

[10] Kurtz v. St. P. etc. Ry., 48–339, 342, 51+221; Cox v. Manvel, 56–358, 363, 57+1062.

[11] Cox v. Manvel, 56–358, 363, 57+1062.

[12] Davis v. Hudson, 29–27, 31, 11+136; West Duluth L. Co. v. Kurtz, 45–380, 47+1134.

[13] Kurtz v. St. P. etc. Ry., 48–339, 342, 51+221.

4100. Notice of appointment—Notice is not a constitutional prerequisite.[14] A guardian for a minor under fourteen may be appointed without notice.[15]

4101. Nomination by minor—A minor over fourteen years of age may nominate his own guardian.[16]

4102. Letters of appointment—Evidence—The records of the probate court are competent evidence of the appointment of a guardian, without the production of the original letters. Letters of guardianship are not subject to collateral attack for defects not appearing on their face.[17]

4103. Bond of guardian—Consent of the probate court is a prerequisite to an action on the bond,[18] but it need not be alleged in the complaint.[19] Ordinarily no action will lie until the guardian is called to account by the probate court and has defaulted in the performance of its order or decree. An action by a ward may be defeated by his laches.[20] The order and determination of the probate court as to the amount due from a guardian to his ward made after due notice to the guardian is final and conclusive on the sureties.[21] A delivery by the guardian to the probate court of the funds of the ward, at the expiration of the trust, has been held not to exonerate the guardian or his sureties on the bond.[22] In an action by a creditor on a bond, the order or decree of the probate court on an accounting is conclusive as to whether the guardian had assets in his hands and the amount thereof. If a guardian with sufficient assets refuses to pay debts of his ward, an action will lie on his bond, at least, if the debt has been first ascertained by a judgment against the ward.[23]

4104. Acts before appointment—Before one's appointment as guardian he has no authority to bind the estate of his future ward.[24]

4105. Natural guardians—A father is the natural guardian of his minor children.[25] If the father is dead the mother is the natural guardian.[26]

4106. Trust companies—By statute a trust company may act as guardian.[27]

4107. Fiduciary relation—The relation of a guardian to his ward is fiduciary. The guardian cannot use the funds of the ward for his personal advantage, or do anything inconsistent with the faithful discharge of his trust.[28]

4108. Control of ward—As a general rule a guardian has the same control over his ward as a parent over his child. He may change the residence of his ward from one state or county to another, when such change will be for the benefit of the ward, and he may select the school which his ward shall attend.[29]

4109. Sales of personalty—A guardian may sell his ward's personalty, to a bona fide purchaser, without an order of court.[30]

[14] Kurtz v. St. P. etc. Ry., 48-339, 342, 51+221. See § 4116.

[15] State v. Bazille, 81-370, 84+120.

[16] R. L. 1905 § 3819; Hanson v. Swenson, 77-70, 74, 79+598; Benedict v. Mpls. etc. Ry., 86-224, 231, 90+360.

[17] Davis v. Hudson, 29-27, 11+136.

[18] R. L. 1905 § 3814; Eaton v. Gale, 96-161, 104+833.

[19] Hantzch v. Massolt, 61-361, 63+1069. See Ganser v. Ganser, 83-199, 86+18.

[20] Brandes v. Carpenter, 68-388, 71+402.

[21] Cross v. White, 80-413, 83+393; Jacobson v. Anderson, 72-426, 75+607; Holden v. Turrell, 86-214, 216, 90+395.

[22] Jacobson v. Anderson, 72-426, 75+607.

[23] In re Hause, 32-155, 19+973.

[24] Huntsman v. Fish, 36-148, 30+455.

[25] Townsend v. Kendall, 4-412(315, 321).

[26] Hanson v. Swenson, 77-70, 75, 79+598

[27] R. L. 1905 § 3038; Minn. L. & T. Co. v. Beebe, 40-7, 41+232.

[28] Johnson v. N. W. etc. Co., 56-365, 377, 57+934, 59+992; Bitzer v. Bobo, 39-18, 38+609; Barber v. Bowen, 47-118, 49+684; Svanburg v. Fosseen, 75-350, 365, 78+4; Brown v. Fischer, 77-1, 79+494; Everett v. O'Leary, 90-154, 155, 95+901; Ashton v. Thompson, 32-25, 41, 18+918; In re Granstrand, 49-438, 52+41.

[29] Townsend v. Kendall, 4-412(315). See Note, 89 Am. St. Rep. 257.

[30] Humphrey v. Buisson, 19-221(182); Pardoe v. Merritt, 75-12, 77+552. See Cox v. Manvel, 50-87, 52+273; Id., 56-358, 57+1062.

4110. Investment of funds—It is the duty of a guardian to invest the funds of his ward and if he fails to do so he is chargeable with interest.[31] A petition has been held to state facts entitling a ward to have an order for the investment of funds set aside on account of the interest of the guardian.[32]

4111. Liability—A guardian is not liable for services rendered or expenditures made in and about the settlement of the account of an administrator of an estate in which his wards are interested.[33]

4112. Gifts from ward to guardian—A gift from a ward to his guardian is presumptively invalid. The burden rests on the guardian to show the transaction to be "righteous." This is true in the case of a gift from a ward to an ex-guardian who retains a controlling influence over his former ward.[34]

4113. Termination of guardianship—A guardianship continues, after the majority of the ward, for the purpose of accounting and settlement.[35] An action by a guardian, begun after the majority of his ward, has been sustained.[36]

4114. Removal—If a guardian tenders his resignation the probate court may enter an order removing him. On appeal to the district court from such an order the hearing may be brought on by any interested person.[37] A guardian cannot be removed without notice to him, if his residence is known.[38] Where an effort is made in the probate court, upon petition of next of kin, to prevent a testamentary guardian from executing his trust, and the probate court decides that he is competent and suitable, upon appeal from such order the question of such guardian's right to act further may be considered, and the district court may permit an amendment of the petition of the next of kin, if necessary, to enable such question to be fully determined.[39]

4115. Death of guardian—Upon the death of a guardian the probate court may call his representative to an accounting;[40] and the district court may enforce a resulting trust.[41]

4116. For non-resident—A guardian of the estate of a non-resident minor may be appointed by the probate court of any county where he has property. In such case the appointment of a general guardian is valid as to the estate of the minor within this state.[42] The existence of a general guardian at the domicil of the minor is unnecessary.[43] The statutory notice is jurisdictional.[44] Notice to the minor is unnecessary.[45] A notice has been held sufficient.[46]

4117. Foreign guardians—If a foreign guardian and his ward come within this state the guardian may exercise control over the person or property of his ward, subject to the laws of this state. He may retake the ward here and remove him to the state of his domicil.[47] A foreign guardian may be licensed by a probate court of the state to sell or mortgage the realty of his ward situated here, and he may act through an attorney in fact.[48]

[31] Crosby v. Merriam, 31-342, 17+950.
[32] In re Granstrand, 49-438, 52+41.
[33] Huntsman v. Fish, 36-148, 30+455.
[34] Ashton v. Thompson, 32-25, 18+918.
[35] Jacobs v. Fouse, 23-51; Huntsman v. Fish, 36-148, 30+455.
[36] Huntsman v. Fish, 36-148, 30+455.
[37] Brown v. Huntsman, 32-466, 21+555.
[38] McCloskey v. Plantz, 76-323, 79+176.
[39] Chadwick v. Dunham, 83-366, 86+351.
[40] Peel v. McCarthy, 38-451, 38+205.
[41] Bitzer v. Bobo, 39-18, 38+609.
[42] R. L. 1905 § 3832; Davis v. Hudson, 29-27, 11+136; West Duluth L. Co. v. Kurtz, 45-380, 47+1134.
[43] West Duluth L. Co. v. Kurtz, 45-380, 47+1134.
[44] Davis v. Hudson, 29-27, 11+136.
[45] Kurtz v. St. P. etc. Ry., 48-339, 51+221.
[46] Kurtz v. St. P. etc. Ry., 48-339, 51+221; Kurtz v. West Duluth L. Co., 52-140, 53+1132. See Edgerly v. Alexander, 82-96, 84+653.
[47] Townsend v. Kendall, 4-412(315).
[48] Townsend v. Kendall, 4-412(315);

ACCOUNTING AND SETTLEMENT

4118. Necessity—An accounting in the probate court is ordinarily a prerequisite to an action on a guardian's bond.[49]

4119. Notice—A statutory notice of the time and place of examining and allowing an account has been held jurisdictional.[50] When a guardian files an account it is his business to have a hearing on it appointed. If he procures an order for a hearing he is bound thereby. A notice of hearing by publication has been held sufficient.[51]

4120. Death of guardian—If a guardian dies before final account and settlement his representative may be held to account by the probate court.[52]

4121. Who may contest—A creditor may contest an account without a previous allowance of his claim by the probate court.[53]

4122. Charges and credits—Allowance may be made for necessary expenses for the support of the ward incurred without an order of court, and even before the appointment of a guardian.[54] Whether a guardian who takes a ward into his own household may be allowed for his support depends upon the intention with which the support was given.[55] A guardian has been held properly charged with interest on funds which he failed to invest.[56] An order on an accounting requiring a guardian to pay over an estate without making allowance for the dower rights of a mother of the ward has been sustained.[57]

4123. Attacking—Laches—The right of a ward to question the account of his guardian may be lost by laches.[58]

4124. Order of allowance—Effect—The order is conclusive in an action on the guardian's bond.[59] It may be set aside by the probate court for fraud.[60] An order has been held not to confirm a sale of personalty by the guardian contrary to an order of the court.[61] An order has been held not to set the statute of limitations running in favor of heirs.[62]

4125. Settlement—Turning over estate—When a guardian has settled his accounts with the probate court, and his guardianship has terminated, he must turn over the estate to his successor, or to the ward, or other person entitled thereto, and he cannot exonerate himself by turning it over to the court.[63] An informal settlement has been sustained after a long lapse of time and acquiescence of wards.[64]

ACTIONS

4126. Action for injury to ward—A general guardian may maintain an action for an injury to his ward.[65]

GUARDS FOR DANGEROUS MACHINERY—See Master and Servant, 5895.

Jordan v. Secombe, 33-220, 22+383; Menage v. Jones, 40-254, 41+972.

[49] Brandes v. Carpenter, 68-388, 391, 71+402.

[50] Jacobs v. Fouse, 23-51.

[51] Brown v. Huntsman, 32-466, 21+555.

[52] Peel v. McCarthy, 38-451, 38+205.

[53] In re Hause, 32-155, 19+973.

[54] In re Besondy, 32-385, 20+366.

[55] In re Besondy, 32-385, 20+366; Boardman v. Ward, 40-399, 42+202; Unke v. Dahlmier, 78-320, 80+1130; Eiken v. Eiken, 79-360, 82+667. See § 7307.

[56] Crosby v. Merriam, 31-342, 17+950.

[57] Hendri v. Sabin, 86-108, 90+159.

[58] Hanson v. Swenson, 77-70, 79+598.

[59] See § 4103.

[60] Levi v. Longini, 82-324, 84+1017, 86+333.

[61] Cox v. Manvel, 56-358, 57+1062.

[62] Holden v. Turrell, 86-214, 90+395.

[63] Jacobson v. Anderson, 72-426, 75+607; Jacobs v. Fouse, 23-51, 55.

[64] Hanson v. Swenson, 77-70, 79+598.

[65] Laws 1907 c. 58; Patterson v. Melchior, 102-363, 113+902. See Patterson v. Melchior, 106-437, 119+402 (amendment of answer to plead that guardian was not appointed until after the commencement of the action denied).

HABEAS CORPUS

4127. Remedy for illegal restraint of person—The office of the writ of habeas corpus is to afford the citizen a speedy and effective method of securing his release when illegally restrained of his liberty.[66]

4128. How far discretionary—The writ of habeas corpus, though a constitutional and imperative writ of right, does not issue, as a matter of course, to every applicant. The petition for the writ must show probable cause for issuing it, and where the petition, on its face, shows no sufficient prima facie ground for the discharge of the applicant, the writ may be legally refused.[67]

4129. Scope of remedy—Not a substitute for appeal—The office of the writ is to afford the citizen a speedy and effective method of securing his release when illegally restrained of his liberty. Its scope, when directed to an inquiry into the cause of imprisonment in judicial proceedings, extends to questions affecting the jurisdiction of the court, the sufficiency in point of law of the proceedings, and the validity of the judgment or commitment under which the prisoner is restrained.[68] Where a person is confined under the final judgment of a court he can be released on habeas corpus only for jurisdictional defects. Habeas corpus cannot be allowed to perform the function of a writ of error or appeal. If a court has jurisdiction of the person and subject-matter and could have rendered the judgment on any state of facts, the judgment, however erroneous or irregular or unsupported by the evidence, is not void, but merely voidable, and habeas corpus is not the proper remedy to correct the error.[69] Errors and irregularities occurring in proceedings before committing magistrates, not ousting the magistrate of jurisdiction, or rendering the proceedings void, cannot be reviewed upon habeas corpus.[70]

4130. Successive applications—Res judicata—A decision of one court or officer upon a writ of habeas corpus, refusing to discharge a prisoner, is not a bar to the issue of another writ, based upon the same state of facts as the former writ, by another court or officer, or to a hearing or discharge thereon.[71] A different rule applies where the writ is used to determine the right to the custody of an infant.[72]

4131. Review of evidence—Where a person is held under a final judgment the sufficiency of the evidence to sustain the judgment cannot be reviewed on habeas corpus,[73] but the evidence on which a committing magistrate has committed a person may be reviewed for the purpose of determining whether it fairly and reasonably tends to show the commission of the offence charged and whether it fairly and reasonably tends to make out probable cause for charging the prisoner with its commission.[74]

[66] State v. Bailey, 106–138, 118+676; State v. Lawrence, 86–310, 90+769; State v. Sargent, 71–28, 73+626.

[67] Hoskins v. Baxter, 64–226, 66+969; State v. Goss, 73–126, 75+1132. See In re Snell, 31–110, 112, 16+692.

[68] State v. Bailey, 106–138, 118+676.

[69] State v. Sheriff, Hennepin County, 24–87; In re Williams, 39–172, 39+65; State v. Kinmore, 54–135, 55+830; State v. Billings, 55–467, 57+206, 794; State v. Kilbourne, 68–320, 71+396; State v. Wolfer, 68–465, 71+681; State v. McMahon, 69–265, 72+79; State v. Norby, 69–451, 72+703; State v. Phillips, 73–77, 75+1029; State v. Wagener, 74–518, 77+424; State v. Matter, 78–377, 81+9; State v. Hausewedell, 94–177, 102+204; State v. Bailey, 106–138, 118+676; State v. Whittier, 108–447, 122+319; State v. Riley, 109–434, 124+11. See State v. Justus, 94–207, 102+452.

[70] State v. Riley, 109–434, 124+11.

[71] In re Snell, 31–110, 16+692; State v. Bechdel, 37–360, 34+334.

[72] State v. Bechdel, 37–360, 34+334; State v. Flint, 61–539, 63+1113.

[73] State v. Norby, 69–451, 72+703.

[74] In re Snell, 31–110, 16+692; State v. Hayden, 35–283, 28+659; State v. Justus, 85–114, 88+415.

4132. Person held under final judgment of competent tribunal—A person committed or detained by virtue of the final judgment of a competent tribunal cannot be released on habeas corpus.[75] If a court is without jurisdiction, either of the person or subject-matter, it is not a "competent tribunal" within this rule.[76] If the law under which a person is held is unconstitutional, he may be released on habeas corpus though held under a "final judgment." [77] The legal existence of a court organized and created under color of law cannot be questioned on habeas corpus sued out by a person convicted and sentenced to imprisonment in proceedings had before it.[78]

4133. Custody of children—Habeas corpus is an appropriate remedy to determine the right to the custody of children.[79]

4134. Removal of guardian—Restraint of incompetent—While the legality of the restraint exercised over an incompetent by his guardian may be inquired into on habeas corpus, a court commissioner has no authority to make an order, in habeas corpus proceedings, which practically removes the guardian.[80]

4135. Discharge for defect of proof—Re-arrest—Under the statute a discharge for defect of proof merely terminates the proceeding, so that the prisoner cannot be further prosecuted, except by a new proceeding instituted on sufficient evidence given in that proceeding. A complaint and warrant for his rearrest may be in the ordinary form.[81]

4136. Jurisdiction—Court commissioners are authorized to issue the writ.[82] Judges of the district [83] and supreme courts [84] are authorized to grant the writ. Judges of the probate court have no authority to grant or issue writs.[85] Under the statute a person applying for the writ must apply for it to a court or judge thereof, if there is one capable and willing to act, in the county where he is restrained of his liberty, and, if there is none in that county, then to the nearest or most accessible court or judge capable and willing to act; and he cannot pass over such near or accessible court or judge, and go to any court or judge in the state that he may select, either to a district court or judge thereof, or to the supreme court or a judge thereof.[86]

4137. Petition—The statute prescribes the contents of a petition for a writ.[87] It should state in what the illegality of the imprisonment consists, and this

[75] R. L. 1905 § 4573.

[76] State v. West, 42–147, 43+845; State v. Kinmore, 54–135, 55+830; State v. Wagener, 74–518, 77+424; State v. Justus, 85–114, 88+415. See State v. Justus, 94–207, 102+452.

[77] In re White, 43–250, 45+232; State v. Sheriff, Ramsey Co., 48–236, 51+112; State v. Billings, 55–467, 57+206, 794; State v. Justus, 90–474, 97+124.

[78] State v. Bailey, 106–138, 118+676. See 22 Harv. L. Rev. 383.

[79] State v. Bechdel, 37–360, 34+334; Id., 38–278, 37+338; State v. Kinmore, 54–135, 55+830; State v. Flint, 61–539, 63+1113; Id., 63–187, 65+272; State v. O'Malley, 78–163, 80+1133; State v. Lowell, 78–166, 80+877; State v. Merrill, 83–252, 86+89; State v. Greenwood, 84–203, 87+489; State v. Anderson, 89–198, 94+681; State v. Martin, 95–121, 103+888; State v. Ott, 98–533, 107+1134; State v. Bryant, 99–49, 108+880; Gauthier v. Walter, 124+634.

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

[81] R. L. 1905 § 4594; State v. Holm, 37–405, 34+748.

[82] R. L. 1905 §§ 148, 4574; Laws 1909 c. 59. See, under former statutes, State v. Hill, 10–63(45) (issuance to another county—returnable before commissioner); State v. Barnes, 17–340(315) (writ without seal of court void); State v. Bechdel, 38–278, 37+338 (review by district court); Betts v. Newman, 91–58, 97+371 (power to issue writ).

[83] R. L. 1905 § 4574; State v. Hill, 10–63(45) (writ may be returnable before judge at chambers); Hoskins v. Baxter, 64–226, 66+969 (writ may be granted by judge in vacation).

[84] R. L. 1905 § 4574; State v. Grant, 10–39(22) (statute conferring power constitutional—power to take recognizances); In re Snell, 31–110, 16+692 (original jurisdiction of supreme court—certiorari as ancillary writ).

[85] In re Lee, 1–60(44).

[86] In re Doll, 47–518, 50+607.

[87] R. L. 1905 § 4576.

should be done by stating facts, as distinguished from mere conclusions of law. If the confinement is by virtue of a warrant a copy thereof should be annexed, or reasons for not doing so stated.[88] It must show affirmatively probable cause for issuing the writ.[89]

4138. Traverse of return—The statute provides that on the return of a writ the petitioner may, on oath, deny any of the material facts set forth in the return, or allege any facts to show either that his imprisonment or detention is unlawful, or that he is entitled to his discharge.[90] In other words, the existence of the alleged process, judgment, or proceeding, under which the relator is claimed to be held, may be controverted, its validity may be questioned, the jurisdiction of the court, or officer commanding the imprisonment, to issue the process or render the judgment may be contested, and any ex post facto matter, such as a pardon after conviction and sentence, may also be set up, showing that the alleged cause of imprisonment has become inoperative, and of no further force or effect.[91] The relator may raise an issue as to his identity by a traverse to the return.[92] If the petitioner does not traverse the return, the petition must be disposed of forthwith on the return alone, without the introduction of evidence.[93]

4139. Order or judgment—Except as directed by statute the court may make such order or judgment as the particular case may require. But a court commissioner cannot make an order which practically removes a guardian.[94]

4140. Remand—Where the judgment by virtue of which the petitioner is held is unauthorized, but his conviction is valid, he will be freed from detention under the judgment and remanded to the proper court or officer for further proceedings according to law.[95]

4141. Certiorari as ancillary writ—It is common practice in this state to employ the writ of certiorari as ancillary to the writ of habeas corpus to bring to the appellate court a full return of the proceedings below.[96]

4142. Appeal—Appeal to the supreme court in habeas corpus proceedings is regulated by a special statute.[97] The object of the statute is to speed the hearing of habeas corpus cases and to take them out of the general rule applicable to appeals to the supreme court.[98] The statute is unsatisfactory as regards the return. The papers are not required to be printed, and a complete record of what happened in the district court is not presented.[99] The application is considered de novo, as if originally made in the supreme court.[1] A reference is ordered when necessary to take testimony.[2] The appeal is heard on the record returned where the certificate of the clerk shows all the proceedings are returned and no application is made for the taking of testimony. On appeal from an order made by a court commissioner the clerk of the district court may certify the proceedings.[3] Where the case involves the custody of a child of tender

[88] State v. Goss, 73–126, 75+1132.
[89] Hoskins v. Baxter, 64–226, 66+969.
[90] R. L. 1905 § 4591.
[91] State v. Sheriff, Hennepin Co., 24–87.
[92] State v. Bates, 101–303, 112+260.
[93] State v. Billings, 55–467, 57+794.
[94] State v. Lawrence, 86–310, 90+769.
[95] R. L. 1905 § 4588; State v. Miesen, 98–19, 106+1134, 108+513; State v. Hoolihan, 104–63, 115+1037.
[96] In re Snell, 31–110, 16+692; State v. Holm, 37–405, 34+748; In re Fanning, 40–4, 41+1076; State v. Fitzgerald, 51–534, 53+799; State v. Wagener, 74–518, 522, 77+424; State v. Bailey, 106–138, 118+676.
[97] R. L. 1905 §§ 4601, 4602. See, under former statutes, State v. Hill, 10–63(45); State v. Buckham, 29–462, 13+902.
[98] State v. Martin, 93–294, 101+303.
[99] State v. Bryant, 99–49, 108+880.
[1] State v. Flint, 61–539, 63+1113; State v. Lowell, 78–166, 167, 80+877; State v. Greenwood, 84–203, 204, 87+489; State v. Justus, 84–237, 87+770; State v. Lawrence, 86–310, 311, 90+769; State v. Bates, 96–150, 154, 104+890; State v. Ott, 98–533, 107+1134; Gauthier v. Walter, 124+634.
[2] State v. Lawrence, 86–310, 90+769; State v. Ott, 98–533, 107+1134.
[3] State v. Merrill, 83–252, 86+89.

years, the judgment must include a direction as to its education and training.[4] Final judgment is rendered in the supreme court.[5] A final order of a court commissioner is appealable within thirty days after it is filed with the clerk of the district court, even though it directs the entry of judgment for the relief awarded.[6] The statute has been held unconstitutional so far as it applied to decisions regarding the custody of children rendered prior to its enactment.[7]

HABITUAL DRUNKARDS—See note 8.
HACKMEN—See Carriers, 1205.
HAIL INSURANCE—See Insurance, 4863.
HALF—See note 9.
HALF-BREED SCRIP—See Public Lands, 7949.
HANDCARS—See note 10.
HANDWRITING—See Evidence, 3320, 3330.
HARMLESS ERROR—See Appeal and Error, 416; New Trial.

HAWKERS AND PEDDLERS

4143. Definition—A peddler is a small retail dealer who carries his merchandise with him, traveling from place to place, and from house to house, exposing his goods for sale and selling them directly to consumers.[11]

4144. A legitimate business—Peddling is a legitimate business and cannot be totally suppressed. But it is apt to become a nuisance and is subject to reasonable regulation under the police power.[12]

4145. Regulation—Cases are cited below involving the validity and construction of various acts and ordinances regulating hawkers and peddlers.[13]

4146. Authority to license—Sp. Laws 1874 c. 1 did not authorize the city of St. Paul to license peddlers.[14] An authority to a municipality to license peddlers is to be strictly construed and controlled by the general law applicable to the subject-matter.[15] Sp. Laws 1881 c. 93 § 16 did not authorize the city of St. Paul to license peddlers.[16] A municipality cannot delegate its authority to license peddlers.[17]

[4] State v. Lawrence, 86–310, 316, 90+769; State v. Ott, 98–533, 107+1134.
[5] State v. Wagener, 77–483, 502, 80+633.
[6] State v. Martin, 93–294, 101+303.
[7] State v. Flint, 61–539, 63+1113.
[8] Leavitt v. Morris, 105–170, 117+393.
[9] Baldwin v. Winslow, 2–213(174); Cogan v. Cook, 22–137.
[10] Benson v. Chi. etc. Ry., 75–163, 166, 77+798.
[11] St. Paul v. Briggs, 85–290, 88+984 See Duluth v. Krupp, 46–435, 439, 49+235; State v. Jensen, 93–88, 91, 100+644; State v. Parr, 109–147, 123+408 (definition of "hawkers," "peddlers," "permanent merchants," "transient merchants" in Laws 1909 c. 248).
[12] St. Paul v. Traeger, 25–248; State v. Wagener, 69–206, 72+67.
[13] Gifford v. Wiggins, 50–401, 52+904 (ordinance of Willmar, prohibiting the peddling of goods, etc., not manufactured or grown within the county of Kandiyohi held void as class legislation); State v. Wagener, 69–206, 72+67 (Laws 1897 c. 107 held void as class legislation); State v. Jensen, 93–88, 100+644 (ordinance of Minneapolis, regulating peddlers, held applicable to persons peddling the products of their own farms or gardens); State v. Nolan, 108–170, 122+255 (ordinance of Hastings, discriminating between residents and non-residents, held unconstitutional); State v. Parr, 109–147, 123+408 (Laws 1909 c. 248 held unconstitutional as class legislation and as not providing for uniform taxation); State v. Ramage, 109–302, 123+823 (ordinance of Northfield exempting "vendors of farm produce or green fruits and vegetables" held invalid).
[14] St. Paul v. Traeger, 25–248.
[15] St. Paul v. Briggs, 85–290, 88+984.
[16] St. Paul v. Stoltz, 33–233, 22+634.
[17] In re White, 43–250, 45+232.

4147. License fees—The fees required of licensed peddlers must be reasonable.[18]

4148. Use of streets and sidewalks—An ordinance relating to the use of streets has been held not violated by a pushcart peddler remaining with his cart at one place on a busy street for thirty minutes.[19] An ordinance prohibiting the use of sidewalks for the purpose of exposing merchandise for sale has been held violated by a licensed peddler depositing his goods on a sidewalk and allowing them to remain for twenty minutes.[20]

HEALTH

4149. Boards of health—Local boards of health are necessarily invested with large discretionary power as to the means to be employed to prevent the spread of a contagious disease, and the expenses to be incurred.[21] A town or village board may employ one of its members, who is a physician, to act for the board in matters requiring the services of a physician.[22] The chairman of a board is authorized by Laws 1901 c. 238 to act for the board in presenting and prosecuting claims against a county for expenses incurred by the board.[23] The term of office of the health officer of Duluth, under Sp. Laws 1891 c. 55 § 6, is one year.[24]

4150. Expenses—Liability of counties, cities, villages, and towns—It is provided by statute that "every local board of health shall employ, at the cost of the town, county, or place in which it exists, when necessary, all medical and other help required for the prevention or suppression of communicable diseases, or for carrying out within its jurisdiction the lawful regulations and directions of the state board and its officers and employees; and, upon its failure so to do, the state board may employ such assistance at the local charge." [25] Cases are cited below involving the liability of counties, cities, villages, and towns, under various statutes, for expenses incurred in the enforcement of health laws and regulations.[26]

[18] In re White, 43–250, 45+232; Duluth v. Krupp, 46–435, 49+235; State v. Jensen, 93–88, 100+644.

[19] State v. Rayantis, 55–126, 56+586.

[20] State v. Messolongitis, 74–165, 77+29.

[21] Schmidt v. Stearns County, 34–112, 24+358; State v. Zimmerman, 86–353, 90+783.

[22] Chairman Board of Health v. Renville County, 89–402, 95+221.

[23] Id.

[24] State v. Routh, 61–205, 63+621.

[25] Laws 1907 c. 327.

[26] Montgomery v. Le Sueur County, 32–532, 21+718 (action by town against county under G. S. 1878 c. 10 § 62—town need not have paid or issued its orders for expenses—county liable if town has "provided" necessaries); Schmidt v. Stearns County, 34–112, 24+358 (special act of 1888 to prevent spread of smallpox in Stearns county—unauthorized employment of physician—ratification—powers of county board); Mankato v. Blue Earth County, 87–425, 92+405 (neglect of county physician to care for person infected with a contagious disease—health officer of municipality may provide medical attendance at expense of county—county liable under Laws 1902 c. 29 for necessary additional salary paid the local health inspector for extra services in locating and combating contagious diseases); Louriston v. Swift County, 89–91, 93+1052 (county held not liable for care of family by town board of another county where the family had acquired a legal residence after leaving former county); Louriston v. Chippewa County, 89–94, 93+1053 (under G. S. 1894 § 7059 county is liable to town for necessary expenses incurred for medical treatment, care, and in maintaining quarantine of a resident family sick with a contagious disease); Chairman, Board of Health v. Renville County, 89–402, 95+221 (chairman of town or village board authorized to present and prosecute claim against county for expenses—under Laws 1901 c. 238 whole expense of quarantine chargeable against county—payment by village held not to discharge county); Lake Crystal v. Blue Earth County, 91–247, 97+888 (Laws 1901 c. 238,

4151. Neglect of county officer—Action by municipal officer—The health officer of a municipality is justified in incurring the expense of furnishing medical treatment for the purpose of controlling a contagious disease, when the county physician, whose duty it is, refuses to treat the infected persons, and such expense may be recovered against the county.[27]

4152. Compulsory vaccination—A regulation, made by a municipal health officer, requiring children to be vaccinated, as a condition to their admission to the public schools of the municipality, has been sustained.[28]

4153. Construction of statutes—The statutes relating to the public health, especially those for the suppression of dangerous and contagious diseases, are given a liberal construction.[29] Grants of power to municipalities, for the protection of public health, are entitled to a broad and liberal construction.[30]

HEARSAY EVIDENCE—See Evidence, 3286.

HEIRS—Those who inherit, or have the right to inherit the property of another; those who by the laws of descent and distribution succeed to the property of an intestate.[31]

HICKS v. STONE (RULE OF)—See New Trial, 7155, 7156.

HIGHWAYS

Cross-References

See Boundaries, 1065; Bridges, 1110; Dedication; Municipal Corporations (Streets), 6615; Roads.

IN GENERAL

4154. Definition—Highway is a generic term for all kinds of public ways. It is a passage or road through the country, or some parts of it, for the use of the people. It includes streets and alleys in cities, villages and boroughs, as well as country roads,[32] navigable waters,[33] railways,[34] and bridges.[35]

4155. Title in state—At common law the title to all public highways was in the king, for the benefit of all his subjects. In this country such title is in the

relating to expenses of towns and villages in controlling contagious diseases held inapplicable to bills for expenses actually paid and adjusted before its enactment—how far retrospective); Comstock v. Le Sueur County, 92-88, 99+427, 100+652 (Laws 1883 c. 132 § 29, making towns, boroughs, and villages liable in the first instance, was amended and repealed by subsequent legislation so that in 1901 the county was solely liable—application of act of 1901—act of 1901 inapplicable to pre-existing liability under contracts); Iosco v. Waseca County, 93-134, 100+734 (authority of chairman of town board to incur expenses for quarantine—ratification of unauthorized action of chairman—county liable for expenses so incurred—expenses of person quarantined for attention to his personal affairs not recoverable); Marshall County v. Roseau County, 93-240, 101+164 (under G. S. 1894 § 7059 a county is not liable to a town, village, or city for care of person affected with a contagious disease, if he is solvent).

[27] Mankato v. Blue Earth County, 87-425, 92+405.

[28] State v. Zimmerman, 86-353, 90+783.

[29] Schmidt v. Stearns County, 34-112, 24+358; Iosco v. Waseca County, 93-134, 137, 100+734.

[30] State v. Zimmerman, 86-353, 90+783. See State v. McMahon, 69-265, 72+79.

[31] Century Dict.; Greenwood v. Murray, 28-120, 9+629; In re Swenson, 55-300, 56+1115; Hanson v. Minn. etc. Assn., 59-123, 128, 60+1091; Birge v. Franklin, 103-482, 115+278; Stangeland v. Mpls. etc. Ry., 105-224, 117+386.

[32] R. L. 1905 § 5514(5); Carli v. Stillwater etc. Co., 28-373, 375, 10+205; N. W. etc. Co. v. Minneapolis, 81-140, 83+527, 86+69.

[33] See § 6928.

[34] State v. St. P. etc. Ry., 98-380, 108+261.

[35] R. L. 1905 § 5514(5); Guilder v. Dayton, 22-366, 370; Willis v. Winona, 59-27, 33, 60+814.

state, either directly or through municipalities, or such agencies as it may create for that purpose, for the use and benefit of all its citizens.[36] The state's right or title is a mere easement which it holds in trust for the public use.[37]

4156. Duty of government to maintain—The government owes to its citizens the duty of providing and maintaining safe and convenient highways.[38]

4157. Nature of public easement—The public easement in a highway is the public and common right to use it for the passage of persons and things.[39] The public has only a right of way, with the powers and privileges incident thereto.[40] A municipality has no proprietary rights in its streets. Whatever rights it holds therein are held in trust for the public.[41]

4158. Legislative control—The legislature has full and paramount authority over all public highways.[42] The power to lay out, open, vacate, or abandon public highways, parks, or parkways, is legislative, to be exercised by the legislature itself, or by municipal boards to which it is delegated.[43] Where land is dedicated for a street, levee, or other public grounds, the legislature cannot divert it to an inconsistent use,[44] or impose a new servitude without compensation.[45] The legislature cannot alienate or surrender the right and duty to exercise appropriate supervision over public streets and grounds whenever the welfare of the state requires its action.[46]

4159. Proof by parol—When the fact of the existence of a highway is involved collaterally it may be shown by parol.[47]

4160. Nonuser and abandonment—Adverse possession—Whether there can be a loss or abandonment of a highway by nonuser is apparently an open question in this state. A misuser does not constitute an abandonment.[48] Title to a highway cannot be acquired by adverse possession.[49]

4161. Reversion to owner—Upon the vacation, discontinuance, or abandonment of a highway the absolute title to the land reverts to the owner of the fee, who may or may not be the abutting owner.[50]

4162. Pleading—Allegations as to the existence of a street held sufficient.[51]

LAW OF THE ROAD—COLLISIONS

4163. Vehicles meeting—Turning to right—It is provided by statute that, "when persons meet on any road or bridge, traveling with vehicles, each shall seasonably drive to the right of the middle of the traveled part of such road or

[36] Sanborn v. Minneapolis, 35–314, 318, 29+126.

[37] Sanborn v. Van Duyne, 90–215, 223, 96+41.

[38] State v. St. P. etc. Ry., 98–380, 390, 108+261.

[39] Newell v. Mpls. etc. Ry., 35–112, 27+839; L. Realty Co. v. Johnson, 92–363, 100+94.

[40] Carli v. Stillwater etc. Co., 28–373, 10+205; Althen v. Kelly, 32–280, 283, 20+188; Rich v. Minneapolis, 37–423, 35+2; Ellsworth v. Lord, 40–337, 339, 42+389; Glencoe v. Reed, 93–518, 101+956. See Sanborn v. Van Duyne, 90–215, 96+41.

[41] St. Paul v. Chi. etc. Ry., 63–330, 63+267, 65+649, 68+458.

[42] Carli v. Stillwater etc. Co., 28–373, 377, 10+205; Robinson v. G. N. Ry., 48–445, 51+384.

[43] State v. Board, Park Comrs., 100–150, 110+1121.

[44] St. Paul v. Chi. etc. Ry., 63–330, 63+267, 65+649, 68+458; Sanborn v. Van Duyne, 90–215, 96+41.

[45] Carli v. Stillwater etc. Co., 28–373, 377, 10+205.

[46] State v. Board, Park Comrs., 100–150, 110+1121.

[47] Cedar Rapids etc. Ry. v. Raymond, 37–204, 33+704.

[48] See Wilder v. St. Paul, 12–192(116); Miller v. Corinna, 42–391, 44+127; Parker v. St. Paul, 47–317, 50+247; G. N. Ry. v. St. Paul, 61–1, 9, 63+96; Sanborn v. Van Duyne, 90–215, 222, 96+41; Steenerson v. Fontaine, 106–225, 119+400.

[49] See § 111.

[50] Steenerson v. Fontaine, 106–225, 119+400.

[51] Farrant v. First Div. etc. Ry., 13–311 (286).

bridge, so that the vehicles may pass without interference." [52] The statute is inapplicable to vehicles crossing a street.[53]

4164. Vehicles passing—Turning to left—It is provided by statute that "the driver of any vehicle passing another vehicle traveling in the same direction shall drive to the left of the middle of the traveled part of the road, and, if such road be of sufficient width to permit such passing, the driver of the leading vehicle shall not obstruct the same." [54]

4165. Municipal regulation—The course of travel on streets is sometimes regulated by municipal ordinance.[55]

4166. Relative rights of pedestrians and vehicles—Collision—The relative rights of pedestrians and vehicles in a public highway are equal and reciprocal—one has no more rights than the other, and each is obliged to act with due regard to the movements of others entitled to be upon the street. Each must exercise his right in a reasonable manner and is required to exercise care commensurate with the risk involved, under the circumstances of each case, to avoid harm. Neither is called upon to anticipate negligence on the part of the other. It is no more the duty of a pedestrian to continually look out for approaching vehicles than it is the duty of drivers to look out for pedestrians. No pedestrian has a right to pass over a public thoroughfare without regard to approaching vehicles, nor has any vehicle a right to appropriate the public street for the purpose of transacting business without regard to its use by pedestrians.[56]

4167. Automobiles—Duty to stop on signal—Laws 1903 c. 356 (R. L. 1905 § 1277) does not impose upon the driver or operator of an automobile on a public road or street the absolute duty upon signal to stop the motive power of his vehicle, in addition to stopping the vehicle itself. Whether the failure to stop the motive power of the vehicle is negligence must be determined by the circumstances of each case.[57] Cases are cited below involving collisions with automobiles.[58]

USE

4168. General rule—The primary object of a highway is for use as a means of travel or communication by the public.[59] Its use is not limited to travel or transportation of persons and property in movable vehicles. To what use a highway may be applied is not to be determined by the uses in vogue at the time it was acquired or by any fixed rules, but by a gradual process of inclusion and exclusion, as cases arise.[60]

4169. Improper use—Question of law—When a street is being used for the purpose (legitimate in its general nature) of the passage of persons and

[52] R. L. 1905 § 1258; Thompson v. Dodge, 58–555, 60+545.

[53] Lyford v. Schmidt, 124+831.

[54] R. L. 1905 § 1259; Wilson v. Mpls. St. Ry., 74–436, 77+238.

[55] State v. Larrabee, 104–37, 115+948.

[56] Stallman v. Shea, 99–422, 109+824; Richardson v. Davis, 94–315, 102+868; Undhejem v. Hastings, 38–485, 38+488; Collins v. Dodge, 37–503, 35+368; Arseneau v. Sweet, 106–257, 119+46; Liebrecht v. Crandall, 126+69.

[57] Mahoney v. Maxfield, 102–377, 113+904.

[58] Arseneau v. Sweet, 106–257, 119+46 (person about to enter street car struck by automobile); Liebrecht v. Crandall, 126+69 (person alighting from street car struck by automobile running twenty miles an hour—held not contributory negligence as a matter of law that he did not look in the direction from which the automobile was approaching before alighting); Thomas v. Armitage, 126+735 (owner of automobile liable for negligence of his driver—collision between team and automobile as latter was being turned around).

[59] Carli v. Stillwater etc. Co., 28–373, 10+205; Thompson v. Dodge, 58–555, 60+545; Cater v. N. W. etc. Co., 60–539, 544, 63+111; N. W. etc. Co. v. Minneapolis, 81–140, 154, 83+527, 86+69; McDonald v. St. Paul, 82–308, 315, 84+1022. See Sheldon v. Mpls. St. Ry., 103–520, 114+1134 (loading logs).

[60] Cater v. N. W. etc. Co., 60–539, 63+111; Carli v. Stillwater etc. Co., 28–373, 10+205.

property, but objection is made to the mode of use, the question of rightfulness depends upon whether the use objected to is consistent or inconsistent with the common public use in which every person is entitled to share. This question of consistency or inconsistency is a question of law.[61]

4170. Customary use—What is a proper use of a highway depends much on the local situation and much on public usage. The general use and acquiescence of the public is evidence of the right.[62]

4171. Pedestrians—Pedestrians and drivers of vehicles have equal rights on the streets of a city. They must both exercise their rights in a reasonable manner and exercise care commensurate with the risk involved.[63] A pedestrian is not required at his peril to keep to the sidewalk and street-crossings.[64]

4172. Bicycles—A person riding a bicycle on a highway has the same rights as persons using other vehicles.[65]

4173. Fire department—A fire department responding to a fire call has special privileges in the streets.[66]

4174. Moving buildings—A permit from the council to move a building through the streets of Minneapolis has been held not to authorize the cutting of trees to render the moving possible.[67] The use of the streets of a city for moving houses is an unusual and extraordinary use, and they cannot be so employed by a house mover without permission from the city authorities.[68]

4175. Deposit of materials—The owner or occupant of land abutting on a highway has a right, temporarily and with due regard to the rights of the traveling public, to deposit therein opposite his land building materials, merchandise, fuel, or other things for his use.[69] Persons engaged in a public work on a highway, under contract with the public authorities, have a right to use the highway for the deposit of building materials connected with the work, but they must do so in a reasonable manner and so as not to interfere unnecessarily with public travel.[70]

4176. Heavy wagons—Wide tires—An ordinance of Minneapolis, prohibiting the use of certain streets by heavy vehicles with tires less than six inches wide, has been held unreasonable and void.[71]

4177. Frightening horses—The driving of a wagon, covered with flying flags for advertising purposes, through the principal streets of a city, has been held to justify a recovery for causing a horse to run away.[72]

4178. Handling baggage at union station—The handling of baggage in connection with a union railway station may require such an occupancy of a street as to interfere with the public right of passage and be inconsistent with it.[73]

OBSTRUCTION

4179. What constitutes—Cases are cited below involving various forms of obstructions in highways.[74]

[61] Newell v. Mpls. etc. Ry., 35–112, 27+839.

[62] Korte v. St. Paul T. Co., 54–530, 534, 56+246.

[63] Richardson v. Davis, 94–315, 102+868. See § 4166.

[64] Collins v. Dodge, 37–503, 35+368.

[65] Thompson v. Dodge, 58–555, 60+545.

[66] See §§ 6603, 6605.

[67] State v. Pratt, 90–66, 95+589.

[68] Edison v. Bloomquist, 124+969 (ordinance of St. Paul requiring a license for moving buildings construed—rights of owners of wires).

[69] See Mankato v. Willard, 13–13(1, 11); Grant v. Stillwater, 35–242, 28+660.

[70] Nye v. Dibley, 88–465, 93+524.

[71] State v. Rohart, 83–257, 86+93, 333.

[72] Jones v. Snow, 56–214, 57+478.

[73] St. Paul U. D. Co. v. St. Paul, 30–359, 364, 15+684.

[74] Schurmeier v. St. P. etc. Ry., 10–82 (59) (railway); Farrant v. First Div. etc. Ry., 13–311(286) (dirt and stone beside a railway right of way); Harrington v. St.

4180. Remedies—An obstruction of a highway is a public nuisance and remediable as such.[75] An action will not lie by a private person unless he is specially injured in a manner different in degree or kind from the public generally.[76] An obstruction which renders a street unsafe for travel may give rise to an action for negligence against the municipality,[77] or the person causing it.[78]

4181. Criminal prosecutions—The legal existence of the highway is an element of the crime and must be proved if disputed, but an indictment will lie though it is in dispute that the land is a highway.[79] Under G. S. 1878 c. 13 § 65 a private person might make complaint.[80] The proceeding thereunder was a criminal prosecution triable by a justice of the peace.[81] Where an order establishing a highway described it by signs and letters, it was held incumbent on the state to prove that the signs and letters were in fact intelligible.[82] A prosecution before a justice of the peace for obstructing a public highway is a criminal action.[83] Evidence held not to show an intent to obstruct a highway.[84]

RIGHTS OF ABUTTING OWNERS

4182. In general—An abutting owner has a special interest or easement in the highway opposite his property, different from the general public. This in-

P. etc. Ry., 17-215(188) (railway); Cleveland v. St. Paul, 18-279(255) (excavation and embankment); Shaubut v. St. P. etc. Ry., 21-502 (railway); Patterson v. Duluth, 21-493 (canal); Simmer v. St. Paul, 23-408 (obstruction caused by construction of sewer in city street); Wilder v. De Cou, 26-10, 1+48 (raceway—flume); Brakken v. Mpls. etc. Ry., 29-41, 11+124; Id., 31-45, 16+459 (railway); Rochette v. Chi. etc. Ry., 32-201, 20+140 (excavation made by railway company); Barnum v. Minn. T. Ry., 33-365, 23+538 (railway cut); Colstrum v. Mpls. etc. Ry., 33-516, 24+255 (railway); Ofstie v. Kelly, 33-440, 23+863 (stairway); Shero v. Carey, 35-423, 29+58 (obstruction in country road); Thelan v. Farmer, 36-225, 30+670 (hay scales); Stearns County v. St. Cloud etc. Ry., 36-425, 32+91 (railway in country road); State v. Eisele, 37-256, 33+785 (fence); Phelps v. Winona etc. Ry., 37-485, 35+273 (snow thrown from railway track); Skjeggerud v. Mpls. etc. Ry., 38-56, 35+572 (railway car); Todd v. Mpls. etc. Ry., 39-186, 39+318 (railway cars and trains); Adams v. Chi. etc. Ry., 39-286, 39+629 (railway); Rippe v. Chi. etc. Ry., 42-34, 43+652 (railway fence); Lakkie v. Chi. etc. Ry., 44-438, 46+912 (railway); Hutchinson v. Filk, 44-536, 47+255 (obstruction of country road); Hayes v. Chi. etc. Ry., 46-349, 49+61 (railway); Holly v. Bennett, 46 386, 49+189 (pile of lumber); Buffalo v. Harling, 50-551, 52+931 (building); Aldrich v. Wetmore, 52-164, 53+1072 (pile of earth); Aldrich v. Wetmore, 56-20, 57+221 (pile of earth and rubbish); Gustafson v. Hamm, 56-334, 57+1054 (private railway); Kaje v. Chi. etc. Ry., 57-422, 59+493 (obstruction of alley by roundhouse and machine shop); Long v. Minneapolis, 61-46, 63+174 (fence and other structures in parkway about a lake); Gundlach v. Hamm, 62-42, 64+50 (private railway); Benson v. St. P. etc. Ry., 62-198, 64+393 (railway); Romer v. St. P. C. Ry., 75-211, 77+825 (street railway tracks connecting with car barn); Moore v. Townsend, 76-64, 78+880 (ladder with lower end resting in gutter and upper end against building); State v. Hendrickson, 80-352, 83+153 (flooding highway with water by a dam); Nye v. Dibley, 88-465, 93+524 (pile of stones); Isham v. Broderick, 89-397, 95+224 (ice formed on sidewalk from water discharged by a pipe from adjoining building); Albert Lea v. Knatvold, 89-480, 95+309 (fence, earth, and rocks in road about a lake); Guilford v. Mpls. etc. Ry., 94-108, 102+365 (railway); Johnson v. Andengaard, 100-130, 110+369 (barn in alley); McDowell v. Preston, 104-263, 116+470 (building); Fitzer v. St. P. C. Ry., 105-221, 117+434 (tunnel for street railway); Bellevue v. Hunter, 105 343, 117+445 (fence); Hruska v. Mpls. etc. Ry., 107-98, 119+491 (railway).

[75] See § 7285.

[76] Guilford v. Mpls. etc. Ry., 94-108, 102+365; Johnson v. Andengaard, 100-130, 110+369; Fitzer v. St. P. C. Ry., 105-221, 117+434 and cases under § 7286.

[77] See § 6818.

[78] Phelps v. Winona etc. Ry., 37-485, 35+273; Skjeggerud v. Mpls. etc. Ry., 38-56, 35+572; Holly v. Bennett, 46-386, 49+189; Moore v. Townsend, 76-64, 78+880; Nye v. Dibley, 88-465, 93+524. See §§ 6839, 6845.

[79] State v. Eisele, 37-256, 33+785.

[80] State v. Galvin, 27-16, 6+380.

[81] State v. Cotton, 29-187, 12+529; State v. Sweeney, 33-23, 21+847.

[82] State v. Hendrickson, 80-352, 83+153.

[83] State v. Cotton, 29-187, 12+529.

[84] Flikkie v. Oberson, 82-82, 84+651.

terest is a distinct property right.[85] Where a highway or public park has been laid out by lawful authority, or acquired by dedication or prescription, the owners of property abutting thereon acquire a special right in the continuance of the park, street, or highway, as the case may be, of which they cannot be deprived except by due process of law. The right accrues to them, in cases where the highway or park is acquired by dedication, by the same proceedings and acts that vest the right in the public.[86]

4183. Fee to center—In the absence of express provision to the contrary, the owner of land abutting on a highway owns the fee to the center of the highway.[87] He is considered to be the owner of the soil for all purposes not inconsistent with the public easement.[88]

4184. Right of access—The owner of land abutting on a street has a right of free ingress and egress, whether he owns the fee in the street or not.[89] The interest in the street which is peculiar and personal to the abutting owner, and which is distinct and different from that of the general public, is the right to have free access to his lot and buildings, substantially in the manner he would have enjoyed the right in case there had been no interference with the street.[90]

4185. Right to light and air—The owner of land abutting on a street, whether he owns the fee of the street or not, has an easement in the street to its full width in front of his land for admission of light and air.[91]

4186. Right to soil, minerals, etc—The owner of land abutting on a street owns the soil, stone, minerals, trees, springs, etc., to the center of the street, subject to the public easement, when the fee to the street is not in the public. He may use the land in any way compatible with the full enjoyment of the public easement.[92]

4187. Lateral support—The owner of land abutting on a street has a right to the lateral support of the soil in the street.[93]

4188. Right to game—The owner of the soil has exclusive dominion over it, and the exclusive privilege of hunting, including the unqualified right to control and protect the wild game thereon. In granting an easement across his premises for the purposes of a public highway, the owner does not surrender to the public his right to foster and protect wild game on the land, and the public does not acquire any right to pursue and kill the same while it is temporarily passing to and fro across the highway.[94]

4189. Remedies—An abutting owner has the right to insist that a street shall be used for the legitimate purposes of its creation and existence, and in a

[85] Carli v. Stillwater etc. Co., 28–373, 376, 10+205; Adams v. Chi. etc. Ry., 39–286, 291, 39+629; Smith v. St. Paul, 69–276, 279, 72+104, 210; Kray v. Muggli, 84–90, 100, 86+882; Vanderburgh v. Minneapolis, 98–329, 108+480; Fitzer v. St. P. C. Ry., 105–221, 117+434.

[86] Kray v. Muggli, 84–90, 99, 86+882.

[87] Brisbine v. St. P. etc. Ry., 23–114, 130. See Boundaries, 1065.

[88] Sanborn v. Van Duyne, 90–215, 96+41.

[89] Carli v. Stillwater etc. Co., 28–373, 376, 10+205; Brakken v. Mpls. etc. Ry., 29–41, 11+124; Adams v. Chi. etc. Ry., 39–286, 292, 39+629; Gustafson v. Hamm, 56–334, 57+1054; Smith v. St. Paul, 69–276, 72+104; Vanderburgh v. Minneapolis, 98–329, 108+480; Fitzer v. St. P. C. Ry., 105–221, 117+434.

[90] Fitzer v. St. P. C. Ry., 105–221, 117+434.

[91] Adams v. Chi. etc. Ry., 39–286, 39+629; Lamm v. Chi. etc. Ry., 45–71, 47+455; Gustafson v. Hamm, 56–334, 57+1054; Vanderburgh v. Minneapolis, 98–329, 108+480.

[92] Althen v. Kelly, 32–280, 283, 20+188; Rich v. Minneapolis, 37–423, 35+2; Viliski v. Minneapolis, 40–304, 41+1050; Ellsworth v. Lord, 40–337, 42+389; Sanborn v. Van Duyne, 90–215, 96+41; L. Realty Co. v. Johnson, 92–363, 100+94; Glencoe v. Reed, 93–518, 101+956.

[93] Dyer v. St. Paul, 27–457, 8+272; Nichols v. Duluth, 40–389, 42+84; McCullough v. St. P. etc. Ry., 52–12, 53+802.

[94] L. Realty Co. v. Johnson, 92–363, 100+94.

manner proper to effectuate the same.[95] He may maintain ejectment, trespass, or other appropriate action, to protect his rights as owner of the fee, subject to the public easement.[96]

LIABILITIES OF ABUTTING OWNERS

4190. Negligence rendering highway unsafe—If a highway becomes unsafe through the negligence of an abutting owner he is liable for resulting injuries; and this is so though the municipality is also liable.[97]

HIRING—See Bailment, 731.
HIS—See note 98.
HITCHING HORSES—See Negligence, 6998.

HOLIDAYS

4191. What acts prohibited—It has been held that it is discretionary with a trial court to proceed with the trial of a cause on a holiday;[99] that an acknowledgment to a deed may be taken on a holiday;[1] and that the publication of a summons is valid, though one of the days of publication is a holiday.[2]

HOME RULE CHARTERS—See Municipal Corporations, 6535.

HOMESTEAD

Cross-References

See Divorce, 2809; Mortgages, 6185; Public Lands, 7925.

IN GENERAL

4192. Definition and nature—A homestead is a place occupied by the owner as a home exempt from forced sale for the payment of his debts.[3] In the ordinary and popular sense it is a house and land occupied by the owner as a home.[4] It is not the interest or title of the owner.[5] It includes the customary appurtenances of a home.[6] The ordinary conception of a homestead includes ownership of the land occupied, but in this state one may have a homestead in a house on the land of another.[7]

4193. Object and general policy of law—The law originated in the wise and humane policy of securing to the citizen, against all the misfortunes and

[95] Carli v. Stillwater etc. Co., 28-373, 376, 10+205; Newell v. Mpls. etc. Ry., 35-112, 27+839; Sanborn v. Van Duyne, 90-215, 96+41.

[96] Sanborn v. Van Duyne, 90-215, 96+41. See Karst v. St. P. etc. Ry., 23-401 (removal of soil—measure of damages—burden of proving right to refill); Morrell v. Chi. etc. Ry., 49-526, 52+140 (trespass—pleading).

[97] Landru v. Lund, 38-538, 38+699 (passage-way from street to cellar). See § 6845.

[98] Rugg v. Hoover, 28-404, 408, 10+473.

[99] State v. Sorenson, 32-118, 19+738; State v. Salverson, 87-40, 45, 91+1; Fureseth v. G. N. Ry., 94-500, 103+499.

[1] Slater v. Schack, 41-269, 43+7.

[2] Malmgren v. Phinney, 50-457, 52+915.

[3] See Ferguson v. Kumler, 27-156, 6+618.

[4] See R. L. 1905 § 3452; Tillotson v. Millard, 7-513(419); Kelly v. Baker, 10-154 (124); Kresin v. Mau, 15-116(87); Byrne v. Hinds, 16-521(469); Wilder v. Haughey, 21-101; Ferguson v. Kumler, 27-156, 6+618.

[5] Kaser v. Haas, 27-406, 7+824.

[6] Tillotson v. Millard, 7-513(419); Ferguson v. Kumler, 27-156, 6+618.

[7] See § 4203.

uncertainties of life, the benefits of a home, not in the interest of himself, or, if a married man, of himself and family alone, but likewise in the interest of the state, whose welfare and prosperity so largely depend upon the growth and cultivation among its citizens of feelings of personal independence, together with love of country and kindred—sentiments that find their deepest root and best nourishment where the home life is spent and enjoyed. Its leading purpose is to exempt from forced sale a homestead—the place made such by the choice, residence, use and occupancy of the owner as a home, including as its necessary incidents, the dwelling house and its appurtenances, and the land thereto belonging.[8]

4194. Statute to be liberally construed—The statute exempting a homestead is to be liberally construed in favor of debtors.[9] It is not to be so construed as to render the exemption valueless when its protection is most needed.[10] But it should not be allowed to be used as an instrument of fraud.[11] While the statute is to be liberally construed, the exemption in favor of mechanics, laborers and materialmen, is also to be liberally construed in their favor.[12]

4195. Constitutional questions—Our state constitution provides that "a reasonable amount of property shall be exempt from seizure or sale for the payment of any debt or liability. The amount of such exemption shall be determined by law. Provided, however, that all property so exempted shall be liable to seizure and sale for any debts incurred to any person for work done or materials furnished in the construction, repair, or improvement of the same; and provided further, that such liability to seizure and sale shall also extend to all real property for any debt incurred to any laborer or servant for labor or service performed." [13] Prior to the provisos in this provision, which were added in 1888, it was held that the legislature could not enact an exemption law discriminating between different classes of creditors or debts.[14] The legislature may provide for a homestead limited in area but not in value.[15] The statute making property otherwise exempt liable for the purchase money is constitutional.[16] The constitutional provision for exemptions is not self-executing; there can be no exemption until the legislature determines what it shall be.[17] The exemption may be reduced or abolished in the discretion of the legislature. The constitution does not require any exemption of realty.[18] Exemption laws that impair the rights of creditors are invalid.[19]

4196. Title essential to support exemption—A party must be the owner of property to hold it exempt as a homestead.[20] But it is unnecessary that he

[8] Ferguson v. Kumler, 27–156, 6+618. See, to same effect, Grimes v. Bryne, 2–89(72); Tillotson v. Millard, 7–513(419); Wilder v. Haughey, 21–101; Ferguson v. Kumler, 25–183; Keith v. Albrecht, 89–247, 94+677; Grace v. Grace, 96–294, 104+969.

[9] Ferguson v. Kumler, 27–156, 6+618; Kiewert v. Anderson, 65–491, 67+1031; Brown v. Hughes, 89–150, 94+438; Lindberg v. Johnson, 93–267, 101+74; Jaenicke v. Fountain City D. Co., 106–442, 119+60.

[10] Jacoby v. Parkland D. Co., 41–227, 43+52; Neumaier v. Vincent, 41–481, 43+376.

[11] Esty v. Cummings, 75–549, 78+242.

[12] Lindberg v. Johnson, 93–267, 101+74.

[13] Const. art. 1 § 12.

[14] Tuttle v. Strout, 7–465(374); Cogel v. Mickow, 11–475(354); Coleman v. Ballandi, 22–144; Keller v. Struck, 31–446, 18+280; Rogers v. Brackett, 34–279, 25+601; Meyer v. Berlandi, 39–438, 40+513.

[15] Cogel v. Mickow, 11–475(354); Barton v. Drake, 21–299; In re How, 59–415, 61+456; Brixius v. Reimringer, 101–347, 112+273.

[16] Rogers v. Brackett, 34–279, 25+601.

[17] Kelly v. Dill, 23–435. See Ward v. Huhn, 16–159(142).

[18] Coleman v. Ballandi, 22–144; Hamilton v. Detroit, 85–83, 88+419.

[19] Gunn v. Barry, 15 Wall. 610; Tillotson v. Millard, 7–513(419); Dunn v. Stevens, 62–380, 64+924. The case of Grimes v. Bryne, 2–89(72) is overruled.

[20] Sumner v. Sawtelle, 8–309(272); Rogers v. McCauley, 22–384; Secombe v. Borland, 34–258, 25+452.

should be the owner in fee. An equitable title is sufficient.[21] So is an undivided interest.[22] A tenant for years is an owner within the meaning of the statute.[23] Where a party pays the consideration for a purchase of land, but has the deed made to another, he cannot claim a homestead exemption in the land. Where a husband pays the consideration for a conveyance of land to his wife the title of the wife is void as to his creditors and she cannot claim a homestead exemption in the land.[24] But where a debtor owns a homestead and conveys it to his wife through a third party the wife may hold it free from the claims of his creditors.[25] No change in the title of the claimant will affect the exemption so long as he retains the ownership.[26]

4197. Title may be in husband or wife or in both—The title to a homestead may be in either husband or wife and the exemption extends to the debts of either or both.[27] A homestead may be owned and occupied by husband and wife as tenants in common.[28]

4198. Unmarried person entitled to—In this state an unmarried person is entitled to a homestead upon the same conditions and to the same extent as a married person.[29]

4199. Insolvent debtor may buy a homestead—A debtor, in securing a homestead for himself and family by purchasing a house with non-exempt assets, or by moving into a house which he already owns, takes nothing from his creditors which the law secures to them, or in which they have any vested right. He merely puts his property into a shape in which it will be the subject of a beneficial provision for himself, which the law recognizes and allows. Even if he disposes of his property subject to execution, for the very purpose of converting the proceeds into exempt property, this will not constitute legal fraud. This he may do at any time before the creditors acquire a lien on the property.[30] But a mere intent to occupy property as a homestead will not defeat a creditor's lien attaching prior to actual occupancy.[31] If an insolvent debtor pays the consideration for a home and has the title placed in his wife, it is not exempt from liability to his creditors.[32]

4200. Actual occupancy necessary—Actual occupancy of the premises as a home is essential to constitute a homestead. There may, of course, be temporary absences, but the homestead must always be regarded and treated as the home of the claimant.[33] A person may acquire a homestead right by inheritance, prior to actual occupancy.[34]

[21] R. L. 1905 § 3455; Wilder v. Haughey, 21-101; Hartman v. Munch, 21-107; Smith v. Lackor, 23-454; Ferguson v. Kumler, 27-156, 6+618; Jelinek v. Stepan, 41-412, 43+90; Law v. Butler, 44-482, 47+53; Keith v. Albrecht, 89-247, 94+677; Hook v. Northwest T. Co., 91-482, 98+463.

[22] Kaser v. Haas, 27-406, 7+824; Grace v. Grace, 96-294, 104+969. See O'Brien v. Krenz, 36-136, 30+458.

[23] In re Emerson's Homestead, 58-450, 60+23.

[24] Sumner v. Sawtelle, 8-309(272); Rogers v. McCauley, 22-384.

[25] Morrison v. Abbott, 27-116, 6+455; Ferguson v. Kumler, 27-156, 6+618.

[26] Kaser v. Haas, 27-406, 7+824.

[27] R. L. 1905 § 3455. See Lesch v. G. N. Ry., 97-503, 106+955; Grace v. Grace, 96-294, 104+969. See, as to the nature of the interest of one spouse in the homestead of the other while both are living, Spalti v. Blumer, 56-523, 58+156; Hamilton v. Detroit, 85-83, 88+419; Grace v. Grace, 96-294, 104+969; Lesch v. G. N. Ry., 97-503, 106+955.

[28] Grace v. Grace, 96-294, 104+969.

[29] R. L. 1905 §§ 3455, 3456. See Ferguson v. Kumler, 25-183; Id., 27-156, 6+618; Myers v. Ford, 22 Wis. 139 (under identical statute).

[30] Jacoby v. Parkland D. Co., 41-227, 43+52; Neumaier v. Vincent, 41-481, 43+376.

[31] Kelly v. Dill, 23-435; Liebetrau v. Goodsell, 26-417, 4+813; Neumaier v. Vincent, 41-481, 43+376; Quehl v. Peterson, 47-13, 49+390.

[32] Sumner v. Sawtelle, 8-309(272); Rogers v. McCauley, 22-384.

[33] Folsom v. Carli, 5-333(264); Tillotson v. Millard, 7-513(419); Sumner v. Sawtelle, 8-309(272); Kelly v. Baker, 10-154 (124); Kresin v. Mau, 15-116(87); Barton v. Drake, 21-299; Kelly v. Dill, 23-

4201. Undivided interests—The amount of land exempted is unaffected by the fact that the claimant has an undivided interest.[35]

4202. Separate tracts—Two separate tracts of land, touching only at the corners, between which there is a regular roadway, may constitute a homestead, if owned, occupied, and cultivated as one farm, though the residence and appurtenances are all located on one of the tracts.[36]

4203. Dwelling house on land of another—A dwelling house occupied as a home is exempt though situated on the land of another.[37]

4204. Size of homestead in cities—The size of homesteads in incorporated places is defined by a recent statute which has not yet been construed.[38] Cases are cited below involving the construction of the word "lot" and of the phrase "laid-out or platted" portion of incorporated places under former statutes.[39] It has been held that an undivided half of two city lots cannot be claimed as a homestead.[40]

4205. Claim for purchase money—Equitable lien—Where A sold land to B and B, as part of the purchase price, agreed to pay a debt of A to C, it was held that B might hold the land as a homestead as against an execution on a judgment recovered by C against him on his agreement to pay such debt, and that if C had a lien it must be enforced in equity.[41]

4206. No limit to value—Our statute places no limitation on the value of the exempted property.[42]

4207. No limitation on use except occupancy as home—Our statute places no limitation on the use of the exempted property except that it must be actually occupied by the owner as a home.[43] The owner may use a part of the building for business purposes.[44] He is at liberty to lease a part;[45] and a receiver cannot be appointed to collect the rents for the benefit of creditors.[46]

4208. Crops growing on homestead—Whether crops growing on the homestead are exempt is as yet undetermined in this state.[47]

LIABILITY FOR DEBTS

4209. Exception in favor of laborers and servants—The constitution provides that a homestead shall not be exempt "for any debt incurred to any laborer or servant for labor or service performed."[48] This provision is self-

435; Wilson v. Proctor, 28–13, 8+830; Jelinek v. Stepan, 41–412, 43+90; Quehl v Peterson, 47–13, 49+390.

[34] Byrne v. Hinds, 16–521(469).

[35] Ward v. Huhn, 16–159(142); O'Brien v. Krenz, 36–136, 30+458.

[36] Brixius v. Reimringer, 101–347, 112+273.

[37] R. L. 1905 § 3455. See Hamlin v. Parsons, 12–108(59); Wylie v. Grundysen, 51–360, 53+805.

[38] Laws 1907 c. 335.

[39] Wilson v. Proctor, 28–13, 8+830; Baldwin v. Robinson, 39–244, 39+321; Mintzer v. St. P. T. Co., 45–323, 47+973; Lundberg v. Sharvey, 46–350, 49+60; In re Smith, 51–316, 53+711; Heidel v. Benedict, 61–170, 63+490; Kiewert v. Anderson, 65–491, 67+1031; Ford v. Clement, 68–484, 71+672; Nat. Bank v. Banholzer, 69–24, 71+919; Phelps v. Northern T. Co., 70–546, 73+842; Mead v. Marsh, 74–268, 77+138.

[40] Ward v. Huhn, 16–159(142). See Kaser v. Haas, 27–406, 7+824; O'Brien v. Krenz, 36–136, 30+458.

[41] Kugath v. Meyers, 62–399, 64+1138.

[42] Cogel v. Mickow, 11–475(354); Barton v. Drake, 21–299; Baldwin v. Robinson, 39–244, 39+321; Jacoby v. Parkland D. Co., 41–227, 43+52; In re How, 59–415, 61+456; Nat. Bank v. Banholzer, 69–24, 71+919.

[43] Kelly v. Baker, 10–154(124); Umland v. Holcombe, 26–286, 3+341; Jacoby v. Parkland D. Co., 41–227, 43+52; In re Emerson's Homestead, 58–450, 60+23; Nat. Bank v. Banholzer, 69–24, 71+919; Spalding v. Emerson, 69–292, 72+119.

[44] Kelly v. Baker, 10–154(124).

[45] Id.; Umland v. Holcombe, 26–286, 3+341; Jacoby v. Parkland D. Co., 41–227, 43+52.

[46] Umland v. Holcombe, 26–286, 3+341.

[47] See Erickson v. Paterson, 47–525, 50+699; Sparrow v. Pond, 49–412, 52+36.

[48] Const. art. 1 § 12.

executing.[49] It is not limited to labor or service performed on or in connection with the homestead, but applies to all labor or service, including that rendered to a firm of which the owner of a homestead is a member.[50]

4210. Exception in favor of mechanics and materialmen—Prior to the amendment of the state constitution in 1888, it was held that a mechanic or materialman could not acquire a lien on a homestead except by special contract amounting to a waiver of the exemption.[51] It is now provided by the constitution "that all property so exempted shall be liable to seizure and sale for any debts incurred to any person for work done or materials furnished in the construction, repair or improvement of the place." [52] This has been held self-executing.[53] The constitutional provision does not of itself create a lien upon the property which may be enforced in an action to foreclose. A lien may be acquired by proceeding under the mechanics' lien statute, by attachment in an action at law to recover the debt, or by docketing a judgment.[54] An assignee of the debt has the same rights as the original creditor.[55] The constitutional amendment was not retroactive.[56]

TRANSFER AND INCUMBRANCE

4211. Necessity of husband and wife joining in conveyance—Statute—The statute provides that "if the owner be married, no mortgage of the homestead, except for purchase money unpaid thereon, nor any sale or other alienation thereof, shall be valid without the signatures of both husband and wife." [57] A deed,[58] or a contract for a deed,[59] or a mortgage [60] other than for the purchase money, of a homestead, without the signature of the wife is void and not merely voidable. It cannot be made the foundation of an action for damages against the husband.[61] Its covenants are not binding.[62] It does not become valid upon the premises ceasing to be a homestead,[63] nor by reason of a subsequent divorce.[64] A husband cannot by any means waive a homestead exemption if his wife does not join in the waiver.[65] A material alteration made in a mortgage by the husband after the wife has signed and

[49] Nickerson v. Crawford, 74–366, 77+292; Bagley v. Pennington, 76–226, 78+1113.

[50] Lindberg v. Johnson, 93–267, 101+74.

[51] Cogel v. Mickow, 11–475(354); 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.

[52] Const. art. 1 § 12; Hamilton v. Detroit, 85–83, 88, 88+419.

[53] Nickerson v. Crawford, 74–366, 77+292; Brown v. Hughes, 89–150, 94+438.

[54] Bagley v. Pennington, 76–226, 78+1113; Hasey v. McMullen, 109–332, 123+1078.

[55] Nickerson v. Crawford, 74–366, 77+292.

[56] Brown v. Hughes, 89–150, 94+438.

[57] R. L. 1905 § 3456; Grace v. Grace, 96–294, 104+969; Lucy v. Lucy, 107–432, 120+754.

[58] Wilder v. Haughey, 21–101; Hartman v. Munch, 21–107; Barton v. Drake, 21–299; Jelinek v. Stepan, 41–412, 43+90. See Kern v. Field, 68–317, 71+393; Murphy v. Renner, 99–348, 109+593; Lucy v. Lucy, 107–432, 120+754.

[59] Barton v. Drake, 21–299; Weitzner v. Thingstad, 55–244, 56+817; Delisha v. Mpls. etc. Co., 126+276 (contract for a perpetual easement for a railway right of way).

[60] Smith v. Lackor, 23–454; Coles v. Yorks, 28–464, 10+775; Coles v. Yorks, 31–213, 17+341; Williams v. Moody, 35–280, 28+510; Conway v. Elgin, 38–469, 38+370; Alt v. Banholzer, 39–511, 40+830; Jelinek v. Stepan, 41–412, 43+90; Law v. Butler, 44–482, 47+53. See, under former statute, Olson v. Nelson, 3–53(22).

[61] Weitzner v. Thingstad, 55–244, 56+817.

[62] Alt v. Banholzer, 39–511, 40+830.

[63] Barton v. Drake, 21–299; Alt v. Banholzer, 39–511, 40+830; Law v. Butler, 44–482, 47+53; Murphy v. Renner, 99–348, 109+593. See Lucy v. Lucy, 107–432, 120+754.

[64] Alt v. Banholzer, 36–57, 29+674; Id., 39–511, 40+830.

[65] Ferguson v. Kumler, 25–183. See Williams v. Moody, 35–280, 28+510; Kern v. Field, 68–317, 71+393.

without her consent renders the mortgage void.[66] The signature of the wife is alone sufficient to satisfy the statute; it is unnecessary that the instrument be acknowledged and attested.[67] The consent of a wife is not essential to the assignment of a mortgage given by the husband prior to his marriage.[68] The signature of the wife is not essential to the validity of a purchase-money mortgage.[69] A conveyance of a homestead and other lands without the signature of the wife is not void as to the other lands.[70] The wife may be estopped by her conduct from asserting her want of assent to a conveyance.[71] After an abandonment of a homestead the husband may mortgage it without his wife joining.[72] If part of a homestead is taken under the power of eminent domain the husband may dispose of the award without the consent of his wife.[73] Where the signature of one of the spouses is obtained by fraud the conveyance may be set aside, unless the grantee is innocent.[74] In an action for specific performance the defence that the wife did not join in the contract must be specially pleaded.[75] Where A mortgaged his homestead to B, his wife not joining, and later, after a divorce, deeded the same to C who agreed to assume the mortgage, it was held that C was estopped to question the validity of the mortgage.[76] Where a wife joins her husband in the execution of a deed which is put in escrow to be delivered on the performance of certain conditions by the grantee, she waives her homestead rights.[77] It is unnecessary for the wife to join in the covenants of her husband's deed in order to bar her statutory homestead interest.[78] The statute cannot be evaded by indirection. A wife abandoning a homestead cannot have partition thereof against her husband.[79] A conveyance of a homestead by a married man without his wife joining is void though at the time she may have abandoned him and her home, and may be living an adulterous life.[80] A husband may be estopped from asserting that his wife did not join in his deed.[81]

ENFORCEMENT AND PROTECTION OF RIGHT

4212. Selection—When the owner of a tract or lot, within the statutory limit of a homestead, actually occupies the same as his sole place of residence, such tract or lot becomes his homestead without further selection.[82]

4213. Selection after levy—Statute—The statute gives the homestead exemption absolutely, without making the right to it depend upon any affirmative action upon the part of the person claiming it towards the officer levying upon it or about to levy upon it. If the person claiming an exemption fails or refuses to make a selection the officer is bound to make one for him. A sale as a whole of a tract including a homestead is void as to the whole if no selection

[66] Coles v. Yorks, 28-464, 10+775.
[67] Lawver v. Slingerland, 11-447(330).
[68] Spalti v. Blumer, 63-269, 65+454.
[69] Jones v. Tainter, 15-512(423); Smith v. Lackor, 23-454; Heyderstadt v. Whalen, 54-199, 55+958. See Spalti v. Blumer, 56-523, 58+156.
[70] Coles v. Yorks, 31-213, 17+341; Weitzner v. Thingstad, 55-244, 56+817.
[71] Coles v. Yorks, 28-464, 10+775; Law v. Butler, 44-482, 47+53; Knight v. Schwandt, 67-71, 69+626; Esty v. Cummings, 75-549, 78+242; Osman v. Wisted, 78-295, 80+1127; Murphy v. Renner, 99-348, 109+593. See Lucy v. Lucy, 107-432, 120+754; Delisha v. Mpls. etc. Co., 126+276.
[72] Williams v. Moody, 35-280, 28+510.
[73] Canty v. Latterner, 31-239, 17+385.
[74] Pineo v. Heffelfinger, 29-183, 12+522; Farr v. Dunsmoor, 36-437, 31+858; First Nat. Bank v. Flynn, 75-279, 77+961.
[75] Brown v. Eaton, 21-409.
[76] Alt v. Banholzer, 36-57, 29+674.
[77] Knopf v. Hansen, 37-215, 33+781. See Esty v. Cummings, 75-549, 78+242.
[78] Sandwich Mfg. Co. v. Zellmer, 48-408, 51+379.
[79] Grace v. Grace, 96-294, 104+969.
[80] Murphy v. Renner, 99-348, 109+593.
[81] Lucy v. Lucy, 107-432, 120+754.
[82] Barton v. Drake, 21-299; Wilson v. Proctor, 28-13, 8+830; Delisha v. Mpls. etc. Co., 126+276.

is made either by the officer or the homesteader.[83] In selecting a homestead the dwelling house and appurtenances must be included. The selection must be reasonable and the tract carved out regular and compact in shape.[84] A selection is conclusive if voluntarily made by the homesteader.[85] It is presumed that an officer making a selection under the statute performs his duty.[86]

4214. Burden of proof—The general rule is that all the property of a debtor is applicable to the payment of his debts. The effect of the exemption laws is to create exceptions to this general rule, so that a debtor claiming an exemption of any portion of his property must bring himself strictly within the terms of the law allowing exemptions, otherwise the general rule must take its course. In other words it is for the debtor to put his finger upon the provision of statute, which by its terms withdraws the property claimed from the operation of the general rule.[87]

ABANDONMENT, WAIVER, FORFEITURE, AND ESTOPPEL

4215. Removal—Notice of claim—Statute—The statute provides that if one ceases to occupy his homestead for more than six consecutive months, he shall be deemed to have abandoned it, unless he files a notice of claim.[88] In computing the time the first day of the absence is to be excluded and the last day included. A temporary absence on business or pleasure, the house being left in charge of a neighbor, has been held not a ceasing to occupy the homestead, within the meaning of the statute.[89] The terms "occupancy" and "residence," as used in the homestead exemption laws, refer to an actual occupancy of the premises, and an actual residence thereon as a home or dwelling-place. Hence, if the owner removes from and ceases actually to occupy the premises for more than six months, without filing the notice required by the statute, his right to claim the same as a homestead ceases, though he may have removed therefrom with the intention of returning and resuming his occupancy at some future time. Neither will this right be regained by his mere intention and preparation to return, unaccompanied by an actual resumption of his occupancy. Filing notice is effective to preserve the right only when there is an intention to return and occupy as a home.[90] The statute does not preserve the right for six months absolutely. If a party leaves his homestead with an intention of never returning his exemption right ceases at once regardless of whether he has filed a claim or not.[91] A party may remove from his homestead for a period of six months with impunity, though he does not file the statutory notice, if he intends to return.[92] Where a homestead right has been lost by removal and failure to file the statutory notice the premises do not pass to the surviving husband or wife as a homestead.[93] Evidence of an abandonment must be clear and convincing.[94] The burden of proving a filing

[83] Ferguson v. Kumler, 25-183; Id., 27-156, 6+618; Kipp v. Bullard, 30-84, 14+364; Mohan v. Smith, 30-259, 15+118; Coles v. Yorks, 31-213, 17+341; Id., 36-388, 31+353; Talbot v. Barager, 37-208, 34+23; Hook v. Northwest T. Co., 91-482, 98+463.

[84] First Nat. Bank v. How, 61-238, 63+632; Ford v. Clement, 68-484, 71+672. See Phelps v. Northern T. Co., 70 546, 73+842.

[85] See Osman v. Wisted, 78-295, 80+1127.

[86] Hook v. Northwest T. Co., 91-482, 98+463.

[87] Ward v. Huhn, 16-159(142); Fred v. Bramen, 97-484, 107+159. See § 4213.

[88] R. L. 1905 § 3458.

[89] Jaenicke v. Fountain City D. Co., 106-442, 119+60.

[90] Russell v. Speedy, 38-303, 37+340; Baillif v. Gerhard, 40-172, 41+1059; Quehl v. Peterson, 47-13, 49+390; Gowan v. Fountain, 50-264, 52+862.

[91] Donaldson v. Lamprey, 29-18, 11+119; Williams v. Moody, 35-280, 28+510; Clark v. Dewey, 71-108, 73+639; Kramer v. Lamb, 84-468, 87+1024.

[92] Russell v. Speedy, 38-303, 37+340.

[93] Baillif v. Gerhard, 40-172, 41+1059.

[94] Robertson v. Sullivan, 31-197, 17+336; Stewart v. Rhoades, 39-193, 39+141; Clark v. Dewey, 71-108, 73+639.

of notice rests on the claimant.[95] As head of the family, it is for the husband to determine and fix the domicil of the family, including that of the wife. His domicil is therefore her domicil; so that when he and his wife remove from a homestead, he having no intention of returning, that fixes the character of the removal as an abandonment, for the intent of the husband as head of the family controls, and he has a right to determine whether there shall be a return or not.[96] To constitute an abandonment there must be an actual removal from the premises; an intention to remove is insufficient.[97] The acquisition of a new homestead works a forfeiture of the old one.[98] Where there has been a loss of exemption by abandonment a resumption of occupancy as a home does not have a retroactive effect, but merely gives a new right as of the date of the resumption.[99] An outstanding interest is not a thing separate and apart from the land so that its acquisition by the claimant may affect the exemption.[1]

4216. Sale or removal—Effect—Statute—The statute provides that a sale of a homestead or a removal therefrom shall not render it liable to execution.[2] Prior to the enactment of this statute it was held that the sale of a homestead rendered it liable to sale on execution.[3] Under the statute, as it then stood, a homestead was only exempt when owned and occupied by the claimant. This was liable to the construction that the homestead right would be lost by a continued omission to occupy it, though only with a temporary purpose, and with an intention to return. One of the objects of this statute was to remove the possibility of such a construction.[4] This statute does not have the effect of rendering actual occupancy as a home unnecessary; it simply authorizes temporary removals after a homestead has been acquired by actual occupancy as a home.[5] A conveyance of a homestead vests a good title in the grantee,[6] even though it is made with a fraudulent intent.[7] This statute was not repealed by Laws 1875 c. 65 § 1,[8] but it was modified and restricted by Laws 1868 c. 58 § 1, as to removals.[9] Prior to the revision of 1905 the proceeds of a sale were not exempt.[10]

4217. Estoppel—A person may be estopped by his conduct from claiming a homestead exemption.[11]

4218. Rural homestead—Effect of platting—The mere fact that the owner of a rural homestead plats it, or any part thereof, into lots, without dedicating the streets shown on the plat to the public, does not affect his homestead rights in any part thereof. Nor does the sale of a part of such lots affect such rights in any part of the original tract remaining unsold, provided the contiguity of what remains is preserved.[12]

[95] Gowan v. Fountain, 50–264, 52+862.

[96] Williams v. Moody, 35–280, 28+510; Kramer v. Lamb, 84–468, 87+1024. See Ferguson v. Kumler, 25–183; Baillif v. Gerhard, 40–172, 41+1059.

[97] Robertson v. Sullivan, 31–197, 17+336.

[98] Donaldson v. Lamprey, 29–18, 11+119.

[99] Clark v. Dewey, 71–108, 73+639.

[1] Kaser v. Haas, 27–406, 7+824.

[2] R. L. 1905 § 3458.

[3] Folsom v. Carli, 5–333(264); Piper v. Johnston, 12–60(27).

[4] Donaldson v. Lamprey, 29–18, 11+119.

[5] Kresin v. Mau, 15–116(87); Donaldson v. Lamprey, 29–18, 11+119; Williams v. Moody, 35–280, 28+510; Quehl v. Peterson, 47–13, 49+390.

[6] James v. Wilder, 25–305; Clark v. Dewey, 71–108, 73+639.

[7] Morrison v. Abbott, 27–116, 6+455; Ferguson v. Kumler, 27–156, 6+618; Furman v. Tenny, 28–77, 9+172; Baldwin v. Rogers, 28–544, 11+77; Horton v. Kelly, 40–193, 41+1031; Eckstein v. Radl, 72–95, 96, 75+112; Keith v. Albrecht, 89–247, 94+677.

[8] Kaser v. Haas, 27–406, 7+824.

[9] Donaldson v. Lamprey, 29–18, 11+119.

[10] Fred v. Bramen, 97–484, 107+159.

[11] Osman v. Wisted, 78–295, 80+1127 (insolvent including portion of homestead in list of non-exempt assets on assignment for benefit of creditors and allowing same to be sold by assignee without objection). See § 4211.

[12] Phelps v. Northern T. Co., 70–546, 73+842.

4219. Severance of building from homestead—A building which is exempt as an appurtenant of an exempt homestead does not lose its exempt character if wrongfully severed by a trespasser.[13]

RIGHTS OF SURVIVING SPOUSE AND CHILDREN

4220. Descent to surviving spouse—The estate of a surviving spouse in a homestead in case there are surviving children is an absolute, unconditional estate for life.[14] It is not qualified by or subject to a distinct or independent right of occupancy by the children. The surviving spouse has the sole right to the use, enjoyment, and disposition of such estate during life, without regard to the children.[15] It is a freehold estate.[16] If there are no children a surviving spouse takes an absolute estate—succeeds to the estate of the decedent.[17] The homestead rights of a widow are limited to the land which her husband had actually devoted to homestead purposes, and was occupying as such at the time of his death.[18] If a homestead has been lost by removal and failure to file the statutory notice, it does not descend to the surviving spouse as a homestead.[19] The rights of the surviving spouse do not depend on a formal selection of the homestead.[20] A surviving spouse cannot be allowed to waive a claim to the homestead fixed by law, and take a part thereof to the injury of other parties interested in the distribution of the decedent's estate.[21] The right of a surviving spouse may be affected by an antenuptial agreement.[22]

4221. Assent of spouse to testamentary disposition—The interest of a surviving spouse in a homestead cannot be divested by the testamentary disposition of the owner to which such survivor did not assent in writing.[23] The statutory [24] assent in writing may be executed, at least if there are children, after the death of the testator.[25] The word "surviving" in the statute refers to the time of the death of the testator, and not to the time the will was executed. The statute has no application where a spouse was living at the time of the execution of the will, but died before the testator.[26]

4222. Election of surviving spouse to take under will—The statute [27] relating to an election by a surviving spouse to take under a will, instead of under the statute, is applicable to a testamentary disposition of a homestead.[28] It is inapplicable where there is no child, or issue of a deceased child, surviving the testator.[29] If a surviving spouse renounces a will, the homestead descends to such spouse and the children unaffected by the will.[30] A failure to exercise the right of election under the statute has the same effect on a testamentary disposition of a homestead as a written assent, and it has this effect though the result is to cut off rights of surviving children in the homestead.[31]

[13] Wylie v. Grundysen, 51-360, 53+805.
[14] Holbrook v. Wightman, 31-168, 17+280; McCarthy v. Van Der Mey, 42-189, 44+53; Gowan v. Fountain, 50-264, 267, 52+862.
[15] McCarthy v. Van Der Mey, 42-189, 44+53.
[16] Hamilton v. Detroit, 85-83, 89, 88+419.
[17] Wilson v. Proctor, 28-13, 8+830; Tracy v. Tracy, 79-267, 82+635; Fraser v. Farmers' etc. Bank, 89-482, 485, 95+307. See Rosbach v. Weidenbach, 95-343, 104+137.
[18] King v. McCarthy, 54-190, 55+960.
[19] Baillif v. Gerhard, 40-172, 41+1059.
[20] Wilson v. Proctor, 28-13, 8+830.
[21] Mintzer v. St. P. T. Co., 45-323, 47+973.
[22] Appleby v. Appleby, 100-408, 429, 111+305.
[23] R. L. 1905 § 3647; Eaton v. Robbins, 29-327, 13+143; Holbrook v. Wightman, 31-168, 17+280.
[24] R. L. 1905 § 3647.
[25] Radl v. Radl, 72-81, 75+111.
[26] Penstock v. Wentworth, 75-2, 77+420.
[27] R. L. 1905 § 3647.
[28] Radl v. Radl, 72-81, 75+111.
[29] Tracy v. Tracy, 79-267, 82+635.
[30] Schacht v. Schacht, 86-91, 90+127.
[31] Jones v. Jones, 75-53, 77+551.

4223. Descent to children—Children by a former marriage stand on the same footing as children of the marriage existing at the time of the decedent's death.[32]

4224. Exemption from debts of decedent—A homestead descends to a surviving spouse and children exempt from all debts of the decedent which were not a valid charge thereon at the time of his death.[33] This exemption is absolute, and does not depend upon the occupancy of the homestead as a home by the surviving spouse or children, but it is not exempt from the debts of the surviving spouse unless it is so occupied.[34] A testamentary disposition of a homestead assented to by the surviving spouse does not render it liable for the debts of the testator.[35] Collateral heirs take subject to the debts of the decedent.[36] Prior to 1889 the exemption of the homestead from the debts of the decedent was less extensive than now.[37]

HOMICIDE

4225. Definition—In defining murder for the jury the court should give the the statutory rather than the common-law definition.[38]

4226. Intention and premeditation distinguished—"Intentionally" and "with premeditated design" are not synonymous expressions; the latter involving a greater degree of deliberation and forethought than the former.[39] If the intention to kill is formed before the "heat of passion, upon sudden provocation, or in sudden combat," or, though formed in the heat of passion, is executed after sufficient cooling time, or after the heat of passion has subsided, the case comes within the meaning of a killing with a premeditated design to effect the death of the person killed.[40]

4227. Presumption as to intention, malice, and premeditation—Every homicide is presumed unlawful and when the mere act of killing is proved, and nothing more, the presumption is that it was intentional and malicious and murder.[41] Murder in the first degree may be proved by the mere fact of an intentional killing.[42] It may be proved by the mere fact of the killing and the attendant circumstances; and, where there are no circumstances to prevent or rebut the presumption, the law will presume that the unlawful act was malicious as well as intentional, and was prompted and determined on by the ordinary operations of the mind.[43] This presumption it is for the accused to rebut.[44] An instruction that "the law presumes a premeditated design from the naked fact of killing" has been held inaccurate, but not prejudicial.[45] A deliberate and intentional homicide is presumptively murder.[46]

4228. Existence and duration of premeditation—Premeditation means thought of beforehand for any length of time, no matter how short.[47] The law

[32] Rosbach v. Weidenbach, 95-343, 104+137.

[33] R. L. 1905 § 3647; Eaton v. Robbins, 29-327, 13+143; Tracy v. Tracy, 79-267, 82+635.

[34] Holbrook v. Wightman, 31-168, 17+280; Gowan v. Fountain, 50-264, 52+862; Clark v. Dewey, 71-108, 73+639.

[35] Eckstein v. Radl, 72-95, 75+112.

[36] Dunn v. Stevens, 62-380, 64+924, 65+348 (note on page 381).

[37] McCarthy v. Van Der Mey, 42-189, 44+53; McGowan v. Baldwin, 46-477, 49+251; Dunn v. Stevens, 62-380, 64+924, 65+348.

[38] Bonfanti v. State, 2-123(99).

[39] State v. Brown, 12-538(448); State v. Hoyt, 13-132(125).

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

[41] State v. Shippey, 10-223(178); State v. Brown, 12-538(448); State v. Lautenschlager, 22-514; State v. Prolow, 98-459, 108+873.

[42] State v. Lentz, 45-177, 47+720.

[43] State v. Brown, 41-319, 43+69; State v. Prolow, 98-459, 108+873.

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

[45] State v. Lautenschlager, 22-514.

[46] State v. Hanley, 34-430, 26+397; State v. Prolow, 98-459, 108+873.

[47] State v. Prolow, 98-459, 108+873.

does not attempt to define the length of time within which the determination to murder or commit the unlawful act resulting in death must be formed. To infer the existence of premeditation does not require the lapse of any precise or definite period of time.[48]

4229. Evidence of premeditation—A premeditated design may be inferred from a previous arming with a deadly weapon [49] or from an expression of the accused that "dead men tell no tales." [50] Where it appears that the accused intentionally committed the murder as a matter of revenge, the premeditated design sufficiently appears.[51]

4230. By conspirators—A person may be guilty of a murder actually perpetrated by another, if he combines with such other party to commit a felony, engages in its commission, and death ensues in the execution of the felonious act. If two or more persons, having confederated to attack and rob another, actually engage in the felony, and in the prosecution of the common object the person assailed is killed, all are alike guilty of the homicide.[52]

4231. Killing officer making arrest—An attempt to make an arrest by an officer authorized to make it is of itself no provocation in law, since every person is bound to submit to the ordinary course of justice, and the officer's warrant is a protection to him for all acts reasonably required for its execution. Hence the intentional killing of an officer acting in the proper discharge of his duty must ordinarily constitute the offence of murder in the first degree. So the malicious and premeditated killing of an officer acting under void process, or without process, is murder, notwithstanding circumstances of provocation or conflict which might otherwise reduce the offence to manslaughter.[53]

4232. Killing an alien enemy—To kill an alien enemy, one of a tribe of Indians, after he has laid down his arms and is in prison, is murder.[54]

4233. Murder in the second degree under G. S. 1866—Burden of proof—To warrant a conviction for murder in the second degree under G. S. 1866 (third degree under Penal Code) the state need not prove affirmatively that the killing was without any design to effect death, or that no circumstances of justification or extenuation existed.[55]

4234. Murder in third degree under G. S. 1894 § 6440—What constitutes—More than one person need not have been put in jeopardy by the reckless act, but it is necessary that the act should have been committed without special design on the particular person or persons with whose murder the accused is charged.[56]

4235. Indictment for murder in first degree—An indictment substantially in the form prescribed by statute is sufficient.[57] The indictment may charge the killing to have been done "with the premeditated design to effect the death" instead of "with malice aforethought." [58] An indictment which charges the killing of a person on a day specified imports that he died on that day.[59] An indictment charging a stabbing in this state, followed by death in another state, has been held sufficient.[60] The means employed to effect the death need not be stated precisely.[61]

[48] State v. Brown, 41-319, 43+69; State v. Prolow, 98-459, 108+873.
[49] State v. Hoyt, 13-132(125).
[50] State v. Staley, 14-105(75, 92).
[51] State v. Gut, 13-341(315).
[52] State v. Barrett, 40-77, 41+463.
[53] State v. Spaulding, 34-361, 25+793.
[54] State v. Gut, 13-341(315).
[55] State v. Stokely, 16-282(249).
[56] State v. Lowe, 66-296, 68+1094.
[57] G. S. 1894 § 7239(2); Bilansky v. State, 3-427(313); State v. Dumphey, 4-438(340); State v. Ryan, 13-370(343); State v. Lessing, 16-75(64); State v. Lautenschlager, 22-514; State v. Johnson, 37-493, 35+373.
[58] State v. Holong, 38-368, 37+587.
[59] State v. Ryan, 13-370(343).
[60] State v. Gessert, 21-369. See State v. Smith, 78-362, 81+17.
[61] State v. Lautenschlager, 22-514.

4236. Indictment for murder in the second degree—The words "wilfully killed" are not the equivalent of the words of the statute "with a design to effect death." [62]

4237. Indictment for murder in third degree—An indictment under G. S. 1866 c. 94 § 2 has been held insufficient for failure to state the acts constituting the offence.[63]

4238. Provocation—Provocation, to reduce homicide from murder to manslaughter, must be something the natural tendency of which would be to disturb and obscure the reason of men of average mind and disposition so as to cause them to act rashly, without due deliberation or reflection, and from passion rather than judgment. To determine the sufficiency of the provocation the instrument or weapon with which the homicide was committed must be considered, for if it was effected with a deadly weapon the provocation must be great, indeed, to lower the grade of the crime from murder. In case of sudden combat the character of the weapon is not to be considered unless to determine whether the party entered into the combat with a premeditated design to kill. The existence of provocation is for the jury under proper instructions from the court.[64] A mere trespass on lands will not ordinarily constitute a provocation.[65] The killing of a friend of the accused, but out of his presence, is not a provocation.[66] Facts constituting provocation must be proved by the accused if they do not appear from the evidence introduced by the state. They cannot be assumed by the jury without evidence.[67] Mere words do not constitute provocation.[68] Because passion is more readily excited in a drunken man than in a sober one the fact of drunkenness may be taken into consideration in determining whether the accused acted under a provocation, but not in determining whether the provocation was adequate.[69] The designed killing of another without provocation and not in sudden combat is none the less murder because done in a state of passion.[70] When the undisputed evidence shows that the homicide was committed with a dangerous weapon with a design to effect death, or under circumstances from which such a design must conclusively be inferred, and after a lapse of time sufficient for passion to subside, the crime is murder, and not manslaughter.[71]

4239. Cooling time—Whether there was sufficient cooling time after a provocation is a question for the jury, unless the evidence is conclusive.[72]

4240. Reward for killing Indian—An offer of an award by officers of the state for the killing of an Indian does not render a homicide justifiable.[73]

4241. Manslaughter in second degree under G. S. 1866 c. 94 § 13—Facts held not to bring the case within the provisions of G. S. 1866 c. 94 § 13 providing that unnecessary killing, in resisting an unlawful act, is manslaughter in the second degree.[74]

4242. Manslaughter in third degree under G. S. 1878 c. 94 §§ 25, 31—Facts held not to bring a case within the provisions of G. S. 1878 c. 94 §§ 25, 31, defining manslaughter in the third and fourth degrees.[75]

4243. Indictment for manslaughter in first degree—An indictment has been construed as one for manslaughter in the first degree and not for murder

[62] State v. Smith, 78–362, 81+17.
[63] State v. McIntyre, 19–93(65).
[64] State v. Hoyt, 13–132(125); State v. Smith, 56–78, 57+325; State v. Towers, 106–105, 118+361.
[65] State v. Shippey, 10–223(178); State v. Smith, 56–78, 57+325; State v. O'Neil, 58–478, 59+1101.
[66] State v. Gut, 13–341(315).
[67] State v. Hanley, 34–430, 26+397.
[68] See State v. Hanley, 34–430, 26+397; State v. Smith, 56–78, 57+325.
[69] State v. Gut, 13–341(315).
[70] State v. Shippey, 10–223(178).
[71] State v. Towers, 106–105, 118+361.
[72] State v. Hoyt, 13–132(125); State v. Towers, 106–105, 118+361.
[73] State v. Gut, 13–341(315).
[74] State v. Hoyt, 13–132(125).
[75] State v. Cantieny, 34–1, 24+458.

in the second degree.[76] An indictment under G. S. 1866 c. 94 § 11 (R. L. 1905 § 4882), for administering drugs to procure a miscarriage, has been held insufficient for failure to allege that the administering was not advised by two physicians to be necessary to preserve the life of the mother.[77]

4244. Indictment for manslaughter in second degree—An indictment under G. S. 1894 § 6449, subd. 2 (R. L. 1905 § 4884, subd. 2), has been held sufficient though it did not allege that the homicide was committed in the heat of passion, or by the use of a deadly weapon, or by the use of means either cruel or unusual.[78] An indictment under G. S. 1894 § 6449, subd. 3 (R. L. 1905 § 4884, subd. 3), for failure to procure medical attendance, has been held insufficient for failing to show that the death was caused by the acts or omissions of the accused.[79]

4245. Self-defence—The law concedes the right to kill in self-defence, but only in extremity, and when no other practicable means to avoid the threatened harm are apparent to the person resorting to the right. If it is practicable, and is so apparent to him, to repel the attempt by other means than by killing his assailant, he is bound to do so. Ordinarily, as an element of legal self-defence in cases of personal conflict, the party assailed must escape by retreat, unless prevented by some impediment or by the fierceness of the assault.[80] But a person is not always obliged to retreat. If he is not an assailant and is where he has a right to be, he may make such resistance as the occasion reasonably demands, even to the taking of the life of his assailant. If he has reasonable grounds for believing, and in good faith believes, that an assailant armed with a deadly weapon is intent on taking his life, or doing him great bodily injury, he may stand his ground and resist the attack even to the taking of the life of his assailant. He may resist in any manner that, under the circumstances, he at the moment honestly believes, and has reasonable grounds to believe, is necessary to save his life or to protect him from great bodily injury.[81] The idea that is embodied in the expression that "a man's house is his castle" is not that he has the right to defend and protect it by other and more extreme means than he might lawfully use to defend and protect his shop, his office, or his barn. The sense in which the house has a peculiar immunity is that it is sacred for the protection of his person and of his family. In this view it is said and settled that in such case the inmate need not flee from his house in order to escape from being injured by the assailant, but he may meet him at the threshold and prevent him from breaking in by any means rendered necessary by the exigency; and upon the same ground and reason as one may defend himself from peril of life or great bodily harm, by means fatal to the assailant if rendered necessary by the exigency of the assault. Defence of one's self in one's habitation is subject to the same qualifications as to good faith in believing the danger imminent as is required elsewhere. The accused must himself have been without fault. He must not have renewed a combat once interrupted or abandoned. One may not defend an assault by a guest in his own house until he has given the guest notice to leave.[82] To justify a person in acting in self-defence it is not enough that he believes himself in imminent danger of great bodily harm, he must have reasonable grounds for his belief.[83] The justification of self-defence

[76] State v. Smith, 78–362, 81+17.
[77] State v. McIntyre, 19–93(65).
[78] State v. Matakovich, 59–514, 61+677.
[79] State v. Lowe, 66 296, 68+1094.
[80] State v. Shippey, 10–223(178); State v. Sorenson, 32–118, 19+738; State v. Rheams, 34–18, 24+302; State v. O'Neil, 58–478, 59+1101.
[81] State v. Gardner, 96–318, 104+971; State v. Touri, 101–370, 112+422; Gallagher v. State, 3–270(185).
[82] State v. Touri, 101–370, 112+422.
[83] State v. Shippey, 10–223(178); State

cannot be invoked by a party who intentionally provokes an assault with the purpose of using a deadly weapon.[84] In resisting an attempted arrest by a peace officer, even though the arrest is unlawful, the killing of the officer is not justifiable, when there is neither danger of great bodily harm, or other felony being committed by the officer, or a reasonable apprehension of such danger in the mind of the person whose arrest is attempted.[85] As bearing on the reasonableness of a belief in imminent danger the quarrelsome and violent character of the assailant may be proved by evidence of his reputation in that regard but not by specific acts of violence.[86] Whether the circumstances warranted the use of force in self-defence and the degree of force necessary are ordinarily questions for the jury,[87] but where the evidence is legally insufficient to show a justification it is the duty of the court to so instruct the jury.[88]

4246. Evidence—Admissibility—Cases are cited below holding evidence admissible [89] or inadmissible.[90]

4247. Evidence—Sufficiency—Cases are cited below holding the evidence sufficient to justify a conviction.[91]

4248. Punishment—Jury fixing—Under a former statute, it was competent for the jury, if they found a person guilty of murder in the first degree, to determine by their verdict that he should be punished by death.[92]

HOPS—See note 93.
HORSE RACING—See note 94.
HOSPITAL REGISTER—See Evidence, 3357.

v. Spaulding, 34–361, 25+793; State v. Smith, 56–78, 57+325; State v. O'Neil, 58–478, 59+1101; State v. Gardner, 96–318, 104+971; State v. Touri, 101–370, 112+422.

[84] State v. Scott, 41–365, 43+62.

[85] State v. Cantieny, 34–1, 24+458; State v. Spaulding, 34–361, 25+793.

[86] State v. Dumphey, 4–438(340); State v. Ronk, 91–419, 98+334.

[87] Gallagher v. State, 3–270(185); State v. O'Neil, 58–478, 59+1101; State v. Gallehugh, 89–212, 94+723.

[88] State v. Rheams, 34–18, 24+302; State v. O'Neil, 58–478, 59+1101; State v. Corrivau, 93–38, 100+638.

[89] State v. Spaulding, 34–361, 25+793 (reason why defendant was armed); State v. Barrett, 40–65, 41+459 (circumstances of obtaining possession of pistol); State v. Lucy, 41–60, 42+697 (fact that a blow sounded like a blow struck with a piece of iron); State v. Holden, 42–350, 44+123 (photograph of deceased—witness for defendant having testified that a photograph of a brother of the deceased looked like a man whom he had seen subsequent to the murder); State v. Lentz, 45–177, 47+720 (condition in life and personal surroundings of deceased showing an absence of motive to commit suicide); State v. Rose, 47–47, 49+404 (correspondence between the hoof of defendant's pony and tracks near scene of murder); State v. Hayward, 62–474, 65+63 (conversations of defendant four or five months before the commission of the murder tending to prove that he was contemplating the murder—statement of deceased a few hours before the murder, not in the presence of the defendant, that she had a business engagement with him that evening); State v. Gallehugh, 89–212, 94+723 (deceased a negro—statement of defendant that he had just as lief kill a black devil as not).

[90] State v. Dumphey, 4–438(340) (threats not communicated to defendant); State v. Hoyt, 13–132(125) (subsequent assault on wife of deceased); State v. Sorenson, 32–118, 19+738 (physical disability of defendant causing nervous sensibility, cowardice and hasty apprehension of danger); State v. Lentz, 45–177, 47+720 (opinion of members of deceased's family that he committed suicide and that defendant was not guilty).

[91] State v. Staley, 14–105(75); State v. Johnson, 37–493, 35+373; State v. Lucy, 41–60, 42+697; State v. Holden, 42–350, 44+123; State v. Rose, 47–47, 49+404; State v. Smith, 78–362, 81+17; State v. Gallehugh, 89–212, 94+723; State v. Nelson, 91–143, 97+652; State v. Crawford, 96–95, 104+768, 822; State v. Prolow, 98–459, 108+873; State v. Quirk, 101–334, 112+409.

[92] State v. Lautenschlager, 22–514.

[93] Sparrow v. Pond, 49–412, 418, 52+36.

[94] Farrier v. State Agr. Soc., 36–478, 32+554 (entry for race at agricultural fair—postponement of race—recovery of entry fee).

HOSPITALS

4249. State hospitals for the insane—The subject of commitment to state hospitals for the insane is considered elsewhere.[95] Cases are cited below involving various matters relating to the state hospitals.[96]

4250. Hospital farm for inebriates—The act of 1907, establishing a state hospital farm for inebriates, is constitutional.[97]

HOTELS—See Innkeepers.
HOUSEHOLD GOODS—See note 98.
HOUSE OF ILL FAME—See Disorderly House.

[95] See § 4523.

[96] St. Paul & C. Ry. v. Brown, 24-517 (trustees mere administrative officers of state and may be sued—action against trustees to determine title to lands—consent of state to action—state auditor held not a necessary party); State v. Bondy, 66-240, 68+1075 (location of fourth hospital under Laws 1895 c. 157—reconsideration by board—complete location—contract—acceptance).

[97] Leavitt v. Morris, 105-170, 117+393.

[98] Webb v. Downes, 93-457, 460, 101+966.